

ORIGINAL



0000133263

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

Arizona Corporation Commission

DOCKETED

2012 JAN -6 A 9:56

JAN 6 2012

AZ CORP COMMISSION
DOCKET CONTROL

DOCKETED BY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COMMISSIONERS

GARY PIERCE - Chairman
BOB STUMP
SANDRA D. KENNEDY
PAUL NEWMAN
BRENDA BURNS

IN THE MATTER OF THE FORMAL
COMPLAINT OF RATTLESNAKE PASS, LLC,

COMPLAINANT,

vs.

TUCSON ELECTRIC POWER COMPANY,

RESPONDENT.

DOCKET NO. E-01933A-10-0125

PROCEDURAL ORDER

BY THE COMMISSION:

On April 5, 2010, Rattlesnake Pass, LLC ("Complainant" or "RP") filed with the Arizona Corporation Commission ("Commission") a complaint ("Complaint") against Tucson Electric Power Company ("Respondent" or "TEP").

On April 28, 2010, the Respondent filed its Answer to Formal Complaint and Motion to Dismiss ("Answer").

On July 14, 2010, the Complainant filed its Response to TEP's Answer ("Response").

Pursuant to a Procedural Order filed on July 27, 2010, a procedural conference was held on September 15, 2010, during which the parties indicated that they had not settled the matter and wanted to set oral arguments on the Respondent's Motion to Dismiss.

Accordingly, pursuant to a Procedural Order filed October 18, 2010, oral arguments were held on the Respondent's Motion to Dismiss on November 9, 2010. At the conclusion of oral arguments, the matter was taken under advisement.

In the Complaint, RP explained that TEP has a 10-foot wide easement dating from 1933 on RP's property. RP claimed that in August 2009, TEP entered RP's property without RP's knowledge and installed a regulator bank on top of an electric pole that was already existing on TEP's easement. RP asserted that, in order to install the regulator bank on the pole, TEP had to have placed its trucks

1 and equipment outside of the granted 10-foot easement. RP alleged that in doing so TEP engaged in
2 criminal trespass and over-burdened its easement, resulting in various damages to RP.

3 RP stated in clear terms it will not permit TEP to again exceed its 10-foot easement under any
4 circumstances. RP alleged that because TEP will not be able to lawfully access the regulator bank for
5 maintenance or to address an emergency situation, a public safety issue exists. RP requested that the
6 Commission direct TEP to either acquire the adequate legal access TEP needs to reach its
7 transmission and distribution equipment or require TEP to relocate the regulator bank to where TEP
8 can lawfully access the equipment.¹

9 In its Answer, TEP noted that there has been an electric line on the easement since the
10 easement's creation. TEP admitted that it installed a voltage regulator bank on this line in August
11 2009, and noted that the equipment was installed in response to an earlier consumer complaint to the
12 Commission about continuing voltage irregularities at the Ironwood Reserve Development in
13 Marana, Arizona.² The Company explained that it placed the voltage regulators on the easement
14 based on electrical engineering requirements and ease of service considerations. TEP asserted that it
15 installed the regulators in accordance with all Commission regulations and requirements and that the
16 regulators are necessary for providing safe and reliable service.

17 TEP denied that it illegally accessed or over-burdened its easement, noting that RP admits that
18 the regulators fit within the TEP easement as part of the pre-existing electric line. TEP also denied
19 that it has trespassed on RP's property. TEP countered that any attempts by RP to prevent TEP's
20 access to those facilities would be in violation of Commission regulations and applicable Arizona
21 law.³

22 Within its Answer, TEP asserted that the Complaint must be dismissed because it is legally
23 deficient and raises issues outside the Commission's jurisdiction. TEP acknowledged that the
24 Commission generally has broad powers regarding "matters that fall within its constitutionally or
25 legislatively endowed authority,"⁴ but TEP also believes that the Commission lacks jurisdiction over

26 ¹ Although RP is a TEP customer, the equipment at issue is not the source of electricity to the Complainant's property.
27 Transcript of November 9, 2010, Procedural Conference, pages 14-15. (Hereinafter, "Tr. at ____".)

² Informal Complaint No. 2009-79501, filed June 5, 2009.

³ Citing A.R.S. § 40-341(B).

⁴ Answer, page 3, citing *Qwest Corp. v. Kelly*, 204 Ariz. 25, at 30, 59 P.3d 789, at 794 (App. 2002).

1 issues raised by the Complainant because they “are unrelated to or attenuated from those matters
2 over which the Commission has express constitutional or statutory authority [and] do not fall within
3 the Commission’s exclusive jurisdiction.”⁵

4 In support of this assertion, TEP cites to A.R.S. § 40-246(A), which states that a person may
5 bring a complaint against a public service corporation for violations of “any provision of law or any
6 order or rule of the commission....” TEP claims that RP has not alleged any violations under any
7 Commission rule, decision or provision of law. According to TEP, the only violation of law RP
8 complains of is under A.R.S. § 13-1502, a provision of Arizona’s criminal code over which the
9 Commission does not have jurisdiction. TEP says that RP’s other claims are based in tort and
10 property law—areas of law that fall within the purview of courts of general jurisdiction and not
11 within the Commission’s area of expertise and statutory responsibility.⁶

12 In its Response, RP re-asserted all of its original allegations of criminal trespass, easement
13 overburden and damages. RP requested that the Commission deny TEP’s Motion to Dismiss because
14 “the [Commission] has jurisdiction in public safety issues where a public utility company is
15 knowingly violating Arizona law.”⁷

16 During oral arguments on the Motion to Dismiss, TEP reiterated its position that the issues
17 underlying the Complaint are based in property and criminal law and are beyond the Commission’s
18 jurisdiction. TEP also argued that RP’s assertion that there is a question of public safety was “vague
19 at best.”⁸ TEP contends that this claim is a red herring to mask the non-jurisdictional essence of the
20 Complaint.⁹

21 RP asserted that the Commission has jurisdiction over all of the issues raised in the Complaint
22 based on a number of statutes, including A.R.S. § 40-246, which states that a complaint may be
23 brought against a public service corporation before the Commission alleging that the public service
24 corporation has acted in violation “of any provision of law or any order or rule of the Commission.”
25 According to RP, the phrase “any provision of law” allows the Commission to hear any complaint

26 ⁵ *Id.*

27 ⁶ Answer, pages 3-5.

27 ⁷ Response, page 5.

28 ⁸ Tr. at 6.

28 ⁹ Tr. at 6, 24.

1 against a public service corporation regardless of its legal underpinnings.¹⁰

2 Regarding the public safety allegation, Greg Mitchell, RP's representative, stated at oral
3 argument:

4 [The] public safety issue is very clear. TEP has equipment here, major equipment for
5 regulating power. If the power goes down, I believe that our government considers that a
6 public safety issue. So if the people don't have power, it is a public safety issue. TEP is
7 not going to be able to get in there to access this equipment.

8 They have placed equipment in there by trespassing. They have violated Criminal Code
9 to trespass to get in there to place their equipment. I am not going to let it happen again.

10 So they have got a ten-foot easement. I physically don't see any way that they can
11 service that equipment without trespassing.... So, therefore, I am not going to let them
12 have access. So if those regulators get destroyed by lightning or malfunction or whatever
13 they may be, they cannot get in there to service them. I won't allow it.¹¹

14 TEP responded that there is no "public safety event" currently at issue before the
15 Commission; only RP's allegation that TEP cannot service its equipment.¹²

16 At the end of oral arguments, RP stated that it is not asking the Commission to award
17 damages, but asks the Commission to stop TEP from further criminal trespass in violation of A.R.S. §
18 13-1502.¹³

19 **Resolution**

20 Pursuant to Article XV of the Arizona Constitution, the Commission has authority over public
21 service corporations and may establish and enforce rules and regulations governing them. TEP is a
22 public service corporation and pursuant to A.R.S. § 40-246 the Commission may hear complaint
23 cases against TEP under certain circumstances.

24 The legal violations alleged in the Complaint—criminal trespass, easement overburden and
25 damages—are not based on any specific rule, law or decision of the Commission and do not relate to
26 questions of rates or provision of service to the Complainant. Rather, they relate to enforcement of
27 criminal statutes and civil law. RP asserts that A.R.S. § 40-246 allows any person to file a complaint
28 against a public service corporation alleging a violation of any provision of law. RP concludes this

¹⁰ Tr. at 15.

¹¹ Tr. at 20.

¹² Tr. at 24.

¹³ Tr. at 21-22.

1 provision grants the Commission authority to decide an issue brought before it in a complaint against
2 a public service corporation, regardless of the subject matter.

3 A.R.S. § 40-421 states, “[t]he commission shall require that the laws affecting public service
4 corporations, *the enforcement of which is not specifically vested in some other officer or tribunal*, are
5 enforced and obeyed....” (Emphasis added.)

6 The enforcement of civil laws, such as those alleged by the Complainant relating to real
7 property disputes, tortious conduct and damages, are the primary jurisdiction of trial courts of general
8 jurisdiction, and are outside of the Commission’s express constitutional and/or statutory authority.¹⁴

9 The enforcement of Arizona criminal statutes, such as RP’s allegation that TEP has criminally
10 trespassed, is specifically vested in Arizona criminal law enforcement agencies. The Commission
11 has no authority to arrest or cite for violations of the Arizona criminal code, or try those charged with
12 such violations. In Decision No. 63134 (November 16, 2000), the Commission concluded as a matter
13 of law that “[t]he Commission does not have authority over claims purportedly based on Arizona
14 criminal statutes.”¹⁵

15 As such, under Arizona law, the Commission does not have the jurisdiction to hear the
16 Complainant’s allegations that are based solely on criminal or civil law.

17 The Complainant has also asserted that there is a public safety issue involved. A.R.S. § 40-
18 361(B) states:

19 Every public service corporation shall furnish and maintain such service, equipment and
20 facilities as will promote the safety, health, comfort and convenience of its patrons,
21 employees and the public, and as will be in all respects adequate, efficient and
22 reasonable.

22 Complainant asserts that it is impossible for TEP to perform any work on the regulator bank
23 and remain within the granted 10-foot easement. RP warns that if TEP must perform service or
24 emergency repairs on its equipment, RP will not allow the Company to exceed its easement to
25

26 ¹⁴ *Qwest Corporation v. Kelly, supra; Campbell v. Mountain States Telephone & Telegraph Company*, 586 P.2d 987, 120
27 Ariz. 426 (App. 1978).

28 ¹⁵ *In the Matter of the Formal Complaint of Thomas R. LaVoie, Sr., General Partner for Total Success Investments LTD II, S. Vetter, B. Pottinger, J. Press, S. Lorch, A. Salcido and F. Monoucheri, Complainants, vs. U.S. West Communications, Inc., Respondent*, Decision No. 63134 (November 16, 2000), page 11.

1 perform the necessary tasks. Complainant claims that TEP's inability to lawfully access its
2 equipment creates a public safety issue that the Commission must address.

3 Although TEP argues that there is no present public safety issue—only the Complainant's
4 suggestion that one could arise—it is in the public interest to insure that the public is not at risk.

5 Accordingly, we believe that the Complainant has raised a question of fact concerning public
6 safety over which the Commission has jurisdiction pursuant to A.R.S. § 40-361(B), and that a hearing
7 should be set. The purpose of the hearing will be solely to take testimony, argument and evidence
8 surrounding the public safety issue. No testimony, argument or evidence will be taken regarding any
9 alleged violations of civil or criminal law.

10 IT IS THEREFORE ORDERED that a **hearing** in this matter shall be held on **March 23,**
11 **2012, at 10:00 a.m.**, at the Commission's Tucson offices, Room 222, 400 West Congress.

12 IT IS FURTHER ORDERED that **the sole question to be addressed by the parties at**
13 **hearing will be the issue of public safety.**

14 IT IS FURTHER ORDERED that the **Complainant shall file with the Commission its pre-**
15 **filed testimony and a list of witnesses and exhibits RP intends to introduce at hearing no later**
16 **than February 27, 2012.**¹⁶

17 IT IS FURTHER ORDERED that the **Respondent shall file with the Commission its pre-**
18 **filed testimony and a list of witnesses and exhibits TEP intends to introduce at hearing no later**
19 **than March 12, 2012.**

20 IT IS FURTHER ORDERED that all parties must comply with Rules 31 and 38 of the Rules
21 of the Arizona Supreme Court and A.R.S. §40-243 with respect to practice of law and admission *pro*
22 *hac vice*.

23 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113 - Unauthorized
24 Communications) applies to this proceeding and shall remain in effect until the Commission's
25 Decision in this matter is final and non-appealable.

26
27
28 ¹⁶ The parties' pre-filed testimony may take either a narrative or a question and answer format.

1 IT IS FURTHER ORDERED that that the Presiding Officer may rescind, alter, amend, or
2 waive any portion of this Procedural Order either by subsequent Procedural Order or by ruling at
3 hearing.

4 DATED this SR day of January, 2012.

5 
6 BELINDA A. MARTIN
7 ADMINISTRATIVE LAW JUDGE

8 Copies of the foregoing mailed
9 this SR day of January, 2012 to:

10 Greg Mitchell, Manager
11 RATTLESNAKE PASS, LLC
12 6045 North Abington Road
13 Tucson, AZ 85743

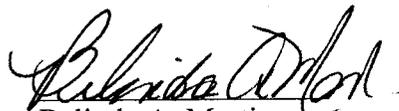
14 Melody Gilkey
15 TUCSON ELECTRIC POWER
16 One South Church Avenue, Suite 200
17 Tucson, AZ 85701

18 Michael Patten
19 Jason Gellman
20 ROSHKA DEWULF AND PATTEN
21 400 East Van Buren, Suite 800
22 Phoenix, AZ 85004

23 Janice Alward, Chief Counsel
24 Legal Division
25 ARIZONA CORPORATION COMMISSION
26 1200 W. Washington Street
27 Phoenix, AZ 85007

28 Steve Olea, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington Street
Phoenix, AZ 85007

ARIZONA REPORTING SERVICE, INC.
2200 N. Central Avenue, Suite 502
Phoenix, AZ 85004-1481

By: 
Belinda A. Martin