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Transcript Exhibit(s)

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RATTLESNAKE PASS, LLC, Complainant, vs. TUCSON ELECTRIC POWER COMPANY, Respondent	DOCKET NO. E-01933A-10-0125 **NOTICE OF FILING PRE-FILED TESTIMONY**

EXHIBIT
TEP 1
ADMITTED

Tucson Electric Power Company ("TEP" or "Company"), through undersigned counsel, submits the Pre-Filed Testimony of Marcus G. Jerden. Mr. Jerden will be the Company's witness in this case.

RESPECTFULLY SUBMITTED this 12th day of March 2012.

TUCSON ELECTRIC POWER COMPANY

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS
GARY PIERCE - CHAIRMAN
BOB STUMP
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RATTLESNAKE PASS, LLC, Complainant, vs. TUCSON ELECTRIC POWER COMPANY, Respondent	DOCKET NO. E-01933A-10-0125

Pre-Filed Testimony of

Marcus G. Jerden

on Behalf of

Tucson Electric Power Company

March 12, 2012

TABLE OF CONTENTS

I. Introduction 1

II. Background 2

III. Existing Easements 5

IV. Secondary Easement 8

V. Complainant's actions to block access to voltage regulators 11

VI. Conclusion 12

Exhibits

J-1 Photograph of Area.

I. Introduction.

Q. Please state your name and address.

A. My name is Marcus G. Jerden. My business address is 88 East Broadway, Tucson, Arizona, 85701.

Q. By whom are you employed and what is your position?

I am currently Senior Legal Counsel for Tucson Electric Power Company ("TEP" or the "Company").

Q. Please describe your education and experience.

A. I have a B.S. in Geography from Oregon State University and a J.D. from Seattle University School of Law. Prior to entering law school, I worked as a professional geographer, survey technician, land-use planner, and title examiner in various private-sector positions in the Pacific Northwest, including large-scale right-of-way acquisition projects. I have worked as an attorney for both state and county environmental agencies in the state of Washington, and since 1992 as an in-house attorney for TEP specializing in environmental and land matters. I am a member of the Washington and Arizona Bar Associations, and am a former professional member of the Association of American Geographers.

Q. Do you have firsthand knowledge of the events regarding the complaint filed by Greg Mitchell on behalf of Rattlesnake Pass?

A. Yes.

Q. What is the purpose of your Pre-filed Testimony in this proceeding?

A. My testimony will show that TEP is providing safe and reliable service by installing the voltage regulators at issue. Further, I will describe the applicable easements and land rights that grant TEP the right to access the regulators at any time for maintenance purposes. This includes TEP's current 10-foot easement in which the regulators are located that has been in existence since 1942 (the "1942 Easement"), the neighboring easement held by El Paso Natural Gas Corporation ("EPNG"), and TEP's secondary easement rights recognized in common law that gives the Company the right to access and maintain the regulators over areas adjoining the 1942 Easement.

II. Background.

Q. Please describe the issues that lead to TEP installing these voltage regulators.

A. TEP had received a customer complaint of voltage irregularities at the Continental Reserve development in Marana, Arizona. Specifically, the customer complaint described power outages and that some rooms in the customer's house had no power. This was on or around June of 2009. TEP responded by first installing chart recorders at the location, which indicated frequent sustained periods of low voltage. TEP determined that the issues stemmed from a long, heavily loaded feeder and the fact that it is sourced from a 3-winding transformer. The Company determined that installing three 333 kVA voltage regulators would resolve these issues. These are the voltage regulators Rattlesnake Pass, through Mr. Mitchell, is complaining about.

Q. When were the voltage regulators at issue installed?

A. They were installed in August 2009.

Q. Where are these regulators located?

A. They remain at or near the 9100 block of North Scenic Drive on wooden power poles. They are entirely within the 1942 Easement in TEP's possession.

Q. Why did TEP install these regulators at this location?

A. TEP's electrical engineering staff determined that locating the voltage regulators along the existing overhead power lines at Scenic Drive was necessary for the facilities to be most effective in resolving the voltage fluctuation issues. Optimum placement for overhead voltage regulator equipment is always as close to the underground feeder riser as possible; for this installation, it was located one span away from the riser. In addition, accessibility for installation and maintenance contributes to determining the required location.

Q. Could these regulators have been installed at another location while providing the same level of reliable service?

A. The selected location was determined to be the optimal location for providing the necessary reinforcement of the distribution voltage in the area. Another location further down the line one way or the other might also have worked in general, but there would have been greater access or traffic issues.

Q. Besides the voltage regulators, what other TEP facilities are at this location?

A. TEP has an existing overhead 13.8kV distribution line there. The voltage regulators were installed on two Class H2 45' wood poles in-line with the existing overhead line, all within the 1942 Easement.

Q. How long have those other facilities been in place?

A. Electrical facilities have existed within the 1942 Easement since that easement came into existence.

Q. Has TEP continuously accessed the easement to maintain and repair those facilities?

A. Yes.

Q. Has TEP received any complaints from Complainant or previous landowners where they have alleged that such access amounts to a 'trespass' or 'violation of the easement'?

A. Not to my knowledge.

Q. Was installing the regulators at this location an economical way to address the voltage problems?

A. Yes. It is a short distance from a paved road, but away from traffic on nearby streets. It is located at the edge of a wide bladed path on the natural gas line, but just before that path is essentially blocked from further travel by a gas metering station. Electrically, it is positioned to serve the intended area well.

Q. Did the installation of the three 333 kVA regulators resolve the voltage issues at the address within the Continental Reserve Development?

A. Yes. It is my understanding that all voltage issues were resolved. The Company is unaware of any service quality issues downstream of the regulators.

Q. Are the regulators currently providing safe and reliable service to TEP customers?

A. Yes. These regulators have experienced no problems. They are necessary and useful facilities to ensure that customers within the immediate area receive voltage that is within

the allowable range of ± 5% of the nominal system voltage. These facilities have been providing safe and reliable power since they were installed in August 2009.

Q. Is Rattlesnake Pass incorrect in alleging that the location of the regulators causes unsafe and unreliable service?

A. Yes. To the contrary, the location of the regulators best ensures that safe and reliable service will continue. As I explained above, the regulators location allows TEP the best access to maintain the facilities. If there were to be a problem or to facilitate maintenance, TEP has easy access to quickly address and repair any of the regulators, yet in doing so would not block any public streets. The location of the regulators was not simply selected at random. This location was selected as the optimal location to address the voltage problems due to the long feeder and the type of substation transformer serving the area.

III. <u>Existing Easements</u>.

Q. Please describe the easement that the regulators are placed within.

A. That easement has existed since 1942. It was originally granted to TEP's predecessor, Tucson Gas, Electric Light and Power Company. The easement grants a 10-foot wide corridor and allows the installation of the electric line and system. The easement has had an electrical distribution line within it since it was created. It is recorded at the Pima County records at Book 76, Page 594.

Q. Are the voltage regulators at issue entirely within the 10-foot wide easement in TEP's possession and existing since 1942?

A. Yes. None of the facilities at issue are outside of this easement. So, as it stands right now, if this were the only easement in the area, TEP would not be in violation of any law.

Q. What other easements are within the area?

A. There is an El Paso Natural Gas ("EPNG") pipeline easement that has been in existence since 1933. At that time, the easement was granted to its predecessor Western Gas Company in a "blanket" manner, meaning that it could be located anywhere within the grantor's property. That was more specifically defined in a 2005 Easement between EPNG and Complainant to tie it to a surveyed "as-built" 40-foot corridor. I noticed that Mr. Mitchell for the Complainant also provided another easement in his materials than grants to EPNG an easement and right-of-way covering a certain 40-by-50 foot area within the 1933 easement to construct the present gas metering station there. What is interesting about that easement is that it also grants a non-exclusive right to maintain and repair – and also includes a non-exclusive right to go across a 10-foot corridor directly east of the "exclusive easement":

> In addition, Grantor hereby grants to Grantee a non-exclusive right of way and easement of ingress and egress to and from, and access on and along said land, with the non-exclusive right to use existing roads, for the purpose of constructing, inspecting, repairing and maintaining the facilities and the removal or replacement of same at will, either in whole or in part on property set forth in the Exclusive Easement. The property subject to this non-exclusive right of way and easement shall also include a non-exclusive grant of ingress and egress by, through and across a ten (10) foot corridor directly east of the Exclusive Easement ("Non-Exclusive Easement").

Based on my experience, this tells me that EPNG and others can use the 10-foot area east of the EPNG easement to access and maintain facilities that are the subject of the 40-by-50 foot easement. Depending upon the exact location of the modern-defined 40' easement, this additional 10' strip is either on or adjoining TEP's 1942 Easement. The same applies to TEP, in that the Company has a right to access its facilities to maintain them under the secondary easement right I describe in Section IV of my Pre-Filed Testimony.

Q. Where are these EPNG easements located?

A. TEP's 1942 Easement was specifically sited in its legal description to be "east of and along the east boundary of the El Paso Natural Gas Company's right of way, as now established." Therefore, the 1933 gas easement is, accordingly, west of and touching the TEP easement. The further-defined 2005 gas easement is located upon the same path, and the 2005 gas meter site easement is by description within the aforementioned 40' gas easement.

Q. Based on your experience, what do the easements in existence tell you about TEP's right to access the voltage regulators for maintenance or repairs?

A. The language in the 2005 EPNG easement shows that Complainant's allegations are wrong; in fact, there is a non-exclusive right to access facilities and make repairs in the hiatus, if any actually exists, between TEP's and EPNG's surveyed-in 2005 easement. This essentially serves the same purpose as a secondary easement TEP also may utilize within the area, which I will explain later. In addition, joint use of utility easements is widely encouraged, not prohibited, by utility regulators and the courts. I see nothing that would prohibit TEP from using the EPNG easement for access, and conversely nothing that would prohibit EPNG from utilizing TEP's 1942 Easement if it needed to.

Q. Has TEP used the EPNG easements in the past to access its electrical facilities within the 1942 easement?

A. Yes. TEP has utilized the bladed EPNG easement adjoining the 1942 Easement, as part of the reciprocal use of each other's linear easements, and which is typical utility industry practice (see the photo attached to my testimony as Exhibit J-1). As this photograph shows, the area from roughly the center of the TEP easement through the entire extent of the EPNG easement, in an east-west fashion, is cleared and disturbed. TEP's access within this area does not result in any more disturbance than what is shown here.

Q. Do you believe it is appropriate for TEP to access EPNG's easements to maintain its own facilities in the 1942 easement?

A. Yes. I think *Koponen v. Pacific Gas & Elec. Co.*, 165 Cal.App.4th 345 (2008) is helpful, because that case supports the idea of joint use of utility property. That case upheld common use of Pacific Gas & Electric Company easements to other companies to install fiber-optic telecommunication lines within the easement. The Court noted the obvious economic and environmental benefits when utilities share easements and rights of way. I think the same principle applies here. By sharing the EPNG easement, TEP is being efficient and negating the need to do any more clearing of vegetation than what has already been cleared. In Exhibit J-1, you will note a number of palo verde trees, prickly pear cacti, and even saguaros that remain today in their natural state because TEP has not cleared out to its 10' limit to the east, and has not had to because of the presence of the adjoining EPNG easement during the entire life of TEP's 1942 Easement.

IV. Secondary Easement.

Q. Mr. Jerden, what is a secondary easement?

A. A secondary easement is widely recognized in common law as the right to do such things that are necessary for the full enjoyment of the easement itself.[1] It allows TEP, for example, to access the voltage regulators from the west (the EPNG side) in order to maintain the facilities; this is the case even if TEP is not within the 10-foot corridor to access the facilities.

[1] See Blacks Law Dictionary, Sixth Ed., at 510.

Q. Has a secondary easement been recognized by courts for utilities?

A. Yes. Secondary easements have long been recognized in real property law. For instance, *Thompson on Real Property* has defines a secondary easement as "the right to enter upon the servient tenement for the purpose of repairing or renewing an artificial structure, constituting an easement." *See* 2 Thompson on Real Property 343, Sec. 676 (611). It has been recognized for utilities as "the right of way for a transmission line includes the right to service and maintain the line." *See e.g. DeRossi v. Duke Energy Carolinas, LLC,* 698 S.E.2d 495 (N.C.App. 2010); *Loyd v. SW Arkansas Utilities Corp.*, 586 SW 2d 229 (Ark. 1979); *Moore v. Indiana & Michigan Electric Co.*, 95 N.E.2d 210 (Ind. 1950); *Pacific Gas & Elec. Co. v. Crockett Land & Cattle Co.*, 233 P. 370 (Cal.App. 1924). A power company may have a right of way of necessity across the owner's remaining lands from the public highway to repair and maintain its transmission line, by operation of law and as a matter of public policy, such as in the *Moore* case I cited to above. The right of access (or ingress and egress) to the right of way for such purposes as repair and maintenance is a secondary easement necessary for the full enjoyment of the primary easement. *See e.g. DeRoss; Virginia Elec. & Power Co. v. Coleman*, 183 S.E.2d 130 (Va. 1971). This shows that the secondary easement is a right in common law recognized throughout the country for utilities to maintain their facilities. It is especially practical and helpful for public safety and reliability of service issues when, for example, an older easement has become fenced off or blocked by vegetation or structures, and the utility can readily access the easement from a side direction to reach its facilities without having to deal with a trespass claim.

Q. Has Arizona recognized secondary easements?

A. Yes. Arizona courts have recognized secondary easements, such as in *Papa v. Flake*, 18 Ariz.App. 496, 503 P.2d 972 (1972). That case recognized a secondary easement to do

all that is necessary and proper for full enjoyment of the easement. In that case, it was to remove obstructions to a ditch. In this case, it would be to access the voltage regulators.

Q. Are there limitations to the use of a secondary easement?

A. Yes. The use must be reasonable, and generally requires the utility to reimburse the landowner for any physical damages to the underlying property. *See, e.g., Motes v. PacifiCorp*, 217 P.3d 1072 (2009). For example, TEP sometimes has occasion to utilize a secondary easement as a way to access lines in the back of a residential lot; in those instances, we would rake or replenish the decorative gravel in the yard or replace a cactus that was knocked over in the process. In the instant case, there is a wide bladed path maintained by EPNG that can be utilized, with no discernible effects.

Q. Does TEP have a secondary easement to access facilities within the 1942 Easement and fully enjoy that easement?

A. Yes. Here, full enjoyment means the ability to access those facilities as needed to ensure that they are providing safe and reliable service to customers. This means that TEP can go outside of the 10' 1942 Easement with service trucks or other equipment if it is doing so in furtherance of fully utilizing the 1942 Easement. As I explained above, the 1942 Easement was granted for purposes of establishing electric service to that general area. TEP therefore has a secondary easement to the extent necessary to maintain that service. Installing and maintaining the voltage regulators is for the sole purpose of maintaining electric service, so TEP has a secondary easement to maintain the voltage regulators at issue.

V. Complainant's actions to block access to the voltage regulators.

Q. By erecting a fence to block TEP access to its regulators, would Complainant be interfering with TEP's right to fully enjoy the easement granted in 1942 and still in effect?

A. Most definitely. Complainant is essentially interfering with TEP's right to access the property and carry out its responsibilities – as well as interfering with the very purpose of the 1942 Easement. That is, the 1942 Easement was granted for TEP to put in electric facilities and provide reliable service to customers in the area. By putting in the voltage regulators, TEP is carrying out that purpose.

Q. By interfering with TEP's right to access the regulators, is Complainant also jeopardizing safe and reliable service?

A. Yes. If there were to be an event (for example, a lightning strike), then TEP must have access to the voltage regulators to make needed repairs. Complainant is not only violating TEP's right to fully enjoy the 1942 Easement, but it is jeopardizing the quality of service to residents of developments such as Ironwood Reserve and other downstream customers. If anything, the Commission under A.A.C. R14-2-206.C.2. gives the utility the authority to take whatever actions are necessary to eliminate any potential hazard or obstruction at the customer's expense:

> When a utility discovers that a customer or customer's agent is performing work or has constructed facilities adjacent to or within an easement or right-of-way and such work, construction, or facility poses a hazard or is in violation of federal, state, or local laws ordinances, statutes, rules or regulations, or significantly interferes with the utility's access to equipment, the utility shall notify the customer or customer's agent and shall take whatever actions are necessary to eliminate the hazard, obstruction or violation at the customer's expense.

If Complainant constructs a fence to block access to the voltage regulators, TEP believes it has the right to remove that fence in order to access its property. I also note that A.R.S.

§ 40-431 provides an agent of the Company the legal ability to inspect its facilities under certain circumstances, which I believe would apply in this situation.

Q. Through your Pre-filed Testimony, are you notifying Complainant and its agent Mr. Mitchell that any fence or other obstacle is a hazard blocking access to the voltage regulators?

A. Yes.

VI. <u>Conclusion</u>.

Q. Mr. Jerden, how would you articulate the Company's position regarding the Complainant's allegations?

A. In short, they are without merit. The Company responded to voltage issues for nearby customers by choosing the most efficient and economical means to address them. Installing voltage regulators at their current location addressed the problem. TEP placed the regulators entirely within an easement that has existed since 1942. TEP has a secondary easement recognized in common law that allows it the right to full enjoyment of its 1942 Easement. But "full enjoyment" here means the right for TEP to continue to provide safe and reliable service. In fact, it is Complainant's actions that jeopardize service, in violation of Arizona law. TEP believes the facts and the law entirely justify the placement of the regulators and TEP's actions. In addition to this really being an issue of real property (the scope and nature of easements), the facts demonstrate the Company's actions to be justified in furtherance of safe and reliable service. Forcing the Company to move the regulators to some other theoretical spot would jeopardize that service.

Q. Does this conclude your testimony?

A. Yes, it does.
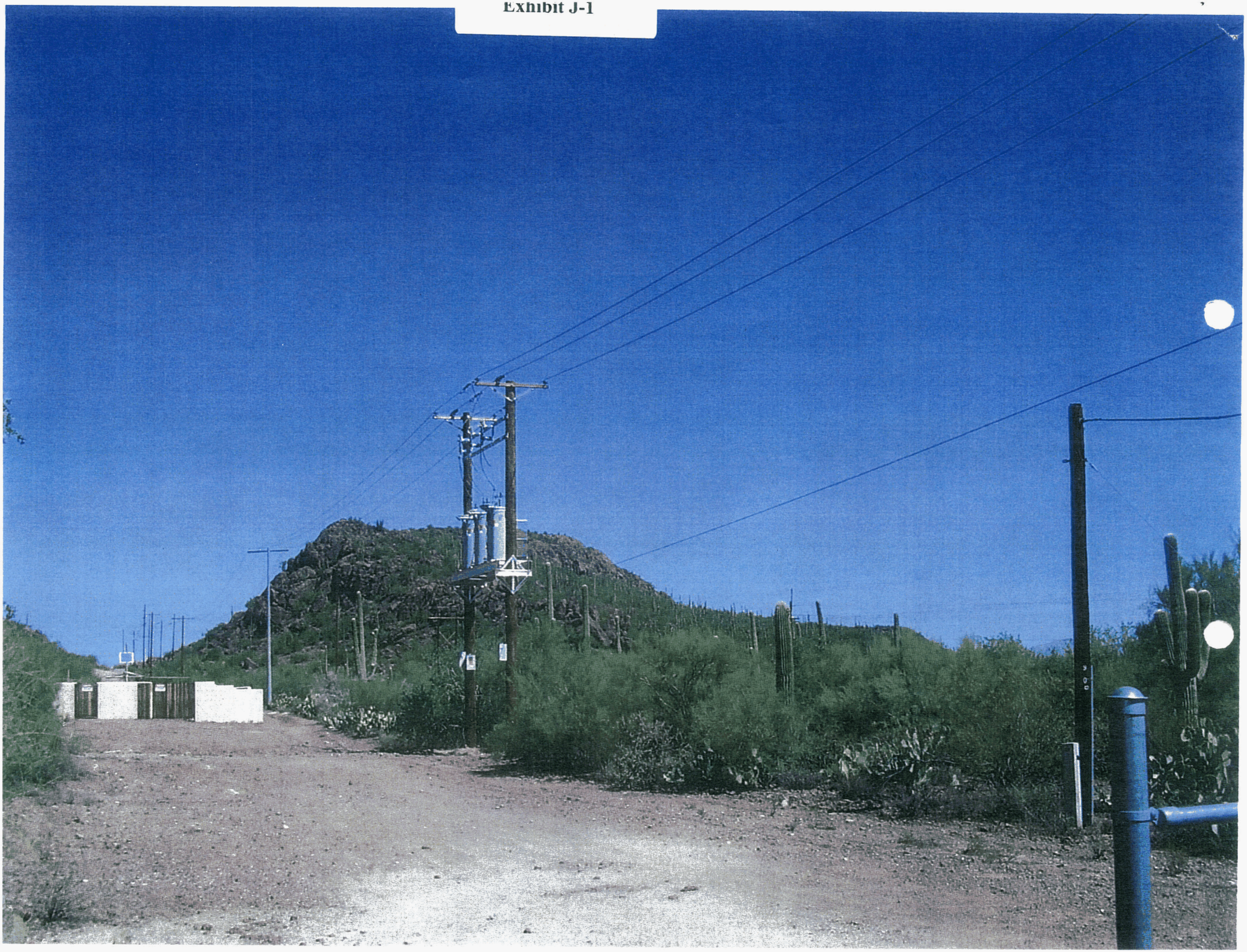
Exhibit J-1