

Underground Arizona, Inc.
ATTN: Daniel Dempsey
PO Box 41745
Tucson, AZ 85717
daniel@undergroundarizona.org

April 30, 2025

Governor's Regulatory Review Council
100 N Fifteenth Ave, Suite 302
Phoenix, AZ 85007
grrc@azdoa.gov

RE: Response to the Commission's April 28, 2025 A.R.S. § 41-1033(H)(3)(c) Statement

Dear Members of the Governor's Regulatory Review Council,

This letter is a response to the April 28, 2025 A.R.S. § 41-1033(H)(3)(c) statement by the Arizona Corporation Commission ("Commission"). Once again, the Commission repeats a lot of arguments that are irrelevant to the questions before you and fails to address the underlying issue of the express statutory limits on the Commission's line siting jurisdiction.

A. Arizona Revised Statutes ("A.R.S.") § 41-1057(A) Exemption Does Not Apply

Arizona Revised Statutes ("A.R.S.") § 41-1057(A)(2) says: "A. In addition to the exemptions stated in section 41-1005, **this article** does not 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." [Emphasis added] "This article" is Article 5 of Chapter 6. Underground Arizona filed an A.R.S. § 41-1033 or Article 3 of Chapter 6 petition. Article 5 exemptions only apply to Article 5 as cited above. Therefore, Underground Arizona's Article 3 petition is not exempt from Governor's Regulatory Review Council ("GRRC") review.

B. The Commission Opted into GRRC Review

As stated in previous responses, even if Article 5 exemption did apply to Article 3 petitions, the statute states in A.R.S. § 41-1057(B) that the Commission may opt into the GRRC process. The Commission advised the public in Decision 79140, and Underground Arizona in its response to our original September 3, 2024 petition, among other communications, that policy statements could be

appealed pursuant to A.R.S. § 41-1033, which establishes and governs the GRRC substantive policy statement review process.¹² The Commission has not established an alternative Article 3 substantive policy statement review process—and we can find no Article 3 exemption available to the Commission even if it had established an alternative. In any event, the Commission’s statements and directions must reasonably be interpreted as actions that opted the Commission into GRRC process were Article 5 exemptions available. Moreover, the Commission’s inaction in failing to timely advise Underground Arizona of alternative processes despite countless opportunities to do so in the last eight months equally illustrates that the Commission voluntarily opted into GRRC review of Article 3 petitions.

The Commission now, for the first time in its third response, eight months after receiving the original petition, cites Decision 78544 as controlling. Only, once again, the subject of Decision 78544 is Article 5, not Article 3. Decision 78544 does not address Article 3 at all, let alone establish an independent Article 3 equivalent process. Quite simply, Decision 78544 does not apply to the issue before you. It does, however, raise the question of whether the Commission established a sufficiently independent alternative to GRRC for Article 5 reviews. Does the Commission approving its own rules satisfy the intent of the Legislature and the letter and spirit of Article 5 exemption? We suspect not.

C. The Issue is Policy Statement 3 of Decision 79140; Appeal of Decision 79550 is Irrelevant

The court’s dismissal of Underground Arizona’s appeal of Decision 79550 as untimely is irrelevant. While the appeal included discussion of the policy statement issue (because Decision 79550 cites the invalid policy statement—and surely so will many more decisions), there was no court decision on the merits. Furthermore, Underground Arizona filed its Article 3 petition weeks prior to the Commission even issuing Decision 79550, and months prior to filing any court appeal.

D. The Issue is Line Siting Jurisdiction Not Ratemaking Jurisdiction

Once again, as with its original response to our petition, and its March 3, 2025 response, the Commission spends most of its statement arguing red herrings. The issue before GRRC is a line siting policy statement, not a ratemaking policy statement. Decision 79140 makes this fact very clear.³

¹ See footnote 1 of Attachment A here: <https://docket.images.azcc.gov/0000209995.pdf>

² The Commission responded on October 31, 2024, stating, on page 2: “The Petitioner is advised that he has 30 days to file an appeal if he so chooses. (3) A.R.S. § 41-1033(E) (“If an agency rejects a petition pursuant to subsection C of this section, the petitioner has thirty days to appeal to the council to review whether the existing agency practice or substantive policy statement constitutes a rule.”)

³ Decision 79140 Finding of Fact 1: “On December 23, 2023, Arizona Corporation Commission Chairwoman Marquez Peterson opened this docket by memorandum to consider the adoption of a substantive policy statement to guide the Line Siting Committee” <https://docket.images.azcc.gov/0000209995.pdf>

Frankly, reading the policy statement alone makes it clear because the leading sentence is effectively, “we don’t have jurisdiction over any of this.”⁴ The Commissioners also stated as much at the public hearing.⁵ Can you issue policy statements (let alone allow them to be treated as rules in practice) on issues for which you explicitly lack jurisdiction? We believe the answer is obviously no. Again, the Commission’s own counsel said as much in a docketed legal memo on June 14, 2023.⁶ By focusing only on its ratemaking jurisdiction and ignoring the limits of its line siting jurisdiction, it seems the Commission is trying to confuse you and sidestep the actual issue because it has no arguments responsive to the actual issue.

Line siting jurisdiction is limited to overhead transmission lines under A.R.S. § 40-360(10). The Commission cannot expand line siting jurisdiction beyond its statutory limitations with policy statements or rules. Moreover, even if an underground line were subject to line siting jurisdiction, the line siting process cannot predetermine ratemaking outcomes. Line siting is a creature of the Legislature, not the Arizona Constitution or the Commission. Thus, the constitutional questions the Commission is attempting to raise by mischaracterizing a line siting policy statement as a ratemaking policy statement are a distraction and not responsive to the actual issue.

E. Existing Law is that Municipalities Can Require Undergrounding at Utility Expense

The Arizona Supreme Court in *APS v Town of Paradise Valley* (1980), and, more recently, the Arizona Superior Court in *TEP v. Board of Adjustment* (2024), as cited in our petition and prior responses, found that existing law does not exempt utilities from municipal zoning ordinances. That said, determining whether undergrounding is allowed by law or not is not the subject of this petition. The question before you is: can the Commission issue policy statements (let alone allow them to be treated as rules in practice) on issues for which it explicitly lacks jurisdiction? Again, the answer is

⁴ “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: 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.” <https://azcc.granicus.com/player/clip/5766>

⁶ See page 16 of Decision 79140: <https://docket.images.azcc.gov/0000209995.pdf>

obviously no, even according to memos from the Commission's own counsel. Only the Legislature can expand line siting jurisdiction to include undergrounding or ratemaking.

F. Conclusion

Underground Arizona suspects that the Commission did not adopt a rule (even though its attorneys advised it that a rulemaking would be required) because it would have failed either GRRC or attorney general review. By issuing a policy statement instead and letting it be treated as a rule in practice, the Commission has attempted to sidestep statutory process and avoid the checks and balances prescribed by the Legislature.

For the aforementioned reasons, Underground Arizona requests that GRRC determine that:

1. Underground Arizona has made an Article 3 petition;
2. Article 5 exemptions do not apply to Article 3 petitions;
3. Regardless, the Commission's actions and/or inactions have or would have opted the Commission into a GRRC review process under either article; and,
4. The Commission's line siting policy statement is void because it "is not specifically authorized by statute, exceeds the agency's statutory authority, and is unduly burdensome."

Sincerely,

/s/ Daniel Dempsey

Daniel Dempsey, Director

Underground Arizona

P.S. It is not clear why the Commission cc'd electric utilities in its statement. We believe this is a straightforward case on the merits and, much like a court of law, we will not be soliciting comments to the Council from supporters or the public. If public comment matters to GRRC's analysis and we should, please advise. Frankly, allowing the unilateral creation of policy statements that expand an agency's jurisdiction are as much a risk to the electric utilities as they are to the public or the rule of law. The sanctity of the rule of law is important to everyone.