ORIGINAL

0000110460

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

2010 APR 28 P 3: 54

AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission
DOCKETED
APR 28 2010
DOCKETED BY

COMMISSIONERS
KRISTIN K. MAYES - CHAIRMAN
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

RATTLESNAKE PASS, LLC, Complainant, vs. TUCSON ELECTRIC POWER COMPANY, Respondent	DOCKET NO. E-01933A-10-0125 **TUCSON ELECTRIC POWER COMPANY'S ANSWER TO FORMAL COMPLAINT** **AND** **MOTION TO DISMISS**

Tucson Electric Power Company ("TEP" or "Company"), through undersigned counsel, answers the Complaint filed by Rattlesnake Pass, LLC ("Rattlesnake" or "Complainant") on April 5, 2010. TEP respectfully requests that the Arizona Corporation Commission ("Commission") dismiss Rattlesnake's Complaint for the reasons explained below.

ANSWER

1. TEP admits that in August of 2009 it installed a voltage regulator bank to address a customer complaint (TEP Complaint No. 79501) of voltage irregularities at the Ironwood Reserve Development in Marana, Arizona. These regulators were placed at or near the 9100 block of North Scenic Drive on existing power poles, within a lawful easement granted to TEP in 1942.[1] That easement is for the 10-foot-wide corridor containing the electric line and system, including power poles and related fixtures and devices (Bk 76/Pg 594, Pima Co. Records) (hereinafter referred to as "TEP Easement"). The TEP Easement has contained an electric line since its creation. TEP's placement of the voltage regulators was based on electrical engineering

[1] See attached Exhibit A depicting the voltage regulators on the existing electric line.

requirements and ease of service. TEP maintains that the installment of the voltage regulators was in accordance with any and all applicable requirements and denies any allegations to the contrary.

2. Adjacent to the TEP Easement is a gas easement belonging to El Paso Natural Gas Company ("El Paso"). The TEP Easement is specifically tied to the east boundary of the El Paso easement, which was originally granted in 1933 and is forty feet wide.

3. TEP also holds a 1961 easement "through, over and across" another portion of Complainant's property west of the easement corridor (Bk 1789/Pg 404, Pima Co. Records).

4. TEP admits that on or about August 10, 2009, it met with Mr. Greg Mitchell, Manager of Rattlesnake, to discuss his concerns about the voltage regulators. TEP further admits that it received correspondence from Mr. Mitchell shortly after that meeting, but the Company denies Complainant's characterization of those communications.

5. TEP further admits receiving correspondence on February 8, 2010 from Mr. Mitchell on behalf of Rattlesnake, but denies any and all allegations made in that correspondence as it is inaccurate and misrepresents what actually occurred. TEP disagrees with all of Rattlesnake's statements regarding applicable Arizona law. For any other statements made, TEP is without sufficient knowledge or information to form a belief at this time as to the truth of those statements contained within, and accordingly denies the same.

6. TEP offered on numerous occasions to relocate the regulators if Rattlesnake would pay for those actions. Rattlesnake rejected those offers. TEP is under no obligation to relocate these regulators at its expense.

7. TEP admits that on February 9, 2010, Mr. Greg Mitchell, Manager of Rattlesnake, filed an informal complaint with the Commission making several allegations – including criminal trespass and violation of Pima County Development Zoning Codes. TEP denies any and all allegations contained within that informal complaint.

8. TEP admits that on February 18, 2010, TEP responded to Rattlesnake's informal complaint denying the allegations contained therein. TEP also acknowledges receiving and

declining Rattlesnake's request for mediation on March 10, 2010 since previous efforts to resolve the issue were rejected by Rattlesnake.

9. The Company denies that it has illegally accessed any easement. Further, TEP maintains that it has lawful authority to access the electric line and voltage regulators pursuant to Arizona Administrative Code R-14-2-206(C) and 207(E)(2)(a) and pursuant to lawfully recorded easements. TEP has used the combined El Paso/TEP line corridor for access to its facilities for over a half-century and under the common law of property, the creation of an easement for an electric line "carries with it a reasonable right of access to enable the utility to discharge its legal obligation to render adequate and reliable service." *Vermont Electric Power Co. v. Anderson*, 147 A.2d 875 at 880 (1959). It is established utility-industry practice for cooperating utility companies to co-utilize the lands within their adjoining easements to minimize disruption to the surrounding landscape, which TEP has done here. Otherwise, the Company would have to denude its own easement, thereby further disrupting the natural surroundings.

10. TEP denies Complainant's allegation that it criminally or civilly trespassed on Rattlesnake's property. Further, Rattlesnake's allegation regarding trespass must be dismissed because the Arizona Corporation Commission cannot provide relief for claims of civil or criminal trespass. Therefore, the Commission lacks jurisdiction to hear this allegation. Consequently, it must be dismissed.

11. TEP denies Complainant's allegation that it overburdened its easement. Complainant admits that the voltage regulators fit within the easement and it is clear from the attached photo that the bank is indeed now part of an existing electric line within an existing utility easement. Further, this allegation is outside the jurisdiction of the Commission and must be dismissed. While the Commission "has broad powers with respect to those matters that fall within its constitutionally or legislatively endowed authority," claims "that are unrelated to or attenuated from those matters over which the Commission has express constitutional or statutory authority do not fall within the Commission's exclusive jurisdiction." *Qwest Corp. v. Kelly*, 204 Ariz. 25 at 30, 59 P. 3d 789 at 794 (Ariz. App. Div. 2, 2002). Where a complaint raises

"relatively simple tort and contract issues revolving around a central inquiry: whether, under traditional judicial principles, [the company] committed a civil wrong against [the complainant]," then the "claims most important aspects involve facts and theories of tort and contract far afield of the Commission's area of expertise and statutory responsibility." *Id.* at 32, 796 (internal quotations omitted). Indeed, "tort and contract claims are the type of traditional claims with which our trial courts of general jurisdiction are most familiar and capable of dealing." *Id.* Therefore, the Commission lacks jurisdiction to hear this allegation. Consequently, it must be dismissed.

12. TEP denies that it has ever damaged Complainant's property.

13. TEP maintains that it acted, and continues to act, in accordance with all applicable Commission requirements by installing, operating and maintaining the voltage regulators at their current location. TEP further maintains those voltage regulators are necessary for providing safe and reliable electric service and that any attempts to prevent access to those facilities is in violation of Commission regulations and applicable Arizona law.

14. Moreover, TEP maintains this is an inappropriate forum for Rattlesnake's allegations as being outside the jurisdiction of the Commission. TEP respectfully requests that Rattlesnake's Complaint be dismissed and all relief requested therein be denied.

15. TEP denies any and all allegations that the voltage regulators pose a safety threat as installed.

16. TEP denies each and every allegation not specifically admitted herein.

AFFIRMATIVE DEFENSES

17. Complainant has failed to state a claim upon which relief may be granted.

18. The Commission lacks subject matter jurisdiction over Rattlesnake's claims.

19. Complainant has alleged no "violation of any provision of law or any order or rule of the commission" as required by Arizona Revised Statute § 40-246(A).

20. TEP has lawful authority to access the electric line and voltage regulators pursuant to Arizona Administrative Code R-14-2-206(C) and 207(E)(2)(a) and pursuant to lawfully recorded easements. Interference with TEP's access would be in violation of A.R.S. § 40-431.

21. TEP does not know at this time which, if any, additional defenses may apply. TEP believes that facts may come to light in this case that support any or all of the affirmative defenses set forth in Rule 8(c), Arizona Rules of Civil Procedure, and hereby incorporates them by reference.

MOTION TO DISMISS

Rattlesnake's Complaint should be dismissed because it is deficient and raises issues outside of the Commission's jurisdiction. Arizona Revised Statute § 40-246(A) requires that Rattlesnake allege a "violation of any provision of law or any order or rule of the commission" in order to file a formal complaint. Complainant has failed to allege a single violation involving Commission rules, decisions, or provisions of law. In fact, the only law Complainant cited deals with criminal trespass, which is well outside the jurisdiction of the Commission. Complainant's other allegations, civil trespass and easement over burden, are "unrelated to or attenuated from those matters over which the Commission has express constitutional or statutory authority" and thus "do not fall within the Commission's exclusive jurisdiction." *Qwest Corp. v. Kelly*, 204 Ariz. 25 at 30, 59 P. 3d 789 at 794 (Ariz. App. Div. 2, 2002). Because nothing the Complainant has alleged is within this Commission's jurisdiction, and because the Complaint is procedurally deficient, this matter should be dismissed.

WHEREFORE, having fully answered Rattlesnake's Complaint, TEP requests that the Commission issue a Decision dismissing the Complaint; and

1. Denying all relief sought by Rattlesnake, including any request that TEP relocate the voltage regulators at its own expense; for any professional and legal fees and costs; and

2. Granting such further relief as this Commission deems just and reasonable.

RESPECTFULLY SUBMITTED this 28th day of April 2010.

TUCSON ELECTRIC POWER COMPANY

By Melody Gilkey

Melody Gilkey, Regulatory Counsel
Tucson Electric Power Company
One South Church Avenue, Suite 200
Tucson, Arizona 85701

Attorney for Tucson Electric Power Company

Original and 13 copies of the foregoing filed this 28th day of April 2010 with:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Copy of the foregoing hand-delivered/mailed this 28th day of April 2010 to:

Lyn A. Farmer, Esq.
Chief Administrative Law Judge
Hearing Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Janice Alward, Esq.
Chief Counsel, Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Steven Olea
Director, Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

By Mary Ippolito

ATTACHMENT

"A"