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E-01933A-10-01a5

**Arizona Corporation Commission Formal Complaint -
Response to TEP's Answers and Motion to Dismiss**

Arizona Corporation Commission

Complainant:

DOCKETED

JUL 14 2010

DOCKETED BY 

Phone #:

Rattlesnake Pass, L.L.C.
Greg Mitchell, Manager
6045 N. Abington Road
Tucson, AZ 85743

520-603-8053

Complaint Number:

84885

Date:

July 12, 2010 (original complaint dated 4/2/10)

Utility Name:

Tucson Electric Power Company

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ACC
DOCKET CONTROL

Rattlesnake Pass, LLC (RP) hereby responds to Tucson Electric Power Company's (TEP) Answer to Formal Complaint and Motion to Dismiss. This response is delayed/late because I was told by Jenny Gomez, the ACC staff assigned to this case, that there was no need to respond, but instead wait to be contacted by the ACC. Every two weeks or so, I called Ms. Gomez, and got the same response. When I called Ms. Gomez on July 5 2010, she suggested I do officially respond. RP respectfully requests that the Arizona Corporation Commission deny all of TEP's motions to dismiss for the reasons stated below.

1. Complainant acknowledges that TEP must have an electrical engineering requirement for placement of their voltage regulators. In RP's discussion with TEP's electrical engineer in August of 2009, the need for this equipment, and why TEP chose to put it where they did, was explained to RP. RP was satisfied with TEP's electrical engineering requirement and admitted so in its initial letter on this matter to TEP on 8/11/09.
2. TEP states that El Paso Natural Gas Company (EPNG) has an easement adjacent to theirs. TEP also states "The TEP Easement is specifically tied to the east boundary of the EPNG easement, which was originally granted in 1933 and is forty feet wide." Neither of these statements are fact. The original 1933 easement to EPNG was sixty feet wide, not forty. Furthermore, the TEP easement was not "specifically tied" to the EPNG easement. TEP's easement adjacent to the east boundary of the original EPNG easement is for locating purposes only, for TEP's easement has no legal description. TEP does not have

an easement adjacent to EPNG's. See appendices B and C for an aerial picture / drawing and a legal survey depicting these easements.

3. RP acknowledges that TEP has another easement across its land, and that other easement is vital to recognizing that TEP doesn't have legal authority to use land outside its ten foot easement in this case. The other easement had diction specifically providing TEP the legal authority to use area outside of the actual easement to gain access to their easement. The easement that this case is about does not provide TEP any additional access – they are limited to use only the easement given as access.

4. TEP may deny Complainant's characterization of communications with RP. However, RP put its communication in writing as it took place to document the most accurate characterization of this communication. This is in sharp contrast to TEP; TEP's Ms. Dickerson was unwilling to put anything in writing even after multiple requests by RP. Furthermore, Ms. Dickerson, nor anyone else at TEP, ever expressed any concern or argument with the characterization of the communications that transpired, even though, Ms. Dickerson told RP, that the issue of this electric regulator bank was raised all the way to the Vice President level in September of 2009.

5. RP maintains that all original allegations (criminal trespassing, overburdening easement, damages incurred to secure the property, and consequential property value decrease, see the original complaint for a thorough explanation) and correspondence with TEP is accurate and in good faith represents what actually transpired between TEP & RP. RP maintains all statements regarding to Arizona law are accurate and applicable.

6. TEP states that they "offered on numerous occasions to relocate the regulators if RP would pay for those actions. RP rejected those offers." That statement is not true. TEP offered to relocate the regulators if RP paid TEP \$20,000 **and** got the neighboring land owner's permission allowing the placement on his land. However, this is irrelevant as it is not RP's responsibility to correct the public safety / lack of adequate easement issue that TEP created.

7. RP maintains that all allegations (see #5 above) in the informal complaint (which was then wholly incorporated into the formal complaint), including criminal trespass and questionable use (or abuse) of TEP's exemption from Pima County Development Zoning Codes, are accurate and should not be dismissed just because TEP denies or disagrees with RP.

8. RP maintains its informal complaint and allegations (see #5 above) against TEP for not trying to resolve said dispute via mediation, since TEP's previous options to RP were essentially TEP's responsibility (obtaining neighboring land owner's approval for regulator bank relocation). It is not RP's responsibility (nor did RP have the authority to negotiate for TEP) to "negotiate" TEP's legal easement rights.

9. RP maintains that TEP illegally accessed land outside TEP's legal easement. TEP implies that Arizona Administrative Code R-14-2-206C and 207(E)(2)(a) allows them legal access to use land outside of their easement. Neither of these codes is applicable, and therefore neither provides TEP the authority to legally access land outside of granted easement, and if done so results in criminal trespassing. With regard to R-14-2-206C, RP is not a "customer" of the utility; there is no "service connection." R-14-2-206 is for "Service Lines and Establishments." With regard to 207(E)(2), this regulator bank and its electric line is not a "Line Extension" or a "Single phase underground extensions in subdivision developments," which is what section 207(E) pertains to. It is important to note that this easement is a transmission and distribution easement, not a service connection easement. There are no service connections on this easement. TEP has no legal right to use any land outside their legal easement for any reason.

TEP further states that "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." The EPNG easement was originally, and still is, exclusive to that company for their use only. TEP has not stated or produced any "co-utilizing" agreement with EPNG. EPNG cannot be a "cooperating utility" and cannot grant TEP access to use their easement, regardless of the purpose. In 2005, RP and EPNG negotiated an easement for EPNG's new metering station (it is located approximately 150' northwest of the regulator bank). In the final agreement reached in April 2005 between RP and EPNG, EPNG relinquished the eastern most twenty feet of their original sixty foot easement. In addition, RP negotiated details with EPNG ensuring RP could still develop its land. RP and EPNG realized the need for RP to "underground" 600 linear feet of TEP's overhead electric lines on both sides of the new metering station for RP's access around the metering station. In December of 2004, TEP's Chuck Leon provided RP a figure of \$20,800 to remove two power poles (the south pole that was to be removed is now where the regulator bank resides; the north one

is just north of the EPNG metering station) and underground 600' of power line. RP can no longer develop its land because the regulator bank now preempts the "undergrounding" as RP planned. TEP was never included in any discussion on the matter of renegotiating EPNG's original easement. TEP has no right to EPNG's access or easement and therefore EPNG and TEP are not and can not be "cooperating utility companies" in this case.

TEP also quotes the following from the case of *Vermont Electric Power Co. v. Anderson*, (1959) "carries with it a reasonable right of access to enable the utility to discharge its legal obligation to render adequate and reliable service." RP believes this quote is completely out of context relative to RP v. TEP. VEPC v. Anderson is a condemnation case whereby:

- Before construction, VEPC researched to determine the best location to place its new facilities with respect to scenic preservation and affected property owners. (TEP states they determined their location by "ease of service" in Answer #1)
- VEPC originally attempted to acquire the additional easement without condemning it. (TEP's senior counsel Mr. Jerden states that TEP doesn't need legal access and therefore TEP never contacted RP.)
- The court ruling for VEPC v. Anderson condemnation made clear that "this condemnation will not interfere with the orderly development of the region and scenic preservation." (The court ruled for the condemnation because the site the utility chose minimized the effect on the neighbors and scenic views. TEP never considered either, only "electrical engineering requirements and ease of service." See TEP's Answer #1.)
- VEPC's original easement (from 1954) specifically stated "the right to enter upon and cross other property owned by the Grantor, for the purpose of gaining access to the aforesaid strip and of exercising any of the rights hereby conveyed." (TEP's easement has no such verbiage, although another one of TEP's easements elsewhere across RP's land does include it. See response #3 above.)
- The affected property owner(s) were compensated for the damages (loss of property value, etc.) sustained by the new facilities installed by VEPC. (TEP didn't offer to compensate RP for property value degradation nor did TEP even try to minimize property value damages (RP's opinion); instead TEP's

installation location was determined by “ease of service.” RP estimates that it would have cost TEP only hundreds of dollars more to install their regulator bank where their electric line meets Twin Peaks road (approximately 1000’ away from current location), where the value to affected property owners would be negligible due to the inability for the land to be developed there. Per TEP’s Don McAdams (engineering), that location also meets TEP’s electrical engineering requirements.)

10. RP maintains the allegations that TEP illegally trespassed on RP’s property, both criminally and civilly and that these allegations are directly applicable to this ACC complaint and need to be heard and considered. RP believes that the ACC has jurisdiction in public safety issues where a public utility company is knowingly violating Arizona law.

11. RP maintains that TEP’s placement of their voltage regulators is overburdening the original easement. TEP cannot service the regulators without going outside their legal easement. All of the TEP facilities on this easement up to August of 2009, when the voltage regulator bank was installed, could be serviced without going outside their legal easement. TEP admits they were trespassing on RP’s land to perform the installation and service of those facilities.

12. RP maintains that TEP did damage RP’s property. Not only did RP incur substantial costs to secure the property, but the land value has decreased dramatically as a result of TEP’s illegal trespassing and regulator bank placement. See the original complaint for a more thorough explanation.

13. RP maintains that TEP did violate TEP’s legal easement by going outside said easement when TEP installed the voltage regulators. TEP also admits trespassing on RP’s land to install the voltage regulators, see #11 above and #19 below. TEP states “any attempts to prevent access to those facilities (the voltage regulators) is in violation of Commission regulations and applicable Arizona law.” RP is not preventing TEP from accessing its current facilities or voltage regulators, only preventing TEP’s **illegal** trespassing on RP’s property adjacent to TEP’s granted easement. RP has made no changes to the land surface of TEP’s ten foot wide easement, or legal access to it, other than facilitating TEP’s access within their easement by removing some of cactus therein. See appendix A for attached photos.

14. RP maintains that these allegations (see #5 above) and this complaint filed with the ACC is within the jurisdiction of the Commission and should proceed.
15. RP maintains that all allegations and complaints (see #5 above) against TEP are accurate and true and that TEP cannot safely maintain the installed voltage regulators without illegally trespassing on RP's property.
16. RP maintains that each and every allegation (see #5 above) previously stated against TEP are accurate and truthful and request the ACC to proceed with its investigation.
17. RP maintains that TEP must either acquire an adequate easement (good faith negotiations or condemnation) for servicing their voltage regulators or relocate them.
18. RP maintains that the Commission has jurisdiction over RP's claims, see #5 above.
19. RP alleges that TEP has violated ARS § 13-1502, criminal trespass. Moreover, TEP admits it will continue to use RP's land outside of its ten foot wide legal easement to service its voltage regulators, thereby, in essence, admitting they will continue to violate ARS § 13-1502.
20. RP maintains that TEP has lawful authority to use only their ten foot wide easement to access their electric line and related devices. Arizona Administrative Code R-14-2-206(C) and 207(E)(2)(a) are not applicable to this case (this easement is not for a Service Line or Line Extension, see #9 above) and therefore cannot provide TEP authority to use land area outside their ten foot wide easement. RP maintains that stopping or interfering with TEP's attempt to use RP's land outside TEP's easement is not in violation of ARS § 40-431.

REQUEST FOR DENIAL OF MOTION TO DISMISS

TEP's reason for dismissal are based on their belief that they have lawful authority to trespass per Arizona Administrative Code R-14-2-206(C), 207(E)(2)(a), and A.R.S. § 40-431. The first two codes don't apply because this easement is not for a Service Line or Line Extension, see #9 above. ARS § 40-431 does not provide TEP authority to trespass because RP is not interfering with TEP's ability to use TEP's legal easement to access or examine their property. However, RP will not allow TEP to use RP's adjacent land for access, examination, or any other purpose, which TEP still admits it will do when necessary. Therefore, TEP is willingly retaining major electrical equipment in such a location that it cannot be safely accessed by them, thereby intentionally creating a public safety issue.

List of Appendices:

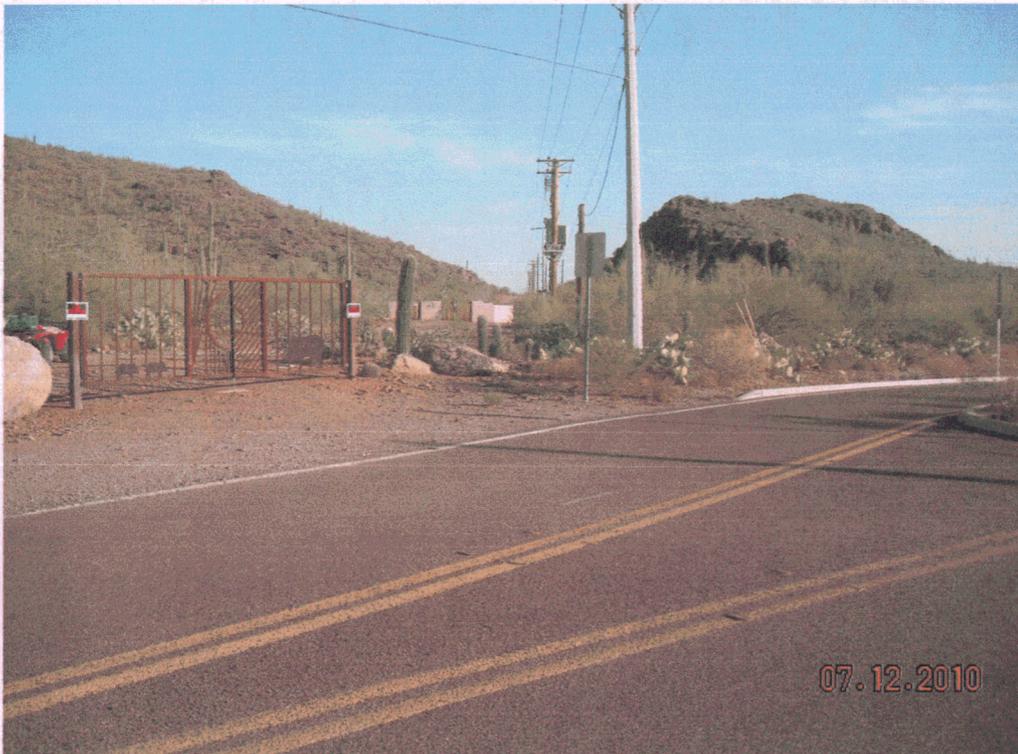
- A: Pictures showing TEP access locations
- B: Survey showing EPNG easements
- C: Marked up Aerial photo

This formal complaint follow-up response filed with the Arizona Corporation Commission against Tucson Electric Power Company is hereby made by the manager of Rattlesnake Pass, L.L.C. this 12th day of July, 2010.

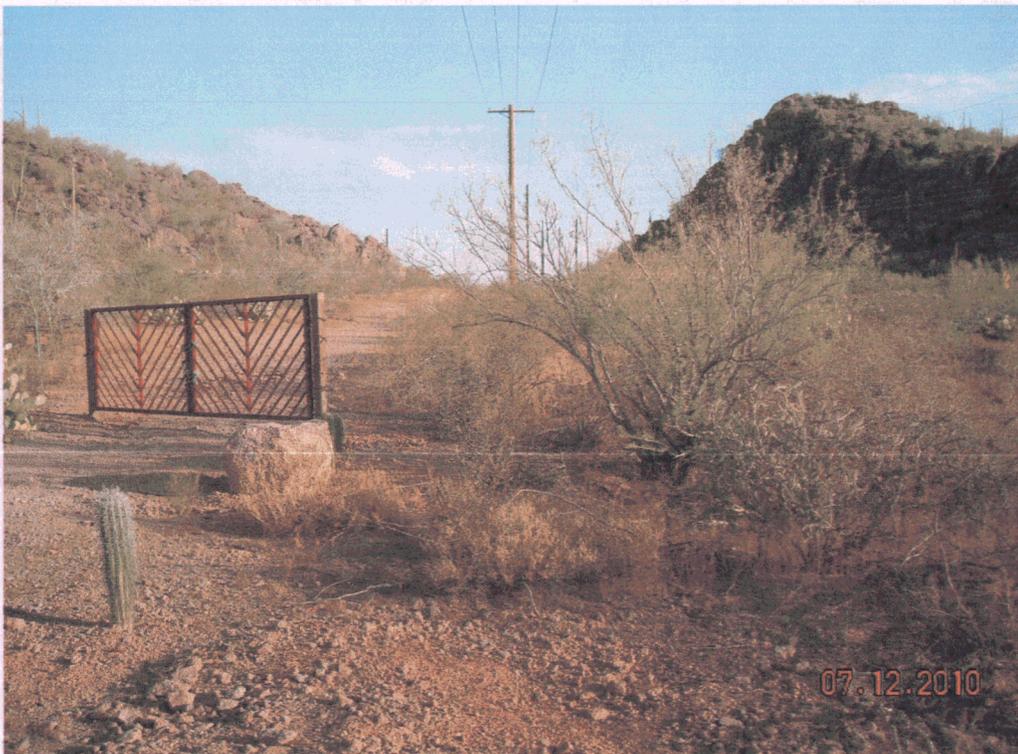


Greg Mitchell, RP Manager

Appendix A, Pictures showing easement access

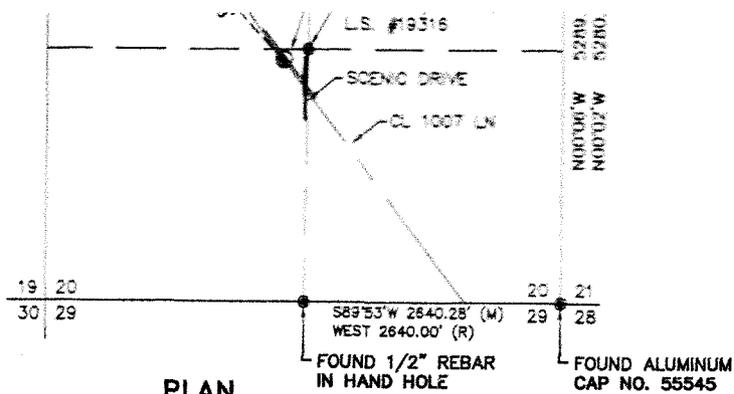


South access; Picture taken standing on Scenic Drive, to the left of projected easement center line. Driveway/security gate installation in complete, re-vegetation is in progress.

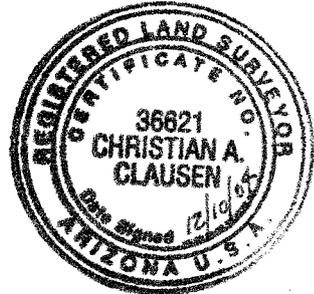
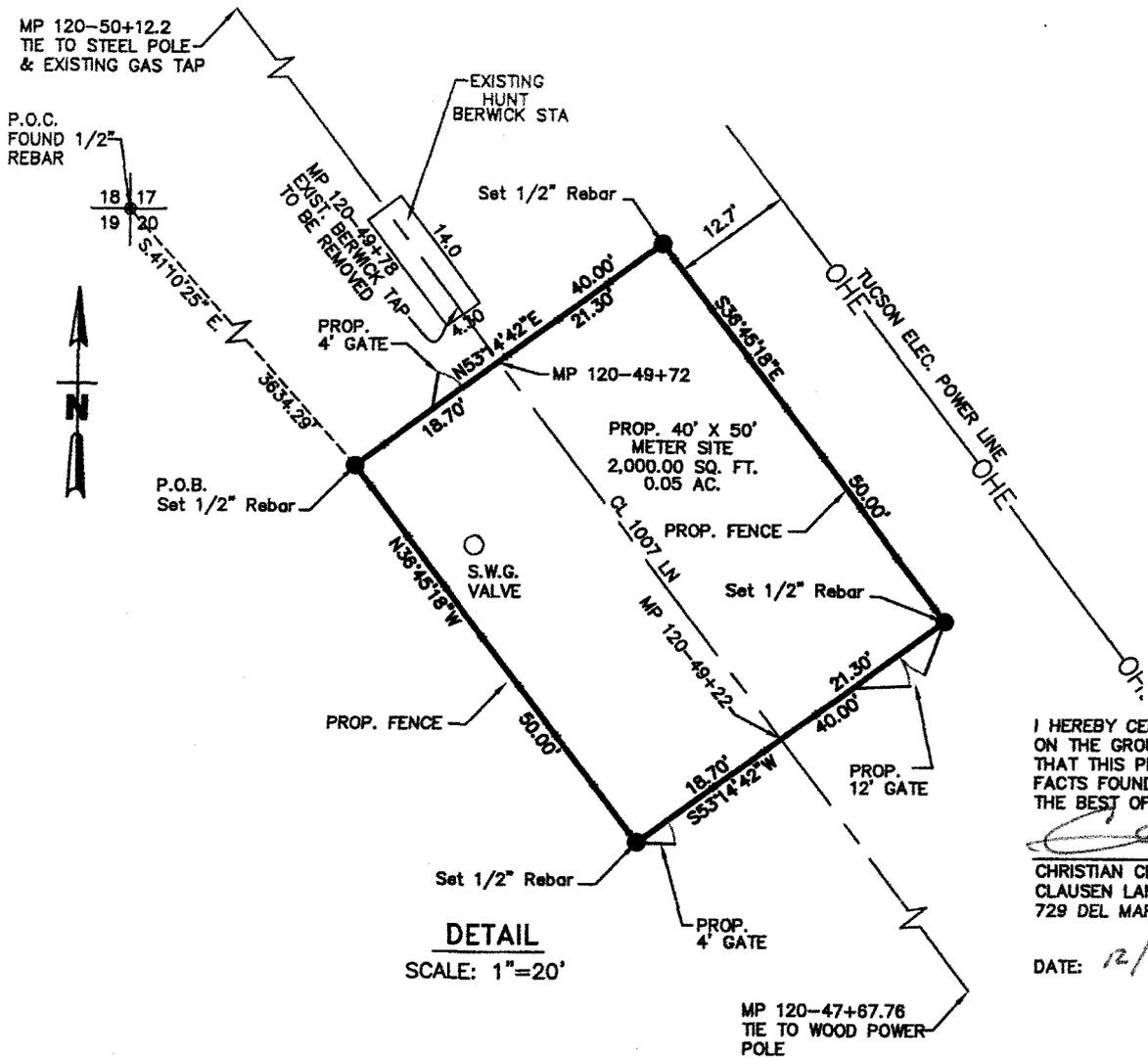


North access; picture taken while standing in center of TEP's ten foot wide easement in RP's land, looking north at neighbor's land

GRADE OF BEARING IS BASED ON UTM ZONE 12 NORTH, NAD 83 COORDINATE SYSTEM. DISTANCES SHOWN ARE GROUND DISTANCES.



PLAN
SCALE: 1"=2000'
APPENDIX B



I HEREBY CERTIFY THAT THIS SURVEY WAS MADE ON THE GROUND UNDER MY SUPERVISION AND THAT THIS PLAT CORRECTLY REPRESENTS THE FACTS FOUND AT THE TIME OF THIS SURVEY TO THE BEST OF KNOWLEDGE.

Christian Clausen
CHRISTIAN CLAUSEN, AZ RLS NO. 36621
CLAUSEN LAND SURVEYING
729 DEL MAR DRIVE, EL PASO, TX. 79932

DATE: 12/10/04

DETAIL
SCALE: 1"=20'

REFERENCE

EPNG DWG. NO 1007.0-22.20
RW# 0400517

1	12-09-04	AA	40' x 50' SITE	096299	L.A.F.
NO.	DATE	BY	DESCRIPTION	PROJ. ID	APPR.

REVISIONS

Division: TUCSON		Op. Area: TUCSON	
Co./Par.: PIMA		St.: ARIZONA	
Dft: AA	Date: 10-15-04	Project ID: 096299	
Chk: .	Date: .	Scale: SHOWN	
Appr: L.A.F.	Date: 11-11-04	Filename: 01007.09-X-054	

LINE FROM EL PASO-DOUGLAS LINE TO GUADALUPE REGULATOR STATION LINE 1007
SURVEY OF A 40' x 50' SITE FOR A PROPOSED METER STATION IN SECTION 20, TOWNSHIP 12 SOUTH, RANGE 12 EAST, G. & S.R.M., PIMA COUNTY, ARIZONA



1007.9-X-54
Sheet: 1 OF 2
Type: AUTOCAD

Appendix C



EPNG metering site
Blue - proposed
Red - actual

1" = 50'

