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BEFORE THE ARIZONA POWER PLANT AND  
TRANSMISSION LINE SITING COMMITTEE

Arizona Corporation Commission

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3 IN THE MATTER OF THE APPLICATION )  
4 OF ARIZONA PUBLIC SERVICE )  
5 COMPANY, IN CONFORMANCE WITH THE )  
6 REQUIREMENTS OF ARIZONA REVISED )  
7 STATUTES §§ 40-360, *et seq.*, FOR A )  
8 CERTIFICATE OF ENVIRONMENTAL )  
9 COMPATIBILITY AUTHORIZING THE TS-5 )  
10 TO TS-9 500/230kV TRANSMISSION LINE )  
11 PROJECT, WHICH ORIGINATES AT THE )  
12 FUTURE TS-5 SUBSTATION, LOCATED IN )  
13 THE WEST HALF OF SECTION 29, )  
14 TOWNSHIP 4 NORTH, RANGE 4 WEST )  
AND TERMINATES AT THE FUTURE TS-9 )  
SUBSTATION, LOCATED IN SECTION 33, )  
TOWNSHIP 6 NORTH, RANGE 1 EAST, IN )  
MARICOPA COUNTY, ARIZONA )

Docket No. L-00000D-08-0330-00138

Case No. 138

LEGAL MEMORANDUM  
REGARDING THE LEGAL STATUS  
OF LAND WITHIN A  
TRANSMISSION LINE CORRIDOR

15 As requested by Chairman Foreman, Applicant, Arizona Public Service Company, submits  
16 this legal memorandum on the legal status of land within a transmission line corridor identified in  
17 a Certificate of Environmental Compatibility ("CEC").

18 **Background:**

19 When the Power Plant and Transmission Line Siting Committee ("Committee") grants a  
20 CEC for the construction of a transmission line and the Arizona Corporation Commission  
21 ("ACC") approves that CEC, it typically does not identify the precise location of the line. Instead,  
22 the CEC usually identifies the location by "corridors" which are wider than the rights-of-way that  
23 will ultimately be required for the line. Once a CEC corridor has been approved, the utility, in  
24 consultation with the property owners and sometimes federal, state, county, and municipal  
25  
26

1 entities, begins its detailed design process and identifies the specific rights-of-way. The corridors  
2 give the utility flexibility to work with property owners to design the line in coordination with the  
3 property owners' future plans and provide more opportunity to mitigate environmental impacts  
4 during the design phase.

5  
6 **Question:**

7 What is the legal status of land within a transmission line corridor identified in a CEC?

8 **Brief Answer:**

9 The identification of a transmission line corridor in a CEC has no effect on the legal status  
10 of land within such corridor. The landowner may continue to develop the land and may even be  
11 compensated for development done after the corridor is approved.

12 **Analysis:**

13 Introduction

14 Identifying a corridor in a CEC is similar to other planning activities such as passing a  
15 resolution to condemn property in the future,<sup>1</sup> creating a flood control district,<sup>2</sup> declaring an urban  
16 redevelopment area,<sup>3</sup> or announcing a university expansion plan<sup>4</sup>. These planning activities notify  
17 property owners that their land *might* be acquired in the future (and give them the opportunity to  
18 plan accordingly) but have no effect on the legal status of property.

19  
20  
21 Arizona law allows property owners with knowledge of the possibility of a future  
22 condemnation to commence or continue developing their land without any risk of losing their

23  
24 <sup>1</sup> *State ex rel. Herman v. Larriva's Ace Electric Co.*, 11 Ariz. App. 542 (1970) (highway  
expansion).

25 <sup>2</sup> *Weintraub v. Flood Control District of Maricopa County*, 104 Ariz. 566 (1969).

26 <sup>3</sup> *DUWA, Inc. v. City of Tempe*, 203 Ariz. 181, 52 P.3d 213 (App. 2002).

<sup>4</sup> *Uvodich v. Arizona Bd. of Regents*, 9 Ariz. App. 400 (1969).

1 investments. As long as the purpose of the improvements is not to increase the amount of  
2 damages in the event of a future condemnation, the condemning authority must pay for the value  
3 of all improvements made prior to the service of a summons in a condemnation action.  
4 Additionally, Arizona's Supreme Court has stated that preliminary planning activities do not  
5 affect a property's title and that any loss of value caused by the possibility of future condemnation  
6 are "injuries [that] are necessarily incident to the ownership of property within a municipality  
7 possessing the power of eminent domain."<sup>5</sup>

9 Developability

10 Land within a transmission line corridor (or similar planning area) can be developed  
11 without restriction and without risk of losing the value of the improvements if done in good faith  
12 before an eminent domain complaint has been served.

13  
14 In one case, a property owner built a new building on his property with knowledge of a  
15 resolution by the State Highway Commission to expand a highway adjacent to his land.<sup>6</sup> After the  
16 final right-of-way was acquired, the property owner claimed that the property had been damaged  
17 by the uncertainty caused by the resolution because the building was constructed in a position that  
18 did not use the remaining land as efficiently as possible. The Court of Appeals rejected this  
19 argument, holding that the property owner was in no way constrained by the resolution in  
20 determining how to develop the property:  
21

22 The appellee could have placed his building upon any part of his land he so desired  
23 prior to the time that the complaint was filed and the summons issued. In fact, he  
24 could have placed the improvements on that part of his property that was  
eventually taken by the State of Arizona, even though he had notice of the

25 <sup>5</sup> *Weintraub*, *supra* note 2, at 570 (1969) (quoting *Chicago Housing Authority v. Lamar*, 21 Ill.2d  
26 362, 172 N.E.2d 790 (1961)).

<sup>6</sup> *Larriva's Ace Electric Co.*, *supra* note 1.

1 resolution, just as long as he didn't do so for the purpose of enhancing his  
2 damages. If done in good faith, he would have been compensated for the taking of  
these improvements.<sup>7</sup>

3 Thus, the announcement of possible future condemnation has no effect on the developability of  
4 land in Arizona. This holding has been cited with approval by the State's Supreme Court.<sup>8</sup>

5 Marketability

6 All land within the jurisdiction of an authority with the power of eminent domain is at risk  
7 of being taken at some time in the future. The increased likelihood of a taking, made public by  
8 the passing of a resolution or the identification of a corridor, does not affect the legal status of a  
9 property or its owner's right to use, occupy, convey title, etc.

10  
11 In *Weintraub v. Flood Control District of Maricopa County*, the Supreme Court of  
12 Arizona held that preliminary planning activities do not affect properties' title and that any  
13 injuries caused by the possibility of future condemnation are "necessarily incident to the  
14 ownership of property within a municipality possessing the power of eminent domain."<sup>9</sup> The  
15 Weintraubs owned land within sections identified by the Flood Control District ("FCD") as the  
16 potential site of a future dam and reservoir. They claimed that their land was damaged by the  
17 FCD's recording of its plans with the County Recorder and they were entitled to compensation for  
18 those damages. The Court ruled in favor of the FCD, holding that the property's title was not  
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20  
21  
22

23 <sup>7</sup> *Id.* at 453-54.

24 <sup>8</sup> *State ex rel. Herman v. Schaffer*, 110 Ariz. 91, 98 (1973) ("Until such time as the summons and  
25 complaint are issued the landowner's freedom of use of his land is in no way infringed upon or  
restricted even by the passage of a resolution by the State to condemn.").

26 <sup>9</sup> *Supra* note 2, at 570 (quoting *Chicago Housing Authority v. Lamar*, 21 Ill.2d 362, 172 N.E.2d  
790 (1961)).

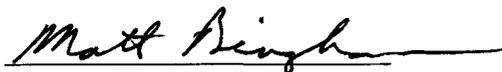
1 affected by the resolution<sup>10</sup> and that any damage caused was “incidental damage which is not  
2 compensable.”<sup>11</sup>

3 Conclusion

4 The identification of a transmission line corridor in a CEC has no effect on the legal status  
5 of land within such corridor. Arizona courts have held that similar public notifications of  
6 planning for public improvements in no way impact property owners’ rights in their land.  
7

8 RESPECTFULLY submitted this 5<sup>th</sup> day of September, 2008.

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18 **ORIGINAL** and twenty-five (25) copies  
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20 this 5<sup>th</sup> day of September, 2008, with:

21 The Arizona Corporation Commission  
22 Utilities Division – Docket Control  
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25 <sup>10</sup> *Supra*, note 2, at 570 (“The resolution not having resulted in the necessary steps for the taking  
26 of the property, the title was not affected. The District not having acquired any interest or title  
to the property, the Weintraubs, as far as the District was concerned, could have conveyed clear  
title.”)

<sup>11</sup> *Supra*, note 2, at 569 (quoting *Hempstead Warehouse Corporation v. United States*, 98 F.Supp.  
572, 120 Ct.Cl. 291 (1951).

1 **COPY** of the foregoing hand-delivered  
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