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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, and SUNZIA TRANSMISSION, LLC, Intervenor.	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 Reply Brief

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In 2016 the Arizona Corporation Commission (ACC) narrowly approved a single Certificate of Environmental Compliance (CEC) for the construction of two transmission lines. Those lines were approved by the ACC, for the first time in its history, based on a claim the market would signal the need for the lines. The market spoke. The lines were not able to obtain financing and were not built. In 2022, the ACC approved an amendment to the CEC splitting it into two separate projects and extending the deadlines for construction. In approving the amendment, the ACC did not perform the statutorily required review to determine if the lines, on their own, met the statutory criteria for approval. In fact, both the line siting committee and the ACC erroneously thought that they were prohibited by the legal doctrines of *res judicata* and law of the case from performing any such review.

Simply put, Mr. Else argues that the original CEC was a unified project; it was a package deal. Like a zoning approval where the developer agrees to build a park in order to gain approval to build a high-rise building, the developer cannot come back later and ask the city staff to split the park from the building because it just wants to build the building. Doing so would change the fundamental premise of the original approval and would need to be assessed on its own terms.

This appeal asks the Court to decide whether the original CEC was such a package deal because its initial approval was based on the benefits of an AC line, such that the original CEC cannot be severed without impact. The ACC defends its failure to perform the statutorily required analysis by arguing that SunZia's amendment requests were "very narrow." ACC Br. at 9. Mr. Else argues that approving construction of a single DC line and granting ownership of that line to the new owner of the wind project in New Mexico is not a narrow change. It is a fundamental one that alters the very nature of the project the ACC approved in 2016.

SunZia asserts that a proceeding under A.R.S. § 40-252 "is limited to the specific issues presented in the application to amend." SunZia Br. at 17. But A.R.S. § 40-252 says nothing of the sort and the case SunZia cites for that proposition refers, as does the statute, to instances where the commission on its own decides to rescind, alter or amend any order

or decision made by it. Neither permits an applicant seeking an amendment to limit the scope of the commission's review. What Mr. Else argues is that the amendments requested here, although packaged by SunZia to the ACC as "technical" and "administrative" and packaged by both to this Court as "narrow" and "limited" and "specific," in fact have vast and legally consequential implications that the ACC did not consider and that go to the heart of the requisite statutory analysis. Neither the ACC nor SunZia points to any law that permits the ACC to forgo the statutory analysis in such circumstances.

Also contrary to SunZia's claims, Mr. Else is not asking this Court to reconsider the original CEC, which was granted in 2016.[1] Mr. Else has no need to ask for that relief in any event because Pattern Energy, the new owner of the SunZia project, has already indicated that it cannot and would not abide by the original CEC's requirement that at least one AC line be constructed. The question is entirely different. It is whether Pattern/SunZia's *new* project can be supported by the *rationale* underlying the *original* project. In short, Mr. Else is not seeking to relitigate settled matters, but rather to point out the obvious: that the rationale supporting the original CEC, centered on the accessibility and reliability benefits an AC line would bring, cannot support an independent project centered on a single DC line.

What Mr. Else argues is that there are several reasons to think that the AC line will never be built in light of the amendment, namely: (1) SunZia requested bifurcation precisely because they could not get financing for both a DC and an AC line; (2) Pattern has no interest in building the AC line to create 4,500 MW of transmission capacity, because its wind facility is only designed to supply enough power for a DC line, and an AC line in any event would allow Pattern to transmit only a quarter the power a DC line does once other generators bid for its use; (3) Southwestern Power Group (SWPG), the current owner of the right to build a single AC line, has not sought WECC (Western

[1] It is true that in one of its requests for relief, the First Amended Complaint references the original CEC. This request was included in an abundance of caution in case it could be pursued. This request was abandoned in the opening brief, as should be obvious by the relief requested in the brief.

Electricity Coordinating Council) approval for the AC line; (4) SWPG did not have a project manager show up to testify at the 2022 Line Siting proceedings; (5) and, the amendment seeks an extension for construction of the AC-based Willow Substation to allow SWPG to see if the market will support the line's construction.

Perhaps most important of all, bifurcating the two CECs means that *neither CEC will be violated if the AC line does not get built*. This point is crucial: Because Pattern Energy is only responsible for the DC line, it has no obligation to ensure that the AC line is ever constructed. It can build its high-rise whether or not the park gets built. As for SWPG, it may not get financing or may simply choose not to build the AC line because *its* CEC for the AC line is merely an authorization to build; a CEC never requires construction. Only a CEC for the two lines together guarantees that if a DC line is built, the AC line must be built also, lest that critical requirement of the CEC be violated. That was the deal the original CEC created—a deal that evaporated with the amendments that SunZia and the ACC try to disguise as "technical."

Mr. Else's claim, in short, is that the ACC was required by law to *consider the possibility* that there will be no AC line, and to perform the statutorily required analysis as to each line standing alone. The ACC argues that Mr. Else's claim about the AC line is "speculative," ACC Br. at 23-24, but none of the five underlying facts described above is speculative; and certainly the reasonable conclusion that the AC line will not be built in light of those facts is less speculative than the ACC's implicit assumption that the AC line will be built. Mr. Else does not have to prove that an AC line will not be built. Mr. Else's argument simply goes to the heart of the project and is therefore the kind of argument that the Commission must at least consider and address to satisfy the arbitrary and capricious standard. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (agency cannot entirely fail "to consider an important aspect of the problem").

Mr. Else's opposition to this project has been consistent. He has always opposed the project to the *extent* that it *unnecessarily* damages an ecologically sensitive and unique

biological watershed. In 2016, when he challenged the project the first time, it was because the then-owner (SunEdison) of the rights to build the New Mexico wind facility had filed for bankruptcy, and Mr. Else feared that, as a result, the lines would be used solely to interconnect with SWPG's gas-fired plant in Bowie. He did not want to rip up the San Pedro Valley for fossil fuels. Now, in 2023, Pattern seems to be on the right track in one respect: if one wants to push massive amounts of wind power from a remote part of New Mexico to California (or elsewhere), giving the producer of that power a direct current line is the most efficient way to do it. Mr. Else's point is different: namely, that once the Pattern project is (sensibly) a single, DC line, then it need not go through the San Pedro Valley. It need not go through Southern Arizona at all because the line does not require a substation near Bowie. SunZia would still need to show a need for such power in Arizona—and it has not made that showing—but at least such a line could avoid damaging the actual physical environment of the state. In short, Mr. Else's opposition has always been the same: he is opposed to unnecessarily damaging an ecosystem that he has spent the past twenty years of his life collaborating with many others to preserve.[2]

ARGUMENT

Because the record demonstrates that an AC line is unlikely ever to be built, and because the amendment no longer requires it to be built, the ACC must *address* that possibility before approving the requested amendment. The failure to address such an important impact of the amendment was legal error. The ACC's brief is a concession that it failed to do so; it continues to describe the requested amendments as "narrow." They are not. As a result, the *rationale* for the original project, based as it was on having at least one AC line, cannot justify the new official "SunZia" (i.e., Pattern) project, which only

[2] Though it should not need to be said, Mr. Else has always opposed the amendments, despite SunZia's counsel getting him to say otherwise in a "gotcha" moment while Mr. Else was unrepresented by counsel. SunZia Br. at 14-15. In numerous filings both before and after the 2022 Line Siting hearing, Mr. Else raised the exact objections he raises in this Court: 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, and 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.

includes the construction of a single, DC line.

None of the ACC's or SunZia's contrary arguments is persuasive. As an initial matter, the ACC argues in passing that "the Commission's determination of what constitutes a substantial change is a question of fact to which the Commission is afforded deference." ACC Br. at 19. Nonsense. Courts decide what factors and considerations are relevant such that they must have been given due consideration by the agency under the arbitrary and capricious standard. *See, e.g.*, *United States v. Nova Scotia Food Corp.*, 568 F.2d 240, 253 (2d Cir. 1977) (concluding that certain public comments were relevant and that it was arbitrary and capricious to ignore them). Otherwise there would never be arbitrary and capricious review because the agency could always say that *it* did not think a particular factor was important. That cannot be right.

The ACC then argues that Mr. Else's arguments are barred by *res judicata*—but *res judicata* does not apply to the ACC and its analysis, and it has no relevance to Mr. Else's appeal. The ACC also argues that the requirement that the ACC find a need for the power supplied by the transmission lines prior to their approval can be met by showing need for the power in other states, but the case on which it relies specifically held that out-of-state needs can be considered to the "extent" that such needs might "affect the availability of power for consumers in Arizona." *Grand Canyon Tr. v. ACC*, 210 Ariz. 30, 38, 107 P.3d 356, 364 (Ct. App. 2005). That analysis was not done. As for SunZia's added arguments that each line need not be assessed independently and that the ACC lawfully considered a variety of extraneous factors, even the ACC effectively concedes error by not advancing those arguments in its brief.

I. The ACC's brief concedes that the Commission failed to consider the substantially changed nature of the project.

The ACC's brief effectively concedes that remand is necessary. The ACC does not dispute that it did not perform the required statutory analysis. It disputes that it was required to perform it. The ACC continues to protest that there's nothing to see here, and that the amendments were narrow and technical. If this Court disagrees with the ACC's claim and

finds that the change is significant, then it must remand.

A. Why the AC line is unlikely to be built.

There are several reasons to think the AC line—which was the heart of the original deal—will never be built in light of the amendment, and that as a result the ACC failed to consider the substantially changed nature of this project. First, SunZia requested bifurcation precisely because there was apparently insufficient financing for both lines. AR Tab B-3 at 51:25–52:8, 103:23–104:1. Second—and what is more likely to be the true reason for bifurcation—Pattern Energy certainly has no interest in building the AC line because its wind facility is planned to fill the transfer capacity of the DC line, and Pattern has declined to build an AC line that, as explained in the Opening Brief, would have only ***one-quarter*** the transfer capacity of a DC line once other generators have bid for use of that line. The question then is whether SWPG will build the AC line (now under the separate project name "RioSol"), but SWPG did not even seek WECC approval, suggesting it has no interest in actually building that line. AR Tab B-5 at 570:15-24. And, it provided no direct testimony by its independent project manager at the Line Siting hearings in 2022.

Is this Court supposed to ignore all of those facts, and to ignore common sense? Surely not. And neither was the ACC supposed to ignore such matters. They go to the heart of the project, and the ACC must therefore have at least *considered* them. That is the essence of arbitrary and capricious review. *State Farm*, 463 U.S. at 43 (agency cannot entirely fail "to consider an important aspect of the problem"); *FCC v. Fox Television*, 556 U.S. 502, 515-16 (2009) (agency must "display awareness that it is changing position," must make a "conscious change of course," and must provide a "reasoned explanation . . . for disregarding facts and circumstances that underlay . . . the prior policy"); *Nova Scotia Food Corp.*, 568 F.2d at 253 (when major issue raised by comment to proposed rule "was neither discussed nor answered," the court held that "to sanction silence in the face of such vital questions" would fail to "safeguard against arbitrary decision-making").

The ACC has nothing to say about any of this, except that Mr. Else's claims about

the AC line are "speculative." ACC Br. at 23-24. But none of the above is speculative. It is not speculative that SunZia requested bifurcation for the cited reason. It is not speculative that Pattern's wind facility will at most produce enough power for a single DC line. It is not speculative that SWPG did not apply for a WECC path rating. And it is not speculative that no SWPG project manager testified at the 2022 hearings. Those are all facts that no party disputes. True enough, Mr. Else cannot see into the future; he cannot *prove* that the AC line will never be built. But that is because no one can see into the future. Which is precisely why, having been bifurcated, the lines needed to be analyzed independently. If arbitrary and capricious review required clairvoyance, there never would be arbitrary and capricious review.

As for SunZia, it tries to convert this question into a factual rather than a legal one, arguing that there is "substantial evidence supporting the continuing intent to build Line 2." SunZia Br. at 24-25. But the commission did not consider this "evidence" and SunZia's "evidence" in fact supports *Mr. Else's* argument. SunZia argues that bifurcating the CECs and extending the deadline for the substation associated with the now-second line would not have been necessary if there was no intent to build that line. *Id.* at 25. If there was no such intent, SunZia claims, it would have just assigned the whole CEC to Pattern, and SWPG would have "been free of any remaining obligations under the CEC as to Line 2." *Id.*

But that gets the legal obligations exactly backward. If the entire CEC had been awarded to Pattern, Pattern would have been on the hook to build the second line. If it only built the DC line—and its entire interest is only in that line—then it would have been liable to the ACC for failing to abide by the original CEC's requirement for "at least one" AC line. App'x Tab 17 at 4:2-6 (original CEC). But now that there are *two* CECs for *two* owners, that risk evaporates. Pattern will not be on the hook if the second line is never built because its CEC requires only one line. But neither will SWPG be on the hook because *its* CEC for the AC line is merely an *authorization* to build, not a requirement to build. In other words, only if the CEC had remained intact would there have been any way for the

ACC to enforce the central requirement that an AC line be built.

The ACC, for its part, totally fails to recognize this problem—which is all the more reason for this Court to remand. The ACC argues that "[e]ven if the Plaintiff is correct in speculating that the AC line *might* not be built, that was contemplated under the original CEC" because there was testimony "that the nature of a merchant transmission line means that if there is no demand, [a second] line will not be built." ACC Br. at 30. But that again gets matters exactly backward. It is more proof—a concession from the ACC, really—that the first line was going to be an AC line because in the event that only one line gets built, the only way to comply with the requirement of the CEC that "at least one" shall be an AC line is to build that AC line first.

That is why all of SunZia's arguments to the effect that the original CEC did not require that the AC line be built first also fail. As an initial matter, it really does not matter in which *order* they were going to be built because Mr. Else has identified several reasons to think the AC line would never be built, regardless of the order in which it was supposed to be built. The ACC must still have considered Mr. Else's arguments because the original CEC required at least one AC line, and Mr. Else's arguments cast doubt on whether there will be any such line. Furthermore, the very fact that it was within the ACC's contemplation that only one line might get built is proof positive that that first line always had to be the AC line—otherwise the original CEC's requirement that there be "at least one" AC line would be violated.

SunZia cites cases about judicial deference to agency interpretations of their own regulations, arguing that the ACC should get deference today as to its interpretation of its own order. SunZia Br. at 21. But such deference no longer exists in Arizona, having been abolished by statute.[3] And SunZia cites twice to the federal environmental impact

[3] "In a proceeding brought by or against the regulated party, the court shall decide all questions of law, including the interpretation of a constitutional or statutory provision *or a rule adopted by an agency*, without deference to any previous determination that may have been made on the question by the agency." A.R.S. § 12-910(f) (emphasis added). Even if deference applied, deference is not a blank check, and here the *only* interpretation that makes sense of the original CEC, which required that "at least one" line shall be an AC line, is that the AC line had to be built first.

statement for the proposition that the DC line might be built first. SunZia Br. at 22, 38. But whatever SunZia might have said in the federal EIS is irrelevant to what the ACC's designee to the Line Siting Committee told the Commissioners (that the AC line would be built first), App'x Tab 14 at 7:25–8:3, and certainly to what the CEC actually required.

B. The relevance of WECC approval.

Relatedly, SunZia misunderstands the significance of Mr. Else's argument about the lack of an approved WECC plan of service. SunZia argues it was accurate for the ALJ to say there was no approved plan of service when the original CEC was adopted because there was no such approved plan *for Option B*—that is, for one AC line and one DC line. Moreover, SunZia now argues that the WECC process is "voluntary." SunZia Br. at 26-27.

But Mr. Else's points were different. The ALJ made the contested statement in paragraph 116 of the final order: "The record shows that CEC 171 originally was approved without an approved WECC plan of service." We know this is not true because precisely such a plan of service had been on record for five years prior to the 2016 CEC decision, and, as explained in the Opening Brief, that WECC approval had been repeatedly touted as proof of regulatory coordination and project reliability during SunZia's testimony.

Additionally, in the next paragraph of the final order, the ALJ made the contested statement, *"*The original CEC does not specify which line was to be constructed first." Not only is this statement directly contradicted by the construction deadline of the AC-based Willow Substation and by the testimony presented during the 2015/2016 hearings, but the actual *existence* of a WECC-approved plan of service for 3,000 MW of power and two lines proved that the initial plan was for two AC lines, or at least that an AC line *had* to be built first. That is because if the DC line were built first with 3,000 MW of transmission capacity, there would never be any guarantee that the second AC line would be built because there was no WECC approval for 4,500 MW. The AC line therefore had to be built first, and only *if* WECC approval could be obtained for a full 4,500 MW, could SunZia then build a second, DC line.

More still, the very fact that SWPG has failed to apply for a path rating when a WECC approved rating was so important to getting the project off the ground in the first place is more indication that SWPG is not interested in building that second line. Those were Mr. Else's only points about the importance of WECC approval, and the failure of the ACC to grapple with them, and indeed the ALJ's incorrect statements to the Commissioners with respect to the underlying facts, proves once again that the agency failed to consider an important aspect of the problem, and therefore acted arbitrary and capriciously as a matter of law, requiring remand.

C. The ACC insists on the "narrow" nature of amendments, proving that it failed to consider an important aspect of the problem.

The ACC's brief totally fails to grapple with any of the above arguments, which further demonstrates that it did not conduct the necessary review at the Commission level. The ACC describes the amendments throughout its brief as "very narrow" or "narrowly tailored" or "specific" or "limited." ACC Br. at 9, 10, 22, 30. It focuses its brief, just as it focused below, on "updated new structure types," "visual impacts associated with the proposed structural changes," "the visual impacts near the San Pedro River Valley," the "new structures," "the structural changes," and the "impacts from the new structures." *Id.* at 36-38. It justifies its failure to consider evidence of need by asserting that the amendment application "was not based on a substantial change in the need for the project." *Id.* at 31. And SunZia naturally continues to maintain that the request for bifurcation "is administrative in nature," SunZia Br. at 31, masking the consequential implications of that bifurcation. In other words, if this Court agrees with Plaintiff that the implications of the requested changes are not in fact minor or narrow, then it must remand because the ACC effectively concedes that it did not appreciate the significance of the requested amendments.

The ACC further downplays the significance of the amendments by stating that changes of ownership are common and lawful. It cites A.R.S. § 40-360.08(A) for the proposition that "Arizona law allows for the transfer and assignment of a CEC to another

entity without Committee or Commission approval." ACC Br. at 28; *see also* SunZia Br. at 32 (same). But that provision allows the transfer of a certificate "to any electric company or electric utility agreeing to comply with the terms, limitations and conditions contained therein." In other words, if Pattern had assumed the *original* CEC, that would be authorized under this provision. But Pattern did no such thing. It has asked to assume ownership of only one part of the project now that it has the rights to build the wind facility in New Mexico. That does not meet the statutory provision at all, and it is why SunZia's cited cases, SunZia Br. at 32, are irrelevant.[4]

Nor does Condition 34 of the original CEC contemplate the kind of change of ownership at issue here. ACC Br. at 28. That condition provided that "[p]rior to construction of any Project transmission facilities, Applicant shall provide the Commission Staff with copies of any Agreement(s) it enters into with the entity or entities it selects to own and operate the 500 kV transmission facilities." CEC 171 at 16:8-10. This condition is simply irrelevant to assigning ownership in a way that relieves all parties from the original CEC's *requirement* to construct at least one AC line. If it did relieve the parties of that requirement, the condition would violate Arizona law, which authorizes transfers of ownership *only if* the company agrees to comply with the original terms. And SunZia did not think the condition authorized it to split its own CEC, otherwise it would obviously have done so and not sought an amendment.

In short, the ACC continues to insist that there's nothing to see here. If the Court disagrees and believes there is something to see—that these amendments have masked potentially consequential changes to the project, authorizing the developer to build the high rise but not the promised park, so to speak—then it must remand for consideration of those potential consequences.

[4] For example, even if *PacifiCorp*, 172 FERC ¶ 61,062 (2020), were relevant to a question of transfer under Arizona's statutes, FERC only authorized a partial transfer on the condition that the transferor remain a co-licensee.

D. Mr. Else is not relitigating the original CEC, but rather arguing that the original CEC's *requirement* to build at least one AC line has been abandoned, and therefore the rationale for the original CEC cannot sustain the new project.

As should now be clear, all of ACC's and SunZia's arguments that Mr. Else is merely relitigating the decision made in 2016 are false. "The route approved in the original CEC has already been litigated, and the issue is therefore barred by *res judicata*," the ACC argues. ACC Br. at 31. The issue of need, the ACC adds, "was fully litigated in the Plaintiff's appeal of the original CEC, and its re-litigation is therefore barred by *res judicata*." *Id.*; *see also id.* at 22-23 (similar); SunZia Br. *passim* (arguing that Plaintiff is seeking to "retry" the 2016 decision). These arguments fundamentally miss the point. *Res judicata* prevents parties from relitigating claims and issues that have been conclusively decided by a court of competent jurisdiction. Mr. Else is not challenging the holding of the court that the Commission's initial CEC was valid. Mr. Else is challenging the Commission's splitting of the CEC into two parts and its modification of those parts without performing the legally mandated review. The ACC and SunZia propose that the initial CEC, although it was an integrated whole and a package deal, can be snapped in half without altering that very deal. The question of a standalone DC line has never been litigated because the ACC failed, and continues to fail, to recognize that the amendments created two independent projects that no longer guarantee that at least one line will provide the AC benefits that were critical to the approval, and which were an explicitly stated requirement of the original CEC.[5]

Even more importantly, res judicata does not apply to the Commission itself reviewing a request for amendment. *Davis v. Ariz. Corp. Comm'n*, 96 Ariz. 215, 21819 (1964) (res judicata does not apply to Commission decisions because Commission has

[5] As for SunZia's argument that the federal EIS identified numerous problems with the Tucson route, SunZia Br. at 42, that too is beside the point because those problems were identified on the assumption that there would be two 500kV transmission lines with a 2,500-foot combined ROW. There is no indication at all that these harms would exist for a single line double circuited to an existing line; indeed, as noted numerous times, SunZia admitted that a single 500kV double circuited to the existing line in Tucson would obviate the leading environmental justice concerns. It would therefore presumably avoid the other potential impacts as well.

"continuing" power to "rescind, alter or amend" its prior decisions "when the public interest would be served"); *see also* A.R.S. § 40-252. Yet the Commission maintained that the ACC's 2016 decision was "res judicata" and the "law of the case." AR Tab A-193 at 31 (conclusion 3). That is perhaps the most important indicator that the ACC failed to conduct the relevant statutory review, and to consider the vast implications of the requested amendments. And it is all the more reason why remand is necessary.

II. There must be need for power in Arizona, and the only "evidence" of such need was hearsay.

In his opening brief, Plaintiff pointed out that the only evidence of need in Arizona was the evidence of Pattern's own witness 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." AR Tab B-5 at 527:8-21. When a committee member asked with how many Arizona customers Pattern was engaged in discussion, the witness refused to say. In other words, the evidence of need in Arizona for Pattern's power is either zero, or it is hearsay, based on Pattern's own assertion that Arizona customers have told Pattern they are interested in Pattern's power. The ACC responds that it is allowed to consider needs in other states. But that is only true if there is *also* a need for the project in Arizona, and to the *extent* that need in other states might affect the availability of power in Arizona.

A. Arizona must have some benefit from the project.

The Commission argues that "limiting the statute to consideration of the need for power in Arizona, as advocated by the Plaintiff, would not only ignore the reality of the interstate market for power, but it would be contrary to the law." ACC Br. at 32. The statute provides that the Commission "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). The Commission argues that "this state" modifies the ecological effect, but not the need for power. ACC Br. at 32. Thus the Commission can consider "out-of-state need for wholesale

power pursuant to its 'considerable discretion' to balance the need for power against the environmental impacts from a project." *Id.* at 33 (quoting *Grand Canyon Tr.*, 210 Ariz. at 38). Mr. Else, however, has never argued that the Commission must *ignore* the need for power in other states. *Cf. also* SunZia Br. at 40 (incorrectly stating Mr. Else's position to be that the "Commission can *only* consider Arizona needs when evaluating a project."). Rather, he argues that the project must meet electrical needs in Arizona to a degree that justifies impacts to an area of unique biological wealth, whether or not it also meets electrical needs in other states.

On that question, the very case on which both the ACC and SunZia rely makes quite clear that the ACC may consider needs in other states *to the extent that* such needs affect the availability of power *in this state*. In *Grand Canyon*, Tucson Electric Power had already established "that its retail consumers alone would need the power to be generated by" the facility in question. 210 Ariz. at 38. It then established that "its wholesale customers needed the power," including "Arizona-based users *and* some external wholesale purchasers." *Id.* (emphasis added). The Commission also heard testimony from Commission staff that "there was a need *within the state* for the power" to be generated. *Id.* (emphasis added). Indeed, the Commission's decision explicitly found that "the environmental impacts of the proposed expansion do not outweigh the need for [an] adequate, economical and reliable supply of electricity *in Arizona*." *Id.* at 37 (emphasis added).

The entire question in that case was whether the Commission could *also* consider wholesale power needs throughout the region without "quantifying" the need for such power in Arizona specifically. *Id.* After explaining that there was plenty of evidence of need *in Arizona*, the Court of Appeals addressed whether other evidence of need could also be considered:

> [T]he statute itself does not require that the need for power be determined based *solely* on the power needs of in-state consumers. Nor is there anything in the statute that requires that the "need" for the "adequate, economical, and reliable" power that is to be balanced against the desire to minimize

> environmental impacts should be determined in any particular way. The statute gives the Commission the obligation to conduct the balancing in the broad public interest and leaves considerable discretion to the Commission in how to determine need under the statute. We cannot say that in an integrated wholesale market the need for wholesale power both in and out of the state will not *affect the availability of power for consumers in Arizona*. To this extent at least, we cannot say that it is irrelevant to the Commission's assessment of the broad public interest to take into account such considerations in the balancing it conducts pursuant to the statute.

Id. at 238 (emphases added; internal citations omitted). In other words, the Commission is wrong to imply that the statute allows it to base its decision on need in other states. It can consider need in other states, but only if there is also a need for power in Arizona, or if such need in other states affects the need for or availability of power in Arizona. And there was no evidence at all of that in the record.

That also explains why none of the Dormant Commerce Clause cases is relevant. *See* ACC Br. at 33; SunZia Br. at 40. It is hardly discriminating against out-of-state commerce to say that there should *also* be benefits to Arizona, if there are to be benefits in other states. That is not discrimination, but rather a requirement of equal treatment.[6] Moreover, it is Arizona land that is being ripped up and utilized for the purpose. Neither the ACC nor SunZia cites any case—and Plaintiff's counsel knows of none—in which the Commerce Clause was held to be violated where a state refused to allow the destruction of its lands for the purpose of facilitating commerce purely between two other states.

B. The only evidence of any benefit *to Arizona* was hearsay.

Once this is understood, the ACC's argument that it relied on "non-hearsay testimony by an expert witness" in assessing need is meritless. ACC Br. at 34; *see also* SunZia Br. at 39 (similar). The ACC cites to testimony from Kevin Wetzel, who was self-interested as an employee of the Applicant, about the need for power in the *region*

[6] For example, that is why *Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 553, 595-597 (1923), is inapplicable. There the Court held that it was unconstitutional for a West Virginia statute to require natural gas suppliers to satisfy the needs of West Virginia consumers before supplying gas to out-of-state customers. Here, the statute does not require SunZia to satisfy Arizona needs before the need of California. It merely requires that the project *also* benefit Arizona, if the Arizona environment is to be sacrificed.

generally. ACC Br. at 34-35. That testimony may not be hearsay, but it is irrelevant. When asked specifically about need *in Arizona*—the actual relevant standard—he provided evasive answers that were based in hearsay or speculation. (See above.) As for SRP's 2022 letter of support, *see* SunZia Br. at 39, that letter did not walk back what SRP had always maintained: that it had no need for SunZia's power. The letter says nothing at all about needing SunZia's power. SRP supports the project for the reason ordinary citizens might: because it is popular to be against climate change and in favor of renewable energy.

In sum, because there was no evidence of need *in Arizona* for a DC line, the CEC with respect to that line must be remanded.

C. The ACC concedes that each line must be assessed independently.

The ACC does not dispute in its brief that the Commission needed to engage in the statutory balancing for each CEC separately—including assessing need—and in fact admitted that it had to do so in its Answer. Answer ¶¶ 394, 398. SunZia's contrary argument is that "Plaintiff could have argued in the first proceeding that the Commission should evaluate the lines separately. He did not." SunZia Br. at 35. That is nonsense. They were not offered separately. In 2016, there was a single CEC. Assuming one accepts the premise that the CEC permitted the DC line to be built first, the CEC would *obligate* the owner to build the AC line and Willow substation. Now, there are two CECs, which means that no one will be held liable if the second, AC line is never built. And, as explained, the two separate owners have two separate objectives and rationales for the respective lines. These are now totally different projects, one of which is likely never to be built, and for that reason the two lines must be assessed independently.

D. The ACC does not dispute that consideration of extraneous factors is irrelevant to fulfilling the statutory requirement of supporting electricity needs in Arizona.

The ACC does not dispute that the extraneous factors of climate change, environmental justice, and ancillary economic benefits are irrelevant to their statutory balancing mandate in A.R.S. § 40-360.07(B). Only SunZia argues that these factors must

be considered. SunZia Br. at 43-44. SunZia argues that the *federal government* was required to consider climate change and environmental justice, which brings those matters within the catchall factor of A.R.S. section 40-360.06(A)(9) (committee may consider "additional factors that require consideration under applicable federal . . . laws pertaining" to the site).

But what "federal law" *requires* the consideration of environmental justice? Even a SunZia witness acknowledged in 2015 that a federal executive order required federal executive officers to consider environmental justice *where possible*. App'x Tab 11 at 2065:19-23 ("And under the executive order federal agencies are required to consider direct, indirect, and cumulative [impacts] with respect to environmental justice populations and, where possible, avoid disproportionately impacting these populations."). Nor does SunZia point to any statute the requires consideration of climate change or economic benefits. Its only defense is the *ipse dixit* "the Commission had express authority, even an obligation, to consider economic benefits, climate change, and environmental justice because they are factors that require consideration under federal law with respect to this Project." SunZia Br. at 44. But again, Mr. Else has shown that such factors are outside the relevant Arizona statutes, and that the state of Arizona is not responsible for the fact that the federal process did not consider other route alternatives for what is now Pattern's exclusive-use DC line. It is therefore *SunZia's* burden, or the ACC's burden, to demonstrate that some federal law in fact *requires* Arizona to consider those factors. Neither has cited any such law.

Conclusion

This Court should vacate CEC 171-A and CEC 171-B and remand to the Commission with instructions as to the applicable legal standards, and grant Plaintiff his attorney's fees in this appeal pursuant to pursuant to A.R.S. sections 12-348(A)(2), 12-348(A)(7), the private-attorney-general doctrine, and any other applicable statute, rule, or authority.

RESPECTFULLY SUBMITTED this 22nd day of June, 2023.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is 6,847 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 22nd day of June, 2023, to the following:

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