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BEFORE THE ARIZONA POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE

IN THE MATTER OF THE APPLICATION OF SUNZIA TRANSMISSION LLC, IN CONFORMANCE WITH THE REQUIREMENTS OF ARIZONA REVISED STATUTES 40-360, ET SEQ., FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING THE SUNZIA SOUTHWEST TRANSMISSION PROJECT, WHICH INCLUDES THE CONSTRUCTION OF TWO NEW 500 KV TRANSMISSION LINES AND ASSOCIATED FACILITIES ORIGINATING AT A NEW SUBSTATION (SUNZIA EAST) IN LINCOLN COUNTY, NEW MEXICO, AND TERMINATING AT THE PINAL CENTRAL SUBSTATION IN PINAL COUNTY, ARIZONA. THE ARIZONA PORTION OF THE PROJECT IS LOCATED WITHIN GRAHAM, GREENLEE, COCHISE, PINAL, AND PIMA COUNTIES.

Docket No. L-00000YY-15-0318-00171

Case No. 171

ORDER DECIDING PARAGRAPH 31 OF PROCEDURAL ORDER OF SEPTEMBER 11, 2015

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Paragraph 31 of the Procedural Order dated September 11, 2015 provided that the Applicant and all other parties and potential parties may file a legal memorandum addressing the following issue:

A.A.C. R14-3-208(F) provides that individual parties may appear at the hearing on their own behalf, whereas all other persons who are parties shall appear only by a licensed attorney. May a domestic nonprofit corporation or association authorized by A.R.S. § 40-360.05(A)(3) to become a party appear, present oral testimony and cross-examine witnesses during the hearing without being represented by a licensed attorney?

1           The Chairman has reviewed Arizona case law, statutes and rules, as well  
2 as correspondence/memoranda submitted on behalf of the Center for Biological  
3 Diversity, the Sierra Club, Grand Canyon Chapter, the Tucson Audubon  
4 Society, Friends of the Aravaipa Region, Cascabel Working Group, Staff of the  
5 Arizona Corporation Commission ("Commission Staff"), and the Applicant  
6 SunZia Transmission, LLC ("Applicant"), and rules as follows.

7           The Arizona Corporation Commission ("Commission") is authorized to  
8 promulgate rules of practice and procedure in matters before the Arizona Power  
9 Plant and Transmission Line Siting Committee ("Line Siting Committee")  
10 ("Committee Rules"). A.R.S. § 40-360.01(D). R14-3-208(F) of the Committee  
11 Rules provides that "Individual parties may appear at the hearing on their own  
12 behalf. All other persons who are parties shall appear only by a licensed  
13 attorney." Parties to a Line Siting Committee certification proceeding include,  
14 but are not limited to:

15           Any domestic nonprofit corporation or association formed in  
16 whole or in part to promote conservation or natural beauty, to  
17 protect the environment, personal health or other biological  
18 values, to preserve historical sites, to promote consumer  
19 interests, to represent commercial and industrial groups, or to  
20 promote the orderly development of the areas in which the  
facilities are to be located, that has filed with the chairman of  
the committee, not less than ten days before the date set for  
the hearing, a notice of intent to be a party.

21 A.R.S. § 40-360.05(A)(3).

22           R14-3-208(F) is clear and unambiguous. Domestic non-profit  
23 corporations or associations authorized to file a notice of intent to be a party in  
24 any certification proceeding shall appear only by a licensed attorney. It is  
25 blackletter law in Arizona that rules prescribing methods of procedure of an  
26 administrative board or commission have the effect of law, are binding on the  
27 board or commission, and must be followed so long as they are in effect. In  
28

1 *George v. Arizona Corp. Comm'n*, 83 Ariz. 387, 322 P.2d 369 (1958), the Court  
2 held as follows:

3 This court has held flatly that rules and regulations prescribing  
4 methods of procedure of an administrative board or  
5 commission,-and specifically the Corporation Commission, -  
6 have the effect of law, are binding on the board or  
7 commission, and must be followed by it so long as they are in  
8 force and effect. *Tucson Warehouse & Transfer Co. v. Al's  
Transfer, Inc.*, [77 Ariz. 323, 271 P.2d 477 (1954)].

8 \*\*\*

9 In *Taylor v. McSwain*, 54 Ariz. 295, 95 P.2d 415, 422 [1939], it  
10 was held that the rules and regulations adopted by the  
11 Unemployment Compensation Commission, under the  
12 authority of statute, have the same force and effect, so far as  
13 their scope is concerned, as law, and all persons affected  
14 thereby, including the Commission, are bound to follow them  
15 so far as they are applicable. The court said in substance that  
16 while the Commission has the power, within statutory limits, to  
17 change its rules and regulations, it was bound by them unless  
18 or until it did change them, and that any action taken by the  
19 Commission must be in conformity with the regulations as they  
20 existed at the time of the action, and not as they might  
21 afterwards be amended. 'Retroactive regulations,' the court  
22 said, 'are just as obnoxious as retroactive laws.'

19 *City of Phoenix v. Sittenfeld*, 53 Ariz. 240, 88 P.2d 83 [(1939)]  
20 and *Welch v. State Board of Social Security and Welfare*, 53  
21 Ariz. 167, 87 P.2d 109 [(1939)], are cases where the Civil  
22 Service Board and the State Board of Social Security and  
23 Welfare, respectively, were similarly held bound to abide by  
24 their own rules, action contrary thereto being declared void.

23 83 Ariz. at 390-391, 322 P.2d at 371; See also, *Clay v. Arizona Interscholastic*  
24 *Ass'n, Inc.*, 161 Ariz. 474, 779 P.2d 349 (1989) (administrative agency must  
25 follow its own rules and regulations and to do otherwise is unlawful), (citing  
26 *Gibbons v. Arizona Corp. Comm'n*, 95 Ariz. 343, 390 P.2d 584 (1964) and B.  
27 Swartz, *Administrative Law* § 5.2 at 204 (2d ed. 1984)); *McKesson Corp. v.*  
28 *Arizona Health Care Cost Containment System*, 230 Ariz. 440, 286 P.3d 784

1 (Ct. App. 2012) (holding an agency must follow its own rules and regulations; to  
2 do otherwise is unlawful); and *Gorman v. Pima County*, 230 Ariz. 506, 287 P.3d  
3 800 (Ct. App. 2012) (same principles of construction that apply to statutes apply  
4 to rules and regulations, and a public entity's regulations, if consistent with its  
5 statutory scheme, are entitled to be given the force and effect of law).

6 Arizona law is clear that the Line Siting Committee must follow the rules  
7 and regulations prescribing methods of procedure as adopted by the  
8 Commission, which have the effect of law, are binding on the Line Siting  
9 Committee, and must be followed by the Line Siting Committee so long as the  
10 rules are in force and effect. It is not the role of the Chairman or the Committee  
11 to rewrite R14-3-208(F) where A.R.S. § 40-360.01(D) expressly gave authority  
12 to the Commission to promulgate rules of practice and procedure before the  
13 Committee. One remedy available to those who argue that a domestic non-  
14 profit corporation or association described in A.R.S. § 40-360.05(A)(3) should  
15 be allowed to be represented by a non-attorney before the Committee is to seek  
16 an amendment to R14-3-208(F).

17 Rule 31(d)(28), Arizona Rules of the Supreme Court, has been cited as  
18 authority that non-profit organizations are authorized to appear in matters  
19 before the Commission where not represented by a licensed attorney, and  
20 therefore non-profit organizations should be authorized to appear in matters  
21 before the Committee without a licensed attorney. Rule 31(d)(28), entitled  
22 "Regulation of the Practice of Law," provides as follows:

23 In matters before the Arizona Corporation Commission, a  
24 public service corporation, an interim operator appointed by  
25 the commission, or a non-profit organization may be  
26 represented by a corporate officer, employee, or a member  
27 who is not an active member of the state bar if:  
28

1 (A) the public service corporation, interim operator, or non-  
2 profit organization has specifically authorized the officer,  
3 employee, or member to represent it in the particular matter,  
4 (B) such representation is not the person's primary duty to the  
5 public service corporation, interim operator, or non-profit  
6 organization, but is secondary or incidental to such person's  
7 duties relating to the management or operation of the public  
8 service corporation, interim operator, or non-profit  
9 organization, and  
10 (C) the person is not receiving separate or additional  
11 compensation (other than reimbursement for costs) for such  
12 representation.

13 Notwithstanding the foregoing provisions, the Commission or  
14 presiding officer may require counsel in lieu of lay  
15 representation whenever it determines that lay representation  
16 is interfering with the orderly progress of the proceeding,  
17 imposing undue burdens on the other parties, or causing harm  
18 to the parties represented.

19 Commission Staff's Response to Procedural Order notes that Rule  
20 31(d)(28) expands upon provisions contained in A.R.S. § 40-243(B) by  
21 extending the provisions of the rule to members of organizations other than  
22 public service corporations as authorized under such statute, and further notes  
23 that the practice of permitting non-attorneys to represent such organizations in  
24 proceedings before the Commission is an ordinary practice. Importantly,  
25 however, Commission Staff's Response correctly notes that Rule 31(d)(28), as  
26 well as A.R.S. § 40-243(B), refer to matters before the Commission, not to  
27 matters before the Line Siting Committee, which Commission Staff concede is a  
28 separate entity. (Commission Response, at 2-3.) In matters before the  
Commission, Title 14, Chapter 3, Article 1 of the Arizona Administrative Code  
sets forth rules of practice and procedure before the Corporation Commission  
(hereinafter "Commission Rules"). The Commission Rules make no provision  
for requiring a non-profit organization to appear before the Commission only  
through a licensed attorney. By contrast, the Committee Rules set forth in Title

1 14, Chapter 3, Article 2 of the Arizona Administrative Code provide in R14-3-  
2 208(F) that any party who is not an individual shall appear only by a licensed  
3 attorney, which is the ordinary practice in matters before the Line Siting  
4 Committee. Simply stated, Rule 31(d)(28) governs proceedings before the  
5 Commission, not the Committee. Interpreting Rule 31(d)(28) as not in conflict  
6 with R14-3-208(F) gives effect to each, consistent with the rules of statutory  
7 construction. *UNUM Life Insurance Company of America v. Craig*, 200 Ariz.  
8 327, 26 P.3d 510 (2001); *Gorman*, 230 Ariz. at 509, 287 P.3d at 803.

9 Moreover, Rule 31(d)(28), as promulgated by the Arizona Supreme  
10 Court, specifically relates to the regulation of the practice of law which is  
11 separate and apart from rules regulating practice and procedure in judicial and  
12 quasi-judicial proceedings. The court in *In the Matter of a Member of the State*  
13 *Bar of Arizona, John Adair Shannon, Jr.*, 179 Ariz. 52, 876 P.2d 548 (1994),  
14 held as follows:

15 Rules regulating the practice of law, from admitting an  
16 attorney to disciplining an attorney, have nothing to do with  
17 regulating "pleading, practice and procedure in judicial  
18 proceedings." Accordingly we find that A.R.S. § 12-109 does  
19 not limit us in the exercise of our jurisdiction over disciplinary  
20 matters. Not only does this interpretation comport with the  
21 plain meaning of the statute's language, but it avoids the  
22 constitutional implications raised by the interpretation that  
23 Respondent urges on the court.

24 A basic tenet of statutory construction is that statutes  
25 should be construed so as be constitutional whenever  
26 possible. *Stillman v. Marston*, 107 Ariz. 208, 209, 484 P.2d  
27 628, 629 (1971) (citations omitted). The interpretation of § 12-  
28 109 that Respondent urges us to adopt would allow the  
legislature to limit this court in determining the range of  
sanctions that we could impose in disciplining an attorney.  
Such an interpretation unnecessarily implicates constitutional  
concerns.

179 Ariz. at 78, 876 P.2d at 574.

1           In the matter before us, the same reasoning applies. Rule 31(d)(28)  
2 regulating the practice of law has nothing to do with regulating “pleadings,  
3 practice and procedure in judicial proceedings.” Rule 31(d)(28) provides that it  
4 is not the unauthorized practice of law for non-attorneys to represent non-profit  
5 organizations in matters before the Commission; it is not a rule of practice or  
6 procedure in matters before state agencies. For example, Rule 31(d)(28) does  
7 not control which non-profit organizations may intervene by right in matters  
8 before the Line Siting Committee. The universe of non-profit organizations  
9 covered by Rule 31(d)(28) is more expansive than those identified in A.R.S. §  
10 40-360.05(A)(3). Arizona statutes and the Committee Rules still govern  
11 pleadings, practice and procedure in matters before the Line Siting Committee,  
12 and R14-3-208(F) requires that a non-profit corporation or association that is a  
13 party in those matters be represented by a licensed attorney. Construing Rule  
14 31(d)(28) as somehow superseding R14-3-208(F) would additionally and  
15 unnecessarily implicate constitutional concerns (namely whether it would violate  
16 separation-of-powers principles for the Supreme Court to dictate procedural  
17 rules for an executive branch agency engaged in quasi-judicial proceedings),  
18 which should be avoided where possible. *In re Shannon*, 179 Ariz. at 78, 876  
19 P.2d at 574.

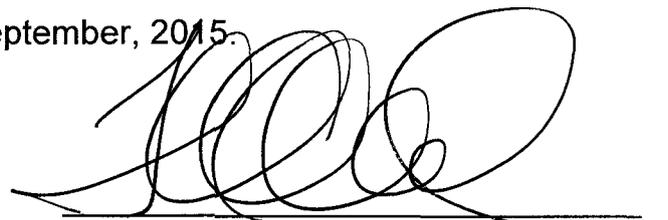
20           The argument has been made that Rule 31(d)(28) was enacted after the  
21 Committee Rules and by implication supersedes R14-3-208(F). However, the  
22 converse is equally true in that the drafters of Rule 31(d)(28) were aware of the  
23 Line Siting Committee, its function and the Committee Rules, and could have  
24 expressly included the Line Siting Committee within Rule 31(d)(28), but did not  
25 do so.

26           Commission Staff’s Response refers to A.R.S. § 40-360.04(C) and R14-  
27 3-202(B) which allow the Chairman acting as a presiding officer, or the  
28 Committee, to require the consolidation of the representation of non-

1 governmental parties having similar interests. To allow individual members of  
2 an environmental group to intervene and then approve the consolidated  
3 representation of the membership of the environmental group by an individual  
4 member thereof, notwithstanding that the member is a non-attorney, still runs  
5 afoul of R14-3-208(F) which specifically prohibits such practice and instead  
6 requires that all non-profit organizations authorized to file a notice of intent to be  
7 a party appear only through a licensed attorney.

8 It is the ruling of the Chairman that R14-3-208(F) provides no discretion in  
9 its requirement that domestic non-profit corporations or associations authorized  
10 by A.R.S. § 40-360.05(A)(3) to become a party, present oral testimony and  
11 cross examine witnesses during the hearing must be represented by a licensed  
12 attorney. Non-profit organizations and associations may make a limited  
13 appearance pursuant to A.R.S. § 40-360.05(B), and provide public comment,  
14 without the requirement to be represented by a licensed attorney.

15 **DATED** this 24th day of September, 2015.

16  
17  
18 

19 Thomas K. Chenal, Chairman  
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1 CERTIFICATION OF MAILING

2 Pursuant to A.A.C. R14-3-204, **ORIGINAL** of the foregoing and 25 copies filed this  
3 **24th** day of September, 2015 with:

4 Utilities Division – Docket Control  
5 ARIZONA CORPORATION COMMISSION  
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