ARIZONA COURT OF APPEALS

DIVISION TWO

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

Consolidated Reply Brief of Mr. Peter Else

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Nothing in the Answering Briefs of the Arizona Corporation Commission ("ACC" or "Commission") or SunZia defeats the logic of Mr. Else's appeal. In 2016, the Commission approved the SunZia project on the basis of certain promised benefits to Arizona: (1) transmission capacity for future solar generation in the I-10 corridor; (2) reliability benefits for the Tucson grid system; (3) a decrease in congestion on existing transmission lines; and (4) increased reliability by allowing non-wind resources to connect to the proposed lines and offset the intermittency of wind power. *See* ACC Br. at 11 (agreeing that the original proposal was based on various grid benefits to Arizona). Each and every one of these promised benefits required at least one alternating current ("AC") line.

There were no other guaranteed benefits to Arizona. No Arizona utility testified it needed SunZia's power, and unlike any Commission proceeding in Arizona history, the applicant would not testify where its power would ultimately end up. That is why SunZia *promised* the Commission that *at least one* of its two transmission lines would be an AC line. Without such a line, none of the promised benefits would materialize and it could not and would not have been approved. Not only was the entire approval of the project based on these representations, the

Certificate of Environmental Compatibility ("CEC") itself provided that the AC line would be built first, and for good measure declared in the preambulatory language that the Commission's intention was that "at least one" line would be an AC line.

Yet in 2022, SunZia came back to the Commission and announced that it could not get financing for the two lines. It sought to bifurcate the CEC so that it could sell part of its ownership interest to a new company, Pattern Energy, which could move forward with just building *one* line: a direct current ("DC") line with no grid benefits. A DC line on its own would bring no benefits whatsoever to Arizona, at least on the record before the Commission, because there was no guarantee that anyone in Arizona would buy the power transmitted over this line. That is why the original SunZia project depended so heavily on an AC line. Yet the Commission approved the amended project with no analysis whatsoever of the mandated statutory balancing in the absence of an AC line. In fact, the Line Siting Committee ("LS Committee" or "Committee") and the Commission erroneously thought they were prohibited from performing the analysis required by law due to the doctrines of *res judicata* and law

of the case, neither of which applies to the ACC's relevant decision-making process.

Moreover, the Commission approved the *route* for the project in 2016 *because of* SunZia's assertions that two massive transmission lines could not be collocated with other lines south of Tucson without environmental justice concerns; the Bureau of Land Management concluded, as a result, that only the virgin San Pedro Valley could accommodate the two massive transmission lines. And yet the Commission's bifurcation of the project now means Pattern Energy gets to build a single DC line through the San Pedro Valley, when such a line could have been routed along multiple existing transmission corridors.

For these reasons, Mr. Else sued the Commission. He argued in the court below, as he argued to the Commission in the prior proceedings, that the Commission acted arbitrarily and capriciously for failing to recognize the changed nature of the project and to do the proper analysis. SunZia said in 2015-16 that the lines would not get built without financing. It asserted that its ability to obtain financing would satisfy its legal obligation to prove need for the project in Arizona. The Commission for the first time in its history determined that a project met the statutory

need requirement without any evidence of actual need as a result of these representations. Yet SunZia conceded in 2022 that it has not been able to get financing for both lines together, and despite the admitted failure of the very condition upon which the project had been approved, the Commission maintained that perhaps the AC line might still be built after all. Further, the CEC required the construction of at least one AC line, and yet the Commission and SunZia now say the project never required an AC line at all. The original pitch to the Commission was that the project would bring grid benefits to Arizona; now, the Commission argues any *regional* benefits, whether any such benefits accrue to Arizona or not, are sufficient for approval. These excuses defy the statutory requirements for a Commission that is charged with protecting the public interest. Mr. Else simply asks that the Court require the ACC to perform the review it is legally required to perform before approving a CEC.

Nothing in the Commission's answering brief addresses any of Mr. Else's arguments directly. Surprisingly, Mr. Else agrees with much of the Commission's brief. The Commission says that the bifurcation "altered the legal status of the transmission lines." ACC Br. at 34. Exactly. That is why SunZia sought the bifurcation and why Mr. Else argues the

bifurcation has important consequences that the Commission failed to address. The Commission states repeatedly that ordinarily it considers only "issues . . . raised" in a § 40-252 application. *Id.* at 33. Mr. Else has no quarrel with that in this instance because his claim is that the bifurcation *raised issues* that the Commission entirely ignored. The Commission also states repeatedly that without the 2022 amendment, SunZia's "existing authorizations will not terminate." *Id.* at 17. Quite right. SunZia would be allowed to build, it would just have to build what it promised.[1]

The remainder of the Commission's brief is an exercise in misdirection. It continually asserts that Mr. Else is seeking to have this Court "reweigh the evidence," ACC Br. at 21, 31, when all he is asking is for a remand so that the Commission can weigh the evidence under the correct legal standards and consider salient issues that the Commission ignored. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*

[1] It is true that in one of its requests for relief, the First Amended Complaint references the invalidity of the original CEC. SunZia Br. at 24. This request was included in an abundance of caution in case it could be pursued. This request was abandoned in the Superior Court. It is also true that Mr. Else does not challenge three of the four requested amendments. *Id.* at 29-31. It is unclear why SunZia thinks that affects his request for relief on the issues he does raise.

Co., 463 U.S. 29, 43 (1983); *FCC v. Fox Television*, 556 U.S. 502, 515-16 (2009); *United States v. Nova Scotia Food Corp.*, 568 F.2d 240, 253 (2d Cir. 1977).

The Commission argues in the alternative that several of these issues are barred by *res judicata* and constitute a collateral attack on the original decision. ACC Br. at 32. It cites a case under an entirely different statute, *see Timmerman v. Lightning Moving and Warehouse, Co.*, 83 Ariz. 398 (1958), while ignoring *Davis v. Ariz. Corp. Comm'n*, 96 Ariz. 215 (1964), which specifically held that *res judicata* does not apply to Commission decisions that, as here, can be amended or revoked at any time. *See* A.R.S. § 40-252. Regardless, the Commission concedes that *res judicata* would only apply to matters "outside" the § 40-252 application, ACC Br. at 32, and all of Mr. Else's arguments pertain to the bifurcation.

As for one of Mr. Else's central arguments—that the CEC required the construction of the AC line first, and at least one AC line in any event—the ACC musters two sentences in response, which are nothing more than *ipse dixit*. ACC Br. at 3 ("CEC 171 authorized SunZia to construct AC and DC transmission lines and specifically authorized it to do so at different points in time—if SunZia chose to proceed with

construction at some time."); *id.* at 24 ("[T]he original CEC 171 approved (but did not require) *either* two AC lines or one AC and one DC line to be built in no particular order."). The Commission does not grapple with any of Mr. Else's cited cases, which establish that preambulatory language must guide a court's interpretation of a legal instrument, and that the historical background and context of a legal instrument inform its meaning. *See Fay v. Fox in & for Cnty. of Maricopa*, 251 Ariz. 537, 540–41 (2021); *Sw. Lumber Mills v. Emp. Sec. Comm'n*, 66 Ariz. 1, 5 (1947); *State v. Salazar-Mercado*, 234 Ariz. 590, 592 (2014). Nor does the Commission ever grapple with Mr. Else's argument that as a result of bifurcation, neither Pattern Energy nor Southwestern Power Group (SWPG) is legally required to build an AC line.

SunZia does attempt to take on this central issue, but it does so by arguing that the original CEC always permitted the construction of a single, DC line. It is completely inconsistent with the record to suggest that those voting for the initial CEC thought they were approving a CEC that could result in a single DC line from New Mexico through the San Pedro River Valley to a substation in central Arizona so that Californians could meet their state-mandated renewable energy requirements. Yet that is

how the ACC and SunZia now ask this Court to interpret the original CEC. It should decline the invitation.

The Commission also does not mention a single time that Western Electricity Coordinating Council (WECC) approval had always existed for two AC lines; that its ALJ falsely denied this fact; that WECC approval was argued in 2015-16 to be essential; and that no one had applied for WECC approval for an AC line under the amended project. These points are relevant to Mr. Else's arguments that the original project required at least one AC line and that now no AC line is likely to get built. That is not speculation. It is reasoning from existing facts. The Commission made obvious legal and factual errors and yet the Commission says not a word about them. This Court cannot let such errors stand.

I. The original CEC required at least one AC line, a condition that bifurcation eliminated.

As noted above, the Commission does not grapple with the language of the CEC or any of the interpretive arguments about the requirements of the original CEC. It instead focuses its brief on the peculiar notion that Mr. Else's arguments are "speculative" because an AC line could still possibly be built. But Mr. Else cannot *know* that the AC line won't be built until he waits another decade, at which point the unnecessary damage to

the San Pedro Valley will already have been done. ACC Br. at 24, 28, 34, 36, 43. The Commission's logic would be equivalent to saying to the challengers in *Nova Scotia*, *supra,* who argued that the agency's rules would destroy their industry, that they had to wait until their industry was destroyed before challenging the government's actions. Of course, such a requirement would be absurd. The court in *Nova Scotia* held for the challengers because there were *good reasons to think* that the destruction of the industry would result, and the agency had completely ignored those arguments. Here, too, Mr. Else argues that the destruction of the San Pedro Valley will now be totally unnecessary if only a single DC line is going to get built, and he points to several reasons why that outcome is now likely. Those *reasons*—the bifurcation, the lack of path rating, the admitted lack of financing, the new approval of a competing interstate AC line in the same vicinity—are not speculative. The Commission had a legal duty to address them.

SunZia seems to recognize the force of this argument. Although it sprinkles the word "speculation" throughout its brief, it ultimately defends the Commission, and its own actions, on the ground that the original CEC *always* contemplated the creation of a single, DC line. "A

requirement to build both lines is not among the 37 original conditions or the two new ones." SunZia Br. at 37. And, the argument goes, Pattern Energy can now therefore build a single, DC line. *See id.* at 35-39. But that claim is false.[2]

To remind the Court: Condition 23 of the original CEC provided for two construction deadlines, and provided that the "first," earlier line, would be built along with the Willow Substation—the substation for the AC line. Mr. Else acknowledges that, while certainly nonstandard, it may be possible to interpret the word "first" merely as identifying one of two lines (instead of saying, for example, line "A" and line "B"), rather than as a temporal requirement. But that is implausible for three reasons.

First, the earlier deadline was effectively a guarantee that the "first" line would be built first. SunZia does not appear to disagree with that; it merely asserts that that first line always could have been the DC line. But that makes no sense because the Willow Substation had the same deadline. SunZia nevertheless argues that it could have built the

[2] And even if it were true, Mr. Else's more general point is that the Commission approved the project on the basis of arguments—the benefits an AC line would bring—that are no longer valid in light of the requested amendment, and that the Commission had a duty as a result to evaluate whether the project still met the public interest.

DC line and the Willow Substation concurrently—an argument with which the Superior Court agreed. *See* ROA.75 at 5. But SunZia's actions belie this assertion. In the 2022 proceedings, it obtained an amendment to move the deadline for the Willow Substation to align with what was now the second line. ROA.31 at 139 (67:1-15). That's because SunZia understood all along that the Willow Substation, which is necessary only for the AC line, was always supposed to be built along with that line. It would have been absurd for the Commission to mix and match components of two different lines in its original CEC authorization.

Second, the Commission in 2016 stated its intent that "**at least one line**" will be an AC line, and Mr. Else has shown that such preambulatory statements, under Arizona law, clarify any ambiguity in legal instruments. *Fay*, 251 Ariz. at 540–41; *Sw. Lumber Mills*, 66 Ariz. at 5. SunZia nevertheless says that the "plain meaning" of the CEC's conditions takes precedence over the preambulatory statement. SunZia Br. at 38. In a sense, Mr. Else agrees: he believes the plain meaning of the CEC requires the AC line to be built first. His point was only that, to the *extent* it's ambiguous, the preambulatory statement merely clarifies the ambiguity that SunZia has invented. And although SunZia is correct that a CEC is

merely an *authorization* to build, that only means that SunZia did not have to build *any* of the lines. But the only fair reading of the original CEC is that if the project was to be built, *at least one* line had to be AC. That is what SunZia remarkably denies.

Third, the Commissioners in 2016 were repeatedly told that the first project component was going to be an AC line. *See* Opening Br. at 50 (citing sources). All of the benefits of the project required an AC line. Courts must use this historical context against which the legal instrument was written to interpret that instrument. *Salazar-Mercado*, 234 Ariz. at 592.

To its credit, SunZia does not appear to defend the Superior Court's granting of deference to the Commission's interpretation of its own prior CEC. Nor does the ACC appear to rely on deference. *But see* ACC Br. at 27-28 (suggesting that generally agencies receive deference when "interpreting a statute or rule which it is charged with implementing"). Thus, the parties seem to agree that the Superior Court got at least that much wrong. This Court should therefore assess the CEC solely on the basis of the interpretive principles described above.

SunZia musters one final argument, however, against Mr. Else's interpretation of the CEC. But it is makeweight. SunZia argues that the Line Siting Committee in 2015 considered, but rejected, "conditions requiring the construction of the Project in full," and that "[s]uch conditions would not have been necessary if Else were correct that the 2016 CEC imposed such an obligation." SunZia Br. at 13 n.10 & 36 n.14. Nonsense. The proposed condition would have required waiting for the New Mexico wind project to be constructed first. Tr.Vol.13_11/19/15 at 168-71 (2638:14–2641:7). That has nothing to do with whether the 2016 CEC required both lines to be built, or merely allowed one.

If Mr. Else is correct that the original CEC required that an AC line be built, there is little doubt this Court must remand. That is because bifurcation eliminates any requirement to build the AC line.[3] As SunZia

[3] Though it should not need to be said, Mr. Else has always opposed how bifurcation would change the original nature of the SunZia project. In a "gotcha" moment while Mr. Else was unrepresented by counsel, SunZia's counsel got him to say he did not oppose separate ownership. SunZia Br. at 20-23. Technically speaking Mr. Else does not oppose separate ownership; he opposes separate ownership only to the extent such a bifurcation undoes the original deal the Commission approved in 2016. When Mr. Else realized how SunZia would use his "admission," he immediately recanted it. ROA.33 at 42 (464:15-19). 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

acknowledges, a CEC is merely authorization to build. Thus if Pattern Energy builds the DC line, it need not build the AC line because it does not even own the CEC for that line. As for SWPG, it does not have to build the line either because its CEC is merely authorization to build. Only if the original CEC is kept intact is there a guarantee that if the project was to move forward at all, "at least one" line would be an AC line. That is why SunZia sought bifurcation: it did not want to be on the hook for that AC line. The Commission seems to recognize as much, observing that bifurcation "altered the legal status of the transmission lines." ACC Br. at 34. Exactly.[4]

SunZia, however, argues that bifurcation was sought "in the spirit of transparency," SunZia Br. at 32, and to "facilitate" financing, *id.* at 41-42, not because SunZia could not get financing for the AC line. That does

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the only line associated with the original CEC that is ever constructed," ROA.21 at 72, and that the benefits SunZia touted in 2015 required an AC line, *id.* at 72-73, 93, 149-50; ROA.32 at 361:22–362:19, 373:16-23, 351:4-10, 352:23–353:1.

[4] That is also why the law allowing for partial transfers does not apply here because the bifurcation altered the conditions of the original CEC. *See* A.R.S. § 40-360.08(A) (allowing transfer of CEC "to any electric company or electric utility agreeing to comply with the terms, limitations and conditions contained therein").

not change the larger point: the result of bifurcation is that Pattern Energy is not on the hook for that part of the project. As Pattern's witness testified at the LS Committee hearing, Pattern was not responsible for seeking customers or contracts for the AC line because it did not own that project. ROA.33 at 104-05 (525:10-526:6).

But contrary to Pattern's assertions, the record makes clear that Pattern did not want to be on the hook for the project precisely because it could not get financing. Although SunZia claims Mr. Else made no citations to the record on this score, he did. *See* Opening Br. at 37 (citing ROA.31 at 123-24 (51:25–52:8) for SunZia's testimony that bifurcation was "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"). The testimony from Mr. Wetzel that SunZia highlights supports this point. Pattern wanted counterparties "to understand that the CEC has been completely bifurcated and each project can be separately financed." ROA.33 at 102 (523:22-24). Mr. Wetzel testified that this would help ensure a "clean and understandable story." *Id.* Why was such a story necessary? Because Pattern's partners did not *want* to

finance an AC line that would transmit only one-quarter of the wind power that its DC line would transmit. *See* Opening Br. at 48-49.

In short, the CEC required the AC to be built first; at a minimum, it always required at least one AC line. The bifurcation eliminates that requirement and thereby undermines the entire basis on which the project was originally approved. Yet the Commission said not a word about this dramatic change. And the lack of financing for the AC line is more evidence that such a line, once bifurcated, will not be built. The Commission refused to consider such matters. That is one reason why the Court must remand.[5]

[5] The ACC argues for the first time in this appeal that Mr. Else is collaterally attacking not only the 2016 CEC, but also Decision 78600, which was the decision sending SunZia's 40-252 application to the Line Siting Committee. ACC Br. at 32-34. The argument is frivolous. Mr. Else has always argued that even if the scope of review is limited to the amendment application, that should have included all the issues he raised, which were about the implications of bifurcation. But even if Mr. Else was required to protest the narrow scope of review, he did exactly that. He insisted on addressing the lack of WECC approval and FERC's granting of a monopoly to Pattern Energy, but Chairman Katz barred such testimony. Opening Br. at 34-35. More still, Decision 78600 could not have been determinative of the scope of review because Chairman Katz allowed SunZia to make an additional amendment—the moving of the Willow Substation deadline described above—that was never addressed in the 40-252 application or in Decision 78600.

II. SunZia relied on WECC approval to convince the Commission in 2016.

As noted above, the Commission says not a word about its patently false misstatement that there was no approval from the WECC prior to the Commission's granting the CEC in 2016. SunZia addresses the argument mostly by way of ad hominem attacks asserting Mr. Else's lack of knowledge of the industry. SunZia Br. at 42-43.

To repeat the point: The Administrative Law Judge (ALJ) stated in the final order adopted by the Commission that "[t]he record shows that CEC 171 originally was approved without an approved WECC plan of service." ROA.29 at ¶ 116. We know this is not true because such a plan of service had been on record for five years prior to the 2016 CEC decision, a point that SunZia accepts. Tr.Vol.02_10/20/15 at 209:2-8, 232:6-13; ROA.12 at 28 (¶330). 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. Opening Br. at 11; *see, e.g.*, Tr.Vol.02_10/20/15 at 243:23–244:1 ("We believe we have demonstrated [regional reliability criteria] with the WECC three-phase rating.").

Mr. Else raised this issue because the *existence* of a WECC-approved plan of service for 3,000 MW of power and two lines is more evidence 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 or even could 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 in 2022 failed even 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's AC line will never be built. Those were Mr. Else's points about the importance of WECC approval, the Commission's failure to grapple with them, and the ALJ's incorrect statements to the Commissioners with respect to them. All of that proves once again that the agency failed to consider an important aspect of the problem, rendered its decision based on a misapprehension of fact, and therefore acted arbitrary and

capriciously as a matter of law. *State Farm*, 463 U.S. at 43; *Fox Television*, 556 U.S. at 515-16.

Contrary to SunZia's suggestion, Mr. Else is fully aware that it is "voluntary" to complete the path rating process **before** the CEC is issued. SunZia Br. at 43. That does not change anything. Condition 18 in the CEC requires SunZia to follow WECC planning standards. SunZia relied on that WECC process as part of its case to the Commission in 2016. And its prior reliance on the 3,000 MW path rating remains evidence of its original intentions, and the absence of a path rating now remains evidence that an AC line is unlikely to get built. Mr. Else also understands that path ratings are done in "phases." *Id.* at 43-44. He merely pointed out that SWPG had not even applied for a path rating for the AC line; not even the first phase had been initiated. The Commission ignored this salient fact in addition to falsely denying the existence of WECC approval in 2016.

As for SunZia's post-hoc rationalization that in 2016 there was no WECC approval for Option B—4,500 MW—that is exactly Mr. Else's point. There was never approval for 4,500 MW, which is why an AC line had to be built first. That hardly means the Commission's statement in

paragraph 116 was accurate. The statement did not say there was no WECC approval for Option B. It said the CEC itself was approved without any WECC approval. ROA.29 at ¶ 116 ("CEC 171 originally was approved without an approved WECC plan of service."). SunZia's attempt at a post-hoc rationalization notwithstanding, the ALJ got this basic fact wrong and included this consequential false statement in what would become the Commission's formal order after Mr. Else timely filed a written exception proving the statement to be false. ROA.29 at 96. That suggests once again that the Commission failed to appreciate how the requested amendments altered the project that had been approved in 2016.[6]

[6] In response to SunZia's accusations that Mr. Else is changing his tune, 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

The ALJ's false statement about the lack of WECC approval also relates to the incorrect statement in the following paragraph that "there has been no change in the anticipated use of the lines." As a result of those two incorrect and conclusory statements, permanently memorialized in the Commission's formal decision, the Commissioners failed to fulfill their statutory mandate to balance the benefits of Pattern's new plan of electrical service with impacts to the environment in Arizona. Just moments before the Commissioners voted in 2016, SunZia insisted that its transmission project would not be an exclusive-use "tie-line," and instead assured the Commission that the open access transmission lines would bring grid benefits to Arizona. Opening Br. at 54. This was critical to setting the expectations of the Commissioners at the time.

III. The Court must also remand for the Commission to consider evidence of need under the correct legal standard.

Not only must any ACC order acknowledge the substantial changes described above, in any subsequent hearings for the two new CECs the

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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.

Commission must consider evidence of need under the correct legal standard.

As Mr. Else argued in his opening brief—and argued throughout the proceedings in the court below and before the Commission—the bifurcation resulted in two separate projects. There is now one project owned by Pattern Energy, and a separate project owned by SWPG. Thus, the statutory balancing must be done for each project. That is because the original CEC contemplated a unified project with two lines, at least one of which was to be an AC line. Mr. Else does not dispute that some need for an AC line had been settled by the 2016 proceedings.

But none of that applies to Pattern Energy's new project, which, as noted, may be the only of these two projects ever completed. That project promises unnecessarily to damage the physical environment of the San Pedro Valley when it could be routed anywhere else. Pattern Energy has no interest in a substation in Willow, no interest in proximity to Bowie (where SWPG has a CEC to build a gas-fired plant), and no interest in creating a reliability loop in Tucson, which a DC line cannot do. It does not matter to Pattern Energy, which created this new project in 2022,

whether a second line by a different owner is ever built. *Pattern's* project can be routed literally anywhere.

More still, there is no record evidence of need in Arizona for a DC line. Without the grid benefits of an AC line, the only need to Arizona that could be met is if Arizona customers buy Pattern Energy's power. But unlike all other transmission projects that have ever been approved by the Commission, there was *no* testimony that *any* Arizona utility or customer needed this power. *See* ROA.33 at 105-07 (526:12–528:9) (Pattern's witness refusing to testify whether any power would end up in Arizona). The only testimony was that utilities could use the grid benefits of an AC line. Thus in the 2022 proceedings both SunZia and the Commission relied on *regional*, out-of-state benefits of the new project.

That is where the major questions doctrine came into play. The major questions doctrine only became relevant in this context when the Superior Court unexpectedly extended the Court of Appeal's ruling in *Grand Canyon Trust v. ACC*, 210 Ariz. 30 (Ct. App. 2005). That decision, Mr. Else argued below, only allowed for consideration of out-of-state benefits as long as some in-state benefits had also been established. Yet the Superior Court concluded that the statute allowed for consideration of

exclusively out-of-state benefits. ROA.75 at 7. The Superior Court must have understood that if it held otherwise, there would have been no evidence of need for Pattern's power.

But the Superior Court's decision was an unwarranted extension of the law. And it is that extension which, for the first time, raises the major questions doctrine because, as stated in the opening brief, whether the legislature delegated to the Commission authority to destroy Arizona's environment solely for the power needs of other states is a major question on which it would have spoken clearly. Mr. Else therefore did not waive the argument, which only became relevant as a result of the Superior Court's unwarranted extension of prior caselaw.

The Commission further argues that application of the major questions doctrine here would run afoul of the Dormant Commerce Clause. ACC Br. at 43-44. Nonsense. 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 or advancing the state's "own commercial interests," *see H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949), but rather a requirement of equal treatment. Moreover, it is Arizona land that is being ripped up and

utilized for the purpose. Neither the ACC nor SunZia cites any case—and Mr. Else'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.

On the merits, SunZia mischaracterizes Mr. Else's argument: "Else's major questions doctrine argument requires the Court to conclude that the legislature either: 1) never considered interstate lines; or 2) intentionally excluded them from state regulation." SunZia Br. at 53. Not so. The argument merely requires this Court to conclude what the Court of Appeals already concluded in *Grand Canyon Trust*: that out-of-state needs may be considered in the statutory balancing so long as there is *some* need met in Arizona. 210 Ariz. at 38 (observing that "the statute itself does not require that the need for power be determined based *solely* on the power needs of in-state consumers," and considering such out-of-state needs to the extent that they "affect the availability of power for consumers in Arizona").

SunZia counters that, in the absence of the line siting statute, it would be allowed to construct the transmission lines regardless of who

the ultimate customers were. Therefore, it argues, "if the Commission lacks the authority to regulate interstate projects" under the major questions doctrine, "then no restrictions on interstate projects exist under Arizona law." SunZia Br. at 53. That argument ignores the environmental compatibility requirements. The state legislature enacted the line siting statute precisely because a wild-west regulatory environment of generation facilities and transmission lines was harming the state's actual environment. The statute now prohibits *all* sitings without Commission approval. The baseline is therefore not total freedom to site lines, but rather a blanket prohibition on doing so. Other "major questions" cases have held that the legislature would have *deregulated* more clearly if that is what it had intended to do. *See, e.g.*, *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994) (holding that Congress would have spoken more clearly if it had intended to allow the agency to exempt phone carriers from the central requirements of the Act).

In short, the major questions doctrine maintains that the legislature would not have authorized an agency to engage in major politically or economically consequential decisions without statutory clarity. Here, it would not have authorized the destruction of Arizona lands purely for

the benefit of out-of-state power customers without speaking clearly on the matter.

Nothing in the statute expressly authorizes such an approval. On the contrary, the siting committee must consider that "any significant increase in costs represents a potential increase in the cost of electric energy to the customers or the applicant." A.R.S. § 40-360.06(A)(8). Of course, this means *Arizona* customers; it would be silly to suggest that the legislature tasked the Commission with ensuring cost-effective power was available to residents of other states. And as previously noted, usually statutes do not have extraterritorial effect without stating so expressly. *Farnsworth v. Hubbard*, 78 Ariz. 160, 168 (1954). The Court must therefore reverse the Superior Court and remand to the Commission to consider what, if any, in-state customers will benefit from Pattern Energy's new project.

As described in the opening brief, once the correct inquiry is understood and vague "regional" needs are discounted—and without the grid benefits of an AC line—there is no evidence of substantial need *in Arizona* for Pattern's DC line. The only evidence of any need was the hearsay testimony from Pattern that Pattern was marketing to and was in

"discussions" with utilities in Arizona. The Commission does not respond to this argument; SunZia addresses it. SunZia does not disagree that hearsay evidence alone ordinarily cannot constitute substantial evidence. *See Richardson v. Perales*, 402 U.S. 389 (1971); *Reynolds Metals Co. v. Indus. Comm'n*, 98 Ariz. 97, 102 (1965). But it says the testimony of Pattern Energy's witness, Kevin Wetzel, was not hearsay but rather "expert" testimony. SunZia Br. at 58. Not so. Testimony about discussions that one is having with counterparties is *lay* testimony. It is "eyewitness" testimony about actual facts, not an expert opinion. And in this case, it is also hearsay because for the Commission to have approved the project, it would have had to take Mr. Wetzel's statements for the proposition that Arizona utilities would contract for SunZia's power. That requires taking Wetzel's testimony of the desires of third parties for the truth of the matter asserted.

Perhaps recognizing the weakness of its position, SunZia attempts to establish other record evidence of need. It fails. It primarily argues that "SunZia's customers must pay Arizona utilities to deliver the power from Pinal Central to their contracted delivery points," and that it is "an incontrovertible benefit to Arizona to have electrons paid for by

customers delivered to the grid in Arizona." SunZia Br. at 55. Translation: California customers would at least have to pay transmission companies in Arizona to get the power from Pinal Central to California. But that is not a need the statute recognizes. The statute only recognizes a need for an economical, reliable, and adequate supply of power in Arizona. That Californians might pay Arizona transmission companies to send SunZia's power outside the state has nothing to do with the statutory mandate. More still, SunZia never raised this argument to the Commission, and it is a well-established principle of administrative law that a court can only affirm an agency on the grounds that were before it. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

SunZia next quotes extensively from the record for the proposition that Mr. Else "reimagines the record when he asserts there was no evidence of need in Arizona." SunZia Br. at 55-56. But nothing in the blocks of text it quotes supports a need in Arizona. Those paragraphs reference need in the "Southwest region," "the region," "as a region," and "in the region." Unsurprisingly, SunZia makes no mention whatsoever of the

fact that Pattern's witness refused to testify that there would be any power sold to Arizona despite the imminence of construction, which required signed contracts to be in place. ROA.33 at 105-07 (526:12–528:9). Hence SunZia relies on the Commission's Staff's conclusion that the project "could" help improve reliability and access to power in Arizona. SunZia Br. at 57. But the Staff's point in making that observation was that the need was *speculative*. *See* Opening Br. at 17 (citing sources).

That leads to the final point. The Commission relies heavily on the statement that "[t]his Court must uphold the Superior Court's Decision if it supported by *any* reasonable evidence." ACC Br. at 21 (citing *Sun City Water Co. v. Ariz. Corp. Comm'n,* 113 Ariz. 464, 465 (Ariz. 1976)); *see also id.* at 27. Mr. Else is not entirely sure what is meant by "any reasonable evidence," but it cannot mean any evidence no matter how slight. It is well established that a reviewing court must consider evidence that fairly detracts from the agency's position because any evidence can appear substantial in isolation of all the other evidence adduced at trial. *Universal Camera Corp. v. NRLB*, 340 U.S. 474 (1951). And no one disputes that there is no record evidence that any customer in Arizona needs the DC line. The rest is just hearsay, speculation, or testimony about

regional needs that cannot be considered absent a need in Arizona. A remand is therefore required with instructions for the Committee and Commission to comply with Arizona law and consider what if any need for power *in Arizona* is met by Pattern Energy's single DC line.

Conclusion

The Commission's brief fails to make any serious effort to address the arguments Mr. Else's opening brief raised. Its brief amounts mostly to *ipse dixit* with almost no substantiation in fact or legal argument. This Court must decide which framing of the issues is correct. If the Court agrees that the initial CEC was approved on the basis of promises and representations that have now been put into question, and that the administrative process is designed to ventilate the issues raised by such changes, then it should hold for Mr. Else and remand to the Commission.

Respectfully submitted,

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