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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 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 REPLY TO MOUNTAIN VIEW RANCH'S LEGAL  
MEMORANDUM ON WESTERN AREA POWER ADMINISTRATION'S  
PARTICIPATION IN THE SOUTHLINE PROJECT**

Southline Transmission L.L.C. ("Southline"), by and through counsel, submits the following Legal Memorandum in response to the Supplemental Memorandum of Law filed by Intervenor Mountain View Ranch Development Joint Venture, LLC ("MVR" or "Mountain View").

**I. SUMMARY OF RESPONSE**

Mountain View's attempts to fabricate state jurisdiction over a transmission line that will be constructed, owned, and operated by a federal agency are based on

Arizona Corporation Commission

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1 a misreading of an inapplicable statute and relevant case law. Mountain View’s  
2 statement that Section 1222 of the Energy Policy Act of 2005 (42 U.S.C. § 16421) “is  
3 the Congressional authorization” for WAPA to participate with Southline in the  
4 Southline Transmission Project<sup>1</sup> is wrong. Moreover, Mountain View’s suggestion  
5 that Ninth Circuit precedent supports its claim is equally flawed. In fact, WAPA’s  
6 authority to construct and own the non-CEC Upgrade Section is independent of  
7 Section 1222, and WAPA is not subject to state procedural requirements—such as  
8 the requirement to obtain a certificate of environmental compatibility (“CEC”)—  
9 with respect to that line.<sup>2</sup> Not only is the law on this issue clear, but accepting  
10 Mountain View’s faulty logic would lead to the untenable result of the Arizona  
11 Corporation Commission (“ACC” or “Commission”) having jurisdiction over all  
12 WAPA transmission line reconstruction projects.

13 **II. MOUNTAIN VIEW’S ATTEMPT TO FABRICATE STATE JURISDICTION**  
14 **WHERE NONE EXISTS SHOULD BE REJECTED.**

15 **A. WAPA’s Authority to Build the Non-CEC Upgrade Section is Not Derived**  
16 **From Section 1222.**

17 Contrary to Mountain View’s argument, WAPA’s authority to construct the  
18 WAPA Upgrade Section and participate in the overall project is *not* based on Section  
19 1222 of the Energy Policy Act of 2005. Southline and WAPA have never claimed  
20 that the Southline Transmission Project, in whole or in part, is being developed  
21 pursuant to Section 1222.<sup>3</sup> The Application simply states the Southline Transmission  
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23 <sup>1</sup> MVR’s Supplemental Memorandum of Law at 2.

24 <sup>2</sup> See Southline’s Legal Memo on FLPMA and Preemption (Nov. 9, 2016).

25 <sup>3</sup> Section 1222 requires an interested applicant to apply through the U. S. Department of Energy. See  
26 DOE, Office of Electricity Delivery & Energy Reliability, [https://energy.gov/oe/services/electricity-](https://energy.gov/oe/services/electricity-policy-coordination-and-implementation/transmission-planning/section-1222)  
27 [policy-coordination-and-implementation/transmission-planning/section-1222](https://energy.gov/oe/services/electricity-policy-coordination-and-implementation/transmission-planning/section-1222). Southline has made  
28 no such application.

1 Project contemplates a public-private endeavor.<sup>4</sup> As discussed below, WAPA has  
2 both (1) independent authority to build its own transmission lines and to participate  
3 in the Southline Transmission Project and (2) sovereign immunity from state and  
4 local control as a federal agency, which has not been waived.

5 WAPA has been in existence since 1977 and has authority under a number of  
6 statutory provisions to develop infrastructure to support its marketing and  
7 transmission of electricity from hydropower generation facilities. As a successor to  
8 the Bureau of Reclamation function of marketing power from Federal hydropower  
9 facilities—including the construction, operation, and maintenance of transmission  
10 lines and attendant facilities<sup>5</sup>—WAPA has broad authority to fulfill its statutory  
11 mission.<sup>6</sup> Cooperating with private organizations and persons in public-private  
12 endeavors is one way in which WAPA has historically exercised its broad authority  
13 to construct, operate, and maintain transmission lines.

14 WAPA's participation in the Southline Transmission Project includes, among  
15 other things, upgrading WAPA's 115-kV transmission line between the existing  
16 Apache Substation, south of Willcox, Arizona, and the existing Saguaro Substation  
17 northwest of Tucson, Arizona, within WAPA's existing Parker-Davis Project  
18 Transmission System ("WAPA Upgrade Section"). The authorities for this upgrade  
19 include the Acts of Congress approved June 17, 1902 (32 Stat. 388) (Reclamation Act  
20 of 1902); August 4, 1939 (53 Stat. 1187) (Reclamation Project Act of 1939); May 28,  
21 1954 (68 Stat. 143) (consolidating the Parker Dam Power Project and the Davis Dam  
22 Project); August 4, 1977 (91 Stat. 565) (Department of Energy Organization Act); and

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23 <sup>4</sup> By citing Southline's Application at pages 2-3, Mountain View misleadingly suggests that Southline  
24 relies upon Section 1222 as the source of authority for WAPA to participate in the Southline  
25 Transmission Project. That suggestion is not correct. *See supra* note 3.

26 <sup>5</sup> 42 U.S.C. § 7152.

27 <sup>6</sup> *See* 43 U.S.C. § 485i (authorizing the Secretary of the Interior (the predecessor to the Secretary of  
28 Energy as it relates to the Federal power marketing function) to "perform any and all acts...as may be  
necessary and proper for the purpose of carrying out the provisions of [the Reclamation Act of  
1939]).").

1 the American Recovery and Reinvestment Act of 2009 (Public Law 111-5, 123 Stat.  
2 115).

3 **B. WAPA Has Sovereign Immunity From State and Local Regulation.**

4 Because WAPA is a federal agency within the U. S. Department of Energy  
5 (“DOE”) it is entitled to a presumption of sovereign immunity from state and local  
6 control absent an express waiver from Congress.<sup>7</sup> Such a waiver must be expressed  
7 in “strong[] language,” given the unlikelihood that Congress would delegate “such  
8 an important function as the decision of whether and where to distribute electric  
9 power from federal facilities to total state control.”<sup>8</sup> “[A] waiver of the traditional  
10 sovereign immunity *cannot be implied* but must be unequivocally expressed.”<sup>9</sup>  
11 Rather, only “clear and unambiguous” language will effect a waiver.<sup>10</sup> None of  
12 WAPA’s authorizing statutes as cited in the previous section contains any waiver.

13 As stated earlier, WAPA’s authority to participate in the Southline Project is  
14 not pursuant to Section 1222. However, even if Southline had submitted a formal  
15 application under the Section 1222 program (which it has not) seeking WAPA’s  
16 participation in the Southline Transmission Project, WAPA would maintain its  
17 sovereign immunity from state and local regulations. Section 1222 does not contain  
18 an unequivocal waiver of sovereign immunity; in fact, it contains nothing more than  
19 routine statutory language that has no bearing on such a waiver. The Section 1222  
20 clause Mountain View references simply preserves the effect of (1) federal  
21 environmental law, (2) federal and state law concerning the siting of transmission

21 <sup>7</sup> “The general sovereign immunity of the federal Government, its agencies and instrumentalities,  
22 from state or local control of its governmental functions, is established under the Supremacy Clause  
23 of Article VI of the Constitution.” *Maun v. U.S.*, 347 F.2d 970, 974 (9th Cir. 1965) (citing *Mayo v. United*  
24 *States*, 319 U.S. 441 (1943)). *See also* Southline’s Legal Memo on FLPMA and Preemption at 4-7 (Nov.  
25 9, 2016) and *infra* note 15.

26 <sup>8</sup> *Columbia Basin Land Protection Ass’n v. Schlesinger*, 643 F.2d 585, 605 (9th Cir. 1981).

27 <sup>9</sup> *United States v. Testan*, 424 U.S. 392, 399 (1976) (citation and internal quotations omitted) (emphasis  
28 added).

<sup>10</sup> *Hancock*, 426 U.S. at 179.

1 lines and (3) existing authorizing statutes. It does not unequivocally subject federal  
2 agencies to state law if those federal agencies are not otherwise subject to those laws.  
3 Section 1222(d) expressly states that “[n]othing in this section affects any  
4 requirement of . . . any existing authorizing statutes.”<sup>11</sup> In addition, Section 1222(e)  
5 further states that “[n]othing in this section shall constrain or restrict an  
6 Administrator in the utilization of other authority delegated to the Administrator of  
7 WAPA or SWPA.”<sup>12</sup> As stated above, none of WAPA’s other authorizing statutes  
8 contains any waiver of sovereign immunity and Section 1222 would not change that.

9 Specifically, the clause from Section 1222 cited by Mountain View provides as  
10 follows:

11 **Relationship to other laws.** Nothing in this section affects any  
12 requirement of

13 (1) any Federal environmental law, including the National  
14 Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.);

15 (2) any Federal or State law relating to the siting of energy  
16 facilities; or

17 (3) any existing authorizing statute.<sup>13</sup>

18 Read in context with the other items in the clause, Section 1222(d)(2) merely states  
19 that applicable state and federal siting laws will continue to apply without  
20 modification. Compare this to the express waiver contained in Section 6001 of the  
21 Resource Conservation and Recovery Act, which provides that:

22 Each department, agency, and instrumentality of the  
23 executive, legislative, and judicial branches of the Federal  
24 Government . . . shall be subject to, and comply with, all  
25 Federal, State, interstate, and local requirements [regarding  
26 solid and hazardous waste disposal].<sup>14</sup>

27 <sup>11</sup> 42 U.S.C. § 16421(e).

28 <sup>12</sup> *Id.*

<sup>13</sup> 42 U.S.C. § 16421(d).

<sup>14</sup> 42 U.S.C. § 6961(a).

1 The waiver included under RCRA is unequivocal and demonstrates the clarity with  
2 which Congress speaks when it intends such a waiver. Compared with the express  
3 congressional waiver under RCRA, the language from subsequently enacted Section  
4 1222(d)(2) falls well short of a “clear and unambiguous” abrogation of the federal  
5 government’s sovereign immunity.

6 This interpretation of the clause is also consistent with the reading adopted  
7 by the DOE in the context of another company’s actual application under Section  
8 1222. The DOE asserted that only a “clear and unambiguous” statement will waive  
9 immunity and this is why “federal courts have consistently rejected arguments that  
10 the [DOE’s] power marketing administrations must obtain state siting approval to  
11 build transmission lines.<sup>15</sup> The DOE concludes that the Section 1222 clause is  
12 “intended only to preserve the existing effect of state siting law, not to expand it to  
13 federal activities otherwise free from state regulation.”<sup>16</sup>

14 Mountain View’s reliance on previous Ninth Circuit cases is ill-founded—  
15 those cases in fact demonstrate that Section 1222 could not waive sovereign  
16 immunity. Mountain View’s attempt to rely on the *Maun* decision to assert that the  
17 language at 42 U.S.C. § 16421(d) can be used to impose state jurisdiction is flawed.  
18 Importantly, the Ninth Circuit issued the decision in *Maun* in 1965; this was 11 years  
19 prior to the U.S. Supreme Court’s decisions in *Tristan* and *Hancock*, among others,

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20 <sup>15</sup> Department of Energy, Summary of Findings In re Application of Clean Line Energy Partners LLC  
21 Pursuant to Section 1222 of the Energy Policy Act of 2005 (March 25, 2016) at 20-21, available at  
22 <https://energy.gov/oe/downloads/clean-line-plains-and-eastern-section-1222-decision-documents>.  
23 See also *Citizens & Landowners Against the Miles City/Underwood Powerline v. Dep’t of Energy*, 683 F.2d  
24 1171, 1178-82 (8th Cir. 1982) (rejecting arguments that either section 103 of the Department of Energy  
25 Organization Act, 42 U.S.C. § 7113, or section 505 of the Federal Land Policy and Management Act, 43  
26 U.S.C. § 1765, evince the necessary congressional intent to require WAPA to comply with South  
27 Dakota’s siting law); *Montana v. Johnson*, 738 F.2d 1074 (9th Cir. 1984); *Columbia Basin*, 643 F.2d at 605  
28 (holding that the Bonneville Power Administration was not required to secure a state certificate to  
build transmission lines and noting that “to require the [Administration] to require the BPA to  
receive a state certificate would imply that the state could deny the application, which would give  
them a veto power over the federal project [and] clearly cannot be the meaning that Congress  
intended.”).

<sup>16</sup> *Id.*

1 which establish that only unequivocal, clear and unambiguous language can waive  
2 federal sovereign immunity.

3 Similarly, Mountain View seems to cite to the decisions in *Pacific Gas &*  
4 *Electric Co. v. State Energy Resources Conservation & Development Commission*<sup>17</sup> and  
5 *Boeing Co. v. Movassaghi*<sup>18</sup> for support of its assertions. However, these opinions do  
6 not support Mountain View's position. In particular, *Pacific Gas & Electric* focuses on  
7 federal preemption and does not directly address the substantive analysis of  
8 determining whether sovereign immunity is waived by a statute. It very briefly  
9 recounts the circumstances of the *Maun* decision and Congress's overruling of that  
10 opinion only to discuss regulation of nuclear safety. Similarly, the *Movassaghi*  
11 opinion likewise focuses on nuclear safety and briefly mentions *Maun*, but without  
12 substantive approval of that opinion.

13 The Court in *Movassaghi* does however acknowledge U.S. Supreme Court case  
14 law (subsequent to *Maun*) that requires "clear and unambiguous" intent to allow  
15 state regulation of federal activities.<sup>19</sup> As illustrated above, no such intent exists  
16 with respect to WAPA's upgrade of the Parker-Davis Project or its participation  
17 generally in the Southline Transmission Project.

### 18 **III. CONCLUSION**

19 The case law and statutory law on the Committee's jurisdiction over WAPA  
20 is clear. Absent unambiguous congressional intent, WAPA is not subject to state or  
21 local law, including Arizona's siting jurisdiction. There is no reason to believe the  
22 Committee or the Commission should exercise jurisdiction over the WAPA Upgrade  
23 Section other than the portion that is part of Southline's application.

24  
25 <sup>17</sup> 461 U.S. 190, 210-211 (1983).

26 <sup>18</sup> 768 F.3d 832, 841 (9th Cir. 2014).

27 <sup>19</sup> *Movassaghi*, 768 F.3d at 840 (citing *Goodyear Atomic Corp.*, 486 U.S. 174, 180 (1988) (quoting *EPA v.*  
28 *State Water Res. Control Bd.*, 426 U.S. 200, 211 (1976))).

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RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of December, 2016.

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