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BEFORE THE ARIZONA POWER PLANT AND TRANSMISSION LINE SITING COMMITTEE

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 AEP CO 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.

CASE NO. 173 DOCKET NO. L-00000AAA-16-0370-00173

MEMORANDUM OUTLINING LEGAL ISSUES AND ANALYSIS OF ISSUES

REC'D AZ CORP COMMISSION DOCKET CONTROL 2016 NOV 18 PM 1 37

Arizona Corporation Commission

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At the Pre-Hearing Conference held on November 16, 2016, Chairman Chenal directed that Intervenor, the Irrigation & Electrical Districts' Association of Arizona ("IEDA"), on behalf of itself and its Members¹ and Associate Members², submit a memorandum outlining

¹ Ak-Chin Energy Services, Buckeye Water Conservation & Drainage District, Electrical District No. 3, Electrical District No. 4, Electrical District No. 6, Electrical District No. 7, Harquahala Valley Power District, Hohokam Irrigation & Drainage District, Maricopa County Municipal Water Conservation District No., Roosevelt Irrigation District, Tonopah Irrigation District, Wellton-Mohawk Irrigation and Drainage District.

1 the legal issues and its analysis of the legal issues raised by IEDA's exhibits to Chairman
2 Chenal by close of business on Friday, November 18, 2016. Responses to this memorandum
3 were ordered to be submitted by Wednesday, November 23, 2016. Any Replies were required
4 to be filed prior to the Hearing. In accordance with Commissioner Chenal's request, IEDA
5 herewith submits the following memorandum.

6 **THE QUESTION PRESENTED**

7 On September 17, 2015, the Federal Energy Regulatory Commission ("FERC") issued
8 an Order Granting Petition for Declaratory Order in Southline Transmission, L.L.C. and SU
9 FERC, L.L.C., Docket No. EL15-65-000 ("FERC Order").³ The FERC Order made a finding
10 that Southline is a passive entity and therefore not a public utility under the Federal Power Act
11 ("FPA") or an electric utility company under the Public Utility Holding Company Act of 2005
12 ("PUHCA 2005").⁴

13 IEDA's primary concern is that the record in this proceeding be complete and support
14 whatever decision the Arizona Power Plant and Transmission Line Siting Committee (the
15 "Committee") recommends and the Arizona Corporation Commission (the "Commission")
16 approves. As will be seen from the FERC Order, a number of our Members and Associate
17 Members participated as the Southwest Transmission Dependent Utility Group ("SWTDUG")
18 in the proceeding before the Federal Energy Regulatory Commission ("FERC") filed by the
19 Applicant, Southline Transmission, L.L.C. ("Southline") and SU FERC, L.L.C. ("SU FERC").
20 The FERC Order in that proceeding is our exhibit IED-A.

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23 ² Aguila Irrigation District, Central Arizona Water Conservation District, Electrical District No. 8, McMullen Valley
24 Water Conservation and Drainage District, Page Electric Utility, The City of Safford, Salt River Project, San
25 Carlos Irrigation Project, The Town of Thatcher, Yuma County Water Users Association, Yuma Irrigation District,
Yuma-Mesa Irrigation and Drainage District

³ See IEDA Notice of Filing of Exhibits, dated November 15, 2016, (Exhibit IED-A: Order Granting Petition for
Declaratory Order, Docket No. EL15-65-000, 152 FERC ¶ 61,211, September 17, 2015).

⁴ FERC Order, pp.26-7.

1 Thus, SU FERC demonstrates that they are soliciting and representing that they have
2 the capacity to execute transmission contracts, and FERC has retained jurisdiction over it.

3 However FERC might define these entities under the Federal Power Act, these
4 pronouncements present factual determinations. Query then how they impact this process and
5 the status of Southline?

6 ARIZONA STATUTORY PROVISIONS

7 A.R.S. § 40-360(11) defines a “utility” as “any person engaged in the generation or
8 transmission of electric energy.” (Emphasis supplied.) While any “person” contemplating
9 construction of any transmission line can file a plan with the Commission (A.R.S. § 40-
10 360.02(B)), and might have an application rejected (A.R.S. § 30-360.02(E)), the application
11 statutes use the term “utility”, not person, viz. applications for Certificates of Environmental
12 Compatibility (“CEC”). A.R.S. § 360.03. This distinction in terms (person v. utility) was
13 placed in these statutes in 1971. The Legislature has revisited this Article several times since
14 then and the distinction remains. Under Arizona law, using different terms indicates legislative
15 intent to convey different meaning.⁶

16 NEXT STEPS

17 If, then, the applicant must be a utility, is the use of the present tense (“engaged”),
18 rather than the past tense (“has been engaged”) or the future tense (“will be engaged”)
19 significant? If Southline has not, is not, and will not for the Southline Project be engaged in
20 generation or transmission, is this a problem? Does our statute say that you already have to be
21 a utility in order to build transmission? If so, how does one start a utility? Would joining SU
22 FERC as a co-Applicant make this issue go away?

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25 ⁶ *Home Builders Ass's of Cent. Arizona v. City of Scottsdale*, 187 Ariz. 479, 930 P.2d 993 (1997), cert. den. 521
U.S. 1120. Indeed, this is a universally held tenet of statutory construction. *Statutory Interpretation: General
Principles and Recent Trends*, Congressional Research Service, #7-5700, December 19, 2001, p.15.

1 We have been unable to find precedent at this point that might shed further light on this
2 issue. Because the issue is one of subject matter jurisdiction, i.e., the ability of the Committee
3 and the Commission to entertain this Application, we believe a definitive answer is warranted
4 in order to have a complete record in this matter. Were the answer to join SU FERC as an
5 applicant, IEDA would support that joinder.

6 Whatever the answer, we believe the question must be answered as an essential element
7 of this proceeding.

8 RESPECTFULLY SUBMITTED this 18th day of November, 2016.

9
10 By /s/ Robert S. Lynch
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21 ORIGINAL & 25 copies of the
22 foregoing were filed with Docket
23 Control on the 18th day of November, 2016.

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