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Governor's Regulatory Review Council  
100 N Fifteenth Ave • Suite 302  
Phoenix, AZ 85007  
[grrc@azdoa.gov](mailto:grrc@azdoa.gov)

RE: Arizona Corporation Commission Decision 79140, Policy Statement 3

Dear Members of the Governor's Regulatory Review Council,

Underground Arizona hereby appeals to the Governor's Regulatory Review Council (the "Council"), pursuant to A.R.S. § 41-1033(E), for a determination that the Arizona Corporation Commission's (the "Commission") October 4, 2023 Policy Statement, as outlined herein, is a rule or is otherwise "not specifically authorized by statute, exceeds the agency's statutory authority, [and] is unduly burdensome."<sup>1</sup>

Underground Arizona submitted an A.R.S. § 41-1033 petition to the Commission on September 3, 2024.<sup>2</sup> The petition was rejected by written letter on October 31, 2024.<sup>3</sup> In the rejection letter, the Commission wrote: "The Petitioner is advised that he has 30 days to file an appeal if he so chooses."<sup>3</sup> Footnote 3 cited A.R.S. § 41-1033(E), which is the Council's review process.

## BACKGROUND

1. **On February 20, 2023**, Tucson Electric Power ("TEP") requested that the Commission issue a policy statement on undergrounding transmission lines (pg. 4):<sup>4</sup>

*"The Commission has often acknowledged that ratepayers should not pay the extra cost of undergrounding a transmission line. Including language to that effect in a policy would be*

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<sup>1</sup> See e.g. A.R.S. 41-1033(G).

<sup>2</sup> Docket ALS-00000A-22-0320: <https://docket.images.azcc.gov/E000038251.pdf>

<sup>3</sup> Docket ALS-00000A-22-0320: <https://docket.images.azcc.gov/E000039777.pdf>

<sup>4</sup> Docket ALS-00000A-22-0320: <https://docket.images.azcc.gov/E000024350.pdf>

*helpful to applicants who need to explain the issue to stakeholders in a CEC proceeding.”*

2. **On June 30, 2023**, the Commission’s Legal Division issued a memo stating the following regarding TEP’s request (pg. 3):<sup>5</sup>

*“If the Commission decides to move forward with this proposal, a rulemaking would be required because the Commission would be prescribing law or policy. It would not be appropriate to adopt a rule regarding ratepayer recovery as part of the line siting rules, however. The Line Siting Committee has no jurisdiction over rates and a line siting rule regarding ratepayer recovery would therefore be outside the scope of authority granted under the line siting statute. Additionally, the Line Siting Committee does not have jurisdiction over underground transmission lines.”*

3. **On September 1, 2023**, the Commission’s Legal Division filed a Proposed Order that did not include a policy statement on rate recovery or undergrounding.<sup>6</sup>
4. **On September 18, 2023**, Commissioner Myers filed Proposed Amendment No. 1, which proposed inserting the following policy statement on undergrounding into the Legal Division’s Proposed Order:<sup>7</sup>

*“3. The Commission does not have jurisdiction over the undergrounding of electric transmission lines. A.R.S. § 40-360(10). Installing electric transmission lines underground is much more expensive than building them above ground. Underground transmission lines also can be more costly and challenging to maintain and repair. As a general matter, utilities under the Commission's jurisdiction should avoid incurring these higher costs unless underground installation of a transmission line is necessary for reliability or safety purposes, or to satisfy other prudent operational needs. Installing a transmission line underground for other reasons, such as stakeholders' preferences, would add unnecessarily to costs recovered through rates. Third parties, including cities, customers and neighborhood groups, seeking to fund the underground construction of a transmission line may do so, among other ways, by forming an improvement district for underground utilities as provided in A.R.S. § 48-620 et. seq.”*

5. **On September 21, 2023**, at the Commission’s Open Meeting, in regard to Commissioner Myers’ Proposed Amendment No. 1, the following statement was made:<sup>8</sup>

**Commissioner Myers:** *“I think it is beneficial to clarify the Commission’s stance on [rates and undergrounding] but at the same time make sure that it’s clear that we don’t have jurisdiction over [rates and undergrounding] when it comes to line siting stuff.”*

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<sup>5</sup> Docket ALS-00000A-22-0320: <https://docket.images.azcc.gov/E000027753.pdf>

<sup>6</sup> Docket ALS-00000A-22-0320: <https://docket.images.azcc.gov/E000030426.pdf>

<sup>7</sup> Docket ALS-00000A-22-0320: <https://docket.images.azcc.gov/E000030810.pdf>

<sup>8</sup> Item 33. [https://azcc.granicus.com/player/clip/5766?view\\_id=3&redirect=true](https://azcc.granicus.com/player/clip/5766?view_id=3&redirect=true)

6. **On October 4, 2023**, The Commission formally issued Decision No. 79140 by a vote of 4 to 1, with Commissioner Tovar dissenting, which adopted three policy statements, including Commissioner Myers Proposed Amendment No. 1 on undergrounding (the policy statement).<sup>9</sup> In Finding of Fact 1, the Commission wrote that the purpose of policy statements was to “guide” the Line Siting Committee (pg. 1).
7. **On May 24, 2024**, TEP filed a Certificate of Environmental Compatibility (“CEC”) application with the Line Siting Committee (“the Committee”). In it, and based on the policy statement, TEP made the following request (pg. 30):<sup>10</sup>

*“Consistent with the Commission’s Policy Statement, given the excessive cost of undergrounding, and the resulting impact on rates, requiring undergrounding would render the Project unreasonably restrictive and not feasible.”*

8. **On September 13, 2024**, In Decision No. 79550, the Committee and Commission approved TEP’s application for a CEC, which included the following findings of fact (pg. 15):

*“10. However, **given the Commission’s Policy Statement found in Decision No. 79140 (October 4, 2023)**, the Committee finds pursuant to A.R.S. 40-360.06(D) that any local ordinance or plan that requires TEP to incur an incremental cost to construct the Project below ground ‘is unreasonably restrictive and compliance therewith is not feasible in view of technology available.’” [Emphasis Added]*

## ANALYSIS

The *ex-ante* line siting process is administered by the Line Siting Committee and focused on identifying routes for transmission lines.<sup>11</sup> It is governed by A.R.S. § 40-360 et seq. The *ex-post* ratemaking process is administered by the Commission and is focused on how a utility recovers costs from ratepayers. It is governed by A.R.S. § 40-361 et seq. Each process has independent jurisdiction and operates according to its own rules and procedures. To put it another way, the line siting process is not an early stage of ratemaking; while costs may be considered in route selection, the process cannot preemptively determine the cost recovery outcomes of the ratemaking process—or vice versa.<sup>12</sup>

On February 20, 2023, Tucson Electric Power (“TEP”) requested that the Commission issue a policy statement to guide the Line Siting Committee on ratepayer recovery and undergrounding (Background 1). On June 30, 2023, the Commission's legal counsel warned that such a policy statement would be outside the scope of the line siting statute and a formal rulemaking would be required

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<sup>9</sup> Docket L-00000C-24-0118-00232: <https://docket.images.azcc.gov/0000209995.pdf>

<sup>10</sup> <https://docs.tep.com/doc/projects/mrp/MRP-CEC-Application.pdf>

<sup>11</sup> In this context, *ex-ante* means before a project is built and *ex-post* mean after a project is built.

<sup>12</sup> As evidence, SRP’s rates are not regulated by the Commission but its transmission lines require approval by the Line Siting Committee.

(Background 2). On September 21, 2023, at a Commission hearing, Commissioner Myers further acknowledged these jurisdictional problems (Background 5). Despite this, on October 4, 2023, in Decision 79140, the Commission issued a line siting policy statement on ratepayer recovery and undergrounding without undergoing a formal rulemaking (Background 6).

On May 24, 2024, TEP applied for a Certificate of Environmental Compatibility (“CEC”) from the Commission (Background 7). On September 13, 2024, in Decision 79550, the Commission granted the CEC. In the CEC, the Line Siting Committee relied on the Policy Statement to preemptively determine that any incremental undergrounding cost would be unrecoverable from ratepayers and therefore was not feasible (Background 8). Thus, the Policy Statement has been treated as a binding rule in practice.

By providing guidance to the Line Siting Committee through a Policy Statement on subjects for which the Line Siting Committee explicitly lacks jurisdiction, the Commission has deliberately confused process and acted in a manner that is “not specifically authorized by statute, exceeds the agency's statutory authority, [and] is unduly burdensome.”<sup>13,14</sup> The bottom line is: why does the Line Siting Committee need to be guided by the Commission on items for which the Line Siting Committee lacks jurisdiction? If the point is not to exert extra jurisdictional authority, then what is it? Why doesn't the Commission simply make a non-line siting policy statement on undergrounding costs?

In its response to Underground Arizona's petition, the Commission said (pg. 5), “The jurisdiction of the Line Siting Committee is not at issue here.” We disagree. It is the *only* thing at issue here. The Commission's arguments about its ratemaking or other jurisdiction are strawmen and not in dispute.

The Commission went on to say (pg. 5): “The Committee was appropriately recognizing state law limitations on cost recovery for undergrounding.” Here, the Commission also errs. According to the Arizona Supreme Court, in *APS v. Town of Paradise Valley* (1980), state law does not limit cost recovery to non-utility parties (p 451):

*“The fact that property owners may petition for the creation of an underground conversion district and be bound to pay for the undergrounding instead of the utility [under state law], does not prevent the Town from mandating the undergrounding **at utility expense**.”* [Emphasis added]

Therefore, the Commission's contention that the Policy Statement is simply a restatement of state law is fatally flawed.<sup>15,16</sup>

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<sup>13</sup> See e.g. A.R.S. 41-1033(G).

<sup>14</sup> See e.g. A.R.S. 41-1091.

<sup>15</sup> Additionally, Underground Arizona has compiled dozens of examples on its website of the utility companies recovering the incremental cost of undergrounding from ratepayers without resistance from the Commission. Thus, its contention that it is disallowed by state law makes little sense.

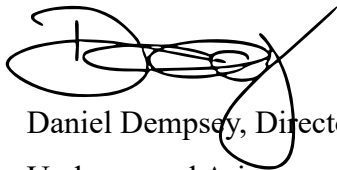
<sup>16</sup> In *TEP v. Board of Adjustment* (2024), the Arizona Superior Court said: “*The State has also preempted the City's ability to determine where, but not how, transmission lines are constructed. The State clearly intended the Arizona Corporation Commission (ACC) to have exclusive authority over line siting for high-capacity transmission lines. A.R.S. § 40-360, et seq.*”

Frankly, it seems that the Policy Statement's only purpose is for the Commission to improperly exert extra jurisdictional authority over the Line Siting Committee, which it succeeded at doing in practice.

## CONCLUSION

For the foregoing reasons, pursuant to A.R.S. § 41-1033 et seq., and at the direction of the Commission, Underground Arizona respectfully requests that the Council hold a public meeting regarding the Commission's Policy Statement, which has been treated as a rule in practice, and determine it void as contrary to law.

Sincerely,

A handwritten signature in black ink, appearing to read 'Daniel Dempsey', with a large, stylized flourish extending from the end of the signature.

Daniel Dempsey, Director  
Underground Arizona

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*See also 1971 Session Laws Ch 67, § 1. The purpose of this is to simplify the process of expanding Arizona's electrical grid, which is necessarily a matter of statewide importance. However, the Court has been unable to locate any law which restricts the City's authority to regulate how transmission lines are constructed. TEP is correct that there is no law which explicitly grants the City the authority to require undergrounding, but neither is there a specific law which purports to exempt utilities from all zoning regulations. Therefore, the Court finds that, as a matter of law, the City has the authority to require undergrounding of transmission lines." It is only reasonable to assume that an applicant pays the cost of complying with zoning regulations. The burden of proof that a municipality pays for the zoning compliance of any party is on TEP.*