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ARIZONA CORPORATION COMMISSION

Office of General Counsel

April 28, 2025

Governor's Regulatory Review Council
100 N. 15th Avenue, Suite 302
Phoenix, AZ 85007
grrc@azdoa.gov

Re: Underground Arizona Petition

Dear Members of the Governor's Regulatory Review Council:

The Arizona Corporation Commission ("Commission" or "ACC") responds to the Governor's Regulatory Review Council's ("GRRC") request for comment on the Underground Arizona Petition, and requests that it be denied for lack of GRRC jurisdiction. As recently stated in a presentation by the GRRC staff attorney to the State Legislature in January 2025, "GRRC oversees nearly every state agency, with the exception of the Arizona Corporation Commission...."¹ The Commission was unable to locate any GRRC review of any rule or policy enacted by the Commission ... since 1912.

A. GRRC Lacks Authority to Review ACC Rules or Policies

The Administrative Procedures Act ("APA"), Arizona Revised Statutes ("A.R.S.") Title 41, Chapter 6, and GRRC's rulemaking review authority do not apply to the ACC. A.R.S. § 41-1057(A)(2) states: "In addition to the exemptions stated in section 41-1005, this article does not

¹ <https://azcapitoltimes.com/news/2025/03/06/gop-review-agency-rules/#:~:text=According%20to%20a%20presentation%20by%20a%20GRRC,exception%20of%20the%20Arizona%20Corporation%20Commission%20and> ("GOP Lawmakers Want Power to Review Agency Rules") (March 6, 2025).

apply to: ... 2. The corporation commission, which shall adopt substantially similar rule review procedures, including the preparation of an economic impact statement and a statement of the effect of the rule on small business.” This exemption is noted on GRRC’s website: <https://grrc.az.gov/sites/default/files/Arizona%27s%20APA%20-%20The%20Role%20of%20GRRC%20Part%201.pdf> (p. 16).² As A.R.S. § 41-1057(A)(2) expressly excludes the ACC, its rules and policies are not subject to GRRC review. The petition should be dismissed.

B. The ACC Has Exclusive Rulemaking Authority

Article XV, Section 6 of the Arizona Constitution grants the ACC sole authority to promulgate rules and regulations. In Docket AU-00000A-16-0141, Decision No. 78544 (April 28, 2022), the ACC adopted its own Rules Review Procedures, substantially similar to GRRC’s but independent of APA oversight.

See <https://docket.images.azcc.gov/0000206627.pdf?i=1656457201339>, Exhibit A (attached). Arizona courts have affirmed this authority: “the foregoing constitutional provision gives the commission judicial, executive and legislative powers ... [including] adopting rules and regulations.” *Ethington v. Wright*, 66 Ariz. 382, 389, 189 P.2d 209, 214 (1948). The ACC’s exclusive rulemaking power extends to rules necessary for its constitutional duties. *State ex rel. Corbin v. Arizona Corp. Comm’n*, 174 Ariz. 216, 219, 848 P.2d 301, 304 (App. 1992). The Arizona Administrative Code (“A.A.C.”) notes the Commission’s exemption from APA certification under A.R.S. § 41-1041. See A.A.C. Title 14, Chapter 5, Editor’s Note.

² Another part of the GRRC website notes: “However, some agencies are exempt from the APA by law and do not need to seek Council approval before filing final rulemakings with the SOS.” <https://grrc.az.gov/rulemaking>

https://apps.azsos.gov/public_services/Title_14/14-05.pdf. GRRC cannot review ACC rules or policies.

C. The Advisory Policy Statement Reflects Existing Law

[Decision No. 79140](#), Policy Statement 3, restates existing statutes. A.R.S. § 40-341(13) defines “underground conversion cost” as “the costs to be paid by each owner to each public service corporation or public agency by the property owners within an underground conversion service area,” ensuring costs fall on beneficiaries, not ratepayers. A.R.S. § 48-620 permits municipalities to fund underground utilities through tax assessments. Arizona Administrative Code R14-2-206.B(2)(c) requires a “customer requesting an underground service line in an area served by overhead facilities [to] pay for the difference between an overhead service connection and the actual cost of the underground connection.” Policy Statement 3 clarifies that utilities should avoid undergrounding unless required for reliability, safety, or operational needs, aligning with these laws. GRRC lacks authority to alter these statutes.

D. The Petition is Potentially Barred by Res Judicata and Defensive Collateral Estoppel

Underground Arizona already challenged the ACC’s policy in Maricopa County Superior Court, Case No. CV2024-033957, alleging that the ACC lacked statutory authority for the Policy. On January 6, 2025, the court dismissed the complaint with prejudice. *See* Exhibit B (attached). Issue preclusion serves to protect litigants from the burden of relitigating an identical issue and to promote judicial economy by preventing needless litigation. *See e.g., Crosby-Garbotz v. State*, 246

Ariz. 54, 57, 434 P.3d 143, 146 (2019) (“the doctrine seeks to avoid the basic unfairness associated with duplicative, harassing litigation”) (citations omitted).³

E. The Advisory Policy Statement is Not a Rule

Policy Statement 3 is a permissible substantive policy statement under A.R.S. § 41-1001(24), defined as “a written expression which informs the general public of an agency’s current approach to, or opinion of, the requirements of ... state statute, [or] administrative rule.” The Policy states it is advisory, and nothing in the Policy is mandatory. This Policy interprets several state statutes mandating cost allocation for undergrounding to beneficiaries, not ratepayers, *and imposes no new requirements*. Even if the APA applied, the statement is exempt from rulemaking and GRRC review. As GRRC explains, “an agency can create substantive policy statements to explain how the agency will enforce a rule, but the substantive policy statement itself cannot be enforced on the general public.” <https://grrc.az.gov/rulemaking>

F. Conclusion

Based on the foregoing, and the ACC and Maricopa County Superior Court record referenced herein, the ACC requests the GRRC to dismiss Underground Arizona’s petition for lack of jurisdiction. The ACC’s broad constitutional authority, the policy’s alignment with existing law,

³ Under the doctrine of res judicata an existing final judgment rendered upon the merits, by a court of competent jurisdiction, is conclusive as to every point decided therein, and also as to every point raised by the record which could have been decided, with respect to the parties or their privies. *Hoff v. City of Mesa*, 86 Ariz. 259, 344 P.2d 1013 (1959).

and the prior court dismissal preclude GRRC action. Please contact the Office of General Counsel with questions.

Sincerely,

/s/ Robert Ridenour

Robert Ridenour, Senior Associate General Counsel

Office of General Counsel

rridenour@azcc.gov

(602) 542-3402

RLR:kj

Attachments:

1. Exhibit A, Decision No. 78544 Docket AU-00000A-16-0141
2. Exhibit B, Court Order of Dismissal

cc: Thomas Van Flein, General Counsel, Office of the General Counsel, tvanflein@azcc.gov
Ajo Improvement Company, John M. Key, jkey@fmi.com
Arizona Electric Power Cooperative, Inc., Erin Peters, epeters@azgt.coop
Arizona Public Service Company, Rachael Leonard,
arizonapublicserviceregulatorydepartment@apsc.com
Columbus Electric Cooperative, Inc., Christopher Martinez, chrism@col-coop.com
Dixie-Escalante Rural Electric Association, Inc., Dane Johnson, danej@dixiepower.com
Garkane Energy Cooperative, Inc., Marcus V. Lewis, marcus.lewis@garkane.com
Graham County Electric Cooperative, Inc., Than Ashby, pcook@gce.coop
Mohave Electric Cooperative, Inc., Andrea Harless, aharless@mohaveelectric.com
Morenci Water and Electric Company, Johnny Key, jkey@fmi.com
Salt River Project Agricultural Improvement and Power District, Brandi Samaniego,
brandi.samaniego@srpnet.com
Sulphur Springs Valley Electric Cooperative, Inc., Ronald Lee, rlee@ssvec.com
Trico Electric Cooperative, Inc., Brian Heithoff, bheithoff@trico.coop
Tucson Electric Power Company and UNS Electric, Inc., Andrea Jacobo
ajacobo@tep.com