TULLY BAILEY LLP
11811 N Tatum Blvd, Unit 3031
Phoenix, AZ 85028
Telephone: (602) 805-8960
Stephen W. Tully (AZ Bar No. 014076)
stully@tullybailey.com
Michael Bailey (AZ Bar No. 013747)
mbailey@tullybailey.com
Ilan Wurman (AZ Bar No. 034974)
iwurman@tullybailey.com

Attorneys for Plaintiff Peter T. Else

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

PETER T. ELSE, Plaintiff, v. ARIZONA CORPORATION COMMISSION, Defendant.	Case No.: CV2023-050310 (Appeal pursuant to A.R.S. § 40-254) (Preferential civil matter pursuant to A.R.S. § 40-255.) Assigned to: The Honorable Melissa Iyer Julian

Plaintiff's Opening Brief

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STATEMENT OF THE CASE

Under Arizona law, power plants and transmission lines must be approved by the Arizona Corporation Commission ("ACC" or "Commission"). If a utility seeks to build a plant or line, it must seek a Certificate of Environmental Compatibility ("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. 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 ACC 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 ACC must balance the effect of a new plant or line specifically on the physical environment and ecology of Arizona against the need *in Arizona* for the electric power that the plant or line will supply.

This suit challenges the Commission's approval of CECs for a pair of Extra High Voltage (EHV) electric transmission lines through the San Pedro Valley in southeastern Arizona—which all parties agree is a unique biological watershed free of any major transmission lines. In 2015, the Commission narrowly approved SunZia Transmission LLC's request to construct 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, to be built first. The lines as approved were not economically feasible and were not built. In 2022, the Commission agreed to split the CEC in two separate CECs because SunZia had sold the right to build a sole direct current (DC) line to Pattern Energy. The

Commission approved the split without performing the legally required environmental balancing review.

The approval of the original CEC was based on the benefits of the construction of an AC line. Disaggregating the lines fundamentally changed the analysis. Arizona law does not permit the Commission to forgo the mandated statutory review prior to issuing two new, separate CECs. Worse, in evaluating the request to split the existing CEC the Commission was confused about the applicable legal standard; not only did it fail to perform the necessary review, but it erroneously thought the original approval was "res judicata" and "the law of the case." Neither legal concept has any application to Commission decisions. 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 FACTS

A. SunZia Applies to BLM

In 2008, SunZia Transmission, LLC 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, and end at the existing Pinal Central Substation in central Arizona where the power could access the electrical grid for the western United States. App'x Tab 1 at 110:8; App'x Tab 16 at 30.[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, while sixty-six percent went through state trust lands and nine percent went through private lands. App'x Tab 1 at 48:20-25; App'x Tab 8 at 1239:8-14. Because SunZia started with BLM, BLM ultimately dictated where the lines could go.

All of SunZia's proposed routes entered Arizona in one of two locations and intersected at a proposed Willow Substation. App'x Tab 22 at 29-30; App'x Tab 16 at 30; *see* Figure 1 (below). All the routes then continued from the proposed Willow Substation

[1] This brief cites both to the official administrative record of the 2022 proceedings, as well as the record from the 2015-16 proceedings. Any record citations to the latter are supplied in Plaintiff's appendix.

and terminated at the Pinal Central Substation. App'x Tab 22 at 29-30; App'x Tab 16 at 30.

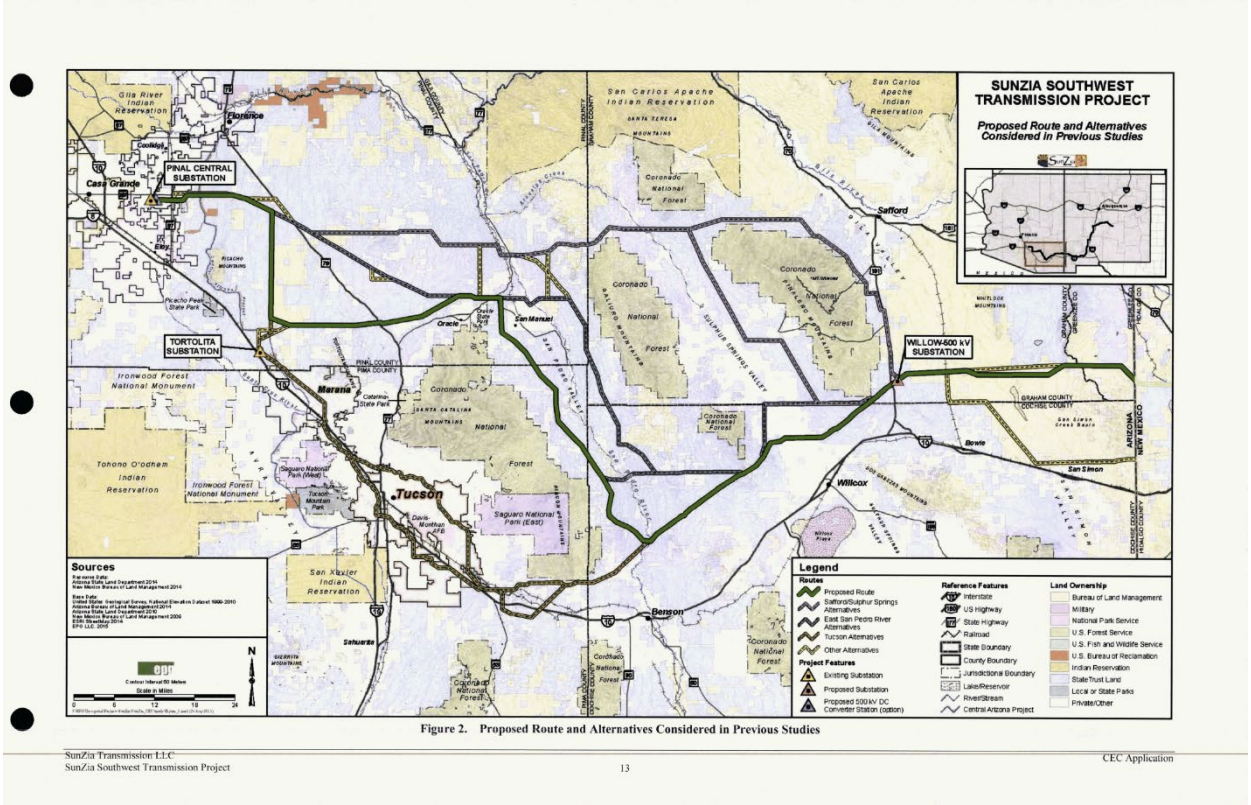

Figure 1 [App'x Tab 16 at 30]

At the time of its BLM application, over ninety percent of SunZia Transmission LLC was owned by Southwestern Power Group (SWPG), a subsidiary of MMR Group. App'x Tab 1 at 81:15-17; Intervenor Answer ("IA") ¶ 20. 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. IA ¶¶ 23-24l *see also* App'x Tab 2 at 352:18-22, 359:21–360:4; App'x Tab 16 at 15; App'x Tab 27 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. App'x Tab 2 at 280:15-25, 301:1-10, 311:1-10 (SunZia lines could connect to Bowie plant). 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 . . . .)." AR Tab C-10 at 3 (emphasis added); *see also* AR Tab B-4 at 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. App'x Tab 16 at 27, 30.

The BLM found drawbacks with all the proposed routes. BLM rejected the proposed routes through Tucson, where other major transmission lines were already located, out of "environmental justice" concerns. App'x Tab 2 at 257:1-5. BLM rejected SunZia's preferred route through the Sulphur Springs Valley due to opposition by the Arizona Game & Fish Department. App'x Tab 11 at 2133:8–2138:15; App'x Tab 12 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. App'x Tab 1 at 47:5-11; App'x Tab 10 at 1739:10-24; App'x Tab 12 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. App'x Tab 10 at 1865:3-25; IA ¶ 37. There are no existing transmission lines or towers in the San Pedro Valley of a similar scale. On the east side of the San Pedro River, there is an existing, non-EHV line of 115kV, which is substantially smaller than an EHV, 500kV line. App'x Tab 14 at 86:20-87:9; App'x Tab 15 at 160:14-25. There are no existing major transmission lines, towers, or other utilities at all on the west side of the San Pedro River for a thirty-three-mile portion of the route through the San Pedro Valley. App'x Tab 10 at 1865:3-25. The SunZia lines would, for about twelve of the forty-five miles on the west side, parallel an underground gas pipeline. App'x Tab 15 at 162:1-12.

SunZia itself vehemently opposed the San Pedro River Valley route in front of BLM. App'x Tab 10 at 1864:22–1866:18; AR Tab C-15. Tom Wray, SunZia's project manager at the time, wrote a letter to BLM in response to the draft Environmental Impact Statement (EIS) in which he stated, "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." AR Tab C-15 at 2. 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" (emphasis in original), which is the "*only* area along the San Pedro River" (emphasis in original) where the route "follows an existing linear feature," and therefore "SunZia believes this amounts to an insignificant collocation of utility corridors." *Id.*

B. SunZia Seeks WECC Approval

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.

Importantly, when seeking initial CEC approval from the Commission, SunZia's plan of service **for two AC lines** and a total of 3,000 MW of power had approval from the WECC. App'x Tab 2 at 209:2-8, 232:6-13; IA ¶ 330. This plan of service was in place for the ten-year period between 2011 and 2021. AR Tab C-11 at 1-3. The WECC approval process is painstaking, technical, and takes about two years. *Id.* at 231:14-25; IA ¶ 126. SunZia's project engineer, Mark Etherton, stated in 2015, "We believe we have demonstrated [regional reliability criteria] with the WECC three-phase rating." App'x Tab 2 at 243:23–244:1. The ACC's Utilities Engineer who testified in 2015 also found it important to point out that the project "achieved WECC Phase 3 status for a path rating of 3,000 MW." App'x Tab 20 at 10. SunZia sought WECC approval for two AC lines in 2011 because that was what it planned to build.

One of the proposed users of the SunZia transmission lines was a proposed wind facility to be built in central New Mexico by a company called SunEdison. That wind facility had not been built, at least in part, because it had no access to the western grid. 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. App'x Tab 15 at 213:1-4; App'x Tab 10 at 1729:3-6, 1749:8-13. This pushed SunZia toward more emphasis on wind power, but SunZia did not foreclose connecting to its proposed Bowie plant.

C. SunZia Applies to the Commission

In 2015, having received approval to build across BLM land and having obtained WECC approval for two AC lines, SunZia filed an application with the ACC seeking a CEC permitting it to construct the transmission lines. In its application, SunZia proposed to build one AC line, and another line either AC or DC. App'x Tab 16 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 seven 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. IA ¶¶ 23, 142. The AC lines could each transmit up to 1,500 megawatts (MW) of power. App'x Tab 2 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, when SunZia filed its application for a CEC with the ACC in September 2015, it presented only the San Pedro Valley route that had been preapproved by BLM. SunZia's application recognized the harm that would result to the valley. App'x Tab 16 at 44, 47, 66, 68 (recognizing the valley has ESA-listed species and is an "important movement corridor for avian and other wildlife species," is a "globally significant" Important Bird Area (IBA), and that transmissions lines lead to bird collisions and construction may lead to habitat loss).

D. 2015-2016 Proceedings

Because the harm to the San Pedro River Valley was apparent and indisputable, SunZia had to convince the Committee and the Commission in the 2015-16 proceedings

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). The difference between AC and DC lines is critical to understanding the ACC's 2016 analysis.

1. Technical differences between AC and DC lines

A direct current transmission line moves more power over longer distances more efficiently than an alternating current line. AR Tab A-193 ¶ 48; AR Tab B-3 at 44:12-24; App'x Tab 2 at 247:16–250:3. Etherton, SunZia's project engineer, testified in 2015 that line losses on a DC transmission line are approximately half of a comparable AC line, which is "pretty significant over the term of a transmission line project." App'x Tab 2 at 222:20-25.

A DC line is not a good value proposition for shorter distances, however, because of the expense of hooking up to the line on either end, which requires a converter station to convert from DC to AC power or vice versa. *Id.* at 224:6-7, 248:3-5, 248:19–250:3. In 2015, the cost of an AC substation, which would be required to interconnect to SunZia's AC line, was about $90 million. *Id.* at 223:24-25. The cost for a DC converter station was about $330 million—3.67 times more expensive. *Id.* at 224:6-7. DC converter stations are substantially larger and more complex than AC substations. *Id.* at 220:15–222:19.

That is why an AC line is critical for multiple interconnections to existing and future generators. As Etherton explained, an AC line "allows for additional interconnections to the existing AC system, more ready [sic] available equipment for those interconnections." *Id.* at 222:6-11. Wray similarly testified that "multiple 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. "[T]he higher cost of the DC alternative," Etherton summarized, is "imbedded primarily in the termination equipment at either end of the system." *Id.* at 374:19-21. He 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. 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. No traditional evidence of need; financing as evidence of need

In a traditional line siting case where the applicant is a utility, the ACC 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. App'x Tab 2 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.

Specifically, SRP had a 4.8 percent ownership interest in the SunZia project. App'x Tab 1 at 81:17-19. Despite its ownership interest, SRP responded to an ACC data request by stating it had "limited interest and participation in the SunZia Project." Tab 24 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 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, App'x Tab 1 at 81:17-19, TEP 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." App'x Tab 25 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 ACC Chairman on the LS Committee summarized the matter at the ACC'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." App'x Tab 14 at 9:19-25. ACC Staff's witness, Mr. Williamson, testified at the 2015 hearings that Arizona utilities "would still function properly" even if the SunZia lines "didn't get built." App'x Tab 8 at 1398:13-20. As for SunEdison—the developer of what was then called the Gallo wind project in New Mexico, App'x Tab 4 at 508:6–509:6—its witness, Mr. Sankaran, 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. Indeed, Sankaran testified at the time that it was possible that all the power from the Gallo 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." App'x Tab 23 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, App'x Tab 17 at 17:4-5, 17:6-7, 17:16-19, and ACC Utilities Division Staff took a neutral position because "the need could be presented as speculative." App'x Tab 1 at 71:22–72:5; *see also* App'x Tab 13 at 2525:2-6 (similar) App'x Tab 15 at 304:4–311:3, 310:20-24 (similar). Therefore, even in 2015 SunZia produced no evidence that its lines would be needed to ensure an adequate, economical and reliable supply of electric power to Arizona. How, then, did the LS Committee and ACC determine there was "need" for this project?

The argument that prevailed was the availability of financing: if there was no demand for the project, then SunZia would not be able to get financing. (Put aside, for now, the problem that that does not answer the question of whether that demand would be *in Arizona*, as opposed to California.) As counsel for ACC 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." App'x Tab 13 at 2525:15-19. The point was hammered again and again by the ACC Staff witness, Mr. Williamson:

> 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. Because I have heard some of the questions that have been asked here, and everybody forgets this is a merchant [line]. It is working in the free marketplace. If it can go out and get people to sign contracts, then it can take those contracts to a lender and the lender can say here is $2.2 billion that we are going to loan you to build this project to go forward.

App'x Tab 8 at 1397:8-21.

When asked "what happens if the line is built and then the merchant transmission line owner goes bankrupt," Williamson responded, "[T]hen we benefit, don't we? If it is sold for pennies on the dollar, the ratepayers don't have to pay for the other 98 cents on the dollar that somebody lost, some bank lost somewhere. That's a hard thing to say, but that's a reality in the free market system." *Id.* at 1400:11–1401:1.[2] What this argument ignores is that if the full lines are built and the owner goes bankrupt, it is possible that the lines would not be sufficiently profitable for future owners to operate. The lines would then be useless, but they would still exist in the San Pedro River Valley. In that case, it's not just some bank somewhere that loses, but rather the environment, and the San Pedro Valley in particular, that loses.

3. Importance of AC line for renewable energy development, reliability loop, congestion relief, and offsetting intermittency

Because SunZia could not and did not present a case for need in Arizona, SunZia's witnesses touted throughout the 2015 proceedings that there would be other benefits to Arizona from an AC line. Specifically, witnesses repeatedly stated that future generators would be able to interconnect with an AC line, thereby encouraging production of

[2] There was significant additional testimony along these lines. App'x Tab 13 at 2532:23–2533:2, 2533:20-21, 2706:1-4; App'x Tab 14 at 10:2-9, 186:6-11.

renewable energy, and particularly solar power, in southeast Arizona; that the line could interconnect with TEP's Springerville-Vail 345kV line, thereby creating a "reliability loop" around Tucson; that the line would relieve congestion and increase reliability generally by allowing other generators to upload and download power to and from the new lines; and that the line would allow non-wind generators to hook up to the line and offset the intermittency of wind energy, also increasing reliability.

Beginning with the development of renewables, Wray 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.

App'x Tab 1 at 128:3–129:7.

Wray further testified that the "take away" is 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," App'x Tab 2 at 176:25–177:1; and that "[t]he point is 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," App'x Tab 15 at 172:16-19.

In addition to creating the opportunity to interconnect to future renewables in southeast Arizona, SunZia touted the AC line as being able to interconnect with a TEP 345kV line, thereby creating a reliability loop around Tucson.[3] For example, Wray explained to ACC 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

[3] *See generally* App'x Tab 1 at 89:1-4, 95:12-17; App'x Tab 2 at 212:4-8, 216:22-24, 217:12-13, 225:18-21, 225:22–227:12; App'x Tab 4 at 571:5-12.

system to create an on-ramp and off-ramp for others who have access to that system to do business onto SunZia." App'x Tab 2 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**," App'x Tab 13 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* App'x Tab 2 at 242:3–243:11 (similar testimony from Etherton). Simply put, without an AC line, there is no reliability loop.

SunZia's witnesses also testified in 2015 that an AC line would relieve congestion on existing lines by allowing additional interconnections, thereby increasing reliability generally. 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 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." App'x Tab 16 at 19. And at the LS Committee hearing in 2015, Etherton testified to "relief of congestion on existing facilities . . . ." App'x Tab 1 at 136:4-8. Etherton testified specifically that along the route there are "a few other locations . . . where the project could interconnect in the future," App'x Tab 2 at 212:8-12, and that 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.

Finally, because wind resources are intermittent, about half the time the wind facility in New Mexico would not be generating electricity. App'x Tab 2 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*.

App'x Tab 11 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." App'x Tab 4 at 566:18–567:3; see also App'x Tab 23 at 11 ("the remaining 50% of that merchant transmission capacity will be the subject of an open season auction . . . approved and regulated by FERC"); App'x Tab 1 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.

Simply put, as Wray explained, "There is very little opportunity for midway interconnections to [a] DC Circuit." App'x Tab 2 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 any corresponding reliability benefits, and (4) no opportunity for non-wind resources to connect to the line to offset the intermittency of wind energy.

4. Other considerations: Clean Power Plan, economic benefits, and environmental justice

At the 2015 LS Committee hearing, the Committee's decisions were partly motivated by a series of non-statutory factors. First, there was significant discussion of the

Obama Administration's Clean Power Plan (CPP). Wray stated it best in the 2015 proceedings, when he discussed that plan along with additional EPA ozone regulations: "You would have to be locked in a basement not to understand that the State of Arizona has come under a lot of scrutiny with respect to a couple of air quality mandates and changes to air quality regulations that will have enormous effect on the State of Arizona's ability to generate electricity." App'x Tab 2 at 191:3-12. Wray further testified that "the emission reductions under the [state implementation plan] on the Clean Power Plan must begin by 2022," *id.* at 197:7-9, which will make plant closures "unavoidable," *id.* at 195:10-11. SunZia, Wray advocated, "provides an option to the State of Arizona to reach compliance with the Clean Power Plan." *Id.* at 197:14-16. The ACC Staff's attorney also emphasized compliance with the CPP, App'x Tab 2 at 384:20–385:20, as did intervenor Pinal County, App'x Tab 13 at 2516:15-21, and as did ACC Commissioner Stump, App'x Tab 14 at 16:6-12.

In addition to testimony about federal environmental regulations, there was testimony and discussion of the economic benefits of the SunZia project. *See, e.g.*, App'x Tab 1 at 136:1-3; App'x Tab 2 at 198:19–201:9; App'x Tab 26 (economic impact assessment).

Finally, and as already described, SunZia presented only the BLM-approved route to the LS Committee for consideration. Because the LS Committee still had authority to choose a different route, *see* App'x Tab 2 at 270:19-25; IA ¶ 199, SunZia had to justify its decision to present the single route through the San Pedro River Valley. SunZia repeated again and again to 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." App'x Tab 2 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. App'x Tab 29 at 10.

5. 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, 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.

As Etherton testified, "Both options include one AC 500kV line as a primary component." App'x Tab 2 at 211:17-18. In response to Member Haenichen's question, "How are you going to make this decision between these two options? I mean if the DC is that much better, why aren't you using it?" Wray testified:

> There is very little opportunity for midway interconnections to the DC Circuit. Should an interconnector want to interconnect, because the cost of interconnection on a direct current basis is just like the cost that Mr. Etherton went to with regard to the DC converter stations, it is an expensive proposition and, as you know, multiple interconnections along a DC circuit, a long DC line, it is very difficult to protect from a relaying and control standpoint when there are line faults on long DC lines, which leads us to believe that in our approach, the first project that's likely to be constructed will be an alternating current facility at 500kV to allow for more affordable interconnections along the length of that as we go through resource zones that we talked about earlier in some of my testimony, particularly along the Interstate 10 corridor.

Id. at 248:3-5, 248:19–250:3.

Indeed, the original CEC 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." App'x Tab 17 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—a point that, although the ACC pleads ignorance about (ACC Answer ¶ 142), SunZia readily admits (IA ¶ 142). Thus, this provision of the CEC specifically contemplated that the AC line would be built first. That interpretation is supported by other testimony. For example, the ACC Chairman's designee on the LS Committee *explained to the ACC 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." App'x Tab 14 at 7:25–8:3 (emphasis added).

6. ACC vote, decision, and dissent

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. That tour that we took, it was beautiful, absolutely beautiful. And my heart just breaks that, you know, there is going to be a transmission line that's going through there. . . .
>
> And . . . the applicant didn't go in with this route, the BLM basically went through their process and picked it . . . . [S]o the path of least resistance is the pristine valley, the San Pedro River Valley, that's protected, given special consideration by statute, it just angers me. . . .
>
> So I vote aye, reluctantly, and it is painful for me to do it. Because I think that statute does mean something, that statute that requires special consideration be given to areas such as the San Pedro River Valley.

App'x Tab 13 at 2704:4–2705:25.

The ACC 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." App'x Tab 18 [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 "there is no evidence on the record that allowing for importation of wind power from New Mexico is the most cost effective way to develop renewable generation." *Id. Id.* at 7. More still, "No Arizona utility has indicated that the proposed line is necessary for meeting future demand." *Id.* The dissent went on: "No Arizona utility intervened in the line siting hearings. Not one." *Id.* at 9. The dissent further lamented: "[T]he 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.

E. 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 Bowie plant to the Willow Substation. 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. (Indeed, 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.

F. The 2022 Amendment Proceedings

SunZia filed an application to amend its CEC pursuant to A.R.S. § 40-252 on May 13, 2022. AR Tab A-1; Tab A-193 [Decision No. 78769] ¶ 3. The amendment application sought to authorize the use of updated structural designs and additional structure types associated with a DC line; to bifurcate the original CEC into two CECs to provide for separate ownership of each line, which would enable the projects to be financed; and to extend the expiration date of the CEC for the first line (now a DC line) from February 2026 to February 2028. AR Tab A-193 ¶ 3. Two months later, Pattern Energy, which had the rights to build the wind project in New Mexico, acquired the rights to build the DC line. AR Tab B-3 at 52:11-18.

The 2022 amendment application and record reveal that the nature of the SunZia project had changed yet again. What was initially a transmission line that could bring power from a gas-fired plant in Bowie, Arizona to market—and subsequently a line that could interconnect with Bowie but which might also bring wind power from New Mexico and other benefits to Arizona—had shifted yet again. Now the SunZia project is to be a single DC line owned by Pattern, which holds the rights to build the wind project in New

Mexico and whose only interest is pushing its own power from that wind project to Pinal Central, where under current market conditions, that power is destined for California. What was SunZia's second line now has separate ownership and is called El Rio Sol. No one has even filed for WECC approval for that second line.

SunZia's filing was a concession that the market would not finance its lines as approved and that the need for which it advocated on the basis of legally questionable evidence never materialized. The filing is necessarily an admission that the only entity with a need for a line from New Mexico is the owner of the New Mexico wind project. The fundamental change in the project required a fundamental reweighing of the statutory factors. Yet, the LS Committee repeatedly refused to recognize that any changes had occurred aside from the design changes to the proposed DC towers. The only distinct evidence in the 2022 proceedings, aside from those design changes, was extraneous testimony about global climate change.

1. Issues Else raised in the 2022 proceedings

Over the course of the 2022 proceedings, Else repeatedly raised the point that the DC line "could turn out to be the only line associated with the original CEC that is ever constructed." AR Tab A-3 at 4 (emphasis added). And he repeatedly pointed out that the benefits SunZia touted in 2015 required an AC line. *Id.* at 4-5; AR Tab A-6 at 4; AR Tab A-16 at 1-2; AR Tab B-4 at 361:22–362:19, 373:16-23, 351:4-10, 352:23–353:1. 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," AR Tab A-4 at 2-3, but that was simply not the case.

The LS Committee chairman, mistakenly, agreed with SunZia and immediately sought to narrow the issues for consideration. Chairman Katz stated that from "what I can tell, the only real issues . . . are the visual impacts of the increased height and the reconfiguration; any effect that it might have on wildlife, and specifically avian or bird flight, and whether the CEC should be split in two." AR Tab B-3 at 9:11-17. And prior to public comments, Chairman Katz again 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." *Id.* at 140:1-9. Despite all of Else's arguments, Chairman Katz 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." AR Tab B-4 at 374:5-13. The Chairman was confused as to the law and therefore failed to address issues necessary for the ACC to analyze the amendments under the correct legal standard.

2. Wetzel testifies that Pattern Energy needs the amendments, but cannot testify that Arizona needs Pattern's power

In the 2022 proceedings, Kevin Wetzel, an employee of Pattern Energy, testified as the new SunZia project manager. Wetzel explained that the two proposed lines now had two separate owners, with Pattern owning the rights to the DC line. AR Tab B-3 at 52:11-18. Wetzel explained that Pattern was also the owner of the wind project to be developed in New Mexico. AR Tab B-3 at 46:14-22. SWPG would continue to own the rights to the second line, now called the El Rio Sol Transmission line. *Id.* at 52:11-22. Wetzel's testimony is important for two reasons. First, it confirms that SunZia's initial plan for at least one AC line failed. Second, Wetzel, like Wray before him, could not testify that any of the New Mexico wind power was actually needed in Arizona.

On the necessity of the three requested amendments, Wetzel explained that the company anticipated "starting construction mid next year and financing the project at the same time, which is why . . . we're . . . requesting these amendments, which are required – all three 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." AR Tab B-3 at 51:25–52:8. "All three" requests, he reiterated, "represent fundamental requirements of this project to be able to be financed and be constructed on a time frame that allows these projects to come online on the time frames that we talked through." *Id.* at 103:23–104:1.

Although Wetzel could testify to the necessity of the amendments for Pattern, he could not testify to the necessity of Pattern's power for Arizona. Wetzel vaguely testified that the project was "critical to meet growing demand." AR Tab A-193 ¶ 49; AR Tab B-3 at 45:13-46:4. And he vaguely 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." AR Tab A-193; AR Tab B-5 at 526:12-18. He could not, or would not, specifically testify as to any power purchase agreements in place with any Arizona counterparty. Hedging his bets, Wetzel opined that "more capacity in the western market" generally "is good for the region as a whole regardless of where that individual resource may be going[.]" AR Tab B-5 at 539:10-14.

As in 2015, no Arizona utility testified at the 2022 proceedings that they needed power from SunZia. When 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." AR Tab B-5 at 527:8-21. 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.* at 527:8-21 (emphasis added). When asked "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 527:25–528:9.

Wray testified in 2015 that financing sufficient for construction required that 70-80 percent of transmission service agreements be in place. App'x Tab 2 at 183:17–184:1, 184:20–185:1, 364:16-20, 366:1–368:8. ACC 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." App'x Tab 21 at 7 (emphasis

added). Wetzel testified in 2022 that construction of the first line is set to begin in mid-2023, AR Tab B-3 at 52:1; yet, despite the imminence of construction, Wetzel would not testify as to any transmission service or power purchase agreements with Arizona utilities.[4]

As in 2015, SunZia focused on the potential for financing even though that does not answer the question of *where* SunZia's power is needed. AR Tab B-5 at 496:4-8. Thus, once again, the ACC Staff response to the proposed amendments explained that SunZia's transmission lines "*could* help improve reliability, safety of the grid, and the delivery of power in Arizona." AR Tab A-78 at 2 (emphasis added). And, as in 2015, there was also no evidence of the *cost* of the power. All Wetzel could say was 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." AR Tab B-5 at 517:4-7, 517:19–518:15. Indeed, Wetzel acknowledged that "Pattern is a for-profit enterprise," AR Tab B-5 at 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, AR Tab B-4 at 359:13-20. The wind power is destined for California.

3. SunZia's new plan of service had no WECC approval, and Pattern was awarded 100 percent of DC line transmission

As noted previously, the central benefits of the AC line were that other generators could interconnect with the line, thereby encouraging development of renewable energy in southeast Arizona, creating a reliability loop in Tucson, decreasing congestion, and offsetting the intermittency of wind power. Two important components of these benefits were that SunZia's initial plan of service for two AC lines had an approved WECC plan of service, and that other generators would be able to bid for use of SunZia's line during FERC's "open season." Both components evaporated with SunZia's new proposed plan of service.

[4] 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 in place to ensure that that power has a buyer. Yet, Pattern could not testify to a single PPA with a single Arizona entity.

Etherton, testifying again in 2022, explained that "the only common point [along the DC line] is going to be the Pinal Central Substation, again, with the DC converter station in New Mexico and Pinal Central" because "there's no, at least proposed, interconnection to those." AR Tab B-3 at 87:7-11. That explains why Pattern's proposed wind project was awarded 100% of the transmission capability on the DC line by FERC's open solicitation process. *Id.* at 46:14-22. That is, Pattern was awarded 100% of the transmission capability because no other utility or plant would have the capability of interconnecting to Pattern's DC line without a DC converter station.

This point is crucial, and it explains why SunZia's initial business plan for two AC lines might have failed. Because Pattern is the only one that can hook up to its own DC line, that line will allow Pattern to sell up to 3,000 MW of its own power at any given time. A single AC line would carry only up to 1,500 MW of power. Not only that, other generators could also bid for use of fifty percent of that line, meaning that Pattern would only be able to sell with an AC line approximately *one-quarter* the amount of power that it could sell if it had a DC line dedicated to itself. If Pattern built two AC lines, it would be much more expensive than a single DC line and Pattern would still be able to sell only half as much of its own power at any given time as on a dedicated DC line once others generators have bid to use the lines.

Not only will Pattern be the only beneficiary of its own line, but SunZia does 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. At the time of the 2022 proceedings, Pattern had only recently filed for a path rating from the WECC for its DC line, AR Tab B-3 at 118:15–119:11, while SWPG *had not filed for a WECC path rating for the El Rio Sol line at all*, AR Tab B-5 at 570:15-24. Even though Else raised the issue of a lack of WECC approval for the new plan of electrical service, AR Tab B-4 at 354:4-12, Chairman Katz erroneously stated, "I don't know that this Committee can get into what's going on in FERC or WECC," *id.* at 357:1-3.

While acknowledging the ACC's mandate to assess the impacts of the proposed

transmission projects on the "Arizona community," Katz barred detailed discussion of SunZia's approval by FERC, which regulates interstate transmission proposals and has significant impacts on the establishment of a rate base for each project, and the impact of giving Pattern a vertical monopoly over both the wind generation and the transmission line. *Id.* at 357:15-20. At the same time that he limited relevant testimony related to the significant potential impact of recent FERC and WECC decisions on the supply of economical and reliable electricity to Arizona consumers, the Chairman also allowed exhaustive testimony about how a single DC line would help combat global climate change, AR Tab B-4 at 291:15–325:25, and about the economic benefits of the project, AR Tab B-3 at 56:17–58:19—two factors (see below) irrelevant to Arizona's statutory analysis and that fall under federal policy purview.

4. Route modifications and alternatives

The 2022 proceedings revealed another salient fact: that, although SunZia had presented the route as a fait accompli in 2015, the route in fact underwent several changes in New Mexico since the 2016 CEC was issued. After the 2016 CEC was issued by the ACC, SunZia's project was initially denied approval by New Mexico's Public Regulation Commission. AR Tab B-4 at 348:9–349:7; IA ¶ 349. SunZia then made route changes in New Mexico and filed an application for a supplemental EIS, the approval process for which remains ongoing. AR Tab B-4 at 348:9–349:7; AR Tab C-8 at 1-4. In both the 2015 and 2022 proceedings, Else also introduced uncontradicted testimony about the proposed High Plains Express Transmission project which, if approved, would parallel SunZia for portions of New Mexico, would enter Arizona near Springerville well north of where SunZia plans to enter Arizona, and could be fully collocated with existing transmission lines. App'x Tab 30 at 5-6; AR Tab B-4 at 378:7-23; AR Tab C-17 at 44. This northern routing avoids Tucson and the San Pedro River Valley.

5. Decisions and briefing

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. The review was performed by an Administrative Law Judge (ALJ). Despite Else raising all the substantial changes that the amendment and proceedings reflected,[5] the ALJ recommended approving the lines. The ALJ's report and recommendation contained several significant and consequential errors.

First, the ALJ wrongly and irrelevantly maintained that the ACC's 2016 decision was "res judicata" and the "law of the case." AR Tab A-193 at 31 (conclusion 3). Second, in paragraph 116 of the proposed findings the ALJ erroneously stated "that CEC 171 originally was approved without an approved WECC plan of service." *Id.* ¶ 116. To the contrary, the original SunZia project was approved by the ACC in 2016 with a WECC plan of service for two AC lines each intersecting the intermediary Willow Substation, as even SunZia admits. IA ¶ 330. This was the WECC approved plan of service for the *ten-year period* between 2011 and 2021. AR Tab C-11. Third, Paragraph 117 of the ALJ's proposed findings erroneously stated:

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

AR Tab A-193 ¶ 117. As referenced above, the initial CEC clearly indicated that the AC line and accompanying Willow Substation would be built first.

Else filed exceptions to this report, providing evidence from the record establishing that contrary to the ALJ's statement in paragraph 116, the original plan of service for two AC lines had been approved by the WECC for a period of five years prior to the 2016 CEC. AR Tab A-180 at 3. With regard to the mischaracterization in paragraph 117, he provided citations to the record explaining that "the Applicant **explicitly** testified in 2015 that the first line would be an AC Line" and that "that the construction of the Willow Substation was tied to the construction of the first line." *Id.* Despite pointing out the legal and factual errors in the ALJ's recommended order, that order was presented to the

[5] AR Tab A-107 at 2-3; AR Tab A-156 at 3, 5, 7, 12-15.

Commission with the errors. The Commission then adopted the ALJ's recommended order verbatim and approved the amendment and the two new CECs on November 21, 2022, without any hearing let alone any acknowledgment of the errors that Else had raised in his filed exceptions.

On December 12, 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), which was deemed denied as a matter of law as of January 3, 2023. Else timely filed the present action in Maricopa County Superior Court.

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, with questions of law being 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 Tr. v. Arizona Corp. Comm'n*, 210 Ariz. 30, 33–34 (Ct. App. 2005) (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). That standard requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," and to determine "whether the decision was based on a consideration of the relevant factors." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citations and quote marks omitted); *see also Billingsley v. Arizona Corp. Comm'n*, 2019 WL 6130830, at *9 (Ariz. Ct. App. Nov. 19, 2019) (relying on *State Farm* standard). An agency action is arbitrary and capricious if the agency has failed to consider an important

aspect of the problem, or has considered irrelevant factors. *State Farm*, 463 U.S. at 43. ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which [the legislature] has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

Finally, pursuant to A.R.S. § 40-254, this Court may "vacate, set aside, affirm in part, reverse in part or remand with instructions to the commission [the] order or decision" of the Commission "on the ground that . . . the order or decision is unlawful, or that any rule, practice, act or service provided in the order is unreasonable."

ARGUMENT

In approving the amended CECs, the ACC committed five overlapping legal errors. First, the agency acted arbitrarily and capriciously by failing to consider an important aspect of the problem, namely that the amendment proposed an entirely new deal and reflected substantial changes to the original CEC and to the bases for that CEC's approval. Second, the statutory factors should have been weighed for each CEC independently as a matter of the plain reading of the Line Siting Statute. Third, once the lines are assessed independently, there is no way to approve the DC line because the evidence (if any) of Arizona's actual "need" for Pattern's power was supplied entirely by the applicant's own hearsay evidence, which as a matter of law is not substantial evidence. Fourth, once the lines are assessed independently, the record shows that a single line can be routed through Tucson (or elsewhere) without prohibitive environmental justice impacts; the failure of the ACC even to consider that possibility was arbitrary and capricious. Fifth, the Commission acted arbitrarily and capriciously by relying on factors beyond the statute.

Once all the pieces are put together, the necessary relief becomes clear. This Court should vacate and remand the decisions approving CEC 171-A (the DC line) and CEC 171-B (the AC line) to the Commission because there is no substantial evidence of need in Arizona for a DC line, and because the Commission must consider alternate routing in

light of the new deal that has been proposed. Although they were represented together as "SunZia" in the recent proceedings, the two lines have different owners and are completely separate proposals. Pattern bought the rights to the DC line in July of last year. The LS Committee hearing was in September. El Rio Sol was not separately represented at the hearing and has not even applied for WECC approval. The permitting for the New Mexico route changes for both transmission projects is ongoing. Since SunZia is fundamentally a new project with a new owner and a new rationale, it should have been treated as such. El Rio Sol is the last remnant of the prior rationale to provide access and reliability benefits for Arizona, and it might never be constructed.

I. The ACC failed to consider an important aspect of the problem, namely that the amendments proposed a radically different project.

The heart of this case is the Commission's failure to recognize that the amendments proposed a radically different project from what was proposed in 2015, and that the bases for approval in 2015 were therefore inapplicable in 2022. In other words, the ACC "entirely failed to consider an important aspect of the problem," and cannot be said to have considered the relevant factors. *State Farm*, 463 U.S. at 43.

The failure to recognize this substantial change can be seen first in the ALJ's *incorrect statement* that the original CEC was approved with no WECC-approved plan of electrical service. AR Tab A-193 ¶ 116. In fact, a WECC-approved AC-based plan of service had been in place for five years prior to approval of the original CEC. Even SunZia admits that there was a WECC-approved plan of service to provide up to 3,000 MW of power through **two AC lines**. IA ¶ 330. And the ACC's own Utilities Engineer testified in 2015 that the project "achieved WECC Phase 3 status for a path rating of 3,000 MW." App'x Tab 20 at 10.

Still another indication that the ALJ and ACC completely missed the substantially changed nature of the project is their assertion that the original CEC did not require the AC line to be built first:

> The record shows that the original CEC was approved with the option for two AC lines or one AC and one DC line that could be constructed at

> different points in time and that the lines were to be used to bring wind power resources from New Mexico to Central Arizona. The original CEC does not specify which line was to be built first. The record shows that there has not been a change in the anticipated use of the lines.

AR Tab A-193 ¶ 117. That is nonsense. As previously noted, the original CEC specifically contemplated 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. App'x Tab 17 at ¶ 23, 12:22–13:3. Moreover, the original CEC guaranteed that "**[a]t least one**" AC line would be built. App'x Tab 17 at 4:2-6 (emphasis added); *see also, e.g.*, App'x Tab 2 at 211:17-18 (Etherton) ("Both options include one AC 500kV line as a primary component."). And the LS Committee member present at the ACC open meeting *told* the ACC commissioners that the AC line was to be built first. App'x Tab 14 at 7:25–8:3. SunZia's WECC approval was only for AC lines. Everyone understood that an AC line was at the heart of the original proposal.

These factual changes matter. It is the AC line that would have created the capacity for new resources to develop in southeastern Arizona. It is the AC line that would have interconnected to TEP to create a reliability loop around Tucson. It is the AC line that would have allowed TEP and other existing generators to connect to the new transmission line, thereby relieving congestion. And it is the AC line that would have allowed other generators to offset the intermittency of wind power. Therefore, the statutory balancing could (and would) come out entirely differently.

Not only that, but Pattern's wind project is designed to generate 3,500 MW of power at build out.[6] The entire 3,000 MW capacity of the DC line was already awarded to Pattern Energy because it was the only entity that could plausibly hook up to its own, DC line. AR Tab A-193 ¶ 50; AR Tab B-3 at 46:5-47:8. In other words, Pattern has no need for an AC line, which is why it does not own that line. And SWPG, which does, has not even applied for WECC approval. These are two separate projects, with separate owners, and separate purposes. The failure even to recognize these changes—and their huge ramifications—was itself arbitrary and capricious. *FCC v. Fox Television*, 556 U.S. 502, 515-16 (2009)

[6] https://patternenergy.com/projects/sunzia-wind/ (https://perma.cc/RL4Y-W9RP).

(agency must "display awareness that it is changing position," must make a "conscious change of course," and must provide a "reasoned explanation . . . for disregarding facts and circumstances that underlay . . . the prior policy").

II. It was arbitrary, capricious, and contrary to law to fail to assess each CEC independently.

The LS Committee Chairman, time and again, stated that the question for the Committee (and Commission) was whether to adopt both new CECs or to retain the old one. "We have one of two alternatives in today's proceedings or this week's proceedings: One is to deny the amended CECs, and then we are going to follow the original CEC; or to allow the amended CEC with some additional stipulations and conditions." AR Tab B-3 at 13:22–14:1; *see also* AR Tab B-4 at 334:23–335:1. The CECs were not considered independently by the ACC, which adopted the findings of the ALJ. The ACC stated, "Decision No. 75464 is a final Decision of the Commission subject to the doctrine of *res judicata* and is the law of the case." AR Tab A-193 at 31. The ACC then approved the two new CECs together: ". . . the broad public interest weighs in favor of approving ROO CEC l71-A and ROO CEC l7l-B as issued by the LS Committee." *Id.* The ACC concluded, "It is reasonable and in the public interest *to modify* Decision No. 75464 . . . ." *Id.* at 32 (emphasis added). The CECs were evaluated together on the basis of the original CEC record in 2015 and the wrongfully limited additional testimony in 2022.

This, too, was legal error. The question the ACC had to answer was whether *each* new CEC individually should be approved on this record. The statutory language mandates that "No *utility* may construct *a* plant or transmission line within this state until it has received *a* certificate of environmental compatibility from the committee . . . ." A.R.S. § 40-360.07(A) (emphases added). In 2015, the SunZia lines were presented and approved as a package. In 2022, however, SunZia was two different entities or "utilities" under the statute: Pattern and SWPG. Each entity asked for its own CEC for its own line, each for a different purpose. As such, the statutory balancing should have been conducted independently as to each CEC. It was not.

Even were it not always necessary to assess each CEC independently, it was arbitrary and capricious not to do so here because the second line may never be built given the separate ownership and that only the first line is apparently ready for financing. In fact, Else repeated time and again that this was *likely* to happen because SunZia did not have an approved WECC plan of service for one DC line and one AC line and SWPG has not even *applied* for approval for the AC line. And for all the reasons described previously, these are two separate projects with two separate owners and two separate purposes.

III. There is no substantial evidence as a matter of law because the only evidence of need in Arizona for a DC line is the applicant's own hearsay testimony.

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*. The only evidence of such need, however, was the hearsay testimony from Pattern that Pattern was marketing to and was in "discussions" with utilities in Arizona. But that is not evidence of need at all. As noted earlier, 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. App'x Tab 24 at 2. And TEP thought there was some "potential" to meet "some" of its renewable energy goals, but primarily sought a reliability loop in Tucson—which the DC line also cannot provide. App'x Tab 25 at 2. Assuming Pattern's statements that it was talking with potential clients could be considered evidence of need, that evidence is hearsay and not substantial evidence.

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 and SunZia 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).

Most of the remaining evidence of need was the testimony about financing. Even *if* financing were evidence of need *in Arizona*—and it is not—relying on the possibility of financing to establish need would still be erroneous. If the line is built but the owner goes bankrupt because the line is not profitable, then it is not just "some bank somewhere" that loses: The towers, lines, access roads, and other disturbances are still there. It is the San Pedro Valley that loses. In fact, since here there is only one supplier of electricity (Pattern), if the transmission business is uneconomical it is probable that the whole project will fail; there will be no economical way of picking up other clients or increasing demand for power on a DC line.

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. There is therefore no substantial evidence *as a matter of law* that Pattern's wind power from New Mexico will meet a need in Arizona for reliable, adequate, and economical electric power, and the ACC therefore made an "unlawful determination" under A.R.S. § 40-254(E).

IV. It was arbitrary and capricious to fail to consider that a single line could be routed through Tucson (or elsewhere) without environmental justice impacts.

With only one line, whether that line be an AC line or a DC line, or with two lines but with two separate owners and purposes, it is possible to route a single line, or each line separately, without ravaging the San Pedro River Valley and without major environmental justice impacts in Tucson. That is because SunZia would need only a single 200-foot ROW rather than a 2,500-foot corridor in which to site two 200-foot ROWs.

At the 2015 proceeding, Wray testified that there was an existing 138kV power line that goes along the west side of Alvernon Way in Tucson. App'x Tab 11 at 2092:11-18. He explained that it was "possible" to collocate one of the SunZia lines with the 138kV power line by double circuiting the existing 138kV line and putting one of the 500kV lines on one set of poles. SunZia's counsel then asked Wray, "[Y]ou could collocate a 500 and a 138kV line, but you still have the second 500kV line, is that correct?" to which Wray responded "correct." *Id.* at 2094:18-22.

As for a solo DC line, such a line does not even need to be connected to southern Arizona because there is no need to route that line near the Willow Substation. Thus, once *either* line is assessed independently, it is arbitrary and capricious not to consider rerouting through the Tucson area or elsewhere entirely. *State Farm*, 463 U.S. at 43 (arbitrary and capricious when agency "entirely failed to consider an important aspect of the problem"). The ACC's own precedent holds that "[t]he purpose . . . of the Siting Act . . . seems clearly to call for the Committee . . . to decide whether the change from a DC to an AC line requires reconsideration of the route previously selected." ACC Decision No. 58793 ("Whispering Ranch"), attached hereto as Exhibit A, at 33.

Yet the Chairman of the LS Committee stated very clearly that the Committee would not entertain any such testimony. AR Tab B-3 at 139:10-15 ("We are not relitigating the decision that this Committee made back in 2015 . . . . The route is already fixed."). And the ACC erroneously stated that the prior line siting was "res judicata," AR Tab A-193 at 31—even though res judicata does not apply to ACC proceedings. *Davis v. Ariz. Corp. Comm'n*, 96 Ariz. 215, 21819 (1964) (res judicata does not apply because commission has "continuing" power to "rescind, alter or amend" its prior decisions "when the public interest would be served"). That was clear legal error. The ACC can always reconsider a CEC decision if in the public interest; and when creating two new CECs for two separate projects the statute *requires* that reconsideration.

V. The ACC acted arbitrarily and capriciously by considering factors irrelevant to the statute.

An agency also acts arbitrarily and capriciously if it "relied on factors which [the legislature] has not intended it to consider." *State Farm*, 463 U.S. at 43; *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 ratemaking authority). What is clear from the record—particularly in the absence of any direct, non-hearsay testimony of a need for the power in Arizona—is that a substantial factor motivating this Commission's approval in 2016 was compliance with the Obama Administration's CPP, and a principal motivating factor in 2022 was climate change generally. Environmental justice and economic benefits were also improperly considered both in 2015 and 2022.

Economic benefits

Starting with economic benefits, the Court will recall that the Commission's statutory authority requires it to "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). Economic benefits have no relation to an economical supply of electric power, and such testimony is merely introduced to bias the decisionmakers improperly. The consideration of such testimony in both 2015/16 and 2022 was error.

"Environmental justice"

Additionally, there was substantial testimony in 2015 about why the route was submitted to the LS Committee as a fait accompli, even though the Committee had the authority to choose an alternate route. The cited concerns were over environmental justice. App'x Tab 2 at 257:1-5. Of course, had SunZia presented federal authorities routing options that did not pass near Bowie, Arizona, it might have avoided the San Pedro Valley and environmental justice concerns in Tucson altogether.

In considering each new line independently, the Commission should have reconsidered the route because the statute requires the ACC to balance "the environment and ecology of this state" against the need for power. A.R.S. § 40-360.07(B). The statute requires consideration of the "environment" and ecology of the "state," and not

"environmental justice." As SunZia's counsel stated in another case: "the statute does not permit considerations of environmental justice." *See* SRP v. ACC, CV2022-008624, SRP Pre-Trial Memorandum, attached hereto as Exhibit B, at 4; *see also id.* at 24. Moreover, legislative efforts to require the ACC to consider environmental justice have failed. *Id.*; *see also* HB 2681, 55th Leg., 2d Reg. Sess. (Ariz. 2022) (never heard); SB 1563, 55th Leg., 1st Reg. Sess. (Ariz. 2021) (same).

Certainly, if environmental justice and the actual environment can both be accommodated—as routes unconnected to the Bowie plant, or a single line through Tucson, would allow—then they both should be. And if both cannot be accommodated, then perhaps the route should not be approved. But there is no statutory authority to sacrifice the actual environment because of concerns over environmental justice.

Clean Power Plan

When considering each independent CEC, the Commission should not consider any of the original record evidence about compliance with the CPP. The Commission may have acted appropriately in considering the CPP in 2015 because compliance with the CPP might have taken generation offline, creating a risk of an "inadequate" supply of electric power. But at the time of the amended application, the Obama Administration's CPP had been declared unlawful. *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). It cannot be said that the legislature intended the ACC to rely on an unlawful EPA regulation in coming to a siting decision. Yet the amended CEC was approved largely based on the original record, in which there was reliance on the since-invalidated CPP.

Global climate change

Nor should the Commission have considered any of the testimony about climate change from the 2022 proceedings. The state of Arizona has not passed legislation that would include climate change as one of the factors that must be considered by the ACC in conducting its balancing mandate. Although climate change policy at the federal level led to the fast tracking of the SunZia project in 2011, the federal authorities did not provide the ACC with route alternatives that would fulfill federal climate change objectives

without significantly damaging "the environment and ecology of this state."

A failure to provide route alternatives by the federal government does not justify degradation of Arizona's ecology, nor does it justify the failure of the ACC to conduct its balancing mandate for each of the two amended transmission projects independently. The competing interstate Southline Transmission Project was able to minimize ecological impacts and obtain its permits in a fraction of the time that it has taken SunZia to get to this point in their permitting process. Southline is now poised to address federal climate change objectives without degrading 33 miles of the most ecologically sensitive portion of the last remaining natural and intact river ecosystem in southern Arizona. App'x Tab 2 at 175:22–176:2; App'x Tab 28 at 4; AR Tab B-4 at 376:5-16.

It is highly unlikely that the state legislature would have given the Commission authority to consider global climate change without explicitly specifying it as one of the factors to be considered by the ACC. The environmental factors in A.R.S. § 40-360.06—"[f]ish, wildlife and plant life," "scenic areas" and "historic sites," and the "total environment of the area"—only make sense in the context of the local environment impacted by the physical placement of plants and transmission lines. As SunZia's counsel stated in the SRP case, a CEC issues when "*the chosen site* is environmentally compatible with the proposed project." SRP Memorandum, *supra*, at 9 (emphasis added).

The Arizona Supreme Court's recent "major questions" doctrine case buttresses this point. In *Roberts v. State*, the Court explained that "the Supreme Court [of the United States] limits the exercise of legislative power by the executive branch on major policy questions to instances where a statute 'plainly authorizes' executive agency action." 253 Ariz. 259, 512 P.3d 1007, 1016 (2022) (citation omitted). "This doctrine guards against unintentional, oblique, or otherwise unlikely delegations of the legislative power." *Id.* (citation omitted; cleaned up). "What the United States Constitution structurally implies, the Arizona Constitution makes explicit," the Court explained. *Id.* Thus, when an agency deals with a "major policy question," it must look for "plain" statutory authority for it. There is no question that climate change, and how to deal with it, is a "major policy

question." The Commission's authority in § 40-360.07(B) is hardly plain authority for it to make decisions on the basis of global climate change.

Summary

The ACC's decision to approve the new CECs was based on considerations of irrelevant and extraneous factors and was therefore arbitrary and capricious. *State Farm*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which [the legislature] has not intended it to consider."). The ACC therefore made an "unlawful determination" under A.R.S. § 40-254(E).

CONCLUSION—WHAT SHOULD BE DONE

If each CEC is assessed separately, only the AC line can plausibly be approved. Only that line provides the benefits that SunZia initially touted. The only benefit of the DC line is if there is a need in Arizona for the wind power from New Mexico—but of that there is no substantial evidence as a matter of law. There is no evidence at all. What is more, if only one line is approved, whether AC or DC, that line need not go through the San Pedro River Valley. Once there is a single line, there is no need for a 2,500-foot corridor to accommodate ROWs for two separate lines. The Commission itself required such a rerouting under similar circumstances in *Whispering Ranch*.

Even *if* both lines might be built, they are still two separate projects with separate owners and two separate purposes. A single AC line can be routed through Tucson, even if it goes by Bowie Arizona. And a DC line can be routed *anywhere* since it does not need access to the substation near Bowie.

Arizona's line siting laws were designed to protect places like the San Pedro Valley. They do not permit the Commission to stumble backward into permitting its destruction. Through institutional inertia and a misunderstanding of the law, the ACC has turned the initial AC line approval into a stalking horse for a DC line that could never have been approved otherwise. Before irreparable harm can occur which the law was designed to prevent, the Court should vacate CEC 171-A and CEC 171-B, with direction to the Commission to perform the statutorily required balancing for each line separately.

RESPECTFULLY SUBMITTED this 12th day of May, 2023.

TULLY BAILEY LLP

/s/ *Ilan Wurman*
Stephen W. Tully
Michael Bailey
Ilan Wurman
Attorneys for the Plaintiff

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is 13,968 words, in compliance with the Court's April 20, 2023 order.

/s/ *Ilan Wurman*

CERTIFICATE OF SERVICE

I certify that the Original of the foregoing was E-filed with the Clerk of the Court via AZ TurboCourt and a COPY was e-mailed on this 12th day of May, 2023, to the following:

Albert H. Acken
Acken Law
111 E. Dunlap Ave, Ste 1-172
Phoenix, Arizona 85020
(602) 790-6091
bert@ackenlaw.com

Eric D. Gere
Jennings, Strouss & Salmon, PLC
One E. Washington St., Suite 1900
Phoenix, Arizona 85004-2554
(602) 262-5944
egere@jsslaw.com
Attorneys for Intervenor SunZia Transmission LLC

Robin Mitchel
Wesley C. Van Cleve
Maureen A. Scott
Kathryn M. Ust
Arizona Corporation Commission
Legal Division
1200 West Washington Street
Phoenix, Arizona 85007
RMitchell@azcc.gov
wvancleve@azcc.gov
kust@azcc.gov
legaldiv@azcc.gov
Attorneys for Defendant Arizona Corporation Commission

/s/ *Ilan Wurman*

Exhibit A

BEFORE THE ARIZONA CORPORATION COMMISSION

MARCIA WEEKS
CHAIRMAN
RENZ D. JENNINGS
COMMISSIONER
DALE H. MORGAN
COMMISSIONER

IN THE MATTER OF THE APPLICATION OF SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, DEVELOPMENT MANAGER, MEAD-PHOENIX DC INTERTIE PROJECT, ON ITS OWN BEHALF AND ON BEHALF OF SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY AND M-S-R PUBLIC POWER AGENCY, OTHER PARTICIPANTS IN THE MEAD-PHOENIX DC INTERTIE PROJECT, IN CONFORMANCE WITH THE REQUIREMENTS OF ARIZONA REVISED STATUTES SECTION 40-360, ET. SEQ., FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY FOR THAT PORTION LYING WITHIN THE GEOGRAPHICAL CONFINES OF THE STATE OF ARIZONA OF THE PROPOSED ±500 kV DC TRANSMISSION LINE FROM THE EXISTING MEAD SUBSTATION NEAR BOULDER CITY, NEVADA, (SECTION 28, T23S, R64E, MDB&M), TO THE PROPOSED NEW EASTWING TERMINAL NORTHWEST OF PHOENIX ARIZONA (SECTION 8, T4N, R1E, G&SRB&M); SUCH PORTION BEING FROM A POINT ON THE ARIZONA-NEVADA BORDER, MIDSTREAM OF THE COLORADO RIVER APPROXIMATELY FIVE MILES DOWNSTREAM OF WILLOW BEACH, ARIZONA (SECTION 12, T28N, R23W, G&SRB&M) TO THE PROPOSED EASTWING TERMINAL NINE MILES NORTHWEST OF PHOENIX, ARIZONA.	CASE NO. 70 Arizona Corporation Commission DOCKETED SEP 21 1994 DOCKETED BY C.M. DECISION NO. 58793 OPINION AND ORDER

DATES OF HEARING: June 18, 1994 (Public Comments); June 20, 21, 22, 23, 24, and 27, 1994 (Hearing).

PLACES OF HEARING: Whispering Ranch Estates, Arizona (Public Comments); Phoenix, Arizona (Hearing).

PRESIDING OFFICER: Charles S. Pierson, Chairman-Designee, Power Plant and Transmission Line Siting Committee.

IN ATTENDANCE: Various members of the Power Plant and Transmission Line Siting Committee

APPEARANCES: JENNINGS, STROUSS & SALMON, P.L.C., by Mr. Preston H. Longino, Jr., and Ms. Deborah A. Jamieson, Staff Attorney, Salt River Project, on behalf of Salt River Project Agricultural Improvement and Power District;

APKER, APKER, HAGGARD & KURTZ, P.C., by Mr. Burton M. Apker and Mr. David B. Apker, on behalf of Douglas Land Corporation;

ARIZONA SENIOR CITIZENS LAW PROJECT, by Mr. Thomas T. Rapp, on behalf of James Osborn and Penny Osborn and as amicus curiae;

Mr. Adam T. Miller, In Propria Persona;

Mr. Alford R. Smith, In Propria Persona.

BY THE COMMISSION:

HISTORY OF THE PROCEEDINGS

On November 26, 1985, the Arizona Corporation Commission ("Commission") entered Decision No. 54792, wherein it confirmed the granting of a Certificate of Environmental Compatibility ("CEC") by the Power Plant and Transmission Line Siting Committee ("Committee") to Salt River Project Agricultural Improvement and Power District ("SRP") for SRP's Mead-Phoenix 500 kV DC Intertie Project, Case No. 70 of the Committee.

Following informal investigation occasioned by complaints by landowners in Whispering Ranch Estates, the Commission on March 12, 1987, entered Decision No. 55471, which confirmed Decision No.

54792. The informal investigation looked into allegations that the Committee's decision was based upon misrepresentations by WIRTH Environmental Services (the prime environmental consultant for the project, including preparation of the Federal Environmental Impact Statement) and a claim that counsel for intervenor Douglas Ranch had, under oath, during the 1985 hearing misrepresented to the Committee the number of residences in Whispering Ranch.

In January, 1994, the Commission received a request from Adam Miller, Vice Chairman of the Whispering Ranch Residents Association, *inter alia*, to rescind Decisions Nos. 55471 and 54792. Mr. Miller's request contains a number of allegations in support of his request for relief, including allegations of inadequate notice to residents of Whispering Ranch of hearings held by the Committee in 1985, of efforts by an employee of SRP to persuade residents of Whispering Ranch not to attend such hearings, and that SRP has begun construction of the transmission line as an AC line rather than the DC line that was applied for and approved.

The Commission entered Decision No. 58576, in which we found that "[t]he allegations raised by Mr. Miller, especially in light of the significant passage of time since the issuance of Decision No. 54792, are sufficient cause to reopen Decision Nos. 55471 and 54792." In addition, we found that "[t]he Committee should be appointed to act as a hearing officer in this matter . . . to conduct proceedings for the purpose of 1) determining whether SRP's construction of the authorized transmission line is in conformance with Decision No. 54792, 2) determining whether Decision Nos. 55471

and 54792 should be rescinded, altered or amended, and 3) any other related issue as may be deemed appropriate by the Committee."

ISSUES

In accordance with this directive, the chairman-designee of the Committee (the presiding officer) convened a prehearing conference on April 27, 1994. In a procedural order dated May 17, 1994 ("Procedural Order No. One"), the following issues were set forth for determination:

> 1. Whether SRP's decision to build the line so that it can be initially energized as an alternating current (AC) line, rather than the direct current (DC) line that was applied for and granted by the Committee, requires that SRP file either a new or amended application.
>
> 2. Whether residents of Whispering Ranch received legally adequate notice of the initial Committee proceeding.
>
> 3. Whether an employee of SRP made misleading representations that caused residents of Whispering Ranch not to attend the [initial] Siting Committee proceeding.
>
> [4. W]hether counsel for Douglas Ranch committed a fraud on the Committee in his representations as to the number of residences in Whispering Ranch as of the time of the initial Committee proceeding.

Procedural Order No. One at 3-4. For convenience, issue number 1 will be referred to as the "DC-AC Issue"; issue number 2 will be referred to as the "Notice Issue"; issue number 3 will be referred to as the "Extrinsic Fraud Issue"; and issue number 4 will be referred to as the "Fraud on the Court [Tribunal] Issue."

PARTIES

In Procedural Order No. One, Adam T. Miller, Alford R. Smith, SRP and Douglas Ranch were made parties. SRP moved to drop Mr. Smith as a party and to limit the participation of Mr. Miller. In Procedural Order Number Three, dated June 20, 1994, SRP's motions were denied as untimely.

On the first day of hearing, Whispering Ranch residents James Osborn and Penny Osborn were made parties to the proceedings, as represented by Thomas T. Rapp, of the Arizona Senior Citizens Law Project. Mr. Rapp was also granted status to appear as amicus curiae. Mr. Rapp put on the case for Messrs. Miller and Smith, as well as for the Osborns. These parties will collectively be referred to from time to time as the "Whispering Ranch Parties."

The hearing commenced on June 20, 1994 and concluded on June 27. Oral arguments were held on June 27, 1994, and the Committee deliberated on July 12, 1994. No post-hearing briefs or memoranda were filed.

DISCUSSION

I. JURISDICTION

Under the act governing the activities of the Committee, A.R.S. §§ 40-360 through 40-360.13 (the "Siting Act"), a certificate of environmental compatibility issued by the Committee ("CEC") is not effective until it is "affirmed and approved by an order of the commission." A.R.S. § 40-360.07. A.R.S. § 40-360.11 provides:

> *Subject to the rights to judicial review recognized in §§ 40-254 and 40-360.07*, no court in this state has jurisdiction to hear or determine any case or controversy concerning

> any matter which was or could have been determined in a proceeding before the committee *or the commission under this article* or to stop or delay the construction or operation of any facility, *except to enforce compliance through the procedures established by article 3 of this chapter* [A.R.S. §§ 40-241 through 40-255].

(Emphasis added.) SRP contends that the Commission lacks jurisdiction to reconsider decisions confirming CECs, arguing that A.R.S. § 40-254 (which provides for judicial review of Commission decisions) is the only non-Siting Act statute applicable.

SRP's reading of A.R.S. § 40-360.11 is too narrow. For example, when section 40-254 is referenced, A.R.S. § 40-253 (which provides for rehearings of Commission decisions) is automatically included, because an application for rehearing is a jurisdictional prerequisite to a judicial review proceeding under section 40-254. Also, section 40-360.11 incorporates the provisions of the entire Article 3 of Chapter 2 of Title 40, Arizona Revised Statutes, to "enforce compliance" with a CEC and with a Commission decision confirming or modifying a CEC. Article 3 includes not only A.R.S. §§ 40-253 and 40-254, but also other general statutes setting out procedures for investigations and hearings by the Commission. If SRP were correct that the only general Commission statute applicable to Siting Committee proceedings is section 40-254, this entire portion of section 40-360.11 would be superfluous, a situation to be avoided if at all possible in statutory construction. *Union Rock & Materials Corp. v. Scottsdale Conference Center*, 139 Ariz. 268, 678 P.2d 453 (App. 1983); *cf. Chaparral Development v. RMED International, Inc.*, 170 Ariz. 309, 823 P.2d 1317 (App. 1992)(court

must harmonize apparently conflicting language of different parts of the statute to give effect to both). Article 3 contains A.R.S. § 40-252, which provides:

> The commission may at any time, upon notice to the corporation affected, and after opportunity to be heard as upon a complaint, rescind, alter or amend any order or decision made by it. When the order making such rescission, alteration or amendment is served upon the corporation affected, it is effective as an original order or decision. In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.

When necessary "to enforce compliance [with a CEC and a confirming Commission decision]," the Commission's powers under § 40-252 may be invoked, as they have been in this proceeding.

There is longstanding precedent for the exercise by the Commission of its powers under A.R.S. § 40-252 in proceedings under the Siting Act. The Committee granted Tucson Gas & Electric Co. (now Tucson Electric Power Co.) ("TGE") a CEC in Case No. 12 for a 500 kV transmission line from the Arizona-New Mexico border to Vail Substation; the CEC was confirmed by Commission order of March 7, 1975. TGE filed an application asking for reconsideration and modification of the order, to permit TGE to build the line either as a 500 or as a 345 kV line. The application was granted by the Commission, which found that it had power to do so under A.R.S. § 40-252. After hearing the CEC was modified as requested by Decision No. 46262. Thereafter, TGE applied for a second modification of the CEC to permit a seventeen-mile segment to be constructed with

double-circuit 345 kV towers. After hearing pursuant to A.R.S. § 40-252, this application was granted in Decision No. 48059.

In this case, the issues addressed under A.R.S. § 40-252 have been limited to those of a jurisdictional nature, given the fact that the CEC and confirming Decision No. 54792 were entered nearly nine years ago. Although § 40-252 may arguably permit the Commission to reopen a decision confirming a CEC on even broader grounds, in this case the Commission confined its inquiry to matters that might properly be raised this long after entry of an order under Arizona Rules of Civil Procedure 60(c)[1], which provides:

> On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment or order was entered or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, . . . or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be

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[1] A.A.C. R14-3-101 provides in part:

> In all cases in which procedure is set forth neither by law, nor by these rules, nor by regulations or orders of the Commission, the Rules of Civil Procedure for the Superior Court of Arizona as established by the Supreme Court of the state of Arizona shall govern.

by motion as prescribed in these rules or by an independent action.

A. **The Notice Issue**

One of the issues raised by Messrs. Miller and Smith is that residents of Whispering Ranch did not receive legally-adequate notice of the original Committee proceedings in 1985. Public notice of Committee hearings is required by A.R.S. § 40-360.04 and prescribed by A.A.C. R14-3-208. It has long been held that proceedings of the Commission held in violation of statutory notice requirements are void, as the Commission is *without jurisdiction* in such cases. *Gibbons v. Ariz. Corp. Comm'n*, 95 Ariz. 343, 390 P.2d 582 (1964); *Metropolitan Lines v. Brooks*, 70 Ariz. 344, 220 P.2d 480 (1950); *see Walker v. De Concini*, 86 Ariz. 143, 341 P.2d 933 (1959). Thus, if Messrs. Miller and Smith are correct that notice was legally inadequate, the CEC would be void, as would the Commission order confirming it. This challenge is one contemplated by Ariz.R.Civ.P. 60(c)(4). A void judgment may be attacked at any time. 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2862 (1973)[hereinafter 11 Wright & Miller]; see also 7 James W. Moore & Jo Desha Lucas, *Moore's Federal Practice* ¶60.24[4] (1993)[hereinafter 7 *Moore's Federal Practice*].[2]

B. **The Extrinsic Fraud Issue**

The essential allegation underlying this issue is that a representative of Salt River Project made misleading statements to

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[2] Ariz. R. Civ. P. 60(c) is the equivalent of Fed. R. Civ. P. 60(b); therefore, interpretations of equivalent the federal rule are persuasive as to the meaning of the State rule. *Edwards v. Young*, 107 Ariz. 283, 486 P.2d 181 (1971).

Mr. Alford Smith and to a Mr. Robert Mills, which caused them to refrain from attending the 1985 Committee hearing. This issue falls under Rule 60(c)(3), "fraud (whether heretofore denominated intrinsic or extrinsic)." Although a motion brought under Rule 60(c)(3) must be brought "not more than six months after the judgment or order was entered," it has long been held that an independent action based on allegations of extrinsic fraud may be maintained beyond the limitation imposed by the rule. *See Kupferman v. Consolidated Research & Manufacturing Corp.*, 459 F.2d 1072 (2d Cir. 1972). A misrepresentation by one party that deprives an opposing party of his right to appear in court would be considered extrinsic fraud. *See United States v. Throckmorton*, 98 U.S. 61, 25 L.Ed. 93 (1898). Because the complaint on this issue (by the Commission on its own motion or by Messrs. Miller and Smith) could be considered the equivalent of an independent action, the six-month limitation does not govern. Alternatively, A.R.S. § 40-252 contains no temporal limitations equivalent to those of Rule 60(c), and the former provision governs if inconsistent with Rule 60(c). A.A.C. R14-3-101.

C. **The Fraud on the Court Issue**

As provided in Rule 60(c), fraud on the court [tribunal] may be raised at any time. 7 *Moore's Federal Practice* ¶ 60.33; 11 Wright & Miller § 2870.

D. **The DC-AC Issue**

The substantive issue considered in this proceeding may be summarized as follows. SRP was granted a CEC to build a 500 kV *DC*

line. However, SRP is now building a 500 kV *AC* line that later may be converted to DC. The question is whether the 1985 CEC can be construed as authorizing the AC line, or whether SRP must apply for a new or modified CEC to authorize the line being built. This is a jurisdictional issue: if the 1985 CEC does not encompass the AC line being built, it is void as to the new line and SRP is without jurisdiction to build that line without applying for, and receiving, a new or amended CEC.

II. LACHES

SRP contends that Messrs. Miller and Smith are too late in raising the Notice, Extrinsic Fraud and Fraud on the Court Issues — that they are barred by laches.[3] In addition, Adam Miller moved to prevent the introduction by Salt River Project of evidence of financial losses that would be sustained by the 1985 applicants if the line were delayed or rerouted as a result of these proceedings.[4] This evidence is in effect part of SRP's laches defense.

A. The Notice Issue

A void judgment may be attacked at any time; the doctrine of laches is inapplicable. 11 Wright & Miller § 2862; 7 *Moore's Federal Practice* ¶ 60.24[4].

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[3] "Salt River Project's Prehearing Memorandum Regarding the Untimeliness of the Whispering Ranch Residents' Request to Rescind or Modify the CEC," dated June 16, 1994.

[4] "Motion to Prevent Irrelevant Financial Evidence," filed June 13, 1994.

B. **The Extrinsic Fraud Issue**

As noted in part I.B, above, A.R.S. § 40-252 contains no time limits for reopening Commission decisions. However, it has been held that Commission grants of certificates of public convenience and necessity may be rescinded, altered or amended under A.R.S. § 40-252 only when the public interest would be served by such an action. *James P. Paul Water Co. v. Ariz. Corp. Comm'n*, 137 Ariz. 426, 671 P.2d 404 (1983). The court came to this conclusion because the Commission's authority to grant a certificate of public convenience and necessity "is controlled by the public interest." 137 Ariz. at 428, n.2, 671 P.2d at 406, n.2. By analogy, A.R.S. § 40-360.06(A)(8) requires the Committee to consider

> [t]he estimated cost of the facilities and site as proposed by the applicant and the estimated cost of the facilities and site as recommended by the committee, *recognizing that any significant increase in costs represents a potential increase in the cost of electric energy to the customers or the applicant*.

(Emphasis added.) If it is determined that SRP did in fact commit extrinsic fraud, which kept Whispering Ranch residents from attending the original hearing, it appears reasonable to consider both claims of laches on the part of Messrs. Miller and Smith and claimed additional costs to SRP if the line must be rerouted as a result of additional proceedings.

C. **The Fraud on the Court [Tribunal] Issue**

Laches does not preclude relief for fraud on the court [tribunal]. Ariz. R. Civ. P. 60(c); 7 *Moore's Federal Practice* ¶ 60.33; 11 Wright & Miller § 2870.

III. Decision No. 55471

Decision No. 55471, the order confirming Decision No. 54792, was docketed March 12, 1987. It is undisputed that Decision No. 55471 was entered without notice and hearing. As noted in part I.A, above, proceedings of the Commission held in violation of statutory notice requirements are void, as the Commission is *without jurisdiction* in such cases. *Gibbons v. Ariz. Corp. Comm'n*, 95 Ariz. 343, 390 P.2d 582 (1964); *Metropolitan Lines v. Brooks*, 70 Ariz. 344, 220 P.2d 480 (1950); *see Walker v. De Concini*, 86 Ariz. 143, 341 P.2d 933 (1959). Accordingly, Decision No. 55471 is void and should be rescinded.

III. THE MERITS

A. The Notice issue

Public notice is required for Committee proceedings by A.R.S. § 40-360.04(A). The required notice is specified in A.A.C. R14-3-208(C), which provides:

> "Public notice," as used herein, shall mean two publications in a daily or weekly newspaper of general circulation within the general area in which the proposed plant or transmission line is proposed to be located. Such notice shall contain a general description of the substance and purpose of such hearing. If a transmission line is proposed to be located in more than one county, publication shall be made in each county wherein the line is proposed to be located.

The evidence establishes that the requisite notice was published in *The Arizona Republic*, *The Phoenix Gazette*, and the *Wickenburg Sun*.[5]

[5] Because this proceeding focused on the Whispering Ranch area, the evidence of notice was confined to papers likely to be seen by Whispering Ranch residents. However, the Commission takes

There was also testimony that no newspapers were circulated in the Whispering Ranch area in 1985, but that many residents travelled regularly to, or worked in, either Phoenix or Wickenburg. Alford Smith testified that he had seen the notice in one of the Phoenix papers, although at the time he was living in Phoenix, and merely contemplating a move to Whispering Ranch.

SRP also offered evidence that its employees had posted hearing notices at several points in the Whispering Ranch area and on its approaches, and that the notices were still posted after the hearing when an employee went to remove them. In addition, Exhibit SRP 68, a letter to Nils I. Larson from Robert R. Mills, dated August 27, 1985, stated in part:

> After reviewing the alternative routes for the Mead-Phoenix DC Intertie Project with a number of the property owners and investor [sic] in the area, and having them bring us their comments *after you "posted" the property* we vote NO to the First, and Third Alternatives.

(Emphasis added.) On the other hand, several residents testified that they had not seen the posted notices.

The Whispering Ranch Parties contend that, because the three newspapers were not actually physically "circulated" on Whispering Ranch in 1985, there was no adequate public notice. The rule provides that the newspaper shall be "of general circulation within the *general area* in which the proposed plant or transmission line is proposed to be located." (Emphasis added.) The Commission is

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notice of the files of the Committee hearing in 1985, and finds that similar public notice was published in other counties traversed by the route and the alternatives contained in the application.

of the opinion that the Phoenix and Wickenburg papers satisfy the criterion of being circulated in the general area. Anyone resident in the Whispering Ranch area in 1985 almost certainly had to travel either to Phoenix or Wickenburg for supplies and, in many cases, for employment. Any of these persons would have had access to a newspaper during such visits. Although there was no evidence that any resident received a newspaper by mail, mail delivery would certainly have been possible. To require that a newspaper be actually delivered to persons in each discrete area along a transmission line route would make notice by publication legally impossible in instances such as this. The Commission concludes that the notice prescribed by R14-208(C) is legally adequate and that the required notice was given prior to the 1985 proceedings.

The Whispering Ranch Parties also contend that the notices posted by SRP were not adequate. These notices were not required by law, and the Commission was not directed to any precedent that would impose on SRP any particular standard of performance for such a voluntary act. In any event, the preponderance of the evidence establishes that the notices were posted, as claimed by SRP, and that they remained posted until after the 1985 hearing. Moreover, Mr. Mills's letter (Exhibit SRP 68) seems to be an acknowledgement of the posting of the notices.

B. **The Extrinsic Fraud Issue**

The Whispering Ranch Parties contend that Nils Larson, an SRP employee, made misleading statements to Alford Smith that caused Mr.

Smith to refrain from attending the 1985 Committee hearing.[6] Mr. Larson's and Mr. Smith's testimony is in conflict. Mr. Larson testified that at no time prior to the 1985 hearing did he indicate to Mr. Smith that he should not or need not attend the hearing. [III, 427] Mr. Larson also testified that he did not recall having any meetings with Mr. Smith prior to the hearing. He also testified that Mr. Smith and Mr. Mills had made these same allegations and others in a letter to Mr. Gary Frey of the Western Area Power Administration, who then convened a meeting attended by, among others, Messrs. Mills, Smith and Larson. Mr. Larson testified that he was prepared to refute these allegations at the meeting, but neither Mr. Smith nor Mr. Larson brought up the issue.

Mr. Smith testified that he did meet with Mr. Larson shortly before the Committee hearing on September 4, 1985. At that time, Mr. Larson showed Mr. Smith Mr. Mills's letter of August 27, 1985. This exhibit (SRP 68) is stamped "Received, Aug 30 1985, Environ. Serv. Dept." Mr. Smith did not recall Mr. Larson's precise words, but he testified that "I was led to believe, by the totality of what

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[6] The Whispering Ranch Parties claim that Mr. Larson made similar statements to Robert Mills. Mr. Larson testified that he had one meeting with Mr. Mills prior to the September 1985 hearing, that he does not recall making any statements to Mr. Mills regarding the outcome of the hearing, and that he does not recall that Mr. Mills inquired about the likely outcome of the hearing. Mr. Larson also testified that he was sure he would remember making such statements because of the importance of the matter and because it would have been out of character for him to do so. The Whispering Ranch Parties did not offer Mr. Mills as a witness, either in person or by deposition, and failed to provide a legally-sufficient reason why his testimony was not proffered. Under these circumstances, the Commission must assume that Mr. Mills's testimony would not contradict that of Mr. Larson and would not support the allegations.

he [Mr. Larson] said, that there was no need to go and there was nothing to worry about, mainly because SRP wanted to stay with the preferred route." In other words, Mr. Smith inferred from what Mr. Larson said that there was no need to attend the Committee hearing; Mr. Larson did not explicitly say there was no need to attend. Apparently, the primary reason that Mr. Smith inferred there was no need to attend was that SRP continued to support its preferred route. The Commission finds that, assuming the meeting did in fact occur, whatever Mr. Larson said to Mr. Smith did not constitute an attempt to dissuade Mr. Smith from attending the hearing; thus, no extrinsic fraud was practiced.

c. **The Fraud on the Court [Tribunal] Issue**

A fraud on the court is fraud that

> does or attempts to defile the court itself, *or is a fraud that is perpetrated by officers of the court* so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.

Kupferman v. Consolidated Research & Manufacturing Corp., 459 F.2d 1072, 1078 (2d Cir. 1972) (*quoting* 7 Moore, *Federal Practice* ¶ 60.33 at 515 [1971 ed.])(emphasis added). As the *Kupferman* court observed, "[An attorney's] loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court." 459 F.2d at 1078 (*quoting 7 Moore,* Federal Practice ¶ 60.33 at 513); *H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115 (6th Cir. 1976); *Mallonee v. Grow*, 502 P.2d 432 (Alaska 1972); *Sutter v. Easterly*, 189 S.W.2d

284 (Mo. 1945)(when an attorney sponsors perjured testimony, it constitutes fraud on the court).

Rule 60(b), Federal Rules of Civil Procedure,[7] recognizes the inherent power of a court to grant relief to a party from a judgment which has been procured by fraud on the court. In *Alberta Gas Chemicals, Ltd. v. Celanese Corp.*, 650 F.2d 9, 12-13 (2d Cir. 1981), the court recognized "the inherent power of any administrative agency to protect the integrity of its own proceedings" and noted that "[t]he . . . power of a federal court to investigate whether a judgment was obtained by fraud . . . has been applied to proceedings before administrative agencies." *See also WKAT, Inc. v. FCC*, 296 F.2d 375 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 841 (1961).

In this case, if fraud on the court [tribunal] has been committed, it would be because the following testimony of Burton M. Apker, counsel for Douglas Ranch, given at the 1985 Committee hearing was perjured:

> The problem with Double P [Whispering Ranch] is that it was not planned, that it was structured to cause an environmental financial disaster, which it did, and the long-term result of the subdivision up there has been a total of five or six trailer homes or small houses over a long period of time.

(Transcript at 117.)

In the present hearing, Mr. Apker testified that during his 1985 testimony, he was thinking of the transmission line corridor, not the entire Whispering Ranch area. He testified also that his

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[7] As noted above, this rule is the equivalent of Rule 60(c), Arizona Rules of Civil Procedure.

information came from his client, Robert D. Wilson, who was president of Douglas Land Corporation at the time, and that he understood Mr. Wilson to be speaking of the corridor. Mr. Apker testified that he did not remember having been at Whispering Ranch before giving his testimony. Mr. Apker also testified that he did not intend to mislead, or misstate anything to, the Committee or the Commission. There was no other testimony on this issue, and the Whispering Ranch Parties did not cross-examine Mr. Apker. They apparently relied on other factual material elicited during the hearing that contradicted Mr. Apker's 1985 testimony. The Commission finds that there is no way at this time to determine whether or not Mr. Apker, in 1985, committed an intentional fraud on the court [tribunal]; accordingly, Decision No. 54792 cannot be overturned on this ground at this time.

D. Overall Inequitable Conduct of SRP

In addition to the notice, extrinsic fraud and fraud on the court [tribunal] issues, during the hearing the Whispering Ranch Parties for the first time suggested that SRP's overall conduct at the time of the 1985 proceeding rendered it inequitable that Decision No. 54792 be allowed to stand. The Commission finds no evidence to support this contention, especially in light of the fact that we find no merit in the notice, extrinsic fraud and fraud on the court [tribunal] issues.

E. The DC-AC Issue

By notice in the Federal Register of Friday, September 7, 1990,[8] the Western Area Power Administration (WAPA) gave notice that the project sponsors proposed to construct the Mead-Phoenix 500 kV line as "a 500 kV AC-transmission line with the capability to be upgraded to ±500-kV DC when warranted by increased demand for transmission capacity." However, SRP did not, at that time or any time subsequent, either file an application with the Committee for a new or amended certificate or an application with the Commission requesting that the Commission, pursuant to A.R.S. § 40-252, amend Decision No. 54792 to permit the line to be built as proposed.

As required by A.R.S. § 40-360, SRP did file with the Commission Ten-Year Plans in January 1986 through January 1989 (Exhibits 40 through 43, respectively), showing the Mead-Phoenix 500 kV DC line, as authorized by the Committee in 1985. The January 1989 report reads as follows:

> SRP is involved in a joint study of a ± *500kV direct current transmission line* which would connect the Mead Substation, near Hoover Dam in Nevada, with the Eastwing Substation area. The proposed in-service date of this line is 1994. Approval was granted by the Arizona Power Plant and transmission Line Siting Committee in late 1985.

(Emphasis added.) This information varied from that supplied in January 1986 (Exhibit SRP 40) primarily in the change of the proposed in-service date from 1991 to 1994.

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[8] 55 Fed. Reg. 36,864 (1990)(Exhibit SRP 49).

The January 1990 Ten-Year Plan (Exhibit SRP 44) contained the following information:

> SRP is involved in a joint study of a 500kV transmission system which will link southern Nevada with the Phoenix metropolitan area. *The proposed 500kV transmission line will be constructed initially as 500kV alternating current (AC) with the capability of being converted to direct current (DC) in the future.* The interim terminations for the AC line will be McCullough II Substation, a new substation to be located in southern Nevada, and the existing Westwing Substation north of Sun City. Ultimately the line will be converted to DC and the terminations will be moved from McCullough II to the existing Mead Substation in Nevada and from Westwing to Eastwing, a new Converter Station Site to be constructed in northwest Phoenix. The proposed in-service date of the interim AC line is 1994. *Approval for this transmission line was granted by the Arizona Power Plant and Transmission Line Siting Committee in late 1985.*

(Emphasis added.) The filings for January 1991 through January 1994 (Exhibits SRP 45 through 48, respectively) are substantially similar to that of January 1994, except that they show the planned in-service date as 1995.

SRP offered these Ten-Year Plan filings apparently to show that the Commission had notice of the planned change in the configuration of the Mead-Phoenix line. However, the filings after the decision to change the configuration do not call attention to the fact that the plans had changed, and each of those reports misleadingly recites that the AC (convertible to DC) line had been approved by the Committee in 1985. Thus, as actual notice of the proposed change, these filings fall far short of being informative. In addition, the filing of a Ten-Year Plan does not relieve SRP of

filing requisite applications for permission to construct facilities. The Commission rejects the implied argument that the filing of a Ten-Year Plan somehow shifts the burden to the Commission to seek out a utility and require that it file an application for an amended CEC or for an amendment to a CEC if the applicant's plans change after the initial granting of the CEC.

The ultimate issue is whether the change in the planned configuration of the line requires that SRP either apply to the Committee for an amended CEC, or to the Commission pursuant to A.R.S. § 40-252 for an amendment to Decision No. 54792, to permit the line to be built initially as an AC line, with the later option of converting it to DC.

The first question to be addressed is whether a new CEC or a modification to a CEC must be sought whenever a utility contemplates any modification, however minor, to a transmission line for which a CEC has been granted. SRP, in a memorandum entitled "Salt River Project's Prehearing Memorandum on Standard for When Amended Certificate of Environmental Compatibility is Required" (the "SRP Memorandum"), urges that amendments should be limited to instances in which modifications would cause a "substantial change" in the anticipated environmental impacts of the transmission line.

The Siting Act is silent on the subject of when modifications in a CEC should be sought, if ever.[9] However, as SRP apparently

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[9] A.R.S. § 40-360.04(A) provides in part:

> If the committee subsequently proposes to condition the certificate on the use of a site other than the site or alternative sites gener-

recognizes, it is unrealistic to think that the Legislature intended that no change to a planned transmission line after issuance of a CEC should require a modification of the CEC. Such an interpretation would render the Siting Act virtually meaningless. Any applicant could propose a very environmentally-innocuous project and, after receiving a CEC, modify its plans to suit itself. As a New York appellate court found:

> While strict compliance with prescribed procedures is required, nothing in [the State Environmental Quality Review Act] or its regulations expressly calls for issuance of a [supplemental environmental impact statement]. Indeed, a supplemental statement is not even mentioned. However, an agency making a final decision about a project must make findings that the environmental concerns of the act have been considered and satisfied . . . , and from this it may reasonably be inferred that an agency must prepare a [supplemental environmental impact statement] if environmentally significant modifications are made after issuance of a [final environmental impact statement].

Jackson v. New York State Urban Development Corp., 494 N.E.2d 429, 444 (N.Y. App. 1986). Similarly, expression in the legislative intent of the Siting Act that "it is the purpose of the article to provide a single forum for the expeditious resolution of all matters concerning the location of electric generating plants and transmis-

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> ally described in the notice and considered at the hearing, a further hearing shall be held thereon after public notice.

This section does not address a situation in which a CEC has been issued *before* a new route is desired; therefore, it is not directly on point. However, the existence of the section is some indication that the Legislature is aware that projects can change after the initial notice has been given and, if they do, renoticing (and rehearing) may be required.

sion lines in a single proceeding," 1971 Ariz. Sess. Laws, ch. 67, § 1, is a strong indication that substantial changes in such lines or generating plants after issuance of CECs would have to be addressed by applications for modifications of the CECs.

The SRP Memorandum discussed several statutes in which the "substantial change" test has been adopted as the test of whether modifications to environmental impact statements or to rules must be undertaken. Also, SRP called attention to the Arizona Administrative Procedure Act, in which section 41-1025 governs when a proposed administrative rule is deemed to be modified so significantly that it must be renoticed before final adoption:

> **A.** An agency may not adopt a rule that is *substantially different* from the proposed rule contained in the notice of proposed rule adoption filed with the secretary of state pursuant to § 41-1022. However, an agency may terminate a rule making proceeding and commence a new rule making proceeding for the purpose of adopting a substantially different rule.
>
> **B.** In determining whether an adopted rule is *substantially different* from the published proposed rule on which it is required to be based, all of the following must be considered:
>
> 1. *The extent to which all persons affected by the adopted rule should have understood that the published proposed rule would affect their interests.*
>
> 2. The extent to which the subject matter of the adopted rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule.
>
> 3. The extent to which the effects of the adopted rule differ from the effects of the published proposed rule if it had been adopted instead.

(Emphasis added.) The Commission finds that the "substantial change" criterion is appropriate for application in this case, and that the tests suggested in A.R.S. § 41-1025 are appropriately utilized in applying this criterion.

The change from a 500 kV DC line to a 500 kV AC line that is later convertible to DC results in a number of differences between the line SRP is building and the line that the Committee and Commission in 1985 authorized it to build. The towers themselves are changed somewhat in design and in dimensions. There are three, rather than two, conductors. The converters (which change direct current to alternating current) are not needed at this time, thereby saving considerable present expense. Also, the possibility lurks that SRP would never choose to convert the line to DC, but instead might seek authorization for a parallel second AC line along the same route.

By far the most significant change caused by conversion to AC, however, has to do with potential biological and health effects of the line. The evidence established that the electromagnetic field ("EMF") generated by a high voltage *DC* line such as that authorized by Decision No. 54792 does not cause any known or suspected biological and health effects on human beings. However, the evidence also established that the EMF from a high voltage *AC* line such as SRP has currently under construction does have effects on both human beings and animals because of what is called a "coupling effect." The Whispering Ranch Parties offered into evidence a number of articles discussing studies that purport to show elevated

incidence of leukemia in children living near high-voltage power lines.[10] These articles were admitted into evidence for the limited purpose of showing that a controversy exists in the scientific community over this issue. SRP offered evidence that these studies suffer from methodological flaws that prevent any conclusive findings to be drawn from them.[11]

The articles submitted by SRP establish that the issue is far from definitively resolved either way. For example:

> The possibility that exposure to electromagnetic fields causes cancers, including childhood cancers, is one of continuing public concern and scientific debate. . . .
>
> . . . .
>
> The possibility that magnetic fields associated with electricity transmission may cause some cases of childhood cancer cannot be dismissed, but the lack of consistency among published studies, and the absence of an accepted biologic explanation for such a relation, means that we have to conclude that at present no causal relation has been established. Results from the large case-control studies of childhood cancer currently in progress will be awaited with great interest.

Gerald Draper, *Electromagnetic fields and childhood cancer*, British Medical Journal, 307:884-85 (1993)(Exhibit SRP 111).

> The possibility that exposure to extremely low frequency (ELF) electromagnetic radiation may increase risk of cancer has been studied epidemiologically in human populations since

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[10] Exhibits WR 4 through 7 and 9.

[11] Exhibits SRP 111 through 124. Like Exhibits WR 4 through 7 and 9, Exhibits SRP 111 through 124 were admitted for the limited purpose of establishing the existence of scientific controversy over the biological and health effects of high voltage AC power lines.

> the mid-1970's. Such studies continue, especially with respect to childhood cancers, but are inconclusive. . . .
>
> . . . .
>
> . . . . Further studies are needed, both laboratory experiments and human observations, to clarify this complex and difficult topic.

Clark W. Heath, Jr., *Extremely Low Frequency Electromagnetic Radiation*, American Cancer Society Fact Sheet No. 2680 (1993)(Exhibit SRP 113).

> "In the absence of any unambiguous experimental evidence to suggest that exposure to [extremely low frequency] electromagnetic fields is likely to be carcinogenic, in the broadest sense of the term, the findings to date can be regarded only as sufficient to justify formulating a hypothesis for testing by further investigation."

J.A. Dennis, *New Evidence on the Possible Hazards of Electromagnetic Fields*, Radiation Protection Dosimetry, 51:75-77 (1974)(*quoting* Electromagnetic Fields and the Risk of Cancer. *Report of an Advisory Group on Non-Ionising* [sic] *Radiation*. Documents of the NRPB 3(1) 1992.)(Exhibit SRP 122).

> While the possibility of a public health concern has been raised in some epidemiological studies, we do not yet have enough information to say whether EMFs pose a health risk or not. . . . It must be remembered that no safe or unsafe levels have been determined.

Environmental Protection Agency, Questions and Answers About Electric And Magnetic Fields (EMFs), 16, December 1992 (Exhibit SRP 118).

Based on the evidence before it, the Commission cannot conclude that it has been conclusively established that persons living near

high-voltage AC power lines are subjected to increased risk of adverse health effects. However, the evidence does establish that the issue is still open. In other words, there are no studies that conclusively establish that there are *no* adverse health effects from living in proximity to high voltage AC power lines. Given the known coupling effects, it is possible that human beings may suffer adverse effects from living near high voltage AC power lines, however remote that possibility may seem at this time.

One thing is certain, however: there is a great deal of public concern over the possibility of adverse health effects, as is demonstrated by the opposition mounted in this case by the Whispering Ranch residents and by the multitude of studies and articles that address the issue.

Given the number of scientific studies that have been performed and the high profile of the controversy in the scientific community, as well as the concern among the general public over this issue, the Commission regards the issue as significant and the decision to convert from a DC line to an AC line as a substantial change requiring an application for an amended CEC.

These health concerns did not arise when SRP requested permission to build a 500 kV DC line. Thus, persons concerned with this health issue (the "EMF Issue") were given no notice by the 1985 proceedings that the EMF Issue was a concern at all. Accordingly, they would have had no reason to appear and protest the location of the line. As discussed above, under A.R.S. § 41-1025(B) a modification to a proposed rule would be considered to make the rule

substantially different unless "all persons affected by the adopted rule should have understood that the published proposed rule would affect their interests." Those persons interested in the EMF Issue most certainly would not have realized that this issue might be affected by the 1985 proceedings. By this criterion — suggested by SRP — the conversion from DC to AC is a substantial change.

The application and evidence presented at the 1985 hearing demonstrate that SRP understood that the EMF Issue was not an issue because the line was to be a DC line, and the utility stressed that fact in attempting to persuade the Committee to grant the CEC:

> [A] static DC field, *unlike a changing AC field*, is not able to induce a significant electric field or current flow within organisms, and so the overall probability that DC electrical fields emanating from the transmission line would produce biological effects is considered to be exceedingly small.
>
> . . . .
>
> There is a limited amount of data regarding the biological effects of exposure to DC electric fields. A review of this data does not suggest that there is sufficient evidence to establish the existence of such effects. Furthermore, the magnitude of energy transferred from a DC electric field to biological organisms is very small. It is, therefore, highly unlikely that the DC electric field found under the Mead-Phoenix DC Intertie Project would produce biological effects.
>
> . . . .
>
> These findings strongly support the conclusion of the Participants that the DC transmission line electric environment associated with the proposed Mead-Phoenix DC Intertie Project will not pose a risk to human health or safety.

Application for Certificate of Environmental Compatibility, Mead-Phoenix DC Intertie Project, Exhibit J-2 at J-2-2, J-2-3 (emphasis added).

> Equal DC and AC field strengths do not produce the same electrical or biological effects. The field coupling to organisms or objects for the two cases are entirely different. In the DC case, the electric field coupling is resistive, with charge carried by natural and corona-generated ions. For AC, the coupling is capacitive and inductive, and is the result of the changing electric magnetic fields. Typically, the DC current coupled to an object is several orders of magnitude smaller than the induced current in an AC field of comparable amplitude. Electromagnetic induction does not occur from DC because the current flow which causes the magnetic field is unidirectional.

Exhibit B-1 to *Application for Certificate of Environmental Compatibility, Mead-Phoenix DC Intertie Project*, at 5-18, 5-19.

> There is a limited amount of data regarding the biological effects of exposure to DC electric field. While some data have indicated biological effects from this component, these studies are not of sufficient quality to establish the existence of such effects, *particularly since the absence of a coupling mechanism for transfer of electrical energy suggests that direct biological effects from electrostatic field exposure are unlikely*. In sum, there is no scientifically credible evidence to suggest adverse health effects are attributable to this HV DC environmental agent.
>
> It can be concluded, based upon a review of the literature available, that most of the components of the HV DC field are of the same order of magnitude as normal ambient levels of these components and thus do not cause any significantly greater risk to biological organisms than the environment without a HV DC line.

Id. at 5-21, 5-22 (emphasis added).

SRP went to great lengths to differentiate DC from AC lines and to highlight the lack of biological and health effects from DC lines. None of the studies discussed in Exhibits SRP 111 through 124 and in WR 4 through 7 and 9 are mentioned in the Draft Environmental Statement and do not appear in the bibliography contained in Exhibit B-1 filed in the 1985 hearing, even though one of them, the Wertheimer-Leeper study, had been conducted in 1979. The reason is obvious: the studies have no relevance to a DC line. Having made such a point of the differences in biological effects between DC and AC current in its 1985 presentation, SRP is now on shaky ground in arguing that the difference is so insignificant that the utility can proceed without applying for a new CEC or a modification to the existing CEC.

SRP's decision to change the configuration of the line without approaching either the Committee or the Commission evinces a lack of understanding as to the Committee/Commission role in the siting of power plants and transmission lines. Although SRP quoted from the purpose clause of the Siting Act portions which the utility thought justified its course of action, SRP ignored other, relevant portions. The purpose clause in its entirety reads:

> The legislature hereby finds and declares that there is at present and will continue to be a growing need for electric service which will require the construction of major new facilities. It is recognized that such facilities cannot be built without in some way affecting the physical environment where the facilities are located. The legislature further finds that *it is essential in the public interest to minimize any adverse effect upon the environment and upon the quality of life of the people of the state which such new facili-*

> *ties might cause.* The legislature further finds that present practices, proceedings and laws relating to the location of such utility facilities may be inadequate *to protect environmental values and take into account the total effect on society of such facilities.* The lack of adequate statutory procedures may result in delays in new construction and increases in costs which are eventually passed on to the people of the state in the form of higher electric rates and which may result in the possible inability of the electric suppliers to meet the needs and desires of the people of the state for economical and reliable electric service. Furthermore, the legislature finds that existing law does not provide adequate opportunity for individuals, groups interested in conservation and the protection of the environment, local governments, and other public bodies to participate in timely fashion in the decision to locate a specific major facility at a specific site. The legislature therefore declares *it is the purpose of this article to provide a single forum for the expeditious resolution of all matters concerning the location of electric generating plants and transmission lines in a single proceeding to which access will be open to interested and affected individuals, groups, county and municipal governments and other public bodies to enable them to participate in these decisions.*

1971 Ariz. Sess. Laws ch. 67, § 1 (emphasis added). The Committee is not charged only with conducting expeditious proceedings to save utilities time and money. It is delegated the duty of making sure that such projects will "minimize any adverse effect upon the environment and upon the quality of life of the people of the state which such new facilities might cause."

To enable the Committee to carry out its charge, the Legislature has not limited the Committee to sites selected by the utility-applicants. Section 40-360.04(A) specifically provides that "[i]f the committee subsequently proposes to condition the certificate on

the use of a site other than the site or alternative sites generally described in the notice and considered at the hearing, a further hearing shall be held thereon after public notice." Subsection E provides that if the Committee's action results in increased costs, the order shall so reflect, to assist the utility in subsequent ratemaking proceedings. The Legislature recognized that in some cases choices proposed by applicant-utilities would not be seen by the Committee as consonant with its statutory charge, presumably after public input provided new perspectives.

The decision of SRP to convert this line from DC to AC without applying for an amended CEC undermines the very foundations of the Siting Act. SRP's action in fact deprives the Committee and, ultimately, the Commission of their statutory powers. The purpose clause of the Siting Act, applied to this situation, seems clearly to call for the *Committee* — not SRP — to decide whether the change from a DC to an AC line requires reconsideration of the route previously selected.

In making a decision pursuant to an application for an amended CEC, the Committee would undoubtedly be asked to consider the possible biological effects of conversion to AC. Even if harmful effects were not conclusively proven in such a hearing, the Committee could take note of the fact that *lack of harm* has likewise not been conclusively proven. The Committee could also consider the number of residents in proximity to the present route, and take into account their fears and concerns. It might be that the Committee would find that protection of the quality of life of the residents

of Whispering Ranch requires that the line be rerouted along an unpopulated route segment. Obviously, it is one thing to site a line in an already populated area, the residents of which might find it difficult if not impossible to relocate even though the line's presence is repugnant to them, and quite another to site it along an unpopulated segment, where future residents could make a choice whether to live in proximity to the line.[12] If SRP files an application for an amended CEC, such a course of action would be open to the Committee, as would a decision that the route should not be changed. What is clear is that this choice cannot appropriately be left to SRP.

The SRP Memorandum cites a number of cases, both state and federal, upholding decisions of agencies not to file supplemental environmental statements before proceeding with projects that were

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[12] A prospective resident who chose not to reside close to the line would be practicing "prudent avoidance":

> Prudent avoidance is an approach to making decisions about risks. This decision-making process is based on judgment and values, can be applied by groups and individuals, and can be considered for all aspects of our lives, not just EMFs. Prudent avoidance applied to EMFs suggests adopting measures to avoid EMF exposures when it is reasonable, practical, relatively inexpensive and simple to do. . . . Until the health issues are clearer, it is entirely up to individuals to decide if they wish to take actions which may or may not reduce any potential health risks.

Environmental Protection Agency, Questions and Answers About Electric And Magnetic Fields (EMFs), 16, December 1992 (Exhibit SRP 118). On the other hand, if the route remains as originally sited, Whispering Ranch residents could avoid living near the line only if they move.

modified in some measure since the filing of required environmental impact statements, on the grounds that the changes were not "substantial." The Commission is of the opinion that the fact situations in these cases can be distinguished from this case. Even more important, however, is the fact that those situations are distinguishable because, in those cases, the agencies that were responsible for filing the environmental impact statements (and any required supplements) had the authority to commence the projects themselves, without any intervention, except through judicial review. The only inquiry in those cases was whether the agencies abused their discretion by deciding that there would be no substantial change in the projects. By contrast, SRP cannot commence the project without obtaining a CEC from the Committee, confirmed by the Commission. Thus, in this case, the decision as to whether a substantial change is being made in a project is necessarily a decision for the Committee, subject to judicial review.

This same reasoning makes the decision of WAPA, in its "Environmental Analysis of the Changes to the Proposed Mead-Phoenix Transmission Project, February 1990" ("1990 Environmental Analysis"), not to file a supplemental environmental impact statement also irrelevant. Again, the decision is for the Committee, not WAPA, as to whether an application for an amended CEC must be filed. In any event, the Commission notes that the 1990 Environmental Analysis is deficient in discussing the possible health effects of the change from DC to AC current. For example, the narrative section of the document fails to mention by name any of the studies

cited in the exhibits filed by SRP and by the Whispering Ranch Residents. Furthermore, the narrative omits even a general reference to various studies of the relationship between childhood leukemia and electric power configurations that were conducted in Europe prior to the publication of the 1990 Environmental Analysis, and the bibliography lists no publications consulted concerning any such tests. The big deficiency, from the perspective of the Commission, however, is that the analysis ignores the statutory responsibilities of the Committee and the Commission to decide whether the change in line configuration is substantial or not.

Precedent in previous Siting Act proceedings indicates that an issue of such moment as the conversion from DC to AC should have prompted SRP either to apply to the Committee for an amended CEC or, at the very least, to invoke the Commission's power under A.R.S. § 40-252 to modify the existing CEC by modification of Decision No. 54792. As noted in part I, above, TGE in 1975 twice asked the Commission to act under section 40-252, once to permit the company to build either a 500 or a 345 kV line, rather than just the previously-authorized 500 kV line, and the second time to permit the company to erect, on a seventeen-mile stretch of the route, towers to accommodate an additional 345 kV line. Neither modification appears to be as significant as the one proposed in this case, yet TGE prudently sought authority before implementing the changes.

Although in the TGE case, the Commission may have appropriately modified the CEC through A.R.S. § 40-252 actions, in this case, the modification is of such significance that the Commission is of the

opinion that an application should be made to the Committee for an amended certificate, so that the proposed change will be noticed to permit the public input deemed so important by Legislature, as evidenced in the purpose clause of the Siting Act, on the EMF Issue.

FINDINGS OF FACT

1. SRP was granted a CEC for the Mead-Phoenix 500 kV DC Intertie Project, Case No. 70 of the Committee. The CEC was confirmed by order of the Commission on November 26, 1985, in Decision No. 54792.

2. After an informal investigation prompted by complaints of residents of Whispering Ranch Estates that the Committee's decision in Case No. 70 was induced by misrepresentations of certain witnesses, the Commission, in Decision No. 55471, dated March 12, 1987, confirmed Decision No. 54792.

3. Decision No. 55471 was entered without notice and hearing.

4. The present proceeding was occasioned by an informal complaint filed by Adam T. Miller, a resident of Whispering Ranch Estates, and was instituted by the Commission on its own motion pursuant to A.R.S. § 40-252.

5. This proceeding considered the following issues:

a. Whether SRP's decision to build the line so that it can be initially energized as an alternating current (AC) line, rather than the direct current (DC) line that was applied for and granted by the Committee, requires that SRP file either a new or amended application. [The "DC-AC Issue."]

b. Whether residents of Whispering Ranch received legally adequate notice of the initial Committee proceeding. [The "Notice Issue."]

c. Whether an employee of SRP made misleading representations that caused residents of Whispering Ranch not to attend the [initial] Siting Committee proceeding. [The "Extrinsic Fraud Issue."]

d. Whether counsel for Douglas Ranch committed a fraud on the Committee in his representations as to the number of residences in Whispering Ranch as of the time of the initial Committee proceeding. [The "Fraud on the Court (Tribunal) Issue.]

THE NOTICE ISSUE

6. The Whispering Ranch Parties allege that they did not receive legally-sufficient notice of the 1985 Committee hearing, and that as a result, the CEC issued as a result of that hearing is void.

7. Public notice of Committee proceedings is required by A.R.S. § 40-360.04(A); the form of notice is prescribed by A.A.C. R14-3-208, which requires publication in "a newspaper of general circulation within the general area in which the proposed plant or transmission line is proposed to be located."

8. The required notice was published in *The Arizona Republic, The Phoenix Gazette*, and the *Wickenburg Sun*, which are newspapers of general circulation in the Phoenix and Wickenburg areas, respectively.

9. Many, if not most, residents of Whispering Ranch Estates get their supplies and work in the Phoenix and Wickenburg areas, where they would have access to these papers.

10. Publication in the Phoenix and Wickenburg newspapers is publication in the "general area" of Whispering Ranch Estates, as required by R14-3-208.

11. In addition to publication of notice required by law, SRP posted notice of the hearing at several communal areas of Whispering Ranch Estates, which notices remained posted until after the 1985 Committee hearing. These notices were identical in content to the notices published in the newspapers.

THE EXTRINSIC FRAUD ISSUE

12. The Whispering Ranch Parties contend that Nils Larson, an employee of SRP, made statements to Robert Mills and to Alford Smith that induced them not to attend the 1985 Committee hearing.

13. Mr. Larson made no statements either to Mr. Mills or to Mr. Smith to the effect that they need not attend the 1985 Committee hearing. Mr. Smith inferred that there was no need to attend because SRP continued to support its preferred route, which ran through Douglas Ranch, not through Whispering Ranch Estates. The inference drawn by Mr. Smith from Mr. Larson's statements to him (if any) that he need not attend the hearing to protect his interests was not reasonable.

THE FRAUD ON THE COURT [TRIBUNAL] ISSUE

14. Certain Whispering Ranch residents claimed in 1987 that the following sworn testimony of Burton M. Apker, counsel for Douglas Ranch, given during the 1985 Committee hearing was perjured:

> The problem with Double P [Whispering Ranch] is that it was not planned, that it was structured to cause an environmental financial disaster, which it did, and the long-term result of the subdivision up there has been a total of five or six trailer homes or small houses over a long period of time.

15. This issue was made a part of this hearing by the presiding officer on his own motion in Procedural Order No. One.

16. Mr. Apker's testimony in this proceeding tends to negate the charge of perjury. No contrary evidence was offered in this proceeding. However, there is no way at this time to determine whether Mr. Apker, in 1985, committed perjury before the Committee.

OVERALL INEQUITABLE CONDUCT OF SRP

17. During the hearing, the Whispering Ranch Parties for the first time alleged that SRP's overall conduct at the time of the 1985 Committee hearing was so inequitable that the CEC and Decision No. 54792 should be voided.

18. The Whispering Ranch Parties failed to offer proof of this allegation, particularly in light of the fact that the Commission has found adversely to the Whispering Ranch Parties on the Notice, Extrinsic Fraud and Fraud on the Court [Tribunal] Issues.

THE DC-AC ISSUE

19. The electromagnetic field ("EMF") from high-voltage DC line, such as the one approved by the CEC issued in Case No. 70, has no known biological and health effects on human beings.

20. SRP emphasized the lack of such biological and health effects in its application and supporting exhibits in Case No. 70.

21. The EMF from high-voltage AC lines, such as the one SRP is constructing in place of the DC line approved in Case No. 70, does have certain biological effects on human beings because of a so-called "coupling effect."

22. Whether the coupling effect results in adverse health effects is the subject of considerable scientific debate and has occasioned a growing number of studies, as well as critiques of these studies.

23. At the present time no one can say with any scientific certainty whether or not exposure to the EMF of high-voltage AC transmission lines results in any adverse health effects. Even those scientists that subscribe to the position that it is more likely than not that there are no ill health effects concede that the issue is still open, and that the possibility of adverse health effects cannot be ruled out pending further, and more scientifically rigorous, studies.

24. There is considerable public concern over the possibility of such adverse health effects, particularly as a result of studies apparently linking childhood leukemia to exposure to high-voltage AC transmission lines.

25. The Committee and, ultimately, the Commission are charged under the Siting Act, among other things, with "minimiz[ing] any adverse effect upon the environment and upon the quality of life of the people of the state which such new facilities [such as the transmission line being constructed by SRP] might cause."

26. Even though the possibility of adverse health effects is arguably small, the fact that they cannot be ruled out causes anxiety for many persons living near high-voltage AC transmission lines and for many persons who might in the future find themselves living near such lines as the result of decisions made in Siting Act

proceedings. Such concerns are viewed as quality of life issues for many persons affected and potentially affected by the siting of high-voltage AC lines; because of their concerns over possible health effects, the siting of such lines near their homes causes an adverse environmental effect.

27. Persons concerned about adverse health effects from exposure to high-voltage AC transmission lines would have had no reason to understand that the 1985 proceedings for the siting of a high-voltage DC line would affect their interests.

28. In addition to possible adverse biological and health effects from exposure to high-voltage AC transmission lines (but not DC lines), other changes as a result of the conversion include changes in configuration of the towers, the addition of a third conductor, and the elimination for the present of the expensive converters that would be necessary to link the DC line to the rest of the system.

29. The change from DC to AC constitutes a "substantial change" in the project from that approved in Case No. 70, primarily because of the issues created over biological and health effects.

30. The Ten-Year Plans filed by SRP after the decision to convert the line from DC to AC are misleading in that they invite the inference that the AC line had been approved in the 1985 Committee proceedings.

31. Statements concerning modifications to facilities previously authorized (in CECs issued by the Committee) made in a Ten-Year Plan do not constitute notification to the Commission that

an applicant such as SRP is requesting authorization for such modifications.

32. At no time since the decision was made to convert the project from a DC to an AC transmission line has SRP sought authorization from either the Committee or the Commission to build the AC line.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction, pursuant to A.R.S. § 40-252, to conduct these proceedings.

2. Adequate notice was given of these proceedings.

3. Commission orders entered without proper notice and without an opportunity for hearing are void.

4. Decision No. 55471 is void.

5. Notice of the 1985 Committee proceedings was legally adequate.

6. Neither SRP nor Mr. Nils Larson practiced extrinsic fraud on Messrs. Mills and Smith.

7. The evidence is insufficient to support a finding that Mr. Apker, in the 1985 Committee hearing, committed perjury; therefore, the CEC and Decision No. 54792 cannot be voided for fraud on the court [tribunal].

8. The Siting Act imposes an implied burden on an applicant to make application for an amended CEC when a substantial change is contemplated in a project for which a CEC has previously been granted.

9. Unless and until such application is made and acted upon, the applicant has no authority to construct such a substantially-changed project.

10. Neither the CEC issued in Case No. 70 nor Decision No. 54792 authorizes the 500 kV AC transmission line that SRP is presently constructing.

ORDER

IT IS THEREFORE ORDERED that Decision No. 55471 is void.

IT IS FURTHER ORDERED, denying relief on the complaint regarding the "Notice Issue."

IT IS FURTHER ORDERED, denying relief on the complaint regarding the "Extrinsic Fraud Issue."

IT IS FURTHER ORDERED, denying relief on the complaint regarding the "Fraud on the Court [Tribunal] Issue," without prejudice.

IT IS FURTHER ORDERED, denying relief on the complaint regarding the "Overall Inequitable Conduct of SRP Issue."

IT IS FURTHER ORDERED, that the Certificate of Environmental Compatibility issued in Decision No. 54792 does not allow for the construction of a 500 kV AC line, whether permanent or temporary.

IT IS FURTHER ORDERED, pursuant to A.R.S. § 40-252, amending Decision No. 54792 by adding the following:

> This certificate of environmental compatibility does not authorize the construction of the "500-kV AC transmission line with the capability to be upgraded to ± 500-kV DC when warranted by increased demand for transmission capacity" referenced in Record of Decision, 55 Fed. Reg. 36,864 (1990).

IT IS FURTHER ORDERED, that if SRP wishes to construct the 500 kV Mead-Phoenix Transmission Line as an AC line, SRP must file for an amended Certificate of Environmental Compatibility or it must file for a new Certificate of Environmental Compatibility for the 500 kV AC line.

IT IS FURTHER ORDERED, that this decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN COMMISSIONER COMMISSIONER

IN WITNESS WHEREOF, I, JAMES MATTHEWS, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 21 day of September, 1994.

JAMES MATTHEWS
EXECUTIVE SECRETARY

DISSENT _____

Exhibit B

Albert H. Acken - 021645
aacken@jsslaw.com
Eric D. Gere - 023226
egere@jsslaw.com
JENNINGS, STROUSS & SALMON, P.L.C.
One East Washington Street, Suite 1900
Phoenix, Arizona 85004-2554

Matthew E. Price – (Pro Hac Vice)
mprice@jenner.com
JENNER & BLOCK, LLP
1099 New York Avenue NW, Suite 900
Washington, DC 20001-4412
Attorneys for Salt River Project Agricultural Improvement and Power District

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, a Political Subdivision of the State of Arizona,

Plaintiff,

vs.

ARIZONA CORPORATION COMMISSION; LEA MARQUEZ PETERSON, in her official capacity as a member of the Arizona Corporation Commission; SANDRA KENNEDY, in her official capacity as a member of the Arizona Corporation Commission; JUSTIN OLSON, in his official capacity as a member of the Arizona Corporation Commission; ANNA TOVAR, in her official capacity as a member of the Arizona Corporation Commission; JIM O'CONNOR, in his official capacity as a member of the Arizona Corporation Commission,

Defendants.

PREACHER JORDAN'S CAMP, an Arizona non-profit corporation; RANDOLPH UNITED COUNCIL; an Arizona non-profit corporation, SIERRA CLUB, a California non-profit corporation;

Intervenors.

No. CV2022-008624

PLAINTIFF SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT'S OPENING PRE-TRIAL MEMORANDUM

(Assigned to the Hon. Randall Warner)

(Trial scheduled for January 4-5, 2023)

INTRODUCTION

On September 13, 2021, Plaintiff Salt River Project Agricultural Improvement and Power District ("SRP"), acting through its Board of Directors, approved the construction of sixteen new gas-fired combustion turbines, the Coolidge Expansion Project ("CEP"). The Board's decision addresses a significant forecasted increase in electricity demand caused by Arizona's expanding commercial, residential, and industrial sectors, while SRP at the same time integrates an increasing amount of renewable—but intermittent—power sources like wind and solar. The specific combustion turbines approved by the Board are often referred to as "quick-start units" because they are designed and operated to quickly provide SRP the back-up that is needed when intermittent renewable power sources are unavailable. SRP determined that its existing Coolidge Generation Station was the most appropriate site to place this additional necessary generation. The site already included twelve other gas-powered units, for which the Arizona Corporation Commission ("ACC") granted siting approval in 2008; it featured additional land for expansion that was zoned appropriately; it was located in an area of the grid that could accommodate new power inflows without causing congestion on the transmission lines; it had access to water; and two separate gas pipelines passed nearby.

Accordingly, SRP filed a siting application with the ACC. As a general matter, the ACC does not regulate SRP, which is a political subdivision of the State of Arizona. Thus, the ACC has no authority over the rates SRP charges its customers or SRP's "resource planning"—that is, the portfolio of power sources on which SRP chooses to rely to meet customer demand. SRP is instead directly accountable to voters through its publicly elected Board, to which the legislature has delegated responsibility to set SRP's rates and make resource planning decisions. *See, e.g.*, A.R.S. §§ 48-2334(F), 48-2336(A)(5), (B). The ACC, however, does have a limited role under A.R.S. § 40-360 *et seq.* regarding the environmental compatibility of the siting of new transmission lines or certain power generation facilities. Under the statutory procedure, SRP's application is first considered by the Arizona Power Plant and Transmission Line Siting Committee ("Siting Committee"), which receives a

detailed application, holds an evidentiary hearing, assembles a record, makes findings based on the record concerning the specific factors in A.R.S. § 40-360.06, and either approves or denies a Certificate of Environmental Compatibility ("CEC"). If the Siting Committee issues the CEC, the ACC thereafter must affirm and approve the CEC, unless a party seeks review. If a party so requests, the ACC reviews the record developed by and decision of the Siting Committee and decides, based on the same statutory factors, whether to affirm that decision. A.R.S. § 40-360.07.

Here, after an eight-day hearing, the Siting Committee issued a CEC with conditions it deemed appropriate to mitigate any adverse environmental effects of the project. ACC staff participated in the hearing, and fully supported SRP's application for the CEC on the view that SRP had satisfied all the requirements of A.R.S. § 40-360.06.

Thereafter, six Randolph residents and the Sierra Club sought review by the ACC, which overturned the Siting Committee's decision. In so doing, the ACC strayed far beyond its statutory authority by imposing requirements on SRP that the statute nowhere requires or contemplates, and by usurping the resource planning authority that properly vests with the SRP Board of Directors. The ACC also made factual findings that were unsupported by the record; and its conclusions of law were dependent upon those erroneous findings. Specifically, the ACC found:

- The record was "not sufficient ... to determine the economics" of the CEP because SRP did not submit a study comparing the cost of gas-fired combustion turbines with alternatives or conduct an all-source request for proposals for the project.

  But (1) the ACC has no authority to assess the "economics" of the CEP, which is a resource planning decision for SRP's Board; (2) the statute does not require the specific studies the ACC named; and (3) in any event, the record contained significant testimony about the economics of the CEP that was more than sufficient for the ACC to reach a conclusion.

- The record was insufficient because SRP failed to provide a power flow and stability study, which is intended to identify any grid instability

from adding a new source of power in a particular location.

> But (1) the statute does not require such a study to be submitted, as the ACC evaluates power flow and stability studies as part of its Biennial Transmission Assessment, not in individual siting cases; (2) SRP did, in fact, provide the study to ACC staff and intervenors; and (3) staff testimony established that there would be no grid instability as a result of the CEP.

- The CEP would inequitably impact the nearby community of Randolph in light of historical injustice that community faced.

> But (1) the statute does not permit considerations of environmental justice; (2) the only environmental justice study in the record found no environmental justice concern; and (3) in any event, SRP's commitments to the surrounding community were substantial and greater than those adopted in similar cases.

- The environmental impacts of the CEP would be significant.

> But the undisputed record flatly contradicted that conclusion.

- The conditions on the CEC did not adequately compensate the citizens of Randolph for the effects of the CEP.

> But (1) the statute does not permit a compensation requirement as part of a CEC; (2) given the substantial commitments and the insignificant environmental impacts, the CEP would leave residents of Randolph better off, not worse.

- The environmental impacts of the CEP outweighed SRP's need for new sources of power.

> But that conclusion was premised on the legally flawed and erroneous factual findings just discussed.

In sum, the ACC exceeded its statutory authority and issued findings that were unsupported by the record evidence. Testimony at the scheduled trial before this Court will further underscore the ACC's errors. Reversal is required to correct those errors.

Reversal is also urgently needed. While the ACC's adverse decision has required SRP to take immediate steps to procure additional generation at significantly higher costs to meet near term needs, Maricopa County and SRP's service territory continue to see substantial

growth and thus SRP continues to need the CEP. Without this project in place, SRP customers face a real risk of electricity shortages in coming years—a result that would plainly be contrary to "the broad public interest." A.R.S. § 40-360.07(B).

I. SRP AND ITS CUSTOMERS NEED THE COOLIDGE EXPANSION PROJECT

A. Salt River Project Agricultural Improvement and Power District

SRP is an agricultural improvement district organized under A.R.S. § 48-2301, *et seq.*, and a political subdivision of the State of Arizona "vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions" under the state and federal constitutions and laws. Ariz. Const. Art. 13, § 7. SRP must acquire, install, and operate the necessary electric generation and transmission infrastructure to provide power to almost 3 million people in Central Arizona. SRP currently owns approximately 8,000 megawatts of generation of various types and has pledged to reduce its carbon emissions 65% by 2035. Tab C-44 at 55. SRP's publicly elected Board is responsible for making resource decisions and setting the rates that SRP customers pay. *See, e.g.*, A.R.S. §§ 48-2334, 48-2336(A)(5), (B).

B. SRP needs additional generation plants to maintain reliability.

The Phoenix metropolitan area, including that portion within SRP's service territory, is growing rapidly. Tr. 268:11-22[1]; Tab C-44 at 49. As a result, "load"—that is, demand for electricity—is growing as well, "driven by all of [SRP's] customer segments," including "residential, small commercial, and … large commercial or industrial." Tr. 92:20-23. Indeed, at present, SRP is "facing unprecedented load growth in [its] service territory." Tr. 57:24-25. All told, SRP projects 300-400 megawatts of growth per year, which represents a 30 percent increase in SRP's total load over the next decade. Tr. 270:13-24.

To meet this growing demand, SRP must build new generation facilities. Ensuring a reliable supply of electricity has "three main components." Tr. 59:14-15.

[1] Unless otherwise indicated, cites to the transcript refer to the hearing before the Siting Committee.

- *Peak demand*: Reliability requires sufficient total supply "to meet peak customer demand." Tr. 59:16-17. If peak demand is higher than what SRP can generate or procure from the market, SRP's system will face significant risk of shortages.

- *Complications from intermittency*: Reliability requires generation to be available when needed. Tr. 59:18-20. When "intermitten[t]" resources—such as wind and solar—are used, power cannot always be produced when residential, commercial, and industrial customers need it. For example, after the sun sets, solar panels no longer produce electricity, but electricity usage is high, as people return home and turn on their air conditioners. *See* Tab C-44 at 57. As Arizona's grid increasingly relies on solar power, the State will increasingly need sources of power—such as natural gas combustion turbines—that can respond quickly and flexibly to fill in for times that solar power is unavailable.

- *Contingency plans:* A reliable electricity grid must have a contingency plan for "unplanned outages and longer duration reliability events," Tr. 59:21-22—for example, several days of cloud cover that reduce solar output far below the norm for an extended period.

To ensure reliability while increasing its renewable energy portfolio, SRP has pursued an "and" approach to resource planning: to build "as much as [it] can of everything." Tr. 272:10-17. For example, SRP has installed or plans to install 2025 megawatts ("MW") of new utility-scale solar by 2025, 450 MW of battery storage by 2023, new flexible gas generation at Desert Basin and Agua Fria, and additional wind turbines. Tr. 272:18-273:1. It also has procured a larger share of the output of the Palo Verde nuclear station, and is seeking to increase efficiency at existing natural gas plants. *Id.* In total, SRP seeks to add 3000 MW of new capacity to its existing 8000 MW nameplate portfolio—a plan that SRP's witness described as a "transformational change." Tr. 272:10-273:23; Tr. 62:2–63:6. However, even with all of these planned capacity additions, SRP still projected that it would fall short of its needs by 700 MW in 2024 and 300 MW more in 2025, "for a total of 1000 [MW]." Tr. 275:1-4, 21-24.

C. The Board selects the Coolidge Expansion Project.

The near-term need for flexible, on-demand power sources led SRP, after thorough consideration of its options, to choose an expansion of its existing Coolidge Generating Station to meet the anticipated growth in demand. The CEP comprises 16 combustion turbine generators and associated interconnection facilities designed to produce a total of up to 820 MW of electrical output. Tab C-44, at 54. The combustion turbines can be dispatched singly or in groups as needed, and can respond to minute-by-minute fluctuations in demand and supply available from other generators on the system. Tab C-44, at 58-59. They can also continue generating for a prolonged period if needed, unlike a battery, which needs constant recharging to be able to provide any electricity to the grid. SRP determined that this type of "quick-start, fast-ramping, flexible generation provides the backbone [SRP] need[s] in order to continue to generate more renewables onto the grid." Tr. 100:8-11.

SRP considered other alternatives, using information it had gathered from recently issued requests for proposals (a process through which potential developers submit bids and project descriptions for new generation). Tr. 82:1-25. SRP also performed an analysis comparing gas generation with a zero-carbon portfolio consisting of solar paired with battery storage, from the perspective of economics, reliability, and environmental impact. And SRP retained the consulting firm E3 to independently assess the zero-carbon option. The result of that analysis indicated that the CEP not only was a "reliable portfolio for SRP customers, but it was also the most economic portfolio as well." Tr. 341:9-13. The conclusion remained the same when modeling lower gas prices or lower battery technology costs. *See* Tr. 337:9–338:13. In sum, SRP concluded that the CEP "is the only project that meets [SRP] reliability requirements with a high degree of certainty, supports our carbon reduction goals, meets the in[-]service dates that as are required, and provides the most affordable option for our customers." Tr. 64:6-10.

D. The Coolidge site is uniquely suitable for the needed capacity

The existing Coolidge Generating Station site is the most appropriate location for

the new combustion turbines. Indeed, that site is the only SRP-owned site that could accommodate a project like the CEP on the needed timeline for SRP's reliability requirements and at the right price for SRP's customers.[2] Tr. 112:01-04. SRP reached that conclusion based on a number of factors:

- ***Gas power plants already exist on the site***: Twelve simple-cycle natural gas turbines and associated interconnection and natural gas infrastructure are already located on the Coolidge site, having received the ACC's unanimous siting approval in 2008.[3] The existing infrastructure would reduce the cost of the new combustion turbines. Tr. 65:7-8.

- ***Other existing infrastructure already exists on the site***: The Coolidge site has "an existing water supply and existing railroad adjacent to the plant site," Tr. 65:10-11, and is located near two separate gas pipelines, providing redundancy in gas supply. Tr. 266:3-18.

- ***Land exists to accommodate the expansion***: SRP already "owns land immediately adjacent to the plant site that [can] accommodate this expansion," Tr. 65:6-15, and that land is "zoned as industrial," Tr. 241:15-16.

- ***No need for new transmission lines***: The site sits "in the Southeast Valley," which reduces the potential need "to build new transmission lines." Tr. 361:12-18, 361:1-3. *See also* Tab C-44 at 118. "[M]ost of SRP's customers are [ ] more in the East Valley or the east part of Phoenix," but much of SRP's existing generation is "located in the West Valley." Tr. 360:4-8. Building new generation in the West Valley would require transmission lines to the East Valley, Tr. 360:8-12, "would result in additional cost for SRP customers," and would

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[2] The COVID-19 pandemic dramatically complicated SRP's resource planning process. In the initial months of the pandemic, consistent with national forecasts, SRP's initial load forecasts were reduced to predict a flat load growth due to a nationwide slowdown in economic activity. In fact, after a brief flat period in the spring of 2020, the opposite then occurred: SRP's pace of load growth significantly increased as businesses and people relocated to Arizona. SRP had to move quickly and decisively to update its load forecast and build new generation to meet that load growth.

[3] In 2008, the ACC determined unanimously that the Coolidge Generation Station was environmentally compatible with the site and authorized its construction. ACC Decision No. 70636.

"potentially jeopardize the schedule for the project." Tr. 361:1-11. There would be a "risk that [SRP] wouldn't be able to have the capacity online" to meet the new demand "in 2024." *Id.* at 361:7-8.

On September 13, 2021, SRP's Board approved the CEP and authorized SRP to move forward with the Project.

II. SRP'S SITING APPLICATION

A. Statutory Background

The ACC has statutory jurisdiction over the siting of certain specified electric infrastructure, including natural gas-fired plants larger than 100 MW, as defined by statute. A.R.S. §§ 40-360 *et seq.* Specifically, in advance of constructing such a plant, an entity must obtain a CEC from the ACC, based on findings that the chosen site is environmentally compatible with the proposed project.

The relevant statutes set out in great detail the process governing an application for a CEC and the review of that application. Ninety days before a party applies for a CEC, it must file a "plan" with the ACC describing the proposed project and providing certain statutorily listed information, to the extent available. A.R.S. § 40-360.02(B). Subsequently, the party must file an application for a CEC with the ACC, the contents of which are specified by § 40-360.03 and the form of which is governed by ACC rule, Arizona Administrative Code R14-3-219.

Upon receiving the application, the ACC refers the matter to the Siting Committee. The Siting Committee holds a hearing on the application, A.R.S. § 40-360.04, and "approve[s] or den[ies]" the application after considering nine specific factors listed by statute "as a basis for its action," A.R.S. § 40-360.06(A). The nine listed factors all pertain to the project's impact on the surrounding environment at the site. A.R.S. § 40-360.06.

Review of the Siting Committee's decision by the ACC is available upon the request of a party. That review is conducted on the record assembled by the Siting Committee. In determining whether to "confirm, deny or modify" a CEC granted by the Siting Committee,

the ACC must "comply with the provisions of section 40-360.06" and "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). A separate provision makes clear that nothing in the siting statutes is intended to give the ACC the power to regulate or supervise "the rates, regulations or conditions of service" of entities like SRP that are not otherwise subject to the ACC's regulatory supervision, or otherwise extend ACC supervision to such entities except as specifically provided in the siting statutes. A.R.S. § 40-360.12.

B. SRP submits its application.

On September 14, 2021, SRP submitted a 90-day plan for the proposed project as required by § 40-360.02. Tab C-51. Next, on December 13, 2021, SRP filed an application under A.R.S. § 40-360.03 to build the 16 combustion turbines and associated interconnection facilities at the Coolidge site. Tab C-43; Tab A-3. That application provided information in the form required by Arizona Administrative Code R14-3-219 and it addressed each of the factors listed in § 40-360.06.

SRP's application detailed the CEP's environmental compatibility. SRP conducted a rigorous assessment of the CEP's environmental impacts, including "existing and planned land use inventory, an air qualify assessment, the water availability assessment, a biological resources survey, a visual resources analysis, a cultural and archeological survey, and a noise analysis." Tr. 523:24-524:3; *See also* Tab A-3, Introduction at 7. With respect to visual impacts, SRP determined that "[o]verall, the project would be similar in form, line, color, texture, and scale as compared with the other existing transmission line generating facility infrastructure." Tr. 549:7-10; See *also* Tab A-3, Exhibit E at E-3. In other words, it would not meaningfully change the appearance of the landscape. As for noise, SRP's assessment indicated that the "expected increase from the project is identified at about .5 to 2.6 decibels," which is "barely noticeable." Tr. 556:6-12; See *also* Tab A-3, Exhibit I at I-4. It also determined that the area would remain in compliance with the federal Clean Air Act's National

Ambient Air Quality standards after the CEP's completion. Tr. 568:3-12; See *also* Tab A-3, Exhibit B at B-2. At trial, SRP witnesses Bill McClellan and Devin Petry will testify regarding these studies and the mitigation measures SRP proposed to take.

Finally, although not required by federal or state law, SRP conducted an environmental justice analysis, which examined the project under three existing methodologies and yielded a favorable view of the Expansion Project. Tr. 581:9-587:17. At trial, witness Kenda Pollio will summarize this analysis. Further, in connection with its application, SRP also committed to investing in the nearby community of Randolph—investments that would amount to between $23,100 and $30,500 per household in a two-mile radius around the CEP. SRP witness Bill McClellan will elaborate on these commitments at trial.

C. The Siting Committee approves the application.

The ACC referred SRP's application to the Siting Committee pursuant to A.R.S. § 40-360.03. The Siting Committee held an eight-day evidentiary hearing to evaluate the environmental compatibility of the site based on the factors set forth in A.R.S. § 40-360.06. The hearing involved 23 witnesses, 85 exhibits, and more than 1,500 pages of transcripts. At the conclusion of the hearing on February 16, 2022, the Siting Committee voted 7 to 2 to grant the CEC "after considering the: (i) [a]pplication, (ii) evidence, testimony and exhibits presented by Applicant and intervenors, and (iii) comments of the public, and being advised of the legal requirements of A.R.S. §§ 40-360 through 40-360.13...." Second Am. Compl. Ex. 1 at 2 ("Siting Committee Decision"). The Siting Committee concluded that the CEP "aids the state and the southwest region of the United States in meeting the need for and adequate, economical, and reliable supply of electric power." *Id.* at 12. The Siting Committee also found that the "Project and the conditions placed on the Project in this Certificate effectively minimize the impact of the Project on the environment and ecology of the state." *Id.* Thus, the Siting Committee concluded that the CEP is "in the public interest because the Project's contribution to meeting the need for an adequate, economical and reliable supply of electric

power outweighs the minimized impact of the Project on the environment and ecology of the state." *Id.* at 13.

D. The ACC's Review and Decision

After the Siting Committee issued the CEC, the Sierra Club and six residents of Randolph asked the ACC to review the CEC pursuant to A.R.S. § 40-360.07(B). On April 28, 2022, the ACC overturned the CEC by a vote of 4-1. The decision depended upon a series of findings of fact and conclusions of law. The ACC found:

> • ***Insufficient record to assess the "economics" of the proposal***: "the record is not sufficient for the Commission to determine the economics of the CEP and whether there are alternatives available that would provide the same capacity, responsiveness, and reliability for SRP's customers but would be less costly and would potentially have less adverse impacts on the local residents or the environment and ecology of the state." Second Am. Compl. Ex. 2 at 11 ("ACC Decision"). The ACC pointed to the absence of three pieces of evidence—"an [All-Source RFP], the E3 Study, and the Power Flow and Stability Study." *Id.* at 10.
>
> • ***Environmental impacts***: the "record shows that the proposed CEP will negatively affect the total environment of the area and state and have significant negative impacts on residents of Randolph from noise levels during construction and operation of the Project, increased lighting, emissions of greenhouse gases, worsened air quality, degraded views, and lower property values." *Id.* at 11.
>
> • ***Environmental justice***: the "record indicates that the residents of Randolph, a historically Black community, have not been treated equitably with other more affluent white communities located in proximity to similar projects." *Id.*
>
> • ***Inadequate compensation***: "The conditions contained in the CEC as issued do not adequately compensate citizens of Randolph for the damages they would incur…" *Id.*

The ACC's final conclusion of law reiterated these bases for its decision: "The *incomplete record* as identified above and the *negative impacts* of the Project compel balancing the competing public interest in favor of protecting the people, environment and

ecology of the State of Arizona by denying Applicant a CEC." *Id.* (emphases added).

SRP sought rehearing. The ACC denied rehearing by a vote of 3-2.[4]

III. THE ACC'S DECISION WAS UNLAWFUL AND UNREASONABLE IN LIGHT OF THE RECORD EVIDENCE.

A. Standard of Review

A.R.S. § 40-254 requires SRP to demonstrate by clear and satisfactory evidence that the ACC's decision was "unreasonable or unlawful." As shown below, the ACC's decision was both.

This Court reviews the ACC's legal conclusions *de novo*. It "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 Tr. v. Ariz. Corp. Comm'n*, 210 Ariz. 30, 33–34 ¶ 11 (App. 2005).

As to the ACC's "factual determinations," this Court reviews for "substantial evidence." *Id.* A determination is supported by substantial evidence only when the relevant evidence would permit "a reasonable person to reach the Commission's result." *Sierra Club-Grand Canyon Chapter v. Ariz. Corp. Comm'n*, 237 Ariz. 568, 575 ¶ 22 (App. 2015) (citing *In re Estate of Pouser*, 193 Ariz. 574, 579 ¶ 13 (1999)). The relevant evidence for this Court's review includes not only the administrative record, but also additional evidence the challenger introduces before this Court that was not "presented to the Commission." *Grand Canyon Tr.*, 210 Ariz. at ¶ 12. Considering all the relevant evidence, the question is whether a reasonable person could agree with the ACC's factual determinations. When the ACC's findings are not reasonably supported, the finding must be reversed.

If the ACC's decision rests on an erroneous view of the law or if any of the factual

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[4] On June 6, 2022, shortly before the vote on rehearing, a third party filed a letter signed by four SRP board members opposing the CEP. This letter was directly contrary to the SRP Board vote in favor of the CEP and was submitted without the knowledge of the SRP Board. This letter was misleading in several respects. On information and belief, intervenor Sierra Club was involved in drafting and obtaining SRP Board members' signatures and perhaps its filing. SRP intends to explore these issues further in discovery and may address this letter in more detail at trial.

determinations underpinning its conclusions of law are not supported by substantial evidence, the Court should reverse. If, under the correct interpretation of the law, the evidence requires granting the CEC, the Court should direct the ACC to do so. But at minimum, if any of the ACC's findings are unlawful or unsupported, then the Court must at least vacate and remand so that the ACC can determine whether its conclusion of law was infected by the erroneous factual finding.

B. The ACC's findings regarding the "economics of the CEP" were unlawful and unreasonable.

The ACC found that the absence of an All-Source RFP and E3 alternatives study rendered the record "not sufficient" for the ACC to determine the "economics" of the project: specifically, whether "there are alternatives available" that "would be less costly and would potentially have less adverse impacts[.]" ACC Decision at 11.

That conclusion was unlawful and unreasonable for three reasons. First, the ACC has no authority to consider the "economics" of SRP's resource planning decisions. Those decisions are entrusted to SRP's elected Board. Second, the statute in any event does not require the specific information that the ACC found lacking. And third, the record did in fact contain sufficient information for the ACC to make a finding regarding the "economics" of the project and alternatives. The significant testimony on these subjects provided the ACC with all the information it needed on this subject.

1. The ACC erred as a matter of law by asserting authority to second-guess the SRP Board's decision regarding cost and resource planning.

The ACC's finding that the record was insufficient to assess the "economics" of the CEP was premised on an error of law. In reviewing an application, the Siting Committee and the ACC are directed to review the environmental compatibility of a chosen site for the project under review. The statutes do not authorize either body to explore the resource planning process that led to the selection of a particular project or site—especially by a political

subdivision like SRP that is not otherwise subject to ACC regulation.

The Siting Committee—the statutorily assigned body charged with developing the evidentiary basis for assessing a CEC application—has a narrow scope of review. Once an application is received, it is referred to the Siting Committee. A.R.S. § 40-360.03. The Siting Committee is required to hold a hearing—and thus develop a record—on the application. A.R.S. § 40-360.04. In considering whether to "approve or deny an application," the Siting Committee is limited to nine listed "factors as a basis for its action with respect to the suitability of either plant …siting plans." A.R.S. § 40-360.06(A). The factors provide for a meaningful and thorough review of the effects of the proposed project on the site and its surrounding area. They include things such as: "[e]xisting plans…for other developments at or in the vicinity of the proposed site"; "[n]oise emission levels and interference with communication signals"; "[e]xisting scenic areas, historic sites[,] and structures or archaeological sites at or in the vicinity of the proposed site." *Id.* None of these factors—or the evidentiary record the Siting Committee will have developed to assess them—relates to the "economics" of the project or the alternative projects considered.[5]

The ACC's review of the Siting Committee's decision is similarly narrow in scope. The ACC reviews the Siting Committee's decision "on the basis of the record" assembled by the Siting Committee. A.R.S. § 40-360.07(B). And in reaching a decision on that record, the ACC "shall comply with the provisions of § 40-360.06," namely the requirement to consider the nine specified factors described above. *Id.*

To be sure, the ACC's review requires it to consider the broader, statewide need for reliable power. *See* A.R.S. § 40-360.07(B) (the ACC must "balance, in the broad public interest, the need for an adequate, economical and reliable supply of electric power with the

[5] A.R.S. § 40-360.06(A)(8) is not to the contrary. That provision requires the Siting Committee to consider the additional project costs imposed by the Committee's own recommendations, "recognizing that any significant increase in costs represents a potential increase in the cost of electric energy to the customers or the applicant." The provision does not require or allow consideration of the economics of the project outside of those Committee-imposed costs.

desire to minimize the effect thereof on the environment and ecology of this state."). The ACC's mandate, however, does not give it unbridled authority to review the economics of a particular project relative to alternatives, or to deny approval to any new gas plant simply because commissioners might prefer renewables. The ACC cannot use its siting review authority to transform itself into a super-SRP-Board. Instead, the ACC must take the Siting Committee's record evidence of environmental impact and balance it against a legislatively determined need for new generation and reliable power. *See* Ch. 2, Art. 6.2, Power Plant and Transmission Line Siting Committee, Declaration of Policy (1971) ("The legislature hereby finds and declares that there is at present and will continue to be a growing need for electric service which will require the construction of major new facilities....").

The ACC's unlawful overreach in purporting to review the "economics" of SRP's project is especially clear given SRP's status as a political subdivision that is not subject to the ACC's plenary regulation. Resource planning decisions—including whether certain costs should be incurred in light of their effect on rates, and how one alternative compares to another—fall solely within the authority of SRP's elected Board. SRP is a political subdivision and a municipal corporation, Ariz. Const. Art. 13, § 7 and A.R.S. § 48-2302, and the ACC has no authority over public utilities "owned and operated by municipal corporations of any character." *See Menderson v. City of Phoenix*, 51 Ariz. 280, 283 (1938).

Allowing the ACC to use its narrow statutorily defined siting authority to second-guess SRP's economic and resource planning decisions would substantially undermine SRP's independence and its accountability to its own constituents. After all, when load is growing, an electric provider such as SRP must build new generation to meet that load. But if the ACC were allowed to use every siting decision to review SRP's resource-planning considerations and dictate the types of plants that should be built—based on the ACC's own view of what will be least costly or most environmentally-friendly for customers—the ACC would be exerting the kind of plenary regulatory control over SRP that neither the Constitution nor statute authorizes.

Indeed, there is reason to believe that is exactly what happened here. During the ACC's deliberations, Commissioner Kennedy made clear that her opposition to the CEP was based on an opposition to any new fossil-fuel generation. *See, e.g.*, Open Meeting (April 12, 2022) Tr. 65:22-66:5 ("One thing is clear, an investment of $1 billion – and that's a B – one billion with a B, on a fossil fuel infrastructure in 2022, when that money could instead be used to accelerate clean energy technology is a tragic displacement of funds."). In dissenting from the ACC's decision, Commissioner Olson noted: "Those following the case from the beginning know the opposition to this application is really an attempt to stop any expansion of natural gas energy generation. The central arguments from the interveners in this case—echoed in public comments—made this abundantly clear. Opposition to this application has been fueled by an ideology set on eliminating natural gas generation, regardless of its impact to ratepayers and the grid's reliability." ACC Decision, Olson dissenting.

A.R.S. § 40-360.12 specifically anticipates and forecloses the ACC's potential abuse of the siting authority. That provision states: "Except as specifically provided for in this article nothing in this article shall confer upon the commission the power or jurisdiction to regulate or supervise any person, that is not otherwise a public service corporation regulated and supervised by the commission" and "[n]othing contained in this article shall confer upon the commission the power or jurisdiction to regulate or establish the rates, regulations or conditions of service of any such person." A.R.S. § 40-360.12. Reading the siting statutes to allow the ACC to second-guess SRP's decisions regarding the "economics" of its resource planning choices would run afoul of this constraint.

Reaching that same conclusion, ACC staff observed in the hearing before the Siting Committee that it "does not believe the ... Siting statutes allow the Committee or Commission to make resource planning decisions on behalf of SRP. Rather, . . . the statute requires the Committee and Commission to base its decision on the factors enumerated in ARS Section 40-360.06." Open Meeting (March 16, 2022) Tr. 204:24-205:22.

This Court should hold the same. The ACC's interpretation not only is inconsistent

with the statutory scheme, but also runs afoul of the State Constitution. As noted, SRP is a political subdivision and a municipal corporation outside of the ACC's jurisdiction. The Arizona Supreme Court, in *Menderson*, made clear that the Legislature may not "enlarge the jurisdiction granted by the Constitution to the Corporation Commission to include subject matter obviously intended to be excluded from such jurisdiction." 51 Ariz. at 285. If properly limited, siting decisions are matters over which the ACC "has already been given jurisdiction" and thus raise no constitutional concerns. *Id.* But plenary authority over SRP's resource planning is not, and cannot be, within the ACC's jurisdiction—that power is "exempt" from the ACC's purview "by other provisions of the Constitution." *Id.*

Interpreting the siting statutes to allow the ACC to review and second-guess SRP's resource planning decisions would do precisely what the Constitution forbids: it would delegate authority to the ACC to regulate SRP. At the very least, a broad interpretation of the ACC's authority under the siting statutes would raise constitutional difficulties. Any ambiguity in the statute must be narrowly construed to avoid constitutional concerns. *See State v. Gomez*, 212 Ariz. 55, 60 ¶ 28 (2006) ("We also construe statutes, when possible, to avoid constitutional difficulties.").

2. The ACC had no authority to require SRP to submit the specific resource planning documents the ACC found were necessary for a sufficient record.

Based on the foregoing, it is unsurprising that the statutory framework does not require CEC applicants like SRP to submit documents like an All-Source RFP or E3 alternatives study. These studies pertain to resource planning, *i.e.*, the choice among alternative technologies, not the environmental compatibility of a proposed project at a proposed site.

A.R.S. § 40-360.03 sets forth the CEC application requirements and provides that the application "shall be accompanied by information with respect to the proposed type of facilities and description of the site, including the areas of jurisdiction affected and the

estimated cost of the proposed facilities and site." *Id.* The provision does not direct applicants to submit information regarding the process by which the applicant selected the proposed project or alternative projects it considered.[6]

Nor does the statute give the ACC the discretion to create new requirements mandating that applicants submit resource planning materials for its consideration. The "powers as the Commission may exercise do not exceed those to be derived from a strict construction of the constitution and implementing statutes." *Rural/Metro Corp. v. Ariz. Corp. Comm'n*, 129 Ariz. 116, 117 (1981). And by listing the type of information required, the legislature of necessity *excluded* any requirement for the applicant to supply other information. *City of Surprise v. Arizona Corp. Comm'n*, 246 Ariz. 206, 211 (2019) ("*Expressio unius est exclusio alterius*—the expression of one item implies the exclusion of others—is appropriate when one term is reasonably understood as an expression of all terms included in the statutory grant or prohibition.").[7]

The ACC erred as a matter of law in finding that SRP's application was insufficient or incomplete without these documents. And its factual finding that the record was incomplete without these documents was therefore wholly unreasonable.

3. The ACC's finding that it lacked sufficient information to evaluate the economics of the CEP was unreasonable.

Even if the ACC's review could properly encompass resource planning questions, the ACC erred by concluding that the "record [was] not sufficient" to answer those questions.

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[6] Separately, A.R.S. § 40-360.02 enumerates the information that, if available, must be provided to the ACC as a prerequisite for applying for a CEC. That information is not part of the CEC application, and the ACC evaluates it in the Biennial Transmission Assessment process, not in individual CEC proceedings. *See* A.R.S. § 40-360.02(G). But even if considered part of the CEC process, § 40-360.02 does not require information about resource planning. It lists things like the location of the plant, § 40-360.02(C)(1), and the estimated date the plant will be in operation, § 40-360.02(C)(3).

[7] While the statute also provides that the "application shall be in a form prescribed by the commission," that statement gives the ACC authority as to the form—not the substance—of the application. A.R.S. § 40-360.03. But even if the ACC were authorized to request resource planning information (it is not), the ACC's form does not do so. *See* Ariz. Admin. Code R14-3-219.

ACC Decision at 11. To the contrary, SRP presented substantial testimony about the alternatives to the CEP, their costs, and their contribution to reliability. Its witnesses were subject to extensive cross-examination on these matters. This testimony was more than sufficient to allow the ACC to assess "the economics" of the CEP and whether granting a CEC was in the public interest in light of "alternatives available." *Id.* The ACC's contrary conclusion was not supported by substantial evidence and thus was unreasonable.

SRP witnesses presented comprehensive testimony as to why the CEP was not only environmentally compatible with the Coolidge site, but also the best choice among potential alternatives. That testimony can be summarized in six parts:

- ***Urgency due to load growth:*** SRP is "facing unprecedented load growth in [its] service territory." Tr. 57:24-25. SRP is seeing three to four hundred megawatts of load growth per year, which represents a 30 percent increase in SRP's total load over the next decade. Tr. 270:15-24. While SRP has plans to develop a broad portfolio of new generation, including solar, wind, and storage, it has an urgent need for 1000 MW of new generation by 2025. Tr. 274:20-275:24. The CEP is a critical resource to help meet that need on the required timeframe.

- ***The need for a reliability backbone:*** SRP has deployed substantial quantities of renewable resource generation and plans to build more. *See* Tr. 62:2–63:4; Tr. 272:18-273:23. Increasing reliance on intermittent forms of generation, however, creates risks to electric reliability without a backup to provide power whenever needed. The CEP serves that role, as a flexible generation resource that could be dispatched as needed to provide a "reliability backbone" for the system and facilitate the further integration of renewables. *See* Tr. 100:8-11.

- ***Consideration of information from developers:*** SRP has "RFPs that are issued, lately on an on[-]going basis." Tr. 82:2-3. SRP thus asked respondents of a recent RFP "if they could extend their bids to allow [SRP] more time so that [SRP] could potentially use those same bids that had already come in on the previous RFP to utilize for this project." Tr. 82:7-11; *See also* Tr. 392:11-24, 416:11–417:2 (describing info from previous requests relevant to Coolidge). Further, SRP sent out a "request for information" for "wind resources that might be available." Tr. 82:13-15. Through that process, SRP acquired "information from wind developers" regarding "timing, costs, etc." Tr. 82:17-19.

- ***Consideration of solar paired with battery storage:*** SRP specifically considered solar paired with battery storage as a potential alternative to the CEP, both from a reliability perspective and an economic perspective, using in-house analysis and an external analysis from the consulting firm E3. That "full body of work ... indicated that not only was the [CEP] the reliable portfolio for SRP customers, but it was also the most economic portfolio as well." Tr. 341:9-13. Specifically, SRP found that the CEP could meet demand at a cost that was between $637 million and $305 million lower than an alternative portfolio on a net present value basis. Tr. 337:3-341:8. SRP's witnesses were subject to cross-examination with respect to the E3 analysis and related questions. *See, e.g.*, Tr. 367:13–385:10, 417:6–428:25.

- ***Consistency with carbon goals:*** All things considered, the CEP would not "impede [SRP's] ability to meet [its] carbon goals." Tr. 295:1. Rather, the CEP will "enable [SRP] to do that by providing a reliability backbone for [SRP's] system as [SRP] transition[s] to more carbon-free resources." Tr. 295:2-4; *see also* Tr. 295:5-299:17.

- ***The benefits of the Coolidge site:*** witnesses explained that the Coolidge site was "unique" due to its existing infrastructure, its land-use profile, and its location on the East Side of the Valley. *See supra* 6-7.

Taken together, this evidence was more than sufficient for the ACC to be able to assess the "economics" of the project. Yet the ACC did not even acknowledge this substantial record evidence. Instead, it simply stated that the record was insufficient because SRP did not submit an All-Source RFP and or the E3 analysis. That was unlawful and unreasonable. As explained above, the statute does not require an applicant to include an All-Source RFP or an analysis like the E3 analysis as part of its CEC application. And to the extent resource-planning information is even relevant, SRP provided that information through its witnesses, who testified on the substance of SRP's earlier All-Source RFP, the E3 analysis specifically, and the economics and available alternatives more generally. Parties including ACC Staff had full opportunity to cross-examine those witnesses. The only reasonable conclusion is that, even if the ACC had authority to consider SRP's resource planning, SRP provided the ACC with more than sufficient information to reach a decision.

C. The ACC's findings regarding the power flow study were unlawful and unreasonable.

The ACC also found the record was not sufficient for it to complete its review because a "power flow and stability analysis" report ("power flow study") was not "provided to the Commission, reviewed by Staff, or available to any other party." ACC Decision at 7, 9-10. The point of such a study is to ensure that new power flows into the grid do not create stability problems, for example by overloading transmission lines.

The ACC acted unlawfully in basing its denial on the absence of such a study. First, the relevant statute does not require a power flow study for approval. A.R.S. § 40-360.02 states that parties seeking to build a new power plant shall submit a plan containing certain information ninety days before they begin the CEC process. Number seven on that list is a "power flow and stability analysis report." A.R.S. § 40-360.02(C)(7). But the provision states that the listed information must be included only "*to the extent such information is available*." A.R.S. § 40-360.02(C) (emphasis added). Thus, on the face of the statute, the absence of a power flow study—like any other piece of listed information—does not prevent an applicant from going forward and seeking a CEC; and its absence therefore cannot be a proper basis for denying an application.

Section 40-360.02 and its legislative history also confirm that the purpose of the listed information is separate from the subsequent CEC process. Rather than inform the ACC's decision on a CEC, the information factors into the ACC's Biennial Transmission Assessment. *See* A.R.S § 40-360.02(G); Senate Appropriations Committee Minutes (Mar. 13, 2001) (Statement of Dean Miller, Commission Legislative Liaison). Indeed, in the hearing, ACC Staff testified that the ACC had previously approved a project lacking a power flow study, Tr. 1364:7-11, and the Siting Committee Chairman indicated it was his "understanding that [the Committee] and the Commission can act without receipt of that information." Tr. 1366:11-12. The ACC thus erred as a matter of law in denying the CEC on the basis that SRP did not submit one.

Putting aside the fact that the statute does not require a power flow study for

approval, the ACC had access to the relevant study here through multiple channels, as Mr. McClellan will testify at trial. SRP addressed the power flow study in its pre-application filing, noting that the study was confidential because it contained highly sensitive information regarding critical energy infrastructure. But SRP offered to make the study "available upon request under a separate cover once a protective agreement is executed." Tr. 1309:2-4; *see also* Tab C-51. Neither the ACC Staff nor the Commissioners ever made such a request. Tr. 1309:12-13. Further, the ACC had access to the study through another avenue: ACC Staff testified that the power flow and stability study was available to the Staff as part of the Biennial Transmission Assessment Docket, E-99999A-21-0009, conducted under A.R.S. § 40-360.02(G). Tr. 1338:4–1339:5. The ACC evaluates plans submitted pursuant to A.R.S. § 40-360.02 in the BTA docket, not in individual CEC application proceedings.

If that were not enough, ACC Staff in fact "review[ed]" the study in that docket and confirmed before the Siting Committee in this proceeding that they had identified no "red flags" with respect to reliability. Tr. 1339:3-5. The ACC's finding that SRP's application was insufficient on the ground that SRP had not submitted the power flow study was not only unlawful, it was contrary to the record and thus unreasonable.

D. The ACC's consideration of the alleged environmental justice impacts of the CEP was unlawful and unreasonable.

The ACC also denied the CEC based on environmental justice concerns. That finding was unlawful, as environmental justice is not a factor to be considered under the statute, and in any event was unreasonable in light of the record evidence.

1. "Environmental justice" is not a factor in siting decisions.

The ACC improperly imported considerations of environmental justice into the scope of its review and then reached a conclusion on that subject contrary to the record evidence. The ACC found, in Finding of Fact 7, that the residents of Randolph, a community largely comprised of people of color, had not been "treated equitably with other more affluent white communities located in the proximity of similar projects." ACC Decision at 11. That

finding, in essence, concludes that the CEP was inconsistent with principles of environmental justice.[8] That finding was both unlawful and unreasonable.

First, the ACC erred as a matter of law in considering environmental justice. SRP does not question the importance of environmental justice, but whether these principles should play a role in siting determinations is a question for the Arizona Legislature. As explained *supra*, the ACC does not possess constitutional authority over SRP and may not be delegated general regulatory authority. *See Menderson*, 51 Ariz. at 283. Any such "powers as the Commission may exercise do not exceed those to be derived from a strict construction of the constitution and implementing statutes." *Rural/Metro Corp.*, 129 Ariz. at 117.

Here, the Legislature has not given the ACC authority to consider environmental justice in assessing environmental compatibility. Section 40-360.06 expressly lists the factors the Committee may consider in reviewing the environmental compatibility of a project, and A.R.S. § 40-360.07 confines the ACC to those very same factors in balancing the environmental impact of the project against the State's need for reliable power. Environmental justice is not mentioned. Nor can such considerations be read into any of the factors that are listed—none mention fairness, equity, or any similar word. That is especially true under a "strict construction" of the powers conferred by the statute. *Rural/Metro Corp.*, 129 Ariz. at 117, 629 P.2d at 84. As such, the ACC's consideration of environmental justice as a basis for denying the CEC was an unlawful unilateral amendment of the statute. In fact, legislative efforts to require the ACC to consider environmental justice have failed. *See, e.g.*, HB 2681, 55th Leg., 2d Reg. Sess. (Ariz. 2022) (introduced by Sen. Hernandez, never heard); SB 1563, 55th Leg., 1st Reg. Sess. (Ariz. 2021) (same). The ACC cannot override the legislature's judgment in this regard.

Second, even if consideration of environmental justice were proper, the record

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[8] The United States Environmental Protection Agency (EPA) defines environmental justice as the "fair treatment" of "all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." *See Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice (last updated Sept. 30, 2022).

evidence yields only one reasonable conclusion: the CEP is consistent with environmental justice considerations. Specifically, as SRP witness Kenda Pollio testified at hearing and will explain at trial, SRP employed three separate analyses, *all* of which indicated that the CEP did not raise environmental justice concerns. Tr. 581:9-587:17. Furthermore, SRP committed to make *significant* investments in the Randolph community. The cost of these commitments totaled approximately $10.4 to $13.7 million—or $23,100 to $30,500 per household in a two-mile radius around the CEP. Those mitigation measures dwarf the measures adopted for the Santan expansion in Gilbert, another project recently sited by SRP in a predominantly white neighborhood. The per household mitigation cost in that case was approximately $1,250. No reasonable person could conclude from that evidence that the Randolph community would be treated "inequitably" in this matter.

2. The record contradicts the ACC's findings about other impacts on the environment.

The ACC also found that the CEP will "have significant negative impacts on residents in Randolph" for a variety of alleged reasons, including noise levels, emissions of greenhouse gases, worsened air quality, degraded views, and lower property values. ACC Decision at 11. The record contradicts every part of that finding, and it was therefore unreasonable.

As Mr. Petry testified at hearing and will further testify at trial, the CEP is not expected to have a "significant negative impact[]" as a result of noise. To the contrary, record and testimonial evidence—based on site specific noise studies and receptors placed in the field—demonstrates that the noise increase from the CEP will be "barely noticeable." *See* Tab A-3, Exhibit I at I-4; *see also* Tr. 555:5-556:12. The estimated increase in noise ranges from 0.5 to 2.6 dBA, the top end of which is at the threshold of human perception. Tr. 555:5-10. That estimated increase, moreover, is at the *nearest* residence, located 1,000 feet from the CEP. *See* Tab A-3, Exhibit I-1 at I-4; Tr. 256:19-23. Residents of Randolph are located more than twice as far away—approximately 2,800 feet or more—and thus the noise levels will be

lower still. Tr. 259:10-18. No other party to the hearing before the Siting Committee offered any controverting noise study.

The ACC's assertions regarding the CEP's purported effect on greenhouse gas emissions is similarly without record support. No testimony traced any particularized effect of greenhouse gas emissions from the CEP on the residents of Randolph. If there were, however, the effect would be positive, not negative. SRP explained that the CEP—which will be used as a flexible generating resource—will allow SRP to *reduce* system-wide greenhouse gas emissions overall, by facilitating the integration of more renewable, intermittent resources that require the kind of flexible back-up that the CEP will provide. Tr. 265:7-11, 342:7-343:4.

The CEP similarly will have no "significant negative impact[ ]" on air quality. As Mr. McClellan will explain at trial, SRP retained an outside consultant to "conduct an air quality assessment" which included "the project itself, the concentrations from the existing Coolidge Generating Station, background concentrations, plus the concentrations from nearby sources." Tr. 566:20, 568:5-8. That assessment "was conducted in accordance with EPA model[ing] guidelines and the Arizona Department of Environmental Quality [air] dispersion [modeling] guidelines." Tr. 567:2-4. The results of the study showed that the CEP would not "impact Pinal County's ability to attain the PM10 standard" nor would the CEP "cause or contribute to a violation of a National Ambient Air Quality Standard for any of the criteria pollutants mentioned, which ... are protective of public health and welfare." Tr. 574:8-12.[9]

The conclusion is the same with respect to visual effects of the CEP. SRP provided expert visual resource analysis—the only expert evidence on record—finding that, "[o]verall, the project would be similar in form, line, color, texture, and scale as compared with the other existing transmission line generating facility infrastructure." Tr. 549:7-10; *see also* Tab A-3, Exhibit E at E-4. To be sure, the study identified one residence in Randolph that would be

[9] As noted above, the CEC included a condition requiring SRP to pave the roads around the CEP and in the Randolph community. The dust from unpaved roads currently contributes to significant particulate matter emissions. Tr. 572:18-23; SRP Exhibit 2, Slide 230. Paving the roads would offset some or all of the particulate matter emissions from the CEP. Tr. 767:15-768:18.

moderately impacted. Tr. 545:10-546:11, Tr. 549:21-25. But a limited visual impact on one residence is a far cry from the "significant negative impacts" that the ACC found.

Finally, the record contains no evidence, let alone substantial evidence, supporting the ACC's finding that the CEP will lower property values. The record contains no evidence attempting to quantify or measure diminution in property value that might follow from the CEP. Randolph Intervenors' expert, Mark Stapp, did not purport to supply that sort of evidence. As he acknowledged, he "didn't do a very extensive analysis." Tr. 1068:25–1069:1. He simply did a "high-level comparative analysis" of sales in the "historic core of Coolidge" to "sales of homes in Randolph." Tr. 1069:3-9. On Mr. Stapp's theory, at least some of the difference in price could be attributable to the currently existing Coolidge Generating Station and the adjacent industrial facilities to the Randolph community. But that analysis falls short the substantial evidence that is necessary to support the ACC's conclusion in multiple respects. Mr. Stapp's analysis did not even attempt to control for other meaningful differences between the two areas—as he acknowledged, the difference in price might be attributable to "proximity to schools" or other relevant features of the neighborhoods. Tr. 1069:23. Further, even if the current price differentials could be attributed to the existing Coolidge Generating Station, it does not follow that that expansion of the existing site would have a similar effect. Indeed, the study on which Mr. Stapp relied—which measures the effects of power plants on home prices more generally—excludes expansion projects. *See* Tr. 1074:9-1076:17.

On this record, no reasonable factfinder could reach the ACC's conclusion.

3. Denying the CEC on the ground that Randolph residents were not adequately "compensated" was both unlawful and unreasonable.

Finally, the ACC acted unlawfully and unreasonably when it denied the CEC on the ground that the CEC conditions "do not adequately compensate the citizens of Randolph for the damages they would incur as a result of approving the Project." ACC Decision at 11.

The ACC's finding—that CEC conditions must adequately compensate nearby residents—represents a dramatic, unprecedented, and illogical departure from the statutory

scheme. Under the Line Siting Statute, the Siting Committee "may impose reasonable conditions on the issuance of a certificate of environmental compatibility." A.R.S. § 40-360.06. Reasonable conditions, in the context of assessing environmental compatibility, are those designed to render the project more environmentally compatible with the site—i.e., conditions like requiring an applicant to pave roads that will be used in connection with the project or landscape the site to minimize visual impacts. And, historically, those are the type of conditions the Siting Committee and the ACC have imposed. The ACC has never before required that an applicant compensate nearby residents. And for good reason: § 40-360.06 makes no reference to compensating nearby residents for the environmental effects of a project. As such, the statute provides no basis for the ACC's extraordinary finding. While just compensation is required when the government *takes* land from a landowner, *Laidlaw Waste Sys., Inc. v. City of Phoenix*, 168 Ariz. 563, 565 (Ct. App. 1991), this case does not involve a taking. SRP is proposing to build a power plant on its *own land*; and as the record demonstrates, any environmental impacts are so minimal that they fall far short of a regulatory taking. *See, e.g., id.* at 567. Moreover, as a practical matter, requiring compensation before any new power plant or transmission line may be built would effectively halt all new projects, thus frustrating efforts to meet the State's growing demand for power. Allowing the ACC to impose a compensation requirement would undermine the "broad public interest" and prioritize local interests instead—exactly the opposite of the ACC's mandate. A.R.S. § 40-360.07(B). The ACC acted unlawfully in finding that the CEC's conditions did not "adequately compensate" the residents of Randolph.

Even if the law did permit the ACC to require compensation (which it does not), the ACC's factual conclusion that compensation was inadequate is unsupported by the record. This is particularly true in light of the lack of environmental impacts on the Randolph community and the substantial SRP commitments to Randolph that will materially help the community and its residents. These substantial commitments include:

- Road paving in the Randolph community and around the plant ($4.1 to $6.6

million).

- Landscaping and beautification projects in Randolph community and around the plant ($1.1 to $1.5 million).
- Landscaping and maintenance ($800,000 to $1.2 million over 20 years).
- Job and skills training for Randolph residents (up to $2 million).
- Scholarship fund for Randolph residents (up to $2 million).
- Support for Randolph to pursue historical designation ($270,000).
- Grant writing support for the Randolph community ($100,000).

The Siting Committee, after extensive public comment and testimony from Randolph intervenors, adopted these commitments as part of the CEC, plus additional conditions the Randolph community requested, including noise restrictions and public safety plans to support the CEP. Line Siting Committee Decision at 5-6. Given the minimal environmental impacts of the project, no reasonable factfinder could conclude that the foregoing conditions of the CEC were inadequate to mitigate the environmental effects. The ACC's contrary conclusion was unreasonable.

E. In Light of these Legal and Factual Errors, the ACC's Ultimate Conclusion of Law Cannot Be Sustained.

The ACC concluded that, due to the "incomplete record" and "the negative impacts of the Project" it was "compel[led] [to] balanc[e] the competing public interests in favor of protecting the people, environment and ecology of the State of Arizona by denying Applicant a CEC." ACC Decision at 11. Because this ultimate finding was infected by the numerous legal and factual errors described above, it, too, was erroneous and must be set aside. When none of the inputs into a balancing inquiry is proper, the result cannot be sustained. Moreover, even if only some of the inputs were erroneous, the Court could not affirm the ACC, because it is impossible to know what relative weight the ACC gave to its various findings, and whether it would have reached the same ultimate conclusion had it not considered unlawful factors or had any of its factual findings been different.

Finally, the "balance" ultimately struck by the ACC altogether neglected SRP's

serious and urgent need for new generation in light of increasing load, which no party disputed. All projects have some environmental impact, but new projects are nonetheless necessary to keep the lights on. The ACC's mandate to balance the "broad public interest" with the project's environmental impact requires it to take the broader view when faced with local opposition to siting a new plant at a specific location. Consideration of "the need for an adequate … and reliable supply of electric power" is required under A.R.S. § 40-360.07(B). Yet the ACC gave little, if any, consideration to that factor.

CONCLUSION

For the foregoing reasons, SRP respectfully requests the Court to vacate the ACC's decision and direct the ACC to affirm the Siting Committee's grant of SRP's CEC. In the alternative, the Court should reverse and remand to the ACC to reconsider SRP's application in light of the full record, and in a manner consistent with the limits on the ACC's authority.

RESPECTFULLY SUBMITTED this 14th day of November, 2022.

JENNER & BLOCK LLP

By: */s/ Matthew E. Price*
1099 New York Ave. NW, Suite 900
Washington, DC 20001

Albert H. Acken (#021645)
Eric D. Gere (#023226)
JENNINGS STROUSS & SALMON, PLC
One East Washington Street, Suite 1900
Phoenix, Arizona 85004

CERTIFICATE OF SERVICE:

The original of the foregoing was e-filed with the Clerk of the Court on this 14th day of November, 2022, and a copy of the foregoing e-mailed to the following:

Robin Mitchell
Wesley Van Cleve
Stephen Emedi
Kathryn Ust
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007
Attorneys for Defendants Arizona Corporation Commission et al.
RMitchell@azcc.gov
WVancleve@azcc.gov
sjemedi@azcc.gov
KUst@azcc.gov

Dianne Post
1826 E. Willetta Street
Phoenix, Arizona 85006
PostDLPost@aol.com
Attorney for Preacher Jordan's Camp and Randolph United Council

Louisa Eberle
Matthew Gerhart
Patrick Woolsey
Sierra Club Environmental Law Group
2101 Webster Street, Ste. 1300
Oakland, CA 94612
Attorneys for Sierra Club
Louisa.eberle@sierraclub.org
Matt.gerhart@sierraclub.org
Patrick.woolsey@sierraclub.org

Court S. Rich
Andrew B. Turk
Logan Elia
Rose Law Group, PC
7144 E. Stetson Drive, Suite 300
Scottsdale, AZ 85251
Attorneys for Sierra Club
crich@roselawgroup.com
aturk@roselawgroup.com
lelia@roselawgroup.com

By: */s/ Rebecca C. Lewis*
Rebecca C. Lewis