



BEFORE THE ARIZONA POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE

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In the matter of the Application of Southline Transmission, L.L.C., in conformance with the requirements of Arizona Revised Statutes 40-360, et seq., for a Certificate of Environmental Compatibility authorizing construction of the non-WAPA-owned Arizona portions of the Southline Transmission Project, including a new approximately 66-mile 345-kV transmission line in Cochise County from the Arizona-New Mexico border to the proposed Southline Apache Substation, the associated facilities to connect the Southline Apache Substation to the adjacent AEPSCO Apache Substation, and approximately 5 miles of new 138-kV and 230-kV transmission lines and associated facilities to connect the existing Pantano, Vail, DeMoss Petrie, and Tortolita substations to the upgraded WAPA-owned 230-kV Apache-Tucson and Tucson-Saguaro transmission lines in Pima and Pinal counties

Docket No. L-00000AAA-16-0370 -00173

Case No. 173

Arizona Corporation Commission

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SOUTHLINE'S LEGAL MEMORANDUM ON FLPMA AND PREEMPTION

This Legal Memorandum responds to the October 24, 2016 Procedural Order ("Order") requesting parties address the following issue:

Does section 505(a)(iv) of the Federal Land Policy and Management Act apply to any portion of what is described in the Application as the Upgrade Section and owned by Western Area Power Administration ("WAPA"), and if so what portion? Assuming section 505(a)(iv) applies, what are Arizona's substantive line siting standards or are such standards established through the Certificate of Environmental Compatibility ("CEC") process? What information would be necessary to enable the Committee to determine compliance with Arizona's substantive line siting

1 standards? Should the Applicant present such information
2 to the Line Siting Committee at the hearing to allow it, and
3 by extension the Commission, to determine whether the
4 Applicant has met Arizona's substantive standards? (The
5 foregoing questions assume the Applicant does not need to
6 obtain a CEC for the WAPA-owned lines and facilities
7 included in the Upgrade Section.)¹

8 Southline Transmission L.L.C. ("Southline" or "Applicant") agrees with the Order's
9 assumption that a CEC is not required for the WAPA-owned lines and facilities.
10 Below we address the specific questions posed by the Order. To eliminate any
11 potential future uncertainty over whether a CEC is required for WAPA's portion of
12 the line, the Applicant requests that the Line Siting Committee explicitly disclaim
13 jurisdiction over the WAPA-owned lines and facilities.

14 **I. SUMMARY**

15 Because WAPA is a federal agency--and will be the sole entity owning,
16 constructing, and operating certain transmission facilities--state line siting
17 jurisdiction over the WAPA Upgrade Section is preempted absent an unambiguous
18 expression of congressional intent to the contrary. Plainly, state procedural
19 requirements such as the CEC process are not applicable to the WAPA Upgrade
20 Section. Only the approximately 1.5 mile portion of the WAPA Upgrade Section
21 that crosses Bureau of Land Management ("BLM") and National Forest System land
22 is subject to the Federal Land Policy and Management Act ("FLPMA"), and by
23 extension subject to Arizona substantive line siting standards.

24 As a practical matter, the Applicant respectfully submits that the Line Siting
25 Committee need not address state line siting substantive standards compliance for
26 the WAPA Upgrade Section. First, WAPA is not subject to Line Siting Committee
27 jurisdiction and is not an applicant in this proceeding. Second, only a small portion
28 of the WAPA Upgrade Section is subject to Arizona substantive standards. Third,
WAPA has previously constructed electric transmission facilities in Arizona, and the

¹ Procedural Order of October 24, 2016 at 10-11 (citations omitted).

1 Applicant understands that WAPA integrates prudent utility practices in its siting
2 and construction of such facilities and would address issues of compliance with state
3 substantive standards should they arise.

4 **II. THE PROJECT**

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6 On October 14, 2016, Applicant requested a CEC for certain portions of the
7 proposed Southline Transmission project ("Project") located in Arizona. Overall, the
8 Project consists of approximately 370 miles of electric transmission line and
9 associated facilities to be located in southern New Mexico and Arizona. The
10 Arizona portion of the Project includes (i) approximately 66 miles of new 345-kV
11 transmission line and less than one mile of 115-kV or 230-kV transmission line and
12 associated facilities that run from the New Mexico border to the Apache Substation
13 in Cochise County (the "CEC New Build Section"); (ii) approximately 121 miles of
14 existing WAPA-owned 115-kV lines located in Cochise, Pima, and Pinal counties
15 that would be upgraded to 230 kV (the "WAPA Upgrade Section"); and
16 (iii) approximately five miles of new transmission facilities that would be privately
17 owned (the "CEC Upgrade Section").² Southline has requested a CEC for the CEC
18 New Build Section and the CEC Upgrade Section, but does not believe that a CEC is
19 required for the WAPA Upgrade Section.

20 WAPA, a federal agency³ that is not an applicant in this proceeding, solely
21 owns and operates the existing WAPA Upgrade Section facilities, and will solely
22 construct, own, and operate the facilities that would be upgraded to double-circuit
23 230 kV. WAPA planned to upgrade these facilities before the Project was
24 contemplated, and absent the Project would itself upgrade its facilities at some
25 future date. WAPA will use its existing land rights or acquire and own any

25 ² For convenience, Appendix 1 to this brief reproduces a map of the Project facilities that was
26 provided as Exhibit A-1 to the Application.

27 ³ WAPA is one of four power marketing administrations within the U.S. Department of Energy
28 whose role is to market and transmit wholesale electricity from multi-use water projects.

1 additional land rights needed to complete the WAPA Upgrade Section. Although
2 Southline is the developer of the overall Project and will finance the WAPA Upgrade
3 Section facilities, neither Southline nor any other private entity will construct or
4 have ownership of those facilities. Similarly, Southline will have certain capacity
5 rights on the WAPA Upgrade Section, but those rights merely reflect contractual
6 rights to transmit designated amounts of electric power across the line and do not
7 constitute physical ownership rights.

8 **III. FEDERAL PREEMPTION OF STATE SITING AUTHORITY**

9 The U.S. Supreme Court has held that the supremacy principle⁴ mandates
10 that "the activities of the Federal Government are free from regulation by any
11 State."⁵ The Court observed that

12 [b]ecause of the fundamental importance of the principles
13 shielding federal installations and activities from regulation
14 by the States, an authorization of state regulation is found
15 only when and to the extent that there is a "clear
16 congressional mandate," "specific congressional action" that
17 makes this authorization "clear and unambiguous."⁶

18 Thus, the activities of a federal agency such as WAPA are "wholly immune
19 from local control unless it can be established that Congress" has unequivocally
20 directed that the agency be subject thereto.⁷ Applying that principle, courts have
21 held that requiring a federal agency to receive a state certificate prior to building an

22 ⁴ This principle is based on the Supremacy Clause of the U.S. Constitution: "This Constitution and the
23 Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which
24 shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and
25 the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State
26 to the Contrary notwithstanding." U.S. Const. Art. VI. Cl. 2.

27 ⁵ See, e.g., *Hancock v. Train*, 426 U.S. 167, 178 (1976).

28 ⁶ *Id.*

⁷ *United States v. 14.02 Acres of Land More or Less in Fresno County*, 547 F.3d 943 (9th Cir. 2008) ("*Fresno County*").

1 electric transmission line "impl[ies] that the state could deny the application, which
2 would give them a veto power over the federal project."⁸ A Congressional intent to
3 subordinate itself to state law thus requires "strong[] language," given the
4 unlikelihood that Congress would delegate "such an important function as the
5 decision of whether and where to distribute electric power from federal facilities to
6 total state control."⁹ For example, in *Columbia Basin* the court found that the
7 Bonneville Power Administration ("BPA"), a federal agency, was not required to
8 obtain line siting approval from the Washington public utility commission under
9 principles of federal preemption, but based on congressional intent expressed in the
10 FLPMA, the statute on which the Chairman has requested briefing, BPA was
11 required to comply with state substantive requirements concerning emissions.¹⁰ The
12 court required BPA to submit information relevant to substantive standards¹¹ to the
13 siting council to enable it to determine whether BPA met those standards.

14 While the FLPMA expresses Congressional intent that federal agencies
15 comply with state substantive standards in certain circumstances, it does not require
16 that federal agencies comply with those requirements on all lands. Section 505(a)(iv)
17 of FLPMA provides:

18 Each right-of-way shall contain (a) terms and conditions
19 which will ... (iv) require compliance with State standards
20 for public health and safety, environmental protection, and
21 siting, construction, operation, and maintenance of or for
rights-of-way for similar purposes if those standards are
more stringent than applicable Federal Standards.¹²

22 ⁸ *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 605 (9th Cir. 1981) ("*Columbia*
23 *Basin*").

24 ⁹ *Id.*

25 ¹⁰ *Id.* at 603-04.

26 ¹¹ For example, BPA was required to submit a description of proposed construction and an indication
27 of the federal, state, and industry criteria used in the siting process.

28 ¹² 43 U.S.C. § 1765.

1 Because the FLPMA only applies to certain federal land, federal agencies are *not*
2 required to comply with state substantive standards on state or private lands.¹³ In
3 *Montana*, the court held that BPA was required to comply with state substantive
4 standards where the transmission line crossed public lands administered by BLM
5 and forest lands administered by the Secretary of Agriculture (lands covered by the
6 FLPMA), but not where the BPA transmission line crossed state and private lands.

7 The courts have applied the preemption principle specifically to WAPA in
8 circumstances analogous to those presented here.¹⁴ In *Fresno County*, a new 500-kV
9 transmission line and associated land that was the most significant part of the
10 transmission upgrade was wholly owned by WAPA.¹⁵ The project was financed
11 “substantially” with non-federal funds,¹⁶ and while WAPA wholly owned the Path
12 15 upgrade line, it retained only 10 percent of the associated capacity rights and
13 relinquished operational control to the California Independent System Operator.
14 The Ninth Circuit Court of Appeals held that because there was no unequivocal
15 congressional intent to override the presumption of preemption concerning WAPA’s
16 construction of a transmission line, “California law is pre-empted and WAPA is not

17 _____
18 ¹³ *Montana v. Johnson*, 738 F.2d 1074 (9th Cir. 1984) (“*Montana*”) (holding FLPMA section 505(a)(iv) did
19 not require BPA to obtain state certification for an electric transmission line but did require
compliance with specific state substantive requirements on federal lands, not state or private lands).

20 ¹⁴ An earlier Line Siting Committee case in which a CEC was issued for a project in which WAPA was
21 one of several participants is easily distinguished by the fact that, there, WAPA did not wholly own,
22 and did not plan to construct, any segment. In Case No. 70, Salt River Project (“SRP”) filed an
23 application for a CEC for a new 500-kV transmission line. WAPA was one of several project
24 participants and would operate and maintain the line and own the rights-of-way, while the Southern
25 California Public Power Authority would own the line and SRP would build it. See Application for
26 Certificate of Environmental Compatibility, Case No. 70 at 1.

27 ¹⁵ *Fresno County*, 547 F.3d at 949.

28 ¹⁶ Trans-Elect provided the bulk of the project funding and retained roughly 72 percent of the
capacity rights on the line. See Path 15 Upgrade Project Fact Sheet, available at
<http://www.datcllc.com/wp-content/uploads/2015/02/DATC-Path15-2015FEB-web.pdf> (DATC is
the successor in interest to Trans-Elect).

1 required to comply therewith in constructing the congressionally-authorized Path 15
2 upgrade."¹⁷

3 **IV. SPECIFIC QUESTIONS INCLUDED IN ORDER**

4
5 **A. Does section 505(a)(iv) of the Federal Land Policy and Management Act**
6 **apply to any portion of what is described in the Application as the Upgrade**
7 **Section and owned by Western Area Power Administration ("WAPA"), and**
8 **if so what portion?**

9 FLPMA section 505(a)(iv) applies to only the minor portions of the WAPA
10 Upgrade Section that cross either BLM-administered public lands or Secretary of
11 Agriculture-administered national forest land.¹⁸ By its own terms, the FLPMA does
12 not apply broadly to any land right held by a federal agency. The FLPMA only
13 authorizes the Secretary of Interior with respect to public lands and the Secretary of
14 Agriculture with respect to lands within the National Forest System to grant, issue,
15 or renew electric transmission rights-of-way.¹⁹ Section 505(a)(iv) of the FLPMA in
16 turn requires that each right-of-way grant under the act comply with state
17 substantive standards.²⁰ Public lands are defined by the FLPMA as "any land and
18 interest in land owned by the United States within the several States and
19 administered by the Secretary of the Interior through the Bureau of Land
20 Management, without regard to how the United States acquired ownership, except
21 (1) lands located on the Outer Continental Shelf; and (2) lands held for the benefit of
22 Indians, Aleuts, and Eskimos."²¹ Therefore, state substantive standard compliance
under the FLPMA only applies to National Forest System and BLM-administered
lands.

23 ¹⁷ *Fresno County*, 547 F.3d at 953-54.

24 ¹⁸ See 43 U.S.C. § 1761(a); *Montana*, 738 F.2d at 1080-81.

25 ¹⁹ 43 U.S.C. § 1761(a).

26 ²⁰ See 43 U.S.C. § 1765.

27 ²¹ 43 U.S.C. § 1702(e).

1 The WAPA Upgrade Section crosses approximately 1.5 miles of land
2 administered by the BLM or the National Forest System in Pima and Cochise
3 Counties.²² Thus, FLPMA section 505(a)(iv) would apply to right-of-way for only
4 approximately 1 percent of that section's length. FLPMA section 505(a)(iv) does not
5 apply to the remaining approximately 120 miles of right-of-way for the WAPA
6 Upgrade Section located on state- or privately-owned lands, lands already owned by
7 WAPA, or federal lands outside the National Forest System and BLM.

8 **B. What are Arizona's substantive line siting standards or are such standards**
9 **established through the Certificate of Environmental Compatibility ("CEC")**
10 **process?**

11 Arizona's statutory scheme does not include any substantive line siting
12 "standards," as the Ninth Circuit has construed that term. To be a "standard"
13 within the meaning of the FLPMA, a requirement must provide "detailed regulation
14 of future activities," rather than being so "subjective and vague" that the
15 requirement, by itself, "would be incapable of offering any guidance" to the federal
16 authorities in determining compliance.²³ Arizona's line siting statutes do not
17 provide sufficiently specific guidance to be deemed "standards," requiring instead a
18 broad and subjective determination, based on the "consideration" of nine general
19 factors, of whether "in the broad public interest, the need for an adequate,
20 economical and reliable supply of electric power" is on balance "with the desire to
21 minimize the effect thereof on the environment and ecology of this state."²⁴ Such a
22 requirement is arguably broader than the general regulation found insufficient to be
23 deemed a "standard" in *Montana*, and is far too vague and subjective to provide the
requisite guidance to the federal authorities who would be bound by its terms

24 ²² See Application Ex. B-1 at Table 2-7 (Southline Transmission Line Project Final Environmental
25 Impact Statement).

26 ²³ See *Montana*, 738 F.2d at 1077-78 (holding that a requirement of "minimum adverse impact" was
27 too subjective and vague to serve as a "standard" within the meaning of the FLPMA).

28 ²⁴ Arizona Revised Statutes § 40-360.07(B) ("A.R.S.").

1 consistent with FLPMA.²⁵ The Arizona Administrative Code ("A.A.C.") provisions
2 governing line siting matters offer no additional substantive guidance, but simply
3 require a CEC applicant to provide evidence of the nine statutory factors that must
4 be considered by the Arizona Corporation Commission ("Commission") in making
5 its determination.²⁶

6 A.R.S. §§ 40-360.06(C) and (D) provide that all CECs include conditions that
7 require compliance with certain standards that could be deemed substantive
8 standards to the extent they "concretely regulate how a [person] should construct
9 and operate the power line."²⁷ Accordingly, Arizona's CEC process may produce
10 route specific conditions that arguably qualify as "substantive standards" under
11 applicable case law.²⁸ For example, the Commission commonly imposes conditions
12 on its grant of a CEC that require:

- 13 • Compliance with all applicable water use, discharge and/or disposal
14 requirements of the Arizona Department of Water Resources and the
15 Arizona Department of Environmental Quality;
- 16 • Compliance with the notice and salvage requirements of the Arizona
17 Native Plant Law and the need, to the extent feasible, to minimize the
18 destruction of native plants during Project Construction; and
- 19 • Compliance with the Arizona Game and Fish Department guidelines
20 for handling protected animal species, should any be encountered
21 during construction.

22 To the extent the Line Siting Committee establishes specific requirements
23 applicable to the non-WAPA Upgrade Section portions of the Project that are before
24 it, those requirements could be viewed as state substantive requirements. However,
25

26 ²⁵ See *Montana*, 738 F.2d at 1077. See also *Romero-Barcelo v. Brown*, 643 F.2d 835, 855-856 (1st Cir. 1981),
27 reversed on other grounds, *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

28 ²⁶ See A.A.C. R14-3-219.

²⁷ See A.R.S. §§ 40-360.06(C) & (D); *Montana*, 738 F.2d at 1078.

²⁸ See *Montana*, 738 F.2d at 1078.

1 because the FLPMA applies only to BLM and National Forest System land,²⁹ WAPA
2 would only be required to comply with those conditions for 1.5 miles of the WAPA
3 Upgrade Section. Moreover, as the Commission recently made plain, WAPA should
4 not be subject to generic regulations that otherwise do not apply to the federal
5 portion of the WAPA Upgrade Section.³⁰

6 Even if certain CEC conditions may meet the definition of a "standard," those
7 conditions cannot subject WAPA to the CEC certification process. As previously
8 discussed, state jurisdiction over WAPA is preempted except in certain narrow
9 instances and, while WAPA may be bound by specific state substantive
10 requirements for limited portions of its route, it is not and cannot be required to be a
11 party to the line siting proceeding.³¹ At most, to the extent the Commission imposes
12 conditions on the Southline CEC and those conditions also apply to the 1.5 miles of
13 the WAPA Upgrade Section on BLM and National Forest System land, WAPA may
14 have to comply with those conditions.

15 **C. What information would be necessary to enable the Committee to
16 determine compliance with Arizona's substantive line siting standards?**

17 A threshold issue—separate from whether WAPA must comply with
18 Arizona's substantive line siting standards—concerns the jurisdiction of the
19 Commission and the Line Siting Committee to determine *whether* WAPA has
20 complied with any such applicable standards for land underlying the WAPA
21 Upgrade Section. As discussed above, WAPA is a federal entity not subject to the
22 CEC process, and it is not an applicant in this proceeding. Thus, the Applicant does
23 not believe that the issue of WAPA Upgrade Section compliance with Arizona

24 ²⁹ See 43 U.S.C. § 1761(a); *Montana*, 738 F.2d at 1080.

25 ³⁰ See ACC Docket No. L-00000ZZ-16-0269-00172 (During the Open Meeting where White Wing
26 Ranch North's CEC was approved, the Commissioners agreed with the Applicant and the Line Siting
27 Committee that otherwise "boilerplate" conditions may be excluded from the CEC if they have no
28 bearing on the Applicant's specific route.).

³¹ See *Columbia Basin*, 643 F.2d at 605 (9th Cir. 1981) (holding that, while the BPA must comply with
Washington state standards, it is not required to go through the certification process).

1 substantive line siting standards is properly before the Line Siting Committee.
2 Assuming, *arguendo*, that the issue were properly before the Line Siting Committee,
3 it would only be with respect to the 1.5-mile portion of the WAPA Upgrade Section
4 identified above that is subject to the FLPMA.

5 Regardless, Applicant believes that it has provided sufficient information to
6 determine compliance with any applicable Arizona substantive line siting standards.
7 First, Application Exhibit B-1 contains a copy of the Final Environmental Impact
8 Statement ("Final EIS") issued jointly by WAPA and BLM. That Final EIS contains
9 voluminous environmental and route selection data and analysis. Second,
10 Application Exhibit B-3 contains the BLM Record of Decision ("ROD"). That
11 document includes the Project Plan of Development, which contains extensive detail
12 on Project facilities, construction techniques, and environmental mitigation
13 measures. The BLM ROD considers all the factors that the Line Siting Committee is
14 required by statute to consider. See, for example, the BLM ROD's discussion of the
15 air quality impact (Application Exhibit B-1 at 14.19); the impact on cultural resources
16 (Application Exhibit B-1 at 14.95); the impact on visual resources (Application
17 Exhibit B-1 at 14.96); and methods to minimize environmental impact (Application,
18 Exhibit B, Table 8 in the Plan of Development at 14.102).

18 **D. Should the Applicant present such information to the Line Siting Committee**
19 **at the hearing to allow it, and by extension the Commission, to determine**
20 **whether the Applicant has met Arizona's substantive standards?**

21 The Applicant in this proceeding is Southline; WAPA is not an applicant. As
22 discussed herein, the Line Siting Committee does not have jurisdiction or authority
23 over WAPA to require it to comply with applicable Arizona substantive standards.
24 That said, as a practical matter it would be both inefficient and unnecessary for
25 Southline to present, and the Line Siting Committee to consider in this proceeding,
26 information concerning WAPA Upgrade Section compliance with Arizona
27 substantive standards.

28 Any concerns with WAPA's compliance with Arizona substantive standards
should be addressed outside of this proceeding. The Applicant understands that

1 WAPA previously has constructed electric transmission lines in Arizona in a
2 prudent manner. Thus, the Line Siting Committee should address WAPA
3 compliance with Arizona substantive standards for the WAPA Upgrade Section in
4 the same way that it would address any other WAPA transmission project in
5 Arizona.

6 Finally, the Applicant believes it has provided sufficient information in its
7 Application to enable the Line Siting Committee to evaluate WAPA compliance with
8 applicable state substantive standards. That information includes details on the
9 proposed structures and conductors; a copy of the Final EIS; and copies of the BLM
10 and WAPA Records of Decisions. No additional information should be required
11 from the Applicant.

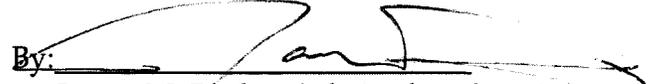
12 **V. CONCLUSION**

13 The Applicant respectfully submits that the Line Siting Committee need not
14 address state line siting substantive standards compliance for the WAPA Upgrade
15 Section. First, WAPA is not subject to Line Siting Committee jurisdiction and is not
16 an applicant in this proceeding. Second, only the approximately 1.5 mile portion of
17 the WAPA Upgrade Section that crosses BLM and National Forest System land is
18 subject to FLPMA, and by extension subject to Arizona substantive line siting
19 standards. Third, WAPA has previously constructed electric transmission facilities
20 in Arizona and integrates prudent utility practices in the construction and operation
21 of those facilities.

22 To eliminate any potential future uncertainty over whether a CEC is required,
23 Southline requests that the Line Siting Committee explicitly disclaim CEC
24 jurisdiction over the WAPA Upgrade Section.
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1 RESPECTFULLY SUBMITTED this 9th day of November, 2016.

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