

**ORIGINAL**

**COMMISSIONERS**  
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**OPEN MEETING ITEM**



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**ARIZONA CORPORATION COMMISSION**

Arizona Corporation Commission 2012 OCT -2 P 4: 05

DATE: OCTOBER 2, 2012

**DOCKETED**  
ARIZONA CORPORATION COMMISSION  
DOCKET CONTROL  
OCT 02 2012

DOCKET NO.: E-01933A-10-0125

TO ALL PARTIES:

DOCKETED BY *JM*

Enclosed please find the recommendation of Administrative Law Judge Belinda A. Martin. The recommendation has been filed in the form of an Opinion and Order on:

**RATTLESNAKE PASS, L.L.C. vs. TUCSON ELECTRIC POWER CO.  
(COMPLAINT)**

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

OCTOBER 11, 2012

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

OCTOBER 16, 2012 AND OCTOBER 17, 2012

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

*Ernest G. Johnson*  
ERNEST G. JOHNSON  
EXECUTIVE DIRECTOR



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**FINDINGS OF FACT**

**INTRODUCTION**

**The Parties**

1. RP is an Arizona limited liability company formed in November 2000, whose general manager is Sidewinder, L.L.C., a New Mexico limited liability company. Greg Mitchell is Sidewinder L.L.C.’s general manager. In approximately 1998, Mr. Mitchell, along with his wife and parents, purchased the property underlying this Complaint and in 2000 or 2001, they transferred the property to RP (“RP Property”). The RP Property is located north of Tucson, west of Interstate 10, south of Twin Peaks Road, and abuts North Scenic Drive on the west. The Mitchell’s home is on the RP Property and RP also owns the house. TEP provides electricity to the house, although the service line does not originate from TEP’s facilities on RP Property that are the focus of this Complaint, but from TEP’s lines situated along a general public utility right-of-way running parallel to North Scenic Drive.<sup>1</sup> Mr. Mitchell represented RP at the hearing and was RP’s only witness.

2. TEP is a public service corporation engaged in the business of providing electric service within portions of Arizona pursuant to authority granted by the Commission. In 1942, TEP’s predecessor was granted a ten-foot wide easement across RP Property for distribution lines, transmission lines and/or system components (“TEP Easement”). TEP placed distribution lines on the TEP Easement at that time and they are still in place today. TEP’s sole witness at hearing was Marcus Jerden, TEP’s Senior Legal Counsel responsible for environmental and land matters.<sup>2</sup>

**Summary of Complaint and Answer**

3. In early August 2009, TEP entered RP Property to install three voltage regulators on the distribution lines located on the TEP Easement. RP claimed TEP cannot physically access its facilities using only its Easement. RP alleged TEP criminally trespassed on RP Property by exceeding the boundaries of the TEP Easement to install the regulators and in order to service them, TEP will have to trespass on RP Property again. RP asserted that given the size of the regulator bank, the narrowness of the TEP Easement and TEP’s inability to access and service its equipment entirely

<sup>1</sup> Transcript of March 23, 2012, Hearing, pages 43-45. (Hereinafter, “Tr. at \_\_\_.”)  
<sup>2</sup> Pre-Filed Testimony of Marcus G. Jerden, page 1.

1 within the Easement's confines, the Company has overburdened the TEP Easement, resulting in  
2 damages to RP and RP Property. RP stated it will not allow TEP access to areas of RP Property  
3 outside of the TEP Easement again and has taken steps to secure the RP Property against  
4 unauthorized entry or use. RP asserted TEP is aware its crews cannot access the regulator bank for  
5 routine maintenance or emergency repairs entirely within the Easement's boundaries and concluded  
6 TEP has knowingly compromised public safety.

7 4. RP requested that the Commission direct TEP to stop trespassing and order the  
8 Company to relocate the regulator bank or acquire legal access sufficient to service its equipment.

9 5. In its Answer to Formal Complaint and Motion to Dismiss, TEP denied certain RP  
10 claims ("Answer") and requested that the Commission dismiss the Complaint ("Motion to Dismiss").  
11 TEP admitted it installed a voltage regulator bank on its distribution lines within its Easement. TEP  
12 denied it trespassed on RP Property, explaining that TEP crews used the bladed area of another  
13 utility's adjacent easement to access the TEP Easement and install the regulators. TEP also asserted  
14 its reasonable use of RP Property outside of its Easement is permitted under Arizona statutes,  
15 Commission regulations and common law.

16 6. TEP requested that the Commission dismiss the Complaint because RP's claims  
17 concern purported violations of civil law and criminal statutes, which TEP asserted are outside of the  
18 Commission's jurisdiction.

19 **Procedural History**

20 7. RP filed its Complaint on April 5, 2010, and TEP filed its Answer and Motion to  
21 Dismiss on April 28, 2010.

22 8. On July 14, 2010, RP filed its Response to TEP's Answer and Motion to Dismiss  
23 ("Response").

24 9. By a Procedural Order docketed July 27, 2010, a procedural conference was held on  
25 September 15, 2010. The parties stated they had not resolved the issues underlying the Complaint and  
26 asked to proceed with the matter.

27 10. On October 18, 2010, a Procedural Order was filed scheduling a procedural  
28 conference for November 9, 2010, for the purpose of taking oral arguments on the Motion to Dismiss

1 and the procedural conference convened as scheduled. The parties presented their arguments and the  
2 Motion to Dismiss was taken under advisement.

3 11. On January 6, 2012, a Procedural Order was docketed concluding the Commission  
4 lacked jurisdiction over RP's claims alleging violations of civil law and criminal statutes, but found  
5 RP had raised a question of fact regarding a potential public safety violation.<sup>3</sup> A hearing was  
6 scheduled for March 23, 2012, for the sole purpose of taking testimony and evidence on whether TEP  
7 is in violation of A.R.S. § 40-361(B).

8 12. On January 17, 2012, TEP filed a Response to Procedural Order and Notice of  
9 Potential Filings, objecting to certain findings in the January 6, 2012, Procedural Order.

10 13. On February 17, 2012, RP submitted its Testimony and Evidence for Hearing of Greg  
11 Mitchell ("Mitchell Testimony") and RP's resolution authorizing Mr. Mitchell to represent RP before  
12 the Commission. Contrary to the findings of the January 6, 2012, Procedural Order regarding the  
13 hearing's scope, RP continued to assert its criminal trespass claim against TEP.

14 14. TEP filed a Motion to Dismiss or, in the Alternative, Motion for Summary Judgment  
15 ("Motion") on February 29, 2012, renewing its argument RP had failed to state a claim upon which  
16 the Commission may grant relief. Alternatively, TEP asserted that there are no facts in dispute and  
17 requested an order for summary judgment in TEP's favor.

18 15. On March 12, 2012, a Procedural Order was docketed denying TEP's Motion and also  
19 striking the portions of the Mitchell Testimony concerning possible criminal violations.

20 16. On March 12, 2012, TEP submitted the Pre-Filed Testimony of Marcus Jerden  
21 ("Jerden Testimony").

22 17. The hearing on the public safety issue convened as scheduled. At the conclusion of  
23 the hearing, the parties stated they had received a fair and adequate opportunity to present their case  
24 and the matter was taken under advisement pending the submission of a Recommended Opinion and  
25 Order to the Commission.

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28 <sup>3</sup> The Motion to Dismiss and the legal bases for the Procedural's Order conclusions are discussed beginning on page 14.

1 **BACKGROUND**

2 **Events Underlying the Complaint**

3 **RP Property Easement History**

4 18. On November 27, 1933, the then-owner of the RP Property granted an easement to  
5 Western Gas Company, predecessor to El Paso Natural Gas ("EPNG"), for placement of an  
6 underground gas line across RP Property ("1933 EPNG Easement").<sup>4</sup> The 1933 EPNG Easement's  
7 legal description was a general section, township and range description of the whole property, rather  
8 than a specific metes and bounds description, and did not specify its width. RP stated the 1933  
9 EPNG Easement was originally a sixty-foot wide bladed area.<sup>5</sup>

10 19. On June 15, 1942, the then-owners of the RP Property granted the TEP Easement to  
11 TEP's predecessor, Tucson Gas, Electric Light and Power Company, "for the purpose of  
12 constructing, operating, and maintaining an electric transmission or distribution line or system  
13 thereon."<sup>6</sup> Like the 1933 EPNG Easement, the location of the TEP Easement was not specifically  
14 defined, but noted it was ten feet wide and situated "east of and along the east boundary line of the El  
15 Paso Natural Gas Company's right-of-way, as now established."<sup>7</sup> Shortly after it was granted, TEP  
16 installed distribution lines down the center of the TEP Easement and they have been in place since  
17 that time.<sup>8</sup> TEP related that the TEP Easement is not bladed, but for the past seventy years its crews  
18 have used the bladed area on the 1933 EPNG Easement to access TEP's facilities.<sup>9</sup> Mr. Mitchell  
19 stated he was aware of the TEP Easement when he and his family purchased the RP Property in 1998,  
20 but RP did not learn that TEP was using the EPNG Easement to access its equipment until 2009.<sup>10</sup>

21 20. Some time after the Mitchell's transferred the property to RP, RP asked EPNG to  
22 place a livestock gate across the 1933 EPNG Easement's entrance to deter saguaro thefts from RP  
23

24 \_\_\_\_\_  
25 <sup>4</sup> Mitchell Testimony, page 10, figure 8.

26 <sup>5</sup> Response, page 1.

27 <sup>6</sup> Mitchell Testimony, page 8, figure 6.

28 <sup>7</sup> *Id.*

<sup>8</sup> Answer, page 1; Jerden Testimony, pages 4-5; Tr. at 70-73. TEP has other easements across the RP Property, but they do not help TEP access the TEP Easement. Tr. at 75-76.

<sup>9</sup> Tr. at 73.

<sup>10</sup> Tr. at 45; Complaint, page 3.

1 Property.<sup>11</sup> EPNG installed a galvanized steel gate and secured it with interlocking locks, allowing  
2 either EPNG or TEP to open the gate for access to the 1933 EPNG Easement.<sup>12</sup> Mr. Jerden testified  
3 that in situations such as this, utilities will cooperate with one another to get interlocking or common  
4 locks, “leaving the landowner out of it.”<sup>13</sup>

5       21. In April 2005, RP and EPNG negotiated an amendment to the 1933 EPNG Easement  
6 (“EPNG Amended Easement”).<sup>14</sup> Mr. Mitchell testified that the EPNG Amended Easement  
7 specifically defined EPNG’s forty-foot wide by 1,275-foot long right-of-way, effectively abandoning  
8 the eastern-most twenty feet of the 1933 EPNG Easement, and creating a strip of unencumbered  
9 private property between the TEP Easement and the EPNG Amended Easement.<sup>15</sup> RP and EPNG  
10 also negotiated a new easement (“New EPNG Easement”) granting EPNG the exclusive right to a  
11 forty-foot wide by fifty-foot long area situated entirely within the EPNG Amended Easement,  
12 enabling EPNG to construct a walled-in metering station.<sup>16</sup> Because the metering station would  
13 encompass the entire forty-foot width of the EPNG Amended Easement, EPNG’s vehicular access to  
14 the portion of its easement on the other side of the metering station would be blocked. To remedy  
15 this, the New EPNG Easement granted a non-exclusive ten-foot wide by fifty-foot long right-of-way  
16 directly to the east of the metering station solely to enable EPNG to access the entire length of the  
17 EPNG Amended Easement.<sup>17</sup> Mr. Mitchell testified that in 2005, RP also granted an easement to  
18 Southwest Gas for access to its distribution facilities inside EPNG’s walled-in metering station. Mr.  
19 Mitchell noted TEP was not a party to easement negotiations.<sup>18</sup> (Solely for ease of reference, the  
20 1933 EPNG Easement, the EPNG Amended Easement and the New EPNG Easement shall be  
21 collectively referred to as the “EPNG Easement.”)

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24 <sup>11</sup> Complaint, page 3.

<sup>12</sup> Complaint, Attachment B-5.

<sup>13</sup> Tr. at 88, 91.

<sup>14</sup> Mitchell Testimony, pages 11-14, figures 9-12.

<sup>15</sup> Response, page 3; Tr. at 102; Mitchell Testimony, pages 11-14, figures 9-12. Mr. Mitchell testified that the EPNG Amended Easement does not contain any language specifically stating EPNG relinquished the eastern-most twenty feet of the 1933 EPNG Easement, but he stated that was the result. Tr. at 103.

<sup>16</sup> Mitchell Testimony, pages 15-19, figures 13-17.

<sup>17</sup> Tr. at 19-20.

<sup>18</sup> Response, page 4; Tr. at 17, 19-20.

1        TEP's Installation of Voltage Regulators Within the TEP Easement

2        22.     The Commission received an informal complaint in June 2009 from a TEP customer  
3 living in the Ironwood Reserve development, located near the RP Property in an area generally  
4 known as Continental Ranch.<sup>19</sup> The customer complained the electricity to his home was  
5 unpredictable, with sudden power outages and/or surges. After researching the complaint, TEP  
6 engineers learned the customer's observations were valid and determined that installing three 333  
7 kVA voltage regulators close to the development on existing power lines along or near North Scenic  
8 Drive would resolve the problem. Mr. Jerden stated that the optimum placement for overhead  
9 regulators is always as close as possible to the underground feeder riser.<sup>20</sup> TEP engineers calculated  
10 that the most effective location for the regulator bank would be on its existing 13.8 kV overhead  
11 distribution lines on the TEP Easement because this put the equipment one riser away from the  
12 underground feeder. Additionally, this location allowed TEP crews to safely and easily access the  
13 regulators and it would prevent disruption of traffic along North Scenic Drive during the equipment's  
14 installation and when TEP needed to access them for service.<sup>21</sup> In early August 2009, TEP accessed  
15 its facilities using the EPNG Easement and installed the regulator bank on two Class H2 45-foot  
16 wood poles in line with the existing overhead distribution lines.<sup>22</sup> The customer advised the  
17 Commission that he was no longer experiencing service issues and the informal complaint was closed  
18 at the end of August 2009. Mr. Jerden testified that the lines and regulators are currently providing  
19 safe and reliable service to TEP customers.<sup>23</sup>

20        23.     Mr. Mitchell stated that TEP did not contact RP before installing the regulator bank  
21 and he learned of it only after it was in place.<sup>24</sup> Unhappy with appearance and noise of the  
22 equipment, as well as a perceived negative impact to RP Property value and to RP's ability to  
23 develop the property for residential lots, Mr. Mitchell contacted TEP to discuss ways to either

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25 <sup>19</sup> Informal Complaint No. 2009-79501, filed June 5, 2009.

<sup>20</sup> Jerden Testimony, page 3.

<sup>21</sup> Jerden Testimony, pages 2-5.

<sup>22</sup> Jerden Testimony, pages 2-3.

<sup>23</sup> Jerden Testimony, pages 4-5.

<sup>24</sup> Complaint, Attachment B-7. During oral argument on TEP's Motion to Dismiss, Mr. Mitchell stated that he was on vacation at the time TEP installed the regulator bank. Transcript of November 9, 2010, Oral Argument, page 15. (Hereinafter, "Oral Arguments at \_\_.")

1 mitigate the aesthetic impact of the equipment or move it to a different location. In an August 11,  
2 2009, letter to TEP, Mr. Mitchell wrote that during a meeting on RP Property the previous day, a TEP  
3 representative explained the need for the regulators and why TEP concluded the best engineering and  
4 logistical location for them was on the TEP Easement. Mr. Mitchell claimed the representative told  
5 him that "TEP installed this regulator bank in an unusually hurried manner due to the severity of the  
6 voltage drop experienced," and TEP had not considered the equipment's aesthetic impact on the area,  
7 nor did TEP attempt to contact him to discuss the least intrusive location for the equipment.<sup>25</sup> Mr.  
8 Mitchell stated he and the representative discussed the possibility of painting the regulators green to  
9 blend in better with the landscape. In his letter, Mr. Mitchell stated he believed TEP should relocate  
10 and paint the regulator bank at its own expense, but he offered \$2,000 to offset TEP's expenses.<sup>26</sup> At  
11 the end of the letter, Mr. Mitchell wrote: "[T]o avoid this problem in the future, is there some way  
12 that TEP can contact me if they are going to make such a major change to their facilities located on  
13 my property? It would be very cost and time productive to have some means of communication open  
14 during the design stage of such a major project."<sup>27</sup> Mr. Mitchell stated that during subsequent  
15 telephone conversations, Mr. Jerden informed him TEP had the right to place the regulator bank on  
16 the TEP Easement and to use the EPNG Easement to access its facilities. Additionally, Mr. Mitchell  
17 claimed TEP refused to consider other locations for the equipment and advised him that it was not  
18 possible to paint the regulators because TEP needs to remove them for service every five years.<sup>28</sup>

19 24. Over the next several months, RP attempted to find a solution to its concerns. RP filed  
20 a complaint with Pima County Development Services claiming TEP had violated zoning codes by  
21 installing the regulator bank in a "Hillside Development Zone," but Pima County advised RP that  
22 public utilities are exempt from the Pima County Zoning Code and closed RP's complaint.<sup>29</sup>

23 25. RP also speculated that in order to install the regulator bank, TEP had to have placed  
24 its trucks and equipment outside of the ten-foot wide boundary set in the TEP Easement. RP stated it  
25 had not given TEP permission to enter or use RP Property except by the TEP Easement, and

26 <sup>25</sup> Complaint, Attachment B-7.

27 <sup>26</sup> Complaint, Attachments B-7, B-8.

27 <sup>27</sup> Complaint, Attachment B-8.

28 <sup>28</sup> Complaint, Attachment B-1, B-2.

28 <sup>29</sup> Complaint, Attachments B-2, B-6.

1 concluded the Company had criminally trespassed on RP Property to install the equipment.<sup>30</sup> Mr.  
 2 Mitchell contacted the Pima County Sheriff's Office to file trespassing charges against TEP,<sup>31</sup> but the  
 3 Sheriff's Office advised him it could do nothing unless TEP is actually observed trespassing.<sup>32</sup> In a  
 4 February 8, 2010, letter emailed to TEP, Mr. Mitchell warned, "the next time TEP trespasses on RP  
 5 land (encroaches outside their 10' wide easement), TEP will be cited for criminal trespass under ARS  
 6 13-1502."<sup>33</sup>

7 26. Mr. Jerden responded to this letter by email the following day, claiming Mr. Mitchell  
 8 had misrepresented their conversations. He stated, "I...do not wish to continue to argue the finer  
 9 points of regulatory and property law with you and then see my statements mischaracterized in a  
 10 subsequent writing."<sup>34</sup> Mr. Jerden wrote TEP was willing to consider moving the regulator bank if  
 11 RP paid the relocation costs, as it would with any other property owner, but he explained:

12 At this point, you have two options: If you have a concern that TEP is not  
 13 constructing its facilities in conformance with the National Electric Safety Code  
 14 or TEP's ACC-approved Rules and Regulations, you may post an inquiry or  
 15 complaint with the Commission's Utilit[ies] Division. If your concern is that TEP  
 has committed some civil wrong, you may consult with an attorney to explore any  
 options you may have for possible redress.<sup>35</sup>

16 27. RP filed an informal complaint with the Commission in February 2010, but the parties  
 17 did not resolve the dispute.

### 18 **RP's Complaint**

19 28. RP filed its Complaint asserting, "RP does not believe that TEP installed the electrical  
 20 bank nor can TEP safely service this massive electrical regulator bank without trespassing  
 21 (repeatedly) on RP's land" in violation of A.R.S. § 13-1502.<sup>36</sup> RP contended that TEP's criminal  
 22 trespass and installation of the regulator bank resulted in considerable damages for RP, claiming the

23 \_\_\_\_\_  
 24 <sup>30</sup> Complaint, pages 1-3.

<sup>31</sup> Complaint, pages 2-3.

<sup>32</sup> Oral Argument at 15.

<sup>33</sup> Complaint, Attachment B-3. A.R.S. § 13-1502(A) states in relevant part:

A person commits criminal trespass in the third degree by: (1) Knowingly entering or remaining unlawfully on any real property after a reasonable request to leave by the owner or any other person having lawful control over such property, or reasonable notice prohibiting entry.

<sup>34</sup> Complaint, Attachment C-1.

<sup>35</sup> *Id.*

<sup>36</sup> Complaint, page 1.

1 regulators' presence de-valued the RP Property and that TEP had illegally acquired the RP Property  
2 surrounding the regulator bank because it is no longer suitable for residential development.<sup>37</sup>

3 29. RP admitted the regulator bank fits within the TEP Easement, but claimed its  
4 placement there overburdens the Easement because access to this equipment requires much more than  
5 the granted ten-foot width Easement. Because TEP has no right to use any other areas of RP  
6 Property, including the EPNG Easement, RP concluded TEP planned to trespass on RP Property  
7 whenever the Company needs to service its equipment.<sup>38</sup> Concerned about ongoing unauthorized  
8 access, RP secured the RP Property by replacing the livestock gate with a large security gate across  
9 the EPNG Easement's entrance, placing boulders and desert plants around the sides of the gate, and  
10 re-vegetating the strip of unencumbered property between the EPNG Amended Easement and the  
11 TEP Easement.<sup>39</sup> RP stated it will not interfere with TEP's access to its Easement, noting RP has  
12 removed the sensitive desert plants from the TEP Easement to facilitate blading.<sup>40</sup>

13 30. RP ended its Complaint by stating: "TEP has been notified in writing that TEP cannot  
14 access their equipment as they originally planned because such access is criminal trespass. IF  
15 SOMETHING HAPPENS TO THIS ELECTRICAL REGULATOR BANK, THE SURROUNDING  
16 COMMUNITY, INCLUDING MYSELF, IS AT RISK BECAUSE TEP CURRENTLY HAS  
17 EXTREMELY LIMITED ACCESS FOR SERVICING IT."<sup>41</sup>

18 31. RP requested that the Commission issue an order requiring TEP to either obtain the  
19 legal access necessary to service the regulator bank or relocate it to another location.<sup>42</sup>

20 **TEP's Answer**

21 32. TEP denied it impermissibly accessed the EPNG Easement when installing the  
22 regulator bank, asserting:

23 [TEP] has lawful authority to access the electric line and voltage regulators  
24 pursuant to Arizona Administrative Code R14-2-206(C) and 207(E)(2)(a) and  
25 pursuant to lawfully recorded easements. TEP has used the combined EPNG/TEP

26 <sup>37</sup> *Id.*

<sup>38</sup> Complaint, pages 1-2.

<sup>39</sup> Mitchell Testimony, page 7, figure 5.

<sup>40</sup> Complaint, page 3.

<sup>41</sup> Complaint, page 4. (Emphasis original.)

28 <sup>42</sup> *Id.*

1 line corridor for access to its facilities for over a half-century and under the  
 2 common law of property, the creation of an easement for an electric line “carries  
 3 with it a reasonable right of access to enable the utility to discharge its legal  
 4 obligation to render adequate and reliable service.” *Vermont Electric Power Co.*  
 5 *v. Anderson*, 147 A.2d 875 at 880 (1959). It is established utility-industry  
 6 practice for cooperating utility companies to co-utilize the lands within their  
 7 adjoining easements to minimize disruption to the surrounding landscape, which  
 8 TEP has done. Otherwise, the Company would have to denude its own easement,  
 9 thereby further disrupting the natural surroundings.<sup>43</sup>

10 33. TEP claimed the TEP Easement is “specifically tied” to the eastern boundary of the  
 11 EPNG Easement and when the 1933 EPNG Easement was more specifically defined by the EPNG  
 12 Amended Easement, it did not create an unencumbered area between the two easements; instead, the  
 13 TEP Easement’s western boundary continued to run along the EPNG Amended Easement’s east  
 14 boundary.<sup>44</sup> TEP disputed RP’s claims that the Company had trespassed, damaged RP Property, or  
 15 overburdened the TEP Easement, and noted RP admitted the regulators fit within the TEP  
 16 Easement.<sup>45</sup> TEP asserted the regulators are necessary to provide safe and reliable service to TEP  
 17 customers and the Company acted lawfully and in compliance with all applicable Commission rules  
 18 when installing them.<sup>46</sup> TEP contended that because it has access rights under common law, lawful  
 19 easements and Commission regulations, any attempt by RP to hinder TEP’s access to its facilities  
 20 will be a violation of A.R.S. § 40-431.<sup>47</sup>

21 34. TEP agreed a representative met with Mr. Mitchell on August 10, 2009, to discuss his  
 22 concerns about the regulators, but claimed RP’s characterizations of that conversation in the August  
 23 11, 2009, letter, as well as those of subsequent conversations discussed in the February 8, 2010,  
 24 letter, were inaccurate and misrepresented what actually occurred. TEP stated that although it is not  
 25 obligated to move the equipment or pay relocation costs, it offered to move the regulator bank if RP

26 <sup>43</sup> Answer, page 3.

27 <sup>44</sup> Answer, page 2; Jerden Testimony, page 7.

28 <sup>45</sup> *Id.*

<sup>46</sup> Answer, pages 1-2.

<sup>47</sup> Answer, pages 4-5. A.R.S. § 40-431 states:

A. A duly appointed and authorized officer or agent of a public service corporation may, at all reasonable times, upon exhibiting written authority signed by the president, secretary or manager of the corporation, enter any premises using the product of such corporation for the purpose of inspecting and examining the property of the corporation, or for ascertaining the quantity of its product consumed.

B. A person who knowingly prevents or interferes with such officer or agent entering such premises or making such examination or inspection is guilty of a class 2 misdemeanor.

1 pays for its relocation, but RP rejected the offer.<sup>48</sup>

2 **RP's Response**

3 35. RP disputed TEP's assertion that it has a right to use the EPNG Easement, stating that,  
 4 "[t]he EPNG easement was originally, and still is, exclusive to that company for their use only. TEP  
 5 has not stated or produced any 'co-utilizing' agreement with EPNG. EPNG cannot be a 'cooperating  
 6 utility' and cannot grant TEP access to use their easement, regardless of the purpose."<sup>49</sup> RP denied  
 7 that the TEP Easement's boundary is tied to the EPNG Easement, asserting the reference to the  
 8 eastern boundary of the 1933 EPNG Easement was for location purposes only, and with the execution  
 9 of the EPNG Amended Easement, the easements are no longer adjacent.<sup>50</sup>

10 36. RP distinguished the case law cited by TEP claiming, among other things, *Vermont*  
 11 *Electric Power Co. v. Anderson* was a condemnation case and TEP had taken the quoted language out  
 12 of context. Additionally, the easement in that case specifically allowed the utility to cross the  
 13 owner's property to access its equipment.<sup>51</sup> RP noted TEP has another easement across RP Property  
 14 containing language permitting TEP to access areas outside of that easement for certain purposes.<sup>52</sup>  
 15 RP argued because the TEP Easement does not contain a similar provision, TEP's access is strictly  
 16 limited to a width of ten feet along the length of its Easement.<sup>53</sup>

17 37. RP asserted that TEP's reliance on Arizona Administrative Code ("A.A.C.") R14-2-  
 18 206(C) and 207(E)(2)(a) is misplaced. RP noted that A.A.C. R14-2-206(C) relates to easements  
 19 granted by utility customers for service lines and service establishments—not to easements granted  
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 26 <sup>48</sup> Answer, page 2.

27 <sup>49</sup> Response, page 3.

28 <sup>50</sup> Response, page 1-2.

<sup>51</sup> Response, page 4.

<sup>52</sup> Response, pages 2, 4; Mitchell Testimony, page 9, figure 7.

<sup>53</sup> Response, pages 2, 4.

1 by private property owners for distribution lines.<sup>54</sup> Likewise, A.A.C. R-14-2-207(E)(2)(a) addresses  
 2 “single phase underground extensions in subdivision developments” between a utility and a  
 3 developer and is also not applicable.<sup>55</sup> RP claimed that although the house on RP Property receives  
 4 service from TEP, the lines at issue are distribution lines, not service lines to the home, and they do  
 5 not relate to RP’s status as a TEP customer.<sup>56</sup> RP also argued that A.R.S. § 40-431 is not applicable  
 6 in this instance because it is not interfering with TEP’s access to its facilities; RP is only insisting that  
 7 the Company access its equipment by means of, and entirely within, the TEP Easement.<sup>57</sup> RP  
 8 asserted TEP is aware it cannot access its equipment for maintenance and repairs while remaining  
 9 solely within the TEP Easement, but refuses to remedy the problem, willfully risking the public’s  
 10 health and safety.<sup>58</sup>

11 38. According to RP, TEP’s statement that it had offered to relocate the regulators at RP’s  
 12 expense is inaccurate. RP stated that TEP offered to move the equipment at a cost of \$20,000 to a  
 13 location on an adjacent property proposed by RP, but RP would first have to obtain permission from  
 14 the owner. RP refused, asserting “it is not RP’s responsibility to correct the public safety/lack of  
 15 adequate easement issue that TEP created.”<sup>59</sup>

16 ...

17 ...

19 <sup>54</sup> Response, page 3. A.A.C. R14-2-206 states:

20 **Service Lines and Establishments...C.** Easements and rights-of-way. 1. Each customer shall grant  
 21 adequate easement and right-of-way satisfactory to the utility to ensure that customer’s proper service  
 22 connection. Failure on the part of the customer to grant adequate easement and right-of-way shall be  
 23 grounds for the utility to refuse service. 2. 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.

24 <sup>55</sup> *Id.* A.A.C. R14-2-207 states:

25 **Line Extensions...E.** Single phase underground extensions in subdivision developments... 2. Rights-of-  
 26 way: (a) The utility shall construct or cause to be constructed and shall own, operate, and maintain all  
 underground electric distribution and service lines along public streets, roads, and highways and on public  
 lands and private property which the utility has the legal right to occupy.

27 <sup>56</sup> *Id.*

27 <sup>57</sup> Response, pages 6-7.

28 <sup>58</sup> Response, page 7.

28 <sup>59</sup> Response, page 2.

1 **Motion to Dismiss**

2 39. A.R.S. § 40-246(A) states in relevant part: “Complaint may be made...by any person  
3 ...by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any  
4 public service corporation in violation, or claimed to be in violation, of any provision of law or any  
5 order or rule of the commission... .” TEP requested that the Commission dismiss the Complaint  
6 because RP failed to allege a violation of any law, order or rule of the Commission and RP’s claims  
7 raised legal issues outside of the Commission’s jurisdiction. TEP noted that the Arizona Constitution  
8 and statutes authorize the Commission to oversee a public service corporation’s activities in such  
9 areas as rates and rate-making, provision and quality of service, line-siting and pipeline safety. The  
10 Company contended it is in areas such as these that the Commission may consider complaints from  
11 customers pursuant to A.R.S. § 40-246(A). TEP conceded the Commission generally has broad  
12 powers to address matters falling within its constitutionally or legislatively granted authority.<sup>60</sup>  
13 However, TEP insisted that the Commission lacks jurisdiction over RP’s claims regarding criminal  
14 trespass and RP’s property rights, asserting that these claims are “unrelated to or attenuated from  
15 those matters over which the Commission has express constitutional or statutory authority [and] do  
16 not fall within the Commission’s exclusive jurisdiction.”<sup>61</sup>

17 40. RP interpreted the phrase “any provision of law” to mean the Commission may hear a  
18 complaint against a public service corporation, regardless of its legal basis. RP argued it had  
19 complied with the requirements of A.R.S. § 40-246(A) by alleging TEP violated A.R.S. § 13-1502  
20 when it illegally accessed areas of RP Property outside of the TEP Easement to install the regulator  
21 bank.<sup>62</sup> RP also asserted the Commission may hear its Complaint and grant RP’s requested relief  
22 pursuant to A.R.S. § 40-203, which states that if the Commission finds a public service corporation’s  
23 “rules, regulations, practices, or contracts, are unjust, discriminatory or preferential, illegal or  
24 insufficient, the commission shall determine and prescribe them by order, as provided in this title.”<sup>63</sup>

25 41. RP explained that it filed its Complaint with the Commission rather than in Superior  
26

27 <sup>60</sup> Answer, page 3, quoting *Qwest Corp. v. Kelly*, 204 Ariz. 25 at 30, 59 P.3d 789 at 794 (App. 2002).

<sup>61</sup> *Id.*; Oral Arguments at 5.

<sup>62</sup> Oral Arguments at 8-9, 15, 21-22.

28 <sup>63</sup> Oral Arguments at 8-9, 18.

1 Court because “[RP] is not in any position and has not had the resources like TEP does to take this to  
 2 a civil court. That’s why I am not asking for compensatory damages here. All I am asking for is for  
 3 the ACC to make TEP follow state law.”<sup>64</sup>

#### 4 DISCUSSION AND ANALYSIS

##### 5 Commission Jurisdiction

6 42. The Procedural Order ruling on TEP’s Motion to Dismiss noted that TEP is a public  
 7 service corporation and pursuant to A.R.S. § 40-246(A), the Commission may hear complaints  
 8 against the Company in certain circumstances, and also noted that A.R.S. § 40-421 states, “[t]he  
 9 commission shall require that the laws affecting public service corporations, the enforcement of  
 10 which is not specifically vested in some other officer or tribunal, are enforced and obeyed... .” For  
 11 the reasons discussed below, the Procedural Order concluded that: 1) The Commission is not the  
 12 appropriate body to hear RP’s claims based on civil law; 2) the Commission does not have authority  
 13 over RP’s claims based on criminal law; and 3) the Commission has jurisdiction over RP’s claim that  
 14 TEP is violating A.R.S. § 40-361(B).

15 43. The Commission has broad constitutional and statutory powers over many aspects of  
 16 public service corporations,<sup>65</sup> and over its long history, “the Commission has developed specialized  
 17 expertise in matters related to its regulation of the service and financial aspects of public service  
 18 corporations.”<sup>66</sup> But Arizona courts have concluded that claims by a customer against a utility based  
 19 on common law theories are “far afield of the Commission’s area of expertise and statutory  
 20 responsibility, and are the type of traditional claims with which our trial courts of general jurisdiction  
 21 are most familiar and capable of dealing.”<sup>67</sup>

22 44. RP’s claims based on real property laws are attenuated from any specific Commission  
 23 rule, law or decision regulating the activities of public service corporations. RP’s civil allegations are  
 24

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25 <sup>64</sup> Oral Argument at 9.

26 <sup>65</sup> *Campbell v. Mountain States Telephone & Telegraph Company*, 586 P.2d 987 at 988, 120 Ariz. 426 at 427 (App.  
 1978). See also *Qwest Corp. v. Kelly*, *supra*.

27 <sup>66</sup> *Id.* at 992, 431.

28 <sup>67</sup> *Id.*, at 993, 432; The Arizona Supreme Court held the construction and validity of a contract are judicial functions for  
 the courts, not the Commission, *Campbell*, at 992, 431, citing *Trico Electric Cooperative v. Ralston*, 67 Ariz. 358, 196  
 P.2d 470 (1948); *Qwest Corp. v. Kelly*, *supra*.

1 unrelated to questions regarding rates, billing, provision of service to RP, or RP's rights as a TEP  
2 customer, and resolution of RP's civil claims does not require the Commission's specialized  
3 expertise. RP's allegations are the type of traditional civil law claims requiring interpretation and  
4 application of common law doctrines and the Procedural Order concluded they are more suitable for  
5 consideration by a trial court of general jurisdiction. After the Procedural Order was issued, TEP  
6 filed the Jerden Testimony, in which Mr. Jerden asserted TEP has a right to use areas of RP Property  
7 outside of the TEP Easement based on the common law doctrine of secondary easements.<sup>68</sup> Mr.  
8 Jerden testified that TEP may also have access rights under a prescriptive easement.<sup>69</sup> At hearing,  
9 Mr. Jerden acknowledged that in order to find TEP has access rights under a secondary or  
10 prescriptive easement, the Commission would have to interpret and apply tenets of civil law—an  
11 action TEP has insisted from the outset is outside the Commission's authority.<sup>70</sup> It would not be  
12 equitable to preclude RP's claims based on real property theories, but allow TEP to employ them to  
13 support its arguments. Accordingly, we decline to address TEP's arguments that it has the right to  
14 access RP Property under a secondary or prescriptive easement.

15       45. RP also asked the Commission to find that TEP has criminally trespassed on RP  
16 Property and order the Company to refrain from further criminal acts. The Procedural Order ruled  
17 that enforcement of Arizona criminal laws is specifically vested in Arizona law enforcement  
18 agencies, noting the Commission has previously concluded as a matter of law it does not have  
19 authority over claims purportedly based on Arizona criminal statutes.<sup>71</sup>

20       46. RP's remaining claim is that TEP has compromised public safety by placing the  
21 regulator bank within the TEP Easement knowing that the Easement is not large enough for TEP  
22 crews to access, maintain or repair its equipment. The Procedural Order ruled that RP had raised a  
23 public safety concern pursuant to A.R.S. § 40-361(B), over which the Commission has jurisdiction.

24 \_\_\_\_\_  
25 <sup>68</sup> Jerden Testimony, pages 8-9. TEP stated in its Answer that under the "common law of property" the Company had a  
26 reasonable right of access to its equipment, but TEP did not argue specific property law doctrines until it filed the Jerden  
27 Testimony.

28 <sup>69</sup> Tr. at 68.

<sup>70</sup> Tr. at 76-79.

<sup>71</sup> Decision No. 63134 (November 16, 2000), *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*, page 11.

1 **Public Safety**

2 47. A.R.S. § 40-361(B) reads:

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

6 **RP's Position**

7 48. In its Complaint, RP claimed that the "massive electrical transformers [installed by  
8 TEP] pose a major safety concern if they malfunction or are struck by lightning [*sic*] resulting in a  
9 violent explosion (very common in this area of the Tucson Mountains)."<sup>72</sup> RP asserted that it is not  
10 physically possible for TEP to access and service the regulator bank using only the TEP Easement,  
11 but if crews attempted to service its equipment using only the TEP Easement, their safety would be  
12 jeopardized because they have only a few feet in which to maneuver.<sup>73</sup> RP warned TEP it does not  
13 have permission to use any area of RP Property outside the TEP Easement under any circumstances,  
14 but TEP refused to either acquire sufficient legal access to RP Property or move the regulator bank to  
15 a more accessible location. RP argues that TEP is knowingly endangering its customers, employees  
16 and the public in violation of A.R.S. § 40-361(B).<sup>74</sup>

17 49. At hearing, Mr. Mitchell testified he does not know whether the regulators are  
18 currently providing safe and reliable service to TEP customers.<sup>75</sup> Mr. Mitchell admitted the regulator  
19 bank fits within the TEP Easement and he agreed that if TEP could access them using only its  
20 Easement, there would not be a safety issue.<sup>76</sup>

21 50. RP disputes TEP's claim that EPNG may share the EPNG Easement with TEP, but  
22 Mr. Mitchell testified that even if TEP could lawfully use the EPNG Easement, there is now an  
23 unencumbered strip of private property between the two and TEP will have to exceed the boundaries  
24 of the EPNG Amended Easement to access the TEP Easement and its facilities.<sup>77</sup> Mr. Mitchell

25 \_\_\_\_\_  
26 <sup>72</sup> Complaint, page 1.

27 <sup>73</sup> Complaint, page 2; Mitchell Testimony, page 2.

28 <sup>74</sup> Tr. at 16-17; Complaint, pages 3-4; Response, page 7.

<sup>75</sup> Tr. at 39-41.

<sup>76</sup> Tr. at 26.

<sup>77</sup> Tr. at 17, 33-34; Mitchell Testimony, page 4; Response, pages 1-2; Complaint, page 3.

1 acknowledged that the ten-foot by fifty-foot area granted in the New EPNG Easement might overlap  
2 with the TEP Easement, but it is only for that specific fifty-foot length along the walled-in metering  
3 station, not its entire length.<sup>78</sup>

4 51. RP argues the rules and statutes cited by TEP to support its argument that the  
5 Company may use areas of RP Property outside of the TEP Easement to access its facilities do not  
6 apply in this case. These provisions relate to what rights a utility has with respect to customer-  
7 granted service easements and a utility's right to enter a customer's property to inspect and repair the  
8 utility's equipment providing service to that customer. RP points out that the TEP Easement is not a  
9 customer-granted service easement and the equipment on the TEP Easement does not directly provide  
10 service to RP; as such, RP may prevent TEP's unauthorized access or use of RP Property.<sup>79</sup> RP  
11 denies it has done anything to block or hinder TEP's access to the TEP Easement, noting it has  
12 removed the more fragile desert plants from area to facilitate blading.<sup>80</sup>

13 52. At hearing, Mr. Mitchell was asked whether RP is the one responsible for placing the  
14 public at risk by asserting its property rights and refusing TEP permission to use the EPNG Easement  
15 to access its equipment for service or repairs. Mr. Mitchell responded:

16 No. No, I don't see it at all that other easements have anything to do with this. I  
17 do not see that. That would just be, the fact that you're saying use other utilities'  
18 easements, that would be just the same as drawing the conclusion using any of my  
19 land they would like, because you're saying another utility's easement, and my  
20 home itself is no different, in my opinion.<sup>81</sup>

21 53. Mr. Mitchell was also asked what the responsible act of a reasonable property owner  
22 would be in an emergency situation where many people are without electricity and TEP needed to  
23 access private property to restore service. He stated, "[i]f it weren't in a situation such as this where  
24 they've had ample chance to correct the problem, it would be to allow them access. In other words, if  
25 that regulator bank were not located here and there was an issue where they needed to get in there, it  
26 might be something that, you know, that that would be reasonable. But in this instance, it is not."<sup>82</sup>

26 <sup>78</sup> Tr. at 19-20.

27 <sup>79</sup> Mitchell Testimony, page 3; Response, page 3; Tr. at 58.

28 <sup>80</sup> Tr. at 50-52; Complaint, page 3.

<sup>81</sup> Tr. at 53.

<sup>82</sup> Tr. at 57.

1 Mr. Mitchell testified he does not believe the Commission has the authority to order RP to allow TEP  
2 to access or use RP Property outside of the TEP Easement,<sup>83</sup> and he believes the Commission should  
3 find that TEP is endangering the public in violation of A.R.S. § 40-361(B) and direct TEP “to either  
4 get an adequate easement or relocate the regulator bank, to put it back where it was before August of  
5 2009 so that we again have safe service for the community.”<sup>84</sup>

6 TEP’s Position

7 54. TEP denies it is in violation of A.R.S. § 40-361(B) and asserts the distribution line and  
8 the regulator bank on its Easement are currently providing safe and reliable service to TEP customers  
9 and will continue to do so.<sup>85</sup> Mr. Jerden admitted TEP crews cannot remain entirely within the TEP  
10 Easement to enter RP Property or to service its equipment,<sup>86</sup> but he noted TEP has used the EPNG  
11 Easement to access its facilities for approximately seventy years. Mr. Jerden testified that, to his  
12 knowledge, TEP has not received any complaints from previous RP Property owners, or from RP  
13 prior this Complaint, that TEP’s use of the EPNG Easement constituted trespass or that TEP was  
14 violating the terms of the TEP Easement.<sup>87</sup>

15 55. Mr. Jerden contests RP’s assertion that there is an unencumbered area of private  
16 property between the two easements, pointing out that they overlap at the ten-foot wide by fifty-foot  
17 long non-exclusive right-of-way granted in the New EPNG Easement.<sup>88</sup> Further, Mr. Jerden testified  
18 that the TEP Easement “makes a call” to the east boundary of the 1933 EPNG Easement that  
19 continued when the EPNG Amended Easement created a more specific description of EPNG  
20 Easement’s location; therefore, the two easements are still adjacent.<sup>89</sup> TEP asserts its use of the  
21 EPNG Easement to access its facilities is a typical utility industry practice, stating, “[J]oint use of  
22 utility easements is widely encouraged, not prohibited by utility regulators and the courts,” because it  
23 minimizes disruption of the natural surroundings.<sup>90</sup> Mr. Jerden testified he does not believe the

24 <sup>83</sup> *Id.*

25 <sup>84</sup> Tr. at 58, 105.

26 <sup>85</sup> Jerden Testimony, pages 4-5.

27 <sup>86</sup> Tr. at 71-74.

28 <sup>87</sup> Jerden Testimony, page 4.

<sup>88</sup> Jerden Testimony, page 6.

<sup>89</sup> Tr. at 67.

<sup>90</sup> Jerden Testimony, pages 7-8, citing *Koponen v. Pacific Gas & Electric Company*, 165 Cal.App 4<sup>th</sup> 345 (2008); Answer, page 3.

1 Commission has specifically addressed this practice,<sup>91</sup> but he claims TEP's use of the EPNG  
2 Easement is efficient and has the benefit of not having to denude the TEP Easement.<sup>92</sup>

3         56. TEP contended the security gate RP installed to prevent the Company's use of the  
4 EPNG Easement jeopardizes the quality of service to TEP customers in the Ironwood Reserve  
5 development and other downstream customers.<sup>93</sup> According to TEP, A.A.C. R14-2-206(C)(2) gives  
6 TEP the authority to take necessary action to eliminate potential hazards or obstructions that might  
7 restrict TEP's access to its facilities.<sup>94</sup> Additionally, A.R.S. § 40-431(A) allows TEP to enter RP  
8 Property to inspect its equipment and provides that any interference with TEP's access to its facilities  
9 is a violation of A.R.S. § 40-431(B).<sup>95</sup> At hearing, Mr. Jerden clarified that under a strict  
10 interpretation, A.A.C. R-14-2-206(C)(2) and A.R.S. § 40-431 are not specifically applicable to this  
11 particular situation because the distribution lines and regulator bank on the TEP Easement do not  
12 provide direct service to RP. Mr. Jerden also explained that A.R.S. § 40-431 is generally meant to  
13 give TEP employees the right to access a customer's property to read meters or inspect a customer's  
14 service equipment, but it does not give TEP "a blanket right to go in and start replacing poles, for  
15 example, that are not related to the service."<sup>96</sup> Mr. Jerden noted he has never before had to respond  
16 to a property owner's claim that TEP crews would be trespassing if they entered the property to  
17 service the Company's facilities, but he testified that TEP uses the cited rule and statute as a "catch-  
18 all" to support TEP's general authority to act when access to its facilities is interfered with or  
19 obstructed.<sup>97</sup>

20         57. At hearing, Mr. Jerden was asked what TEP would do if it needed to access the RP  
21 Property to effect emergency repairs. He responded that if TEP is unable to enter the EPNG  
22 Easement's bladed area because the security gate is locked, TEP will do whatever is reasonably  
23 necessary to gain access to RP Property in order to restore service, especially considering that the  
24

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25 <sup>91</sup> Tr. at 77-78.

26 <sup>92</sup> Jerden Testimony, pages 7-8.

27 <sup>93</sup> Jerden Testimony, pages 11-12; Tr. at 86-87.

28 <sup>94</sup> Jerden Testimony, page 11; Answer, page 3. See footnote 54.

<sup>95</sup> Jerden Testimony, pages 11-12; Answer, pages 4-5. See footnote 47.

<sup>96</sup> Tr. at 83-84.

<sup>97</sup> Tr. at 83-86.

1 13.8 kV line crossing RP Property provides service to thousands of customers.<sup>98</sup> Mr. Jerden stated  
2 now that TEP is aware of the RP's position and of the gate blocking access to the EPNG Easement,  
3 TEP will work with RP or with the other utilities to ensure sufficient access to RP Property.<sup>99</sup>

4 Discussion

5 58. Although RP's Complaint centers on TEP's purported public safety violation, it is  
6 apparent that RP's grievance against TEP is that RP does not want the regulator bank on RP Property.  
7 After attempting unsuccessfully to have TEP move the regulator bank, RP filed its Complaint with  
8 the Commission claiming TEP's inability to access the regulators using only the TEP Easement  
9 negatively impacts public safety. But the same access and public safety issues exist for TEP's other  
10 equipment on the Easement. For example, if one of TEP's power poles was struck by lightning and  
11 collapsed, it is unlikely the pole would land neatly within the TEP Easement—TEP would have to  
12 enter areas of RP Property outside of the TEP Easement to repair the pole and lines. Under RP's  
13 reasoning, if its main concern is the effect that TEP's lack of adequate access will have on public  
14 safety, TEP would not only have to relocate the regulator bank, but also its distribution lines.

15 59. Mr. Mitchell complained that the regulators are a safety hazard to his family, his  
16 home, his property and the public in general because they could be struck by lightning “resulting in a  
17 violent explosion” or malfunction in some other way, but as noted above, this hazard is not restricted  
18 to the regulator bank and the dangers posed by electrical equipment are not unique to the RP  
19 Property—downed power lines or equipment damage can occur anywhere. Mr. Jerden testified that  
20 in these situations, TEP will enter the property containing the damaged equipment, whether within or  
21 outside of an easement, in a manner reasonably necessary to gain access to its facilities in order to  
22 repair the equipment and restore service. The Company claims its right to access property, including  
23 RP Property, as needed to fulfill its obligations as a public service corporation is permitted by  
24 Commission rules and by statute.

25 60. RP asserts TEP may not enter RP Property as needed to access the regulators, insisting  
26 RP can refuse TEP access to the EPNG Easement or other areas of RP Property, except that granted

27 \_\_\_\_\_  
28 <sup>98</sup> Tr. at 92-94.

<sup>99</sup> Tr. at 90, 96.

1 under the TEP Easement, regardless of the circumstances.

2       61.     RP requests that if the Commission is unwilling to order TEP to relocate the regulator  
3 bank, then it should order TEP to obtain legal access sufficient to service its equipment; however,  
4 based on the record, it is uncertain whether the parties are willing to resolve the access issues  
5 amicably or inexpensively. Regardless of how the parties characterize their discussions, several  
6 things are clear. First, although TEP was perhaps within its rights to place the regulator bank on its  
7 Easement, photographs show it is an obtrusive piece of equipment. At a minimum, TEP could have  
8 attempted to discuss with RP the installation of the regulator bank as a matter of courtesy—a simple  
9 act might have forestalled the subsequent dispute.<sup>100</sup> Second, it appears that soon after their initial  
10 conversations, communications between RP and TEP deteriorated, resulting in both parties taking  
11 intransigent positions. Further, the solutions proposed by the parties to date, do not raise hopes for a  
12 quick or inexpensive resolution of access issues. TEP claims it is willing to move the regulator bank  
13 at a cost of \$20,000 to a location on an adjacent property recommended by RP, but placed not only  
14 the cost, but also the burden on RP to get permission from the property owner. RP also proposed  
15 options, stating, “RP would consider negotiating an easement for a non-elevated electrical regulator  
16 bank (outside of their existing easement). RP is also aware that TEP can start the legal process to  
17 acquire an adequate easement through the ‘eminent domain’ taking process.”<sup>101</sup> It is regrettable that  
18 things have come to a point where each party has threatened the other with criminal charges, rather  
19 than working toward a positive solution that is in the best interests of many TEP customers as well as  
20 in Mr. Mitchell’s interests in protecting his family, his home and his property.

21       62.     TEP believes its use of the EPNG Easement benefits RP and the RP Property because  
22 TEP has not had to blade its own Easement, preserving the desert vegetation. TEP notes that other  
23 public utility commissions and courts encourage utilities’ joint use of easements in order to minimize  
24 the amount of land encumbered by multiple easements, or to lessen the physical impact on the  
25 property. In most circumstances, it is likely that a property owner would recognize the benefits of

26 \_\_\_\_\_  
27 <sup>100</sup> Mr. Mitchell stated he was on vacation when TEP put up the equipment. Depending on the severity of the voltage  
28 fluctuation issue in the Ironwood Ridge subdivision, waiting until Mr. Mitchell returned before installing the regulators  
might not have been reasonable.

<sup>101</sup> Complaint, page 3.

1 shared easements and welcome the practice and it appears that RP recognized this when it granted to  
2 Southwest Gas an easement that allows it to access its facilities inside EPNG's walled-in metering  
3 station by using the bladed area of the EPNG Easement, eliminating the need to disturb the desert to  
4 create another access road. It appears that TEP's actions and communications with RP have caused  
5 RP to be less accommodating with TEP's Easement.

6 Resolution

7 63. The TEP Easement grants the Company the right to construct, operate and maintain  
8 electric lines or systems on the RP Property. TEP placed distribution lines on its Easement seventy  
9 years ago and they have been in use since that time. In order to address voltage irregularities in a  
10 development near RP Property, TEP installed a regulator bank along the lines within the TEP  
11 Easement after evaluating the equipment's optimal placement based on engineering requirements and  
12 its need for safe and convenient access to the regulator bank for maintenance and repairs. TEP and  
13 RP agree that the regulator bank fits within the TEP Easement. TEP stated that its facilities on the  
14 TEP Easement are currently providing safe and reliable service and RP did not produce any evidence  
15 to the contrary. Accordingly, we find that TEP's installation of the regulator bank was designed to  
16 ensure adequate electric service and it is currently providing safe and reliable service to TEP  
17 customers.

18 64. As a public service corporation, TEP has a duty to ensure it is providing adequate,  
19 efficient and reasonable service and to maintain its facilities in a manner that promotes the health and  
20 safety of its customers, employees, and the public-at-large. TEP stated that in order to fulfill its  
21 obligations to the customers served by TEP's equipment located on the Easement, it will access RP  
22 Property in a manner reasonably necessary to inspect, repair and maintain its equipment. We believe  
23 it is possible that a potential danger to public health and safety may arise from RP's determination to  
24 prevent TEP's use of the EPNG Easement or its reasonable use of other RP Property as strictly  
25 necessary to access TEP's facilities.

26 65. We conclude the testimony and evidence presented in this matter demonstrate that  
27 TEP's electrical facilities on the TEP Easement are providing safe and reliable service to TEP  
28 customers and TEP is not jeopardizing public health and safety. Accordingly, we find that TEP is not

1 in violation of A.R.S. § 40-361(B). Nevertheless, for the benefit of TEP and its customers, TEP  
2 should take proactive measures to ensure the Company is able to access its facilities for inspection,  
3 routine maintenance and emergency repairs. It is not in the best interest of TEP customers to have  
4 uncertainty as to the ability of TEP to lawfully access its facilities when necessary. RP and TEP  
5 should put their past disagreements aside and reach a compromise that will promote everyone’s best  
6 interests.

7 **CONCLUSIONS OF LAW**

8 1. TEP is a public service corporation pursuant to Article XV of the Arizona Constitution  
9 and A.R.S. §§ 40-246 and 40-361.

10 2. The Commission has jurisdiction over TEP and over the subject matter of the  
11 Complaint that relates to public safety.

12 3. A.R.S. § 40-246(A) allows any person to make a written complaint to the Commission  
13 setting forth any act or thing done or omitted to be done by any public service corporation in  
14 violation, or claimed to be in violation, of any provision of law or order or rule of the Commission.

15 4. Service of the Complaint was made upon TEP, and notice of the hearing was provided  
16 to TEP, as required by § 40-246.

17 5. The Commission does not have authority over RP’s claims alleging civil or criminal  
18 violations under common law or Arizona statutes.

19 6. The Commission has jurisdiction over RP’s claims alleging public safety violations  
20 pursuant to A.R.S. § 40-361(B).

21 7. The testimony and evidence presented in this matter do not support a finding that TEP  
22 is in violation of A.R.S. § 40-361(B).

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**ORDER**

IT IS THEREFORE ORDERED that the Formal Complaint of Rattlesnake Pass, L.L.C. versus Tucson Electric Power Company is dismissed with prejudice.

IT IS FURTHER ORDERED that Tucson Electric Power Company shall take action to ensure it is able to lawfully access its facilities for inspection, routine maintenance and emergency repairs.

IT IS FURTHER ORDERED that Tucson Electric Power Company shall notify the Commission in writing of the means it has secured for access to its facilities on the TEP Easement.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN	COMMISSIONER	COMMISSIONER
COMMISSIONER	COMMISSIONER	COMMISSIONER

IN WITNESS WHEREOF, I, ERNEST G. JOHNSON, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
ERNEST G. JOHNSON  
EXECUTIVE DIRECTOR

DISSENT \_\_\_\_\_

DISSENT \_\_\_\_\_

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SERVICE LIST FOR: RATTLESNAKE PASS, L.L.C. V. TUCSON  
ELECTRIC POWER COMPANY

DOCKET NO.: E-01933A-10-0125

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