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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 AEPCO 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

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**SOUTHLINE TRANSMISSION'S LEGAL MEMORANDUM ON  
SOUTHLINE TRANSMISSION AS THE CEC APPLICANT**

This Legal Memorandum responds to the Irrigation & Electrical Districts Association's ("IDEA") November 18, 2016 Memorandum concerning whether Southline Transmission, L.L.C. ("Southline Transmission") is the correct applicant to request a certificate of environmental compatibility ("CEC") for the Southline Transmission Project ("Southline Project").

As discussed in detail below, Southline Transmission is the proper applicant to request a CEC for the Southline Project, and it is not appropriate to join SU FERC as a co-applicant as IEDA suggests. Southline Transmission is the only entity that is planning and proposes to construct the CEC Proposed Route portion of the

1 Southline Project that is before the Arizona Power Plant and Line Siting Committee  
2 (“Committee”). The potential issues raised by IEDA are based on a different  
3 statutory scheme than that underlying the Arizona CEC process and involve a  
4 discretionary waiver of Federal Power Act (“FPA”) jurisdiction over Southline  
5 Transmission by the Federal Energy Regulatory Commission (“FERC”). Moreover,  
6 concluding that Southline Transmission—the entity that will construct and own the  
7 proposed transmission facilities—is not the proper applicant would yield one of two  
8 unreasonable results: (1) an entity that is currently not providing utility service  
9 cannot apply for a CEC—a plainly incorrect interpretation of the relevant statutory  
10 scheme particularly in light of the recent grant of a CEC to SunZia Transmission,  
11 LLC (“SunZia”)<sup>1</sup>; or (2) no CEC is required for a non-utility to construct a  
12 transmission line, which would be contrary to sound public policy and governing  
13 law.

## 14 I. BACKGROUND

### 15 A. The FERC Declaratory Order

16 Underlying the IEDA brief is a May 11, 2015 Southline Transmission and SU  
17 FERC petition for a FERC declaratory order finding that, *inter alia*, Southline  
18 Transmission would not be a “public utility” under Section 201(e) of the FPA or an  
19 “electric utility company” under the Public Utility Holding Company Act of 2005  
20 (“PUHCA”) because of its ownership interest in the Southline Project.<sup>2</sup> There, the  
21 applicants explained that Southline Transmission would construct the portions of  
22 the Project not owned by the Western Area Power Administration (“WAPA”) and  
23 would lease those transmission facilities to SU FERC, which would operate the  
24 facilities. Applicants explained that Southline Transmission would not control

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26 <sup>1</sup> *In re SunZia Transmission, LLC*, Docket No. L-00000YY-15-0318-00171, Decision No. 75464 (Feb. 22,  
2016) (“Case 171”).

27 <sup>2</sup> *Southline Transmission, L.L.C., and SU FERC, L.L.C., Petition for Declaratory Order* (May 11, 2015)  
28 (“FERC Petition”).

1 capacity reservations on or transmission service over the Southline Project but  
2 would function as a passive investor and transmission project developer.

3 Consistent with its longstanding precedent, on September 15, 2015, FERC  
4 granted the requested disclaimer of jurisdiction, determining that Southline  
5 Transmission would not be a “public utility” under the FPA or an “electric utility  
6 company” under PUHCA.<sup>3</sup> Although Southline Transmission, as an “owner” of  
7 facilities subject to FERC’s jurisdiction, would technically be subject to FERC’s  
8 “public utility” jurisdiction, FERC exercised its discretion to waive such  
9 jurisdiction.<sup>4</sup>

10 **B. CEC Application**

11 Pursuant to section 40-360.03 of the Arizona Revised Statutes, “Every utility  
12 planning to construct a plant, transmission line or both in this state shall first file  
13 with the commission an application for a certificate of environmental compatibility.”  
14 A “utility” is defined as “any person engaged in the generation or transmission of  
15 electric energy,”<sup>5</sup> and a “person” is defined as “any state or agency or political  
16 subdivision thereof, or any individual, partnership, joint venture, corporation, city  
17 or county, whether located within or without this state, or any combination of such  
18 entities.”<sup>6</sup> The statute does not say that only a utility may request a CEC, merely  
19 that a utility (a broadly defined term) planning to construct a transmission line  
20 “shall” request a CEC.

21 On October 14, 2016, Southline Transmission requested a CEC for certain  
22 portions of the proposed Southline Project located in Arizona because it is planning  
23 to construct a transmission line in Arizona. Southline Transmission previously had  
24 submitted a Ten Year Plan in compliance with A.R.S. § 40-360.02. The “CEC

25 <sup>3</sup> *Southline Transmission, L.L.C.*, 152 FERC ¶ 61,112 (2015) (“FERC Declaratory Order”).

26 <sup>4</sup> FERC Declaratory Order at P 74.

27 <sup>5</sup> A.R.S. § 40-360(11).

28 <sup>6</sup> A.R.S. § 40-360(8).

1 Proposed Route” portion of the Project includes (i) approximately 66 miles of new  
2 345-kV transmission line and less than one mile of 115-kV or 230-kV transmission  
3 line and associated facilities that run from the New Mexico border to the Apache  
4 Substation in Cochise County (the “CEC New Build Section”); and  
5 (ii) approximately five miles of new transmission facilities that would be privately  
6 owned to interconnect with the approximately 121 miles of upgraded 230-kV  
7 facilities owned and operated by WAPA (the “CEC Upgrade Section”). As  
8 presented in the CEC application, Southline Transmission would construct and own  
9 the CEC New Build Section and the CEC Upgrade Section.

10 **C. Question Raised by IEDA**

11 IEDA has recently raised the issue of whether Southline Transmission is the  
12 correct applicant in this proceeding. At the November 16, 2016 prehearing  
13 conference, IEDA stated that if the representations made in the FERC Petition are  
14 accepted as fact, and applied to the definitions in Arizona, “there may be some  
15 question about whether or not Southline is a, quote, utility.”<sup>7</sup> In its November 18,  
16 2016 Legal Memo, IEDA again raises this question, but it does not appear to take a  
17 position on the ultimate question.

18 **II. SOUTHLINE TRANSMISSION IS THE CORRECT APPLICANT FOR THE**  
19 **SOUTHLINE PROJECT CEC.**

20 **A. The Petition for Declaratory Order and FERC’s Discretionary Disclaimer of**  
21 **Jurisdiction Are Consistent With Southline Transmission’s Application for a**  
22 **CEC.**

23 The FERC Petition and subsequent Declaratory Order involve a federal  
24 statute – the FPA – that has a distinctly different purpose and structure than A.R.S. §  
25 40-360.03. The purpose of the Arizona statute is to regulate the siting and  
26 construction of a transmission line. In contrast, the FPA does not regulate or certify  
27 the location of interstate electric transmission lines, but instead generally regulates  
28 the operation and rates for such transmission lines.

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<sup>7</sup> Tr. at 17 (Nov. 16, 2016).

1 FERC has determined that, as a matter of policy in certain instances where a  
2 transmission developer or passive financing entity would technically be subject to its  
3 jurisdiction under the FPA, FERC may nevertheless disclaim jurisdiction. That is  
4 precisely what happened in the Declaratory Order. Southline Transmission will  
5 develop the Southline Project, but it will turn over operational control of the  
6 transmission facilities comprising the Southline Project to SU FERC. For that reason,  
7 Southline Transmission would not provide FERC-jurisdictional transmission service.  
8 The Petition explained that “when energized, Southline Transmission’s portion of  
9 the Project would constitute an electric transmission facility that is subject to  
10 [FERC’s] ‘public utility’ jurisdiction.”<sup>8</sup> Under the FPA and FERC’s implementing  
11 regulations, a “public utility” is defined to include any person that owns  
12 jurisdictional facilities, and is subject to comprehensive regulation with respect to  
13 rates, terms and conditions of jurisdictional service, securities issuances, corporate  
14 governance, and related matters. However, FERC has determined that, in certain  
15 instances, finding that the technical owner of jurisdictional facilities is a “public  
16 utility” would “raise form over substance and restrict the availability of services  
17 needed by operating companies that perform the traditional functions of a public  
18 utility.”<sup>9</sup>

18 Similarly, FERC determined that Southline Transmission would not be an  
19 “electric utility company” under PUHCA. PUHCA defines an “electric utility  
20 company” as “any company that owns or operates facilities used for the generation,  
21 transmission, or distribution of electric energy for sale.”<sup>10</sup> FERC’s PUHCA  
22 regulations specifically provide that “the owner-lessors and owner participants in  
23 lease financing transactions involving utility assets” will not be regulated as “electric  
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25 <sup>8</sup> FERC Petition at 17.

26 <sup>9</sup> See *Nevada Power Co., Sierra Pacific Power Co., and Great Basin Transmission, LLC*, 133 FERC ¶ 61,666,  
27 at P 33 (“*Nevada Power*”).

28 <sup>10</sup> 42 U.S.C. § 16451(5) (2012).

1 utility companies.”<sup>11</sup> Southline Transmission will execute a long-term lease of all of  
2 its ownership interests and associated capacity rights in the Southline Project to SU  
3 FERC.<sup>12</sup> Accordingly, FERC determined that Southline Transmission would not be  
4 an “electric utility company” under PUHCA.

5 **B. The Circumstances of FERC’s Disclaimer of Jurisdiction do not Preclude**  
6 **Southline Transmission From Being a CEC Applicant.**

7 Although FERC has disclaimed “public utility” jurisdiction over Southline  
8 Transmission, allowing Southline Transmission to be the “utility” applicant of a  
9 CEC application is fully consistent with Arizona’s statutory scheme. FERC’s  
10 disclaimer of jurisdiction applies to FPA § 201(e) and PUHCA,<sup>13</sup> and it does not  
11 extend beyond those statutory provisions.

12 Nothing in the Arizona statute precludes Southline Transmission from  
13 applying for a CEC. Under Arizona law, “Every utility planning to construct a  
14 plant, transmission line or both in this state shall first file with the commission an  
15 application for a certificate of environmental compatibility.”<sup>14</sup> The applicable statute  
16 also provides that “[n]o utility may construct a plant or transmission line within this  
17 state until it has received a certificate of environmental compatibility from the  
18 committee with respect to the proposed site”<sup>15</sup> The statute does not, however, state  
19 that only a utility may apply for a CEC; merely that a “utility” must do so before it  
20 can construct a transmission line.

21 As a matter of both law and public policy, it would be illogical to determine  
22 that a transmission developer planning to construct a project in Arizona cannot

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23 <sup>11</sup> 18 C.F.R. § 366.1 (2016). While neither PUHCA nor the Commission’s regulations defines the term  
24 “utility assets,” the definition of that term in PUHCA § 2(a)(18) includes the facilities of any electric  
25 utility company used for the transmission of electric energy. *See* 15 U.S.C. § 79b(a)(18).

26 <sup>12</sup> FERC Petition at 16.

27 <sup>13</sup> FERC Declaratory Order at P 74.

28 <sup>14</sup> A.R.S. § 40-360.03.

<sup>15</sup> A.R.S. § 40-360.07.

1 apply for a CEC. To do so would lead to one of two unreasonable results. First, to  
2 determine that an entity that plans to construct a transmission facility but that is not  
3 currently "engaged in the . . . transmission of electric energy" (*i.e.*, the Arizona  
4 definition of a utility) cannot apply for a CEC is plainly incorrect under governing  
5 law.<sup>16</sup>

6 Second, to determine that an entity that plans to construct a transmission  
7 facility but that is not currently engaged in the transmission of electric energy cannot  
8 apply for a CEC suggests that such an entity may construct the transmission facility  
9 without a CEC. That is, the statute mandates that a "utility" obtain a CEC before  
10 constructing a transmission line, but it does not require an entity that might not be a  
11 utility to do so. Concluding that a non-utility cannot apply for a CEC would  
12 undercut the statutory purpose of reviewing the siting of proposed transmission  
13 lines. Moreover, it would discourage the construction of needed transmission  
14 facilities, which would be contrary to sound public policy.

15 Similarly, it would not be appropriate to include SU FERC as a co-applicant  
16 for the CEC. SU FERC's role in the Southline Project is that of the FERC-  
17 jurisdictional transmission service provider. SU FERC will lease the capacity on the  
18 Southline Project from Southline Transmission, and thereafter operate the facilities  
19 and provide transmission service. SU FERC is not the developer of the Southline  
20 Project, *i.e.*, it is not "planning to construct a . . . transmission line."<sup>17</sup>

### 21 **III. CONCLUSION**

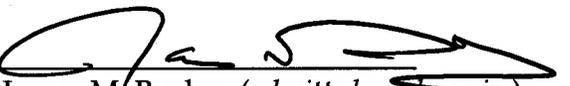
22 Southline Transmission respectfully submits that the Committee should find  
23 that Southline Transmission is the appropriate applicant for a CEC for the Southline  
24 Transmission Project. This finding would be fully consistent with the determination  
25 made by FERC in the FERC Declaratory Order because FERC can make a narrow  
26 disclaimer of jurisdiction under specific statutory definitions without impacting a

27 <sup>16</sup> See A.R.S. § 40-360; see also Case 171.

28 <sup>17</sup> A.R.S. § 40-360.03

1 state's ability to find otherwise for different reasons. A determination by the  
2 Committee that Southline Transmission is not the correct applicant for the CEC for  
3 the Southline Project is inconsistent with the Arizona statutory scheme and would  
4 lead to the anomalous result that no CEC needs to be requested for the Southline  
5 Project. Finally, because Southline Transmission is the entity that is developing the  
6 Southline Project, it should be the applicant; in contrast, SU FERC should not be a  
7 co-applicant because it is not "planning to construct a . . . transmission line."

8 RESPECTFULLY SUBMITTED this 23rd day of November, 2016.

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