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BEFORE THE ARIZONA CORPORATION

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RATTLESNAKE PASS, LLC,

Complainant,

vs.

TUCSON ELECTRIC POWER COMPANY,

Respondent

DOCKET NO. E-01933A-10-0125

**MOTION TO DISMISS OR, IN
THE ALTERNATIVE, MOTION
FOR SUMMARY JUDGMENT**

Arizona Corporation Commission

DOCKETED

FEB 29 2012

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Tucson Electric Power Company ("TEP" or "Company"), through undersigned counsel, requests dismissal of Rattlesnake Pass, LLC's complaint because it still fails to allege facts upon which relief can be granted.¹ The January 6, 2012 Procedural Order was clear in that the only issue to be decided was one of public safety. None of Complainant's February 17, 2012 filing substantiates any allegation that there is any public safety issue. In fact, Complainant's filing still makes allegations of criminal trespass and easement violations regarding installation of voltage regulators. There are simply no public safety issues with those regulators; the undisputed fact is that TEP is providing safe and reliable service. Because Complainant has not substantiated any claim upon which the Commission can grant relief, this matter should be dismissed with prejudice.

In the alternative, TEP requests that this motion be treated as a request for summary judgment. The material facts in this case are not in dispute. The case rests completely on

¹ In its January 13, 2012 filing, TEP informed the Commission that if Complainant's pre-filed direct testimony failed to substantiate any allegations that TEP is failing to provide safe, efficient and reasonable service, TEP reserved the right to file a Motion to Dismiss or Motion for Summary Judgment.

1 matters of law. Here, TEP has the right to full enjoyment of its easement that has been in
2 existence since 1942. This includes the right to access, maintain and repair facilities necessary to
3 provide electric service. Complainant has no right, as a matter of law, to restrict TEP's access to
4 its easement. Therefore, TEP is entitled to judgment in its favor.

5 TEP will, however, submit pre-filed testimony on March 12, 2012, in accordance with the
6 Procedural Order dated January 6, 2012. Even so, TEP requests a procedural conference be held
7 before the scheduled evidentiary hearing on March 23, 2012, so that it can be heard on the
8 motion. TEP believes that the matter can be decided based on the submissions made and without
9 the need to proceed with the evidentiary hearing. The Company incorporates all previous filings
10 on the record in this docket by reference as support for its filing.

11 ARGUMENT

12 **1. Complainant cannot substantiate an allegation under A.R.S. § 40-361(B). Therefore, dismissal is warranted.**

13
14 In the January 6, 2012 Procedural Order, it states that the only issue that was to be decided
15 was to be the issue of public safety. Specifically, the Procedural Order stated that the purpose of
16 the hearing will be solely to take testimony, argument and evidence surrounding the public safety
17 issue and whether TEP is providing safe and reliable service in accordance with A.R.S. § 40-
18 361(B), and that no testimony, argument or evidence will be taken regarding any alleged violations
19 of civil or criminal law. *See* Procedural Order (January 6, 2012) at 6.

20 Complaint has still failed to substantiate any claim that there is any public safety issue in
21 violation of A.R.S. § 40-361(B). Complainant still alleges that TEP committed criminal trespass
22 under A.R.S. § 13-1502. For instance, Complainant states that TEP trespassed when it installed
23 the voltage regulators and that the installation will violate A.R.S. § 40-361:

24 "TEP's blatant disregard for ARS § 13-1502 in installing the voltage regulator bank
25 (see Figure 1) violates ARS § 40-361(B). ARS §40-361(B) reads such that a public
26 service corporation must maintain service and equipment as will promote safety,
27 health, comfort and convenience. Without the permission of the privately owned
land owner, TEP will be unable to adhere to ARS § 40-361(B) as TEP's easement
is not wide enough to support the equipment necessary for maintenance or repair of
the voltage regulator bank."

1 See Testimony of Greg Mitchell, February 17, 2012 at 1 (footnotes and internal quotations omitted).

2 Later in Complainant's testimony, Mr. Mitchell states that TEP would violate criminal
3 trespass and criminal damage statutes if it were to attempt to access the voltage regulator bank
4 during a storm:

5 "To await a maintenance or storm incident condition whereby TEP personnel
6 response would violate ARS §13-1502 (criminal trespassing) as well as ARS §13-
7 1602 (criminal damage) in order to service or repair TEP's regulator bank is unsafe
to the public's comfort and convenience and unsafe for TEP personnel as well."

8 Mitchell Testimony at 2 (footnotes omitted).

9 These statements are speculative and are not supported by any fact. Mr. Mitchell is
10 attempting to introduce criminal allegations as a potential public safety issue. Complainant
11 provides no support that there is any public safety issue and fails to state how it is entitled to any
12 relief.

13 Further in his testimony, Mr. Mitchell states that Complainant "in protecting and
14 enforcing its private property rights, may exclude TEP personnel and equipment (such as trucks,
15 cranes etc.) from entering the areas of [Complainant's] property outside TEP's [10-foot]
16 easement." Complainant ignores that it cannot interfere with TEP's right to full enjoyment of its
17 easement, which is access to maintain the facilities within that easement. Complainant cannot
18 now simply rewrite his allegations as a public safety issue, yet still allege what are essentially real
19 property issues.

20 In short, the entirety of Complainant's allegations still rest on matters unrelated to those
21 which the Commission has express authority over. See *Qwest Corp. v. Kelly*, 204 Ariz. 25, 30-
22 32, 59 P.3d 789, 794-96 (App. 2002). The allegations are still rooted in real property and
23 criminal law, despite the attempts to invoke A.R.S. § 40-361(B). In short, there is no public
24 safety issue. Because Complainant provides no testimony that substantiates any claim that there
25 is a public safety issue, its complaint should be dismissed with prejudice.

26 ...

27 ...

1 **2. In the alternative, TEP is entitled to summary judgment in its favor as a matter of law.**

2 Summary judgment is appropriate in cases where there is no genuine issue as to any
3 material fact and where the moving party is entitled to judgment as a matter of law. *See e.g.*
4 *Arizona Bank v. Arizona Laborers*, 201 Ariz. 74, 38 P.3d 12 (2002). None of the material facts in
5 the following numbered paragraphs regarding the voltage regulators are in dispute:

6 1. The voltage regulators at issue were installed in August 2009 to address quality of
7 service issues.

8 2. The voltage regulators satisfactorily addressed the quality of service issues.

9 3. The voltage regulators are providing safe and reliable service.

10 4. TEP has a 10-foot easement on Complainant's property, which has been in
11 existence since 1942.

12 5. The voltage regulators are entirely within that easement.

13 6. The purpose of the easement is for TEP use of the property for providing safe and
14 reliable electric service.

15 7. There is an easement in close proximity to TEP's easement that is now in the
16 possession of El Paso Natural Gas Corporation ("EPNG").

17 8. That EPNG easement has been in existence since 1933, and is 40-feet wide.

18 9. TEP has used the EPNG easement in the past to access its facilities for
19 maintenance purposes.

20 These facts demonstrate that no public safety issue presently exists. Any issues regarding
21 whether TEP has the right to access the regulators relates to the scope and nature of the
22 easements, and whether TEP has: (1) a secondary easement; and (2) the right to jointly use the
23 existing EPNG easement. These are matters of law that support a finding in TEP's favor. A
24 secondary easement is widely-recognized in common law as the right to do such things that are
25 necessary for the full enjoyment of the easement itself. *See Blacks Law Dictionary*, Sixth Ed., at
26 510. It has been recognized for utilities that the right of way for a transmission line includes the
27 right to service and maintain the line. *See e.g. DeRossi v. Duke Energy Carolinas, LLC*, 698

1 S.E.2d 455, 458-60 (N.C.App. 2010); *Vermont Elec. Power Co. v. Anderson*, 147 A.2d 875, 880
2 (Vt. 1959); *Moore v. Indiana & Michigan Electric Co.*, 95 N.E.2d 210, 212 (Ind. 1950); *Pacific*
3 *Gas & Elec. Co. v. Crockett Land & Cattle Co.*, 233 P. 370, 374 (Cal.App. 1924). A power
4 company has a right of way of necessity across the owner's remaining lands from the public
5 highway to repair and maintain its transmission line, by operation of law and as a matter of
6 public policy. The right of access (or ingress and egress) to the right of way for such purposes as
7 repair and maintenance is a secondary easement necessary for the full enjoyment of the primary
8 easement. *See e.g. DeRossi*, 698 S.E. 2d at 460; *Virginia Elec. & Power Co. v. Coleman*, 183
9 S.E.2d 130, 131 (Va. 1971). Arizona has recognized the existence of secondary easements to do
10 all that is necessary and proper for the full enjoyment of the primary easement. *Papa v. Flake*, 18
11 *Ariz.App.* 496, 498, 503 P.2d 972, 974 (1972) *quoting from Mosher v. Salt River Valley Etc.*
12 *Ass'n*, 24 *Ariz.* 339, 344, P. 596, 597 (1922).

13 Further, TEP's right to use the EPNG easements in furtherance of ensuring safe and
14 reliable service. Here, joint use of utility easements should be encouraged. For instance, in
15 *Koponen v. Pacific Gas & Elec. Co.*, 165 Cal.App.4th 345 (2008), the court upheld common use
16 of Pacific Gas & Electric Company easements to other companies to install fiber-optic
17 telecommunication lines within the easement. The Court noted the obvious economic and
18 environmental benefits when utilities share easements and rights of way.

19 As a matter of law, TEP has a secondary easement that allows it the right of access to
20 maintain the regulators. Complainant has no right to prevent such access, despite its threats to do
21 so. Further, the law supports TEP using the EPNG easement to the extent necessary to access its
22 easement, and such access is for the purpose of maintaining public safety. The law essentially
23 grants TEP the right to full access. In any event, Complainant presents no evidence supporting
24 any genuine issue of fact that there is any public safety issue. As a matter of law, TEP is entitled
25 to a judgment and decision in its favor.

26 ...

27 ...

1 **CONCLUSION**

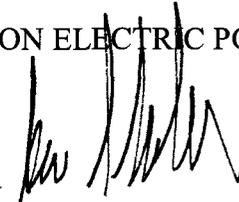
2 Complainant has had close to two years to state its case. Yet, during that time,
3 Complainant cannot substantiate any allegations that TEP is failing to provide safe and reliable
4 service. There is no public safety issue, despite Complainant's attempts to allege one. In fact,
5 Complainant's allegations are still based in real property and criminal law, Because Complainant's
6 February 17, 2012 filing cannot substantiate a claim that there is a public safety issue that entitles
7 it to any relief, dismissal is warranted.

8 Even if dismissal is denied, a hearing is not necessary or warranted. None of the relevant
9 facts are in dispute. Complainant fails to provide any evidence showing that there is a genuine
10 issue of material fact supporting its allegation that a public safety issue exists. Further, the law is
11 that TEP has a secondary easement to maintain the regulators, and supports TEP utilizing the
12 EPNG for that purpose as well. This is in addition to the 10-foot easement in existence since
13 1942; the regulators are entirely located within that easement.

14 While TEP will file its pre-filed testimony March 12, 2012, TEP requests a procedural
15 conference before the scheduled evidentiary hearing so that TEP may be heard on its motion.
16 Further, TEP believes that, based on the submissions in the record, this matter can be decided
17 without the need to proceed with an evidentiary hearing.

18 RESPECTFULLY SUBMITTED this 29th day of February 2012.

19 TUCSON ELECTRIC POWER COMPANY

20
21
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1 Original and 13 copies of the foregoing
2 filed this 29th day of February 2012 with:

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7 Copy of the foregoing hand-delivered/mailed
8 this 29th day of February 2012 to:

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