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December 7, 1988

The Honorable Jim Skelly
Arizona State Representative
State Capitol - House Wing
Phoenix, Arizona 85007

Re: I88-126 (R88-063)

Dear Representative Skelly:

You have requested our opinion on the following questions:

- (a) Does the Arizona Corporation Commission have rule making authority to establish regulations addressing underground utility installations by public service corporations?
- (b) If the answer to (a) is in the affirmative, does the Arizona Corporation Commission have rule making authority to require public service corporations to:
 - (i) Establish and maintain accurate location records of underground utility lines;
 - (ii) Permit access to these location records by individuals;
 - (iii) Alert workers to the presence of underground utility lines?
- (c) Does the Arizona Corporation Commission have rule making authority to establish regulations addressing underground utility installation by utilities owned and/or operated by a political subdivision of the state?

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- (d) If the answer to (c) is in the affirmative, does the Arizona Corporation Commission have rule making authority to require utilities owned and/or operated by a political subdivision of the state to:
- (i) Establish and maintain accurate location records of underground utility lines;
 - (ii) Permit access to these location records by individuals;
 - (iii) Alert workers to the presence of underground utility lines?

The general answer to question (a) is yes. A.R.S. § 40-321(A) is broad enough to permit the Commission by rule to regulate underground utility installations: .

When the commission finds that the equipment, appliances, facilities or service of any public service corporation, or the methods of manufacture, distribution, transmission, storage or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine what is just, reasonable, safe, proper, adequate or sufficient, and shall enforce its determination by order or regulation.

Perhaps the most important aspect of your inquiry is the question whether the Commission may promulgate rules relating to the safety of members of the public who may come into contact with underground utility installations. Although A.R.S. § 40-321(A) itself arguably provides authority for the promulgation of such rules, A.R.S. § 40-336 provides even more specific authorization:

The commission may by order, rule or regulation, require every public service corporation to maintain and operate its line, plant, system, equipment, and premises in a manner which will promote and safeguard the health and safety of its employees, passengers, customers and the public, and may prescribe the installation, use, maintenance and operation of

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appropriate safety or other devices or appliances,
. . . establish uniform or other standards of
equipment, and require the performance of any other act
which health or safety requires.

(Emphasis added.)

The inquiry is not at an end, however. We note that the legislature has addressed the general subject matter which would be encompassed by these rules. See A.R.S. §§ 40-360.21 to -360.30, which require persons who plan to excavate in utility easements to determine the location of underground utility lines before they begin excavating and which impose liability on persons who fail to do so and who damage utility facilities as a result. These statutes, commonly known as the "blue stake law," were apparently initially enacted primarily to protect utility facilities from damage, but a legislative act amending these sections referred to "safety" in its title. Laws 1981 (1st Reg. Sess.) Ch. 153. This law was further amended by Laws 1988 (2nd Reg. Sess.) Chs. 232 and 236.

Because the Commission's power to enact rules on this subject is legislative^{1/} in origin, we think that any Commission rules on this subject would be valid only if they do not conflict with the "blue stake law" and if the "blue stake law" does not itself evidence a legislative intent to occupy the field. At the time you posed your questions, the "blue stake law" did not cover the subjects contained in question (b), and the Commission would have been free to promulgate rules on these subjects.

^{1/} Ariz. Const., art. XV, § 3 provides in part that
the Commission may . . . make and enforce
reasonable rules, regulations, and orders for
the convenience, comfort, and safety, and the
preservation of the health of the employees
and patrons of such [public service]
corporations.

(Emphasis added.) As was pointed out above, these rules would relate primarily to the safety of persons who might come into contact with underground utility facilities while excavating -- the public, in other words. The quoted constitutional provision gives the Commission no authority to enact safety rules for the benefit of the public.

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However, in Laws 1988 (2nd Reg. Sess.) Ch. 232, the legislature enacted provisions which address each of these points. For example, A.R.S. § 40-360.30(A) specifically requires owners of underground facilities (including public service corporations under the jurisdiction of the Commission) to maintain the kinds of records contemplated by your question (b)(i). The only appropriate Commission rule on this subject might be one which establishes, in some detail, the form such records should take.

The issue of permitting public access to location records (your question [b][ii]) seems fully addressed by A.R.S. § 40-360.30 (B), (C) and (D). There does not appear to be any room for a Commission rule on this subject.

Likewise, a rule to alert workers to the presence of underground utility lines (your question [b][iii]) would appear superfluous in light of the detailed provisions of A.R.S. § 40-360.22, concerning the marking of the location of underground facilities.

The answer to question (c) is "no." The applicable statutes give the Commission power to promulgate rules affecting only "public service corporations," not municipal corporations or other entities. However, we think it equally clear that the legislature could not vest such jurisdiction in the Commission, even by attempting to broaden the scope of these statutes. The Supreme Court of Arizona has held squarely that the Commission can be vested with regulatory power only over public service corporations enumerated in Ariz. Const., art. XV, § 2. In Menderson v. City of Phoenix, 51 Ariz. 280, 76 P.2d 321 (1938), the court stated that the legislature could not vest the Commission with regulatory power over municipal corporations which operate public utilities,^{2/} because Ariz. Const., art. XV, § 2 expressly excludes municipal corporations from the definition of public service corporations.

In Rural/Metro Corporation v. Arizona Corporation Commission, 129 Ariz. 116, 629 P.2d 83 (1981), vacating in part 129 Ariz. 119, 629 P.2d 86 (App. 1980), the court used the

^{2/} This category would include, for example, the water system of the City of Phoenix and the electric utility owned and operated by the City of Mesa, as well as the electric system of an entity such as the Salt River Project, which is vested with immunities of municipal corporations by virtue of Ariz. Const., art. XIII, § 7.

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reasoning of Menderson to hold that the legislature could not extend public service type regulation by the Commission to private entities, such as Rural/Metro Corporation, which did not fall within the definition of public service corporations in Ariz. Const., art. XV, § 2. The court took the final step in American Bus Lines, Inc. v. Arizona Corporation Commission, 129 Ariz. 595, 633 P.2d 404 (1981), holding that the legislature cannot vest the Commission with the power to regulate and control non-public service corporations even if the regulations were not utility-type regulations.

From these cases we can conclude that the Commission could not be vested by the legislature with jurisdiction to impose rules concerning underground utility facilities on any entity except public service corporations.^{3/} It follows that the Commission could not, of its own volition, impose such rules on non-public service corporations.

Because question (c) is answered in the negative, we do not address question (d).

Sincerely,



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^{3/} By contrast, we think that the legislature, under the Menderson, Rural/Metro and American Bus Lines tests properly permitted the Commission, in A.R.S. § 40-336, to regulate public service corporations for the benefit of the safety of the public at large, given that the Commission has been empowered by the Constitution to promulgate safety rules benefiting employees and patrons of such corporations. A.R.S. § 40-336 is a logical extension of those powers.