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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

C.A. No.: 2014-CP-23-5816

Duke Energy Carolinas, LLC ..... Appellant,

v.

Caleb E. Walker and Christina T. Walker ..... Respondents.

RECORD ON APPEAL

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2305816

PLAINTIFF(S)	**DEFENDANT(S)**
Duke Energy Carolinas LLC	**Caleb E Walker** **Christina T Walker**
Submitted by:	**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$0.00

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	**2162** **Judge Code**	8/2/2016 **Date**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Joshua D. Spencer PO Box 2048 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

R. Mills Ariail Jr. 11 North Irvine Street, Suite 11 Greenville, SC 29601

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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Greenville Common Pleas

Case Caption: Duke Energy Carolinas LLC vs. Caleb E Walker , defendant, et al

Case Number: 2014CP2305816

Type: Order/Form 4

So Ordered

s/Letitia H. Verdin, SC Judge 2162

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STATE OF SOUTH CAROLINA **COUNTY OF GREENVLLE** **DUKE ENERGY,** **PLAINTIFF,** **VS.** **CALEB E. WALKER,** **AND** **CHRISTINA T. WALKER** **DEFENDANTS.**	**IN THE COURT OF COMMON PLEAS** **THIRTEENTH JUDICIAL CIRCUIT** **C.A. NO.: 2014-CP-23-5816** **ORDER**

This matter was tried before the Court without a jury on May 31 and June 1, 2016. The Court has considered the testimony and exhibits presented by the parties together with the arguments presented. In accordance with Rule 52(a), SCRCP, the Court makes the following Findings of Fact and Conclusions of Law thereon:

Findings of Fact

Defendants Caleb and Christina Walker ("Defendants") are the owners of the property located at 239 N. Rutherford Rd., Greer, SC 29615 (the "Property"). Duke Energy, through its predecessor in interest, Duke Power Company, has an easement over the Property dated November 4, 1939 (the "Easement"). The Easement is 68 feet in width and provides that the Easement remain "clear of all trees, structures, and other objects except those placed thereon by [Duke Energy]."

For many years, Duke Energy has owned, operated, and controlled a high voltage electric transmission line, which is located on the easement and rated at 100,000 volts.

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The Defendants admit that they purchased the Property subject to the Easement. On March 7, 2013, Artistic Pools and Spas requested a permit on behalf of the Walkers for a 20 ft. x 40 ft. in-ground pool, a retaining wall, a patio, and a metal fence (the "Encroachments") to be built on the property. A small portion of that construction encroaches into the Easement. Mr. Walker testified that prior to construction of the Encroachments, he was aware that they may encroach on Duke Energy's Easement.

At trial, the Defendants contested two facts: (1) the location of the Easement, and (2) whether the Encroachments pose any safety risk or otherwise limit Duke Energy's use and enjoyment of the Easement. The Court addresses each of these issues.

With respect to the location of the Easement, the Court finds that the survey prepared by Dan Proctor conclusively establishes the location of the Easement to the extent that any margin of error would not be sufficient to eliminate the encroachment. Mr. Proctor is a licensed South Carolina Surveyor and was qualified as an expert without objection. Additionally, his survey is consistent with the plat referenced in the Defendant's deed and the Court therefore finds that the Easement and the encroachments are accurately depicted on the Survey prepared by Mr. Proctor.

Regarding Duke Energy's use and enjoyment of the Easement, the court finds that the Encroachments do not presently interfere with Duke Energy's use and enjoyment of the land such that the Defendant should be required to eliminate the Encroachments at this time. The Encroachments, as depicted in the Survey, reach approximately 15 feet into a 68-foot easement at the greatest point of encroaching. Duke Energy asserts that the Encroachments could prevent Duke Energy from having access to certain points on the power lines and therefore cause delays in repairs. Duke Energy asserts that these delays could leave thousands of people without power, including homes, businesses, and hospitals. However, since 1939, there has been no documented

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occasion that indicates Duke Energy has ever used or needed to use the portion of the Easement where the Encroachments lie. Furthermore, evidence was presented that the retaining wall encroaches on a portion of the easement that may not have been usable by Duke Energy due to the grading of the property at that location.

Duke Energy asserts that the Encroachments create a safety risk to personnel of Duke Energy and its contractors who may be called to perform maintenance, because it creates a possibility for Duke Energy's trucks to fall over the retaining wall portion of the Encroachment. However, the evidence presented at trial showed that such harm to Duke Energy's personnel would only result if the personnel or contractors were grossly negligent.

Furthermore, Duke Energy claims that the metal fence portion of the Encroachments pose a significant safety risk to personnel of Duke Energy and its contractors who may be called to perform maintenance, the Defendants, and other members of the public. These risks exist as a result of the close proximity of the fence and the transmission lines that sit on the Easement. If one or more of the transmission lines fell, they could migrate to the metal fence and electrify it, posing significant safety, electric, and fire hazards.

Conclusions of Law

The Easement unequivocally gives Duke Energy "the right to keep said right of way clear of all trees, structures, and other objects except those placed thereon by the Grantee [Duke Energy]." Based upon the Proctor Survey, the Encroachments are located at least partially within Plaintiff's Easement. This clause does not include any exceptions or safety requirements. "'The language of an easement determines its extent.' Thus, [the] court must construe unambiguous language in the grant of an easement according to the terms the parties have used." *Plott v. Justin Enterprises*, 374 S.C. 504, 513-14, 649 S.E.2d 92, 96 (Ct. App.

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2007) (quoting *Binkley v. Rabon Creek Watershed Conserv'n Dist.*, 348 S.C. 58, 67, 558 S.E.2d 902, 906-07 (Ct.App.2001)); *S. Carolina Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981) ("Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in plain, ordinary, and popular sense."). To the extent the language and terms of an easement are specific, they cannot be constricted to any degree. *Xanadu Horizontal Prop. Regime v. Ocean Walk Horizontal Prop. Regime,* 306 S.C. 170, 172, 410 S.E.2d 580, 581-82 (Ct. App. 1991). Based on the foregoing, this court concludes that the Encroachments are in violation of Plaintiff's Easement.

However, Defendants have established a defense of laches as Plaintiff did not act promptly to avail itself of its rights under the Easement. "The equitable defense of laches is defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.'" *State v. Policao*, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) (quoting *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007)). In the case at bar, Plaintiff brought action almost two years from the time the Walkers installed the Encroachments. "Whether the plaintiff is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party." *Arceneaux v. Arrington,* 284 S.C. 500, 503, 327 S.E.2d 357, 358 (Ct. App. 1985).

At trial, Plaintiff admitted it performed at least two fly-over observations per year that should have made Duke Energy aware of the encroachments. (Where a party should have been aware of a fact had it exercised reasonable diligence, but neglected to do so, neglect of the party will charge him with laches the same as if he had known the facts. *Arceneaux* at 503.) Plaintiff

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should have known of the Encroachment but did not seek to enforce its rights under the easement for two years. This Court finds that delay unreasonable under the circumstances and prejudicial to Defendant. Accordingly, Defendant has established that the defense of laches applies in this case.

The court further concludes that equity in this case is served by allowing the Encroachments to remain. Plaintiff has never exercised, nor ever needed to exercise, its easement rights, and the court finds that removal of the Encroachments would place an unreasonable and unnecessary burden on Defendants. Moreover, evidence produced at trial indicates that Plaintiff has a number of alternative locations across the Easement that would provide access to the transmission lines outside of the Encroachments. However, if Plaintiff should ever need to access its power lines and it became necessary to remove the Encroachments, the Defendant must bear the costs of removal. Furthermore, Defendant and his successors shall hold Plaintiff harmless for any damage associated with access to the property or any damage or harm that may result from a downed power line or pole in the encroachment area.

Based on the foregoing, the court orders the following:

1. If a time arises when Duke Energy needs access to the easement from the location of the Encroachments, the Encroachments must be removed and the Easement must be restored to accessible condition at full cost to the Defendants.
2. The duty to restore and responsibility for the costs associated with those repairs are to be filed with the register of deeds in Greenville County and are intended to be a covenant that runs with the land, so that any subsequent owners of the property own it subject to the same duty as the Defendants.

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3. In the event that the Defendants must exercise their duty to remove the Encroachments and restore the Easement to an accessible condition, the Defendants must make all reasonable efforts to begin and complete the restoration within 10 days of when the need arises.
4. If the Defendants fail to make all reasonable efforts to begin or complete the restoration within 10 days, the Court hereby authorizes Duke Energy to enter the property at any time without prior notice or further action of the Court to remove the Encroachments and restore the easements to accessible condition. Any costs for such reparations would be at the expense of the Defendants.
5. In the event that any harm is done to the Defendant's property resulting from damage to the transmission lines or poles, Defendant shall hold Plaintiff harmless where such harm would have been prevented if Defendant had built outside of the Easement.

IT IS SO ORDERED.

_____
Letitia H. Verdin
Circuit Court Judge
Thirteenth Judicial Circuit

_____, 2016

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Greenville Common Pleas

Case Caption: Duke Energy Carolinas LLC vs. Caleb E Walker , defendant, et al

Case Number: 2014CP2305816

Type: Order/Other

So Ordered

s/Letitia H. Verdin, SC Judge 2162

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2305816

Duke Energy Carolinas LLC	Caleb E Walker Christina T Walker
PLAINTIFF(S)	**DEFENDANT(S)**
Submitted by:	**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court: **After review of Plaintiff's Brief and the Record in this case, this Court denies Plaintiff's Motion to Amend its Order entered August 2, 2016.**

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

2162 8/30/2016

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SCCA SCRCP Form 4C (Revised 3/2013)

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Joshua D. Spencer PO Box 2048 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

R. Mills Ariail Jr. 11 North Irvine Street, Suite 11 Greenville, SC 29601

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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Greenville Common Pleas

Case Caption: Duke Energy Carolinas LLC vs. Caleb E Walker , defendant, et al

Case Number: 2014CP2305816

Type: Order/Form 4

So Ordered

s/Letitia H. Verdin, SC Judge 2162

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2014-CP-23-05816

DUKE ENERGY CAROLINAS, LLC,

Plaintiff,

vs.

CALEB E. WALKER AND CHRISTINA T. WALKER,

Defendants.

COMPLAINT
(NON- JURY)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL E. HICKENSIMER
2014 OCT 21 PM 3 42

Plaintiff, Duke Energy Carolinas, LLC, complaining of the Defendants, alleges and says as follows:

1. Plaintiff, Duke Energy Carolinas, LLC ("Duke Energy"), is a limited liability company duly organized and existing under the laws of the State of North Carolina, and it is fully authorized and empowered to transact and carry on its business in the State of South Carolina.

2. Duke Energy is informed and believes and, thereupon, alleges that Defendants Caleb and Christine Walker (the "Walkers") are residents of Greenville County.

3. Duke Energy is informed and believes that the Walkers are the owners of real property in Greenville County, South Carolina, located at 239 N. Rutherford Rd., Greer, South Carolina, 29651. This tract is designated as Greenville County tax map number T021000110403, more particularly described in a Deed recorded January 28, 2010, from A-I Properties, recorded in the office of the Register of Deeds for Greenville County, South Carolina at Deed Book 2367, Page 4131 (the "Property").

4. Duke Energy, through its predecessor in interest Duke Power Company, has an easement or right of way over the Property, dated November 4, 1939 and recorded in the office of the Register of Deeds for Greenville County, South Carolina at Deed Book 216, Page 226. A true and accurate copy of the foregoing is attached hereto as **Exhibit A** and incorporated herein by reference (collectively, the "Right of Way" or "Easement").

5. The Right of Way entitles Duke Energy, among other things, "the right to keep said right-of-way clear of all trees, structures and other objects except those placed thereon by grantee [Duke Energy]."

6. By virtue of filing and recordation of the Right of Way, Duke Energy is the owner and holder of an indefeasible right of way easement on, over, and through the Property.

7. The Walkers acquired the Property subject to all of the obligations, requirements, prohibitions, limits, and rights contained in Duke Energy's Right of Way.

8. For many years, Duke Energy has owned, controlled, operated, and maintained an electric transmission line over and across the Property (the "Line"). The Line is rated at 100,000 volts, or 100 kV.

9. The Line has been continuously, openly, and notoriously used and maintained on the Property in order to supply power by electricity for at least sixty (60) years, without interruption, under a claim of right as against the Walkers and their predecessors in title, who have had notice of Duke Energy's claim of right to use and maintain the Line on and across the Property during that time.

10. The area within the Right of Way is to be kept free from structures, vegetation, or objects in order (i) for Duke Energy to get its equipment onto the Right of Way to perform construction and maintenance work on the Line; and (ii) for Duke Energy to preserve a safe

distance between the Line and the general public who may be working on, residing in, or visiting the structures in proximity to the Line.

11. Duke Energy is informed and believes that, in 2013, the Walkers constructed, placed, and maintained a retaining wall, patio, and iron fence (collectively, the "Encroachments") within Duke Energy's Right of Way on and across the Property, without the permission or consent of Duke Energy and in violation of Duke Energy's rights.

12. The Encroachments interfere with, and encroach upon, Duke Energy's Easement, and materially and unreasonably interfere with Duke Energy's use and enjoyment of its Easement.

13. On or about February 3, 2014, Duke Energy notified the Walkers that the existence of the Encroachments on the Right of Way constituted a violation of Duke Energy's rights. Duke Energy demanded that the Walkers remove the Encroachments.

14. The Walkers have failed and refused to remove the Encroachments and have continued to maintain the Encroachments without the consent of Duke Energy and in violation of its rights.

FIRST CLAIM FOR RELIEF
(Interference with Use and Enjoyment of Easement/Breach of Easement Agreement)

15. The allegations contained in Paragraphs 1 through 14 of the Complaint are incorporated herein by reference.

16. The Encroachments are expressly prohibited pursuant to the Right of Way.

17. The above-described Encroachments are located within Duke Energy's Right of Way, and they unlawfully interfere with Duke Energy's use and enjoyment of its Easement. In addition, said interference is material and unreasonable.

18. The Walkers have unlawfully interfered with and invaded the rights of Duke Energy over the Property and impaired Duke Energy's operating rights and responsibilities.

19. As a result of the foregoing conduct of the Walkers and the existence and location of the Encroachments, Duke Energy's rights have been, and will be, impaired and abridged, and the Walkers' conduct and use of the Encroachments and the location of the Encroachments, constitute an interference with the use and enjoyment of Duke Energy's Easement and a breach of Duke Energy's rights.

20. As a result of the foregoing, Duke Energy is entitled to an Order requiring the Walkers to immediately remove the Encroachments from the Easement, as well as all other structures and objects within said Right of Way.

SECOND CLAIM FOR RELIEF
(Permanent Injunction)

21. The allegations contained in Paragraphs 1 through 20 of the Complaint are incorporated herein by reference.

22. Duke Energy is immediately and irreparably harmed by the Walkers' conduct and the existence and location of the Encroachments in that Duke Energy's ability to protect the safety of the public, provide reliable electrical service to the public, and properly and safely maintain its transmission lines is threatened. Duke Energy has no adequate remedy at law.

23. Accordingly, Duke Energy is entitled, pursuant to Rule 65, SCRCP, to the entry of an order for permanent injunctive relief:

a. prohibiting the Walkers, or anyone acting on their behalf, from further interfering with Duke Energy's ability to protect the safety of the public, provide reliable electrical service to the public, and properly and safely maintain its transmission lines; and

b. requiring the Walkers to immediately remove the Encroachments from the Easement.

THIRD CLAIM FOR RELIEF
(Estoppel/Waiver)

24. The allegations contained in Paragraphs 1 through 23 of the Complaint are incorporated herein by reference.

25. As set forth above, Duke Energy has owned, controlled, operated and maintained the Line on and across the Property as described in Paragraph 8 above for many years.

26. The Walkers have waived and/or should be estopped from any alleged entitlement to contest the Right of Way.

27. Accordingly, Duke Energy is entitled to the entry of an order:

a. prohibiting the Walkers, or anyone acting on their behalf, from further interfering with Duke Energy's ability to protect the safety of the public, provide reliable electrical service to the public, and properly and safely maintain its transmission lines; and

b. requiring the Walkers to immediately remove the Encroachments from the Easement.

FOURTH CLAIM FOR RELIEF
(Prescriptive Easement)

28. The allegations contained in Paragraphs 1 through 27 of the Complaint are incorporated herein by reference.

29. As set forth above, Duke Energy has owned, controlled, operated and maintained the Line on and across the Property as described in Paragraphs 8 and 9 above for many years.

30. Duke Energy accordingly has also acquired a prescriptive easement which entitles Duke Energy to the entry of an order:

a. prohibiting the Walkers, or anyone acting on their behalf, from further interfering with Duke Energy's ability to protect the safety of the public, provide reliable electrical service to the public, and properly and safely maintain its transmission lines; and

b. requiring the Walkers to immediately remove the Encroachments from the Easement.

WHEREFORE, Plaintiff, Duke Energy Carolinas, LLC, prays the Court rule that it has and shall recover of the Defendant as follows:

1. Enter an order for permanent injunctive relief in favor of Duke Energy, and against the Walkers, prohibiting the Walkers or anyone acting on their behalf, from further interfering with Duke Energy's ability to protect the safety of the public, provide reliable electrical service to the public, and properly and safely maintain its transmission lines;

2. Enter an order in favor of Duke Energy, and against the Walkers, requiring the Walkers to remove the Encroachments (as well as any other structures and/or objects) from the Easement within thirty (30) days after receipt of written notice of the entry of an order from the Court requiring them to do so;

3. If the Walkers fail to remove the Encroachments from Duke Energy's Easement within thirty (30) days after receipt of written notice of the entry of an order from the Court requiring them to do so, enter an order in favor of Duke Energy, and against the Walkers, granting permission for Duke Energy, and any and all other persons acting on its behalf, to enter the Property at any time thereafter, and without prior notice to the Walkers or further action of the Court, to remove the Encroachments from the Easement and award Duke Energy a monetary judgment in its favor and against the Walkers for all expenses, including attorneys' fees, incurred by Duke Energy as a result of any such removal work;

4. That Duke Energy have and recover of the Walkers its attorneys' fees as permitted by law;

5. That the costs of this action be taxed against the Walkers; and

6. For such other and further relief as the Court may deem just and proper.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

Joshua D. Spencer (S.C. Bar No. 74782)
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Attorneys for Plaintiff, Duke Energy Carolinas, LLC

10/21, 2014
Greenville, South Carolina

EXHIBIT

A

STATE OF SOUTH CAROLINA,
COUNTY OF 504 GREENVILLE } 00398

KNOW ALL MEN BY THESE PRESENTS, that Della R. Lanford, Carl K. Lanford, Rosalie Lanford and Ruth Evelyn Lanford

In consideration of the sum of $ 160.00 .. in hand paid by DUKE POWER COMPANY, a corporation organized under the laws of the State of New Jersey, the receipt whereof is hereby acknowledged, do hereby grant and convey unto said Duke Power Company, its successors and assigns, a right of way sixty-eight (68) feet in width in, upon, and across that tract of land belonging to us (me), situate in the above County and State, bounded by lands of

C. P. Brown, P. T. Brown and others

for the purpose of constructing, operating and maintaining a line of towers, poles, or other structures, (which may be changed from one to the other from time to time, and which may be of wood, steel, concrete, or other material, at the option of the grantee), together with such wires, conductors, telephone wires, and other apparatus and appliances as, in the opinion of the grantee, may be advisable or desirable for or in connection with the transmitting and distributing of electric power; the grantee, its successors and assigns, is also granted the right at all times to enter upon said tract of land for the purpose of constructing and making necessary or desirable repairs, alterations, substitutions or additions to, and inspections of the structures and other property to be placed upon said right of way by the grantee the grantee, its successors and assigns, is also granted the right to keep said right of way clear of all trees, structures and other objects except those placed thereon by the grantee, together with the further right to cut away and keep clear any trees outside of said 68-foot strip that might in any way endanger the proper maintenance and operation of the structures and other property placed upon said right of way by the grantee. It is understood and agreed that the failure or neglect of the grantee, its successors or assigns, at any time to exercise any of the rights herein granted shall not be construed as a waiver or abandonment of the right at any time thereafter to exercise any or all of such rights and privileges.

IT IS AGREED that the owner of said tract of land may use, or permit said right of way to be used for growing such crops and maintaining such fences thereon as may not in any manner interfere or conflict with the use of said right of way and rights by the grantee for the purposes hereinabove mentioned.

TO HAVE AND TO HOLD the aforesaid right of way, rights, privileges and easements unto the said Duke Power Company, its successors and assigns, to its and their only use and behoof forever.

IN TESTIMONY WHEREOF, the said Della R. Lanford, Carl K. Lanford, Rosalie Lanford and Ruth Evelyn Lanford

Bk. B Fd. 1
Deed No. 132

do hereunto set their hand and seal, this the 4th day of November, A. D., 19 39.

Signed, Sealed and Delivered in the Presence of:

Rosalie Lanford (SEAL)
Carl K. Lanford (SEAL)
Della R. Lanford (SEAL)
Ruth Evelyn Lanford (SEAL)

[redacted]

130

THE STATE OF SOUTH CAROLINA
Greenville 504 COUNTY. 00399

PERSONALLY appeared before me A. T. Bowman

and made oath that he saw the within named Della R. Lanford, Carl L. Lanford

Rosalie Lanford

sign, seal, and as their Act and Deed deliver the within written Deed; and that he

with Lan Lanford witnessed the execution thereof.

A T Bowman

SWORN to before me, this 21st

day of November, A. D., 19 39.

Notary Public for S.C.

DRAWN B
TYLOED L

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

PERSONALLY appeared before me A. T. Bowman and made oath that he saw the within named Ruth Evely Lanford sign, seal, and as her Act and Deed deliver the within written Deed; and that he with Edith Cobe Kendrick witnessed the execution thereof.

A T Bowman

SWORN to before me, this 21st
day of November, A.D., 1939.

Notary Public for S.C.

1.00
50
1.50

DEC 7 1939 11:20
THE STATE OF SOUTH CAROLINA
Greenville COUNTY.

Della R. Lanford
Rosalie Ruth Evelyn
Lanford

TO

DUKE POWER CO.

RIGHT OF WAY

Filed 7th day of
Dec. A. D. 1939
and recorded in Book 216
Page 226

Greenville County, S. C.

Fd. at 8:30 A. M.

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)))	IN THE COURT OF COMMON PLEAS C.A. No.: 2014-CP-23-5816
DUKE ENERGY CAROLINAS, LLC, Plaintiff, vs. CALEB E. WALKER AND CHRISTINA T. WALKER, Defendants.	))))))))))	**ANSWER** **(JURY TRIAL DEMANDED)** FILED 2015 JAN 15 PM CLERK OF COURT GREENVILLE CO. SC PAUL [illegible] DICKENSON

The Defendants, Caleb E. Walker and Christina T. Walker (hereinafter referred to as "Defendants"), through their attorney of record, R. Mills Ariail, Jr., hereby Answers the Complaint of the Plaintiff:

1. Paragraphs 1, 2, 3, 4, 5 and 6 of the Plaintiff's Complaint are admitted.
2. Paragraph 7 is denied.
3. Defendants are without sufficient information to form a belief regarding Paragraphs 8, 9, 10 and 11 and therefore, they are denied.
4. Paragraph 12 of the Plaintiff's Complaint is denied.
5. Defendants admit the allegations of Paragraph 13 of the Plaintiff's Complaint.
6. Defendants deny the allegations of Paragraph 14 of the Plaintiff's Complaint.
7. Paragraphs 15, 16, 17, 18, 19, 20, 21, 22 and 23 along with all subsections of the Plaintiff's Complaint are denied.
8. To the extent a response is required, Defendants' deny the allegations set forth in Paragraph 24 of the Plaintiff's Complaint.
9. The Defendants do not have sufficient information in which to form a belief regarding Paragraph 25 and therefore, it is denied.

10. The Defendants deny the allegations set forth in Paragraphs 26 and 27 and subsections of the Plaintiff's Complaint.

11. The Defendants deny the allegations set forth in Paragraph 28 of the Plaintiff's Complaint.

12. In regards to Paragraph 29, Defendants do not have sufficient information to form a belief and therefore, this Paragraph is denied.

13. The Defendants deny the allegations set forth in Paragraph 30 and subsections of the Plaintiff's Complaint.

14. Defendants deny all relief requested in the WHEREFORE section.

FOR A FIRST AFFIRMATIVE DEFENSE
(WAIVER AND ESTOPPEL)

15. Plaintiff's claims are barred under the equitable defenses of waiver and estoppel.

FOR A SECOND AFFIRMATIVE DEFENSE
(LACHES)

16. Plaintiff's claims are barred under the equitable defense of laches.

FOR A THIRD AFFIRMATIVE DEFENSE
(RESERVATION OF RIGHT TO SUPPLEMENT)

17. Defendants reserve the right to supplement this Answer with any additional Affirmative Defenses they may assert.

WHEREFORE, Defendants, having fully answered the Complaint of the Plaintiff, pray that this Court dismiss the Complaint with Prejudice, with costs including reasonable attorney's fees, and for such other and further relief as the Court may deem just and proper.

R. Mills Ariail, Jr. (SC Bar#15584)
11 North Irvine Street, Suite 11
Greenville, SC 29601
864-232-9390
Fax 864-232-9392
mills@rmalawoffice.com
Attorney for Defendants

Greenville, SC
Date: 1/15/2015

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Duke Energy Carolinas, LLC, Plaintiff, v. Caleb E. Walker and Christina T. Walker, Defendants.	C. A. No.: 2014-CP-23-5816 **MOTION TO AMEND OF PLAINTIFF, DUKE ENERGY CAROLINAS, LLC**

Pursuant to Rules 52 and 59, SCRCP, Plaintiff, Duke Energy Carolinas, LLC ("Duke Energy"), hereby moves to alter or amend this Court's order filed August 2, 2016. Duke Energy received written notice of the entry of the order on August 2, 2016.[1]

For the following reasons, Duke Energy firmly believes that the Court's order contains errors of law and misapprehends certain facts, particularly as it relates to the application of the doctrine of laches. In the event the Court does not issue an amended order, Duke Energy will appeal to address the significant legal, business, and public policy matters presented below.

1. **Findings of Fact.**

The Court correctly determined the existence, location, and scope of the easement ("easement" or "right of way"), which was based, in part, on the testimony of Duke Energy's expert surveyor, Dan Proctor. Duke Energy does not dispute those findings. Duke Energy further agrees with the general description of the retaining wall, patio, and fence (the "encroachments"); the Court's finding that Caleb and Christina Walker ("Walkers" or "Defendants") purchased their property subject to the Duke Energy easement; and the Court's

[1] Since receiving the Court's order, Duke Energy has ordered a transcript of the trial in this matter; however, this motion is written without the benefit of that transcript.

finding that when the Walkers built the encroachments, they did so with the knowledge that they may encroach on Duke Energy's right of way.

Duke Energy takes issue with the Court's findings relating to its use of the easement and its safety concerns. Just because there has not been an emergency at this location to date, does not mean that it could not happen. The Court improperly declined to fully credit the testimony of Doug Gould, Steven Pryor, and Duke Energy's expert, Frederick Brooks, P.E., as to safety concerns and further did not consider the dangerous and time-sensitive types of emergency situations in which repair crews work, including darkness, storms, and icy conditions. Given this testimony, it was error on the Court's part to find that the encroachments could only present a danger to Duke Energy's personnel in the event of gross negligence. This is particularly true given the Court's finding that "risks exist as a result of the close proximity of the fence and the transmission lines that sit on the Easement [and] [i]f one or more of the transmission lines fell, they could migrate to the metal fence and electrify it, posing significant safety, electric, and fire hazards." August 2, 2016 order at p. 3. Despite these important safety-related findings, the Court's order does nothing to rectify this dangerous situation, which can only be accomplished by the immediate removal of the encroachments.

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The order also appears to misapprehend the chronology of events leading up to the filing of the Complaint in this action, as shown below:

Date:	Event:	Source:
11/4/1939	Duke Power Company (predecessor to Duke Energy) purchases 68 foot easement.	Pl. Ex. 1
1/28/2010	Walkers buy property. Easement clearly shown on plat referenced in deed.	Pl. Exs. 12 & 13
3/7/2013	Walkers apply to Greenville County for pool permit.	Pl. Ex. 2
Next few months	Pool project constructed.	Trial testimony
October or November 2013	Duke Energy fall helicopter flyover for entire transmission line system in the Carolinas. Encroachments are fully constructed at that time.	Trial testimony
January 2014	Caleb Walker calls Duke Energy to discuss additional landscaping he is considering.	Trial testimony
1/27/2014	Steven Pryor of Duke Energy visits site and tells Walkers encroachments are within easement and must be removed. Encroachments are fully constructed at that time.	Pl. Ex. 3
2/3/2014	Duke Energy sends Walkers a letter demanding that encroachments be removed, and unsuccessful settlement discussions ensue.	Pl. Ex. 8
6/20/2014	Duke Energy marks easement per request of the Walkers to facilitate discussions between the parties.	Pl. Ex. 6
10/21/2014	Complaint filed.	Complaint

The facts contained in this chart are uncontested and illustrate several key points. From the application for a construction permit (prior to any construction of the encroachments) until the filing of the Complaint, only one (1) year, seven (7) months, and fourteen (14) days elapsed. In addition, Duke Energy was consistent in insisting that the encroachments be removed from the day it first observed them (January 27, 2014) until the day of filing. Also, the encroachments were fully constructed as of the time Duke Energy first became aware of them, and just a little over six months had passed between the installation of the encroachments (pool was constructed in spring of 2013) and Duke Energy's first knowledge of the encroachments in January 2014.

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Finally, while there was testimony that Duke Energy conducted helicopter flyovers of the thousands of miles of transmission line it owns in the Carolinas in the spring and fall of 2013, there was no evidence that these flyovers actually spotted the encroachments in the right of way.[2] Further, no evidence was presented that the encroachments were even in place when the spring 2013 flyover occurred, and evidence was presented that the fall flyover would have likely occurred in October or November—just two (2) or three (3) months prior to Duke Energy actually learning of the encroachments and contemporaneously informing the Walkers that they must remove the encroachments that they had placed in the right of way.

2. Conclusions of Law.

a. The Court correctly recited the law applicable to this easement, which does not require that Duke Energy prove interference with its use and enjoyment of the easement, prove a safety hazard, or show that removal of the encroachments is necessary in order to be able to require them be removed.

Duke Energy agrees completely with the first paragraph of the Court's order in its Conclusions of Law section.

> **The Easement *unequivocally* gives Duke Energy "the right to keep said right of way clear of all trees, structures, and other objects except those placed thereon by the Grantee [Duke Energy]."** Based upon the Proctor Survey, the Encroachments are located at least partially within Duke Energy's Easement. **This clause does not include any exceptions or safety requirements.** "'The language of an easement determines its extent.' Thus, this court must construe unambiguous language in the grant of an easement according to the terms the parties have used." *Plott v. Justin Enterprises*, 374 S.C. 504, 513-14, 649 S.E.2d 92, 96 (Ct. App. 2007) (quoting *Binkley v. Rabon Creek Watershed Conserv'n Dist.*, 348 S.C. 58, 67, 558 S.E.2d 902, 906-07 (Ct.App.2001)); *S. Carolina Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981) ("Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in plain,

[2] Counsel does not recall specific testimony that the area over the Walkers' property was actually flown during either flight, but does not have the benefit of a transcript to confirm one way or the other. Duke Energy reserves all rights related to the substance of the helicopter flyover testimony.

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> ordinary, and popular sense."). **To the extent the language and terms of an easement are specific, *they cannot be constricted to <u>any degree</u>*.** *Xanadu Horizontal Prop. Regime v. Ocean Walk Horizontal Prop. Regime*, 306 S.C. 170, 172, 410 S.E.2d 580, 581-82 (Ct. App. 1991). **Based on the foregoing, this court concludes that the Encroachments are in violation of Plaintiff's Easement.**

August 2, 2016 order at pp. 3-4 (emphasis added).

This analysis should have ended the Court's inquiry. Once the Court found an easement, it was error to constrict the rights that Duke Energy purchased in that easement "to any degree." *Xanadu Horizontal Prop. Regime*, 306 S.C. at 172, 410 S.E.2d at 581-82.

Although Duke Energy believes it proved at trial that the encroachments interfere with its use and enjoyment of the easement and also present a safety hazard, Duke Energy need not prove either of these things, nor make any showing of necessity of removal, to require removal of the encroachments from the easement it bought and paid for. While Duke Energy pled in its complaint that the encroachments interfere with its use and enjoyment of the easement and pose a safety hazard, it also pled that the mere existence of the encroachments in the right of way breaches the purchased easement and also pled for injunctive relief under the easement to have the encroachments removed. Plaintiff's Complaint at pp. 3-4.

As noted above, the Court's order states: "The Easement unequivocally gives Duke Energy 'the right to keep said right of way clear of all trees, structures, and other objects except those placed thereon by the Grantee [Duke Energy]." The Court also rightly held that, "[t]his clause does not include any exceptions or safety requirements." Because *Xanadu Horizontal Prop. Regime* prohibits the Walkers or the Court from "constricting [the easement] to any degree," Duke Energy need not prove that the Walkers actually interfered with Duke Energy's use and enjoyment of the right of way to require removal of the encroachments. Duke Energy has the clear right under the easement to require the removal of any objects in the right of way

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placed there by the Walkers. Mr. Walker unequivocally admitted on cross examination that the fence, wall, and patio were all objects, and the Court rightly found that the "encroachments are in violation of Plaintiff's easement." August 2, 2016 order at p. 4. The inquiry ends there.

b. South Carolina law does not allow a public purpose easement to be modified or abandoned under the facts presented here.

In addition to the general law of easements, additional protections apply to easements acquired to serve a public purpose. Namely, if a property right has been acquired to serve the public interest, that property right cannot be defeated or modified by prescription unless the property has been enclosed in such a way as to completely occupy the property in a manner inconsistent with the right of way *for the entire statutory period*. *Blume v. S. Ry. Co., Carolina Div.*, 85 S.C. 440, 442, 67 S.E. 546, 547-48 (1910) (emphasis added). In *Blume*, the court addressed whether a railroad easement could be destroyed by a claim of prescription as follows:

> [T]he public cannot acquire by prescription the right to use the right of way of a railroad company in a manner inconsistent with the company's use of it for corporate purposes... [T]he public has an interest in the construction and operation of railroads as highways, which are burdened with duties to the public. Therefore, a railroad company cannot dispose of or so use its right of way as to impair or destroy its ability to serve the public; and that, even under the condemnation statutes, another highway cannot be laid out over the right of way of a railroad, if the construction of such other highway operates as a hindrance to the use and enjoyment of the right of way for the purposes for which it was previously procured. *Prescription rests in the presumption of a grant or dedication, and, as the railroad company has no power either to grant or dedicate its right of way for any other than the purpose for which it was acquired, the presumption cannot arise; and, therefore,* ***neither private individuals nor the public can acquire by prescription any right to use the right of way of a railroad, which is incompatible with the purposes for which it was acquired, or which would hinder or impair the railroad company in discharging its duties to the public, imposed upon it by law.***
>
> . . . . [T]he facts of the case do not bring it within the principles laid down in *Railway v. Beaudrot*, 63 S. C. 266, 41 S. E. 299, and *Hill v. Railway*, 67 S. C. 548, 46 S. E. 486. In each of those cases, a part of the alleged right of way was enclosed by a substantial fence, and held in possession for the statutory period under claim of right, exclusive of any right or interest therein by the railroad

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> company. It was held in those cases that such an assertion of right to the exclusive occupancy of the land in question was incompatible with the easement, and, if held for the statutory period, would defeat the easement. But in this case no such possession of any part of defendant's right of way was shown, and no use thereof was proved which is incompatible with the purpose for which it was acquired.

Id. (emphasis added).

Like railroads, power companies serve the public interest. It has been the law in South Carolina for decades that the manufacture, distribution, and sale of electric power serve an important public function and are for the public good. *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 181 S.E. 481, 486 (1935); *Park v. Greenwood County*, 174 S.C. 35, 176 S.E. 870, 873 (1934). Moreover, similar to railroads, property used in the generation or the transmission of power cannot be condemned. S.C. Code Ann. § 58-27-130. This reflects that the public purpose underlying the rule in *Blume* is also present for property used for the generation or the transmission of power. Given these similarities between railroads and power companies, the same rule should apply here as to the continued right to enforce the full rights conveyed in the easement.

This reasoning has been accepted recently by the Hon. R. Keith Kelly in a Spartanburg County case brought to enforce a Duke Energy right of way. *Duke Energy Carolinas, LLC v. LKQ A&R Auto Parts, Inc.*, C/A No. 2013-CP-4036 (order attached as Ex. A). As set forth there,

> South Carolina law recognizes that the manufacture, distribution, and sale of electrical power serve an important public function and are for the public good. *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 181 S.E. 481, 486 (1935); *Park v. Greenwood County*, 174 S.C. 35, 176 S.E. 870, 873 (1934). The court finds that the Rights-of-Way support the distribution of electrical power, serve an important public function, are for the public good, and are thus public purpose rights-of-way. In South Carolina, if a property right has been acquired to serve the public interest, such as these Rights-of-Way, that property right cannot be defeated or modified by prescription unless the property has been enclosed in such a way as to completely occupy the property in a manner inconsistent with the right-of-way for the entire statutory period. *Blume v. S. Ry. Co., Carolina Div.*, 85 S.C. 440, 442, 67 S.E. 546, 547-48 (1910).

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Ex. A at 8-9.

Moreover, the burden of proof would be on the Walkers to establish any abandonment of the easement by clear and convincing evidence. *Carolina Land Co. v. Bland*, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975). "[M]ere nonuse of an easement created by deed for a period however long will not amount to an abandonment, but there must be other acts by the owner of the dominant estate conclusively manifesting either the present intention to relinquish the easement or purpose inconsistent with its further existence." *Id.* Here, Duke Energy has continuously used the right of way and was consistent in its communications with the Walkers that the encroachments must be removed.

c. Laches does not apply.

After finding that the encroachments were in violation of Duke Energy's easement rights, the Court then stripped Duke Energy of those rights, citing the equitable doctrine of laches. This was in error. Based on the authority cited above, Duke Energy's rights in this easement acquired for a public purpose cannot be stripped unless the property has been enclosed in such a way so as to completely occupy the property in a manner inconsistent with the right of way for the entire statutory period. However, even assuming laches could apply, it does not for the reasons set forth below.

i. Equity follows the law, and this case was brought within any potentially applicable limitations period.

As an initial matter, "[i]t is well known that equity follows the law." *Smith v. Barr*, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007). In this case, Duke Energy brought action within less than two (2) years from the time the Walkers installed the encroachments and within less than one (1) year of when Duke Energy first became aware of the encroachments. That is

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well within any possible statutory limitation period for an action to require the Walkers to remove the encroachments from the easement. *See* S.C. Code Ann. §§ 15-3-530 (providing three year statute for trespass or damage to real property); 15-3-340 (providing 10 year statute for recovery of real property).[3]

Given this maxim, South Carolina Courts place a heavy (and heightened) burden on a party "asserting the defense of laches in a lawsuit filed within the applicable limitations period," as follows:

> In order to constitute laches, there must be shown, not merely neglect for a time to enforce a legal or equitable right, where such neglect is for a period short of that which is a bar under the statute of limitations, but *it must further be made to appear that such delay was accompanied either by a failure to perform some legal duty, whereby prejudice has resulted to the person pleading such neglect, or that such delay was accompanied by some act on the part of the person so negligent, which operated to mislead the person pleading such neglect, to his prejudice to such an extent that it would be unjust and inequitable thereafter to permit such negligent party to enforce such right.*

Brown v. Butler, 347 S.C. 259, 267, 554 S.E.2d 431, 435 (Ct. App. 2001) (emphasis added) (quoting *Edwards v. Johnson*, 90 S.C. 90, 103-04, 72 S.E. 638, 644 (1911)). In this case, there was no evidence that Duke Energy failed to perform any legal duty or that it misled the Walkers in any way, and the Court's order does not make any finding on either of these elements. The evidence was undisputed that Duke Energy was clear and consistent in its continued insistence that the encroachments be removed. Thus, the Walkers again failed to meet their high burden on establishing a laches defense.

The Court's order does not cite the applicable standard for applying laches in a case filed within the limitations period, nor does it (or could it) determine that Duke Energy failed to perform a legal duty or that it mislead the Walkers. Accordingly, the Court's order contains an

[3] For reasons not at issue in this case, Duke Energy does not concede that either of these, or any, statute of limitations applies to its efforts to have encroachments removed from its easements.

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error of law to the extent it finds that laches provided the Walkers a defense in this case, which was brought well within the earliest possibly applicable statute of limitations.

ii. Laches does not apply in this case because the Walkers have not met their burden.

The Court's order provides a cursory discussion of laches in general followed by a conclusory statement that Duke Energy's delay of less than a year in filing this action was unreasonable and prejudicial. August 2, 2016 order at pp. 3-4 (emphasis added). The Court does not enumerate any way in which any alleged delay by Duke Energy was unreasonable, nor does the Court identify any way in which the Walkers prejudiced by Duke Energy's alleged failure to act. These findings constitute error as a matter of law and are not supported by the evidence in this case.

"In order to establish laches as a defense, a defendant must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the defendant." *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007). Thus, the burden falls to the Walkers to establish this defense.

South Carolina appellate courts have stressed that laches is akin to waiver and requires a knowing abandonment of a right. *See id*, 375 S.C. at 85, 650 S.E.2d at 470–71 ("The equitable doctrine of laches is equivalent to the legal doctrine of waiver, which is the "voluntary and intentional relinquishment or abandonment of a known right.[] Both laches and waiver require a party to have known of a right, and known that the party was abandoning that right." (citation omitted, emphasis added)); *see Kelley v. Kelley*, 368 S.C. 602, 607, 629 S.E.2d 388, 391 (Ct. App. 2006) ("Additionally, in order for the defense of laches to be sustained, 'the circumstances must have been such as to import that the complainant had abandoned or surrendered the claim or right which he now asserts.'" (quoting *Byars v. Cherokee County*, 237 S.C. 548, 560, 118

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S.E.2d 324, 330 (1961)). No evidence presented at trial showed that Duke Energy abandoned or surrendered its claim to any portion of the right of way at any time. Instead, the Court improperly imputed knowledge to Duke Energy based upon two alleged helicopter flyovers (August 2, 2016 order at p. 4), one of which likely would have occurred prior to the encroachments being constructed, and no evidence was presented that either of these flyovers resulted in Duke Energy'sactual knowledge of the encroachments. Further, there was no testimony or other evidence that could even lead to the implication that Duke Energy intended to relinquish its rights to enforce the easement as drafted. Thus, there is no evidence in the record reflecting a knowing and intentional relinquishment of the easement, or any portion thereof, on the part of Duke Energy.

In addition, to prove laches, a party must show: "(1) delay, (2) unreasonable delay, (3) prejudice." *Hallums v. Hallums*, 296 S.C. 195, 198–99, 371 S.E.2d 525, 527–28 (1988). "[D]elay alone in assertion of a right does not constitute laches." *Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002).

> Under the doctrine of laches, if a party who knows his rights does not timely assert them, and by his delay, **causes** another party to incur expenses or otherwise detrimentally change his position, then equity steps in and refuses to enforce those rights. The party asserting laches has the burden of showing negligence, the opportunity to act sooner, and material prejudice.

Richey v. Dickinson, 359 S.C. 609, 612, 598 S.E.2d 307, 309 (Ct. App. 2004) (citations omitted, emphasis added); *see Chambers of S.C., Inc. v. Cty. Council for Lee Cty.*, 315 S.C. 418, 421, 434 S.E.2d 279, 280–81 (1993) ("Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay **causes** his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily

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refuse to enforce those rights." (emphasis added, citing *Rabon v. Mali,* 289 S.C. 37, 344 S.E.2d 608 (1986) and *Mack v. Edens,* 306 S.C. 433, 412 S.E.2d 431 (Ct. App.1991)..

Here, Duke Energy promptly told the Walkers to remove the encroachments as soon as it knew its rights had been violated, and nothing Duke Energy did or failed to do **caused** the Walkers to change their position because the encroachments were already fully constructed. This is not a case where the Walkers approached Duke Energy prior to encroaching into the easement and gained some type of approval that then **caused** them to construct the encroachments. Mr. Walker specifically testified the Walkers never sought any such permission from Duke Energy. As a result, Duke Energy did nothing to indicate it would consent to any encroachment in the easement that in turn **caused** any action on the part of the Walkers.

Instead, the Walkers built the encroachments knowing that they might encroach on Duke Energy's right of way and then approached Duke Energy around six (6) months later. At that time, Duke Energy promptly told them to remove the encroachments. In other words, the Walkers designed, built, and arranged to pay for the encroachments before any evidence suggests Duke Energy had any actual or constructive knowledge of them. Thus, the minimal time that elapsed between construction and Duke Energy telling the Walkers to remove the encroachments could not have been prejudicial. Given the time frame at issue, even if Duke Energy had hovered over the Walkers' property during its fall flyover in October or November of 2013 (the only helicopter flyover in which it was even remotely possible that Duke Energy could have spotted the encroachments) and called down to the Walkers to remove the encroachments, they would have to do exactly what Duke Energy is seeking to have them do now—remove the encroachments from Duke Energy's right of way. Simply put, there is no prejudice by any alleged delay in Duke Energy seeking to enforce its rights related to the easement.

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By way of illustration, this case is very different from *Jones v. Leagan*, 384 S.C. 1, 19–20, 681 S.E.2d 6, 16 (Ct. App. 2009), a case in which the Court of Appeals affirmed the Special Referee's application of laches. There, a landowner (Jones) failed to visit his property for seventeen years. In the meantime, another couple invested time and money in the property under the good faith belief that they owned it and without any knowledge of Jones's claim of ownership. Here, on the other hand, (1) Duke Energy asserted its rights as soon as it learned of the encroachments (and just a few months from the time they were installed), (2) the Walkers admitted that they knew the encroachments might encroach into the easement, yet did not contact Duke Energy prior to construction. In this case, the Walkers were in the best position to protect their rights, and they easily could have done so by consulting with Duke Energy prior to construction. Instead, they waited until after the project was fully completed to approach Duke Energy, apparently believing it was better to seek forgiveness than permission. As a matter of equity, the Court simply cannot reward this approach, which is exactly what the August 2, 2016 order does.

Although the Court's order references prejudice, there is no evidence that any delay on Duke Energy's part **caused** the Walkers "to incur expenses or enter into obligations or otherwise detrimentally change position." The Walkers admit that they proceeded at their own risk without consulting Duke Energy first. Unlike in *Jones*, where seventeen years had passed and the encroaching defendants had no knowledge of any claim to the property, the Walkers knew about Duke Energy's easement, built the encroachments without permission, and Duke Energy immediately sought the removal of the easements once it was aware of them. Thus, there is no basis for applying laches, or any equitable doctrine for the Walkers' benefit, in this case.

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Moreover, courts have long recited "[h]e who seeks equity must do equity." *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (Ct. App. 1994). Therefore, in considering whether to invoke equity, the Court must balance the equities between the parties to determine what relief, if any, is appropriate. *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct. App. 2005). As discussed above, the Walkers knew about the easement and built the encroachments anyway with full knowledge that they might encroach.

Applying laches under the facts of this case strips Duke Energy of its rights under the easement. As noted by the Court, the easement gives Duke Energy the right to keep the easement clear and does not include any exceptions or safety requirements. As also noted by the Court, a clear and unambiguous easement cannot be constricted to any degree. In essence, however, the Court has done exactly that by permitting willful and knowing encroachments to remain. It is irrelevant whether every inch of the easement is needed. Duke Energy's predecessor bought and paid for those rights, and the Court cannot cut them back based on its own determination that Duke Energy has never "needed to exercise its easement rights," particularly when the Court's order specifically recognizes that Duke Energy may need to do so in the future.

To allow relief under the facts of this case undermines the public policies underlying statutes of limitations and favoring the provision of electric power to South Carolinians. In addition, it provides incentive for willful encroachment into utility rights of way because it allows such encroachments if the utility does not notice it *and file suit* **immediately**.

How is a utility to operate if it can lose its rights under its easements for failing to notice and file suit over every single encroachment in all of its rights of way, even when the encroachment has only been there a few months—far less than the time allowed to bring suit

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under any potentially applicable statute of limitations? It simply cannot. No electric utility can constantly monitor its thousands of miles of electric transmission line, such as the 13,000+ miles of transmission line maintained by Duke Energy Carolinas. Yet, that is exactly what the Court's order would require. To suggest that utilities should operate in this manner completely obviates the protections afforded claimants by potentially applicable statutes of limitation. Further, what effect does such an order have on pre-suit settlement discussions if objecting face-to-face and sending a confirming letter—all within just a few months of the encroachments being placed in the easement and well within any potentially applicable statute of limitations—is not enough? It necessarily means that the utility will have to immediately file suit and clog the state's courts with matters that otherwise might have been resolved amicably. This cannot be the law in South Carolina, yet it is exactly the effect of the Court's August 2, 2016 order. For all the reasons set forth above, the law and equity require that the Walkers be ordered to remove the encroachments immediately.

iii. The easement's savings clause prohibits application of laches.

The easement contains a "savings clause" that provides: "It is understood and agreed that the failure of neglect of the grantee, its successors or assigns, at any time to exercise any of the rights herein granted shall not be construed as a waiver or abandonment of the right at any time thereafter to exercise any or all of such rights and privileges." Pl. Ex. 1.

Thus, even assuming that Duke Energy failed or neglected to enforce its rights between the time the encroachments were constructed in the spring of 2013 and when it objected to them in January 2014 (filing suit later in 2014), it had a contractual right to do so under the easement without waiving or abandoning its rights in the easement in any way. The Walkers took their property with that provision and are bound by it just as they are by the rest of the easement.

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In his order in the *LKQ A&R Auto Parts, Inc.* case, cited above, Judge Kelly recognized Duke Energy's rights that flow from a nearly identical savings clause. Judge Kelly determined, as a matter of law, that the defendant could not establish a modification of the rights-of-way because of the savings clause. Ex. A. at p. 12. The same is true here. To allow the encroachments to remain despite the savings clause modifies the easement, which violates both the plain language of the easement and South Carolina law. At present, the Court's order imposes a requirement of need and/or necessity of use of the specific area of the encroachments on the easement and/or requires that Duke Energy demonstrate that the encroachments on its easement bar or substantially restrict the use of the easement. These concepts are irrelevant to the enforceability or validity of a written, purchased, and recorded easement, particularly one with a savings clause like the easement at issue here.

3. The relief ordered is not adequate to address Duke Energy's concerns.

The Court appears to attempt to split the baby in terms of the relief ordered by declaring that the encroachments may remain except "if Plaintiff should ever need to access its power lines and it became necessary to remove the Encroachments, the Defendant must bear the cost of removal." August 2, 2016 order at pp. 5-6. Specifically, the Court ordered:

> 1. If a time arises when Duke Energy needs access to the easement from the location of the Encroachments, the Encroachments must be removed and the Easement must be restored to accessible condition at full cost to the Defendants.
>
> 2. The duty to restore and responsibility for the costs associated with those repairs are to be filed with the register of deeds in Greenville County and are intended to be a covenant that runs with the land, so that any subsequent owners of the property own it subject to the same duty as the Defendants.
>
> 3. In the event that the Defendants must exercise their duty to remove the Encroachments and restore the Easement to an accessible condition, the

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Defendants must make all reasonable efforts to begin and complete the restoration within 10 days of when the need arises.

4. If the Defendants fail to make all reasonable efforts to begin or complete the restoration within 10 days, the Court hereby authorizes Duke Energy to enter the property at any time without prior notice or further action of the Court to remove the Encroachments and restore the easements to accessible condition. Any costs for such reparations would be at the expense of the Defendants.

5. In the event that any harm is done to the Defendant's property resulting from damage to the transmission lines or poles, Defendant shall hold Plaintiff harmless where such harm would have been prevented if Defendant had built outside of the Easement.

These terms, however, raise more questions than they answer. For example: How would it be determined "when Duke Energy needs access to the easement from the location of the encroachments" for purposes of Paragraph 1? What is to be recorded with the register of deeds for purposes of Paragraph 2? What happens in the event of an emergency where time is of the essence? The order contemplates that the Walkers will have ten days to remove the encroachments in the case of need, but Duke Energy does not get ten days notice of an emergency along its rights of way. What about the customers served by Duke Energy's transmission line, including fragile populations? Are they to wait nearly two weeks to have their power restored while the Walkers remove the encroachments? What about the penalties from the Federal Energy Regulatory Commission ("FERC") for the transmission line outage that might result from such a lengthy outage? What is the mechanism for invoking the "hold harmless" language in Paragraph 5? In addition, Paragraph 2 on its face provides that Duke Energy's property rights have been changed by this order, which South Carolina law does not allow.

This relief stands in stark contrast to the plain statement of the parties' rights under the valid, recorded easement that has been in place without incident from 1939 until the Walkers constructed the encroachments in 2013. Duke Energy's easement must be enforced to its full

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extent, which necessarily requires the court to order the Walkers to remove the encroachments immediately.

In further support of its Motion to Reconsider, Plaintiff relies on and incorporates by reference all evidence submitted and all written and oral arguments made at trial and in support of Plaintiff's Motion for Summary Judgment and this Motion to Amend.

CONCLUSION

While it is regrettable that the Walkers expended money to construct the encroachments in the easement, they did so in knowing disregard of Duke Energy's rights under the easement. The Court cannot now reward them for their folly and punish Duke Energy in the process, all the while allowing a significant and demonstrated safety risk to persist. For all of these reasons, the Court should reconsider its order and issue an amended order granting Duke Energy the relief requested in its Complaint. There is no basis in fact, law, or equity for stripping Duke Energy of any of its rights under the clear and unambiguous easement.

Respectfully submitted,

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Attorneys for Plaintiff, Duke Energy Carolinas, LLC

August 11, 2016
Greenville, South Carolina

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EXHIBIT A

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS
Duke Energy Carolinas, LLC, Plaintiff, v. LKQ A&R Auto Parts, Inc., Defendant.	C. A. No. 2013-CP-4036 **ORDER GRANTING DEFENDANT'S MOTION TO AMEND, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND PLAINTIFF'S REQUEST FOR A PERMANENT INJUNCTION**

FILED
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This matter comes before the Court on the following motions:

1) The motion of Defendant, LKQ A&R Auto Parts, Inc. ("LKQ"), to amend its Answer and assert counterclaims pursuant to Rule 15, SCRCP;

2) The motion of Plaintiff, Duke Energy Carolinas, LLC ("Duke Energy"), for summary judgment as to its claims against LKQ and as to LKQ's counterclaims set forth in its Proposed Amended Answer and Counterclaims; and

3) Duke Energy's request for a permanent injunction as to Duke Energy's claims against LKQ, as made a part of its motion for summary judgment.

This court heard both motions on September 11, 2015. After considering all filings and the arguments of counsel at the hearing, the court grants LKQ's Motion to Amend (except as to its request for a jury trial, which the court finds moot), grants Duke Energy's Motion for Summary Judgment, and grants Duke Energy's request for a permanent injunction.

UNDISPUTED FACTS

The record before the Court establishes the following undisputed facts:

1. Duke Energy owns three (3) easements or rights-of-way over property owned by LKQ at or near 511 Gap Creek Road, Duncan, in Spartanburg County ("Rights-of-Way"). Duke Energy uses the Rights-of-Way for purposes of maintaining four (4) separate high voltage

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electric transmission lines and their associated towers, which are used to transmit electric power to thousands of commercial and residential customers in the upstate.

2. Duke Energy purchased the three (3) Rights-of-Way from LKQ's predecessors-in-interest respectively in 1953, 1967, and 1971. After each Right-of-Way was purchased, a written Right-of-Way Agreement was duly and properly recorded in the Spartanburg County land records for each Right-of-Way. Duke Energy then constructed and installed certain electric transmission lines and towers within each Right-of-Way, and each Right-of-Way has since been continuously used for purposes of the transmission of electric power to Duke Energy's customers.

3. In 2009, LKQ purchased the subject property over which the Rights-of-Way run subject to the properly recorded Rights-of-Way. The electric transmission towers and lines were present and in operation within the Rights-of-Way at the time of LKQ's purchase.

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4. In relevant part, the 1955 Right-of-Way provides:

> [Duke Energy has] the right to enter said strip of land, and to construct, maintain and operate within the limits of same, poles, towers, wires, lines, apparatus and appliances for the purpose of transmitting electric power and for telephone purposes, and to make such relocations, changes, renewals, substitutions, and additions of or to same from time to time, as said Power Company may deem desirable; **with the right to keep said strip of land free and clear of any or all structures, trees and other *objects* of any nature**, except those placed in or upon same by said Power Company; with the right at all times to cut away all trees located upon said land outside of said strip which, if they should fall or be blown or cut down might strike any of said poles, towers, wires, lines, apparatus or appliances; with the right of ingress to and egress from said strip of land across the land above referred to, for the purpose of exercising the rights hereby granted; provided that **the failure of the Power Company to exercise any of the rights herein granted shall not be construed as a waiver or abandonment of the right thereafter at any time and from time to time to exercise any or all of same.**

(emphasis added).

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5. In relevant part, the 1967 and 1971 Rights-of-Way provide:

> (1) [Duke Energy has] **the right at any time to clear said strip and keep said strip clear of any or all structures, trees, fire hazards, or other *objects* of any nature. . . .**
>
> **The failure of [Duke Energy] to exercise any of the rights herein granted shall not be construed as a waiver or abandonment of the right thereafter at any time and from time to time to exercise any or all of them.**

(emphasis added).

6. LKQ, like certain of its predecessors-in-interest, operates an auto salvage yard on the property over which the Rights-of-Way are located. LKQ and its predecessors-in-interest have placed certain objects in the Rights-of-Way, including salvaged vehicles, various other man-made objects, and an electric fence surrounding the subject property. Duke Energy asserts the salvaged vehicles, other man-made objects, and the electric fence represent a safety risk to the safe and reliable operation of its transmission lines within the Rights-of-Way. As a result, Duke Energy has requested that LKQ remove these objects, but LKQ has not done so. However, under the circumstances present at the subject property, Duke Energy consents to allowing the electric fence to be maintained in its current configuration by LKQ and its successors-in-interest within the Rights-of-Way provided that LKQ places a "kill switch" to the electricity running to the entire fence at one of the fence's gates of Duke Energy's choosing so that Duke Energy may obtain 24-hour-per-day, 7-day-a-week, 365/366-day-per-year access to the areas of its Rights-of-Way located within the electric fence.

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7. LKQ alleges that through the course of time within which LKQ and its predecessors have operated a salvage yard on the subject property, they have used the Rights-of-Way in such a manner so as to render the Rights-of-Way either abandoned or modified. LKQ also alleges that the Rights-of-Way specifically state that they have the right to "maintain fences on said strip of land." LKQ also alleges that the referenced gates were constructed for the

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necessary preservation, use, and enjoyment of their tenement and do not constitute an unreasonable burden or interference on the rights of Duke, as LKQ asserts that they have always made it known to Duke that Duke can have access through the gates at any time.

DISCUSSION

I. LKQ's Motion to Amend

On June 9, 2015, Duke Energy filed its Motion for Summary Judgment. Thereafter, on July 16, 2015, LKQ filed a Motion to Amend its Answer to assert certain additional defenses and counterclaims for Prescriptive Easement / Abandonment and Modification of the Rights-of-Way. LKQ also sought to add a demand for a jury trial. Duke Energy does not oppose the proposed amendments with the exception of LKQ's demand for a jury trial.

A. Standard of Review

Rule 15, SCRCP, provides, in relevant part, as follows: "[A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." "A motion to amend is within the sound discretion of the trial judge and the opposing party has the burden of establishing prejudice." *Health Promotion Specialists v. S.C. Dep't of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013).

With respect to the demand for a jury trial, Rule 38(b), SCRCP, provides:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue.

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B. Discussion

This action was filed on October 1, 2013, and LKQ served its original Answer on December 6, 2013. LKQ's original Answer did not include a jury demand.

The Court notes that the jury trial demand presents both procedural and substantive hurdles. Duke Energy's Complaint presents facts relating to the existence and use of the Rights-of-Way over the LKQ property. In its original Answer, LKQ included defenses related to the existence, enforceability, and potential extinguishment of the Rights-of-Way. The proposed additional defenses and counterclaims set forth in LKQ's Amended Answer and Counterclaims similarly challenge Duke Energy's claims relating to its Rights-of-Way, alleging alternatively that Duke Energy abandoned its Rights-of-Way, that LKQ has a prescriptive easement over them, or that they have been modified over time. The parties have engaged in discovery on these issues in the course of this action, even though the Motion to Amend was only recently filed. The issues presented by all of the claims, defenses, and counterclaims in this action ultimately relate to whether Duke Energy is entitled to have LKQ clear the Rights-of-Way of encroachments.

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As a substantive matter, "the existence of an easement is a question of fact in a law action, [whereas] the determination of the extent of an easement is an equitable matter." *Plott v. Justin Enters.*, 374 S.C. 504, 510, 649 S.E.2d 92, 95 (Ct. App. 2007); *see also Tupper v. Dorchester Cnty.*, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997); *Rhett v. Gray*, 401 S.C. 478, 489, 736 S.E.2d 873, 879 (Ct. App. 2012). The court finds as a matter of law and undisputed fact that the Rights-of-Way exist and that their scope is clear based upon their plain language. *See Plott* at 513-14, 649 S.E.2d at 96-97 (Ct. App. 2007) ("The language of an easement determines its extent. . . . [the court] must construe unambiguous language in the grant of an easement according to the terms the parties have used."). To the extent a modification of the Rights-of-Way is alleged by LKQ in the Amended Answer and Counterclaims, those allegations relate to

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the extent of the easement and are equitable in nature. *See Plott, supra.* Because these are matters of chancery, there is no right to a jury trial. *Id.*

Duke Energy does not oppose LKQ's Motion to Amend, except to the extent it seeks a jury trial. Therefore, the Court grants LKQ's Motion to Amend, except as to its request for a jury trial.[1] The Court need not decide the jury trial issue at this time, as that issue is moot in light of the Court's decision on Duke Energy's Motion for Summary Judgment. Further, in light of the Court's grant of summary judgment, Duke Energy need not file a Reply to LKQ's Amended Answer and Counterclaims, and LKQ's allegations contained therein will be deemed denied by Duke Energy.

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II. Duke Energy's Motion for Summary Judgment

A. Standard of Review

Summary Judgment is a drastic remedy and should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues. Rule 56, SCRCP; *Englert, Inc. v. Leaf Guard USA, Inc.*, 377 S.C. 129, 134, 659 S.E.2d 496, 498 (2008); *Conner v. City of Forest Acres*, 348 S.C. 454, 462-63, 560 S.E.2d 606, 610 (2002). In considering a motion for summary judgment, evidence and all reasonable inferences must be viewed in a light most favorable to the non-moving party when determining if any triable issues of fact exist. Rule 56, SCRCP; *Englert, Inc., supra*; *Thalia v. Progressive*, 401 S.C. 395, 398-99, 736 S.E.2d 863, 865 (Ct. App. 2012). Summary judgment is not appropriate where further inquiry into facts is desirable to clarify application of the law. Rule 56, SCRCP; *Englert, Inc., supra.*

If a motion has been properly made and supported in accordance with Rule 56, SCRCP, the non-moving party may not rest on its pleadings but must come forward with specific facts

[1] The Court has taken full account of the allegations contained in the Proposed Amended Answer and Counterclaims in deciding Duke Energy's Motion for Summary Judgment.

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showing that there is a genuine issue for trial. Rule 56(e), SCRCP; *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 580, 602 S.E.2d 389, 392 (2004). The trial court must rule based "on the record the parties have actually presented, not on one potentially possible." *Spencer v. Miller,* 259 S.C. 453, 456, 192 S.E.2d 863, 865 (1972).

B. Discussion

As an initial matter, the Court finds that the Rights-of-Way were purchased, properly recorded, and that LKQ and its predecessors-in-interest were on both record and actual notice of the Rights-of-Way by virtue of the written Rights-of-Way being properly recorded and by virtue of Duke Energy's continuous use of the Rights-of-Way for purposes of transmitting electric power. The Court further finds that there are easily observable transmission lines and towers located within the Rights-of-Way and have been for many years. Accordingly, the Rights-of-Way have been in continuous use for the purpose of transmitting electric power since the construction of the transmission lines and towers. For this reason, LKQ cannot establish nonuse of the Rights-of-Way by Duke Energy.

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1. Duke Energy is entitled to summary judgment under the plain language of the Rights-of-Way.

Under South Carolina law, "'[t]he language of an easement determines its extent.' Thus, this court must construe unambiguous language in the grant of an easement according to the terms the parties have used." *Plott* at 513-14, 649 S.E.2d at 96 (quoting *Binkley v. Rabon Creek Watershed Conserv'n Dist.*, 348 S.C. 58, 67, 558 S.E.2d 902, 906-07 (Ct. App. 2001)); *S. Carolina Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981) ("Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in plain, ordinary, and popular sense."). To the extent the language and terms of an easement are specific, they cannot be constricted to any

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degree. *Xanadu Horizontal Prop. Regime v. Ocean Walk Horizontal Prop. Regime*, 306 S.C. 170, 172, 410 S.E.2d 580, 581-82 (Ct. App. 1991).

The Rights-of-Way expressly provide that Duke Energy has the right to have the Rights-of-Way kept free and clear of objects. Salvaged vehicles and electric fences, among other things, are "objects." The Rights-of-Way further provide that a failure to exercise any rights thereunder does not constitute a waiver or abandonment of those rights. There is no ambiguity in these clauses.[2] Through this action, Duke Energy seeks to enforce its rights to require that LKQ remove the salvaged vehiclesand other man-made objects from the Rights-of-Way. Because Duke Energy has that right under each of the purchased Rights-of-Way, it is entitled to summary judgment as provided herein below. LKQ and Duke have agreed that LKQ and its successors-in-interest shall have permission to maintain the electric fence in its current configuration within the Rights-of-Way provided LKQ does not unreasonably burden or interference on the rights of Duke. The parties have further agreed that LKQ shall install and maintain a "kill switch" to the electricity running to the entire fence at one of the fence's gates of Duke Energy's choosing so that Duke Energy may obtain 24-hour-per-day, 7-day-a-week, 365/366-day-per-year access to the areas of its Rights-of-Way located within the electric fence.

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2. LKQ's arguments relating to prescription, modification, and abandonment are unavailing.

South Carolina law recognizes that the manufacture, distribution, and sale of electrical power serve an important public function and are for the public good. *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 181 S.E. 481, 486 (1935); *Park v. Greenwood County*, 174 S.C. 35, 176 S.E. 870, 873 (1934). The court finds that the Rights-of-Way support the distribution of

[2] The Court notes that a right of way will not necessarily confer a right of unrestricted use of the encumbered property for access in the grantee; however, in this case, the Court is constrained to abide by the plain language of the Rights-of-Way which provide that Duke Energy may demand that the Rights-of-Way be kept free of any and all structures or objects.

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electrical power, serve an important public function, are for the public good, and are thus public purpose rights-of-way. In South Carolina, if a property right has been acquired to serve the public interest, such as these Rights-of-Way, that property right cannot be defeated or modified by prescription unless the property has been enclosed in such a way as to completely occupy the property in a manner inconsistent with the right-of-way for the entire statutory period. *Blume v. S. Ry. Co., Carolina Div.*, 85 S.C. 440, 442, 67 S.E. 546, 547-48 (1910). The Court considers LKQ's arguments relating to modification, abandonment, and prescription in light of this principle and policy. In addition, each of these arguments is subject to the express non-waiver language found in the Rights-of-Way and quoted above.

a. Duke Energy has not abandoned the Rights-of-Way as a matter of law.

The Court finds that LKQ has made no affirmative showing that Duke Energy abandoned all or any part of its Rights-of-Way because they are still in use today and have been in continuous use in the decades since they were constructed. In addition to the plain language of the Rights-of-Way that establish Duke Energy's rights, "mere nonuse of an easement created by deed for a period however long will not amount to an abandonment, but there must be other acts by the owner of the dominant estate conclusively manifesting either the present intention to relinquish the easement or purpose inconsistent with its further existence." *Carolina Land Co. v. Bland*, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975).

Duke Energy has continuously availed itself of the Rights-of-Way. These easements were acquired to facilitate the transmission of electric power and have continuously been used for that purpose. That use is patently inconsistent with a present intent to relinquish the easement or a purpose inconsistent with the easements' further existence. Moreover, the Rights-of-Way expressly provide that the failure to exercise any of the rights under the Rights-of-Way

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shall not be construed as an abandonment of those rights. Thus, even if LKQ could establish that Duke Energy did not always require that the Rights-of-Way be kept clear of objects, that evidence would not amount to a showing that Duke has abandoned its Rights-of-Way in light of the continuous use and the language of the Rights-of-Way. Therefore, the Court finds as a matter of undisputed fact and law that Duke Energy has not abandoned or otherwise been excluded from its Rights-of-Way or any portion thereof.

b. LKQ has not established a prescriptive easement over the Rights-of-Way as a matter of law.

The Court finds as a matter of law that LKQ cannot establish a prescriptive easement over or within the Rights-of-Way for the following reasons:

First, LKQ cannot meet the elements required to obtain an easement by prescription where, as here, LKQ owns the land and by definition a prescriptive easement is against the land of another. *See, e.g., Bundy v. Shirley*, 412 S.C. 292, 304, 306, 772 S.E.2d 163, 169-70, 171 (2015) ("An easement is a right given to a person to use the *land of another* for a specific purpose. An easement may arise . . . by prescription. . . . [A] party claiming a prescriptive easement has the burden of proving all elements by clear and convincing evidence.") (emphasis added).

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SPARTANBURG

Second, LKQ cannot establish a prescriptive easement over the Rights-of-Way because they are public purpose Rights-of-Way and LKQ has presented no evidence that it enclosed them in such a way as to completely occupy the property for the entire statutory period in a manner inconsistent with the Rights-of-Way. *See Blume, supra.* In *Blume*, the court addressed whether a railroad easement could be destroyed by a claim of prescription as follows:

> [T]he public cannot acquire by prescription the right to use the right of way of a railroad company in a manner inconsistent with the company's use of it for corporate purposes... [T]he public has an interest in the construction and operation of railroads as highways, which are burdened with duties to the public.

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> Therefore, a railroad company cannot dispose of or so use its right of way as to impair or destroy its ability to serve the public; and that, even under the condemnation statutes, another highway cannot be laid out over the right of way of a railroad, if the construction of such other highway operates as a hindrance to the use and enjoyment of the right of way for the purposes for which it was previously procured. *Prescription rests in the presumption of a grant or dedication, and, as the railroad company has no power either to grant or dedicate its right of way for any other than the purpose for which it was acquired, the presumption cannot arise; and, therefore,* ***neither private individuals nor the public can acquire by prescription any right to use the right of way of a railroad, which is incompatible with the purposes for which it was acquired, or which would hinder or impair the railroad company in discharging its duties to the public, imposed upon it by law.***

(emphasis added).

Like railroads, power companies serve the public interest. Moreover, similar to railroads, property used in the generation or the transmission of power cannot be condemned. S.C. Code Ann. § 58-27-130 ("[n]o property or rights used for the generation or transmission of electricity, or devoted to public use for such purposes, shall be condemned [under South Carolina's condemnation statutes]." Given this background, it does not stand to reason that a private individual or company, such as a salvage yard, can acquire by prescription property rights related to the Rights-of-Way that not even the State of South Carolina or the county could acquire from Duke Energy by exercising the powerful, sovereign right of eminent domain.

In this case, the undisputed facts show that LKQ has not excluded Duke Energy from the Rights-of-Way, or any portion thereof, as Duke Energy has continuously used the Rights-of-Way for purposes of transmitting electric power through its electric transmission lines located within the Rights-of-Way for decades. Therefore, as a matter of law, LKQ cannot establish an easement by prescription over the Rights-of-Way.

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c. **The Rights-of-Way have not been modified as a matter of law.**

The Court finds as a matter of law that LKQ cannot establish a modification of the Rights-of-Way by action where, as here, the terms of the Rights-of-Way are contractual and the Rights-of-Way each contain savings clauses that state, "the failure of the Power Company to exercise any of the rights herein granted shall not be construed as a waiver or abandonment of the right thereafter at any time and from time to time to exercise any or all of same" or "[t]he failure of [Duke Energy] to exercise any of the rights herein granted shall not be construed as a waiver or abandonment of the right thereafter at any time and from time to time to exercise any or all of them."

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C. Conclusion

For all of the above-stated reasons, the Court **ORDERS** as follows:

1) Duke Energy's motion for summary judgment as to all claims and counterclaims in this action is **GRANTED** and judgment shall be entered in Duke Energy's favor.

2) Duke's Energy's request for permanent injunctive relief against LKQ and its successors-in-interest is **GRANTED**. As a part of this grant of permanent injunctive relief:

   a. LKQ is **ORDERED** to permanently remove no later than December 31, 2015 all salvage vehicles, and all other man-made objects not belonging to Duke Energy (except as specifically allowed by the language of the Rights-of-Way), from the Rights-of-Way with the exception of the electric fence on the terms and conditions provided herein.

   b. LKQ is **ORDERED**, no later than December 31, 2015, in consultation with Duke Energy, and at its own expense, to install and maintain a "kill

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switch" to the electricity running to the entire electric fence, or any replacement fence, for the benefit of Duke Energy at one of the electric fence's gates of Duke Energy's choosing so that Duke Energy may obtain 24-hour-per-day, 7-day-a-week, 365/366-day-per-year access to the areas of its Rights-of-Way within the electric fence.

c. LKQ shall refer to the surveys filed with Duke Energy's Motion for Summary Judgment to determine the extent of the Rights-of-Way and the areas from which the objects identified herein must be permanently removed, so long as such surveys do not contradict the metes and bounds of the Rights-of-Way as originally filed, in which case the metes and bounds of the Rights-of-Way, as originally filed, govern.

d. Subject to the exceptions in subparagraph b. above, LKQ and its successors-in-interest are permanently **ORDERED** to keep all salvage vehicles, and all other man-made objects not belonging to Duke Energy (except as specifically allowed by the language of the Rights-of-Way), out of the Rights-of-Way, as delineated in the surveys filed with Duke Energy's Motion for Summary Judgment.

e. Except as specifically set forth in this Order, the rights and obligations of the Duke Energy and LKQ, and their respective successors-in-interest, set forth in the Rights-of-Way are unaffected.

f. Duke Energy may file this Order in the Spartanburg County Register of Deeds office to ensure the relief granted in this Order against LKQ and its successors-in-interest runs with the land.

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CLERK OF COURT
SPARTANBURG, S.C.

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IT IS SO ORDERED.

R. Keith Kelly
Circuit Judge, Seventh Judicial Circuit

15 October, 2015
Spartanburg, South Carolina

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SPARTANBURG COUNTY
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August 17, 2016

VIA EMAIL ONLY (lverdinj@sccourts.org)

The Honorable Letitia H. Verdin
Circuit Court Judge, Thirteenth Judicial Circuit
305 E. North St., Ste. 318
Greenville, SC 29601

Re: ***Duke Energy Carolinas, LLC v. Caleb E. Walker and Christina T. Walker***
C. A. No. 2014-CP-23-05816

Dear Judge Verdin:

We are in receipt of the transcript of the trial in this matter. By way of this letter, we seek to supplement our post-trial motion filed last week to include those portions of the transcript relating to helicopter flyovers.

As shown in the attached pages, there was no definitive testimony about whether or not a flyover covering the Walkers' property occurred between the completion of the construction of the encroachments at issue and Duke Energy's advising the Walkers that the encroachments would need to be removed in January 2014. In addition, there was no testimony in the record about the timing of fall flyovers generally. To the extent the post-trial motion varies from the transcript, Duke Energy asks that the transcript control the Court's analysis.

Please let us know if the Court needs anything further in connection with the post-trial motion.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

Sarah P. Spruill

SPS/jmb
Enclosures

cc: The Honorable Paul B. Wickensimer (via ECF)
R. Mills Ariail, Jr., Esq. (via Email only, mills@rmalawoffice.com)

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STATE OF SOUTH CAROLINA	COURT OF COMMON PLEAS
	2014-CP-23-05816
COUNTY OF GREENVILLE	
DUKE ENERGY CAROLINAS, LLC, PLAINTIFF,	
vs.	TRANSCRIPT OF RECORD
CALEB E. WALKER and CHRISTINA T. WALKER, DEFENDANTS.	

May 31 and June 1, 2016
Greenville, South Carolina

B E F O R E:

THE HONORABLE LETITIA H. VERDIN, Judge

A P P E A R A N C E S:

SARAH P. SPRUILL, ESQ.
JOSHUA D. SPENCER, ESQ.
Attorneys for the Plaintiff

R. MILLS ARIAIL, JR., ESQ
Attorney for the Defendant

CHERYL A. SMITH
Circuit Court Reporter

A He may have. I just don't remember the dates.
Q Do you remember ever making a comment to him that we do flyovers and we would have caught this?
A Sure.
Q You said that?
A I said that we do flyovers.
Q Okay.
A I didn't say that we would have caught it. I may have said something along those effects. I just don't remember word for word.
Q Well, I mean, did you tell him that we do flyovers, and during those flyovers, we catch these ---
A We look for encroachments, looking for several things.
Q Okay. And are you in charge of the flyovers during this period of time?
A I'm not in charge of the flyovers, no. I get the reports.
Q Do you know if there were any flyovers that were done during this period of time?
A Not when I was out there. They fly periodically, so . . .
Q Okay. But what I'm saying is, at some point in time, this work was done, and then you came out to be able to look at the property. I think it was on

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1/27/2014.
A That's correct.
Q So during the period of time when it was done to when it was built to the time you came out, are you aware of any flyovers during that period of time?
A There was flyovers before that. I don't know if they took place before or after construction. I can't verify that.
Q Okay. Well, then tell me, did any of this -- in any of those flyovers, was it ever drawn to your attention that there was an encroachment?
A The first of my knowledge was when he called me.
Q Okay. So if a flyover was done, then nobody reported any type of encroachment, because you would be the one that would get that information.
A I would get that information.
Q Okay. So you hadn't received that?
A There are times where that, you know, depending on where the helicopter flies, the skew, the angle, they may not see something. That's why they fly it multiple times periodically to catch things they may not have seen. Because one flight doesn't do you justice along a transmission line when you're flying at speed.
Q Have there been any issues with this line that you're aware of, I guess, since 2013?

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difference to Duke Energy?
A Yes, it does.
Q Why is that?
A Because those structures interfere with our ability to safely maintain and operate that line with serving our customers 24/7. It's directly related to safety for our employees and the public.
Q Mr. Ariail asked you about flyovers. Your first knowledge, I believe you testified in your testimony, of these encroachments was at the end of January 2013; is that what you testified to?
A That is correct.
Q And you sent your letter a few days later in early February. Do you know when the pool was built?
A I don't recall the date.
Q We'll ask Mr. Walker those questions.
A Yeah.
Q Do you know what specific flyovers occurred between the time this was built and when you met with Mr. Walker?
A We have our spring and our fall flights. Mid-spring, like May, April.
Q In the right-of-way, which is Exhibit 1, where it talks about the right to keep said right-of-way clear of all trees, structures and other objects together with the further right to cut away and keep clear any trees

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Q Well, I mean, but you've made exceptions to encroachments and right-of-ways, correct?
A Correct.
Q Okay. And from what I'm understanding is, you know, they still would be issues that could cause danger, could, you know, affect the operation and maintenance, correct?
A Correct.
Q Okay. So y'all have done that in the past and have made those exceptions.
Now, the flyovers, if I'm understanding, May, April is when one of the flyovers is done?
A The time frame fluctuates a little bit. It's generally spring and fall. Then they plan out those dates. As we get closer to the flights, they plan them out, so I don't have the exact date.
Q Right. And I'm going to make sure I'm correct on the dates. But you went out there on January 27th or 29th of 2014?
A Right.
Q Okay. So if the work was done, let's say, the year before, January, February of 2013, then there would have been two flyovers, correct?
A That's a possibility.
Q Possibility.

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A Yeah.
Q Okay. When you say "possibility," is it not -- I mean, it's not a definite that flyovers were done on these lines?
A No. There are flyovers done, but I need to know that they flew that line. I can't sit here and tell you that they flew that line on a specific date or when. What I'm questioning in my head is I don't know when the pool was built, so I can't tell you if two flyovers or three flyovers or one or none. I don't know.
Q Now, you went into a little bit about the type of fence and the issue with the fence that is at the Walker's residence right there. Now, my understanding is it's a metal fence; is that correct?
A Some type of metal. I don't know if it's aluminum or steel.
Q Okay. And you've -- are there other metal fences along this right-of-way or easement here?
A I'm only familiar with this property.
MR. SPENCER: Your Honor, I'm going to object to this as subject to the motion in limine.
THE COURT: You're talking about this particular easement?
MR. ARIAIL: Yeah. I'm talking -- I mean, he asked him -- here's my dilemma. I believe he opened the door

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STATE OF SOUTH CAROLINA	) COURT OF COMMON PLEAS
	) 2014-CP-23-05816
COUNTY OF GREENVILLE	)
	)
	)
	)
	)
	)
DUKE ENERGY CAROLINAS, LLC,	)
PLAINTIFF,	)
	)
vs.	) TRANSCRIPT OF RECORD
	)
CALEB E. WALKER and	)
CHRISTINA T. WALKER,	)
DEFENDANTS.	)
	)

May 31 and June 1, 2016
Greenville, South Carolina

B E F O R E:

THE HONORABLE LETITIA H. VERDIN, Judge

A P P E A R A N C E S:

SARAH P. SPRUILL, ESQ.
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Attorneys for the Plaintiff

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CHERYL A. SMITH
Circuit Court Reporter

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PROCEEDINGS

MONDAY, MAY 31, 2016

THE COURT: The first thing I probably need to put on the record with everyone here in this case is that my administrative assistant/law clerk I think is -- was Mr. Ariail's babysitter for some period of time. Don't think she is anymore. She's in law school. But ---

MR. ARIAIL: She wasn't my babysitter. She was my kids'.

THE COURT: Well, I thought you needed a babysitter. So no. I'm sorry. Your children's babysitter for some period of time, and I felt like I should put that on the record. If anybody has any problem with her being in here, I certainly would -- you know, can screen her from this case.

MR. SPENCER: Your Honor, I'm Josh Spencer. I represent the plaintiff Duke Energy. We don't have a problem with it.

THE COURT: Okay. All right. Thank you.

Mr. Ariail, you got a problem?

MR. ARIAIL: I don't. No, Your Honor.

THE COURT: Okay. All right. And so I think there's at least one motion in limine I know of. Is there anything else? Any other matters other than that one we need to take up pretrial?

MR. SPENCER: Yes, Your Honor. There is an issue with respect to the survey that Ms. Spruill is going to handle all those issues for us.

THE COURT: Okay. All right. Well, let's start with your motion in limine then.

MS. SPRUILL: Yes, Your Honor. I'm Sarah Spruill here on behalf of the plaintiff, Duke Energy. Our motion in limine won't take us very long to argue. It's a clear-cut ---

THE COURT: I've read your -- and I've read your motion.

MS. SPRUILL: Does Your Honor have any questions?

THE COURT: I don't think I do. I guess my real question would be for Mr. Ariail as to what sort of evidence that -- I mean, what would be the nature of that evidence? Is it ---

MR. ARIAIL: The nature of the evidence, Your Honor, and my client can fill you in more than I can. There's certain things along this right-of-way which we want to bring up which basically show other encroachments that have happened over time and they've been there for years. There's some -- there are cypress trees that are there, there's a fence that's right across from his house which we've got pictures of, there's a -- junk cars right around the corner that are under this easement, there's

some trailers that are under one of the structures, there's a pond -- man-made pond that is in the vicinity that we would bring up.

Now, clearly -- and the reason that we think these are relevant and why they should come in is their expert's going to get on the stand, I believe, and testify that these are safety issues with his house and things he's done. Well, clearly, I need to be able to go into if he thinks these other things are safety issues and why they are not addressing those and why didn't they remove those, because that goes into whether or not -- I mean, my view is the safety issues that exist on my client's property and, you know, clearly I think is relevant. And they can say that it's not probative, you know, all these different legal issues in regards to it. But I clearly think it's relevant, and I need to be able to explore it to be able to give you a little basis.

THE COURT: Just to be clear, is this on this particular easement?

MR. ARIAIL: It's within -- I'm saying I can -- he can provide more. It's on the -- well, actually, when you say "the easement," his easement?

THE COURT: Well, yeah.

MR. ARIAIL: It's along the -- what I call the right-of-way, I guess. It's in the vicinity. I'm not

exactly -- he can provide you exactly how far away. Most of these are very close by, and I would say less than a couple hundred, 300 yards to where he is. There's not -- I'm not talking -- there's one -- you know, clearly we could -- there's a -- this right-of-way goes across Lake Cunningham down the -- down the way, which is maybe a mile or two down the road, you know. Things of that nature. I'm not saying that. What I'm thinking is in the vicinity is where I'm looking at.

THE COURT: Well, I guess I poorly framed my question. Really, my question is, are these particular easements or encroachments on a Duke Power easement? Is it -- would they bear somehow or another on the safety issue at hand in this case, I mean, directly bear on the issue of whether or not it would be safe to come into this particular piece of property?

MR. ARIAIL: And I don't know how they're going to argue their case, but I think what they're going to say is clearly there's a retaining wall in this case. They're going to say that a truck could drive over it. But they're also going to say there's a fence there which can conduct electricity. You know, my view is if they're going to argue that, I need to be able to show, hey, there are other things down the road. There's access issue.

For instance, they're going to say, well, there's a fence across the way. We've -- I'm saying you let that stay, and even though you're telling my client to remove his, there's a junk car that you haven't removed. There's a trailer you haven't removed. There's a pond you let be built underneath this or is in the right-of-way. These are all things that I think we need to be able to bring up. Because if they're going to argue, well, there's a safety issue with yours, I need to be able to find out why they don't believe there's a safety issue with the other ones.

THE COURT: Yes, ma'am?

MS. SPRUILL: I would just argue, as we put in our motion, what he's talking about is apples and oranges. He doesn't know what those easements say. They have no foundation for it. He doesn't know what's going on with the line in those places. He doesn't know what those safety issues are. What we're here to talk about is this easement on this piece of property, and nothing else is relevant.

MR. ARIAIL: And I can just address -- I know they put it as part of their brief. They're saying I don't know anything about the right-of-ways. I'm not trying to bring in what those right-of-ways are on different property -- pieces of property. I'm trying to show what

his first-hand knowledge is, you know, in regards, not give an opinion as to what he believes those right-of-ways allow because he doesn't have that information. I'm just trying to get him to be able to put forward information that he sees on that line in that right-of-way that's safety issues that, you know, he believes or has seen are there to be a part of the record to be able to show that they -- you know, they hadn't asked for those things to be removed.

THE COURT: All right. I'll tell you that my inclination is -- just to sort of let you know going forward, my inclination is not to allow that evidence in. But I will tell you this. I know you're going to need to protect the record and to be able to at least offer it. If, at some point, it does become relevant or you want to revisit this issue, then I certainly will take it up then when I know a little bit more about the case. But at this point, my inclination is that -- at least at this juncture, it seems irrelevant to me. And I don't know what competent evidence could be offered of those particular -- those particular encroachments.

All right. Yes, ma'am?

MS. SPRUILL: Thank you, Your Honor. We have discovered we have a second little issue this morning. I will hand you and your clerk -- we've got notebooks of

the plaintiff's trial exhibits for you.

THE COURT: Oh, okay. I was going to say, if that's your brief, it looks like more than a little issue.

MS. SPRUILL: No, no. Those are the exhibits, and the notebook is bigger than the -- the notebook's bigger than the exhibits.

The issue becomes -- Exhibit No. 5, which is the survey that you see on the big board, too, in front of you, prior to trial, I asked opposing counsel if he'd be willing to stipulate to the right-of-way in our survey. And he told me he would. So we're not planning to call our surveyor, and he can't be here today.

Well, this morning, Mr. Ariail has told me that he's not willing to stipulate that the right-of-way is where our survey says it is, which puts us in a bind because we don't have the surveyor here to further explain the survey. I'm happy to show you the e-mail I sent to Mr. Ariail asking him to stipulate. And I expressly said in the e-mail, "If you'll agree on these two exhibits, we won't need to call the surveyor in. We can skip going through the title history on the property."

So if we don't have a stipulation on this survey as to the location of the right-of-way, that leaves us in a real bind that we were blindsided with this morning.

THE COURT: Do you need this e-mail back?

MS. SPRUILL: Unless you need it, Your Honor.

THE COURT: Not necessarily, no.

Yes, sir?

MR. ARIAIL: Your Honor, and I talked to her before we came in here, and clearly I'm going to have to say when preparing for this, and clearly my issue is I haven't taken Mr. Procter's deposition. Going back and reviewing over the weekend, what I found was and what I have explained to them coming in here, and maybe I sent this e-mail and not explaining myself, I'm agreeing there's a right-of-way, okay? I've told them that. There's a 68-foot right-of-way.

My issue is and what I've had a problem with, and I, you know, drew it up over the weekend was there's a 68-foot right-of-way back in 1939. That was the year my father-in-law was born in -- 77 years ago, and I don't know where this right-of-way was. I know the Lanfords -- and I'll get into it -- transferred over this right-of-way to Duke Power, but when I do right-of-ways, I just did one last week, you put the bearings down, you put the pins, you put the information and the feet. I haven't seen that.

And going through this -- and I will say that there's an e-mail that I said that the survey was, you know, okay. What I wanted to be able to do was to be

able to cross-examine him in how he got his right-of-way located on his survey. And, you know, my issue is I don't want to forgo that issue because I think that's clearly relevant, because if they can't prove the right-of-way is where it is, and if it starts, you know, 14 feet off, then my client could have his property outside the right-of-way and wouldn't have to move anything.

So I don't mean to put them in a bind. My problem is, over the weekend reviewing it and looking back, I need that information to be able to verify that that right-of-way, he knew where he was putting it and how it matches up.

THE COURT: Let me just ask this. And I understand the position that y'all are put in, obviously. But just by way of just figuring this thing out, since it's a nonjury trial, we'll be a little loser. Is there a time that your surveyor could be here or is he out of town like today and tomorrow?

MR. SPENCER: Your Honor, he probably -- he may be able to be here tomorrow if needed, but not today.

THE COURT: Okay. Maybe tomorrow. Say, do you think he could possibly be here tomorrow at like 10:30 or something like that?

MR. SPENCER: I think we could arrange that.

THE COURT: Okay. The last thing -- I mean, I totally understand the situation y'all are in. I totally understand the situation y'all are in. And, no, it's not ideal to find out on the threshold of trial that you need to have somebody here that you believed could not be here.

In light of the circumstances of the case, if y'all would try to get in touch with him and see if he could possibly be here maybe tomorrow, even if y'all have closed -- or, I mean -- I'm sorry. Not closed. Even if y'all have rested, you know, then just we would, you know, leave the record open for you to have the surveyor here, you know.

MR. SPENCER: We can do that.

MS. SPRUILL: Thank you, Your Honor.

MR. ARIAIL: Your Honor, I apologize for that. Just going through and looking at it over the time, and I explained to her I'm sorry about that, and I would do whatever to be able to have him here and not prejudice them in regards to that.

THE COURT: Well, and my understanding is y'all anticipate this trial will go into tomorrow; is that right?

MR. SPENCER: We were hoping to get it done today. We were optimistic.

MR. ARIAIL: I'd love to stay here tomorrow because I've got two TPRs to try, and if I'm here, I won't do that.

THE COURT: Well, and I will tell you -- I'll tell you, in all candor, tomorrow morning I really would love for y'all to indulge me to start about 10:15 or 10:30.

MR. SPENCER: That's no problem.

MS. SPRUILL: I certainly don't think we need two full days.

THE COURT: Okay. And I'll just tell you exactly what it is. I have twin seventh graders and they have awards day tomorrow morning. I can miss it and -- I can miss it and it will be fine.

MS. SPRUILL: No need to.

THE COURT: I think I've gone to every one of them, so I'm probably due a miss. But if -- so in order to work with anybody's schedule or in order to get this case done, if I need to, I will miss that. But if at all possible, then maybe we could, you know, have the surveyor come in tomorrow morning at 10:30.

MR. SPENCER: We'll get that lined up. If it's all right with you, I'll send an e-mail.

THE COURT: You do whatever you need to do. You do whatever you need to do.

MS. SPRUILL: And just before we get started, a

couple of little housekeeping issues.

THE COURT: Sure.

MS. SPRUILL: How would Your Honor like to proceed? Do you want opening arguments? Do you want closing arguments?

THE COURT: If y'all feel like -- I have read your pretrial brief, and the facts don't seem to be that much in dispute. And I think you even say that in your pretrial brief. So to the extent that anybody feels like there's any issue they need to lay out, I'm happy to hear opening arguments. I certainly will give you an opportunity to sum things up at any point that you want to. And, you know, we'll just -- we'll kind of go -- we can kind of go from there.

MS. SPRUILL: And I have one other. I've already tendered our exhibit notebooks. We have a few little deposition designations, if I could go ahead and tender those.

THE COURT: Sure.

MS. SPRUILL: Save everybody having to listen to it.

THE COURT: I appreciate it.

MS. SPRUILL: I'll put that with the clerk's set.

And we don't have any counter-designations or objections, so these are not controversial either.

THE COURT: Thank you. All right. So y'all look

like you're fairly ready to go.

MS. SPRUILL: I think that was the last of my list, Your Honor.

THE COURT: All right. Mr. Ariail, anything we need to take up from the defense before we get running?

MR. ARIAIL: No, Your Honor. We're ready to proceed. Thank you.

THE COURT: All right then. Okay. Yes, ma'am -- or yes, sir.

MS. SPRUILL: Well, unless Your Honor wishes an opening, I think we're ready to start presenting witnesses.

THE COURT: All right then. Very good.

MR. SPENCER: Your Honor, we call Steven Pryor.

THE COURT: Sir, if you'll come up here and be sworn.

WHEREUPON,

STEVEN PRYOR

After having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SPENCER:

Q Good morning, Mr. Pryor. Can you state your full name for the record?

A My name is Steven Charles Pryor.

Q And who are you employed by?

A Duke Energy.
Q And what is your title at Duke Energy?
A Transmission runway asset protection specialist.
Q And what territory do you cover?
A I cover the southern region of the Carolinas, which is basically all of the transmission lines in South Carolina for Duke Energy.
Q Is that Duke Energy Carolinas?
A Duke Energy Carolinas.
Q And what are your responsibilities with the company?
A My role with the company is to educate customers and work with customers one-on-one. My full-time job is to keep these right-of-ways safe and clear for our crews and the general public. We do plan reviews for commercial and residential, and we also work with the customer one-on-one, hand-in-hand. When they call and have questions about what they can do inside the right-of-way, what they can't do inside a right-of-way, we help answer those questions for customers.
Q And you work in the -- you're an asset protection specialist, you say. Can you tell the Court what assets it is your job to protect?
A Yes, sir. My job is to protect particularly the transmission right-of-way easement itself, the overall right-of-way, the structures, the wires. Everything

that's contained within the easement itself, my job is to protect that corridor, the right-of-way, and the lines.

Q And what, in your mind, is a right-of-way?

A A right-of-way is an easement that Duke Energy purchases from a landowner, and they do not own the land but they own the rights to protect that easement across that tract of land. So that's in a nutshell what an easement is.

Q And can you tell the Court what a transmission line is as opposed to a distribution line.

A Sure. A transmission line is a high-voltage or high-capacity power line that transfers power from our power plants and substations back and forth to one another. They tie the grid system in together. So high voltage comes out of the power plants, and it goes to the substations, then from substations there, it goes to large customers and then retail substations that serve our communities.

Q As opposed to a distribution line, can you tell the Court what a distribution line is?

A Sure. A distribution power line is the smaller lines that come out of those substations that feed power directly to commercial businesses, residential homes. They're the smaller lines that network about into our communities and feed power to our customers. Lower

voltage.
Q With respect to when objects or fences that we'll be talking about in this case, walls, patios, those type things, are built by someone in a transmission line right-of-way, what is your job with respect to those things?
A My job is for encroachment removals. We remove encroachments that violate the actual easement document. If it's a violation of the easement that we remove, we have -- work with the customers one-on-one so we can resolve getting the encroachments removed.
Q And in this case with respect to Mr. and Mrs. Walker, how did you get involved?
A Mr. Walker called me. I don't have the date down here right in front of me. But he called me with questions about what he can do and what he could not do in the easement on his piece of property. He was looking to do some work in his yard. And that's where our communications started.
Q Have you ever spoken with Mrs. Walker?
A I do not remember ever speaking with Mrs. Walker.
Q In the telephone conversation you had, do you recall the contents of that conversation and what followed on from that?
A Yes. Mr. Walker asked several questions about what

he could and could not do in the right-of-way. And I don't have the actual details of the conversation, what he asked specifically, but he wanted to do some work in his yard. And, you know, I tried to explain the things that you can and cannot do and offered to share guidelines and restrictions, and then if we can't come to an understanding on the phone, Mr. Walker asked if I could come out and do a site visit. And that's another part of my responsibility is to come out to the property owners and help them understand what they can do on their property.

Q Okay. I believe you made reference earlier in your testimony to the easement or the right-of-way document being the governing document for what can and can't be in a right-of-way. We have a copy of that. It's Plaintiff's Exhibit 1. Plaintiff's Exhibit 1, which is in the notebook in front of you, which I believe you've seen before, is this a copy of the right-of-way document in this case?

A Yes, it is.

MR. SPENCER: And by stipulation, that's already in evidence, so I don't think we have to go through the normal motions there.

BY MR. SPENCER:

Q Did Duke Energy pay in 1939 $160 to obtain that

right-of-way or easement?
A Yes, sir.
Q Now, if we'll go back out and zoom into the next large paragraph, I'm not planning to read all this, but does it grant about where it -- kind of where we have it highlighted, Duke Energy, I'm quoting now, ". . . the right to keep said right of way clear of all trees, structures and other objects except those placed thereon by the grantee, together with the further right to cut away and keep clear any trees outside of said 68-foot strip that might in any way endanger the proper maintenance and operation of the structures and other property placed upon said right of way by the grantee"?
A Yes. That is correct. Those are our rights.
Q Is there a specific part of this in the next paragraph where it says "it is agreed" that deals with fences?
A Yes. It is agreed. Yeah. That is correct.
Q All right. And does this state, and I'm quoting, "It is agreed that the owner of said tract of land may use, or permit said right of way to be used for growing such crops and maintaining such fences thereon as may not in any manner interfere or conflict with the use of said right of way and rights by the grantee for the purposes hereinabove mentioned"?

A That is accurate.
Q Okay. Is there any mention, to your knowledge, in this right-of-way, of retaining walls being allowed in the right-of-way?
A No. They're not allowed.
Q Is there any mention of patios being allowed?
A No. Not allowed.
Q You mentioned you got called out for a site visit to speak with Mr. Walker. Do you prepare a document internally when you go out for such a site visit?
A We save information in files for site visits. They're generally when we already know there's an encroachment that exists on a right-of-way. And in this case, we did not know it existed, so I created the file for Mr. Walker after our meeting.
Q Okay. Is this a copy of that file?
A Yes. That's correct.
Q Okay. If we look up here at the top or in the middle, is the date of the contact January 27, 2014?
A Correct.
Q And do you have -- can you just kind of walk us through what this shows on this document?
A Sure. This is what we call our line encroachment checklist. Basically, it's a field checklist for us working out in the field, our inspectors and so forth.

And we fill this data out there so we have record of the location, the line name, the structure numbers, the type of encroachment that was found on the right-of-way, and then also the property owners' information and contact information. And then there's just a brief dialogue down there about the conversations.

Q I'm not going to read the whole dialog, but in the first sentence there, do you state, "I met with Mr. Walker to review a set of landscape plans, and I found the encroaching wall and the fence. I advised that it would need to be removed and I would start pulling together documents to review"?

A That is correct.

Q So the first time that you had knowledge that there were encroachments was, what, when you went out there personally and met with Mr. Walker on January 27, 2014?

MR. ARIAIL: Objection, Your Honor. Leading.

MR. SPENCER: I'll rephrase.

THE COURT: All right.

BY MR. SPENCER:

Q Mr. Pryor, can you tell the Court the first time you had knowledge that there were encroachments on this property?

A That is correct. The day that I met with Mr. Walker and we started discussing his plans on his property is

when I discovered the encroachments.

THE COURT: I'm sorry. What I was really wanting to hear, what was the date on that? 1/27?

MR. SPENCER: Yes, Your Honor. I believe Mr. Pryor testified January 27, 2014.

THE COURT: I'm sorry. Thank you.

BY MR. SPENCER:

Q And I'll just ask you to confirm that, if you will, Mr. Pryor.

A That is correct, yes.

THE COURT: Sorry. I just missed the year. I apologize.

BY MR. SPENCER:

Q When you went out to the property, what did you discuss with Mr. Walker?

A First just common introductions, you know, who I was, what I did. And Mr. Walker and I talked briefly on his tract of land. We walked up towards the right-of-way, and he started telling me some of the things that he wanted to do on his property and, you know, kind of asking what he could and could not do. And I could visually see down the right-of-way that there were some objects in the right-of-way that appeared not to comply with our easement.

And so I listened to Mr. Walker first before --

that's part of what we do is, you know, communicate, friendly communications, and then, you know, I also had to inform him of what I found.

Q What objects did you find in the right-of-way?

A The issues that I found on Mr. Walker's property as shown in the picture on the survey is the iron fencing or maybe aluminum, the fencing, the retaining wall itself, and then the concrete patio, which is all part of the foundation around the pool.

Q I'm going to pull up Plaintiff's Exhibit 4, Bates stamped Duke 46. It's one of the pages in there. What does this picture show?

A That's looking back up towards Mr. Walker's house on the left, and that's my white truck sitting underneath the tree there in his driveway.

And what we were doing was measuring the edge of the right-of-way to show where -- how much of his pool, patio and fencing, retaining wall encroached into the easement there. So that's my tape measure that I had pulled down from the center of the right-of-way, and those are my -- you can see the two circles right there, which I can point to them here, if this is on.

Right here (indicating), these circles right here are my flags that I put to the edge of the right-of-way, and then edge of right-of-way right here is another flag.

And this is my tape measure, which is pulled from the center of the right-of-way, which is from the center of the poles that are on the right-of-way. And that's right at the edge of 34 feet from center showing how much is encroaching.

Q And so the Court's clear about the date, the date on this picture is June 20, 2014; is that right?

A Yes.

Q And is that the date you -- did you take this picture?

A Yes.

Q That was when there were some negotiations going on and you were asked to come out and mark the right-of-way; is that right?

A That is correct. Yeah. It was another visit to the property, and we've remarked the right-of-way.

THE COURT: Can I just ask a quick question? And I know we're being informal here, so I just want to be sure. I see a circle at the top of the stick right there. Is that where -- are you saying that's where another point is back there by the fence?

BY MR. SPENCER:

Q Mr. Pryor, can you explain how that was pulled?

A I can. Is it okay if I walk down there to show you?

THE COURT: Please do.

THE WITNESS: It's easier.

THE COURT: My eyes are not that great. I apologize.

THE COURT: Yeah. It's easier if I come down here.

So right up here at the top, can you see the dark wires?

THE COURT: I do.

THE WITNESS: So these are the wires right here. And if you can imagine looking down the right-of-way like this, and if I'm standing in the center under the wires, come 90 degrees off-center going towards the red line and you measure with a tape measure 34 feet over and then you put a mark in, that's the edge of the right-of-way. That's a field measurement.

THE COURT: I got you.

THE WITNESS: So then I walked up here on the other side of the encroachment and did the exact same thing. That way, it depicts an accurate measurement on either side of the encroachment. Like say it was a shed, you would know how far the shed needs to move or in the encroachment.

THE COURT: Thank you. That helps me a lot. I apologize.

BY MR. SPENCER:

Q The markings on this document, the red line that can

be seen there and then the text boxes over here, did you place those on this document?

A Yes, I did.

Q Did you follow up with a letter after the meeting that you had in January with Mr. Walker?

A I did. Per our conversation with Mr. Walker, I said that, you know, we would pull the easement documents and draft up a letter. That was our process to go ahead and notify him of the encroachments.

Q This is Plaintiff's Exhibit 8 which has already been stipulated to as being in evidence. Is this a copy of that letter?

A Yes.

Q If we go into the second -- and is it dated February 3, 2014?

A Yes.

Q And if we go into the second paragraph, did you state in your letter (as read), "Enclosed is a copy of the right-of-way document that was purchased from G.P. Brown in 1939. Please note that this document gives Duke (the Grantee), quote, 'the right to keep said right of way clear of all trees, structures and other objects except those placed thereon by the grantee'"? And then you go on to say, "This line is a 100,000 volt line and safety is a major concern. Also enclosed is a copy of

the right-of-way restrictions." Did I read that correctly?

A That is correct.

Q So we saw on the earlier document you learned about the encroachments on January 27th?

A Right.

Q And you sent this letter about six days, seven days later?

A I did. I had to do some homework. I had to go back to the office and request these easement documents. I don't have them in hand. They're recorded in the county, so I had to have our real estate agents pull the documents and draft a letter, create the folder to put all the pictures in it and put all documents in and send the letter.

Q There's a reference in your letter to this being a 100,000 volt line. Can you tell us how much voltage that is compared to, say, the light socket over there in the wall?

A You have 120 volts roughly coming out through here in the building with your general outlets, and that is 100,000 volts.

Q So not quite 1,000 times more, but about in that range?

A That is correct.

Q And is this a transmission line that crosses the property?
A Yes, it is.
Q Looking back at Plaintiff's Exhibit 4, Duke 46, can you tell us what we see here in terms of encroachments that Duke has taken issue with?
A Well, again, you have the structural wall, which is a structure that's encroaching into the right-of-way. It's got a vertical slope bank on there. You cannot transverse through the wall. You have the iron fencing which runs out into the right-of-way without any access. And then you also have the concrete patio, which is also a structure.

You know, if we were to get in there with any equipment, it would damage the foundation and everything for the patio and even the pool foundation as well.
Q You used the word "structure." Do you consider these items to be a structure?
A Yes. Clearly.
Q You consider them to be an object within the plain meaning of that term?
A Yes, I do.
Q As a part of this case, did Duke Energy have a survey done?
A Yes, we did. We had a survey.

Q And that is Plaintiff's Exhibit 5 already introduced into evidence subject to what we talked about with the judge earlier.

Is that board right there a blowup of Exhibit 5?

A That is correct.

Q If we look over to the actual survey itself, which is on the third page of Exhibit 5, is it your understanding that the right-of-way was marked by the surveyor?

A Yes.

Q And is the right-of-way marking consistent with the marking you made that we saw on the picture just a minute ago?

MR. ARIAIL: I'm going to object, Your Honor. This is based on my previous objection prior to until they prove where that right-of-way is. I mean, I know he can testify to this is what the survey says, but, I mean, clearly, I don't know if he can provide any testimony in regards to, you know, how the surveyor got to where that right-of-way was.

MR. SPENCER: Your Honor, if I may.

THE COURT: Certainly.

MR. SPENCER: I'm just asking of him if this is consistent, if the showing of the marking of the right-of-way is consistent with what he marked.

THE COURT: All right. And you may want to just lay a little foundation with him about reading surveys and things like that.

MR. SPENCER: Okay. Absolutely.

BY MR. SPENCER:

Q Are you familiar in your job with reading surveys?

A Yes, I am.

Q Is this the typical survey of a -- maybe not a typical survey. This is for purposes of litigation. But if you're looking at a survey of a right-of-way, does it typically look like what we see here?

A Yes. That is correct.

Q And we saw earlier the picture where you had marked on it the field marker right-of-way.

A Yes.

Q Do you see where the line marking the right-of-way on the survey is?

A Yes, I do.

Q And can you point that out with the pointer?

A I can point it out with the pointer.

THE WITNESS: And, Your Honor, if you'd like us to bring that survey up closer, I can show you, too.

THE COURT: I've got a smaller version of it right here.

THE WITNESS: You do? Okay. Good.

You can see right here (indicating) the surveyor has indicated the centerline. The centerline of the right-of-way is defined by the structures that are out there on the property. We measure from the center of the structures. That's how I can do a fairly and accurate field measurement, although I'm not a licensed surveyor. My field measurements, which were in the pictures we just previously looked at, indicate almost exactly where he's indicating the 34 feet from center coming through the pool, the patio. And this is where my other little flag was right here (indicating) on this side of the fence and one on this side. It's almost identical to the way I field measured it.

THE COURT: I see.

MR. ARIAIL: Your Honor, just for -- and maybe I didn't preserve the objection right. I'm not letting him -- or I'm objecting to him providing any expert testimony or any opinions in regards to surveys. He hadn't been qualified for that.

THE COURT: I'm limiting his testimony. And I think what it's being offered for is just to say that from his field measurement, that nothing in the survey conflicted with that.

MR. SPENCER: That's accurate Your Honor,

THE COURT: All right.

MR. ARIAIL: And I would just object to any of the issues that he raised about centerlines or how he marks that, anything that the surveyor would have to testify to.

THE COURT: All right. And, of course, any of this would be subject to the testimony of the surveyor about it.

BY MR. SPENCER:

Q Let's go back to Exhibit 1 in the middle paragraph there. We've talked about the language and read into the record the language about what Duke Energy's right, as it sits here, to keep said right-of-way clear of all trees, structures and other objects. Based upon your experience working with Duke Energy in the asset protection department, did you make a determination about whether or not the fence, the patio and the retaining wall were structures or objects within the meaning of that right-of-way?

A Yes, I did.

Q Okay. And what did you determine?

A I determined that they are encroaching into the right-of-way and they do not comply with this easement document.

Q It goes on down and talks about "in any way endanger the proper maintenance and operation of the structures

and other property placed upon said right of way by the grantee." Did you make a determination about whether or not the patio, the fence and the retaining wall interfered with the proper maintenance and operation of the structures and other property placed upon said right-of-way by Duke Energy?

A Yes, I did.

MR. ARIAIL: I'm going to object, Your Honor. I don't know if he's letting any opinions in regard to that or if he's been qualified as anybody who can provide expert testimony in regards to what is endangering proper maintenance, operation of the structures. I mean, he's an asset protection individual. I think they have to have an expert that's going to testify that there are safety issues with that. And from what I've heard so far, he doesn't have the background to be able to qualify for that.

THE COURT: All right. I'll tell you what. I don't necessarily think expert testimony is required here. If you'll just lay a little more foundation with him and talk about what he bases this on. It sounds like this is within the scope of his employment ---

MR. SPENCER: Yes, ma'am.

THE COURT: --- to make this determination. So let's hear about it.

BY MR. SPENCER:

Q Mr. Pryor, as a part of your work for Duke Energy, do you have to make determinations about whether or not encroachments interfere with the maintenance and operation of structures within a right-of-way?

A Yes, I do. That is my job. I actually do that every single day. We all have eyes in the field, but we walked what's going on out there in those right-of-ways. We work with customers on what they can and cannot do. We support our construction and our maintenance folks who need to be able to get the equipment in there.

Because one of the things that customers don't understand is what it takes to have the trucks go in there to set up the 100-foot buckets with four outriggers that are very wide trucks. We can't set those trucks underneath a 100,000 volt line. They have to be set up to the edge of the right-of-way.

So those are the things that I do know, that our trucks cannot work, or our folks cannot work in certain circumstances. So I have to make a call on what they can and cannot do and where they can and cannot work. So that's how I make a determination of what is okay in the right-of-way and what is not okay based on the easement document.

Q I believe you testified that that is, in effect,

your job, and that's what you do every day.
A That's what I do every day.
Q With respect to this particular case and in doing what you do every day, did you make a determination about whether that retaining wall, the fence and the patio were interfering with the maintenance and operation of that transmission line?
MR. ARIAIL: I'll preserve my previous objection.
THE COURT: All right. It's noted for the record. All right.
MR. SPENCER: I believe he can answer.
THE COURT: He certainly can.
THE WITNESS: Just review again. I got distracted.
BY MR. SPENCER:
Q Sure. As a part of what you do every day in determining whether or not certain encroachments interfere with the maintenance and operation of a transmission line, did you make a determination in this case as part of your normal regular business activity whether or not the wall, the fence and the patio interfered with the proper maintenance and operation of that transmission line?
A Yes, I did.
Q And what was that determination?
A That they, in fact, violate the easement, and they

were a problem for Duke Energy.

Q And did you sum that up in a letter that we've already seen to the Walkers?

A In person and in the letter.

Q You made reference to the issue of a transmission line work truck having to be set up on the edge of an easement and how it has 4-foot outriggers. Can those outriggers, to your knowledge, be set up over a retaining wall or through a fence?

A Safetywise, no, they cannot.

MR. SPENCER: Mr. Pryor, those are all the questions I have. I may have some redirect after Mr. Ariail asks you some questions.

THE WITNESS: Thank you.

THE COURT: Mr. Ariail?

MR. ARIAIL: Thank you, Your Honor. May it please the Court.

THE COURT: Yes.

CROSS EXAMINATION

BY MR. ARIAIL:

Q Mr. Pryor how are you doing today?

A Pretty good. How are you doing?

Q Good, good.

Let me just start off real quick and get a quick understanding of this document. This is a survey that

was put in, I think -- I don't know exactly what the exhibit number is. As you see here, there's a row of cypress trees at the top. Do you agree with that?

A Yes.

Q Okay. A fence, too.

THE COURT: I'm sorry?

MR. SPENCER: Your Honor, this is subject to the motion in limine with respect to the cypress trees and the fence. They're not on Mr. Walker's property. Actually, may I?

THE COURT: No.

MR. ARIAIL: Well, Your Honor, the reason -- and they've opened the door to it. They put in the survey, and I clearly should be able to cross-examine based on what's on the survey.

Now, their motion was for other items outside of that. What they've done is specifically put in, which I should be able to cross-examine in regards to this document and the specifics that are set forth on it.

THE COURT: All right. I'm going to allow him just to ask what's on the survey but to go no further than that.

MR. ARIAIL: Okay.

THE COURT: Just on the survey.

///

BY MR. ARIAIL:

Q Mr. Pryor, there's a row of cypress trees at the top, correct?

A Correct.

Q Okay. And there's a wood privacy fence I think that's dotted, slashed and then X marked on the outside of that; is that correct?

A Correct.

Q And I think -- let me make sure because this is easier to see. I think it is that 46 -- I think it's Exhibit 4, Bates marked 46, the one that we're talking about that you marked with, I guess, your little circles and all that.

A Yes.

Q That shows these trees, if I'm not mistaken; is that correct?

A It does.

Q Okay. And it shows this wood privacy fence that is there also?

A Correct.

Q Okay. So we've got a wood privacy fence and a row of cypress trees at the time this survey was done that take up -- and I'm not going to piece together exactly how many feet it is, but let's say it's three-quarters of that 68 feet, correct?

A Correct.
Q I mean, it's completely blocking any type of access, any type of trucks that can get in there, correct?
A No.
Q Okay. So how are they going to get through the fence, and how are they going to get through the cypress trees?
A The fence crosses the right-of-way on an angle -- on an approved angle, and it does not go all the way across the right-of-way. Just such as Mr. Walker's driveway crosses the right-of-way, we allow items to cross the right-of-way. Some of those items are utilities, driveways, fences, tree lines.

The trees were a nonapproved species of a tree. I learned through this case that those trees were being trimmed, and it was some type of trim agreement. But I'm not part of the vegetation group so I don't handle vegetation. But I do handle issues such as the fencing.

So we do allow a fence to cross the right-of-way, and it meets those guidelines. And if that fence crosses all the way across the right-of-way, I explained to Mr. Walker that they would have to have a 16-foot-wide gate in it. But it does not have a -- it does not cross all the way across the right-of-way.
Q Okay. Maybe I can say it a different way. This

encroachment, the cypress trees and the wood privacy fence encroach the easement farther than what Mr. Walker's encroachment is, correct?

A Define "encroachment."

Q I mean, going -- say feet across, this right-of-way -- I mean, we've got 68 feet, we'll say -- give or take let's say it's 55 to 60 feet, correct?

A Approximately.

Q Approximately. Okay. Here we've got, what are we saying, 10 to 15 feet?

A I think it's closer to 17.

Q 17 feet. Well, 50 and 55 is greater than 17; wouldn't you agree?

A Right.

Q Okay. And Duke's allowed that to be in place?

A That's correct.

Q Okay. Now, what we've got to understand is the asphalt drive right here is his asphalt drive, correct? I mean, it attaches into his property?

A Correct.

Q Okay. So the way Duke accesses this property to get down this line is they come across his property out into the right-of-way, correct?

A It is a course of action to come in that way. It may not be the only way in.

Q Okay. Well, then tell me, what are the only -- what are the other ways to be able to get into this piece of property.

A I cannot tell you from looking at these pictures right here. But generally, we can come in -- we have the rights or the easement for ingress and egress to the property, and it's not defined in a specific area. So -- but right now, that's the easiest way is to come down the driveway. It turns right down the right-of-way. Then that's generally what they do.

Q Okay. Now, he would come down, you would bring your trucks down, and then you would be able to come down and set up to be able to maintain this wire, correct?

A Right.

Q Okay. So we're talking -- and I don't want to get into square footage because I'm certainly not good at that. But this is probably an area of, let's say, at most, 20 by 20, would you say?

A Approximately, yeah.

Q So we've got 400 square feet of encroachment, would you -- give or take?

A Correct.

Q Okay. So as you see from this there's an area that is -- I guess has the fence around it which is marked by, once again, a little dash with an X mark that, I guess, a

truck couldn't get by there, correct?
A Correct.
Q Okay. So to maintain this wire, which I take is this middle large black line; is that correct?
A It's a centerline. It's not a wire.
Q Okay. That's the centerline, but the pole will be probably above that, correct?
A The poles are, yeah, vertical on that centerline, and the wires are on either side. So the wires are offset.
Q Okay. So when you set up and need access to this wire -- first of all, have you ever had to have access to this wire on Mr. Walker's property? Do any maintenance?
A I don't have knowledge of that. At some time, yes, we have been there.
Q So you can't tell us when that was, correct?
A No. I can't tell you.
Q You don't know what work was done on his property?
A I'm not part of those construction and maintenance group. I support them. So I'm not privileged to look at all their records every time they go out and maintain a line. It could be tonight, it could be tomorrow, it could be next week.
Q All right. And what we're saying is you can get access to this line on either side of this fence,

correct? I mean, down here in this area where I'm pointing to below the fence or above the fence, correct?

A Right now we have no choice.

Q Okay. So that's what you would have. And you also have 34 or whatever feet on the other side to be able to do that, correct?

A Correct.

Q You also can do it underneath the wire if you need to?

A Not all the time. What you fail to understand is that we have to set the trucks up on either side because you have two sets of wires on either side. So here's the centerline, and you've got 100,000 volt wires running on this side, you've got 100,000 volt wires setting up on both sides. So you can't just limit your access to one side or the other. You have to be able to get to both sides.

Q Okay. Now -- and we went through, and I want to make sure that I understand this correctly. You say there is -- and I don't have the right-of-way specifically in front of me, but it endangers the operation.

A Uh-huh.

Q Tell me -- I mean, I know you said it endangers the operation. Tell me how it does.

A Well, there's several things. If you look at it from a perspective of Mother Nature does something tonight and a storm happens and a tree falls down right down here in the wood line below Mr. Walker's property, then we have to have crews dispatched immediately because it's shutting down not just a neighborhood. It's shutting down thousands of people.

And the response time, it has to be immediately on these lines because these are protected right-of-ways that we have to get the lines restored. We've got to get power restored as quickly as we possibly can. In order to do that, you have to have tree crews come in down in here (indicating). You've got to have the maintenance crews come in down here (indicating). You have to have all of their safety gear, all of their equipment. You've got to have the lines grounded. Then you've got to have trucks here to set up and hold up those conductors over this area here (indicating). I mean, in other words, like most people think that they have to set up at the poles. That's completely incorrect. When they have to work on an energized wire, to do it safely, they have to set up large trucks in the span of that right-of-way, anywhere in the span of that right-of-way.

Q Maybe I missed it. But how is this endangering the operation or maintenance of these wires? How is this

retaining wall?
A Maintenance-wise for one. Like I just explained, you can't maintain a line if you can't set up a truck right there. You can't work on the conductors right there if you've got to work on the conductors. You can't pull new wire up and run wires across Mr. Walker's fence and patio and pool. We can't set up a truck right there. So it interferes in many ways.
Q Okay. But what I'm saying is you can get access below it or above it to be able to maintain and operate that line, correct?
A No. I disagree.
Q You have to specifically have the piece of property that he has put this 400 foot section to be able to operate that line?
A We need 100 percent of the right-of-way that we purchased, 68 feet, because we don't have rights outside of that right-of-way. They're limited rights.
Q That was another question I have. What information have you relied upon to tell me that that right-of-way is where it should be? I mean, we've got 64 feet -- or, excuse me -- 68 feet. You're going off the survey, right?
A Right. I'm going off of my knowledge, too, because even back in 1939, this right-of-way was purchased at

68-feet wide. That number is a number that is a standard number for transmission line right-of-way of this voltage.

So the structures were set in the center of the right-of-way, and that's how we measure them, from the center over 34 feet on each side of center.

Q Okay. Now, we're going back to 1939. Were you born at that ---

A No, sir.

Q Okay. Didn't think so.

Now, you've interpreted a document back from 1939, and I want -- it's Plaintiff's Exhibit 1. Let me just ask you a quick review of this, and take your time looking at it. Where in the world does it say that this right-of-way is 34 feet on each side of the centerline of these structures?

A I don't need to read it. I've read it. It doesn't say that.

Q Okay. And second of all, back in this time, you know, back in 1939, I'm not sure about Duke Power, but they're not maintaining structures like they are now, correct?

A Things have changed over the years.

Q Okay. Now, where in this document does it say anywhere that the 68 feet that we have put on this

document -- or this surveyor has put on this document is correct?
A Can you rephrase the question?
Q What I'm asking is, where in this document can we tell exactly where that 68 feet is?
A Where the structures are located on Mr. Walker's property.
Q Okay. But here's the question I have. Back in 1939 when they put this together, there were no -- you don't know what the structures were, do you?
A No. I don't have the knowledge of it. I would say that they were probably towers over poles.
Q Okay. So let's say a structure is 15 feet over here (indicating) on this side, okay?
A Correct.
Q So it would be 34 on this side, and then 34 on this side which would allow his easement or his encroachment to fall within it, correct?
A I don't know.
Q What I'm trying to get at is if your -- if the centerline is off in this ---
A Yeah.
Q --- then the whole easement would be off, correct?
A Correct. But I trust the information that I have.
Q I know. And you do a lot of this because you're an

asset protection manager, correct?
A Specialist.
Q Specialist.
You look at a lot of deeds and a lot of plats and a lot of surveys through your line of work, correct?
A Yes, sir.
Q Now, tell me, you know, normally, when you put together a survey or you put together, you know, a right-of-way, you attach a plat or a survey which shows you where this type of easement is, correct?
A Sometimes there are other documents, and in this case, this is what I was provided.
Q Okay. So -- and this is where I'm getting at. I mean, I put together one last week for a special-purpose district, and when you put it together, you put the bearings, the pins, because in 60, 70, 80 years down the road, somebody's going to need to know to go back to figure out how you calculated that easement, correct?
A Well, today it's based off where the structures are located.
Q Okay. But here's where the issue is. Back in 1939, there was a -- there's a 68-foot easement that was granted to Duke Power, correct?
A Right.
Q Okay. Now, you know that it was granted from the

Lanford's to Duke Power, correct?
A Correct.
Q There's nothing that you have in your records that shows you what piece of the 68-foot segment of their property they granted easement on, correct?
A Other than I know to maintain 34 feet on either side of centerline of that structure today.
Q But you don't know if that was what was agreed to back here, correct?
A Well, it's what we maintain today, and have for many years.
Q Let me just go through this. So my backyard has a section where Duke Power has an easement to come in and cut.
A Right.
Q Okay. And it's marked by, hey, here's your 10-foot segment on the back that they can come in and they can cut my cypress trees down, which y'all have done before.
A Right.
Q Okay. But it's designated on a survey which shows that, okay?
A Right.
Q That's just my -- I don't have one where it is just that there's a 10-foot segment anywhere in my property where you can have it to. Is that normal?

A I can't answer if it's normal or not. All I can tell you is I trust the survey that we have, and you've got arguments about the survey.
Q Okay. But -- and what I want to get out of your testimony is you believe there's a 68-foot right-of-way.
A Correct.
Q You don't know if this is correct as to where the 68-foot right-of-way should be.
A It's correct to my knowledge, but I'm not an expert in survey.
Q Got it. And you have nothing that you can present to the Court today or give me which shows in 1939 what the right-of-way was and where it was placed.
A Other than the document you have.
Q Correct. Which is this deed which doesn't say. It just grants a 68-foot right-of-way.
A Right.
Q Now, this right-of-way, if I'm not mistaken, I want to go back to it, allows for fences, correct?
A It reads that some fences can be maintained per the easement document.
Q Used for -- let's see. Right-of-way to be used for growing such crops and maintaining such fences, correct?
A Correct.
Q Okay. So if you're allowed to maintain a fence,

then you're also allowed to grow crops that I guess wouldn't interfere with this area; is that right?
A Crops can be planted in the right-of-way.
Q Okay. So you can plant those items?
A As long as they're not clearance issues.
Q Okay. And you're saying that the reason that this fence is not allowed is it interferes with Duke's ability to maintain and operate the line?
A Correct.
Q Okay. Now, when you went out, Mr. Walker was the one that provided you notice of this encroachment, correct?
A He didn't provide me knowledge of the encroachment. He asked me to come and explain to him what he could and could not do on a right-of-way.
Q He contacted you?
A He contacted me.
Q Okay. And y'all discussed it. And this was nearly a year after, I guess, the work was done; is that correct?
A I don't know the dates, off the top of my head, when the work was done.
Q Okay. So you didn't -- did he tell you when you were out there, hey, I've done the work at this point in time and you don't never come out here?

A He may have. I just don't remember the dates.
Q Do you remember ever making a comment to him that we do flyovers and we would have caught this?
A Sure.
Q You said that?
A I said that we do flyovers.
Q Okay.
A I didn't say that we would have caught it. I may have said something along those effects. I just don't remember word for word.
Q Well, I mean, did you tell him that we do flyovers, and during those flyovers, we catch these ---
A We look for encroachments, looking for several things.
Q Okay. And are you in charge of the flyovers during this period of time?
A I'm not in charge of the flyovers, no. I get the reports.
Q Do you know if there were any flyovers that were done during this period of time?
A Not when I was out there. They fly periodically, so . . .
Q Okay. But what I'm saying is, at some point in time, this work was done, and then you came out to be able to look at the property. I think it was on

1/27/2014.

A That's correct.

Q So during the period of time when it was done to when it was built to the time you came out, are you aware of any flyovers during that period of time?

A There was flyovers before that. I don't know if they took place before or after construction. I can't verify that.

Q Okay. Well, then tell me, did any of this -- in any of those flyovers, was it ever drawn to your attention that there was an encroachment?

A The first of my knowledge was when he called me.

Q Okay. So if a flyover was done, then nobody reported any type of encroachment, because you would be the one that would get that information.

A I would get that information.

Q Okay. So you hadn't received that?

A There are times where that, you know, depending on where the helicopter flies, the skew, the angle, they may not see something. That's why they fly it multiple times periodically to catch things they may not have seen. Because one flight doesn't do you justice along a transmission line when you're flying at speed.

Q Have there been any issues with this line that you're aware of, I guess, since 2013?

A What do you mean? What kind of issues?
Q What I want to know is are you aware of the work that has been done or any maintenance on these lines that occurred since 2013?
A I don't have those records, the maintenance records. I don't have those records.
Q You were coming to testify today about this line and about maintenance issues, about ---
A Because I deal with encroachments, like I deal with Mr. Walker one-on-one. I don't do the maintenance.
Q Well, my issue is you came in here and you say that there's issues with safety and maintenance and operation of this line, but you haven't brought any documents showing what work y'all have done for the period of time we're talking about.
A What you have is what I brought.
Q Okay. So if there were issues with maintenance and with operation and things that were a problem here, you would have brought that, correct?
A I wasn't asked to bring those records.
Q Okay. So can we take it that there are no maintenance issues or operational issues with this line?
A All lines require maintenance and they do have issues, so we do maintain that line. It's not like something you build and just leave there. So we do

maintain that line and it's monitored.
Q Would you agree that a right-of-way that we have here, one that allows for fences and allows those items and then prohibits objects, that that would be ambiguous?
A No. I read that document that it was done in 1939. A lot of times those easement documents were purchased back in the day when it was mostly all farm land, and they allowed the farmers to maintain fences. It doesn't say maintain existing fences, but in today's world, a fence is a structure. We've got a set of guidelines and restrictions that we try to work with folks with what they can and cannot have. A fence crossing is one of those items that you can have.
Q What about an easement that allows for a fence to be maintained? Doesn't say what type of fence.
A Right.
Q It doesn't say if it's a barbed wire, an electric fence, anything of that nature, but it allows for a fence and then restricts other objects. Wouldn't that be ambiguous or ---
A Not at all.
Q --- create an issue?
A Not at all, because it says in the paragraph above that if it interferes with our ability to do our job, then it does not comply with the easement. And that's

what we're saying.
Q Okay. So the theory is it has to be an interference with the maintenance and operation of this line; is that correct?
A And an interference with the easement document itself. It is a structure in the right-of-way.
Q I'm confused. There's two things you just said right there. Interference with the line, and then interference with encroachment of the easement. What does that mean?
A The easement gives us the rights to keep it free and clear of any and all encroachments or structures of any nature; is that correct?
Q It says, ". . . endanger the proper maintenance and operation of the structures and other property placed upon said right-of-way."
A Correct.
Q Okay. So you're saying that if it endangers -- the determination is whether or not this encroachment endangers the operation, maintenance of that line, correct?
A Correct.
Q Okay. So if there's a determination that it does not and that y'all have access to be able to get in there on both sides, then you would agree it doesn't violate

that right-of-way.
A I'm telling you what I think, and I'm telling you that it violates it. So whose opinion are you asking to make that determination?
Q What I'm asking is if you look at the document and you make a decision that this doesn't endanger the operation or maintenance of the line, you make that decision ---
A Right.
Q --- then it doesn't -- it doesn't fall out of compliance with this right-of-way, correct?
A I still disagree with you.
Q But you would agree that if you say it does not endanger the maintenance or operation of the line, it doesn't fall -- it doesn't fall outside of that, then you'd be okay to do that?
A Like grow corn.
Q I'm going to take that that you're not going to give me a straight answer on that; is that right?
A I -- I agree with your statement. It's like I said, if you said "grow corn" or something else, something that did not interfere.
Q So if the determination -- and this is the last time I'm -- that does not interfere with the maintenance or operation of the line, it is not out of compliance with

that right-of-way.
A Correct.
Q Now, Mr. Walker's been very compliant with you and worked with you during this process, correct?
A Yes.
Q I mean, I know you deal with some people and I've dealt with before that can be quite ornery in regards to these types of situations, correct?
A Correct.
Q And he's tried to work with you and tried to find a resolution for this, correct?
A It's been limited, but we've been pleasant with each other. No problems. There's nothing personal at all.
Q There you go. Y'all shook hands when you came in here.
A Oh, yeah.
Q Good. If you'll bear with me one second.
One thing I should have hit in the beginning, the right-of-way -- and I think -- and if I'm wrong, we can go back. You indicated that it did not allow patios and retaining walls, correct? Is that right?
A Correct.
Q Okay. But it does not say specifically that those items are excluded, does it?
A Correct. It doesn't say specifically.

MR. ARIAIL: Okay. Thank you.

I have no further questions, Your Honor.

MR. SPENCER: Redirect, Your Honor?

THE COURT: Certainly.

MR. SPENCER: The first questions I have, Your Honor, relate to the issue of the cypress trees and the fence that I want to be able to respond to subject to our motion in limine.

THE COURT: Certainly, certainly.

REDIRECT EXAMINATION

BY MR. SPENCER:

Q So that we're clear with the Court, Mr. Pryor, these cypress trees and this wood privacy fence that are right here (indicating) are not on Mr. Walker or Ms. Walker's property; is that right?

A Correct.

Q And there is what we see is a wood privacy fence right here that you -- I think you made reference in your testimony to a crossing fence?

A Correct.

Q Is that what this is? Can you drive around it?

A Yes.

Q So it just is -- it's there, but just crosses?

A Correct.

Q You do have a couple of pictures to show. These are

not an exhibit, but we did produce them. It's Duke 53 and Duke -- we previously produced this, and I don't want to make this an exhibit, but it's Duke 53. We see these cypress trees, Leyland cypress trees here on the survey. Have those been removed?

MR. ARIAIL: Your Honor, I don't know where we're going with this, but, I mean, I would clearly object. If he's going to get into subsequent remedial things that have been done with these cypress trees, I clearly want to object to that. I mean, they were there at the time of the survey. They've been there. I don't know if they've cut them down or what they've done with them since, but ---

THE COURT: I think, if my memory serves me correctly, you testified that trees were something that could be removed fairly easily or pruned in some way or something like that. If -- this is what this testimony, these questions will go towards?

MR. SPENCER: Well, Your Honor, it also goes to the fact that he's asked him all these questions about interference and everything. It is a subsequent remedial measure, which I don't think it is. It's not -- what he's trying to prove, I think, is that we can get multiple means of access, and we're not enforcing our rights equally along this easement.

THE COURT: I've got you.

MR. SPENCER: And so I think this is absolutely relevant and not subsequent to any exclusion based on subsequent remedial measures because of the fact it's showing just what he says we're not, which is we're enforcing the rights.

THE COURT: Yeah. I don't think it's any subsequent remedial measure because it's not necessarily between these two parties that are subject to this action.

I'm going to allow some brief testimony about it.

MR. SPENCER: Okay. It won't take long, Your Honor.

BY MR. SPENCER:

Q Mr. Pryor, have those trees that are shown in this survey been removed?

A Correct.

Q I believe you said in your earlier testimony with Mr. Ariail that it was because they were noncompliant species?

A Correct.

Q All right. Do we see the edge of the fence over here?

A I do.

Q And I believe you testified earlier that that's just a crossing fence, it's not enclosed, and you can go around it?

A That is correct.
Q Speaking of fences, let's go into that paragraph where it says "it is agreed." This is the -- is this the only reference you're aware of to fences in the right-of-way?
A Correct.
Q And it says, "It is agreed that the owner of said tract of land may use, or permit said right of way to be used for growing such crops and maintaining such fences thereon as may not in any manner interfere or conflict with the use of said right of way and rights by the grantee for the purposes hereinabove mentioned."
A Correct.
Q That's all the language about fences, not just a part of it that Mr. Ariail was talking about.
A Right.
Q All right. This fence here that we see encroaching into the right-of-way from the Walker property, how is it different from this fence (indicating)?
A It turns and it runs parallel within the easement. It also has -- it's made out of metallic objects. It's also they've got a retaining wall backing up against it. We don't know if those structures are tied into the retaining wall.
Q Are those differences differences that make a

difference to Duke Energy?
A Yes, it does.
Q Why is that?
A Because those structures interfere with our ability to safely maintain and operate that line with serving our customers 24/7. It's directly related to safety for our employees and the public.
Q Mr. Ariail asked you about flyovers. Your first knowledge, I believe you testified in your testimony, of these encroachments was at the end of January 2013; is that what you testified to?
A That is correct.
Q And you sent your letter a few days later in early February. Do you know when the pool was built?
A I don't recall the date.
Q We'll ask Mr. Walker those questions.
A Yeah.
Q Do you know what specific flyovers occurred between the time this was built and when you met with Mr. Walker?
A We have our spring and our fall flights. Mid-spring, like May, April.
Q In the right-of-way, which is Exhibit 1, where it talks about the right to keep said right-of-way clear of all trees, structures and other objects together with the further right to cut away and keep clear any trees

outside of the strip that might in any way endanger the proper maintenance and operation of structures and other property placed upon said right-of-way by the grantee, we're just talking about that. Is there any requirement on Duke Energy that you're aware of from this right-of-way or otherwise that the method of getting to the right-of-way be the easiest or the only one to be able to enforce these rights?

A No. Not at all.

Q Is that what Duke -- did Duke Energy purchase some sort of contingent right that if they could get in over here, then it's okay if they don't get in over here?

A No. Because they knew circumstances change every day with weather, anything.

Q Is there any requirement that you're aware of for Duke Energy to make an exception for Mr. and Mrs. Walker's fence, retaining wall and patio?

A No.

Q What happens when exception after exception is made along the right-of-way?

MR. ARIAIL: Objection, Your Honor. I don't know if we've gotten into this redirect. I don't know if I got into exceptions being made, so I'm going to ---

THE COURT: Well, I do think that that was -- I understood at least your question into the go-to reasons

that an exception could be made in this case from the plain language of the deed, so I'll allow it.

BY MR. SPENCER:

Q From your knowledge as an asset protection specialist, what happens if exception after exception is made for property owners along the right-of-way?

A We lose -- theoretically, we lose our easement rights altogether and our ability to safely maintain that line.

Q Is it part of your job in asset protection to anticipate the problems that might occur down the line?

A Every day.

MR. SPENCER: Thank you, Mr. Pryor. I don't have anything further.

THE COURT: Mr. Ariail?

RECROSS EXAMINATION

BY MR. ARIAIL:

Q Since we're on the topic of exceptions, tell me how many exceptions you've made as part of your job to homeowners that have encroached?

A I can't think of too many at all.

Q Can't think of too many? Well, you've made some.

A There's a few times where there was items that have been in the right-of-way for a very, very long time. I can't tell you specific examples off the top of my head.

Q Well, I mean, but you've made exceptions to encroachments and right-of-ways, correct?
A Correct.
Q Okay. And from what I'm understanding is, you know, they still would be issues that could cause danger, could, you know, affect the operation and maintenance, correct?
A Correct.
Q Okay. So y'all have done that in the past and have made those exceptions.
Now, the flyovers, if I'm understanding, May, April is when one of the flyovers is done?
A The time frame fluctuates a little bit. It's generally spring and fall. Then they plan out those dates. As we get closer to the flights, they plan them out, so I don't have the exact date.
Q Right. And I'm going to make sure I'm correct on the dates. But you went out there on January 27th or 29th of 2014?
A Right.
Q Okay. So if the work was done, let's say, the year before, January, February of 2013, then there would have been two flyovers, correct?
A That's a possibility.
Q Possibility.

A Yeah.
Q Okay. When you say "possibility," is it not -- I mean, it's not a definite that flyovers were done on these lines?
A No. There are flyovers done, but I need to know that they flew that line. I can't sit here and tell you that they flew that line on a specific date or when. What I'm questioning in my head is I don't know when the pool was built, so I can't tell you if two flyovers or three flyovers or one or none. I don't know.
Q Now, you went into a little bit about the type of fence and the issue with the fence that is at the Walker's residence right there. Now, my understanding is it's a metal fence; is that correct?
A Some type of metal. I don't know if it's aluminum or steel.
Q Okay. And you've -- are there other metal fences along this right-of-way or easement here?
A I'm only familiar with this property.
MR. SPENCER: Your Honor, I'm going to object to this as subject to the motion in limine.
THE COURT: You're talking about this particular easement?
MR. ARIAIL: Yeah. I'm talking -- I mean, he asked him -- here's my dilemma. I believe he opened the door

with regards to it. With the fences, he's saying that there's an issue with regards to fences here because of the metal with that. Well, my question is, are there other fences that are on here based upon if he's got an issue with that, has he asked them to be removed if they're metal fences.

MR. SPENCER: Your Honor, I only asked him about ---

THE COURT: Objection sustained. It's sustained.

MR. SPENCER: Thank you.

MR. ARIAIL: Your Honor, can I at least proffer that?

THE COURT: I'll certainly allow you to proffer that question. And just so the record is clear, this is just a question proffered solely for the record. All right?

MR. ARIAIL: Thank you, Your Honor.

BY MR. ARIAIL:

Q Metal fences, are there other metal fences that are located along this 68-foot easement in the vicinity of their house?

A Not to my knowledge.

Q Okay. Have you allowed other metal fences to remain within a Duke Power easement at any time during your career?

A It depends on the easement document itself. So there may be cases where there's something in there and

the easement -- specific easement document allowed it. So like in this case, in this situation with Mr. Walker's easement, the answer is no.

Q Okay. But -- and maybe I'll say it this way. Have you had right-of-way documents which allow for fences and you have allowed them to maintain a metal fence in those right-of-ways?

A There are some places, yes.

MR. ARIAIL: Okay.

THE COURT: All right. Does that conclude the proffer?

MR. ARIAIL: That's my proffer, Your Honor. Thank you.

If you'll bear with me one second.

THE COURT: Oh, certainly. Take your time.

BY MR. ARIAIL:

Q A couple more issues. On this document, the survey -- I keep going back and I probably should find the exhibit number here soon. But on this survey, it doesn't list any structures that are placed on the right-of-way for the Walkers, correct?

A Explain. You mean structures like his pool/patio or you mean like our towers?

Q That was a bad way of saying it. Thank you for correcting that.

There are no Duke Power structures -- maybe I'll just say this -- Duke Power towers located on his right-of-way?

A Correct.

Q Okay. Now, the hedge -- and I don't want to go back and call this a cypress hedge. You've indicated this is on his neighbor's property. Are you sure about that?

A I was basing that off of what Mr. Walker told me when I was there. He told me it was on his neighbor's property.

Q Okay. Have you looked at his survey or plat of his property to determine if this is on his property?

A I did not analyze to see where the property line is, including the trees.

Q Well, the reason -- I'm sorry. I don't mean to cut you off. The reason I'm asking that is it says "property line" at the top here, and it shows these trees. Give or take, half of them or so are halfway in and halfway out of his property line. Do you have any reason to believe that there -- this is -- they're not on his property?

A Looking at that, I might say that the neighbor planted some trees on Mr. Walker's property. I can't tell.

Q Okay.

A He might have an issue with his neighbor's trees.

Q Okay. Well, he doesn't have an issue anymore because y'all cut them down, correct?
A Well, we cut down what was in the easement, based on my knowledge.
Q Okay. So you didn't cut down some of the trees?
A We cut down the trees that were inside the right-of-way.
Q Okay. So the ones that are in the right-of-way y'all cut down. Did you consult him about that?
A That's not my job.
Q Who does that?
A Vegetation management handles tree-related issues.
Q Okay. So they would have gone to him and basically said, "We're going to cut down your trees"?
A I don't -- I don't work in that field.
Q Did you have an agreement at some point in time with his neighbor about a trimming agreement?
A I heard that there was. But that firsthand knowledge came from Mr. Walker. He told me that there was an agreement.
Q Okay. But you weren't aware of -- you didn't negotiate that?
A I've never seen it, never had anything to do with it.
MR. ARIAIL: Okay. I have no further questions,

Your Honor. Thank you.

THE COURT: All right. Anything else?

MR. SPENCER: Nothing further Your Honor.

THE COURT: Sir, you can step down.

Why don't we take just a short break.

(WHEREUPON, a recess is taken at 11:10 a.m.)

THE COURT: All right. Yes, sir?

MR. SPENCER: Your Honor, I'm ready to call my next witness if the Court's ready.

THE COURT: Certainly.

MR. SPENCER: We call Frederick M. Brooks, P.E.

WHEREUPON,

FREDERICK BROOKS

After having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SPENCER:

Q Good morning, Mr. Brooks.

A Good morning, sir.

Q If you will, state your full name for the record.

A Frederick Michael Brooks.

MR. SPENCER: Your Honor, I have a PowerPoint presentation we'll be going through in Mr. Brooks' testimony. I've provided a copy to Mr. Ariail, and I have copies for you and your law clerk.

THE COURT: Certainly. Oh, thank you.

MR. SPENCER: Your Honor, as a part of Defendant's Exhibit 6, Mr. Brooks' CV is included, just for purposes of the record.

THE COURT: All right.

BY MR. SPENCER:

Q Can you state your business address for the record, Mr. Brooks?

A Sure. 2 -- I don't -- 2 -- it's O'Neal Lane, Baton Rouge, Louisiana. 2039, I believe.

Q All right. And what's your educational background?

A I have a bachelor of science in electrical engineering, Louisiana State, 1967.

Q By whom are you employed?

A Brooks, Jackson and Little, Incorporated.

Q Are you a practicing electrical engineer?

A Yes, I am.

Q What is the business of Brooks, Jackson and Little, Incorporated?

A We're primarily a -- what I'd consider to be a forensic or investigative engineering company. We're a consulting engineering company but specializing in investigative work.

Q How long have you been engaged in the practice of electrical engineering?

A Over 45 years.

Q Are you a registered professional engineer?
A I am in two states.
Q Do you belong to any professional organizations?
A Yes, I do. And quite a number of them.
Q Are you a member of the National Society of Professional Engineers?
A I am, yes.
Q Are you a member of the Consulting Engineering [sic] Council?
A I am.
Q The Institute of Electrical and Electronics Engineers, also known as the IEEE?
A Yes, sir.
Q And the Professional Engineers in Private Practice?
A Yes, sir.
Q The American Society of Safety Engineers?
A I'm a member of the Safety Engineering Society, yes sir.
Q And the National Association of Fire Investigators?
A Yes, sir.
Q Could you give the Court a brief background of your working experience since you've received your engineering degree from LSU?
A Sure. I started right out of school, actually was going to graduate school and started working as -- in a

consulting engineering business. Electrically, electrical type work starting out in electrical projects for electric utilities, for industrial electrical concerns and chemical -- petrochemical industry, also. Also in the sugar industry: Louisiana, Florida, South Texas, South America, the Caribbean islands. We did a lot of work with sugar factories, sugar processing plants.

I guess for 16 years I was in a consulting engineering firm, came to be the chief operating officer of that company. It employed about 250 people. It was in the top 500 design firms, engineering, back in the '80s. And during that period, I gravitated from doing actual design work to project management, to company management, managing other people. But I always sort of had my fingers in the engineering including investigative work.

The work we did for the electric utilities was primarily for smaller utilities like rural electrification, cooperatives and municipals. So when an accident or an incident or something happened on their system, I would call to go out and document the scene or make an investigation.

In the process, we also did transmission design work, distribution design work actually from inception to

routing of high-power lines, transmission lines to right-of-way acquisition, to actually purchasing the -- having people go out and purchasing fee simple or getting easements for right-of-way, then design the lines, and placing of them, and seeing that they're constructed properly.

After that I was at Barbay Engineers to about 1981. I went off into business for myself and with partners, then went back and bought the former company in the '80s and stayed with it, basically, doing similar work with a little bit more investigative work flare in that period up till like 1991 where I sold out of that company and started a smaller more forensic -- and by forensic, when I say "forensic engineering," I'm talking about investigative engineering, equipment failure analysis, accidents involving electrical facilities, both electric power lines and industrial, commercial, even -- even product stuff around your home, fire causing origin explosions, big explosions and other similar -- business interruption, companies that shut down because of the power interruption. I would tend to get involved in those type of cases, too.

So that's -- that's sort of a basic history of what I've done in my career.

Q All right. I think you touched upon this some, but

throughout your career, have you either been directly or indirectly involved in electrical design engineering or perform electrical consultation for electric utility companies?

A Yes. I have since 1967.

Q About how many companies have you done electrical design engineering or performed electrical consultation for?

A Well over a hundred.

Q And how many states are you familiar with the practices of electrical utility companies?

A I've worked in all -- we just did a little census, so to speak. I was a bit surprised. I've actually worked in every state in the United States and even in Puerto Rico.

But as far as actual knowledge of electric utility practices, most of them, 30 to 40 states.

Q And how many -- strike that.

Are you familiar with the obligations of electrical utilities to comply with the regulations of the state bodies governing those electrical utilities such as the South Carolina Public Service Commission?

A Absolutely. I deal with that constantly.

Q And does that include interpretation of regulations of those bodies including the interpretation of

regulations of the South Carolina Public ---

MR. ARIAIL: Objection. He's leading. I mean, if he can ---

THE COURT: I think you're just laying some foundation as an expert.

MR. ARIAIL: I know. I'm just going to let him go along, but if he can ---

THE COURT: All right. If you'll just rephrase. Be careful about the leading, but I understand you're just kind of getting through some of these preliminary questions.

MR. SPENCER: Yes, Your Honor.

BY MR. SPENCER:

Q The work you do, does it involve interpretation of regulations propounded by the state bodies governing electrical utilities?

A Yes. I've testified before regulatory commissions in several states.

Q And do you have to interpret those regulations and how they relate to a particular utility?

A Yes. As far as operating practices and the application of policy and procedures, regulatory codes and standards become part of it. You have to interpret them and adapt them to your operating procedures.

Q Does your experience include experience with the

regulations of the South Carolina Public Service Commission?

A Yes. From an application standpoint.

Q Have you testified in court previously in matters relating to electric power equipment and electrical incidents?

A Sure.

Q And about how many jurisdictions, including state and Federal?

A 50, 60, 70.

Q In the course of your work, have you had occasion to refer to and utilize what's referred to as the National Electrical Safety Code?

A Yes, I have.

Q What is the National Electrical Safety Code, also known as the NESC?

A Yes. It's a consensus standard that exists in the electric utility industry for the safe operation, maintenance and construction of electrical power lines.

Q When did you first become acquainted with the NESC?

A When I first started in this business in the late '60s.

Q Have there been revisions to that code since that time?

A Several, yes.

Q And are you familiar with those revisions as they've gone through the years?
A Yes, I am.
Q What is the current version of the NESC?
A Two double O -- 2012. It's 2017 will be coming out next year.
Q Who writes or administers that code?
A The organization you mentioned previously, IEEE, Instute of Electronic Engineers.
Q Are you on the code-making committee for the NESC?
A Yes, I am.
Q Have you conducted any schools or seminars where you would teach others the meaning and interpretation of the NESC?
A Yes. I typically do that to clients or for clients. After a code is revised, put on seminars to utility clients to let their personnel know how to apply the code, for one thing, but also the changes that have been made from edition to edition.
Q Have you had training or experience in the field of safety engineering?
A Yes, sir.
Q Can you explain that a little bit?
A Throughout my career, safety engineering has been part of it. I've run construction crews, I've run

electricians, instrumentation technicians. I've instructed electric utility personnel in safety issues.

The area of the National Electrical Safety Code committee that I sit on is -- and of course that's a safety code -- is specifically -- specifically addresses work rules, safety rules for electric utility personnel to when they're working on or around electric facilities and the work that they need to do to protect the public from electrical -- from electrical hazards.

I also -- well, we can speak about OSHA if you wish or -- OSHA, Occupational Safety and Health Administration. I've been certified by OSHA as an instructor of construction safety, basically. And I've instructed with that -- in that capacity, I've instructed predominantly industrial type electrical workers, but also those type of workers who work out of bucket trucks that work on overhead power lines. I have been employed by OSHA in the past to look at cases that they've brought relating to safety issues where they're citing employers basically for electrical issues.

Q Are you familiar with safety risks that exist to persons and property imposed by encroachments into right-of-ways that might potentially result from downed power lines or other operating anomalies?

A Yes, I am.

Q Are you familiar with electrical utilities' obligations to comply with Federal and state reliability requirements?

A Absolutely.

Q Have you been qualified in courts of law as an expert in the fields of electrical engineering, electric utility operations, the National Electrical Safety Code and the electrical workplace -- and electrical workplace safety including OSHA regulations?

A Yes. Many times. Both state and Federal courts.

MR. SPENCER: Your Honor, at this time, we would proffer Mr. Brooks pursuant to Rule 702 of the South Carolina Rules of Evidence as an expert in three areas: first, the National Electrical Safety Code; second, utility operating practices including those related to construction, operation and maintenance and safety of electric transmission lines and easements associated with those lines; and third, electric transmission lines and rights-of-way.

THE COURT: Any objection to his being qualified in these three areas or any further voir dire?

MR. ARIAIL: Your Honor, if I can just voir dire.

THE COURT: Certainly.

MR. ARIAIL: Thank you.

///

VOIR DIRE

BY MR. ARIAIL:

Q Mr. Brooks, how are you doing today?

A I'm great, sir.

Q Great.

Let me go through a little bit. I think the two areas that I want to concentrate on are utility operating practices and transmission utility -- electronic transmissions. Those two areas, have you testified in South Carolina in regards to those items before?

A I don't know that -- I don't know that I've ever testified in South Carolina before. Maybe I have. I just don't remember.

Q Have you testified in states ---

A I mean, I've testified in depositions many times in South Carolina, but not -- not -- I don't know that I've testified in court.

Q Maybe I should have started off, have you been qualified as an expert before in South Carolina in a trial?

A Not in a trial. Not that I remember. Maybe, but I don't remember.

Q Maybe you can help me with all this. These items that we're talking about, the NESC, utility operating practice of electronic transmissions, are they -- I

guess, will they be the same for other states as they are for South Carolina or are there differences?

A They'd be the same.

Q Okay. So the same. So if you -- and you've been qualified ---

A No. Let me say the only difference might be regulatory mandates might be a little different from state to state, but as far as codes and practices and operating procedures and so forth, those are pretty uniform throughout the country.

Q Okay. So that's what you'd be testifying with things that are applicable for other states, they're the same for South Carolina?

A Generally speaking, yes. I mean, I'd be testifying relating to generally accepted utility practices.

MR. ARIAIL: Okay. Your Honor, I have no further questions.

THE COURT: All right. Any objection to his being qualified in these three areas?

MR. ARIAIL: No, Your Honor.

THE COURT: All right. He'll be so qualified to give his opinions in those areas.

DIRECT EXAMINATION (Continued)

BY MR. SPENCER:

Q Mr. Brooks, have you reviewed certain documents and

other materials related to this case, Duke Energy vs. Caleb and Christina Walker?

A Yes, I have.

Q What was the scope of your assignment?

A It was to look at the facts and circumstances relating to the facilities that were built at the -- at the property and make a determination, if I could, as to how those facilities -- and by facilities, I'm speaking of what we've talked about: fences, patios, walls, pools -- how they may have affected Duke Energy's ability to maintain and operate their transmission facility, and also how those facilities may or may not be allowed in accordance with the easement that existed for that property.

Q Based upon your review of the facts and circumstances of this case, have you reached certain opinions?

A I did, yes, sir.

Q And to your knowledge, were those summarized in a supplemental discovery response in this case dated January 21, 2016?

A They were.

MR. SPENCER: And those, Your Honor, are marked as Defendant's Exhibit 6 which we had stipulated to the admissibility of. With your permission, I'd like to hand

Mr. Brooks a copy of that.

THE COURT: All right. Thank you.

MR. SPENCER: And I have one for Your Honor and for ---

THE COURT: Thank you.

BY MR. SPENCER:

Q If we turn over to the second supplemental responses on page 4 of 7 . . .

A I've got that, yes, sir.

Q All right. Are you identified as an expert witness in this case there?

A I am.

Q All right. And is there a 12 paragraph summary, 12 numbered paragraphs of your opinions in this case?

A Yes, sir.

Q Has a PowerPoint been prepared that summarizes those opinions?

A Yes. There has been a PowerPoint prepared.

Q All right. And we'll go through that.

There are some references in your PowerPoint to regulations of the State of South Carolina, and specifically the Public Service Commission. What is the nature of your reliance upon those regulations?

A By the nature of my reliance is that those are mandatory provisions that utilities have to adhere to,

those utilities that are under the regulation of the commission.

Q And is that based upon your experience as an electrical engineer?

A It's based upon my experience as an electrical engineer and the electric utility industry.

Q All right. Your first opinion, which is summarized there on page 4, can you explain that opinion to the Court, please.

A Yes. Carolinas -- well, this relates to the National Electrical Safety Code and the adoption of the National Electrical Safety Code in the State of South Carolina. The National Electrical Safety Code, as we said, is a national standard. It only takes the force of law or regulation if adopted by statute or by regulation.

So this code 103-361 is simply the adoption of the National Electrical Safety Code in the State of North Carolina as a minimum standard of accepted good engineering practice.

Q Did you mean to say South Carolina?

A What did I say? I meant to say South Carolina.

Q All right. And is this a copy of the regulation here shown in the PowerPoint, 103-361?

A It is.

Q And does it state, "Unless otherwise specified by

the Commission, after hearing if requested, the electrical utility shall use the applicable provisions of the latest edition, Part 2, of the 'National Electrical Safety Code', as minimum standards of accepted good engineering practice"?

A That's what it states. And I'll say that Part 2 has to do with overhead power lines.

Q Is that what we're talking about in this case, overhead power lines?

A Yes, it is.

Q All right. What is your opinion as it relates to the regulation of Public Service Commission 103-362?

A Well, it states in 362 that the NESC is an acceptable reference. I think that's kind of bookkeeping. The first provision says it's the accepted good engineering practice. So it's a reference that forms the accepted good engineering practice -- or is recognized as good engineering practice in the State of South Carolina.

Q Even outside the regulations of the Public Service Commission, is the National Electrical Safety Code considered the standard for electrical utilities in this country?

A It absolutely is. Outside of regulation or statute, it is still the mandated standard for, again, safety of

the operation, maintenance and construction of electrical power lines.

Q All right. I think that covers your first opinion. Let's move onto the second.

What is your opinion as it relates to Opinion 2?

A This is part of the NESC we call the -- the number we call rules. So Rule 200 states the purpose. And the purpose, again, of Part 2, which you can see here, I think, as I said, is the safety rules pertaining to overhead electric supply lines. So the purpose is the practical safeguarding of persons during the installation, operation and maintenance of these overhead supply lines and their associated equipment.

Q With respect to Opinion 3 as it relates to Rule 213, what are your opinions?

A 213 is probably the rule I point to as far as this case is concerned relating to NESC applicability. Rule 213 requires that the utility have ready access to its facilities, and it states all parties -- all parts that must be examined or adjusted during operation shall be arranged so as to be accessible to authorized persons by the provision of adequate climbing space, working space, working facilities and clearances between conductors. So what this is basically saying is if it must be examined during operation, you have to have accessibility in order

to do so.

Q And does that apply to transmission lines like the line we're talking about in this case?

A Yes, sir. It does.

Q The next rule that's also a part of this Opinion 3 is Rule 214(A)(5)(a). Can you tell us what that is and how it relates to your opinions?

A Yeah. This is the -- 214 are the inspection provisions required by the NESC, and 214(A) when in service. (5) speaks to corrections. And the (a) part of it that states lines and equipment with recorded conditions or defects that would reasonably be expected to endanger life or property shall be promptly corrected, disconnected or isolated.

So what this does is speaks to the duty of the electric utility when the first provision was in operation. This is -- it's sort of when things are abnormal: lines down, storms or something has just -- equipment has broken and puts the line in a condition where it's not in compliance with the safety rules of the NESC.

The relevance here is encroachments that -- you know, that restrict the utility's full use of the right-of-way would necessarily interfere with the ability of the utility to properly access and promptly correct or

disconnect or isolate its equipment.

Q So if I'm hearing you correctly, are you saying that encroachments in a right-of-way can interfere with the utility and electric utility's ability to satisfy these two rules?

MR. ARIAIL: Objection, Your Honor. Leading.

THE COURT: If you'll rephrase.

BY MR. SPENCER:

Q Can encroachments in a right-of-way interfere with the utility's ability to comply with Rule 213 and 214(A)(5)(a) if they are allowed to stay?

A Yes. Encroachments would typically interfere with the ability to promptly correct or isolate the equipment. That's the reason you have easements, that's the reasons there are rights-of-way, to allow for ease of access and ready access when problems occur.

Q I think we can move on to your fourth opinion. And we have pulled up Public Service Commission Regulation 103-381. Would you tell us what your opinions are related to this?

A This particular part of the code states that -- or requires that each electric utility make all reasonable efforts to avoid interruptions of service, but when interruptions occur -- I'm cut off by that board. I can't see the end of it. Thank you. Service shall be

reestablished within the shortest time practicable, consistent with safety of its employees, customers, and of the general public. That's a fairly all-encompassing mandate to react as soon as possible, shortest time practicable, to reestablish service when service is interrupted.

Again, the relevance of this is -- goes back to access. If we have problems that we'll need control of power lines, distribution lines, transmission lines, we need access, ready access, unfettered access in order to accommodate this particular mandate.

Q Also a part of your Opinion 4 is a reference to Public Service Commission Regulation 103-391. Can you tell us what this was?

A Yes. This states (as read), "Each electric utility shall exercise reasonable care to reduce the hazards to which its employees, its customers and general public may be subjected." That is a fairly subjective type of rule or mandate. It's usually satisfied by a utility operating in accordance with the National Electrical Safety Code which the commission says is the reasonable standard of accepted good practice.

But in this particular case, I bring this forward because we have some unusual things going on that fall a little bit outside of just the utility's responsibility

to access its facilities to make repair. We have a circumstance here with the general public that is subjected to some hazards.

Q We'll get into those.

As it relates to your Opinion 5, can you tell us what you're talking about there?

A Yes, sir. Well, Mr. Pryor went through this in his testimony, and so I'll repeat without belaboring but maybe giving some emphasis.

This is a classification of facilities, and it's a hierarchy of importance as it relates to reliability and response. We -- we started a power plant, and then we distribute electricity across high-voltage power lines to what we call substations. And what happens at a substation is you change the voltage from -- in this case we have 100kV. There may be a subtransmission, we didn't include that here, which could be 69,000 volts, let's say. But ultimately, we end up with what we call a distribution substation where the voltage is transformed down to the voltage that's used by the customers up and down the streets in residential subdivisions. Around 8,000 volts, typically.

The hierarchy or the order of importance as far as reliability is concerned and as far as customer outages is concerned and to an extent as far as safety is

concerned increases as your voltage goes up with major transmission lines being the highest priority and the most important element of electric utility power system as it relates to those issues.

Q I believe you made reference to the fact that the line at issue here is a 100,000 volt line, and we also heard that testimony from Mr. Pryor. Can you tell us what category that falls into?

A Yeah. That -- those are the transmission lines. And stated a little differently, distribution lines serve customers in an area, a residential area, a portion of a city. Not all of a city, but a portion of a city. Transmission lines can take various forms, I mean, but basically, they serve substations that serve blocks of distribution lines, typically thousands of people. But also, they're the cross-country mechanism for transmitting power, and transmission lines interconnect with other utilities.

So as far as their importance is concerned, there are reliability issues, there are safety issues, there are issues that relate to, as we have heard, brownouts and regional. In other words, instead of it being a city or a county, it could be a state or interstate. I mean, these transmission lines interconnect between utilities, and there's growing concern has been exhibited in the

past with the Northeast brownouts of a few years ago that -- that added that mandates put down that utilities have to pay -- be diligent and pay greater attention to transmission facilities because the consequences are more widespread, not just -- not just countywide necessarily, but it could be regional, statewide or multistate.

Q Are transmission lines subject to any greater regulation than, say, distribution lines?

A Yes. When you start speaking of transmission lines that intertie between utilities, what's commonly referred to as the grid, then the regulation becomes Federal instead of state. FERC, Federal Energy Regulatory Commission, is the typical agency that governs, controls how utilities operate their transmission facilities.

Q Moving onto your Opinion 6, can you tell us what that relates to?

A Again, it's an extension of the last opinion, the reliability requirements of transmission lines that are of the highest order.

So a utility has a heightened obligation and duty to maintain and operate their system so that outages are kept to a minimum. And this requires unimpeded access to the facilities, really, at all times. You never know when you may be called to react or have to fix or explore or investigate a power line that may fall out of service.

Q As a part of your work in this case, have you come to understand how many customers are fed off of this specific transmission line?
A This particular line supplies a substation that I understand serves 5,600 customers.
Q Is this a map that has been prepared showing the effects of this transmission line or what this transmission -- the amount of customers it runs to or the areas of the customers it runs to?
A Yes, sir. The areas in purple are directly affected by this line.
MR. ARIAIL: Your Honor, I'm going to object. I don't know if there's any foundation, whether he put this together or how he got this or ---
MR. SPENCER: It's Plaintiff's Exhibit 7, Your Honor, which was not objected to in our exhibit list.
THE COURT: I certainly am going to allow you to cross-examine him.
MR. ARIAIL: That's fine. I didn't realize that this outage map was one of the ones that we had agreed to enter into, but I'll just do it on cross.
THE COURT: That sounds fine. Sounds good.
BY MR. SPENCER:
Q I will ask you some questions related to that, Mr. Brooks. How did you come to the knowledge that this

line serves 5,600 customers?
A I asked the question, and, as I recall, Mr. Jones came up with some information and then shared it with me.
Q Is that Mark Jones, the senior engineering technologist for Duke Energy?
A Yes, sir.
Q In the work you do for electric utilities, both consulting work outside of the courtroom and consulting work that lands you in a courtroom, do you often rely upon information from the utility who has hired you to give information of that sort?
A Certainly.
Q I believe you were talking about what the dark purple shows versus the light purple.
A Yes, sir. Again, the dark purple shows the directly affected geographic area where the -- what I understand the 5,600 customers that reside that are served by the substation.
Q And it's difficult to see up here, but you have the book in front, which it's under Tab 7 will have Plaintiff's Exhibit 7. It's a little bit easier to see there.
Do we have the town of Travelers Rest -- to give some context of where this is in Greenville County, is the town of Travelers Rest over here (indicating)?

A Where you're pointing, yes, sir. That's Travelers Rest. And Greer is to the east and Greenville is to the south.

Q Do you see the reference to Pebble Creek there in the light purple?

A I do.

Q And do you see the references to -- the references to the O'Neal retail station right there (indicating)?

A Yes, sir.

Q And the Greer city station there (indicating)?

A Yes, I do.

Q Do you have an understanding of what those represent with the station markations [sic] on this map?

A The O'Neal retail station is the station that provides service to -- distribution service to Duke customers. The Greer city station, there are some city services that are supplied through the Duke system. That's my understanding. And then the lighter -- the lighter color shows secondary impact that may occur if the transmission is lost.

Q Okay. And at the bottom, do you see substations for Langston Creek retail and North Greenville tie?

A Yes, I do.

Q What is a tie station?

A Typically, that's a station that ties into another

utility.

Q All right. So we have two substations there (indicating), two substations there (indicating), and both in the dark purple, and then one in the light purple?

A That's correct.

Q If we go back to our map that you were talking about or the flowchart, is the substation where the transmission line flows into?

A The substation is the facility, yes, that the transmission line supplies wherein a transformation is made in voltage from the higher voltage to the lower voltage, the distribution voltage that then goes out into the city or the county and serves actual individual customers.

Q And here we have four substations in the dark purple and one in the light purple?

A Correct.

Q Let's look over at your Opinion No. 7. Can you tell us what this is and what its importance is here?

A This is an excerpt from a respected entity that does research for the electric utility called the Electric Power Research Institute. They publish peer-reviewed articles and offer other publications that are used by electric utilities for their operational purposes.

This is from one of their publications that's entitled Electric Transmission Rights-of-Way Uses and Risks. It speaks specifically, I think, to the issues -- some of the issues in this case and states that the importance of electric utility rights-of-way and the ability to manage these rights-of-way has become critical to the economic and security interest of electric utilities and the public they serve in North America. Major transmission blackouts in recent years have demonstrated the ramifications of severe system failures. The ability of electric utilities to control and manage transmission line rights-of-way, identify risk to system's reliability, and mitigate identified risk is key to providing a reliable transmission grid.

Q And that resource, Electric Transmissions Rights-of-Way Uses and Risks published by the Electric Power Research Institute, is it a publication relied upon by experts in your field in doing the work that they do?

A Yes, sir. It's a treatise that is relied upon in the industry. This is.

Q Move onto Opinion 8. Can you tell us what your opinion is there?

A 8 is a broader opinion that relates to -- to other items that result from compromised transmission facilities or particular outages that are created because

of impact to transmission facilities. It creates a risk of harm and death in ancillary contingency-type reasons, those being when you turn your traffic signals off in intersections, when they fail to function, then they begin traffic accidents. People don't always revert back to the four-way stop procedure.

Life-support systems, those -- those can be critical issues, people that are on life support that rely upon electricity.

Of course, hospitals, nursing homes, fire, police, all of these emergency -- these types of institutions are the emergency response type of entities that exist can be impacted by loss of electricity.

As we said before, when you lose transmission systems, you can have major outages throughout large geographic areas. And it's just -- it falls within prudency for electric utilities to just minimize their exposure to these types of outages and maximize their ability to respond to equipment damages or downed lines and easements.

Downed lines, in and of themselves, are a life-hazard circumstance. We don't want power lines on the ground. They're supposed to be de-energized if they hit the ground, but it doesn't always happen that way.

So these are some of the reasons why utilities

actually obtain easements of rights-of-way and establish corridors for their transmission lines so that the reliability and the safety can be maximized.

Q Moving onto your Opinion No. 9, can you tell us what your opinions are there?

A 9 deals with right-of-way widths and what's acceptable. And typically -- I mean, I acknowledge typically what occurs across the United States. I mean, each utility forms its own basis for acceptable rights-of-way widths. I find the 68 feet that exists in this particular right-of-way to be within reason. A 100-foot right-of-way is not unusual at all for this type of line. 50-foot would be narrow. So, I mean, I think Duke is right -- right in the middle of things. I find nothing out of standard practice for them acquiring and maintaining a 68-foot right-of-way.

Accessibility, again, you need it for normal operations, but you need it for abnormal operations. And that's perhaps when most of the difficulty would occur as far as access is concerned. We can speak of access when you have to open gates or tear down fences or things of that nature, but when it's dark and it's storming or there's ice and the equipment has to get down the right-of-way, that presents a different set of circumstances, and those are the circumstances of really

why you want full access, full use of your easement.

Encroachments on the easement restrict the ability to -- for a utility to do what they need to do under the rules that we spoke to previously, the National Electrical Safety Code and the requirements of the Public Service Commission and just generally good accepted utility practice.

Q Moving onto your Opinion 10, can you tell us what your opinions are there?

A This opinion speaks specifically to what was placed by the Walkers in the right-of-way which includes, as has been discussed, a patio, a fence and a wall. I consider it a significant encroachment. It's taking up 20 percent, 25 percent of the width of the right-of-way.

Moreover, the fence, in its outer reaches, is close enough to be under the actual transmission conductor to be problematic from the standpoint of safety. Certainly, if the wire fell, it would be onto the fence or onto the wall, or if a pole broke, it could be as far over as onto the patio, and then unrestricted access to those areas to do repair work is absolutely necessary.

Q Do you have any opinion about whether the patio, fence and retaining wall interfere or conflict with the ability of Duke to have full access to its easement?

A Certainly. I mean, it's sort of obvious that they

don't have full access. And as was testified with Mr. Pryor, you also don't want to have limited access of just where the obstruction might be is where you might need to place your crews, either from an access standpoint or a working standpoint, in order to effect repairs when abnormal conditions exist.

Q Do you have any opinion as it relates to whether or not these encroachments must be removed from the right-of-way based upon electric utility operation and maintenance safety?

A I think these encroachments are significant enough to where they -- they have significant adverse impact and should be removed. There's some types of encroachments that -- you know, that may be acceptable under certain conditions. A fixed wall, an iron fence that can be removed or there's no access through it is -- would be the type of encroachments or structures or instrumentalities that the utility would not want to encounter and should be removed.

Q Let's talk about your Opinion 11. Can you tell us what your opinions are?

A 11 is a little bit more of the same. I mean, it speaks to access, but specifically with regard to the wall and the fence and the envisionment that, you know, when you need to access the right-of-way, there's usually

a time of day or night when things are adverse, not pristine where you can't negotiate around things. Your desire is to come straight -- straight into the -- into the right-of-way from an access point that occurs at the end of that asphalt driveway that has been pointed to previously.

There's a significant safety risk here with vehicles coming into contact with the fence or the wall. We could have a vehicle accident that would be serious that would cause injury or death. But moreover, as pointed out, it's just limiting the utility's ability to utilize that space either for access or in order to set up equipment in order to do whatever repairs are necessary under the circumstances.

Q As it relates to your review of the survey and this photo here which the Court has seen before, part of Plaintiff's Exhibit 4, Bates stamped Duke 46, did you notice any change in the topography of the land as it comes from the driveway down towards the easement?

A Well, it's obviously photographed, but, also, the survey shows, yes, we don't have a level piece of property here. It's significant grade differentials from the driveway to where the stick is here. Yeah. The other side is a drainage ditch that cuts through about the center of the right-of-way, according to the survey.

It's not impossible to negotiate, but it's not the most easily negotiated piece of property that exists, either.

Q As it relates to your Opinion 11, are you aware in this case of an animation that has been prepared to show some of the issues that you raise in Opinion 11?

A Yes. I work with a gentleman, Grimdess [phonetic] Consulting, and confer with him, reviewed animation that he prepared, prepared it for the survey. I was part of that process.

And it's just simply an illustration of what could occur, what the hazards by having this type of facility in the right-of-way, what could occur. If a line truck was not aware of the obstructions, we could have a serious vehicular accident.

MR. SPENCER: And we're just showing that for demonstrative purposes only, Your Honor.

THE COURT: I've got you.

BY MR. SPENCER:

Q Is that the only concern you have?

A No.

Q Okay. What are the others?

A Well, the others, just general safety risks to -- not only to Duke and its contractors, but to the Walkers and other members of the public.

This is -- as stated, this is a metal fence, and

metal conducts electricity. You see the wires here overhead (indicating). If one of these wires comes down and comes into contact with the fence or even close to the fence, this fence can transmit electricity.

We have a swimming pool. We have the fence that goes right up to the house. If we have a wire down that falls in a storm or some other event, this fence could become electrified and there would be a risk of injury or death to anybody that was in electrical contact with the fence, and there would be a fire hazard relating to the house itself from the potential fire hazard. I'd have to look into it more -- more detail. But it's common -- not uncommon, let's put it that way, to have electrical energy transmitted into a residence through conductive mechanisms and the result of which would be a fire in the residence or an explosion.

Q With respect to the access issues, can a truck be set up over that retaining wall, based upon your experience?

A No.

Q Based upon your experience, and I believe you've alluded to this earlier in having complete access and unfettered access to the right-of-way, if the line needs to be worked on in the vicinity of this patio and fence and wall on this side (indicating), on the Walker's side

of the easement, where does the truck have to set up?
A It has to set up in the area where the fence and the wall and the patio exists, on that side of the right-of-way. To be clear of the line that is offset from the centerline, it has to be outside of the shadow of the footprint of that line in order to set up to go up and work on a line or repair the line or put it back in the air if it's on the ground.
Q And is that true in a maintenance situation and in an abnormal storm, perhaps storm-related event?
A Yes. Both.
Q All right. Let's look at your Opinion 12. I think you've hit upon some of these things already, but if you could tell us if there's anything additional you want to add.
A No. I think I've covered Opinion 12.
MR. SPENCER: All right. Mr. Brooks, those are all the questions I have, subject to any redirect.
THE COURT: Yes, sir?
MR. ARIAIL: Thank you, Your Honor. I don't know how long you want to go, but I could be a little bit lengthy with him. Close to an hour.
THE COURT: Okay. You anticipate you'd be as much as an hour with him?
MR. ARIAIL: I possibly could. I mean, if you want

to -- I mean, it doesn't matter to me.

THE COURT: I'm fine to take a lunch break now. Is everybody else fine to do that?

Sir, I know that you've said you haven't been qualified in South Carolina in a trial. We're going to take a lunch break. It's probably the same in every state you've testified in, but you can't discuss your testimony with anyone over the lunch break.

THE WITNESS: I'm aware of that.

THE COURT: Other than that, you certainly are free to leave the courthouse, do what you need to do.

All right. I'll tell you what. Let's take -- let's be in recess until 1:45. So we'll resume at 1:45.

(WHEREUPON, a recess is taken at 12:26 p.m.)

THE COURT: All right.

MR. ARIAIL: Thank you, Your Honor. May it please the Court.

THE COURT: Yes.

CROSS EXAMINATION

BY MR. ARIAIL:

Q Mr. Brooks, how are you doing today?

A I'm great, sir.

Q Good, good.

Let me start off real quick and I want to get a little bit of information about your involvement in this

case. You've been hired by Duke, I guess, to review the situation; is that correct?
A Yes, sir.
Q How long have you been on the case?
A Since December of last year.
Q December of last year. And who did you speak with in regards to doing a review of this case?
A Mr. Spencer.
Q Okay. And what did he ask you to do when he called you up to, I guess, hire you or retain you?
A I think he gave me brief facts but said he wanted to come meet with me and go over the information that he had. And my understanding, I don't remember specifically how I was communicating, was employ me to show the industry standards that relate to the need for easements and the importance of easements, particularly with regard to transmission line service.
Q Okay. I guess he went through the background of what you were -- what was happening here?
A Sure.
Q And some of the facts about it?
A Yes, sir.
Q Did he give you any documents or anything for you to review?
A Yes. Absolutely. I saw discovery from both sides

and answers to interrogatories production, had the depositions of Mr. and Mrs. Walker, I saw aerial maps, survey, Google maps, South Carolina Code of Regulations. I looked at my own -- from my own sources, NESC, and other ancillary documents.

Q Did he give you a copy of the right-of-way to take a look at it?

A Oh, yes, sir.

Q So you reviewed the right-of-way and understood what the right-of-way said, correct?

A I did, yes.

Q Now, and tell me a little bit, because we've got your industry standards is what it says, and then we've got a right-of-way as to what it says Duke is allowed to do. Explain to me how the right-of-ways work in conjunction with the industry standards.

A Well, the industry standards set the theme for what a utility is obligated to do according to the operation and maintenance and restoration of its electrical system. Again, on the hierarchy I presented earlier, less stringent for distribution, much more stringent for transmission. The rights-of-way and the easements that are associated with distribution and/or transmission or subtransmission just reflect one of the parameters that a utility needs in order to basically get its job done

under the regulations.

Q Okay. I mean, and this right-of-way you've seen was drafted back in 1939.

A I did see that, yes, sir.

Q Okay. I mean, things have changed since then, I guess we could say, in regards to industry standards.

A A lot of industry standards have changed, yes, sir.

Q Okay. So at no time have you seen that Duke went back and got another right-of-way to allow it to comply with the current industry standards; is that correct?

A That is correct, yes, sir.

Q Okay. You haven't been given anything in regards to that.

Now, I guess what I'm asking is the right-of-way we have here sets forth what can be done by Duke as part of maintaining this right-of-way. If it's not set forth in this right-of-way, then Duke technically doesn't have the authority to do it unless they go get that authority from the homeowner, from the individual who has the piece of property, correct?

A Technically, that's a legal question. But from my engineering standpoint, I agree with you.

Q Okay. There was no objection, so I asked you that. So that's technically it right there.

Now, in this right-of-way -- and I don't know if you

have a copy of it in front of you -- one thing that just kind of stood out to me when I'm going over this thing I don't know how many different times -- and it certainly is not written like most of the ones we have today. This is back in 1939. And my question is, as you can see, and I think it's -- I'll just take the second long paragraph. It's the, let's see, one, two, three, four, fifth line up and I'm going to start around -- maybe, actually, I'm on the sixth line. It says, ". . . in any way endanger the proper maintenance and operation of the structures and other property placed upon said right of way by the grantee," okay?

A Okay. Let me get on the same page as you are.

Q Sorry.

A That's all right. It's very faint, the typing. I've got that.

Q And we can go back and look at the initial, but it basically gives Duke the right to take off these objects. And it says that if they, in any way, endanger the proper maintenance, operation of the structures and other property placed upon said right-of-way by the grantee, now, my question is -- and I've gone back and looked at this issue. From my review, there are no structures as were contemplated by this agreement, which is the first language says line, towers, poles or other structures.

So correct me if I'm wrong, but there are no structures that are located, from my understanding, on the Walker's property.

A I really haven't looked into that. But I know -- I presume you're correct. No one has ever expressed to me that the structure is located on their property subject to this -- the structures subject to this easement.

Q Okay. And it says also "structures and other property." Now, property will not be placed -- to be able to place property on a -- and you would have to -- it's going to be placed on there, there will be something that Dukes owns is placed on there. Is there any other items that you're aware of, structures, towers, poles, anything that Duke has that's been placed on the Walker's property?

A Yes.

Q What?

A The wires.

Q Okay. Now -- and I'm asking you a question from the standpoint of this document right here, and we clearly can see it says, ". . . other properties placed upon said right of way." Are the lines placed upon the ground or are they in the air?

A The lines are in the air.

Q Okay. With that -- reading that language, would you

agree that the way that stated was it's other property placed upon? I mean, placing upon is putting on something, correct?

A Not necessarily, no.

Q Okay. So your interpretation would mean that the lines above are property that's been placed upon the land?

A Yes.

Q Okay. Now, as part of this, it also allows for fences to be maintained in any manner that don't conflict with the use of said right-of-way, okay?

A Yes, sir.

Q Okay. Now, my question for you is, first of all, have you been to this piece of property?

A I haven't visited. I've seen it only photographically and Google Earthwise and otherwise. But, no, I haven't been there.

Q Okay. Just asking a very simple -- do you believe it's necessary for you to go look at it to give us an understanding of not only what exists out there, the terrain, other things that will help this judge make a determination if it's interfering with the operation and maintenance of the easement?

A No. I see a survey. I know what the terrain is like, basically, from the grade lines. But, really, it's

a narrow question as to the improvements of the facilities that were built on the right-of-way. I don't really need to see anything else. I mean, I don't need -- I'm not looking at alternate routes or things around this structure. It's my focus is to whether this -- the structures that are built there are built in accordance with the terms of the easement or if Duke has the right to remove the structures.

Q Okay. And I want to go back and make sure I understand this because I know you say industry standards allow them to do certain things. If the easement does not allow them to do this, they cannot do it, correct?

A Yeah. I think you're asking a legal question. But from an engineering standpoint, it's my appreciation that they can do what the easement allows.

Q Okay.

A If the easement doesn't allow it, then the lawyers take over.

Q Okay. Got it.

A Or if somebody thinks the easement doesn't allow it.

Q I understand that.

Now, one thing you brought up in which you can't really see it from this, there's a terrain issue out here, correct?

A Yes, sir.

Q Okay. In fact, there's a major issue over here (indicating) in regards to terrain. And what I'm pointing to, sorry, is the bottom 34 feet of the easement.
A It's a significant grade change.
Q Okay. When we say "significant," you tell me what you see from your records showing how much the change is feetwise in the terrain on this side.
A It depends on where you start from. I have about a 10-foot drop from, I guess, the east side of the right-of-way around the concrete driveway, the asphalt driveway to down below the pool.
Q We've got maybe ---
A More than 10 feet, actually.
Q The concrete driveway, there's more than 10 feet from the concrete driveway to down -- to the bottom of the pool?
A Yes.
Q Would you say from the corner (indicating), which I'm pointing to right here which is the concrete driveway next to the house, down to this black dot which is -- black bar which is below the pool?
A The question again?
Q Is that the 10-foot drop you're talking about?
A Approximately 10 feet, according to the survey.

Q Okay. Now -- and my question, what I'm trying to figure out is there is a terrain or a grade drop which is too significant for a truck to be on, correct?
A I don't know that without actually setting foot on the ground there. It's one aspect of it. You can go straight downhill, there's a side-to-side grade circumstance and then there's a front-to-back grade circumstance. I mean, you can go downhill if there's no side grade issues. But to what extent, I really haven't analyzed to what extent, you know, it affects the operation of the truck. Just a simple grade issue there.
Q But my question is, I mean, it would be helpful -- I mean, tell me, would it be helpful if you had gone out and looked at and give us an understanding if a truck could even have parked on the side of this or in this area to be able to access this line?
A If I were -- if that was part of what I was exploring, it may have helped me to go out. It isn't. The fact is, the structures that have been placed in the right-of-way preclude the operation of the truck. There are ways to allow the truck out. We can put mats, we can put blocks. It's not -- a truck isn't going to run the significant difference we talked about with a 10-foot drop. I mean, you can put 100 trucks down -- not literal. You can put many trucks along that length. If

you're speaking of the grade differential being a factor as far as where that truck can set up, you're looking at an area of 20 feet, you know, not 100 feet, as an example.

Q Okay. But I guess my question is and what I'm trying to figure out is if this area was the grade that is not accessible or it cannot be used by a truck, then there would be no reason for Duke to have access to it; do you agree with that?

A No.

Q Okay. So ---

A I mean, that's one of the reasons to have a truck being able to -- be able to be set up there. The other reason is just to have an area where the truck can traverse the property to get to somewhere else.

Q Okay. And I understand that. But we've got a 68-foot easement where they can traverse anywhere on here. The question I have and ---

A Well, that's not necessarily true. It may be. I just haven't explored that.

Q Okay. Well, but you haven't been out there to see it to be able to tell us that.

A That's just what I said, yes, sir.

Q Okay. So the point here and what I'm trying to get at is we've got, let's say, a 15-foot encroachment, give

or take, with an area that I think Mr. Pryor testified to was somewhere about 400 square feet. That area right there (indicating), you don't even know if it's accessible or traversable by Duke; is that correct?

A Well, it's not accessible as it stands. I don't understand your question.

Q My question was, you don't know if it's even accessible if that's not there. If the grade is too -- or the slope is too much, they might not even be able to put the trucks there or use it, or even be able to access it based upon the slope.

A If your hypothetical is true, I don't perceive that the slope is too much for that to be true. I'm just looking at photographs. There is a grade differential, but it doesn't seem to be so extreme as to preclude the operation of setting up of a truck in that area.

Q But you can't give us a definitive answer because you haven't been out to see it, correct?

A I can give you a definitive answer within the limits of what I've seen, and that's photographs and the survey. I don't see anything on the survey or the photographs that tell me you can't set a truck up there excepting for the obstructions that have been placed there.

Q Okay. Have you been out to see where these wires -- well, you haven't been out, so you don't know if the

wires are over the fence or any of that area.
A Not specifically, no.
Q Okay. So I know you said there was an issue with these wires falling on the fence, but you can't specifically tell us if even those wires are over the fence.
A Well, they're not over the fence. If the structure falls in the direction of the fence, the wires are going to be coming down. I'll guarantee you they'll be on the fence.
Q Okay. But where's the structure that's going to fall? I mean ---
A The structure is a structure -- either structure on either end of the span which are supporting these lines.
Q Okay. Well, the structure, if it falls -- which how many structures have you seen fall in the last couple years?
A More than you can count.
Q Well, how many in South Carolina are you aware of?
A You want to narrow it down? I mean, come to Louisiana during hurricane season because it takes six weeks to pick up transmission structures.
I don't have the South Carolina experience.
Q I mean, if the structure falls, it's not going to only hit the wires, it's going to be in the pool,

probably, too, correct?
A The wires could very well be in the pool. Could be. But, you know, that's geometry, and I haven't played with geometry. I have enough intuitive knowledge to know that if the wires fell because either -- a structure fell in that direction or a tree limb came down and tore the wire and pushed it in that direction, it's very likely to hit the fence. Now, if it was far enough to hit the pool, typically we have our rights-of-way wide enough to where if a structure falls, the wire would not extend outside of the right-of-way. But I don't know if that's factual in this case. It could -- I don't -- I don't preclude that the wire could fall in the pool. I just don't -- haven't looked at it. Don't know.
Q Okay. Are there any -- and you're saying this is a dangerous item encroachment to have in there. I mean, is there anything that you see that can be done with this encroachment to allow it to be safe so that it can be maintained?
A Remove it.
Q I mean, anything other than remove it or slope it a different way or do something to it that will allow it to be maintained in some type of form.
A The iron fence has to go. I think that in and of itself is a public hazard, not only an impediment to

egress and utility operations, but I think it's a shock hazard and a fire hazard.

The wall, it's the same thing we've said before. The wall has to go. I mean, it's an impediment to -- definite impediment to traffic. It's a safety issue.

The deck, I don't know that that impedes anything other than probably damage property if you roll over it with a big line truck.

Q Is there any way to provide -- I mean, and I guess we're talking the major issue that you're hearing is there is a problem with the safety in driving over this and issues with the line falling on there; is that correct?

A Those are some of the issues. The main issue is just it's just not allowed to be there and it's there.

Q And here's what I -- you've looked at this to determine that -- I guess you looked at the survey to see that this falls within the easement, is that correct, that their encroachment does?

A Yes.

Q Okay. But you haven't reviewed anything to show that that easement is where it's located. I mean, if it's off 15 feet one way or the other from -- it it's off 15 feet this (indicating) way, that encroachment might not fall in that easement, correct?

A If hypothetically that was true, it is correct. That would be highly unusual. That's not the norm. But if it happened to be true, I mean, if it's outside the easement, it's outside the easement.

Q Correct. And then it wouldn't have to be removed, correct?

A There would be no -- there would be no authority under the easement to have it removed if it wasn't in the easement.

Q There you go. Okay.

Now, the cypress hedges up here and this wood privacy fence, have you gone -- well, have you seen those items?

A No.

Q Okay. Now, as part of this, it shows that these cypress trees and wood privacy fence block or are an impediment to at least three-quarters of the easement. Have you seen that?

A Yes.

Q Okay. Now, what's your take on that? Is that a safety hazard?

A I really don't have a take on that. I mean, my take is it probably just on its face shouldn't be there, but I -- as far as the trees are concerned, but that would be dependent upon how they're spaced and how high they grow

and other things that I'm not privy to.

As far as the fence is concerned, I have no idea. I don't know why it's there, what authority put it there. I just have no knowledge.

Q Okay. And for whatever it's worth, I mean, it's there and it existed at some point in time. Are there ways and means to grant exceptions to easements?

A Yes, there are.

Q Okay. And are you aware of any exceptions that have been made to this easement to allow for structures or other things to exist?

A To this easement, no.

Q Has anybody told you why these cypress hedges and wood privacy fence were allowed at some point in time?

A I don't understand that those items are on this easement.

Q Okay. And I don't know if you were sitting here with the testimony, but there was testimony that these cypress trees were on, at some point in time, Mr. Walker's property.

A No. I didn't get that testimony.

Q Okay. Well, if that's the case, then do you know why they were allowed to stay there for a time?

A No, sir, I don't.

Q Okay. You don't have any communications with Duke

as to why they allowed that?
A No.
Q Okay. Now, and maybe you can enlighten me a little bit on this because I'm trying to figure out how this works. When a Duke Power truck comes in for an issue with a wire or tower, on a transmission line, tell me how they access the line. I mean, if you can give me an understanding of what needs to be done because I'm sitting here trying to understand if there's a problem with the line, don't they go to the structure to deal with it there? Explain to me how a normal operation of a line takes place.
A It would depend on what the problem is. Some problems you go to the structure to resolve. Some problems you go to the point of where the problem is. And if it's at midspan, you'd set up a bucket, one or more bucket trucks in order to access it and go up it and repair the problem. If it's something on the line or bridging across the line, you have to go up right there and take it off. If the line is broken or frayed at some point, you go to that point and access it and put a repair sleeve or reslice it, or if it's on the ground in two parts, you bring it back up at the point and fix it there. You don't really go to the structure for that.
Q Okay. And tell me -- we've seen pictures. How high

are these wires off the ground usually?
A I don't know. I mean, I can give you a range, but 30 or 40 feet, I would expect.
Q 30 or 40 feet up in the air?
A I would expect. I don't know.
Q Okay. So you've got a truck. And at 30 or 40 feet, a truck's got to have a boom to be able to get up to that wire; is that correct?
A Yes, sir.
Q Okay. So just from my understanding, is it easier -- I mean, accessing it from a slope, and I'm trying to understand how you're going to do this. From this area down here (indicating), if it's a slope down this grade, would you access it from down here (indicating) or from above the line, I mean, if we're talking the center point of the line is this (indicating) little line going down?
A First of all -- first you'd level your truck.
Q Okay.
A So it really doesn't matter if you're upgrade or downgrade, you've got hydraulic jacks, basically, outriggers on your truck that allows you to level the truck. Whether I'm pointing uphill or downhill, it really doesn't matter. Pointing across the right-of-way or up and down the right-of-way, it doesn't matter. I'm going to level the truck anyway. I'm not going to go up

there with a truck that's on a -- I'll find a mechanism to level it. So I don't really know that your question is answerable.

Q Well, my question, I think you answered it, is it doesn't matter where the truck is when you access these lines because you can do it from above or below or up here (indicating). You don't have to be on this encroachment area.

A You have to be outside of the footprint of the line. You're not going to be between two wires at 100,000 volts, you know, doing this work. You're going to be on the outside of the line between the outer line and the edge of the easement. That's where you're going to set your truck up.

Q Okay. Well, so -- but -- and what I'm getting at is I think you just said it doesn't matter. You can be anywhere on the slope here (indicating), above it, here (indicating), inside. You don't have to necessarily be over this encroachment and use that for ---

A Well, if that's where you have to work, you have to. I mean, you can't just be anywhere. You have to be where the work is. These devices don't have an infinite reach. I mean, you've got a 75-foot boom on a truck. I mean, you can't be 120 feet away. You've got to be close enough to the point of work to -- for the lifting boom

apparatus to function.
Q And here's the reality of the situation. If you're putting a boom on this (indicating) area right in here, there's only a finite portion of that wire that you're going to be able to access from that area, correct?
A That's correct. Yes, sir.
Q Okay. So we're talking about a limited space. And if you can access it from above or below where this wall is, then you don't need that area to be able to access it, correct?
A I don't know that because I haven't explored if you set up above or below if you have sufficient reach to reach the middle, which is what I'm saying, you don't need to be there because you can get on one side or the other to reach the middle.
Q Right.
A It occurs to me that what you're doing is you're limiting the ability of the utility to function. You're setting parameters that the easement doesn't -- doesn't contemplate.
Q You agree, and I think you previously did, that Duke and other utilities have allowed exceptions to the easement and allowed encroachments, correct, which would impair their ability to access the line?
A No. I don't know that. You have an appearance that

something like that may have occurred, but I think you're pointing to the fence and the trees. You said they were on the Walker property, and I don't get that from the -- the fence doesn't appear to be on the Walker property. If that's on another easement, I don't know what the terms of that easement might be, so I can't agree with you.

Q And I'm going to move on real quick. But I just -- I mean, my question is, if you're accessing this (indicating) part of the line right here, there's no way you're going to be able to access it on top of the trees, correct? So there (indicating). What I'm saying is you can't put a truck here where these hedges are or where that fence is, correct?

A You can't -- agree. You can't physically put a truck where the tree is or where the fence is.

Q Okay. Are you aware that one of these fences is a -- I guess a tear-away or a pull-up fence down here (indicating) in this area to allow access if needed?

A No.

Q Okay. Does that -- if Duke was allowed to have access to behind the fence and around this area in here (indicating), does that change your opinion if they were given access there?

A Not if you eliminate two fence considerations, no.

Q Not if you -- excuse me?
A Not if your -- if your question only addressed the fence, the answer would be "no." You have a wall there also to consider.
Q So we still have the wall issue.
A Yes, sir.
MR. ARIAIL: Bear with me one second.
Your Honor, I have no further questions.
THE COURT: All right.
MR. SPENCER: Redirect, Your Honor?
THE COURT: Certainly.

REDIRECT EXAMINATION

BY MR. SPENCER:
Q Mr. Brooks, Mr. Ariail asked you some questions related to the language of the easement itself. He asked you . . .
A It is difficult to read, isn't it?
Q About the other property, he was asking you about operation of structures and talking about no structure being exactly on the Walker's property. And then he asked you about the other property. And he asked you whether there was any, quote, other property, and you, I believe, testified that the wires are other property?
A Yes, I did.
Q Okay. How big around -- could you illustrate for

the Court about how big around 100kV line wire is?
A No. I mean, the size of the wire doesn't have anything to do with the voltage. It has to do with the amount of current it carries. But typically, transmission wire's going to be something, two or three inches in diameter. Sometimes it's bundled. Sometimes there's two conductors of that size that are coupled together (gesturing). I mean, it's big wire.
Q Bigger than it looks from the ground; is that fair to say?
A It's big wire. It's heavy wire.
Q Is it heavy?
A It's heavy.
Q Is it expensive?
A Yes. It's expensive.
Q Is it property?
A Oh, sure. It's property.
Q All right. With respect -- you were also asked some questions about those trees that are shown on the survey. I believe Mr. Pryor testified to this and you were here for that testimony. But does this picture make it appear that those trees have been cut down within the right-of-way?
A It does.
Q Can trees that are not there interfere with the

operation of the line?
A No.
Q Now, Duke -- in Mr. Pryor's testimony that you heard, there was discussion about how this was a purchased right-of-way back in 1939. Do you recall that? If you'll look at Exhibit 1.
A I recall the 1939 date, certainly. I just don't remember if -- yeah. Consideration of $160. Purchased.
Q When Duke purchased the right-of-way, did it purchase the entire right-of-way?
A My understanding, it purchased an easement to utilize the land under certain conditions that are contained within this document.
Q To your knowledge based upon your experience in the industry, when a right-of-way is purchased, does that place an obligation on the utility in the future to agree to any encroachment that a property owner may want to put into an easement just because the property owner thinks it doesn't interfere with the utility's lines?
A No.
MR. ARIAIL: Objection. I don't understand the question. I'm sorry.
MR. SPENCER: I'll move on.
THE COURT: Okay.
///

BY MR. SPENCER:

Q There was some reference to a tear-away fence. Is a fence, whether it's tear-away or not, if it's a metal fence, is it still subject to being electrically charged if a line falls on it or within close proximity to it?

A Yes, it is.

Q And just on that close proximity issue, does the line actually have to touch the fence for the fence to be energized?

A No. Not from the standpoint of electrical shock. If somebody is in contact with a fence and the line falls within a prescribed distance, there's a calculation that can be made. Electricity can migrate to the fence, basically, and create enough of an electrical shock to cause severe injury or death.

MR. SPENCER: Thank you, Mr. Brooks. I have nothing further.

THE COURT: Mr. Ariail?

MR. ARIAIL: Nothing further, Your Honor.

THE COURT: Sir, you can sit down.

THE WITNESS: Thank you.

MR. SPENCER: And may Mr. Brooks be excused, Your Honor?

THE COURT: Any objection to that?

MR. ARIAIL: No, Your Honor.

THE COURT: All right. Sir, thank you for being here. Have a safe trip back.

THE WITNESS: Okay, Judge. Thank you.

MR. SPENCER: Are you ready, Your Honor?

THE COURT: Yes, sir.

MR. SPENCER: The plaintiff calls Doug Gould.

WHEREUPON,

DOUGLAS GOULD

After first having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SPENCER:

Q Mr. Gould, if you will, state your full name for the record.

A Douglas Arnold Gould, G-O-U-L-D.

Q Who is your employer?

A Duke Energy.

Q And are you an electrical engineer?

A I am.

Q Where did you get your degree?

A I've got a bachelor degree from Georgia Tech.

Q And how long have you worked for Duke Energy?

A 42 years.

Q What is your title?

A Manager, asset protection.

Q And how many states does that cover?

A My responsibility covers six states.
Q Can you name those states for us?
A I think so. Kentucky, Ohio, Indiana, North Carolina, South Carolina and Florida.
Q So you're the manager for the whole asset protection department?
A That is correct.
Q You are Mr. Pryor's boss?
A That is correct.
Q How many miles of transmission line?
A Approximately 32,000 miles of transmission lines in those six states.
Q And we've talked a lot, and I don't want to cover a lot of ground we've already covered, but do you have -- have you reviewed the survey and the pictures of the encroachments in this case?
A I have.
Q As the manager of asset protection for Duke Energy corporatewide, is that an acceptable thing? Are those encroachments acceptable?
A No, it's not.
Q Why not?
A Because it does potentially create an interference for our construction crews if there was emergency work to be done, or even some new construction work that had to

be done.
Q Is it critical for Duke Energy and it's linemen to be able to access the area where these encroachments are?
A Yes.
Q And does that include the metal fence?
A It does.
Q Does it include the retaining wall?
A Yes, it does.
Q Does it include the patio that's below the retaining wall on the ground?
A Yes, it does.
Q What about the wall and the fence and the patio is problematic? What specifically is the problem with those?
A Well, as mentioned several times today, we never know where crews are going to have to set up to do the type of work that they do, whether it be a rebuild of that line to increase the capacity to serve customers, or it could be a storm situation. I've worked many eye storm, many storm damage situations where crews are put in situations that can be anywhere on the right-of-way. And our responsibility is to keep that right-of-way free and clear of obstructions from edge of right-of-way to edge of right-of-way, because we never know specifically where they might have to work.

Q Is a crew having vehicles operating in the area of where those encroachments are safe as it sits today?
A It very well could not be safe.
Q And why is that?
A Well, you've got -- you've got a wall that you've got to work around, you've got fences you've got to work around, you've got some terrain issues that you've got to keep in mind. You've got 100,000 volts that you've got to keep an eye on and where the issue is. You've got lots of people there. You could have weather conditions working. That entire right-of-way could be covered in freezing rain. It could be very slippery. So you've got lots of opportunities there that it would be a dangerous situation to have to work around more obstacles.
Q We saw a video with Mr. Brooks. I'm going to take a look at it again. Can you tell us from Duke Energy's perspective whether what's shown in that animation is a concern?
A It is. It could happen, yes.
Q Are there issues that Duke Energy has with the fence and where it's positioned in the right-of-way relative to the house?
A It does. We do, yes.
Q And what are those issues?
A Well, again, a fence, you've got to be able to

maneuver up and down that right-of-way any time, so a fence that you have no access to, either going through it or removing it in order to do the work would create issues of safety, it would slow their response time down. You've got -- as stated earlier, you've got 5,600 people that are out of power, and getting that line back on quickly is necessary. So anything that's an obstacle to them is a problem for us.

Q With Mr. Brooks we looked at a copy of the outage map. You made reference in your testimony just a minute ago to 5,600 customers that are served by this transmission line. Do you have knowledge of whether or not there are any fire departments or police stations served by this?

A It is my understanding that there is one fire department and one school as well as the 5,600 customers. And there is one substation of the City of Greer which I do not know how many customers might be served off of that.

Q And is that the one we see right here (indicating), the Greer city station?

A It very well could be.

Q And we can't see -- I believe you just testified we can't see the customers coming out of that line.

A That's correct.

Q And is that because Greer City controls that information?

A That's right. It's their customers. They do the billing for their customers.

Q Do you have an understanding of whether or not the people served by this line, the 5,600 customers, are primarily residential?

A I do not have specific knowledge of that. But that area is rural, so I would assume that's pretty accurate.

Q What are some of the issues that arise when the power goes out at a residence based on your experience with Duke Energy? What kind of people live out there that Duke Energy is aware of?

A Well, you're talking primarily residential customers. And in particular, this line is a tap line. It does not have a way to back feed the power so that you can isolate an outage and get some of the customers back on.

So you've got a rural area that's primarily residential. There's more and more folks that have medical alert situations at their house where they might have someone on oxygen or some other medical alert situation that without power, their life is in danger or they have to take them to the hospital, take them somewhere else. So the criticality of the residential

customers are pretty high for us.

Q Can it very well be a life-and-death issues if it is someone on a machine or something?

A Absolutely, absolutely.

MR. SPENCER: Thank you, Mr. Gould. Those are all my questions.

MR. ARIAIL: Thank you. May it please the Court?

THE COURT: Certainly.

CROSS EXAMINATION

BY MR. ARIAIL:

Q Mr. Gould, just so I'm understanding, are you saying that not having access to this 400 square feet on this board is going to put 5,600 people at risk of potential issues: death, cutting off supply of energy to a fire station and all that?

A No. That's not what I said. I said that if we had an outage that was in this particular area, it could delay us in getting that power back on significantly.

Q Okay. But there's nothing you testified to that shows that any of that's going to happen by not having access to this 400 square feet, correct?

A Say that again?

Q There's nothing you've presented testimonywise here in the last 15 minutes that shows that anything and not having access to this area is going to cause all those

issues.
A It's not going to cause the outage.
Q It's not going to cause the outage, but you also haven't shown anything that's going to tell us that it's not going to -- it's going to prevent y'all from getting it back in or getting that energy back to them.
A But you haven't shown me the issues that occurred maybe at that structure or between the structures which would cause us to have to be at that location.
Q And here's the question. You just put this doom and gloom theory out to the Court and put all this stuff, all these things are going to happen, but you haven't provided anything showing that that 400 square feet is going to prevent you guys from getting in there and being able to fix any type of issue on this line.
A But it could.
Q Okay. But you haven't shown me that, right?
A I don't know if a real situation has occurred at that site. But if there -- well, it could occur tomorrow.
Q Let's just figure this out. Has any issues occurred along this site that have caused any issue to you over the last three years?
A I'm not aware of any.
Q Okay. So you're not aware of anything that's

happened in the last three years to that that have caused any problems to the structures, the wires, any items in that area.

A That's correct. But I've not asked either.

Q Okay. And you knew you were coming to testify today, correct?

A I did.

Q I mean, that was one of the key things was to figure out whether or not there are issues along that line, right?

A We can have an outage at any point in time anywhere on the line. Tomorrow afternoon's thunderstorm could cause an outage there.

Q Okay. But it hasn't in the last three years for that area, correct?

A Not that I'm aware of.

Q Okay. And in the last three years, you know, there's been no outage of 5,600 people in this vicinity, correct?

A I'm not aware of that.

Q Okay. Now, we went through this right-of-way, and I want to make sure because Mr. Pryor -- is it Mr. Pryor -- are you his boss or does he work with you?

A I am. Yeah. I am his supervisor.

Q Now, you heard him testify that he was unaware of

where this easement is. I mean, he says there's a 68-foot easement. We don't know if that easement is along the lines of this survey or if it's off. Did you hear him testify to all that?

A I did.

Q Okay. Do you have anything you're presenting today that shows that this easement, I guess, is correct or includes this area?

A We're going off the fact that it's the transmission line is most likely built on the centerline, and he pulled a tape, and that's the information that we have at this time. And the survey shows that also.

Q Okay. And there's nothing in the right-of-way that shows that the 68 feet is off of the centerline, correct?

A Nothing that I'm aware of.

Q Okay. And there's -- I mean, correct me if I'm wrong. There's no other documents you're aware of that Duke has an easement for this area except for this document back in 1939?

A That's the only one I'm aware of.

Q Okay. It also does not exclude -- specifically exclude walls, fences or patios in this easement, correct?

A It excludes structures, and those -- all three that you mentioned are structures.

Q Okay. But it doesn't specifically say those three items, does it?
A It specifically says they're structures, yes.
Q Okay. I'm not trying to argue with you. I'm just saying in here does it say retaining wall? fences?
A No, it does not.
Q Okay. It doesn't say any of that in there.
It does say, actually, that fences are allowed to be kept in there, correct?
A Under certain restrictions, yes.
Q Okay. So as long as they don't interfere or conflict with the use of said right-of-way?
A That's correct.
Q Now, you understand there is a fence that is up here that has been allowed by Duke, correct?
A There is a fence up there.
Q Okay. And that's -- I mean, you tell me. Does that interfere with the easement?
A Based on the photos I've seen, you can get around that fence. So trucks can move freely up and down that right-of-way, they can operate in that particular area.
Q So they can get around it now that you've cut the trees down, right?
A I assume so.
Q Okay. But, I mean, you still -- when the trees were

here, you could get around it, correct?
A Based on that drawing right there, that's correct.
Q You can get around in this little area right here (indicating) which is probably give or take -- I'm not good at math here -- 18 feet, maybe somewhere in there; is that correct?
A If it's 18 feet, we can get around it with our vehicles.
Q Okay. And so you're saying ---
A But that doesn't mean that you can -- if there was an incident out there that you wouldn't have to do the very same thing that you have to do around that pond. You very well may have to cut those trees down before you can do anything. You very well may have to take that fence down before you can do anything.
Q Okay. But you haven't done that. To your knowledge, that fence is not there -- that fence is still there, correct?
A To my knowledge.
Q Okay. And you've got 18 feet up here. Down here we've got 15 feet where there's an encroachment. So 68 minus 15 -- 53 feet we've got access to over here; is that right?
A I don't believe you have access to that down there. I think you're blocked off where that gate and that fence

and -- and the wall is.
Q You're blocked off for 15 feet?
A You can't remove that.
Q But, I mean, that's just 15 feet, correct?
A Yes.
Q Okay. So there's 53 other feet that you can utilize in that area?
A It depends on where the outage is. Depends on where they have to set up. All the previous testimony is exactly right. You're making a hypothetical that you can set up anywhere on that right-of-way and do any work on that side, and that's not true.
Q Now, I think you testified that your crews could be safe by doing work in this area even though this encroachment was there; is that correct?
A I didn't say that.
Q You didn't say anything ---
A They could be safe?
Q Could be safe.
A Depends on the situation, I guess.
Q Okay. But, I mean, if they see this, know it's there, don't access in that area, don't run over it like your animation over here, they're going to be safe, correct?
A If you eliminate all other possibilities of unsafe,

then you can say that. But there's other things that you've got to eliminate in order to be safe.

Q What's your view -- and tell me about this because we got Mr. Brooks to testify in regards to it, and I think you went -- your -- a little bit of this testimony is that this easement -- I'm going to read it to you because it's a little confusing here -- (as read) ". . . granted the right to keep said right of way clear of all trees, structures and other objects except those placed thereon by the grantee together with the further right to cut away and clear any trees outside the 68-foot strip that might in any way endanger the proper maintenance and operation of the structures and other property placed upon said right of way by the grantee."

Would you agree that there are no structures -- when I'm saying "structures," towers, poles, anything that are on -- in the right-of-way for the Walkers?

A Duke structures?

Q Right.

A Other than wire, as previously mentioned.

Q Other than the wire?

A Right. At this point in time.

Q Okay. And back in 1939, do you know if the interpretation of this language "other property placed upon" meant, what they meant by that language?

A No, I do not.
Q Okay. When ---
A Because they were looking into the future. That line would be there for many, many years, and so therefore, they don't know how the electric utility industry is going to change, what new features we may have, what new ways of doing business we may have. We paid for the easement right to be able to run that business forever.
Q What is your definition of "placing upon," placing something upon something?
A In the right-of-way or in the air space above it.
Q Okay. So you think it includes the space above it, the air and anything above that?
A I would think so, yes.
MR. ARIAIL: If you'll bear with me one second. Your Honor, I have no further questions.
MR. SPENCER: Redirect, Your Honor?
THE COURT: Certainly.

REDIRECT EXAMINATION

BY MR. SPENCER:
Q I asked Mr. Pryor, I guess I'll ask you this, too. Is it a part of your job as asset protection manager to anticipate problems that may happen on a transmission line, not just deal with problems that occur at a

specific point at a specific place in the past?
A Absolutely.
Q Are there situations where you have a line that is in service for years, maybe decades, and on a particular segment, you have no issue whatsoever?
A That's correct, yes.
Q And can the next day you all of a sudden have an issue that has to be dealt with?
A Absolutely.
Q And can those present life safety issues?
A Absolutely.
Q And can there -- are there sometimes access issues that have be dealt with as in this case?
A Yes.
Q The fence that was made reference to by Mr. Ariail, does that fence, based upon your experiences as manager of asset protection for all of Duke Energy, interfere with or conflict with Duke Energy's use of that right-of-way?
A We would prefer that fence not to be there. I do not know how it got there, under what circumstances it was put there, but we would prefer it not to be there.
Q And I'm talking about the iron fence next to the house ---
A Oh, you're talking -- I thought you meant the other

fence. Oh, yeah. That -- that is -- that blocks us from our ability to do our work.

Q With regard to the structures, to your knowledge, is there any limitation in the right-of-way that if Duke Energy wanted to rebuild this line, they could put a structure right next to where that patio is?

A Absolutely. If you rebuild that line, because it's a radial line and you cannot deenergize it in order to rebuild it so you needed to put a larger wire up for the increased growth in that area, you would need to build a temporary line typically done at the edge of the right-of-way. Poles are much closer together because of the temporary nature in it, and so therefore, you very well may have to put poles in that particular area, string wire, and have cranes and bucket trucks that weigh 80,000 pounds.

Q We're looking at some language here from the right-of-way which is part of Exhibit 1 that addresses that, and I'll read it into the record. "For the purpose of constructing, operating and maintaining a line of towers, poles, or other structures," in parentheses, "(which may be changed from one to the other from time to time, and which may be of wood, steel, concrete, or other material, at the option of the grantee), together with such wires, conductors, telephone wires, and other

apparatus and appliances as, in the opinion of the grantee, may be advisable or desirable for or in connection with the transmitting and distributing of electric power." Did I read that correctly?

A You did.

Q And is that the language you're referring to about coming in and maybe needing to rebuild the line or replace the line?

A It is, yes.

MR. SPENCER: Those are all the questions I have. Thank you, Mr. Brooks.

THE COURT: Mr. Ariail?

MR. ARIAIL: Nothing further, Your Honor.

THE COURT: All right. Sir, you can sit down.

MS. SPRUILL: Your Honor, we have a quick housekeeping type question for you. This is normally where we would call our surveyor if we knew we had to call him, but he won't be here until tomorrow. So we aren't technically ready to rest because we have one more witness.

THE COURT: I understand.

MS. SPRUILL: We would like to go ahead and move into evidence for the record our exhibits which were previously tendered to the Court and our deposition designations.

THE COURT: All right. And I've got those.

(WHEREUPON, Plaintiff's Exhibit Nos. 1 through 11 and 16 were admitted into evidence.)

MS. SPRUILL: I assume we would be allowed to make any motions after Mr. Proctor testifies tomorrow.

THE COURT: All right. Exactly.

MS. SPRUILL: Thank you.

THE COURT: So we'll just reserve all motions until the plaintiff actually does rest. And we'll just, for timing purposes, then begin with the defendant's case.

Do y'all need to take a break? Anybody need a break?

MR. ARIAIL: I would love one just real quick.

THE COURT: Let's take a 10 minute break.

MR. SPENCER: Thanks so much, Your Honor.

THE COURT: Thank you.

(WHEREUPON, a recess is taken at 2:47 p.m.)

THE COURT: All right. Are you ready to proceed?

MR. ARIAIL: Yes, Your Honor.

THE COURT: All right.

MR. ARIAIL: I call Mr. Caleb Walker to the stand.

WHEREUPON,

CALEB WALKER

After having been duly sworn, testified as follows:

///

DIRECT EXAMINATION

BY MR. ARIAIL:

Q Caleb, how are you doing today?

A Very nervous.

Q Well, state your name for the record.

A My name is Caleb Walker.

Q Okay. And I guess it goes without saying this is probably your first time testifying?

A Yes.

Q Okay. Got you.

A Forgive me if I call you "Your Honor."

THE COURT: Well, just take your time, and if you need something to drink, there's some water right there.

THE WITNESS: Very good. Thank you.

BY MR. ARIAIL:

Q All right. So let me go through a little bit of background about you. First of all, you're married; is that correct?

A Yes. My wife is here.

Q Your wife is here?

A Yes.

Q And what's her name?

A Christina Walker.

Q All right. And how many little kids do you have?

A We have six children who are currently five years

old through twin 17-year-olds.
Q Wow. Got your hands full there.
A Yes.
Q All right. And y'all reside at this 239 North Rutherford Road; is that correct?
A Yes, sir.
Q Okay. How long have you been there?
A Since 2010.
Q Okay. And who did you buy it from?
A It was a foreclosure, so it was bank-owned property, and I don't remember the name of the bank.
Q Okay. Y'all bought it and moved in in 2010, and then I guess lived there for that period of time. At some point in time, did you decide to make some improvements?
A Yes, we did. So if we're speaking of these improvements, we've been improving the property just bits and pieces where we can, you know, so new kitchen, things like that.
Q Got it. I guess we can talk about the outside stuff you decided to do.
A Right.
Q There were some things that I think you were going to do landscaping-wise outside which included a pool and some other things. What was your plan here as to what

you were going to do?

A Yes. So on the outside, obviously, with the little kids and whatnot, a pool was on our radar ever since we moved in. So we had saved a couple of years and actually refinanced the house at the end of 2012 to be able to install the swimming pool and, of course, the retaining wall, the fencing, the patio, all of that. That was put in. So, obviously, just a really, you know, nice family investment.

Q If you're anything like my family, it's hard to get them convinced to put a pool in, so you had probably some planning beforehand; is that correct?

A We did. Actually, my family was extremely excited to put a pool in. So ---

Q Okay. How long -- what process did you go through to make this decision to put a pool in?

A So we consulted with a landscape architect, Joel Kirby with Curly Willow Designs. And one of our stipulations was we wanted to make sure that whatever was put in did not prohibit the Duke Power easement in any way.

So we did review the restrictions that Duke Power has posted online for the public to review, and certainly those restrictions for the public to view talk about you can have fencing, you can have driveways, you can have

parking lots, all kinds of things so long as it did not interfere with their ability to move up and down that right-of-way and access their structures, the towers, and those kind of things. In fact, it talks about putting barriers around the towers if you're building a parking lot and those kinds of things.

So the only restriction we saw on fencing was that it didn't -- it couldn't exceed eight feet, so we made sure that it was no more than eight feet tall at its highest point, you know, where it joins the retaining wall and those two structures are together. So we took every measure we thought to ensure that this project would be within the scope and spirit of what Duke Power required.

Q I mean, maybe a simple way of saying it is you did your homework in regards to what you thought was required to be able to build this.

A We did. Because the way we read the restrictions that Duke Power had posted, nowhere in those restrictions does it say anything about these objects being strictly forbidden or strictly prohibited under all circumstances, you know. None of that language was in there. And it just simply said that nothing could be placed there, essentially -- I'm paraphrasing, obviously -- that did not hinder their ability to maintain and access this

easement, which, of course, we believed it did not. We tried to make sure it didn't. Obviously, I wouldn't have reached out to Steven Pryor had I thought that it was an issue.

Q And we'll go into that a little bit. But you reached out to them and contacted them, correct, about doing some landscaping, I guess?

A Yes, I did. So a year after the initial project was finished, or approximately a year. So this project was started beginning of 2013, I believe, and then I reached out to Steven Pryor at the beginning of 2014.

Q Okay. And let me just go through. When you were doing your review of the restrictions and other things, did you review the right-of-way that we've been discussing and has been made a part of our, I think, Exhibit 1, Defendant's Exhibit 1?

A If that's the 1939 right-of-way, that was reviewed after Steven Pryor came and made his visit. So at that time, we were able to review the original 1939 restrictions, and it seemed to be in line with what -- the general restrictions that Duke Power has posted online, had to say as well.

Q So the things that you had followed online for the restrictions you believe were consistent with that right-of-way in 1939?

A Absolutely. In fact, the 1939 restrictions were far more vague and ambiguous as to, you know, fencing, those kinds of things because I don't understand what all the fuss is about metal fence. But nowhere in any restrictions does it specify any kind of material that the fencing should be made of. And, actually, in some of the photographs taken by Steven Pryor and Duke Energy, if you look very closely, in the background, you can see other wire fences that cross this exact same easement. So if ---

MR. SPENCER: Your Honor, we just need to renew our motion in limine on this point.

THE COURT: All right.

MR. ARIAIL: And I'm not going ---

THE WITNESS: I apologize if I stepped out of line.

MR. ARIAIL: We're going to get into that and we'll proffer that down the road unless she allows that.

THE COURT: No. You're fine. For that, you're fine.

BY MR. ARIAIL:

Q Now, let me go through maybe just to get a quick snapshot of what you believe the right-of-way. Once you reviewed it, what was your view of what that right-of-way allowed and if it was consistent with what you had done?

A So essentially, just making sure -- you know, the

biggest thing we saw in there was that the fencing had to have -- aside from not being more than eight feet tall, the online restrictions for just sort of the general public to review said that they needed 16 feet to pass through. So, obviously, again, they have more than 50 feet at the most narrow point of that right-of-way to pass through. We made sure that was very open.

We didn't believe that the retaining wall or any of those things were an issue because that particular part of the right-of-way was completely eroded away because of the steep grade. It was completely impassable by any wheeled vehicle before we did this project. We did leave room at the bottom of the fence and retaining wall in this lower right-hand portion where fence panels could be removed if needed to drive a truck or anything like that from the back side.

And, of course, when Steven Pryor came out, even offered to, you know have some sort of waiver or agreement signed that said if they were to pull onto the patio and damage it or so on and so forth, that we would be fine with that. We would assume sole responsibility and liability for damage to any of those things within their right-of-way.

Q Okay. Now, in regards to your interpretation of the right-of-way after you reviewed it and discussed it with

Mr. Pryor, what was your understanding of, I guess, the ability to maintain structures on there? If they don't endanger the proper maintenance and operation of the structure, how did you interpret that?

A Right. So our interpretation of that is they just need to be able to have access up and down that right-of-way to be able to get to their towers. There are no towers on our property.

Obviously, we knew that we couldn't build something completely across completely blocking any access up or down that right-of-way, but that was, in essence, our interpretation was that we just needed to make sure that they had access to move up and down that right-of-way to get to their structures and be able to get to their lines. That's also one reason why the wall and the fence and so on and so forth, they don't even -- they don't go under the power lines. I think maybe we have some photos in evidence that show that.

Q Right. And we'll get to those in a little bit.

But your view is that there are no -- first of all, there are no structures on your property or right-of-way; is that correct?

A That's correct.

Q Okay. Are there any other, as they say in this, property placed upon that easement?

A No. Not in our -- obviously, we didn't even consider the fact that someone would think lines above would be property on our soil. So no. There's nothing that Duke Power owns that touches our soil.
Q Okay. Now, we've gone through and tried to figure out this easement. We've got the surveyor coming in tomorrow. Have you been provided any type of plat, survey documentation showing exactly how that easement was, I guess, plotted or placed on where it currently is?
A No, I have not.
Q And you haven't seen anything through discovery or anything else?
A No, I have not.
Q Were you provided anything at the closing of your house or anything like that?
A Not to my knowledge or recollection.
Q Okay. Now, we've got a fence that has been installed. What type of fence is this that you have installed?
A It's a hollow aluminum fence. The panels are just screwed to the posts that are very easy to take down. I can take a fence panel down in two minutes.
Q Okay. So they can be lifted out of the ground and placed to the side, moved around, anything like that?
A Sure.

Q So if someone was to come down there and needed access, could they remove them?
A Absolutely.
Q Okay. Now, the retaining wall, tell me, prior to the retaining wall being installed, what did the property look like in that area?
A As I stated before, it was completely eroded away. It was heavily overgrown with underbrush in areas that weren't bare ground from erosion. But, again, it just -- it was -- it is impassable by -- I couldn't run a lawn mower over it.
Q Okay. Prior to you doing the work on this property, what -- I guess, did you see any Duke Power individuals out there doing work in that vicinity at any time?
A Prior to work, I think there might have been a guy on foot walking down spraying weeds. But no.
Q Have you ever seen any trucks come down through there?
A Prior to work, no.
Q Prior to the work.
A No, sir. No, sir.
Q Okay. Had anybody ever used the area where you have -- had Duke Power ever used the area where you put the retaining wall now?
A No. There's been no need. And we've offered access

through the gates that are there just for like the surveying, those kind of things.

Q Okay. And my understanding, you know, they say this is a safety issue. They're concerned for the endangerment of individuals. What is your view of that?

A Respectfully, that's -- that's kind of crazy, I mean, just in layman's terms. I wish we could take the Court to the property to see just how crazy it is, and I think some of the pictures will give a little better depiction of just how much room there is around this.

You know, I think that if a power line were to fall in that vicinity as people have tried to, you know, give the worse case scenario for, we've got a lot bigger problems than an aluminum fence. So it's just -- yeah. It's just kind of crazy to think that this would be a hindrance to anyone.

And so I challenged Mr. Pryor when he came out on how that was a hindrance. And anyway, the answers he gave I was able to offer several compromises, which . . .

Q Okay. And I want to go into a little bit about the -- bear with me one second. When he came out, what was the discussion with him in regards to the right-of-way?

A Well, obviously, again, I contacted him in good faith because we wanted to do some landscaping, plant some trees and shrubs around the pool area and in other

areas that would intersect with the right-of-way. And initially, on the phone, he told me that I can plant pretty much anything I wanted to provided it did not grow more than 15 feet tall and provided we could allow at least 16 feet access between trees, shrubs, whatever there is.

So then I did invite him to the property to come and take a look because I wanted to be sure that whatever we did was in compliance and we were on the same page. And while he was at the property and saw the retaining wall and the fence and the patio, that's when he said, "Oh, those things can't be there."

And so I don't know how far you want me to go with that question.

Q That's fine.

After your discussion, and maybe I can ask this, too, looking at this retaining wall and where it is, if you were to stand on the wall itself, where are the transmission lines above?

A They're far over. I mean, they're close to what they have designated as the centerline. They are to the right and left of that centerline, however, they're far away. They're still several feet away from actually being directly over the fence or the retaining wall.

Q Here's my question, and without going out and seeing

it, if you were to put a truck in the area around the retaining wall at the top right in here (indicating) and try to get access to these lines, can you do it in this area, I guess, around where we call "landscape bed" and all that?

A Yeah. That -- that wouldn't be an issue at all. I mean ---

Q There wouldn't be any problem with accessing the line. If I'm looking, and I want to make sure, where is the line -- that's the centerline, they're saying. How many lines are there? Three?

A Three, maybe four.

Q Okay. And how far off of the centerline do they come, do you think?

A Maybe 10 feet on the other side.

Q So 10 feet would be a third of that. So somewhere in this range right here?

A Yes, sir.

Q So they're coming in that range, and you can put a truck right in there and access them?

A Absolutely.

MR. SPENCER: Your Honor, I'm going to object to this. He's asking Mr. Walker, who I understand has not been qualified as an expert in electrical utility engineering, about where Duke Energy can put a truck and

do work on the transmission line. Quite frankly, I don't think Mr. Walker's qualified to give answers to those questions.

THE COURT: Yes, sir?

MR. ARIAIL: I'll move forward, Your Honor.

THE COURT: All right.

BY MR. ARIAIL:

Q Where is the nearest structure to your property?

A Just roughly I would say it's another hundred yards off of our property moving to the right. If you move to the ---

Q Down here (indicating)?

A Yes.

Q A hundred yards, somewhere in there?

A A hundred yards, just roughly, and probably 200 yards in the opposite direction.

Q Okay. So we just have lines that are coming through in this (indicating) area; is that correct?

A Correct.

Q Okay. Where is -- and tell me, I guess the access point of where Duke can come to enter this area down through here, where would that be?

A Well, so they've been coming out of their easement, now their right-of-way, onto my driveway, which didn't make sense to me why they can just do that when they

allowed someone else to block the right-of-way. But they were coming through there.

Now, as they've pointed out, they've recently, for whatever reasons, removed the Leyland Cypress there.

Q So these (indicating) have been removed?

A Uh-huh.

Q So where were they gaining access before those Leyland cypress were removed and that fence?

A Across my property, so outside the right-of-way.

Q And then ---

A Where your pinky is, yes.

Q So the asphalt drive?

A Yes. And then they would cut across into the driveway.

Q Would they come down your driveway or would they cut out ---

A No. They would -- they would cut across where your pinky was before. They would not come down the concrete. There was no need to come down the concrete. That would be completely foolish.

Q Okay. And so my understanding of the way you gain access, they don't have an easement to come down your driveway, correct?

A That's correct.

Q So they need to come down the side as to, you know,

where this -- this is the guideline in between the wood privacy fence and then come down this (indicating) area, correct?

A That's correct.

Q Okay. Now, tell me the slope once you get past this wood privacy fence and you're starting to come in, it looks like there's a CO drainage ditch, there's a drainage ditch in the middle here.

A Uh-huh.

Q Tell me a little bit about the slope and how this goes.

A Well, that drainage ditch, again, that through there would be pretty difficult for a vehicle to cross certainly before we did any grading. As it curves down and around before we did this project, that was completely washed out. That was very steep. So down where the retaining wall, obviously, that was the purpose of the retaining wall because the grade became so steep down there that it just -- even if we graded it back to what it was, you're still not driving a vehicle through there. Not staging a vehicle, certainly.

Q Okay. Now, back to the right-of-way. I want to make sure we have this. There's two different areas that I want to concentrate on. There's the first part of this that says that they're allowed to, I guess, remove these

structures if they, in any way, endanger the proper maintenance, operation -- I think I'm reading this correctly. Sorry. They're also granted the right to keep said right-of-way clear of all trees, structures and other objects except those placed thereon by the grantee together with the further right to cut away and keep clear any trees outside of said 68-foot -- 68-foot strip that might, in any way, endanger the proper maintenance and operation of the structures and other property placed upon said right-of-way. Now, it's your view that none of this endangers the proper operation of this right-of-way; is that correct?

A That's correct.

MR. SPENCER: Your Honor, I don't -- I need to object. I don't believe that Mr. Walker's qualified to testify as to what endangers the structures and the wires and things within the right-of-way.

THE COURT: I understand, and I understand your objection, and it's noted. I'm going to allow him to testify to it, certainly let you cross him. But I think it would go to the weight of his testimony. But it being his property, I'm going to allow him to testify to it.

MR. ARIAIL: Thank you, Your Honor.

BY MR. ARIAIL:

Q Now, in regards to the fence aspect of it, you're

believing that you're allowed to have this fence because it's not interfering or conflicting with the use of that right-of-way; is that correct?

A That's correct. And we've offered access inside of the fence, if needed, at any point in time.

Q Have you seen Duke maintaining or do any work on these lines at any time while you've been an owner of this house?

A Recently, obviously, with the removal of the Leyland cypress there's been some work, weed control that they've driven a truck down.

Q And I understand there's been the Leyland cypress. That's what I'm asking was, has there been any maintenance or repair of the wires ---

A Oh, no.

Q --- or structures?

A No, sir.

Q Okay. Now, when Mr. Pryor came in, did y'all discuss any means of trying to resolve this?

MR. SPENCER: Your Honor, I believe this is inadmissible pursuant to Rule 408, settlement instructions.

THE COURT: All right. How -- is there a way this would be admissible?

MR. ARIAIL: I don't know if he got into any

discussion with him where he admitted anything about how he could resolve it. I think he testified Mr. Pryor told him that he said the patio was okay, but the retaining wall was not. So I don't know. I mean, I'm going to ask him if they discussed anything in regards to how to make any changes to it to make it . . .

MR. SPENCER: Those are still settlement discussions.

THE COURT: It sounds like it. This being a nonjury matter, I'm going to allow you to proffer whatever his answer is, and then I'll make a decision once I hear.

MR. ARIAIL: I'm going to proffer that, Your Honor, and also do the other encroachments at the same time, if that's ---

THE COURT: All right. Certainly.

MR. ARIAIL: I'll just do them both.

BY MR. ARIAIL:

Q Did y'all discuss any remedial measures, you and Mr. Pryor?

A I did ask him if there's any way to keep it. He seemed to waiver a little on the patio, that that might be possible. But the retaining wall seemed to be the biggest issue. With the fence, I do remember specifically asking him about that. And there was no discussion about it being a metal fence. That wasn't a

problem.

May I use the pointer?

Q Sure.

A There's about a -- maybe a 12-foot section fence right about here (indicating) that he says runs parallel with the wire. And that 12-foot section was the only section of fence he said was an issue because running parallel to the wire. So I did ask him about pulling it out and making a right-angle corner there. But at that point, he just said, "No. The whole fence has to come down." Couldn't really explain why the whole fence for that 12-foot section.

Q Okay. Now, as part of this, I'm going to proffer the testimony that you have about the other encroachments that are along the line that you want to testify to. We talked about the Cypress and the fence at the top. What other encroachments are you saying have been or allowed to remain within the easement down through or close to your property?

A So the other neighbor has essentially a field full of junk cars completely blocking the right-of-way. Again, we can see other wire fencing and things like that crisscrossing from our house that hasn't been an issue.

There is a horse farm just a couple of doors down on North Rutherford that is part of this easement that has a

man-made pond coming within I'm guessing about 10 feet. I haven't put a tape measure on it, but about 10 feet of an actual tower. That's been there for years and years and years, far before we were living there.

I believe that this same easement right-of-way crosses Lake Cunningham, so if, you know, a power line dropping on our metal fence is going to cause the apocalypse, I wonder what would happen if it dropped in Lake Cunningham.

So there's -- there's a lot of encroachments, lots of fences, lots of man-made things, a pond, so on and so forth that, you know, it looked as if when we built this that as long as we allowed them access up and down that driveway to get to their towers to be able to get to their power lines, whatever they needed, that it would be fine. It wasn't a danger to anything.

MR. ARIAIL: Your Honor, that's the end of the proffer.

THE COURT: All right.

MR. ARIAIL: I think I'm close to -- let me review my notes real quick.

I have no further questions, Your Honor.

THE COURT: All right.

MR. SPENCER: Cross-examination, Your Honor?

THE COURT: Certainly.

CROSS EXAMINATION

BY MR. SPENCER:

Q Good afternoon, Mr. Walker.

A Good afternoon.

Q I believe you testified in response to Mr. Ariail's questions that you and your wife do, in fact, own the property at 239 North Rutherford Road in Greer, Greenville County, South Carolina; is that correct?

A That's correct.

Q You've resided there since 2010. That's about six years; is that correct?

A That's correct.

Q And Duke Energy's your electricity provider there; is that correct?

A That is correct.

Q And that's been the case the whole time that you've lived there, Duke's been your electricity provider; is that correct?

A That is correct.

Q You are a licensed real estate agent in the state of South Carolina; is that correct?

A That is correct.

Q And your license is current; is that right?

A That is correct.

Q And you're also a licensed residential builder in

the state of South Carolina, right?
A Those are both correct; however, I'm not practicing either.
Q But you had to take the exams for both, and you have current licenses to ---
A That's correct.
Q --- practice both professions in this state; is that correct?
A That's correct.
Q Now, when you purchased your house, you knew the transmission line crossed a portion of your property, didn't you?
A That's correct.
Q All right. And when you purchased your house, you were aware that there was a written and recorded right-of-way easement for that transmission line; is that correct?
A I knew that there was an easement across the property. That's correct.
Q Do you recall in your deposition when I asked you -- this is on Page 17 at line 13 ---
MR. SPENCER: And, Your Honor, I've got a copy of the transcript I'll be glad to hand you. Permission to open it.
THE COURT: Yes.

BY MR. SPENCER:

Q If you'll turn with me, please, to page 17 of the transcript.

A I'm there.

Q Do you see on line 13 where I asked you, "When you purchased the property, were you aware of whether or not there was a written and recorded right-of-way or easement for that transmission line"?

And the answer you gave was, "I believe we knew that was there when we purchased it, yes." Did I read that correctly?

A Yes, sir.

Q All right. Let's pull up Plaintiff's Exhibit 1. Plaintiff's Exhibit 1, which is in the book that's to your right up there if you want to take a look at the actual document itself and you're shown here partially on the screen, is that a copy of the right-of-way?

A I'm sure that it is, yes.

Q And you bought your home subject to the terms of that right-of-way, correct?

A Correct.

Q Do you see the language in there -- let's highlight the middle paragraph. Do you see the language that we talked about here today where it says it, being Duke Energy (as read), ". . . is also granted the right to

keep said right of way clear of all trees, structures and other objects except those placed thereon by the grantee, together with the further right to cut away and keep clear any trees outside of said 68-foot strip that might in any way endanger the proper maintenance and operation of the structures and other property upon said right-of-way by the grantee"? Did I read that correctly?

A I believe you did, yes.

Q And the next paragraph, there's been discussion of fences here today. Does it say, "It is agreed that the owner of said tract of land may use, or permit said right of way to be used for growing such crops and maintaining such fences thereon as may not in any manner interfere or conflict with the use of said right of way and rights by the grantee for the purposes hereinabove mentioned"? Did I read that correctly?

A Yes, you did.

Q And that language that I read was a part of the right-of-way that was written and recorded for your property when you purchased it; is that correct?

A Yes.

Q Now, prior to installing the pool and the fence and the patio and retaining wall, you did not reach out to anyone at Duke Energy to ask them whether or not those things would interfere with Duke Energy's right-of-way,

did you?
A No. I thought that was common sense.
Q You didn't call anyone at Duke to say, "I want to put this fence on part of your right-of-way"?
A Correct. I did not.
Q Okay. Now, you never worked for an electric utility, correct?
A No, sir.
Q And you have no electrical background on a utility level at all, do you?
A Not on a utility level.
Q And you have no knowledge regarding the maintenance or repair of electric transmission lines, do you?
A No.
Q And you have no knowledge of Federal or State regulatory requirements affecting electric utilities, do you?
A Well, no, not to the extent that you're asking the question.
Q This photograph, which is Plaintiff's Exhibit 6, Bates stamped Duke 46, it shows the fence, retaining wall and patio we've been discussing in this case, correct?
A Correct.
Q All right. That fence is an object, correct?
A Correct. And so is the one behind it.

Q -- The retaining wall is an object, correct?
A Correct.
Q The patio is an object, correct?
A Correct. So are the rocks and things behind there.
Q You have seen this document, I believe, in your deposition. Is it a copy of your residential addition and alteration application to Greenville County that your contractor submitted for purposes of building a pool?
A I'm sure it is.
Q If you want to see the actual document, that's Exhibit 2.
A It looks to be, yes.
Q All right. If we can zoom in on the top there where the date is, is the date of this March 7, 2013?
A I'm trying to find it. I'm sorry.
Q Right there (indicating).
A Oh, thank you. Yes, it is.
Q And is that about the time that you -- I guess sometime prior to this, you contacted the contractor, and then he submitted the application to build a pool on or about March 7, 2013; is that correct?
A Correct.
Q Now, when you were considering building the pool, you and your contractor discussed the fact that the fence, retaining wall and patio would encroach into

transmission line right-of-way, correct?
A We -- yes.
Q And you, I believe, in your direct testimony, testified that you checked this issue out because you knew that Duke Energy needed access; does that sound correct?
A Correct. Access to the right-of-way, sure. Yes.
Q But you didn't actually review, I believe, based on your direct testimony, the 1939 restrictions that were actually in your chain of title; is that correct?
A That's correct.
Q So you did not review the actual legal document that governs the relationship with respect to this right-of-way between you and your wife and Duke Energy; is that correct?
A Correct. We reviewed the documents that Duke Power put out for the general public.
Q Pull up Plaintiff's Exhibit 9, Curly Willow Designs 24. First of all, is this a -- this is a document that was produced by Curly Willow Designs in this case, and it's Plaintiff's Exhibit 9 already moved into evidence without objection. Joel Kirby with Curly Willow Designs was a landscape architect that worked for you on this project, correct?
A Yes. That's correct.

Q And if we look right here (indicating), is there a note in his file that says, "Duke Power needs access"?
A That's correct. As I said, we discussed that in the planning stages.
Q But you never called Duke to ask them what kind of access they needed prior to building, did you?
A No. No. Because the restrictions, again, online said you needed at least 16 feet to pass through, so we left you 50. We thought that was more than enough.
Q And you didn't look at the right-of-way, which is the actual document in your chain of title, to determine what you could or couldn't do, correct?
A That is correct. However, that didn't change after Mr. Pryor provided us a copy.
Q All right. We've looked at Plaintiff's Exhibit 5, and we can pull it up here. We've got the board here. You were asked about this in your deposition. This is a survey taken of your property subsequent to this litigation being commenced; is that correct?
A Yes. That's correct.
Q And it shows where the fence and the retaining wall and the patio all are, correct?
A Yes.
Q Okay. And it shows them encroaching into the right-of-way; is that correct?

A That's correct. Provided the right-of-way is where it's supposed to be.
Q But you testified just a minute ago that you had a discussion with your contractor about the fact that the fence, retaining wall, and patio would encroach into the transmission line right-of-way, correct?
A That's correct.
Q And in your deposition when you were asked about this survey, you didn't dispute anything about it, correct?
A I'm not a surveyor. How can I?
Q Point taken.
And this survey shows the fence, the patio and the retaining walls and how they relate to the piece of property; is that correct?
A That's correct.
Q And I believe you also testified that a vehicle cannot be driven through the fence or over that retaining wall safely, can it?
A You need to hire new drivers. No. No, it cannot. However, we did offer to make access through the fence for you guys if you needed it as well as several other ---
MR. SPENCER: Your Honor, I'm going up to move to strike. This testimony is subject to Rule 408.

THE COURT: All right. So stricken.

MR. SPENCER: And not responsive to the question.

THE COURT: All right. Go ahead.

BY MR. SPENCER:

Q Now let's talk about your contact -- well, let's back up. There's been some issue that's been raised for the first time today about where this right-of-way is. These are Plaintiff's Exhibit 12 and 13 not previously provided because we didn't think this was an issue.

MR. SPENCER: Permission to approach, Your Honor.

THE COURT: Oh, certainly.

BY MR. SPENCER:

Q Do you recognize Plaintiff's Exhibit 12?

A Not right away. I know I initialed it, so those are my initials.

Q Does this appear to be the title to your house?

A Okay. Yes. Thank you for explaining.

Q Does it say, "Know all men by these presents that A-1 Properties, LLC, it's successors, and assigns in consideration of $175,000"? And it goes on down, but it conveys unto Caleb E. Walker and Christine T. Walker your house; is that correct?

A That's correct.

Q And do you see that paragraph in the middle of the page where it says, "This conveyance is made subject to

all covenants, restrictions, easements and rights-of-way affecting the property"?

A I'm sorry. Which -- oh, yes. I'm sorry. Yes. I see that.

Q Duke Energy has an easement or right-of-way, correct?

A That's correct.

Q And the deed that you took to your house says that you took subject to that, correct?

A That's correct.

Q All right. In the next paragraph down, it's kind of indented on both sides, if you look down there, is there a reference in the description of the property? it says, "All that piece, parcel or lot of land situate, lying and being in the County of Greenville, State of South Carolina, being known and designated as Lot 1 as shown on the plat entitled Mill Valley Creek Lot 1 survey for Pete Souvola," that's S-O-U-V-O-L-A, "prepared by Freeland and Associates, Inc., dated January 23, 2002, and recorded in the office of the Register of Deeds of Greenville County, South Carolina in Plat Book 45-C at page 77." Do you see that?

A I see that.

Q Okay. It says, "Referenced to said plat is made for a metes and bounds description thereof." Do you see

that?
A Yes.
MR. SPENCER: All right. At this time, Your Honor, we would proffer Exhibit 12 into evidence. I believe it's a self-authenticated record. It's the recorded version from the Greenville County Register of Deeds Office.
THE COURT: Any objection?
MR. ARIAIL: No objection.
THE COURT: All right. It's so admitted as Plaintiff's 12.
(WHEREUPON, Plaintiff's Exhibit No. 12 was admitted into evidence.)
BY MR. SPENCER:
Q Now I'm going to -- you have in front of you Exhibit 13. Do you recognize this document?
A I don't, but as I'm looking at it, it looks like it's probably our street and property.
Q Okay. If you look down at that bottom right-hand corner, does it say in the block down there, "Mill Valley Creek Lot 1 survey for Pete Souvola"?
A Yes, it does.
Q If you look over, is there a handwritten notation near the bottom note that says "45-C-77"?
A Yes, sir.

Q And if we look back at Exhibit 12, the deed, does it say, "Plat Book 45-C at page 77"?
A Yes, sir.
Q And up at the top of the middle, does it say, "Filed Greenville, South Carolina, 2002 February 12, P. 339, Judy G. Nix, Register of Deeds"?
A I'm not sure. Mine looks like it might cut that off. Oh, I'm sorry. I'm looking on the wrong document. Yes.
Q I'll ask you again about that. It says, "Filed, Greenville, South Carolina, 2002 February 12, P. 339, Judy G. Nix, Register of Deeds," on Exhibit 13; is that correct?
A Yes. I see that.
Q Does that appear to be the plat referenced in the title to your house?
A Yes.

MR. SPENCER: Your Honor, at this time, we would move Exhibit 13 into evidence as a self-authenticating document.

THE COURT: Any objection?

MR. ARIAIL: No objection, Your Honor.

THE COURT: All right. It's so admitted as Plaintiff's 13.

///

--(WHEREUPON, Plaintiff's Exhibit No. 13 was admitted into evidence.)

BY MR. SPENCER:

Q Now, if you look at the plat on the left, do you see where it says "68-foot Duke Power easement"?

A Yes.

Q And do you see the three lines there?

A Yes, sir.

Q Do you see them cross the road, the asphalt drive coming to your house?

A Yes, sir.

Q Do you see your house there?

A Yes, sir.

Q Do you see how it is around the corner, the front left corner is relative to where that easement is?

A I don't see that. I see the front left corner relative to the property line.

Q Do you see the front left corner and do you see the dotted line running right next to it where the easement is running?

A I do. I don't see a measurement there, though.

Q Well, if we look here, and this is actually -- one of them is upside down. Which one, I don't know. But if we turn that this way to where these line up, we've got the house right here at the edge of the concrete drive,

correct?
A Yes, sir.
Q We've also got a house right here on the plat, correct?
A Yes, sir.
Q And if we look at where the asphalt drive is, it's kind of curved kind of like a finger; do you see that?
A Yes, sir.
Q And it's also curved kind of like a finger right there next to that easement, correct?
A Yes, sir.
Q Do you still have any doubt about where that right-of-way is?
A Yes, sir. Because this still does not give a measurement from the house to the edge of the driveway.
Q But it's pretty close, isn't it?
A It's close, but it might be 15 or 20 feet off.
Q You think that's 15 or 20 feet off?
A It's possible.
Q You're not a licensed surveyor, right?
A No, sir.
Q Going to your contact with Mr. Pryor, after the pool, fence, retaining wall and patio were built, you first contacted Mr. Pryor to discuss landscaping issues, correct?

A Yes, sir.
Q And that was the first contact you had ever directly met with anybody at Duke Energy to discuss the right-of-way on your property; is that correct?
A That's correct.
Q You did not, as you testified to earlier, contact them about building the pool, the fence and the retaining wall and all that?
A That's correct.
Q The first contact was by phone; is that correct?
A Yes, sir.
Q And that was in about January 2014?
A That sounds close, yes.
Q In that same conversation, you mentioned the pool with the fence and patio; is that correct?
A Yes, sir.
Q And he told you on the phone that that kind of thing was not allowed in the right-of-way, correct?
A He told me that the pool was not, which the pool, of course, is not. He did say on the phone, at that point, that the retaining wall probably would not be, which is why I invited him to come and take a look instead of hanging up.
Q And he did come out; is that correct?
A He did.

Q And he told you there in person the fence and the wall and the patio would not be allowed; is that correct?
A Yes. That's correct.
Q And nobody from Duke Energy has ever told you anything other than that; is that correct?
A I've never talked to anyone else from Duke Energy.
Q So by virtue of the fact you've never talked to anybody ---
A That's correct.
Q --- nobody else has said, "Oh, you can have that fence," or "You can have that patio," or "You can have that wall," correct?
A That's correct.
Q And he told you that wall, the fence and the patio would have to be moved out of the right-of-way, correct?
A Yes. That's correct.
Q And he sent you a letter, that's Plaintiff's Exhibit 8, on February 3, 2014, about a week later, correct?
A Yes. That's correct.
And I apologize. I may have misunderstood your question. May I ---
Q Go ahead.
A When he was there, as discussed before, we did

actually talk about the patio and the fencing possibly remaining. So there was some question there, but he remained adamant, especially with this follow-up letter.

Q That he would have to ---

A With his follow-up letter. He couldn't give me reasons why at the time, because I asked him at the time how it endangered. He couldn't -- he couldn't give me a clear answer.

Q He told you he needed to go back and check his paperwork, correct?

A Not really. He just couldn't give me an answer.

Q Within a week he sent you a letter. And he said, "Enclosed is a copy of the right-of-way document that was purchased from G.P. Brown in 1939. Please note that this document gives Duke (the Grantee), the right to keep said right of way clear of all trees, structures and other objects except those placed thereon by the grantee." Did I read that correctly?

A Yes, sir.

Q And the lawsuit in this case was filed in October of 2014, correct?

A That sounds right.

MR. SPENCER: Your Honor, we would just ask the Court to take judicial notice that the complaint was filed on October 21, 2014.

THE COURT: All right. So noted.

BY MR. SPENCER:

Q October 21, 2014, the Court has taken notice of the filing date of the lawsuit in this case. That is roughly 18 months after you built the pool; is that correct?

A That sounds right. Yes, sir.

Q Well within three years?

A Yes, sir.

MR. SPENCER: Your Honor, I do have some questions that relate to the issues on the motion in limine. I'm not sure if with regard to the proffer I need to ask him now or not.

THE COURT: All right. Then we'll just -- then I'll just say that you're proffering these or you're asking these questions without waiving any right that you have pursuant to your motion in limine, so you can just proffer those questions now and then we'll just make the record clear when you end the proffer, all right?

MR. SPENCER: Okay. Thank you, Your Honor.

BY MR. SPENCER:

Q The cypress trees as we discussed here have been removed, correct?

A That's correct.

Q And you're not personally aware, and you did not

participate in any negotiations or discussions between any of the other property owners along this transmission line of Duke Energy relative to any of the things that you talked about in the proffer Mr. Ariail gave that you believe are encroachments; is that correct?

A Okay. If I understand the question correctly ---

Q I'll rephrase it.

A Yeah. Help me here.

Q You discussed in the proffer that Mr. Ariail, he asked you several questions, I think a pond was mentioned, other fences along the right-of-way, different things like that. Do you recall those questions?

A Yes, sir.

Q All right. You're not -- with respect to those specific encroachments on other rights-of-way not on your property, you're not personally aware and you did not participate in any negotiations or discussions between any of those property owners and Duke Energy at any time, did you?

A No. With the exception of the Leyland cypress that were planted by our neighbor, and I'm not -- I'm trying to answer your question the best I can. But I was personally aware and did witness the documents that were exchanged with allowing to keep those Leylands there. So I personally did see and witness that. However, I did

not personally speak to Duke Power, if that's what you're asking.

Q And with respect to anything other than the Leyland cypresses, you don't have any personal knowledge about what the negotiations or deal for whatever are between -- if there are between Duke Energy and those property owners?

A No, sir.

Q And you don't know the status of any efforts Duke Energy may be taking this very minute to have any of those things removed, do you?

A No, sir.

Q Do you have any knowledge of Duke Energy's internal policies and procedures related to helicopter flyovers or inspection of rights-of-way?

A No, sir.

Q Do you have any knowledge of the timing of those?

A Other than what Mr. Pryor has testified to, no, sir.

Q But as to your personal knowledge, you don't have any?

A No, sir.

Q You mentioned in your direct testimony that there are -- that before the patio, retaining wall and fence were built, that this area was impassable because of the grade. Do you recall that testimony?

A Yes, sir.
Q Do you have any pictures to offer the Court to show that?
A No, sir. I didn't think those were necessary.
MR. SPENCER: Thank you, Mr. Walker. Those are all the questions I have.
THE COURT: Any other questions?
MR. ARIAIL: Just a couple questions, Your Honor.
THE COURT: Sure.

REDIRECT EXAMINATION

BY MR. ARIAIL:
Q Mr. Walker, this new document that they provided you, I think it's Plaintiff's 13, just my understanding whereas you agree there's a 68-foot easement, correct?
A Correct. No question.
Q And so the dilemma you're having is you're not a surveyor and you don't know where that 68-foot easement is on your property; is that correct?
A That's correct.
Q Okay. So, I mean, what I'm reviewing from this document and what I understand is the easement cuts across the corner of your property; is that correct?
A Correct.
Q I mean, it looks like there's a portion of it, as you can see, the top of your property, which is not a

part of the easement; is that your understanding?
A That's correct.
Q Okay. So if that easement is 10 feet or 15 feet over on that side up in that corner, then the piece of property, the encroachment that they're saying you have right now is not an encroachment. Would you agree with that?
A That is correct.
Q Okay. So no one has ever shown you a document saying, "Hey, here exactly are the metes and bounds, the pins and everything that show exactly where this easement was and where it was meant to be back in 1939"?
A That's correct.
MR. ARIAIL: I have no further questions, Your Honor. Thank you.
THE COURT: Anything?
MR. SPENCER: Nothing further, Your Honor.
THE COURT: Sir, you can step down.
THE WITNESS: Thank you.
MR. ARIAIL: Your Honor, that's -- one housekeeping matter for us. I just -- I have a bunch of exhibits we've moved -- they've stipulated and we're moving in. If I can just make those a part of the record, that will be our case.
THE COURT: All right. Is that ---

MS. SPRUILL: He's removed the couple of pages we've had an objection to, so subject to that, I think it's without objection.

THE COURT: All right. And do you know what those -- just what those numbers are very quickly, just for the record?

MR. ARIAIL: 1 through 6. I want to make sure I'm not -- 1 through 6, Your Honor.

THE COURT: All right. Great.

MR. ARIAIL: Perfect. They're all right there.

THE COURT: Defendant's Exhibits 1 through 6 are hereby entered.

(WHEREUPON, Defendant's Exhibit Nos. 1 through 6 were admitted into evidence.)

THE COURT: All right. So we've come to the conclusion of the defendant's case, subject, of course, to the surveyor tomorrow morning.

Well, if there's not anything else we need to take up tonight, then we'll reconvene tomorrow morning to hear from the surveyor at about 10:30. Does that work for everyone?

MR. SPENCER: Yes, Your Honor.

MS. SPRUILL: Sounds perfect.

THE COURT: All right. Thank y'all so much. I appreciate it.

MR. ARIAIL: Thank you.

THE COURT: All right. Y'all have a good evening.

(WHEREUPON, a recess is taken at 3:57 p.m.)

WEDNESDAY, JUNE 1, 2016

THE COURT: All right. We're going to pick up today in the plaintiff's case with, I believe, the surveyor; is that correct?

MR. SPENCER: Well, Your Honor, before we call the surveyor, we need to briefly recall Mr. Pryor related to a couple of documents that were brought up that are going -- we need to lay a foundation for what the surveyor's going to ---

THE COURT: Okay. All right. Any objection to that?

MR. ARIAIL: I mean, that's the first time I've known about that. I thought they closed. I know they have the ability to rebuttal, but, I guess ---

THE COURT: Well, I think in light of the fact that they need this for the surveyor, and in light of the interesting circumstances that we've got the surveyor coming, I thought ---

MR. ARIAIL: I don't have any problem with that. I don't know what he's going to -- if it's just for the surveyor aspect and the documents, he had told me what he's trying to put in, but if it just relates to that, I don't think I have an issue.

MR. SPENCER: It's just a strip map.

MR. ARIAIL: That's not a problem.

THE COURT: Okay. Very good.

MR. SPENCER: We recall Steven Pryor, Your Honor.

THE COURT: Sure. And I will remind you that you're under oath.

THE WITNESS: Yes, ma'am. Thank you, Your Honor. Good morning.

THE COURT: Good morning.

WHEREUPON,

STEVEN PRYOR

After have previously been duly sworn, testified as follows:

REDIRECT EXAMINATION

BY MR. SPENCER:

Q We're looking back, Mr. Pryor, at Exhibit 1, which is the right-of-way, Plaintiff's Exhibit 1 which is already in evidence. And do you see in this document where the right-of-way was given by several folks with the last name Lanford up at the top?

A Yes, I do.

Q Okay. And it says down below that near the bottom of what we see here on the screen, it says, ". . . situate in the above County and State, bounded by the lands of G.P. Brown, P.W. Brown and others."

A That's correct. Surrounded by Brown and Brown.

Q All right. I'm going to hand you what's been marked

as Exhibit 14.

MR. SPENCER: May I approach, Your Honor?

THE COURT: Certainly.

BY MR. SPENCER:

Q Can you tell us what this document is?

A This is part of Duke Energy's documents that they maintain and hold. It's a 1939 strip map of the line that was built back in the day.

Q What is the significance of the year 1939 relative to this transmission line?

A For this transition line, this strip map matches up perfectly with the easement documents that were signed by the property owners along this line where it was built and its existence in 1939.

Q Okay. Has the transmission line been in this area shown on this strip map since around 1939?

A Yes.

MR. ARIAIL: Objection, Your Honor. I don't know where he's going. I mean, he's asking back in 1939 to make a decision as to whether he knows it. I mean, clearly, I don't know how he's going to know that because we weren't -- I don't think any of us were born in 1939.

MR. SPENCER: I can lay some more foundation, Your Honor.

THE COURT: All right.

BY MR. SPENCER:

Q Is this a document that is maintained as a part of Duke Energy's records?

A It is.

Q And what is the purpose for Duke Energy maintaining this document?

A It's our record-keeping.

Q And did you research Duke Energy's records to find this document?

A Yes, I did.

Q And based upon the research you did, did you make a determination about whether or not the transmission line that runs along this strip map has been there since 1939?

MR. ARIAIL: I'm still going to object, Your Honor. I don't know how he can -- I mean, based on reviewing this, first of all, I've got this document. I'm looking at it. I don't know how we can determine anything with regards to it. So how he's going to draw that out of his testimony to be able to say ---

THE COURT: I'm going to allow him to testify to it. I'm going to ask him to explain how he did that. But I think, based on his testimony yesterday and his position with Duke Power, I think he's qualified to talk about this document. I just want to hear a little bit more about how he's come to his conclusion about this.

MR. SPENCER: Okay. Thank you, Your Honor.

BY MR. SPENCER:

Q Mr. Pryor, can you explain to the Court the conclusions that you made about the existence of the transmission lines since 1939 based upon this document?

A I can. Sure. And I understand I wasn't born in 1939, but this is normal actions for Duke Energy, is normal business to maintain archived documents on a line that was built where we went out and purchased easement documents. It's got the names for all the property owners, it's got the locations of where it crosses, it's got references where it was built, and we have maintained an easement since 1939, public record recorded in the county on the deed saying the easement document, and it matches this strip map that Duke Energy keeps and maintains in its records.

Q Based upon your experience with the company, when you look at a strip map like this and look at the year that it was created, is that about the time that the line was built?

MR. ARIAIL: Objection, Your Honor. I don't know how he's going to . . .

THE COURT: If he knows the answer, then I'm going to allow him to answer and explain how he knows.

THE WITNESS: Of course, I wasn't around in 1935

when they built the line, but these records that we maintain indicate the line was -- an easement was purchased and the line was built in 1939.

BY MR. SPENCER:

Q And is this the document that is maintained in the normal course of Duke Energy's business?

A Yes, it is.

MR. SPENCER: Your Honor, at this time, we would move Plaintiff's Exhibit 14 into evidence.

THE COURT: Any objection?

MR. ARIAIL: No objection, Your Honor.

THE COURT: All right. Then it will be so admitted as Plaintiff's 14.

(WHEREUPON, Plaintiff's Exhibit No. 14 was admitted into evidence.)

MR. SPENCER: May I approach, Your Honor?

THE COURT: Oh, certainly.

BY MR. SPENCER:

Q Mr. Pryor, I've handed you what's been marked as Plaintiff's Exhibit 15. Can you tell the Court what this document is?

A This is the same document that we just reviewed. It's page 1 of the document. And it shows the lines where I have indicated several referenced landmarks which conclude to the larger circle where it is surrounded by

the property Brown and Brown, the Lanford's easement document.

Q Okay. And do you see on the bottom line where you have the largest oval there in red, do you see Leo Lanford estate, in pencil "130" written above that?

A Yes, I do. In the large circle.

Q All right. Do you see on Exhibit 1 here where it says "Deed No. 130"?

A Yes, I do.

Q Okay. And if we can go back out and go back up to the top, and we see the Lanfords here like we talked about earlier, and then we see "situated in the above county, bounded by the lands of G.P. Brown, P.W. Brown." Did you, based on this right-of-way, make a circle on this strip map, which is Plaintiff's Exhibit 15, to show where the right-of-way is that crosses Mr. Walker's property today?

MR. ARIAIL: Your Honor, I'm just going to object. I mean, I've looked at this document they've presented. I see Leo Lanford. I don't see any of the other individuals that were on the right-of-way for the -- that was granted by -- to Duke Power by Della, Carl, Rosalie and Ruth Lanford. So, I mean, I would just ---

MR. SPENCER: Your Honor, I think I can clarify that.

THE COURT: Okay.

BY MR. SPENCER:

Q You see here Leo Lanford estate?

A Yes.

Q And all these last names are Lanford?

A Yes.

Q Does it appear to you that these are the heirs of the estate of Leo Lanford?

A Yes, it does.

Q And then we've got G.P. Brown and P.W. Brown on either side?

A That is correct.

Q Based upon your investigation and role with Duke Energy as an asset protection specialist, is the area you've shown in the oval on Plaintiff's Exhibit 15 the area where the right-of-way that Duke Energy owns that we've been talking about, Plaintiff's Exhibit 1, crosses Mr. Walker and Mrs. Walker's property?

A Clearly it ties the documents all together.

MR. SPENCER: Your Honor, at this time, we would move Plaintiff's Exhibit 15 into evidence.

THE COURT: Any objection?

MR. ARIAIL: No objection, Your Honor.

THE COURT: All right. It's so moved.

///

(WHEREUPON, Plaintiff's Exhibit No. 15 was admitted into evidence.)

MR. SPENCER: Thank you, Mr. Pryor. Please answer any questions that Mr. Ariail, may have.

THE WITNESS: Thank you.

THE COURT: Yes, sir.

MR. ARIAIL: Thank you. May it please the Court.

THE COURT: Yes.

RECROSS EXAMINATION

BY MR. ARIAIL:

Q Mr. Pryor, just to get a little information in regards to this document. You didn't but this document together, did you?

A This document was provided when I asked Real Estate Services to pull the easement documents for Mr. Walker, and I provided them to him in the letter.

Q Okay. And are you aware that this transmission line was out of service for a while in the last 10, 15 years?

A Yes. I'm aware of that.

Q Okay. So was it moved at any point in time during that period of time?

A It was not moved.

Q Okay. So are you certain of that? How long have you been with Duke Power?

A I've been with Duke Power for six years.

Q Okay. So before that, you're not sure if it would have been moved or anything of that nature, correct?
A It would not have been moved.
Q Why would you know that if you weren't there?
A It's not in our normal course of action to move a transmission line that's recorded and tied to an easement.
Q Okay. But what I'm saying is you don't know what was done with that line before you got there six years ago.
A I do not know.
Q Okay. Now, I'm looking at this -- what do you call this document?
A I call it a strip map.
Q Okay. It looks like a bunch of lines on here. And I'm trying to figure, and that I want to go back to your testimony yesterday.
A Sure.
Q You know, we're sitting here and we're discussing where this easement is, exactly the location of the easement.
A Right.
Q Okay. What does this document help us determine in regards to if this easement is 15 feet off or 20 feet off one way or the other?

A This -- this document helps tie the easement document itself to the strip map where we built the line. It's got reference points on here that I'm not going to refer to because I'm not a licensed surveyor. But it outlines, it has the road crossings, it has the -- you know, it has reference points on here to tie it together. But to be perfectly honest, I'm not a licensed surveyor, but I can put two and two together very easily.

Q Okay. But -- so it doesn't -- I mean, your view yesterday that the easement is off or if it's 15 feet off one way or the other, 15 feet off this (indicating) way, then this encroachment could be included, it could be allowed?

A I disagree completely. My opinion is it's spot on.

Q Okay. Now, as part of this document, Leo Lanford -- I mean, you've made an assertion that Leo Lanford estate has something to do with Della Lanford and all these people that issued this right-of-way. How do you know that?

A Partly we rely on our real estate experts at Duke Energy who pull these easement documents and they tie that information together with the easement document. With the strip map and the locations, they all add up together to give us the evidence that supports the easement crossing Mr. Walker's property.

Q Okay. So -- and I'm going to take it that you have no clue whether or not this property was deeded over to Leo Lanford by Della Lanford or if it's even connected with them.
A Had we had more opportunity to argue the survey and chain of title, we would have done that.
Q But you've got the ability to do that now, don't you?
A Based on my information here, everything is accurate.
Q Okay. But you're -- okay. In this document -- I want to go back. The right-of-way gives a 68-foot easement. It doesn't tie into any of these pins or markings that are on here, does it?
A Yes, it does.
Q Okay. Back to your easement ---
A But, again, I'm not a licensed surveyor to verify that.
Q I'm just going to go back to this easement once again. Show me in this easement on Exhibit 1 where it says anything about where the 68-foot easement is tied to any pin, pins, bearings, metes, bounds, anything of that nature.
A I can't answer that.
Q Is it on that document?

A The document ties it to the strip map which has the reference points, and the line was built across the Walker's property in 1939 or when it was built, and it was built at 34 feet of each side of center. That's just standard.

Q I'm not trying to put words in your mouth. I just want you to show me on this document where there's any metes, bounds, bearings, pins, anything that match up with that 68-foot easement.

A I'll leave that up to the surveyor to explain. I can't explain it.

Q I'm not asking what the surveyor is going to testify to. I'm asking you to tell me if there's anything in that document that says that.

A I don't know how to tie that to this like you're asking. I can't do that.

Q I take that as a "no". That would be a "no." Thank you.

Now, on this document there is, and if I'm -- I can't read this exactly. There are pins and bearing markings on this document, correct?

A Right.

Q Okay. And this was done in October 1939?

A Correct.

Q Right? So it would have been around the time the

easement or the right-of-way was granted, correct?
A Correct.
Q So you can't tell us why none of these bearings or pins or metes and bounds were not placed in that right-of-way, can you?
A I can't tell you what.
MR. ARIAIL: Okay.
Your Honor, I have no further questions.
MR. SPENCER: Briefly redirect, Your Honor?
THE COURT: Certainly.
MR. SPENCER: Pull Plaintiff's Exhibit 1. You can go to the bottom right-hand corner.

REDIRECT EXAMINATION

BY MR. SPENCER:
Q Does that say Deed No. 130?
A It does.
Q Does that, in your mind, tie that to this strip map at 130, the estate of Leo Lanford?
A Yes.
MR. SPENCER: Thank you, Mr. Pryor.
THE COURT: Anything else?
MR. ARIAIL: Yes, Your Honor.

RECROSS EXAMINATION

BY MR. ARIAIL:
Q You don't know who put this 130 on this document, do

you?
A No.
Q I mean, you didn't put it, did you?
A No. It was normal real estate transactions. I didn't do it.
Q Here's another. You don't know if it was put there in 1939 or if it was put there last night, do you?
A I believe it was put there when it was -- when it was created in 1939. Why would we make them up?
Q You don't know that, do you?
A No.
MR. ARIAIL: Okay. Thank you. No further questions.
THE COURT: Anything else for this witness?
MR. SPENCER: No, Your Honor.
THE COURT: Sir, you can step down.
THE WITNESS: Thank you, Your Honor.
THE COURT: Thank you.
MS. SPRUILL: Duke Energy will call Dan Proctor.
WHEREUPON,

DANIEL PROCTOR

After having been duly sworn, testified as follows:
THE COURT: And, Mr. Proctor, thank you so much for working with our schedule.
///

DIRECT EXAMINATION

BY MS. SPRUILL:

Q Good morning, Mr. Proctor.

A Good morning.

Q Can you please tell the Court for the record your name and business address.

A My name is Robert Daniel Proctor, South Carolina registered land surveyor No. 11068. I live in Greenwood, South Carolina. My office is in Greenwood, South Carolina.

Q And can you describe your education for the Court?

A Two years of associate degree, two years technical school, seven years apprenticeship, and 30 years in private practice.

Q And are you a licensed surveyor in the State of South Carolina?

A Yes, I am.

Q And how long have you been a licensed surveyor in the State of South Carolina?

A Since 1986.

Q And since 1986, you got any guess how many surveys you've done?

A No. Thousands.

Q Thousands.

Have you ever been qualified as an expert by a court

in South Carolina?
A Yes.
Q And how many times?
A Approximately eight, and once in Federal court.
Q And has your testimony ever been excluded or limited in any way?
A No.
Q Have you ever performed a survey which showed the location of utility easements?
A Yes.
Q Is that something you routinely do in the course of your practice of surveying?
A Yes.
Q Got any guess what percentage of the surveys you've done have included that kind of feature?
A Probably 50 percent, at least.
Q So if you've done thousands of surveys, how many utility easements would you guess you've depicted over the years?
A At least 500.
MS. SPRUILL: Given that background, we would like to proffer Mr. Proctor as an expert in survey to include the location depiction of utility easements.
THE COURT: Any objection or further voir dire?
MR. ARIAIL: No objection, Your Honor.

THE COURT: All right. Then he'll be so qualified.
BY MS. SPRUILL:
Q Mr. Proctor, what were you asked to do in this case?
A To locate the right-of-way, the utilities and the encroachments.
Q And I see you looking at the blowup in front of you. Is that a survey you prepared in this case?
A Yes.
Q You'll see in front of you there is a notebook of exhibits.
A Yes.
Q Can you take a look at Exhibit 5 and let me know if you recognize those documents?
A (Witness complies) Sure.
Q What are they?
A This is an affidavit I did.
Q And is your survey attached behind it?
A Yes.
Q And is the affidavit still true and correct, to the best of your knowledge?
A Yes.
Q Does the survey accurately depict the Walker's property, to the best of your knowledge?
A It accurately depicts the ties that I made to their property, yes.

Q Did you visit the property?
A Yes.
Q What did you do while you were there?
A Well, I observed the line and observed the encroachments and then located everything with instruments.
Q And what instruments did you use? What measurements did you take?
A Well, I used a GPS to start with, tied everything to the state planned coordinates, and then we used the instrument, a robotic instrument that we normally use in everyday practice.
Q And is the photograph in the bottom corner of that survey there, did you take that at the time you made those measurements?
A Yes.
Q And does it accurately reflect what you saw while you were out there?
A Yes.
Q And did you look at the right-of-way document in this case?
A I did.
Q Is that a type of document you routinely look at in the course of preparing a survey?
A It is.

Q What does that top paragraph tell you about the right-of-way in this case?
A Who the right-of-way was purchased from.
Q If you want it, there is an Exhibit 1 in your notebook, if you have trouble seeing.
A Okay. So it tells the grantors of the right-of-way.
Q Okay. What else does it tell you?
A And what Duke was trying to buy.
Q Okay. And what -- do you see there where it says that they do hereby grant and convey unto said Duke Power Company, its successors and assigns, a right-of-way 68 feet in width in, upon and across that tract of land?
A Yes.
Q What does that tell you as a licensed surveyor in South Carolina?
A That they granted an easement across there to Duke Energy and everyone else after that will be abided by that.
Q And what does that 68 feet in width mean to you?
A Normally, 68, unless I see something else in that paragraph, means that normally it's a 34-foot each side of the centerline.
Q And is that customary for a utility easement in South Carolina?
A Yes.

Q And generally, if there's some kind of variation from that usual custom, would it be noted in the easement document?
A Yes.
Q In addition to this easement document, what else did you review?
A I -- before I came out to the survey, I looked at the strip map.
Q And that's the Exhibit 14 you just heard us talk about? It's in front of you.
A Exactly.
Q Okay.
A And then I looked at the deed, of course, or easement.
Q Okay.
A And then I always go on Google Earth and look at the entire line to see if it looks in the PIs, which are a point of intersections, of the entire line, look and see what it looks like, the right-of-way that's been maintained, the width of it, the trees and so forth. Then I looked at the GIS for Greenville County. Then I also looked at the Walker's plat, downloaded the Walker's plat, took that with me to the field so I could make the proper ties.
Q And it should be -- do you see Exhibit 13 in front

of you somewhere? If not, we'll get it back from the court reporter.

A I don't see it.

Q The court reporter has it.

A Yes. I got you. 13.

Q Is that what you mean when you say you looked at the Walker's plat?

A Yes. I always do that before I perform a survey.

Q And how did you confirm that was the Walker's plat?

A I found it under their deed, referenced from their deed, referenced from the GIS, referenced from the tax maps.

Q And when you say "their deed," is Exhibit 12 over there? Is that what you looked at?

A Yes, yes.

Q And what did our site visit and review of those documents and the Internet resources you just described, what did all those things tell you?

A That this plat showed before I got to the site where the right-of-way was, and mainly that Walker was probably informed where the right-of-way was before I got there.

Q And how did you determine the location of the right-of-way?

A I located the poles after looking at the entire line. And so I used that evidence of where the poles are

today, verification from the GIS, and then I used Walker's plat more than anything because it shows the same thing.

Q And is that the way you customarily perform a survey?

A Yes.

Q Any reason not to apply that technique in this case?

A No.

Q Any reason to believe that the right-of-way isn't where you've indicated it on Exhibit 5?

A No.

Q Have you got a pointer up there? Actually, it might be better --

MS. SPRUILL: Your Honor, may I move the exhibit and may the witness approach the exhibit?

THE COURT: Whatever you need to do and whatever he needs to do.

BY MS. SPRUILL:

Q All right. I'm going to pull this up here.

Mr. Proctor, if you would, point out for us where the right-of-way is on there.

A Okay. Where I have right-of-way limits shown, and this (indicating) would be the centerline located based on the poles.

Q And is that consistent with everything you've

reviewed?

A Yes.

Q And just by way of example, if you would take Exhibit 13, we just talked about that ---

A Yes.

Q --- and compare it with Exhibit 5, show us how that right-of-way is in the same place as the right-of-way on the plat reference in Mr. Walker's deed.

A Okay. I verified the pins. And here's (indicating) the pin. And this is a pin. That's shown on the same plat. The distance and the bearing corresponds to -- with the reason the difference in ---

THE COURT: Hold on just one second.

Mr. Ariail, would it be helpful to you to be able to see this a little bit better?

MR. ARIAIL: I'm going to move over ---

THE COURT: You move wherever you want to move.

THE WITNESS: As I was saying, this (indicating) pin from this pin, as far as I'm concerned, in my opinion, that that's the same pins that's shown on the Walker's survey. I located that.

And then to verify that the plat was kind of in some kind of accuracy, the pins checked. I also checked this distance from the corner of the house. So the house is shown on the Walker plat. It's still in the same place.

I didn't have any reason to doubt that the power line that's shown on Walker's plat was any different than what was out there at the time of the survey because the line had been rebuilt, of course, but it'd been rebuilt a long time ago. So at the time that they did the survey, the line was probably in the same place I was in.

BY MS. SPRUILL:

Q And you can take your chair. Thank you.

Mr. Proctor, we had some discussion earlier about Exhibit 14. How does --

A Which one was this? 14.

Q It's this one that looks like ---

A Okay. Strip map. Okay.

Q What information does that strip map provide you?

A Well, it has the ties done in 1939, '38, whenever they did it. But most of the times, those ties are very hard to go back and find. They're missing nowadays. The mete -- the bearing on the line is within reason to the bearing on the line that we have shown here. So it's not out of rotation.

Q Okay. So what you see here on Exhibit 14 is also consistent with what you've shown on Exhibit 5?

A I believe so.

Q And as you've shown on Exhibit 5, in your professional opinion and based on everything you've

reviewed, does that survey accurately depict the size and location of the Duke Energy right-of-way on the Walker's property?

A It does.

Q And to the best of your knowledge, would that be consistent with respect to the line, what was there when this thing was built in 1939, 1940?

A I believe so.

Q And in your professional opinion, are there objects or structures located within that right-of-way on the Walker property?

A Yes.

Q Can you -- if you would, approach Exhibit 5 and show the judge what those encroachments are.

A (Witness complies) There was a fence along here (indicating), a metal fence, and a patio with a wall and a little bit of concrete. It's pretty much as you see in this here picture.

Q And do you, as a licensed professional surveyor -- you can take your chair. Do you, as a licensed professional surveyor, have any reason to believe that the right-of-way, as you've shown on Exhibit 5, could possibly be 10, 15 feet in another direction?

MR. ARIAIL: Objection, Your Honor. Leading.

THE COURT: I'll allow her to ask that question.

Yes, sir.

THE WITNESS: You want me to answer?

THE COURT: Yes, please.

THE WITNESS: Okay. My opinion with all the documents I examined and the field work I did on the ground, it's as shown.

BY MS. SPRUILL:

Q Okay. And in your -- we've already asked that.

Do you have any reason to believe what's shown in Exhibit 5 is not the location of the right-of-way?

A No.

Q And as a licensed surveyor, do you have any reason to believe the location of the right-of-way has changed since it was purchased by Duke Energy in 1939?

A It doesn't appear to be changed any from all the documents I examined.

MS. SPRUILL: Nothing else for you. Please answer Mr. Ariail's questions.

THE WITNESS: Sure.

THE COURT: Mr. Ariail?

MR. ARIAIL: Thank you.

CROSS EXAMINATION

BY MR. ARIAIL:

Q Mr. Proctor, how are you doing today?

A I'm okay. How are you?

Q Great, great.

Let me ask you this. I've listened to your whole testimony, and just kind of want to go through it a little bit to get an understanding of some of the measurements here. Now, what I have not heard and what was a little surprising to me was you didn't match up any metes, bounds, bearings, pins or anything that existed back in 1939.

A I did not.

Q Okay. And the reason you didn't do that is because you can't find those or they're not listed; is that correct?

A That's true.

Q Okay. So here's where we are with this case. We're trying to figure out where this 68-foot easement is, okay?

A Uh-huh.

Q So as my wife told me one day, if a pilot is off a centimeter when he's flying through his whole course, by the time he finishes, he could be miles off from his location; do you understand that?

A I do.

Q Okay. So if we're 10 or 15 feet off of where this easement is, then that could allow for those encroachments to fall outside of the easement. You would

agree with that?
A I agree.
Q Okay. So you took your measurements and based them off of where the poles are as of today, correct?
A Took them off and based them on the best available evidence at the time of the survey.
Q Correct. Okay. So that best available evidence you had was where those poles are now?
A Where the poles are and Walker's survey.
Q Okay. And we'll get through Walker's survey.
But if the poles -- and I'm just throwing it out there. If the poles are in the wrong location, because, as you've said, you know, this was back in 1939, the poles have been put in at some point in time.
A Uh-huh.
Q If they're in the wrong location or they're off 10, 15 feet, then your measurements are incorrect based on where the easement was; is that right?
A That could be.
Q Okay. So we know this, and this is what nobody has disputed in this case. There's a right-of-way for 18 feet, okay?
A That's true.
Q We got that. And Mr. Walker said that.
Now, my question to you, and help me because my

math's not very good, we know that there's some area in here which is unencumbered by the easement, correct?

A True.

Q I guess that -- and I'm ---

A The corner.

Q How many feet do you think that is up through there?

A I don't know. I have a scale if you want a scale.

Q Well, that's what I -- if I took it it was an inch ---

A Equals five, one -- five feet.

Q Okay. So two inches would be about 10 and three inches would be about 15, right?

A Yeah.

Q So do you think that's --

A I could scale it if you want to scale it.

MR. ARIAIL: Your Honor, could he come down and scale that for me?

THE COURT: Please.

BY MR. ARIAIL:

Q I knew you'd have a tool to be able to do that.

A So you're looking at about 20 or so feet.

Q 20 or so feet. Okay.

So if the easement covers that 20 feet and it was supposed to be over into that area, there's still an ability to have 68 feet, correct?

A That's true.
Q And it might -- I mean, if the case is it's up here, you've got 20 feet over here, then that would reduce the 20 feet down below where the current encumbrance is, correct?
A True.
Q Okay. Now, under that situation, that would fall outside of their easement, correct?
A That's true.
Q Okay. So what I'm trying to understand, and I know we're going back and we're saying a lot of different things about the surveys and about information, there's nothing that shows us specifically what you have testified to as to where that easement was located in 1939.
A True.
Q Now, you've marked -- and what I understand, I know we took this -- I guess it's a plat for the house.
A That's true.
Q And you marked it from his front corner and showed a square footage or a line up into this (indicating) area; is that correct?
A A distance.
Q Distance. Okay.
Now, that in no way, or this document didn't show

anything about how far away from the house the right-of-way was or how far it was -- I guess how far away it was spaced away from the house, does it?

A It does not.

Q Okay. It also, this document -- and you didn't put this together correct?

A No.

Q And they could have taken the same information you had, 34 feet to the right, 34 feet to the left of the center pole, and just put their easement in there the same way.

A I'm sure they did.

Q Okay. So if they did it wrong, too, and didn't find the bearings and pins and none of that, they could be off on their easement also, correct?

A True.

Q Okay. The reality is, based on everything that we have, you can't definitively tell us where that easement was back in 1939 unless you get the bearings and the pins and everything that were set back then.

A I'm going to have to disagree with that.

Q How would you disagree with that?

A I feel that looking at all the evidence, the poles that's out there, the right-of-way's been maintained, I believe it's still in the same location. That's my

opinion.
Q Okay. Well, let me take two things away from you.
A Okay.
Q Because we didn't have poles back in 1939. You're not aware of that, are you?
A No. I'm not aware of that.
Q So the only way we're going to be able to figure it out is if we go back and we had the metes, bounds, pins and all that information, correct?
A That's true.
Q And based off of reading that easement, there's nothing in there that helps us make an exact determination where that easement is?
A True.
MR. ARIAIL: Your Honor, I have no further questions. Thank you.
THE COURT: All right. Anything else for this witness?
MS. SPRUILL: Nothing further, Your Honor.
THE COURT: Sir, you can step down. Thank you for being here.
THE WITNESS: No problem.
MR. SPENCER: Your Honor, at this time, the plaintiff rests.
THE COURT: All right. Anything else? Does anybody

want to make any sort of brief summations, anything like that?

MR. ARIAIL: Your Honor, I mean, I don't know if we're making motions or how you want to do it because clearly ---

THE COURT: Right.

MR. SPENCER: I don't know if they want to or I can in regards to mine.

THE COURT: You certainly both can do whatever you'd like to do since we're sort of a little off kilter. And I'm sorry. I forgot. We didn't do motions yesterday.

MR. ARIAIL: I'm sorry, too. That was my issue with the rescheduling.

Now, I don't know how -- I guess they're the plaintiffs. Do you want them to go first or you want me to go first? It doesn't matter.

MS. SPRUILL: Your Honor, we would reserve any -- we're nonjury. I don't think the directed verdict rules are quite the same, but we would move for a directed verdict or judgment as a matter of law as to the location, existence of the easement, the fact that the encroachment's within the easement and Duke's entitlement to the requested relief that the encroachment should be removed.

THE COURT: All right. And you've got your motion

for nonsuit?

MR. ARIAIL: Correct, Your Honor. I mean, I think, based upon the testimony here now, there's no way they can definitively say that there's an encroachment if they can't even have the specific location of the easement. They don't have anything matching it up with the metes and bounds that existed in 1939. As a result, I don't think they've satisfied their burden to be able to show that there is an easement which restricts or allows them to get the relief that they set forth.

Also, I don't believe that under the right-of-way they have established that, you know, they're allowed to -- they don't have any structures on the property that are in danger, they don't have any -- if it was placed upon the property that is in danger. I don't think they've satisfied their burden in that. I think the easement is ambiguous, and as a result, should be construed in favor of my client, and as a result, I would ask for a nonsuit.

Thank you, Your Honor.

MS. SPRUILL: Your Honor, may I respond just very briefly?

THE COURT: Certainly.

MS. SPRUILL: The easement speaks for itself. We think it's clear.

But on the second point, we plead this both as a written recorded easement and by prescription. There is no testimony that this line has not been there for many, many years just like it is.

To the extent they would assert a defense, the burden is on the defendant. We believe we have established everything required to be entitled to the equitable relief we've requested.

THE COURT: All right. I'll take -- I certainly will take those motions under advisement as they both go to the heart of the case and the decision to be made in the case.

Is there any sort of brief summations that either side would like to make?

MS. SPRUILL: I would, Your Honor, briefly.

THE COURT: Certainly. Go right ahead.

MS. SPRUILL: And I appreciate Your Honor's patience with us. I will try to keep this very short.

THE COURT: Certainly.

MS. SPRUILL: You know, I think the core of this dispute is what this easement says and that the defendant has attempted to take pieces out of order or put them back together to try to mix, match and selectively quote pieces of what we think is a very clear easement. And when you work through the body of the easement piece by

piece, that becomes very evident.

As you see here, we've got Exhibit 1 up on the board. The first part of this, which starts with the "for the purpose" here explains what Duke's use of the property is going to be. It's to construct, operate and maintain a line of towers, poles or other structures, gives Duke the right to change this from time to time, and all of that is in the opinion of Duke. They can do whatever they need to do, whatever may be advisable or desirable for a connection with the transmission and distribution of electric power.

From there we move to Duke Energy's right of entry. So we've got right here the grantee, its successors and assigns is also granted the right at all times to enter upon said tract for the purpose of constructing and making the necessary repairs.

And then from there, we get to the part of this we've discussed at great length. We get to what Duke can do within that right-of-way. It also has the right to keep said right-of-way clear of all trees, structures and other objects except those placed there by Duke. Then there's a comma, and the next clause is what we typically refer to as a danger tree section which gives Duke some powers outside the right-of-way. So right there, we get to together with the further right to cut away and keep

clear any trees outside the said 68-foot strip that might, in any way, endanger the proper maintenance and operation of the structures and other property on the right-of-way.

So you've heard a lot about that clause, but that's talking about tree trimming outside the right-of-way if it's endangering Duke's property. So that comma is a hard stop, and we move into danger trees from the earlier provision about Duke's right to keep it clear.

Next provision, which we hadn't talked much about but is important also, is a nonwaiver provision. It's understood and agreed that the failure or neglect of Duke or its successors or assigns to exercise any rights under this easement aren't a waiver or abandonment of the right at any time in the future.

And lastly, we have that second little paragraph we've talked about which talks about fences, which is a very limited paragraph describing how the landowner may continue to use the property which includes a carve-out for fences to the extent they don't interfere or conflict with the use of the property by Duke.

So when you walk through piece by piece, that easement's perfectly clear. You can tell what's going on in each clause as you go through there.

Defendant's effort to mix all that up doesn't take

away from the clear language, and as we've set up in our trial brief, what's clearly there, the Court can't take away.

THE COURT: Let me just ask you a quick question about that.

MS. SPRUILL: Sure.

THE COURT: Mr. Walker -- and I was just sort of thinking about all the testimony, and lots of questions from Mr. Ariail, I know. But when Mr. Walker testified, he said this is the type of fencing that can be very easily removed. I believe even his testimony was like two minutes to unscrew this type of light aluminum fencing that, I guess, is required. If I understand it, to have a pool, you had to have some sort of fencing around it.

MS. SPRUILL: Sure.

THE COURT: And he says he can remove that pretty quickly.

MS. SPRUILL: Sure.

THE COURT: So would that comply? Because it's something that he could supposedly make not interfere.

MS. SPRUILL: Well, first, I'm going to go back to the plain language of this easement ---

THE COURT: Sure.

MS. SPRUILL: --- that says, ". . . as may not in

any manner interfere or conflict with the use by the grantee." And up here it says that the grantee's use gives it anything advisable or desirable for or in connection with the transmitting or distributing of electric power. And then, if the Court wishes to consider the parol evidence in addition to the easement itself, you've got the testimony you heard about the kind of exigencies that can exist. We may be talking about the middle of the night. We may be talking about an ice storm. We may be talking about a time when Mr. Walker isn't home, and Duke doesn't know the trick to take his fence apart. There are lots of reasons why that the fence can easily be disassembled by Mr. Walker doesn't change Duke's rights under this.

And also, you know, Duke is just asking him to pull back out of the right-of-way. We're not saying he can't have a fence around his pool. We're just saying he needs to move it so it's not in the right-of-way.

So I don't see where that changes the construction of this document.

THE COURT: So if -- okay. And I know there's a retaining wall now and there's a patio and there's a fencing.

MS. SPRUILL: Right.

THE COURT: If he were to move that fence back out

of the right-of-way, would Duke Power still have a problem with that?

MS. SPRUILL: If it's out of the right-of-way, we don't have a problem.

THE COURT: The fence?

MS. SPRUILL: The fence. He has to move -- I mean, the retaining wall needs to come out. We need it -- I believe the grading ratio, it needs to be a 4-to-1 slope, the hand jesters from my table tells me.

THE COURT: 4-to-1 slope.

MS. SPRUILL: You know, but he can have a fence. He can have drainage control devices. He can have a patio. We just don't want them in the right-of-way.

THE COURT: Well, he says, if his testimony serves me right, that before he made these improvements to the land here, that really a truck couldn't have passed over that area anyway.

MS. SPRUILL: Well, I think his testimony was that there was some brush and that it was eroded.

THE COURT: Okay.

MS. SPRUILL: He did mention a truck. I don't think he said whether he tried to drive one. But, again, I would point to the nonwaiver provision in here. Even if it had fallen into neglect for some reason, that doesn't prevent Duke from asserting that right now, and doesn't

change what Mr. Walker and Mrs. Walker were on notice of at the time they undertook this project.

THE COURT: Okay. And I really, I just really wanted to ask those questions since we're in a little more of an informal setting.

MS. SPRUILL: Sure. We're happy to provide any information the Court needs.

THE COURT: I appreciate it.

MS. SPRUILL: So once we've got the easement, we go to we believe the location of the easement has clearly been established. We believe the survey is conclusive, we believe the only -- the only licensed surveyor presenting testimony in this case placed it at the location depicted in Exhibit 5.

The Walkers have offered no evidence. They have conceded that there is a 68-foot right-of-way. They've offered no evidence of where else they think it might be.

You know, if it's off 10 or 15 feet, as they've repeatedly suggested -- or I guess it has to be 15 to 20 to get it totally out of the right-of-way, where is their surveyor's say-so? Where is some evidence to the contrary? The only evidence that's been presented as to the location is from Duke which shows it where it's shown on Exhibit 5.

THE COURT: Right.

MS. SPRUILL: The only witnesses in this case with knowledge of electric utility business and safety practice testified that the encroachments present a safety concern and interfere or conflict with Duke Energy's use of the right-of-way. The undisputed testimony of both Mr. Pryor and Mr. Gould of Duke as well as the qualified electrical engineering utility expert, Mr. Brooks, all agree that there are safety concerns about the location of these easement -- encroachments within the easement.

In addition to all of that, Mr. Walker has conceded several very important points. He's conceded that he bought the home subject to the written recorded right-of-way at Plaintiff's Exhibit 1. He's conceded that he knew where the power lines were. He's conceded he knew he was making these improvements in the general area of the power line, even if he's -- after telling us he was willing to stipulate to Exhibit 5, come in today and said that that is not necessarily the case. He certainly knew that there was a likelihood that this construction project was within the Duke Energy right-of-way.

He did not call Duke until after these improvements were in place. If anything, it looks to me more like an example of choosing to seek forgiveness after it was done

rather than asking for permission beforehand and risk being told "no."

Duke Energy, since it found out about these easements -- encroachments, took quick action to enforce the terms of its easement and has consistently told the Walkers that the improvements aren't permitted within the right-of-way and, as admitted by Mr. Walker, nobody from Duke Energy has ever told him anything different.

It's undisputed that the encroachments were built in -- I think the permit is March 2013, so roughly early 2013, that Duke Energy learned about them in early 2014, that there were a -- there was a follow-up visit where the easements were marked in June 2014, and this was filed in -- I think it's October. So Duke hasn't waited around to prosecute its rights.

So there's just no culpable argument that this is a laches case. So for that reason, given all the evidence and the plain language of the right-of-way, we believe that the Court should order the Walkers to remove the encroachments to the extent they're within the right-of-way as shown on the survey. And that's Exhibit 5.

Duke is only seeking equitable relief. It only wants the Walkers to remove those encroachments, the fence, the retaining wall and the patio from within the

right-of-way and return the area to a minimum of 4-to-1 slope.

Unless the Court has something further, that's what I wanted to present in summation.

THE COURT: Okay. I appreciate it. You've answered my questions.

MS. SPRUILL: Thank you.

THE COURT: Mr. Ariail?

MR. ARIAIL: Thank you. May it please the Court. Just a quick summary on our part, and I think -- I mean, our whole basis, Your Honor, you've seen it, is they can't prove where this easement was, they can't prove that it was -- specifically covers the encroachment. Their surveyor, who I appreciate him coming to testify today, and sorry I delayed until today, clearly said that, you know, he had nothing to match up to what was done in 1939. So, you know, if it was done wrong, if it was not done correct at that time, there's nothing to match it up. If he came in here and told me that I matched up a tie, a metes and bounds and I had everything in place and that it was in that location, I would not be advancing that argument.

THE COURT: Well, let me just stop you right there for one second. So, you know, all these -- I would say a good portion of these easements go back that far. So if

this isn't enough evidence to prove it, then -- and I find that this is enough evidence to prove where that easement's located, then the question in my mind is how could you ever prove where the easement is, and how could Duke Power ever provide utility service, or any utility company, for that matter?

MR. ARIAIL: I think it's on a case-by-case -- in this -- I mean, I'm not sure we haven't gone through there and let me put in any other right-of-ways or any other items. Normally, the way it's done -- and, you know, I just did one for a sewer district, as I explained, is that they put the metes and bounds so that there is no question later in time where that easement is, where that access point is, how to get into that location.

Here, my problem is, if this is a large piece of property, let's say it's over -- I mean, we don't know what the Lanford's owned and what they had, the Browns, if it was a larger piece of property. They're only granting a 68-foot easement. That easement could be anywhere. But if they tie it into the metes and bounds and all that, we know specifically it's in that area. We don't have that.

Now, I think that is -- any type of ambiguity is construed in the favor of my client because, you know,

they can't prove that if they're 15 feet off, he doesn't have the right to be able to do that. Their own expert, and I don't remember his name, Mr. Brooks, I think, yesterday said that if they are off in regards to that and it's outside the easement, they have no right to be able to take that -- those objects out.

So based on that, based on testimony of him, the surveyor and Mr. Walker, you know, I believe there's clearly an issue in regards to them proving they have the easement for that 15 feet.

And the other thing I think, which I tried to point with the surveyor in regards to it, is we're not saying there's not a 68-foot easement. But as you can see, there's a portion at the top on that survey which, you know, it could be granted for that area. It might not be. I mean, but what the issue is, they haven't been able to prove that based on the lack of information they've given us to show how it's tied in. Now ---

THE COURT: Well, let's just throw out this. Let's just say everything else aside, language of the deed, language of the easement, everything aside, there's a power line running right near a pool and a metal fence.

MR. ARIAIL: And I understand there is that pool and all that is there, and they're saying they've had that easement. My issue is, if they're off in regards to

that, I mean, we're trying to take the drastic step of telling my client he's got to move everything. I'm saying they've got to satisfy their burden of bringing this to show that it is an encroachment in that easement.

Now, they can say they haven't. He's -- their own expert, I think, and even Mr. Walker said that area was impassable, wasn't able to use it, all that. I don't know. By looking at this, the only thing that I see that has changed in regards to it is he's actually put a retaining wall, built it up, he's taken away some of the area in there. They can put a truck around in that area. He can take his fence down. He can do certain things in regards to that, and he's willing to do that.

You know, the other items that -- what I want to bring up, and, you know, going back, I have a different interpretation of the right-of-way than they do. I think that the issue that I brought up of saying that they -- as long as it doesn't endanger a structure, I believe that doesn't refer to trees. I mean, I believe it's all in one sentence together. It was inartfully drafted, whichever way -- however you want to say it back in 1939, but I think that's construed in favor of my client.

I'm saying that there is no endangerment to structures, first of all, because there are no structures on his property.

The second thing I'm saying is that there is nothing that has been placed upon this property which is -- they're saying the lines are in the air. The last time I checked, placing upon something was putting something, putting your hand on something, something on the ground. I looked it up in Webster's. That might not be the best resource to look it up. But it said it had to be put upon. Placed, you know, is that way. I don't see how those lines being placed in the air is enough to satisfy that requirement under the easement.

Now, you know, I also -- you know, I'm a little -- you know, in regards to their testimony about the safety, interference issues and all of these other different items, we've clearly shown this is a 400-foot square-foot section which they can maneuver around and they can do things around to be able to get access to that line.

You know, I'm not seeing and don't understand if he had built it all across the entire easement and had used the entire thing, then I would say there's an issue. We're talking about a small segment of it, and I believe that he should be allowed to maintain that based upon they can't prove where that easement is.

And I think that's pretty much the crux of our case, Your Honor.

THE COURT: All right. Thank you. I appreciate it.

I appreciate you answering my question.

Is there anything in reply from the plaintiff?

MS. SPRUILL: No, Your Honor.

THE COURT: All right. Well, I want to thank y'all -- all three for trying such an outstanding case. I'm glad my law clerk got to see it. She's just here for the summer, so I'm glad she got to see this. Nonjury trials are not that often anymore. But I appreciate it.

I'm going to take this matter under advisement. I have very little under advisement, so I would anticipate issuing a decision, you know, sometime in the next couple of weeks. But I want to make sure I have ample time to look at everything. I will be in Charleston for two weeks, so that will cut into my ability to be able to probably review this case as much as I want to. So I just say, you know, to both sides, it would probably be several weeks before I do issue a decision.

MS. SPRUILL: Is there anything we can do to assist the Court? Would you like some kind of posttrial briefing or proposed findings of fact and conclusions of law? Anything we can help you with?

THE COURT: I will tell you this. If either side wants to send me anything within the next two weeks, I will tell you I won't consider anything until those two weeks have passed. And I will -- because one week I'll

be holding court in Charleston, like I said. The next week I'll be on vacation in Charleston. So I will not consider anything until that time. Anything that either side wants to submit, and I just ask you to submit it via e-mail, if you don't mind. That would be easiest for me.

MS. SPRUILL: Certainly, Your Honor. Do you have a preferred format?

THE COURT: However you want to do it. And I'd certainly give either side, you know, an opportunity to respond.

MR. ARIAIL: Okay. And I guess we're not submitting any new evidence or anything of that nature.

THE COURT: No, no, no. I guess she's just -- she's just asking possibly to submit something akin to a proposed order, and I'm happy for either side to have done something like that. That will be fine, and I certainly will take it into consideration.

MR. SPENCER: Thank you, your Honor.

THE COURT: Okay.

MR. ARIAIL: Thank you.

THE COURT: All right. Thank y'all.

(WHEREUPON, Plaintiff's Exhibit No. 16 was marked for identification at the conclusion of the proceedings.)

**********END OF TRANSCRIPT OF RECORD**********

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, CHERYL A. SMITH, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 31st day of May and 1st day of June, 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

August, 16, 2016

_____

Cheryl A. Smith, CVR-M
Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF [redacted]

504 | 00398

KNOW ALL MEN BY THESE PRESENTS, that
Della R. Lanford, Carl E. Lanford, Rosalie Lanford and Ruth Evelyn Lanford

in consideration of the sum of $ 150.00 in hand paid by DUKE POWER COMPANY, a corporation organized under the laws of the State of New Jersey, the receipt whereof is hereby acknowledged, do hereby grant and convey unto said Duke Power Company, its successors and assigns, a right of way sixty-eight (68) feet in width in, upon, and across that tract of land belonging to us (me), situate in the above County and State, bounded by lands of

C. J. Brown, P. F. Brown and others

for the purpose of constructing, operating and maintaining a line of towers, poles, or other structures, (which may be changed from one to the other from time to time, and which may be of wood, steel, concrete, or other material, at the option of the grantee), together with such wires, conductors, telephone wires, and other apparatus and appliances as, in the opinion of the grantee, may be advisable or desirable for or in connection with the transmitting and distributing of electric power; the grantee, its successors and assigns, is also granted the right at all times to enter upon said tract of land for the purpose of constructing and making necessary or desirable repairs, alterations, substitutions or additions to, and inspections of the structures and other property to be placed upon said right of way by the grantee; the grantee, its successors and assigns, is also granted the right to keep said right of way clear of all trees, structures and other objects except those placed thereon by the grantee, together with the further right to cut away and keep clear any trees outside of said 68-foot strip that might in any way endanger the proper maintenance and operation of the structures and other property placed upon said right of way by the grantee. It is understood and agreed that the failure or neglect of the grantee, its successors or assigns, at any time to exercise any of the rights herein granted shall not be construed as a waiver or abandonment of the right at any time thereafter to exercise any or all of such rights and privileges.

IT IS AGREED that the owner of said tract of land may use, or permit said right of way to be used for growing such crops and maintaining such fences thereon as may not in any manner interfere or conflict with the use of said right of way and rights by the grantee for the purposes hereinabove mentioned.

TO HAVE AND TO HOLD the aforesaid right of way, rights, privileges and easements unto the said Duke Power Company, its successors and assigns, to its and their only use and behoof forever.

IN TESTIMONY WHEREOF, the said
Della R. Lanford, Carl E. Lanford, Rosalie Lanford and Ruth Evelyn Lanford

R. R. Rd. 1
Deed No. 132

do hereunto set their hand and seal this the 4th day of November A. D., 19 59

Signed, Sealed and Delivered in the Presence of:

Rosalie Lanford (SEAL)
Carl E. Lanford (SEAL)
Della R. Lanford (SEAL)
Ruth Evelyn Lanford (SEAL)

PLAINTIFF'S EXHIBIT
tabbies

DUKE_00003

THE STATE OF SOUTH CAROLINA
Greenville 504 COUNTY. } 00399

PERSONALLY appeared before me A. P. Bowman

and made oath that he saw the within named Della R. Lanford, Carl L. Lanford

Rosalie Lanford

sign, seal, and as their Act and Deed deliver the within written Deed; and that he

with Mrs. Lanford witnessed the execution thereof.

A. P. Bowman

SWORN to before me, this 21st

day of November, A. D. 1939.

Notary Public for S.C.

PLAT BOOK 6 FOLIO 1

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE }

PERSONALLY appeared before me A. P. Bowman and made oath that he saw the within named Ruth Evely Lanford sign, seal, and as her Act and Deed deliver the within written Deed; and that he with Edith Cobe Hamrick witnessed the execution thereof.

A. P. Bowman

SWORN to before me, this 14th
day of November, A.D., 1939.

Notary Public for S.C.

1.00
.50
1.50

DEC 7 1939

THE STATE OF SOUTH CAROLINA
Greenville COUNTY.

Della R. Earl M. Rosalie Ruth Evelyn Lanford

TO

DUKE POWER CO.

RIGHT OF WAY

Filed 7th day of
Dec. A. D. 1939
and recorded in Book 216
Page 226

Offie Farmworth
Greenville, S. C.
Fd. at 8:30 A. M.

DUKE_00004

Attention: Brenda James

Greenville County
Freedom of Information Request Form

REC'D JUN 03 2014

Greenville County Square
301 University Ridge, Suite 4100, Greenville SC 29601-3686
Phone (864) 467-7080 Fax (864) 467-7222

DATE: June 3, 2014

(Please Print)

Name (Mr., Mrs., Ms.): Joshua D. Spencer, Esq.

Company Name: Haynsworth Sinkler Boyd, P.A.

Address: One North Main, 2nd Floor

City, State, Zip: Greenville, S.C. 29601

Telephone #: 864-240-3270

Email: jspencer@hsblawfirm.com

Under the Freedom of Information Act (FOIA), I would like to request the following:

All permits to build a swimming pool, retaining wall, and/or fence at or near 239 N. Rutherford Road, Greer, S.C. 29651.

email: jspencer@hsblawfirm.com

Correspondence

As a public body under the South Carolina Freedom of Information Act, Greenville County may collect fees not to exceed the actual cost of searching for and making copies of requested records.

Request should be mailed or faxed to Greenville County Codes Enforcement, Attn: Brenda James, 301 University Ridge, Suite 4100, Greenville, SC 29601; Telephone (864) 467-7357; Fax (864) 467-7222.

Email: bjames@greenvillecounty.org

CHARGES WILL APPLY TO ALL FOIA REQUEST

FOR OFFICE USE ONLY:

RESEARCH TIME: _____ **TOTAL # OF COPIES** _____

TOTAL COST: _____

T0210001040 3

PLAINTIFF'S EXHIBIT 2

DUKE_00012

COUNTY OF GREENVILLE
301 UNIVERSITY RIDGE SUITE 4100
GREENVILLE, SC 29601
(864) 467-7060
AUTOMATED INSPECTION SYSTEM (864) 467-5660

Application Number . . . . . 13-00001282 Date 3/07/13
Property Address . . . . . 239 N RUTHERFORD RD
TAX MAP NUMBER T021.00-01-104.03
TAX DISTRICT 289
Tenant nbr, name . . . . . INGROUND POOL 20X40
Application description . . . SWIMMING POOL
Subdivision Name . . . . . .
Property Use . . . . . DWELLING
Property Zoning . . . . . R-S - RES SUBURBAN
Application valuation 24900

Owner	Contractor
WALKER CHRISTINA T	ARTISTIC POOLS & SPAS LLC
WALKER CALEB E	486 CHANDLER RD
239 N RUTHERFORD RD	PELZER SC 29669
GREER SC 29651	(864) 243-3060

------ Structure Information INGROUND POOL 20X40 -----
Setback distances cited below are those minimums established by Greenville County Zoning Ordinance/Land Development Regulations. Please be aware that properties may be subject to private deed restrictions and covenants in excess of those shown on this permit.
Occupancy Type . . . . . RESIDENTIAL SINGLE FAMILY
Flood Zone . . . . . OUTSIDE FLWAY & FLPLAIN

Permit . . . . . ELECTRICAL
Additional desc . . INGROUND POOL 20X40
PHONE ACCESS CODE . 2287274
Permit Fee . . . . 30.00 Plan Check Fee . . .00
Issue Date . . . . 3/07/13 Valuation 0
Expiration Date . . 9/03/13

Qty	Unit Charge	Per		Extension
			BASE FEE	30.00

Special Notes and Comments
WADE HAMPTON BLVD TURN LEFT ONTO
FAIRVIEW RD TURN ONTO N RUTHERFORD RD
HOUSE ON RIGHT
ARTISTIC POOLS & SPAS LLC 243-3060

Fee summary	Charged	Paid	Credited	Due
Permit Fee Total	30.00	30.00	.00	.00
Plan Check Total	.00	.00	.00	.00
Grand Total	30.00	30.00	.00	.00

Skip Lumbaker

Validity of Permit: Every permit issued shall become invalid unless the work is commenced within 180 days from issuance, or if the work is suspended or abandoned for a period of 180 days. At a minimum a progress inspection must be requested to verify the continuance of the work within the 180-day period from the date of last inspection request.

DUKE_00013

Greenville County

Greenville County Square
301 University Ridge, Suite 4100, Greenville SC 29601-3686
Phone (864) 467-7060 Fax (864) 467-7407
permits@greenvillecounty.org

RESIDENTIAL ADDITION/ALTERATION APPLICATION

APPLICATION MUST BE COMPLETED PRIOR TO REQUESTING PERMIT

Date:	3/7/2013	Property Owner's Name:	Christina T. & Caleb E. Walker			Phone No.	[redacted]
Exact Address of Property:	239 N. Rutherford Road			City:	Greer	State/Zip:	SC 29651
Subdivision Name:	Mill Valley Creek	Lot No.:	1	Tax Map No.:	T021000110403		
Project Valuation: $	24,900.00	Additional Square footage?			Is this a Corner Lot:		
Description of work:	20 x 40 Lazy L vinyl inground pool						
If Re-roof/roof type?		If Demo/M-		Demo Permit?		Pool? In ground or	In ground
Existing or Acthra Permit No.?						Mobile Phone No:	[redacted]

CONTRACTOR **faxing application, also fax a copy of the contractor's license**

Name:	Thomas S. Bryant	Co. Name:	Artistic Pools & Spas, LLC.		License No.: 36303	Exp. Date:	06/2013
Mailing Address:	486 Chandler Road		City:	Pelzer	State/Zip:	SC 29669	
Phone No.:	864.243.3060	Mobile No:	864.303.4586		Fax No.:	864.243.3639	
Email:	artistlepools@charter.net						

ELECTRICAL CONTRACTOR

Name:		Co Name:			License No.:	Exp. Date:	
Mailing Address:			City:		State/Zip:		
Phone No.:		Mobile No:			Fax No.:		
New Service Information:	No. of Amps:		No. of Breakers:		Name of Power Company:		
☐ Existing Panel	☐ Upgrade	No. of Amps being added:			No of Breakers being added:		

MECHANICAL CONTRACTOR

Name:		Co. Name:			License No.	Exp. Date:	
Mailing Address:			City:		State/Zip:		
Phone No.:		Mobile No:			Fax No.:		
No. of Heating Units of each type:	Gas:		Propane:		Heat Pump:	Wood	
No. of Water Heaters of each type:	Gas:		Electric:		Name of Gas Company:		
Ductwork:	Any Gas Appliances (including but not limited to; gas logs, gas grill, gas stove, give description on next line)						

PLUMBING CONTRACTOR

Name:		Co. Name:			License No.:	Exp. Date:	
Mailing Address:			City:		State/Zip:		
Phone No.:		Mobile No:			Fax No.:		
No. of Plumbing Fixtures:	(Including but not limited to: bathroom fixtures, kitchen sink, dishwasher, hot water heater, washer, laundry						
Septic Tank:	☐	OR	Sewer:	☐			

EXACT DIRECTIONS TO SITE (from a main road) **Turn left onto S. Church St; bear left onto Fairview Road; Bear left onto N. Rutherford Road; the hous is on the right # 239.**

Applications must be faxed to the Permit Application Center 48 hours in advance of permit pick up. For information regarding culverts, driveways, or encroachment permits, contact 467-7016 if the property is on a county road or 241-1224 if the property is on a state road.

The applicant hereby certifies and agrees as follows: 1) That he/she is authorized to make this application; 2) That he/she has read the above information and it is true and correct; 3) That he/she will comply with all County of Greenville ordinances, laws and regulations, all State and Federal Laws and regulations regulating the use of land and structures and the construction of structures; 4) That he/she will perform only the work outlined above at the property indicated above; 5) That he/she grants the right of entry to the property to the Building Official or employees of the County of Greenville for the purpose of inspections, and posting of notices. If any of the information supplied by the owner and/or owner's agent is incorrect, the permit may be revoked.

THIS PERMIT WILL BECOME INVALID WITHIN 6 MONTHS FROM DATE OF ISSUE IF: WORK HAS NOT COMMENCED, IF AN INSPECTION HAS NOT BEEN REQUESTED, OR IF WORK HAS BEEN SUSPENDED FOR A PERIOD OF 6 MONTHS.

This permit is permission to proceed with construction and shall not be construed as authority to violate, alter or set aside any of the provisions of the Building Code and any other applicable laws or ordinances, nor shall the issuance of this permit prevent the Building Official from requiring correction of errors in construction documents or of violations of the Building Code of the County of Greenville, South Carolina.

DATE: 3/7/2013 BY OWNER OR AUTHORIZED AGENT: Deborah E Bryant

Permit No: _____ Cost of Permit: $ _____

Customer prefers processed permit to be Emailed ☐ Faxed ☐ or picked up ☐

30 00

H drive/P Wright/Fillable Forms/March – 2010

DUKE_00014

Greenville County

Grading/Erosion Control Acknowledgement
Single Family Residential Construction

Site Location Address: 239 N. Rutherford Road Simpsonville SC 29651

Tax Parcel Number: T021000110403

Subdivision Name: Mill Valley Creek **Lot #:** 1

Owner or General Contractor: I certify that I will follow the Stormwater Pollution Prevention Plan (SWPPP) for the subdivision or comply with the requirements outlined in the *"Single Family Residential Erosion/Sediment Control Standards"*. I am responsible for implementing, maintaining and monitoring effectiveness of the SWPPP during construction on the lot(s) listed above. I understand and agree to implement required erosion and sediment control measures described in the *"Single Family Residential Construction Erosion/Sediment Control Standards"*. I also understand that I may need to supplement or modify implemented protection measures as site conditions develop to control on-site erosion and ensure all site runoff is adequately treated by stormwater controls. I will also be responsible for actions of all subcontractors and delivery personnel at the worksite as they relate to the SWPPP and *"Single Family Residential Construction Erosion/Sediment Control Standards"*. I further understand that if this lot is a part of a larger common plan without developer provided NOI coverage I must apply for NOI coverage as required by SC DHEC in Suite 5800 or if I am disturbing over 1 acre of land and not a part of a larger common development, I will obtain a land disturbance permit in Suite 3900.

Artistic Pools & Spas LLC	4186 Chandler Road
Company Name or Property Owner (please print)	Street Address

Pelzer	SC	29669	243-3060	243-3639
City	State	Zip Code	Telephone	Fax

Deborah E. Bryant	Deborah E Bryant
Contact Name (if owner is company -please print)	Signature

Building Permit Number: 13-1282 Issued By: [signature] Date: 3-7-13

Jurisdiction: ☒ Unincorporated ☐ Fountain Inn ☐ Mauldin ☐ Simpsonville ☐ Travelers Rest

Revised: 9/2011

DUKE_00015

COUNTY OF GREENVILLE
BUILDING SAFETY DIVISION
301 UNIVERSITY RIDGE STE 4100
GREENVILLE SC 29601

DATE: 3/07/13
TIME: 14:17:58

RECEIPT #: 0000153909
CASHIER: VMILLER

APPLICATION NBR: 13-00001282

ITEM DESCRIPTION	PAID
PERMIT FEES	30.00
TOTAL AMOUNT PAID:	30.00

PAYMENT TYPE: CHECK
CHECK NBR: 000001031

DUKE_00016

PREPARED 6/03/14, 12:51:31
PROGRAM BP521L
COUNTY OF GREENVILLE

INSPECTION HISTORY REPORT
0/00/00 THRU 0/00/00

APPLICATION STRUCTR	PROPERTY ADDRESS PERMIT	TAX MAP NUMBER INSPECTION	TAX DISTRICT RESULT DATE/STATUS	INSPECTOR
13 00001282	239 N RUTHERFORD RD	T021.00-01-104.03	289	
001 001	EL 00 ELECTRICAL PERMIT	EL10 0001 ELEC - GROUND/BOND POOL	3/27/13 APPROVED	053
	RES COMM: T/S: 03/27/2013 02:36 PM DPAULKNER			
001 001	EL 00 ELECTRICAL PERMIT	EL13 0001 ELEC - ELECTRICAL FINAL	6/14/13 APPROVED	053
	RES COMM: T/S: 06/14/2013 02:04 PM DPAULKNER			

DUKE_00017

LINE ENCROACHMENT CHECKLIST

Line Index # : 1O3992 Point to Point Name: ONEAL RETAIL TAP

Operating Name : UNION BL KV : 100

Latitude : 34.96727225 State : SC

Longitude : -82.28207013 County : GREENVILLE

Parcel # : W/O: 4925846

Type Structures : STEEL LATICE Span : 4 5

Estimated Distance to Structure # : 5 is 225 feet

Total R/W Width: R/W Width on Encroachment Side is : feet

Type Encroachment : RETAINING WALL 17FT FROM CENTER AND PATIO WITH IRON FEN

CONTACT INFORMATION

Date: 1/27/2014 Time: 1PM By : S.PRYOR

Customer Name : WALKER, CALEB E & CHRISTINA T

Address : 239 N RUTHERFORD RD

City: GREER State: SC Zip Code 29651

Actual Contact : CALEB Relationship: OWNER

Customer Phone # : 864 525-7347

E-MAIL : walkerpestimanagement@yahoo. Meter # :

I MET W/ MR. WALKER TO REVIEW A SET OF LANDSCAPE PLANS AND I FOUND THE ENCROACHING WALL AND FENCE, I ADVISED THAT IT WOULD NEED TO BE REMOVED AND I WOULD START PULLING TOGETHER DOCUMENTS TO REVIEW. MR. WALKER PLANNED TO DO THE SAME, ALSO HE AS NOT HAPPY WITH THE WORDING IN THE GUIDELINES AND RESTRICTIONS THAT STATED IN DUKES OPINION INTERFERS WITH THE ELECTRIC TRANSMISSION ROW. MR. WALKER STATED THAT THEY BELIEVED THAT THERE IS NO WAY IT WOULD INTERFER. I EXLPAINED WE DO NOT HAVE TO PROVE INTERFERANCE, IT IS A MATTER OF LAW NOT OPINION. HE REPLIED THAT IT SHOULD NOT STATE IN OUR OPINION ON THE G&R THEN, (POINT WELL, TAKEN).

Checklist:	Yes	No
Stake edge of R/W :	Yes	
Take Pictures of Encroachment :	Yes	
Personal Business Card :		No
Asset Protection Business Card :	Yes	

	Yes	No
Door Hanger :		No
Comment Card :		No
R/W Restrictions :	Yes	

PLAINTIFF'S EXHIBIT 3

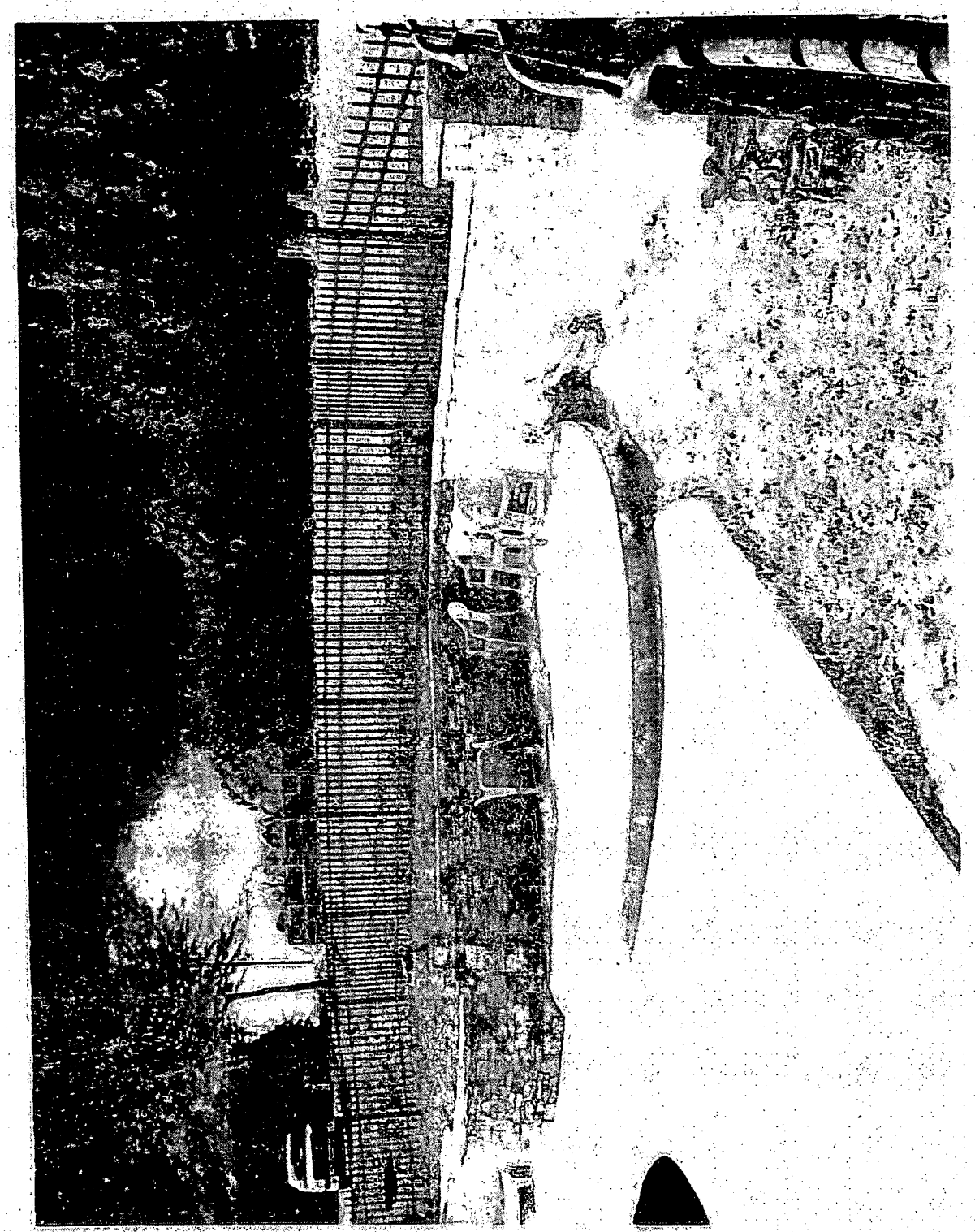
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PLAINTIFF'S EXHIBIT 4

DUKE_00022

DUKE_00023

DUKE 00024



DUKE_00026

DUKE_00027

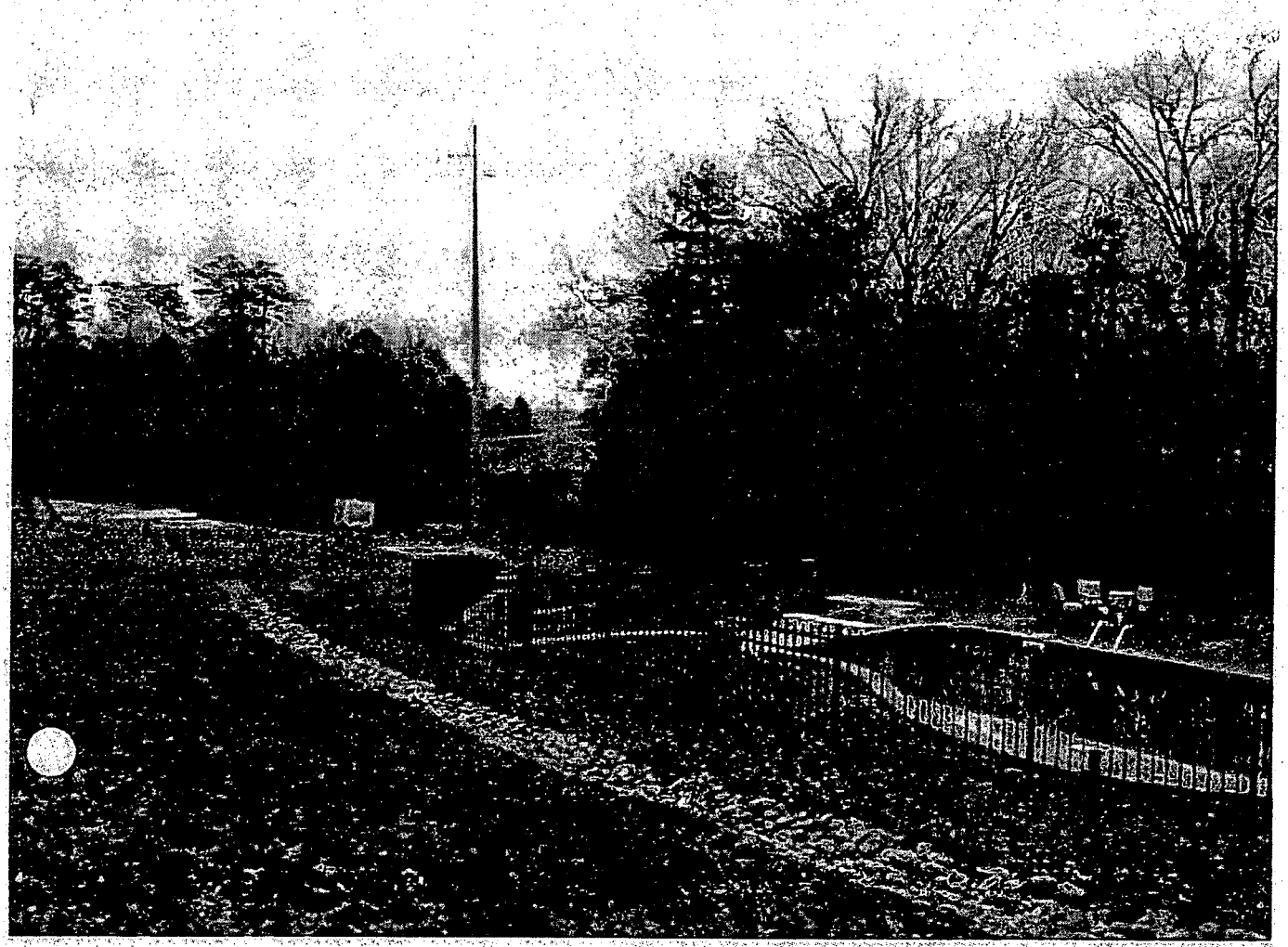
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DUKE 00029

DUKE_00030

DUKE_00031

DUKE_00032



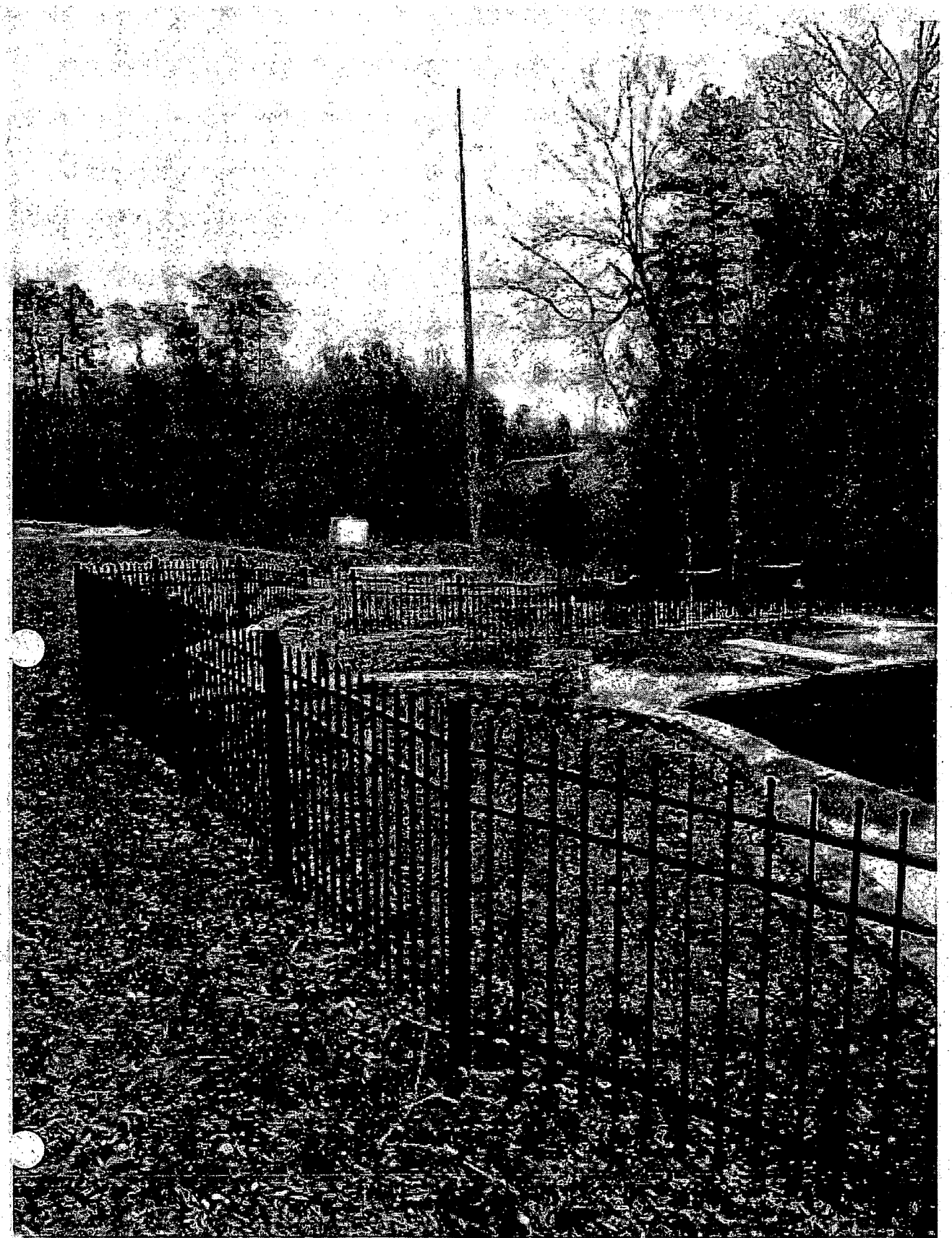
DUKE 00038



DUKE_00039



DUKE_00040



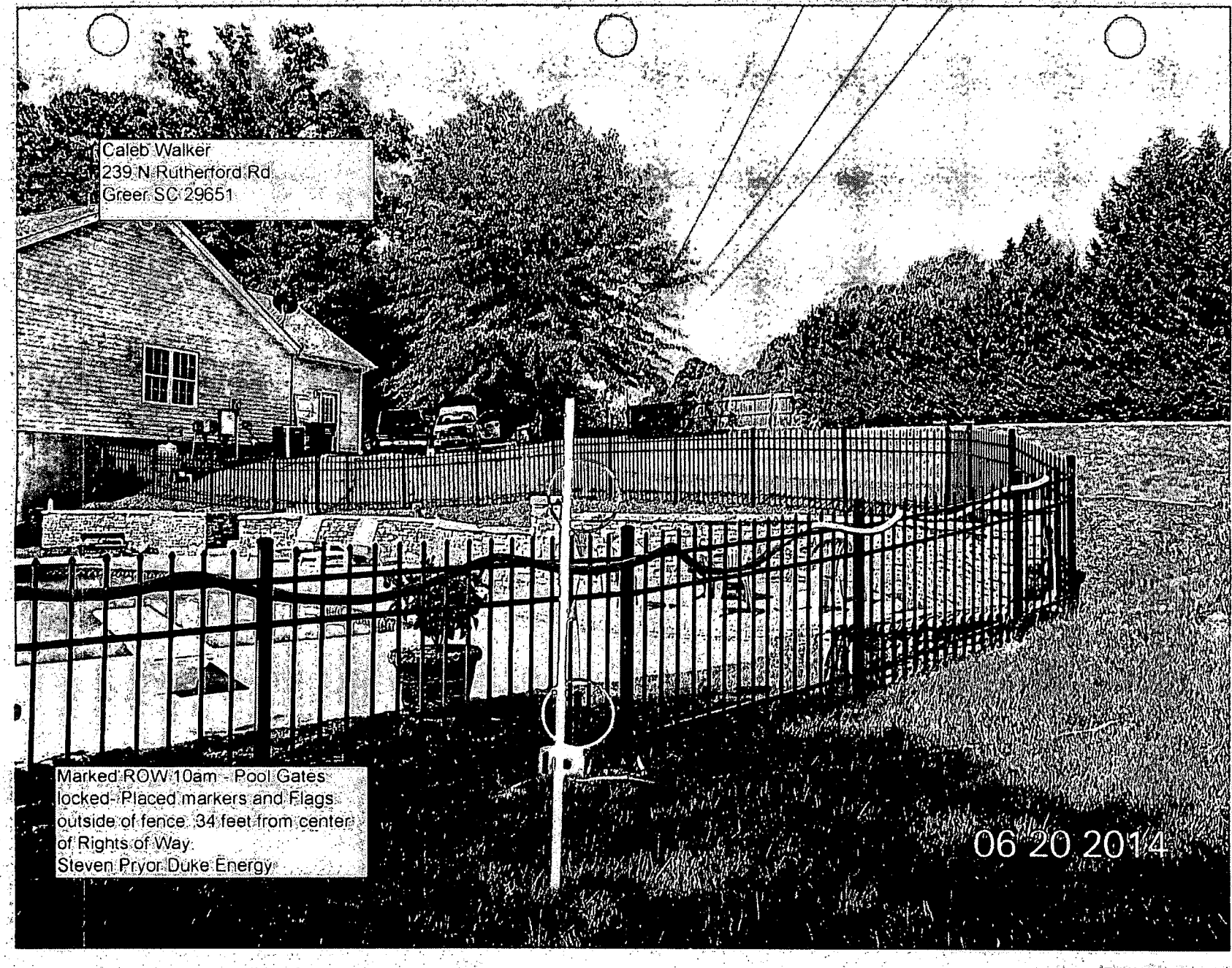
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DUKE_00042

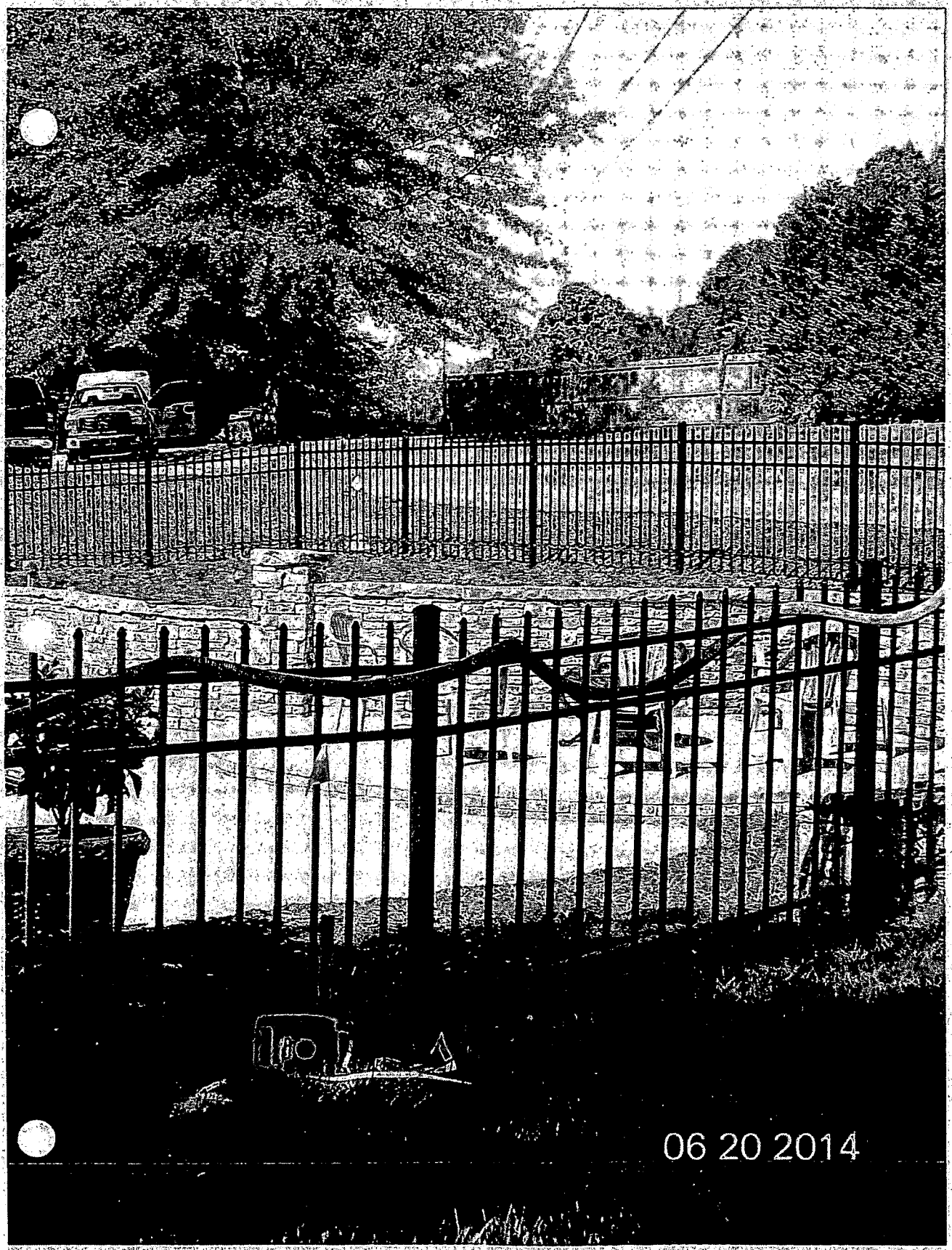
DUKE_00043

DUKE_00044

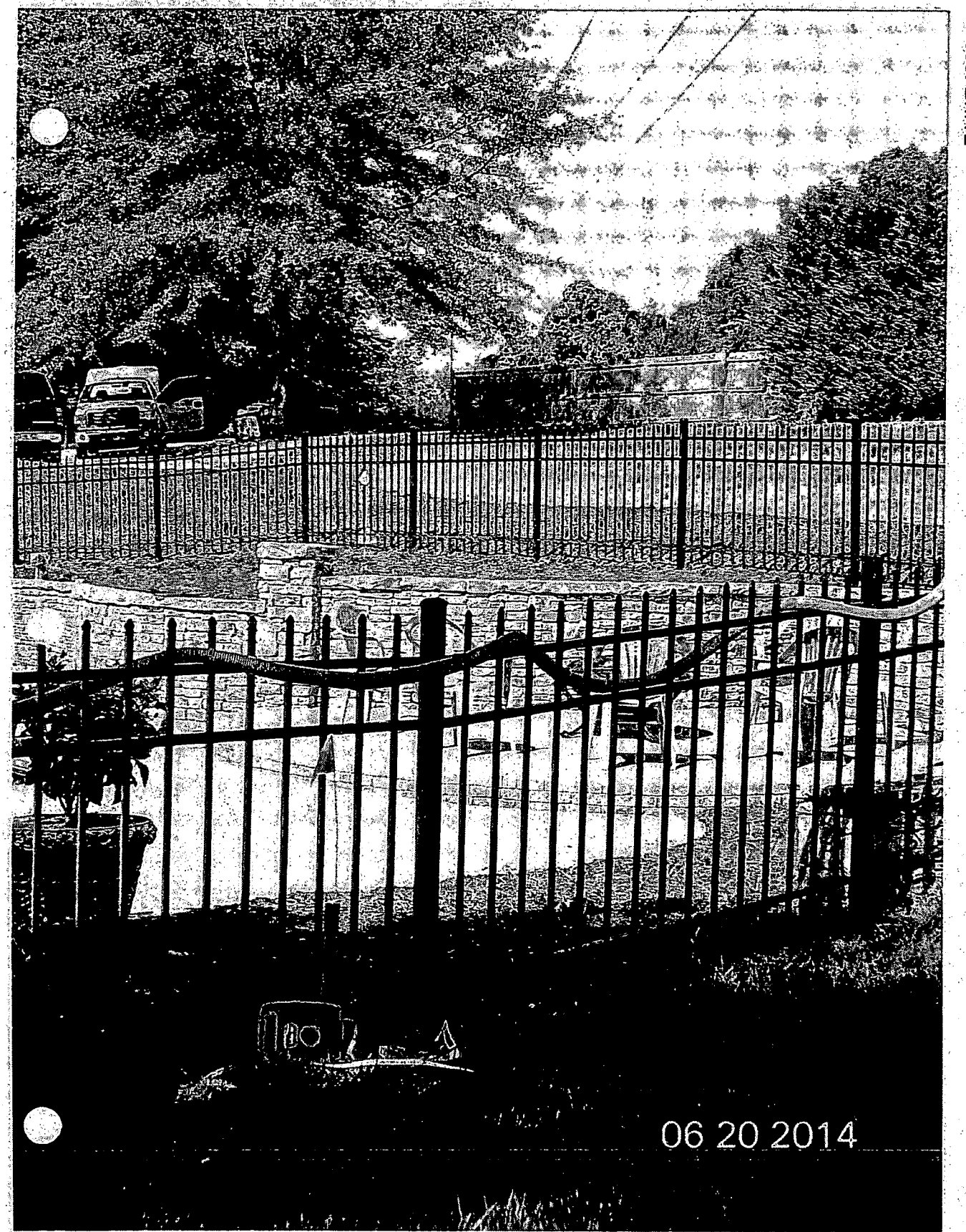

Caleb Walker
239 N Rutherford Rd
Greer SC 29651
Marked ROW 10am - Pool Gates locked- Placed markers and Flags outside of fence. 34 feet from center of Rights of Way.
Steven Pryor Duke Energy
06 20 2014

DUKE_00046

DUKE_00047



DUKE_000048



DUKE_00049

DUKE_00050

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
	)	Case Number: 2014-CP-23-5816
Duke Energy Carolinas, LLC,	)	
	)	
Plaintiff,	)	**AFFIDAVIT OF R. DANIEL PROCTOR**
vs.	)	
	)	
Caleb E. Walker and Christina T. Walker,	)	
	)	
Defendants.	)	

PERSONALLY APPEARED BEFORE ME, the undersigned officer duly authorized to administer oaths, R. Daniel Proctor, who, after being duly sworn, states as follows:

1. I am a citizen, resident, and domiciliary of the State of South Carolina, County of Greenwood.

2. I am over the age of twenty-one (21) years.

3. I am a surveyor with Piedmont Surveying, Inc., and I have personal knowledge of the matters set forth in this Affidavit.

4. I personally conducted a survey of certain real property at 239 N. Rutherford Road, Greer, South Carolina, 29651 (the "Property") on March 12, 2015.

5. The written survey attached as Exhibit A to this Affidavit is a fair and accurate representation of the Property, including a right-of-way owned by Duke Energy Carolinas, LLC and the pool and patio area at the rear of the Property.

6. Attached to the survey is a photograph, taken by me, which accurately depicts the encroachment of the patio/pool area into the Duke Energy Carolinas, LLC right-of-way.

[signature page follows]



DUKE_00035

FURTHER AFFIANT SAYETH NOT.

R. Daniel Proctor

SUBSCRIBED TO AND SWORN TO before me this

28 day of May, 2015

Notary Public for South Carolina Greenwood County

My Commission Expires: 4/27/22

DUKE_00036

DUKE_00037

DUKE ENERGY.

Date: 6-20-14

Customer Name: MR. Caleb Walker

Customer Address: 239 N Rutherford Rd
Greer SC, 29651

Dear MR. Walker :

Per your request, Steven Pryor, an Asset Protection Specialist with Duke Energy, marked the outer most limits of the Duke Energy right of way located at the above referenced address. Please be advised that this field measurement is a courtesy provided by Duke Energy, and is meant to provide an estimated location for the outer most limits of the right of way. The Asset Protection Specialist providing the measurement is not a licensed surveyor, and the measurement is not exact.

Should you wish to identify the exact location of the Duke Energy right of way on your property, Duke Energy recommends that you contact a licensed surveyor and request that a professional licensed survey be prepared for your property.

Thank you for your anticipated cooperation.

Sincerely,

Steven Pryor

Steven Pryor

Asset Protection Specialist, Duke Energy

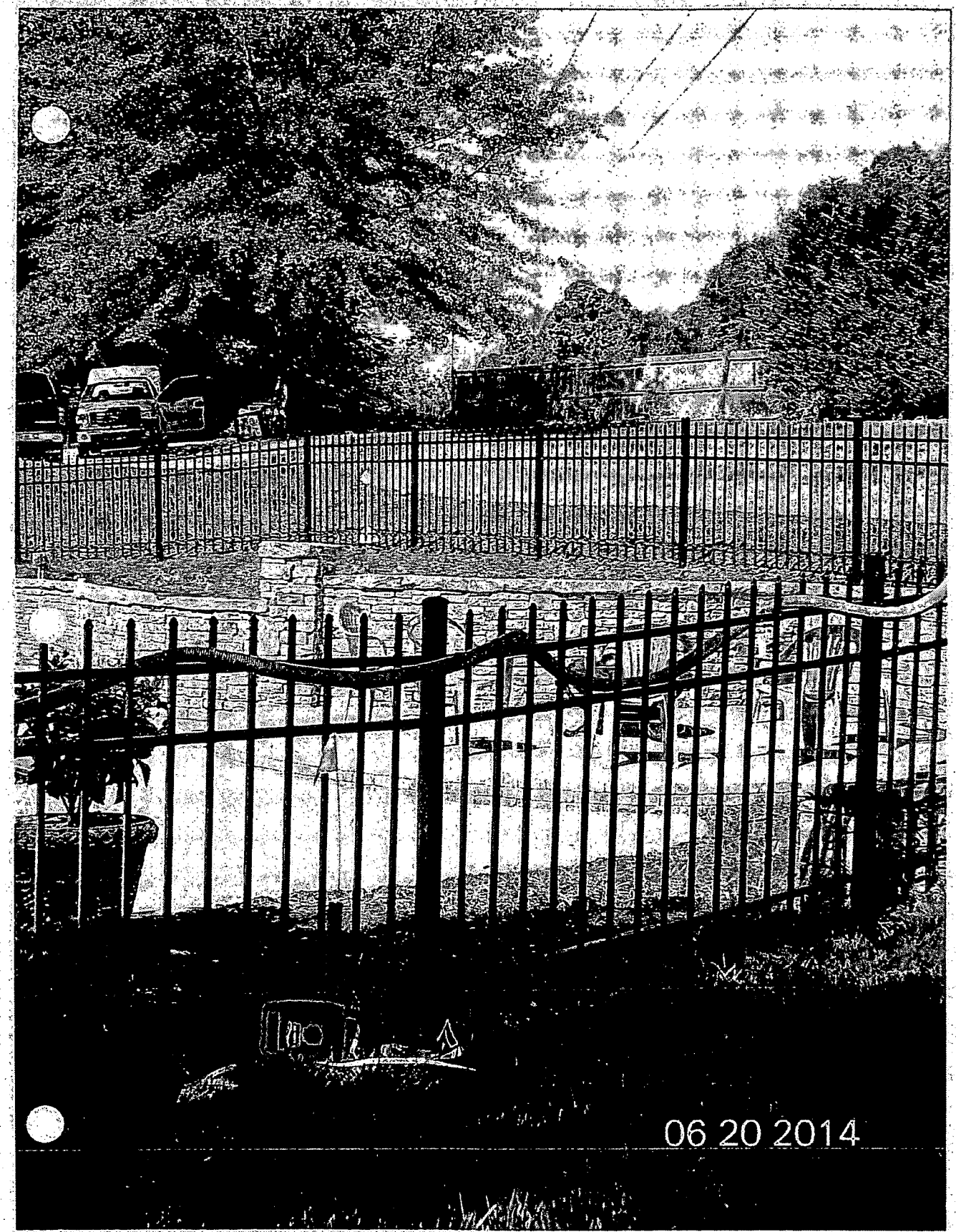
PLAINTIFF'S EXHIBIT 6

DUKE_00045


Caleb Walker
239 N Rutherford Rd
Greer SC 29651
Marked ROW 10am - Pool Gates locked- Placed markers and Flags outside of fence, 34 feet from center of Rights of Way
Steven Pryor Duke Energy
06 20 2014

DUKE_00046

DUKE_00047

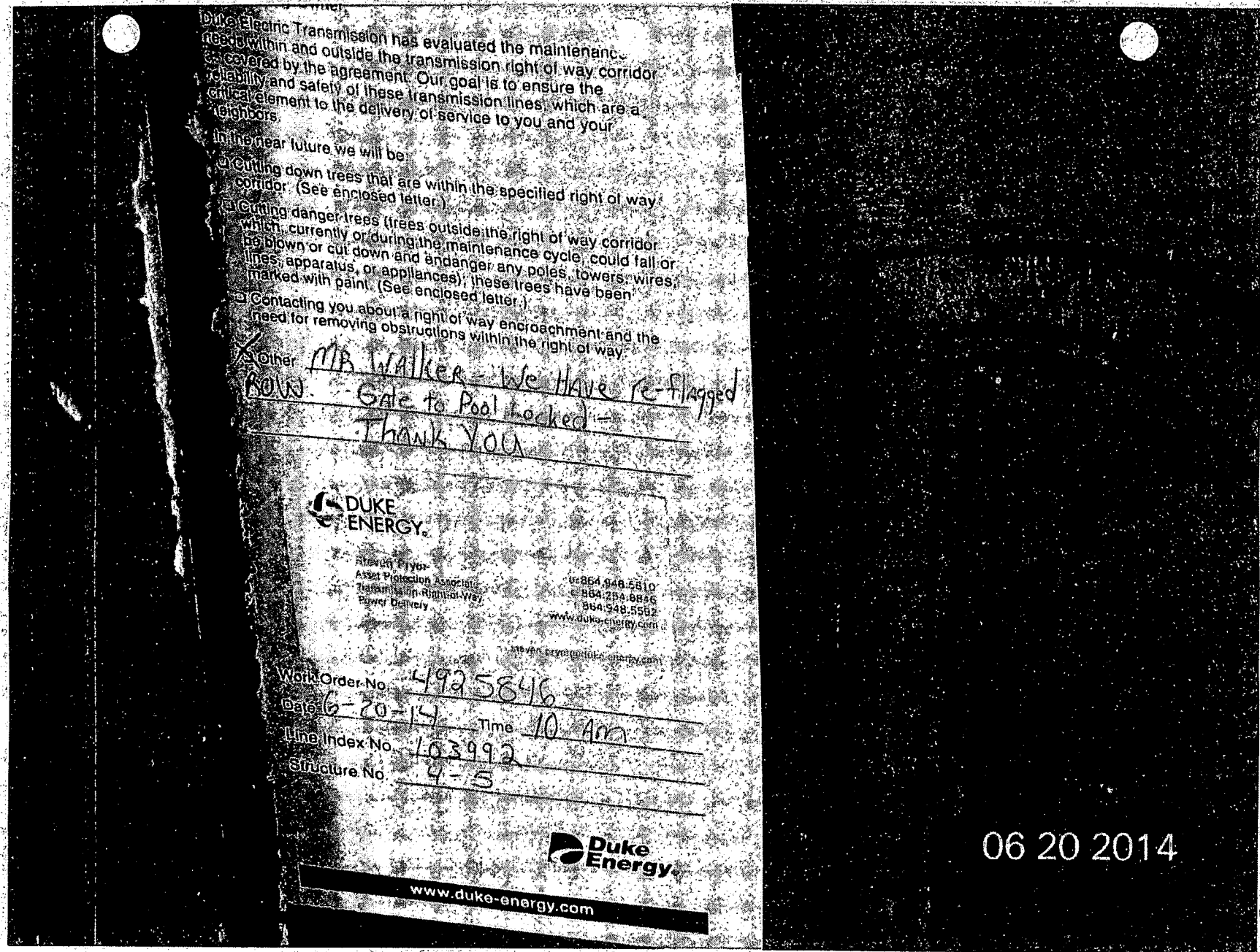


DUKE_00048



DUKE_00049

DUKE_00050



Duke Electric Transmission has evaluated the maintenance need within and outside the transmission right of way corridor covered by the agreement. Our goal is to ensure the reliability and safety of these transmission lines, which are a critical element to the delivery of service to you and your neighbors.

In the near future we will be:

- Cutting down trees that are within the specified right of way corridor. (See enclosed letter.)
- Cutting danger trees (trees outside the right of way corridor which, currently or during the maintenance cycle, could fall or be blown or cut down and endanger any poles, towers, wires, lines, apparatus, or appliances), these trees have been marked with paint. (See enclosed letter.)
- Contacting you about a right of way encroachment and the need for removing obstructions within the right of way.

X Other MR WALKER - We Have re-flagged ROW. Gate to Pool Locked - Thank You

DUKE ENERGY®

Steven Tryon
Asset Protection Associate
Transmission Right-of-Way
Power Delivery

O: 864.948.5810
864.294.6846
864.948.5592
www.duke-energy.com

steven.tryon@duke-energy.com

Work Order No. 49258416

Date 6-20-14 Time 10 AM

Line Index No. 103992

Structure No. 4-5

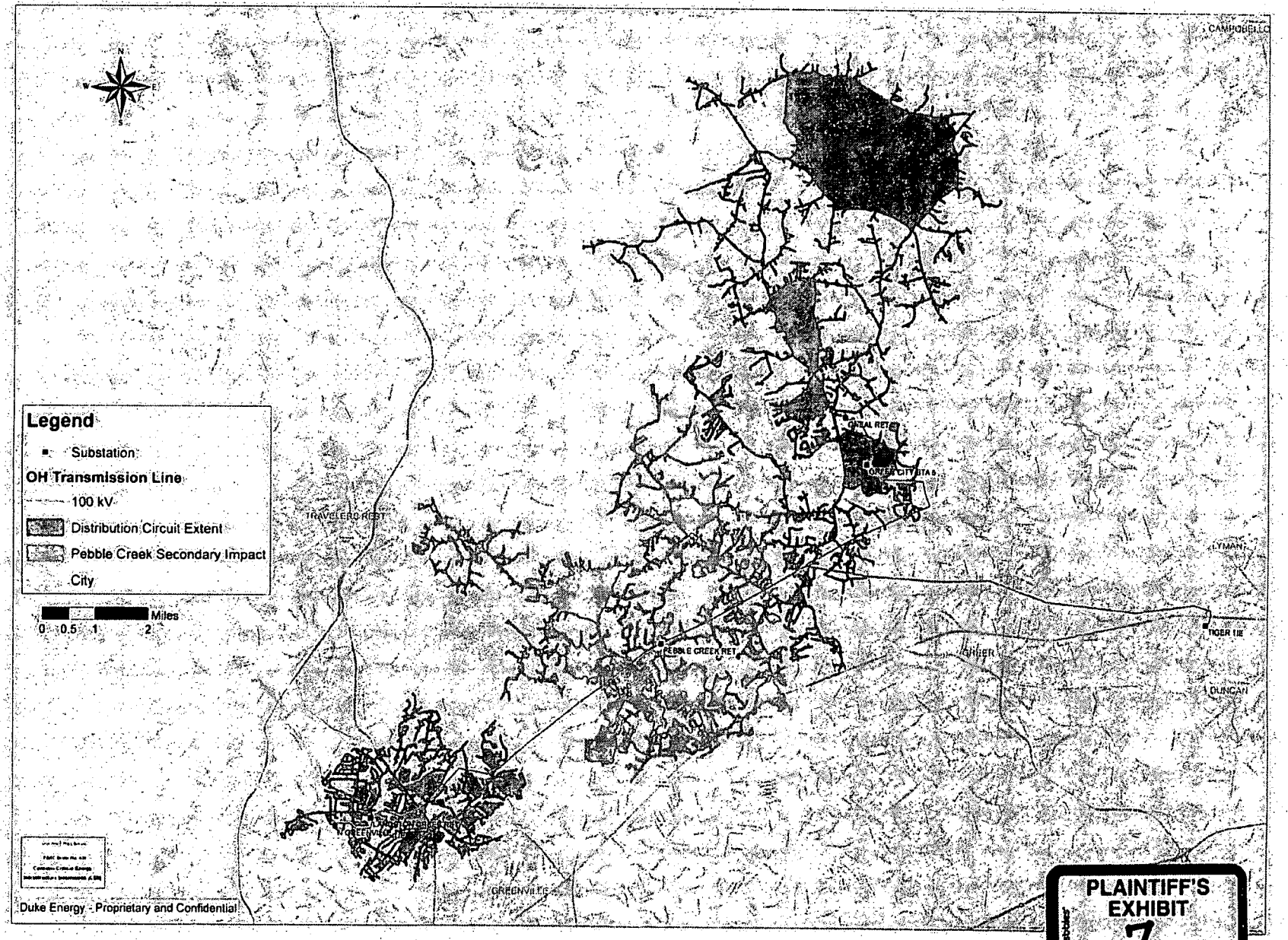
Duke Energy®

www.duke-energy.com

06 20 2014

DUKE ENERGY

Potential Effects of Outage on Transmission Lines Which oss Walker Residence at 239 N Rutherford Rd, Greer, SC



PLAINTIFF'S EXHIBIT 7

CONFIDENTIAL

DUKE ENERGY.

920 Beaumont Avenue
Spartanburg, SC 29303
864-948-5610

February 3, 2014

Caleb E. and Christina T. Walker
239 N. Rutherford Rd.
Greer, SC 29651

Subject: Retaining Wall, Patio and Iron Fence on R/W

Dear Caleb and Christina Walker:

It has been reported that there is a retaining wall, patio and iron fence encroaching on the Duke Energy's purchased right-of-way.

Enclosed is a copy of the right-of-way document that was purchased from G. P. Brown in 1939. Please note that this document gives Duke (the Grantee), "the right to keep said right of way clear of all trees, structures and other objects except those placed thereon by the grantee." This line is a 100,000 volt line and safety is a major concern. Also enclosed is a copy of the right-of-way restrictions.

This letter is to inform you in writing of Duke's right-of-way restrictions, which indicates buildings or structures of any kind cannot be permitted on Duke's right-of-way. It is not our intent to resort to the use of legal action. However, failure to hear from you may result in legal action in the future.

Duke would like to work with you on a time frame for removal of this encroachment. Please call me (office 864/948-5610) within 10 business days of this letter to discuss a removal plan. It is our hope that we can agree on a timetable that is mutually agreeable for both parties.

If you have any questions about this matter, please contact me at (864) 948-5610.

Sincerely,

Steven Pryor

Steven Pryor
Asset Protection Associate
Office: 864-948-5610
Steven.Pryor@duke-energy.com
W/O# 4925846



WALKER_000036

LANDSCAPE DESIGN CLIENT - Caleb Walker **CLIENT #**_____

Address: 239 N Rutherford St Christie

Billing address: Greer SC 29651

Ph. #s: (c) 525-7347 (w) _____ (h) _____

Email: walkerpestmanagement@yahoo.com →

Initial consult: _____
Site visit: _____
Preliminary plan: _____
Cost estimate: _____
Final Plan: _____

$ EST OF DESIGN $2000 PTF

EST TIME FRAME _____

Irrigation Pump off creek

SITE VISIT: Entire property ____ Front only ____ Rear only ____ Other ____

Specifics – likes: Pool + fence $30,000

Irrigation - they want it gate ?? duke power needs access. connect decks.

Specifics – dislikes: Heath. Inside

New h

drain lines. → Septic in way of Pool

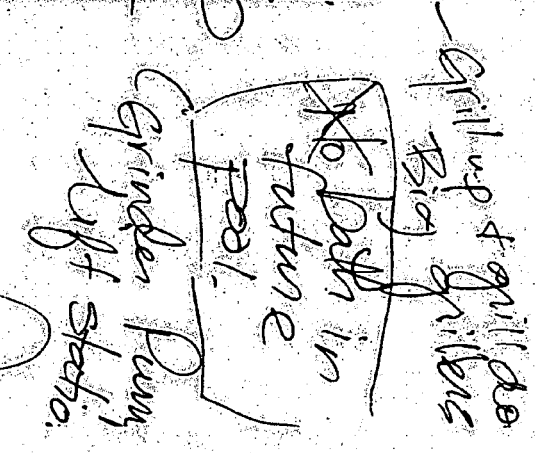
CURLY WILLOW DESIGNS_00024

PLAINTIFF'S EXHIBIT 9 Webber

Details:

outdoor lighting

more access to/ garage. does not go into AL.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	
	)	CASE NUMBER: 2014-CP-23-05816
DUKE ENERGY CAROLINAS, LLC,	)	
	)	
Plaintiff,	)	
	)	**DEFENDANTS' RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES**
v.	)	
	)	
CALEB E. WALKER AND CHRISTINA T. WALKER,	)	
	)	
Defendants.	)	
	)	

The Defendants, by and through their undersigned attorney, responds to Plaintiff's First Set of Interrogatories as follows:

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

   ANSWER:

   - **Caleb Walker. 239 N. Rutherford Road, Greer, SC 29651. Mr. Walker may only be contacted through undersigned counsel.**
   - **Christina Walker. 239 N. Rutherford Road, Greer, SC 29651. Ms. Walker may only be contacted through undersigned counsel.**

   Caleb Walker signed an affidavit regarding this case on October 9, 2015. Defendants produced this affidavit to Plaintiff in conjunction with Defendants' Opposition to Plaintiff's Motion for Summary Judgment.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense in the case.

   ANSWER:



- **Defendants took photographs of their backyard and of the right of way after this lawsuit was commenced. Defendants produce these documents in conjunction with their Responses and Objections to Plaintiff's Requests for Production.**

3. In cases involving personal injury, set forth the names and addresses of all physicians who have treated the party and all hospitals to which the party has been committed in connection with said injuries and also set forth a statement of all medical costs involved.

   ANSWER: **Not applicable.**

4. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party.

   ANSWER: **Defendants have incurred attorneys' fees and costs in defending this case. Defendants reserve the right to supplement this Answer at a later time.**

5. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case.

   ANSWER: **Defendants have not identified an expert witness. Defendants reserve the right to supplement this Answer at a later time.**

6. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witness.

   ANSWER: **Defendants Caleb and Christina Walker may testify regarding the 1939 right of way, Duke Energy encroachment regulations, engaging in good faith discussions with Duke Energy to comply with the right of way and regulations before building any structure in their backyard, building the structures allegedly at issue, and other attendant issues.**

AS TO ANSWERS:

Caleb Walker

AS TO OBJECTIONS:

R. Mills Ariail, Jr.
South Carolina Bar #15584
Law Office of R. Mills Ariail, Jr
11 North Irvine Street, Suite 11
Greenville, SC 29601
864-232-9390
mills@rmalawoffice.com

Greenville, SC
Date: 1/21/2016

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)))	IN THE COURT OF COMMON PLEAS C.A. No.: 2014-CP-23-5816
DUKE ENERGY CAROLINAS, LLC, Plaintiff, vs. CALEB E. WALKER AND CHRISTINA T. WALKER, Defendants.	)))))))))))	**RESPONSES TO PLAINTIFF'S REQUEST TO ADMIT**

The Defendants, Caleb E. Walker and Christina T. Walker (hereinafter referred to as "Defendants"), through their attorney of record, R. Mills Ariail, Jr., hereby Answers the Request to Admit by Plaintiff:

REQUEST TO ADMIT

1. Admit that the permit application attached as Exhibit A and dated March 7, 2013 is a true and accurate copy of the application filed on behalf of the Walkers in connection with the construction of a swimming pool on their property located at 239 N. Rutherford Road, Greer, South Carolina, 29651.

   ANSWER: ADMIT.

2. Admit that the photographs attached as Exhibit B reflect portions of the Walkers' property located at 239 N. Rutherford Road, Greer, South Carolina, 29651.

   ANSWER: ADMIT.

R. Mills Ariail, Jr. (SC Bar#15584)
11 North Irvine Street, Suite 11
Greenville, SC 29601
864-232-9390
Fax 864-232-9392
mills@rmalawoffice.com
Attorney for Defendants

Greenville, SC
Date: March 5, 2015

PLAINTIFF'S EXHIBIT 11

Prepared by:
Sallé Law Firm
9 Caledon Court, Suite A
Greenville, SC 29615

2010005887 DEED
2 PGS
Book:DE 2367 Page:4131-4132
January 28, 2010 02:12:48 PM Cons:$175,000.00
Rec:$10.00 Cnty Tax:$192.50 State Tax:$455.00
FILED IN GREENVILLE COUNTY,SC

STATE OF SOUTH CAROLINA)
) **TITLE TO REAL ESTATE**
COUNTY OF GREENVILLE)

KNOW ALL MEN BY THESE PRESENTS, that, **A-1 Properties, LLC, its successors and assigns,** in consideration of **One Hundred Seventy-Five Thousand and xx/100 ($175,000.00) Dollars,** the receipt of which is hereby acknowledged, have granted, bargained, sold and released, and by these presents do hereby grant, bargain, sell, and release, subject to the easements, restrictions, reservations and conditions set forth below ("Exceptions"), unto **Caleb E. Walker and Christina T. Walker,** as joint tenants with rights of survivorship and not as tenants in common, their heirs, successors and assigns, forever:

THIS CONVEYANCE IS MADE SUBJECT TO: All covenants, restrictions, easements and rights-of-ways affecting the property.

All that piece, parcel or lot of land situate, lying and being in the County of Greenville, State of South Carolina, being known and designated as Lot 1 as shown on a plat entitled "Mill Valley Creek, Lot 1, Survey for Pete Sauvola" prepared by Freeland & Associates, Inc. dated January 23, 2002 and recorded in the Office of the Register of Deeds for Greenville County, SC in Plat Book 45-C at Page 77; reference to said plat is made for a metes and bounds description thereof.

This being that same property conveyed unto A-1 Properties, LLC, its successors and assigns, by Master's Title of Charles B. Simmons, Jr. as Master in Equity for Greenville County, dated November 12, 2009 and recorded November 16, 2009 in the Office of the Register of Deeds for Greenville County, South Carolina in Deed Book 2364, Page 4489.

Tax Map No.: T02100010403

Grantee's Address: 239 N. Rutherford Road
Greer, SC 29651

Together with, subject to the above exceptions, all and singular the rights, members, hereditaments and appurtenances to said premises belonging or in any wise incident or appertaining. To have and to hold, subject to the above exceptions, all and singular the premises before mentioned unto the grantee(s) as joint tenants with right of survivorship and not as tenants in common, and the grantee's(s') heirs or successors and assigns, forever. And, the grantor(s) do(es) hereby bind the grantor(s) and the grantor's(s') heirs or successors, assigns, executors and administrators to warrant and forever defend all and singular said premises, subject to the above exceptions, unto the grantee(s) and the grantee's(s') heirs or successors and assigns and against every person whomsoever lawfully claiming or to claim the same or any part thereof.

PLAINTIFF'S EXHIBIT
tabbies
12

WITNESS the grantor's hand and seal this 22nd day of January, 2010.

SIGNED, sealed and delivered
in the presence of:

WITNESS

WITNESS

A-1 Properties, LLC, its successors and assigns

By: (MEMBER)

Its: MEMBER

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

PROBATE

Personally appeared the undersigned witness and made oath that (s)he saw the within named grantor(s), sign, seal and as the grantors' act and deed, deliver the within written deed and that (s)he, with the other witness subscribed above, witnessed the execution thereof.

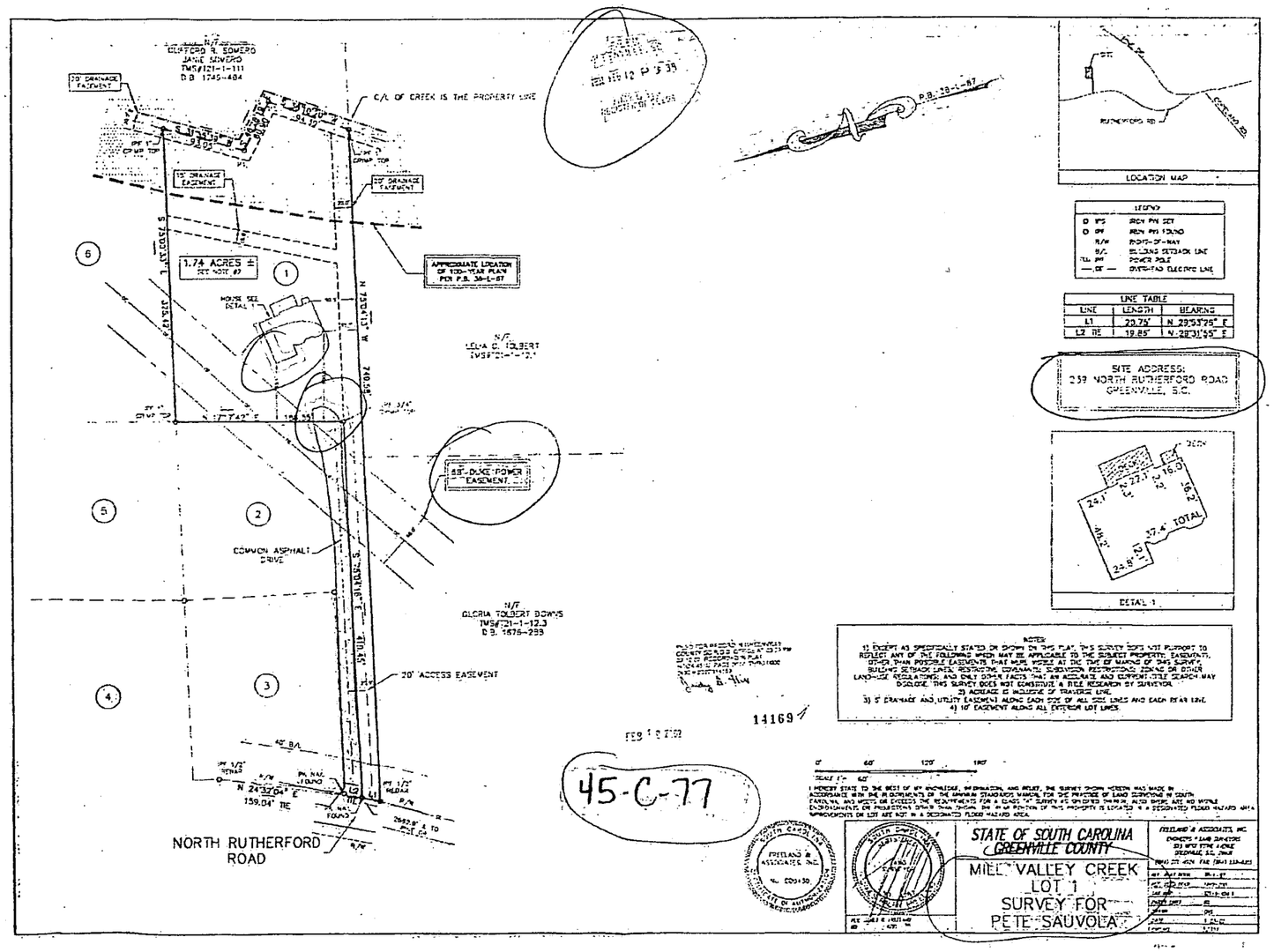
WITNESS

SWORN to before me this
22nd day of January, 2010.

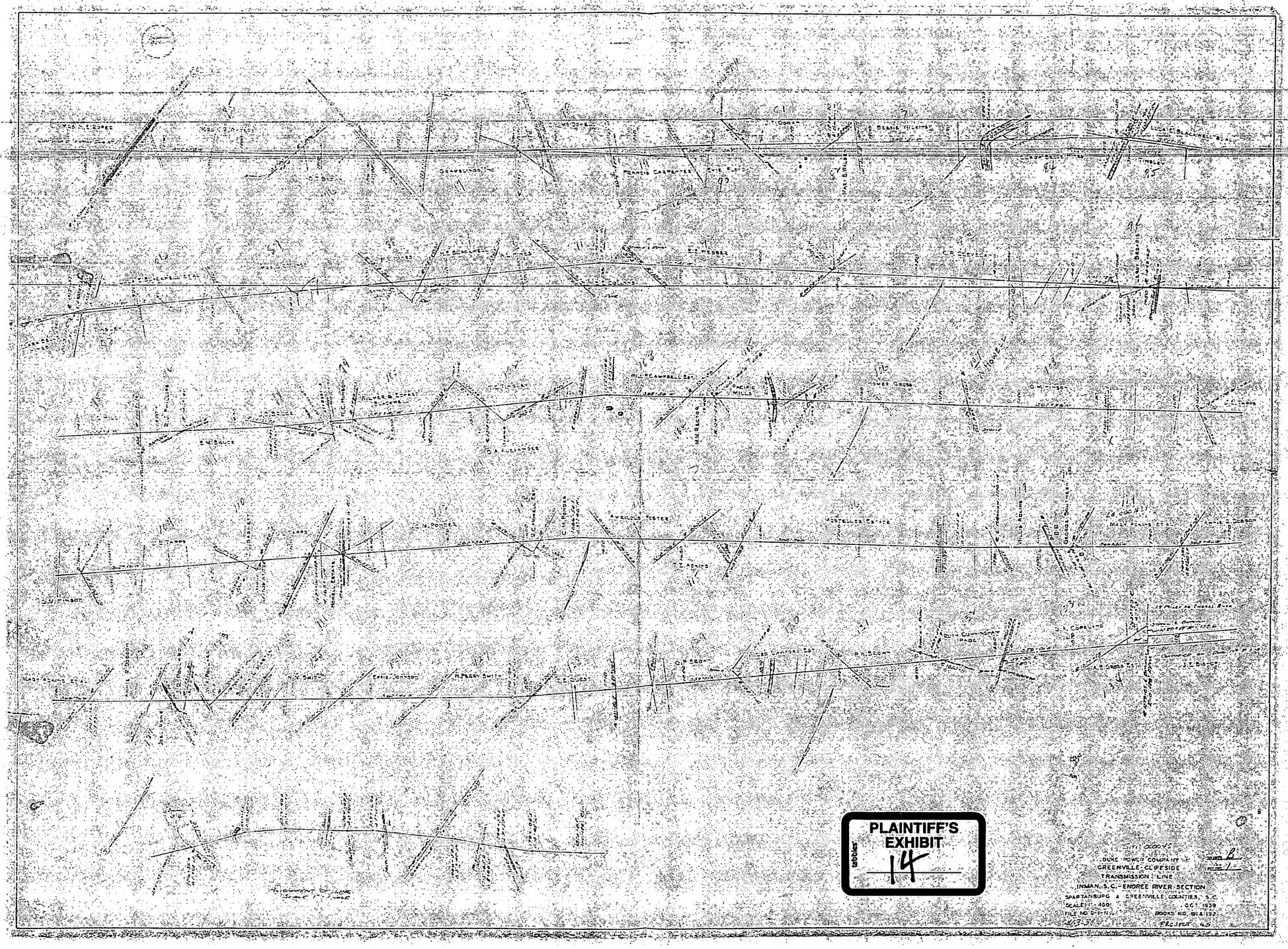
(SEAL)
NOTARY PUBLIC for South Carolina
My Commission Expires: 10/4/15

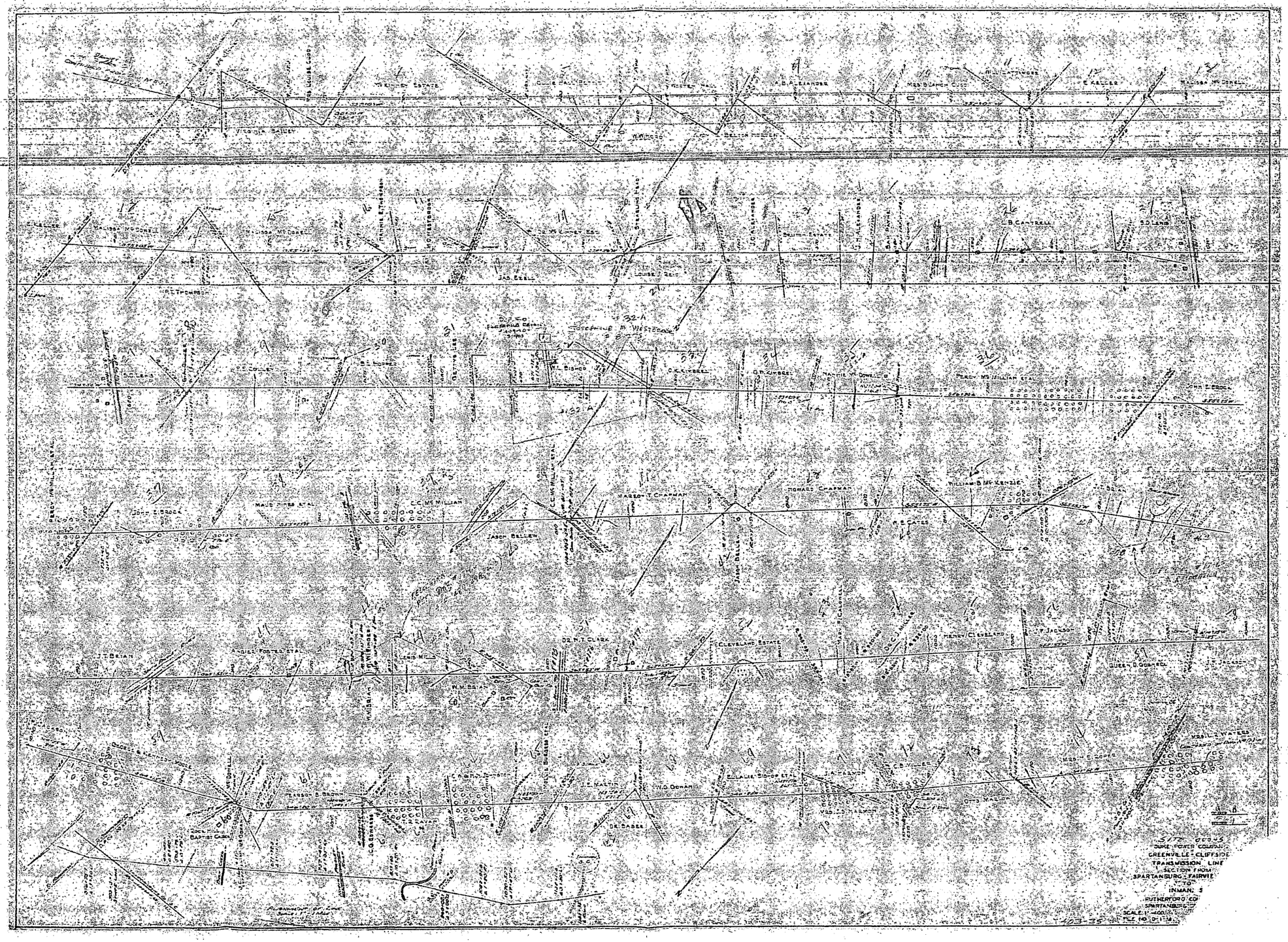
PETER R. SALLE
NOTARY PUBLIC
MY COMMISSION EXPIRES OCT 4, 2015
SOUTH CAROLINA

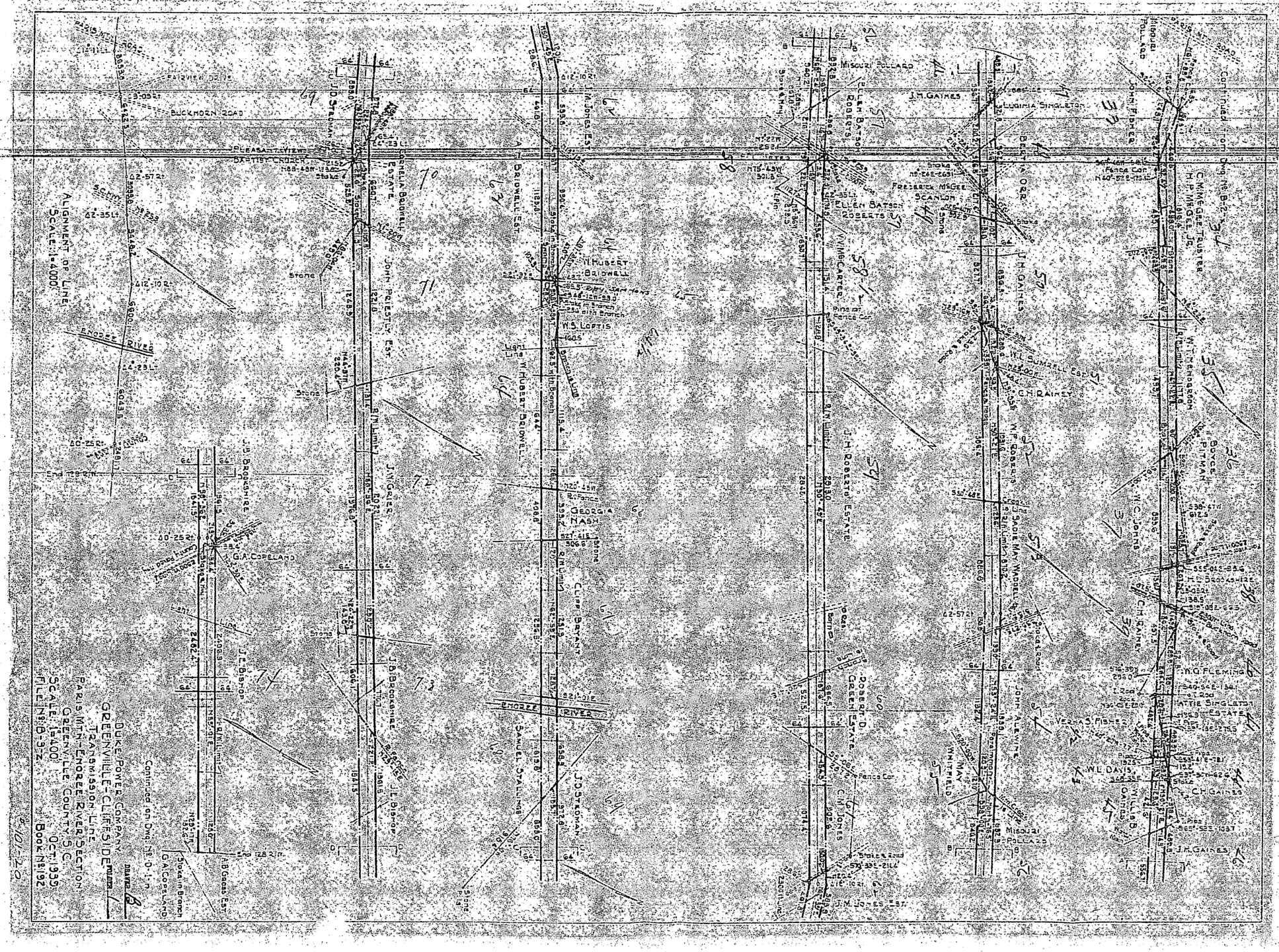
FILED FOR RECORD IN GREENVILLE COUNTY, SC ROD
2010005887 Book:DE 2367 Page:4131-4132
January 28, 2010 02:12:48 PM

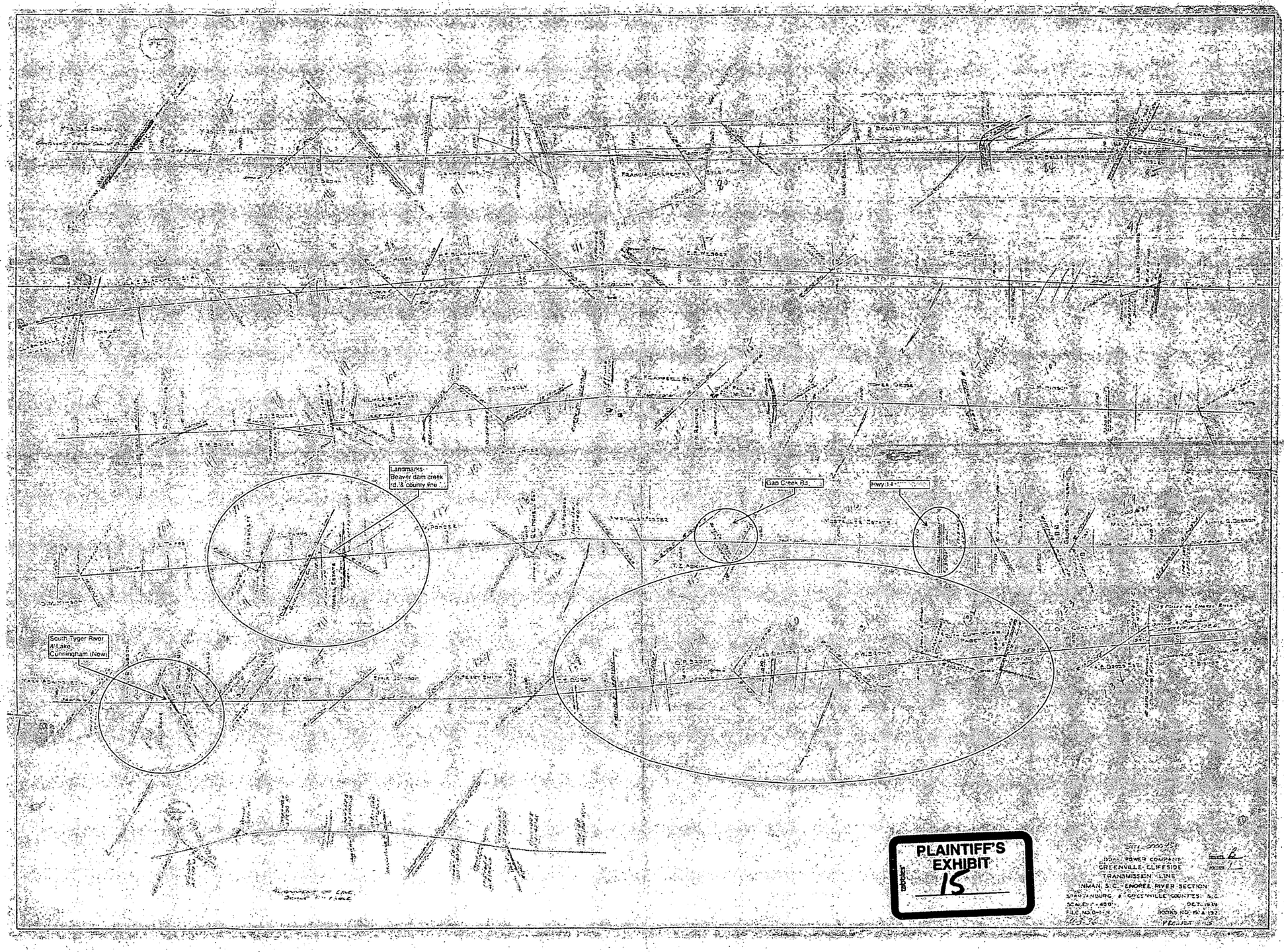


PLAINTIFF'S EXHIBIT 13


PLAINTIFF'S
EXHIBIT
14
DUKE POWER COMPANY
GREENVILLE-CLIFFSIDE
TRANSMISSION LINE
INMAN, S.C.-ENOREE RIVER SECTION
SPARTANBURG & GREENVILLE COUNTIES, S.C.
SCALE 1" = 400'
OCT. 1929
FILE NO. D-81-1
DRWG. NO. 61A192


DUKE POWER COMPANY
GREENVILLE - CLIFFSIDE
TRANSMISSION LINE
SECTION FROM
SPARTANBURG - FAIRVIEW
TO
INMAN
RUTHERFORD CO
SPARTANBURG
SCALE 1" = 400'
FILE NO. D-1-19


DUKE POWER COMPANY
GREENVILLE-CLIFFSIDE
TRANSMISSION LINE
PARKS MT.-ENOREE RIVER SECTION
GREENVILLE COUNTY, S.C.
SCALE 1:400'
OCT. 1939
FILE No. B-322
Book No. 192
ALIGNMENT OF LINE
SCALE 1:4000'
Continued from Dwg. No. B-22-34
Continued on Dwg. No. B-22-36
BUCKHORN ROAD
PLEASANT VIEW BAPTIST CHURCH
FAIRVIEW CHURCH
Enoree River
Pleasant Ridge Branch
Brushy Creek
Stoddards Branch
Stoddards Creek
Cedar Creek
Mill Creek
Cliff Branch
Rocky Creek
Mill Branch
Beaverdam Creek
Gilder Creek
Gilder Creek Branch
Brushy Creek Branch
Stoddards Branch
Mill Branch
Rocky Creek
Cliff


Landmarks
Beaver dam creek
rd. & county line
Gap Creek Rd.
Hwy 14
South Tyger River
Lake
Cunningham (Now)
PLAINTIFF'S
EXHIBIT
15
DUKE POWER COMPANY
GREENVILLE-CLIFFSIDE
TRANSMISSION LINE
INMAN, S.C. - ENOREE RIVER SECTION
SPARTANBURG & GREENVILLE COUNTIES, S.C.
OCT. 1939

STATE OF SOUTH CAROLINA,
COUNTY OF GREENVILLE

504 | 00393



KNOW ALL MEN BY THESE PRESENTS, that

Della B. Lanford, Carl L. Lanford, Rosalie Lanford and Ruth Evelyn Lanford

in consideration of the sum of $ 160.00 in hand paid by DUKE POWER COMPANY, a corporation organized under the laws of the State of New Jersey, the receipt whereof is hereby acknowledged, do hereby grant and convey unto said Duke Power Company, its successors and assigns, a right of way sixty-eight (68) feet in width in, upon, and across that tract of land belonging to us (me), situate in the above County and State, bounded by lands of

C. P. Brown, P. W. Brown and others

for the purpose of constructing, operating and maintaining a line of towers, poles, or other structures, (which may be changed from one to the other from time to time, and which may be of wood, steel, concrete, or other material, at the option of the grantee), together with such wires, conductors, telephone wires, and other apparatus and appliances as, in the opinion of the grantee, may be advisable or desirable for or in connection with the transmitting and distributing of electric power; the grantee, its successors and assigns, is also granted the right at all times to enter upon said tract of land for the purpose of constructing and making necessary or desirable repairs, alterations, substitutions or additions to, and inspections of the structures and other property to be placed upon said right of way by the grantee. the grantee, its successors and assigns, is also granted the right to keep said right of way clear of all trees, structures and other objects except those placed thereon by the grantee, together with the further right to cut away and keep clear any trees outside of said 68-foot strip that might in any way endanger the proper maintenance and operation of the structures and other property placed upon said right of way by the grantee. It is understood and agreed that the failure or neglect of the grantee, its successors or assigns, at any time to exercise any of the rights herein granted shall not be construed as a waiver or abandonment of the right at any time thereafter to exercise any or all of such rights and privileges.

IT IS AGREED that the owner of said tract of land may use, or permit said right of way to be used for growing such crops and maintaining such fences thereon as may not in any manner interfere or conflict with the use of said right of way and rights by the grantee for the purposes hereinabove mentioned.

TO HAVE AND TO HOLD the aforesaid right of way, rights, privileges and easements unto the said Duke Power Company, its successors and assigns, to its and their only use and behoof forever.

IN TESTIMONY WHEREOF, the said

Della B. Lanford, Carl L. Lanford, Rosalie Lanford and Ruth Evelyn Lanford

Dr. B Fol. 1

Deed No. 130

do hereunto set their hand and seal, this the 4th day of November A. D. 1959

Signed, Sealed and Delivered in the Presence of:

Mae Lanford

Edith Wm Hamby

W. H. Salmon

Rosalie Lanford (SEAL)

Carl L. Lanford (SEAL)

Della B. Lanford (SEAL)

Ruth Evelyn Lanford (SEAL)

DEFENDANT'S EXHIBIT
number 1

WALKER (COUNTY)

[redacted]

THE STATE OF SOUTH CAROLINA
Greenville COUNTY

PERSONALLY appeared before me A. P. Berman

and made oath that he saw the within named C. P. Brown

sign, seal, and as his Act and Deed deliver the within written Deed; and that he with J. R. Hiecins witnessed the execution thereof.

SWORN to before me, this 10th day of November A. D. 1931

Notary Public

Book 6 Folder 1

[redacted]

TO

DUKE POWER CO.

RIGHT OF WAY

Filed ... day of ... A. D. 19

JAN 12 1940

Recorded in Book 217 page 303 at 9 A.M.

Greenville County, S. C.

THE STATE OF SOUTH CAROLINA
Greenville COUNTY

JAN 12 1940

[redacted]

WALKER_000032



THE STATE OF SOUTH CAROLINA
Greenville COUNTY } 504 00399

PERSONALLY appeared before me A. T. Bowman

and made oath that he saw the within named Della B. Lanford, Carl L. Lanford

Rosalie Lanford

sign, seal and as their Act and Deed deliver the within written Deed: and that he

with Reed Lanford witnessed the execution thereof.

A. T. Bowman

SWORN to before me, this 29th

day of November A. D. 19 39

Notary Public for S.C.

BOOK B FOLIO 1

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

PERSONALLY appeared before me A. T. Bowman and made oath that he saw the within named Ruth Evelyn Lanford sign, seal, and as her Act and Deed deliver the within written Deed; and that he with Edith Cobe Hendrix witnessed the execution thereof.

A. T. Bowman

SWORN to before me, this 29th
day of November, A.D., 1939.

Notary Public for S.C.

$1.00
50
$1.50

DEC 7 1939

THE STATE OF SOUTH CAROLINA
COUNTY.

Della B. Lanford
Rosalie Reid M.
Carl Evelyn
Lanford

TO

DUKE POWER CO.

RIGHT OF WAY

Filed 7th day of

Dec. A. D. 1939

and recorded in Book 216

Page 226

Otis Farmer

Greenville County, S. C.

Pd. at 8:30 A. M.

MICROFILMED

STATE OF SOUTH CAROLINA,
COUNTY OF GREENVILLE

KNOW ALL MEN BY THESE PRESENTS, that G. P. Brown

in consideration of the sum of $ 175.00 in hand paid by DUKE POWER COMPANY, a corporation organized under the laws of the State of New Jersey, the receipt whereof is hereby acknowledged, do hereby grant and convey unto said Duke Power Company, its successors and assigns, a right of way sixty-eight (68) feet in width in, upon, and across that tract of land belonging to us (me), situate in the above County and State, bounded by lands of T. E. Guest, Lee O. Lanford Estate and others

for the purpose of constructing, operating and maintaining a line of towers, poles, or other structures, (which may be changed from one to the other from time to time, and which may be of wood, steel, concrete, or other material, at the option of the grantee), together with such wires, conductors, telephone wires, and other apparatus and appliances as, in the opinion of the grantee, may be advisable or desirable for or in connection with the transmitting and distributing of electric power; the grantee, its successors and assigns, is also granted the right at all times to enter upon said tract of land for the purpose of constructing and making necessary or desirable repairs, alterations, substitutions or additions to, and inspections of the structures and other property to be placed upon said right of way by the grantee; the grantee, its successors and assigns, is also granted the right to keep said right of way clear of all trees, structures and other objects except those placed thereon by the grantee, together with the further right to cut away and keep clear any trees outside of said 68-foot strip that might in any way endanger the proper maintenance and operation of the structures and other property placed upon said right of way by the grantee. It is understood and agreed that the failure or neglect of the grantee, its successors or assigns, at any time to exercise any of the rights herein granted shall not be construed as a waiver or abandonment of the right at any time thereafter to exercise any or all of such rights and privileges.

IT IS AGREED that the owner of said tract of land may use, or permit said right of way to be used for growing such crops and maintaining such fences thereon as may not in any manner interfere or conflict with the use of said right of way and rights by the grantee for the purposes hereinabove mentioned.

TO HAVE AND TO HOLD the aforesaid right of way, rights, privileges and easements unto the said Duke Power Company, its successors and assigns, to its and their only use and behoof forever.

IN TESTIMONY WHEREOF, the said G. P. Brown

do hereunto set his hand and seal, this the 22nd day of November, A. D., 19 39.

Signed, Sealed and Delivered in the Presence of:

G P Brown (SEAL)

(SEAL)

Dr. B Pd. 1 (SEAL)

Deed No. 129 (SEAL)



129

THE STATE OF SOUTH CAROLINA
Greenville COUNTY. } 9393

PERSONALLY appeared before me A. S. Bowman
and made oath that he saw the within named O. P. Brown
sign, seal, and as his Act and Deed deliver the within written Deed; and that he
with J. H. Higgins witnessed the execution thereof.

Attachment

SWORN to before me, this 16th
day of January, A. D., 1940.
Notary Public

Drawn B. 6
POLDER 1

7:32 AM
Feb 28
JAN 17 1940
THE STATE OF SOUTH CAROLINA
Greenville COUNTY.

TO
DUKE POWER CO.

RIGHT OF WAY

Filed ..... day of
JAN 17 1940 A. D. 19
and recorded in Book 217
at 302 at 9 A.M.

J. H. Higgins
R. M. C.
Greenville County, S. C.

DUKE ENERGY.

920 Beaumont Avenue
Spartanburg, SC 29303
864-948-5610

February 3, 2014

Caleb E. and Christina T. Walker
239 N. Rutherford Rd.
Greer, SC 29651

Subject: Retaining Wall, Patio and Iron Fence on R/W

Dear Caleb and Christina Walker:

It has been reported that there is a retaining wall, patio and iron fence encroaching on the Duke Energy's purchased right-of-way.

Enclosed is a copy of the right-of-way document that was purchased from G. P. Brown in 1939. Please note that this document gives Duke (the Grantee), "the right to keep said right of way clear of all trees, structures and other objects except those placed thereon by the grantee." This line is a 100,000 volt line and safety is a major concern. Also enclosed is a copy of the right-of-way restrictions.

This letter is to inform you in writing of Duke's right-of-way restrictions, which indicates buildings or structures of any kind cannot be permitted on Duke's right-of-way. It is not our intent to resort to the use of legal action. However, failure to hear from you may result in legal action in the future.

Duke would like to work with you on a time frame for removal of this encroachment. Please call me (office 864/948-5610) within 10 business days of this letter to discuss a removal plan. It is our hope that we can agree on a timetable that is mutually agreeable for both parties.

If you have any questions about this matter, please contact me at (864) 948-5610.

Sincerely,

Steven Pryor

Steven Pryor
Asset Protection Associate
Office: 864-948-5610
Steven.Pryor@duke-energy.com
W/O# 4925846

DEFENDANT'S EXHIBIT 2

WALKER_000036

DUKE ENERGY.

Date: 6-20-14

Customer Name: Mr. Caleb Walker

Customer Address: 239 N Rutherford Rd
Greer SC, 29651

Dear Mr. Walker:

Per your request, Steven Pryor, an Asset Protection Specialist with Duke Energy, marked the outer most limits of the Duke Energy right of way located at the above referenced address. Please be advised that this field measurement is a courtesy provided by Duke Energy, and is meant to provide an estimated location for the outer most limits of the right of way. The Asset Protection Specialist providing the measurement is not a licensed surveyor, and the measurement is not exact.

Should you wish to identify the exact location of the Duke Energy right of way on your property, Duke Energy recommends that you contact a licensed surveyor and request that a professional licensed survey be prepared for your property.

Thank you for your anticipated cooperation.

Sincerely,

Steven Pryor

Steven Pryor

Asset Protection Specialist, Duke Energy

WALKER_000037

DUKE ENERGY. CAROLINAS

Lauren B. Llamas
Attorney
Office of the General Counsel

Duke Energy Corporation
550 South Tryon Street
Charlotte, NC 28202

Mailing Address:
DEC45A / P.O. Box 1321
Charlotte, NC 28201

980-373-8534 fax

May 6, 2014

Via UPS Overnight Delivery
R. Mills Ariail, Jr.
Attorney at Law
11 North Irvine Street, Suite 11
Greenville, SC 29601

Re: Your Client: Caleb Walker – Retaining Wall, Patio and Iron Fence on Duke Energy Carolinas, LLC ("Duke Energy") Right of Way

Property: 239 N. Rutherford Road, Greer, SC 29651 (the "Property")

Dear Mr. Ariail:

I am writing with regards to your client, Caleb Walker. Per our discussion of February 28, 2014, I informed you that a retaining wall, patio and iron fence located at the above-referenced Property were encroaching on Duke Energy's transmission right-of-way and must be removed immediately. At that time you informed me you would pass the information along to Mr. Walker and get back to me in one week. I have left several phone messages for you, however, to date, I have not received a return phone call.

I am enclosing a copy of the 1939 Duke Energy Right of Way Agreement, which has been previously provided to Mr. Walker. Please note that this document gives Duke Energy "the right to keep said right of way clear of all trees, structures and other objects except those placed thereon by grantee." This transmission line is a 100,000 volt line and, therefore, safety is a major concern.

We would like to work with you and your client on a time frame for the removal of the retaining wall, patio and iron fence. It is our hope that we can agree on a timetable that is mutually agreeable for your client and Duke Energy. It is not our intent to resort to the use of legal action; however, failure to hear from your client may result in legal action in the near future.

Please contact me **within five (5) business days** of this letter to discuss a removal plan.

Thank you in advance for your assistance and immediate attention to this matter, and I look forward to working with you to resolve this issue in a timely manner.

Sincerely,

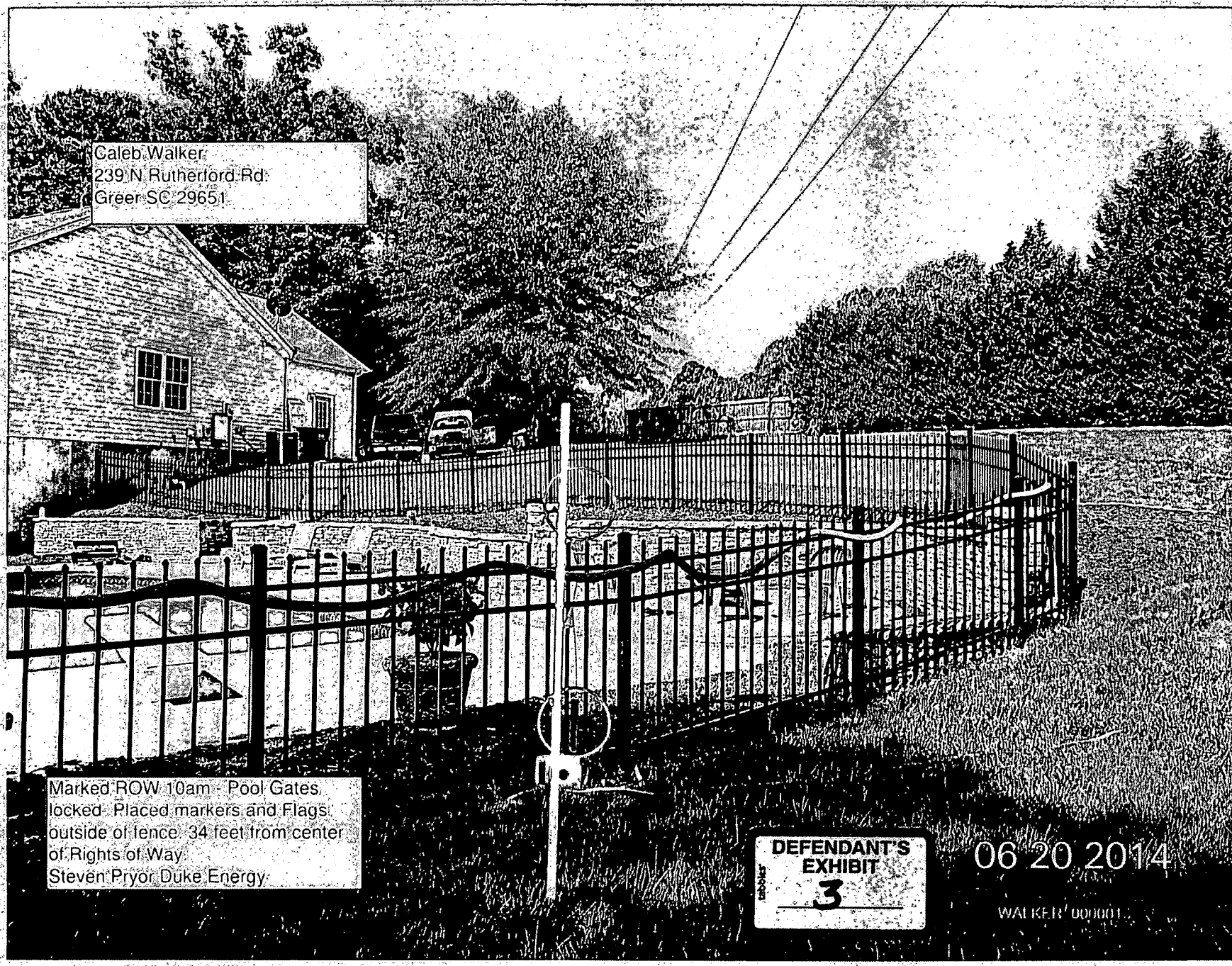
Lauren B. Llamas

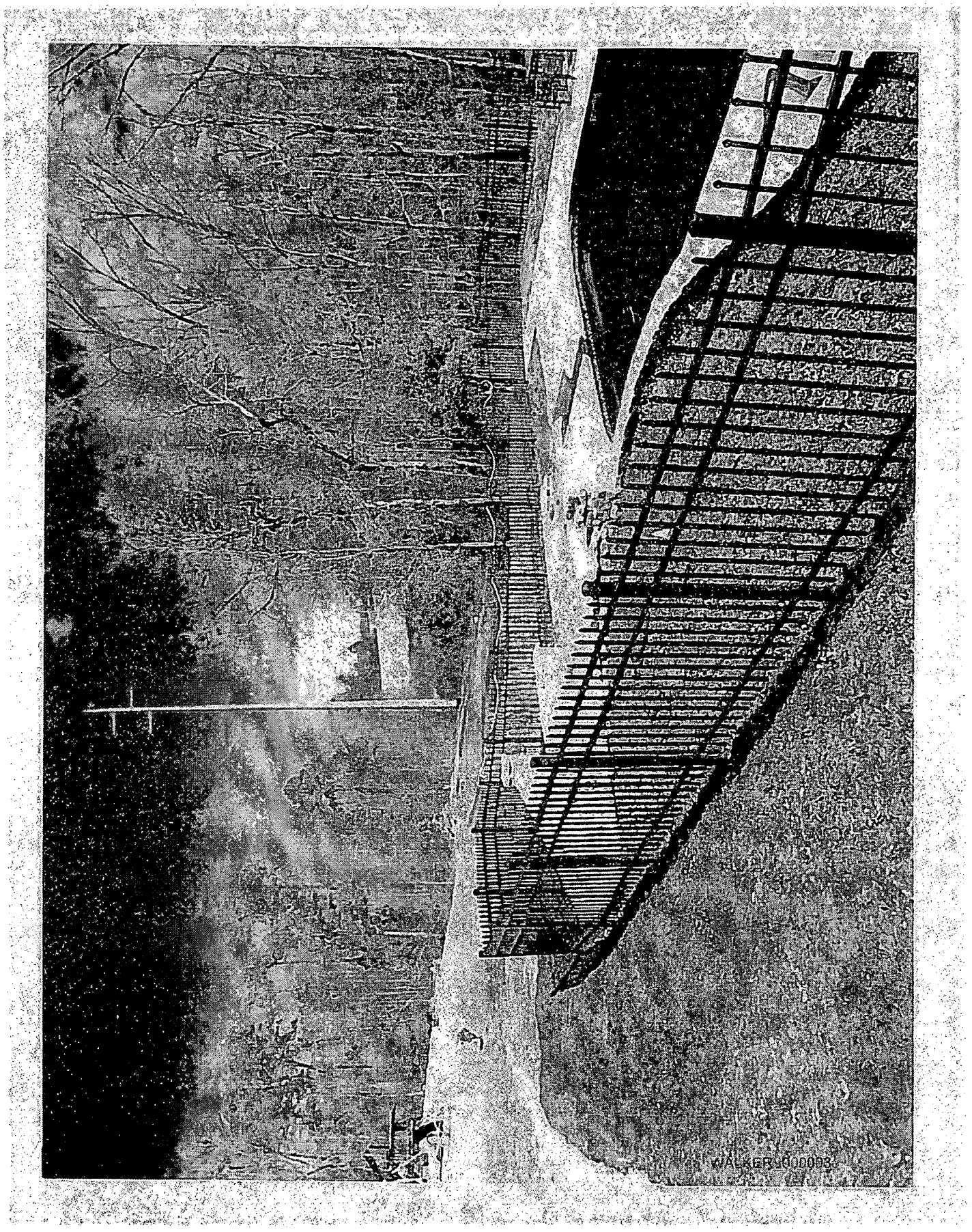
LBL/lmc
Enclosure

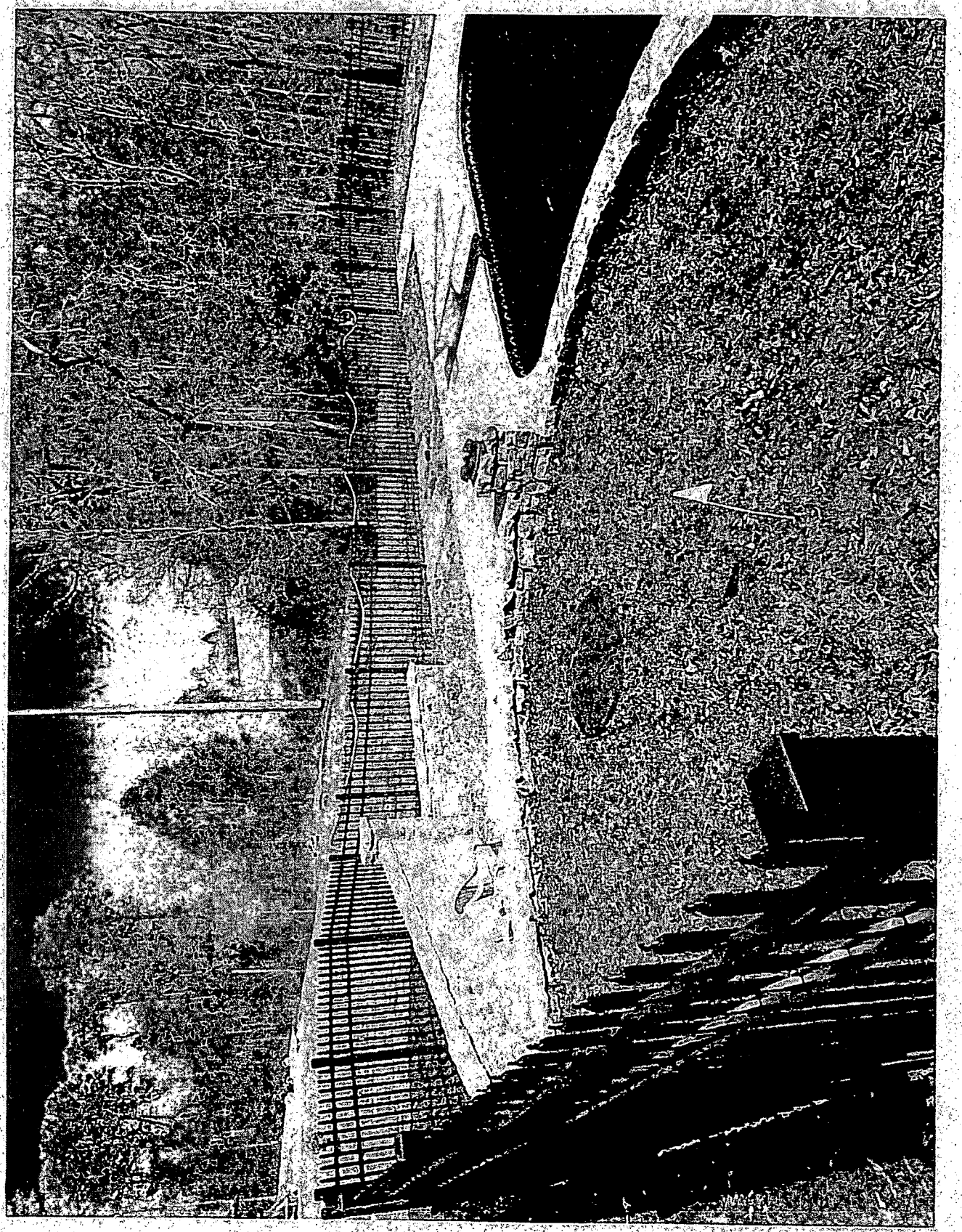
cc: Steven C. Pryor, Asset Protection *(via electronic mail - w/o# 4925846)*

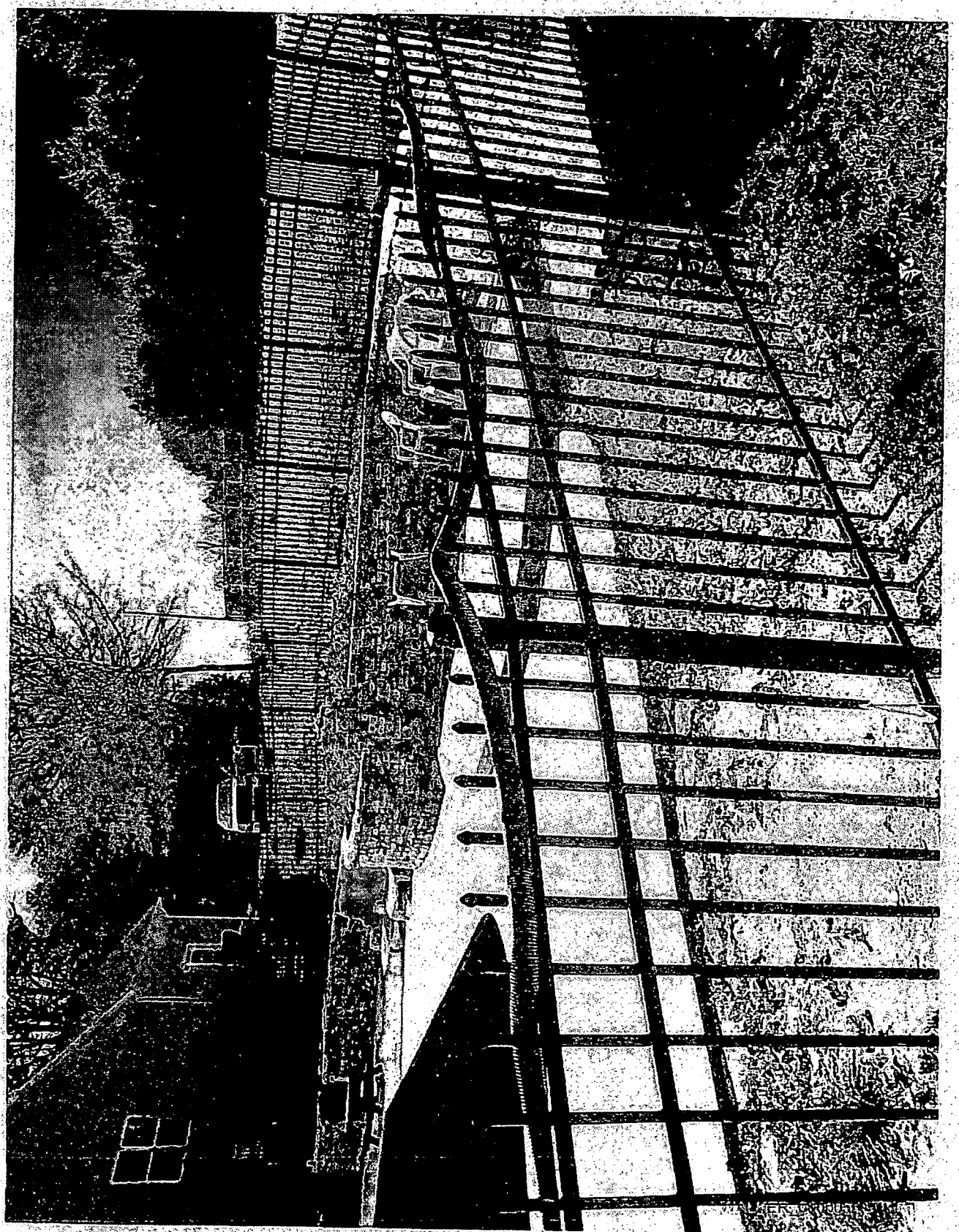
CONFIDENTIAL

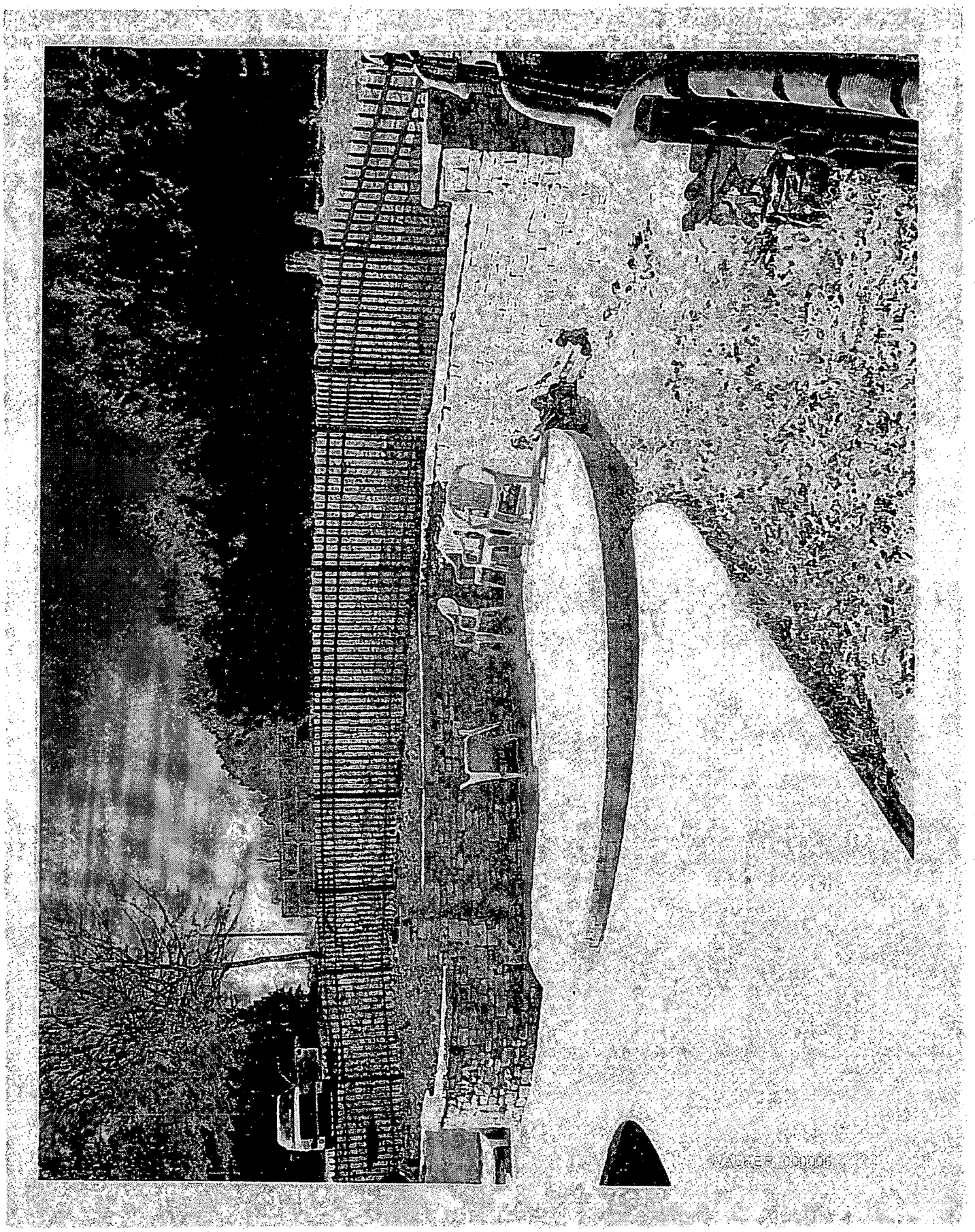
WALKER

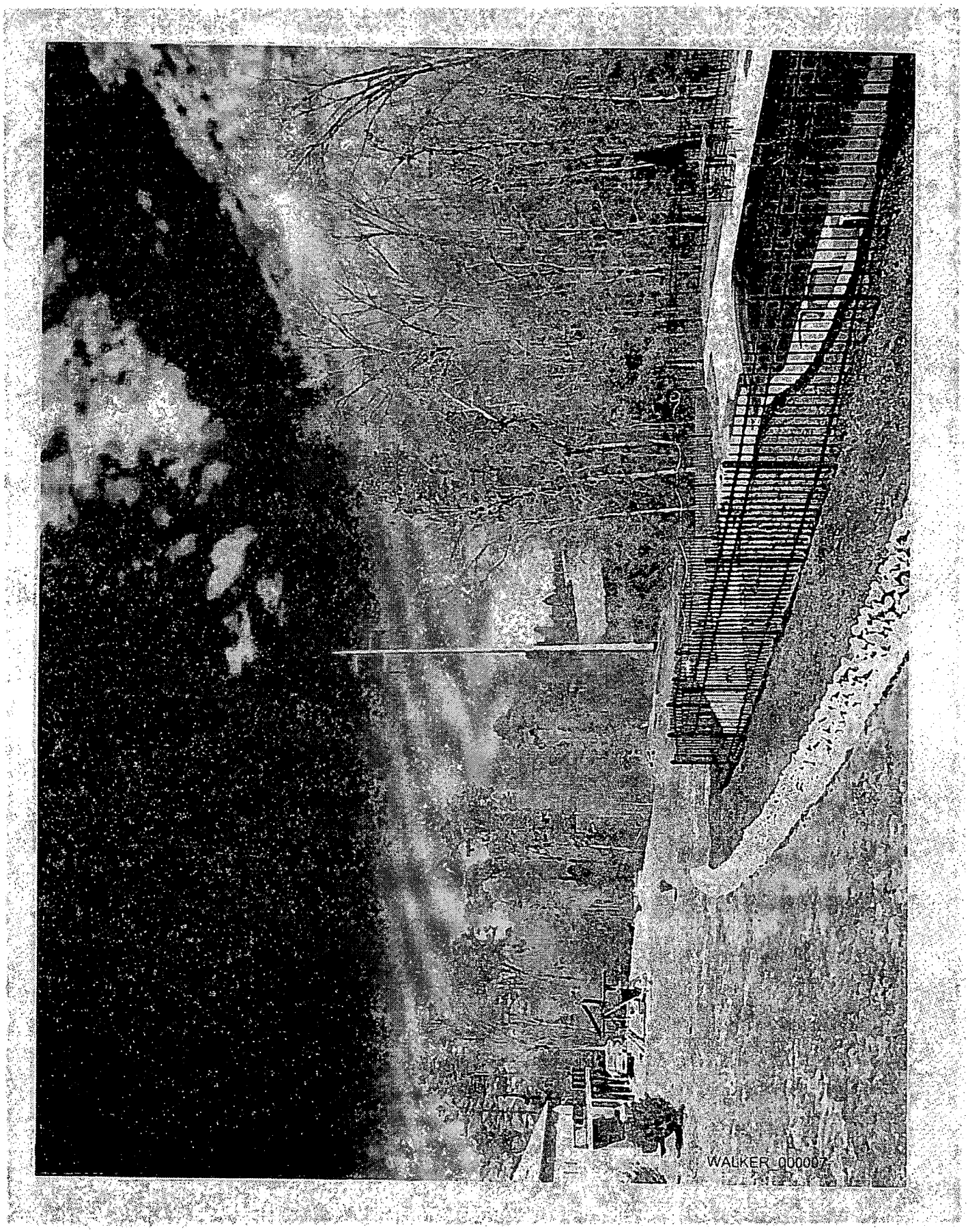

Caleb Walker
239 N Rutherford Rd
Greer SC 29651
Marked ROW 10am - Pool Gates locked. Placed markers and Flags outside of fence. 34 feet from center of Rights of Way.
Steven Pryor Duke Energy
DEFENDANT'S EXHIBIT
3
06 20 2014
WALKER 000001

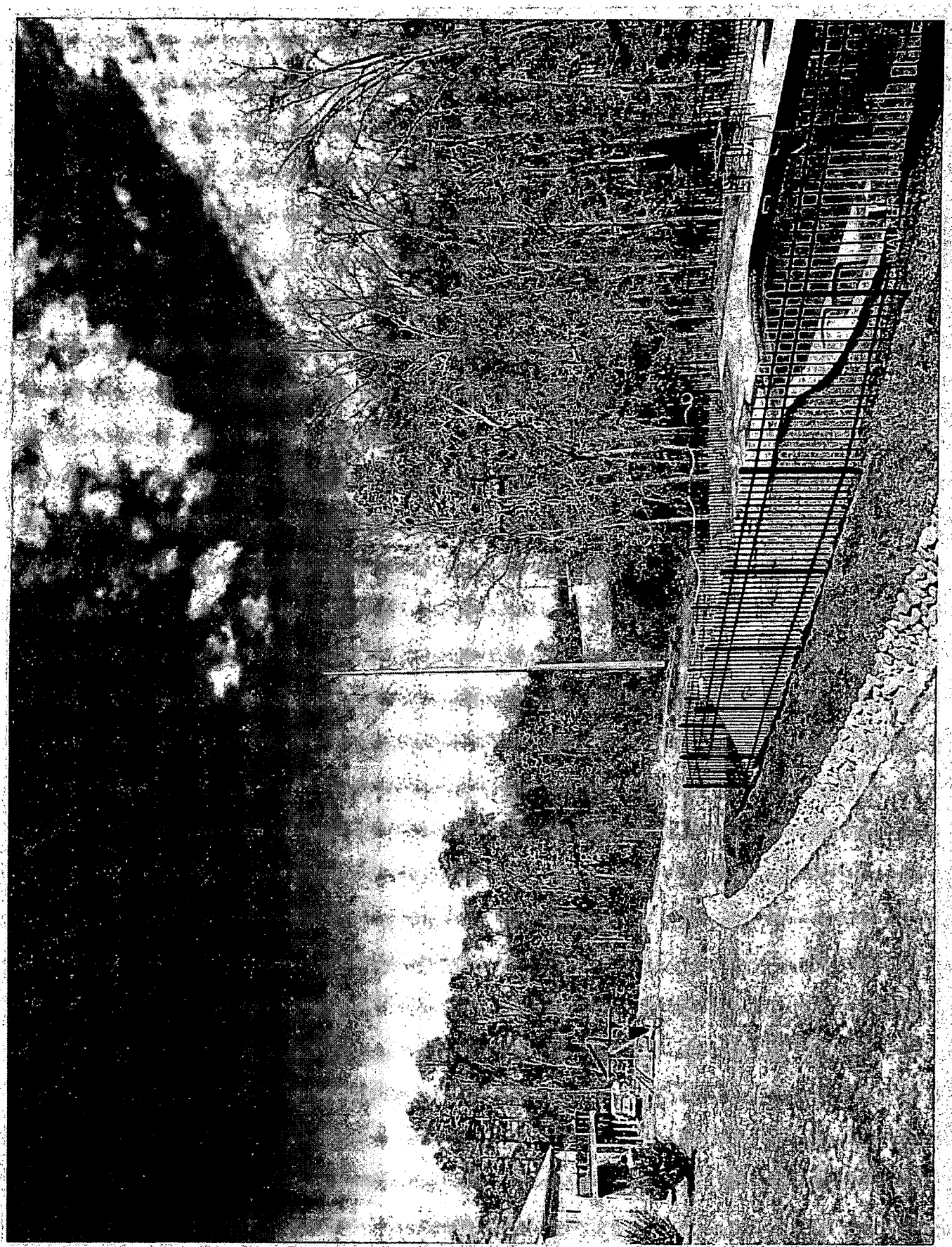

WALKER 000093



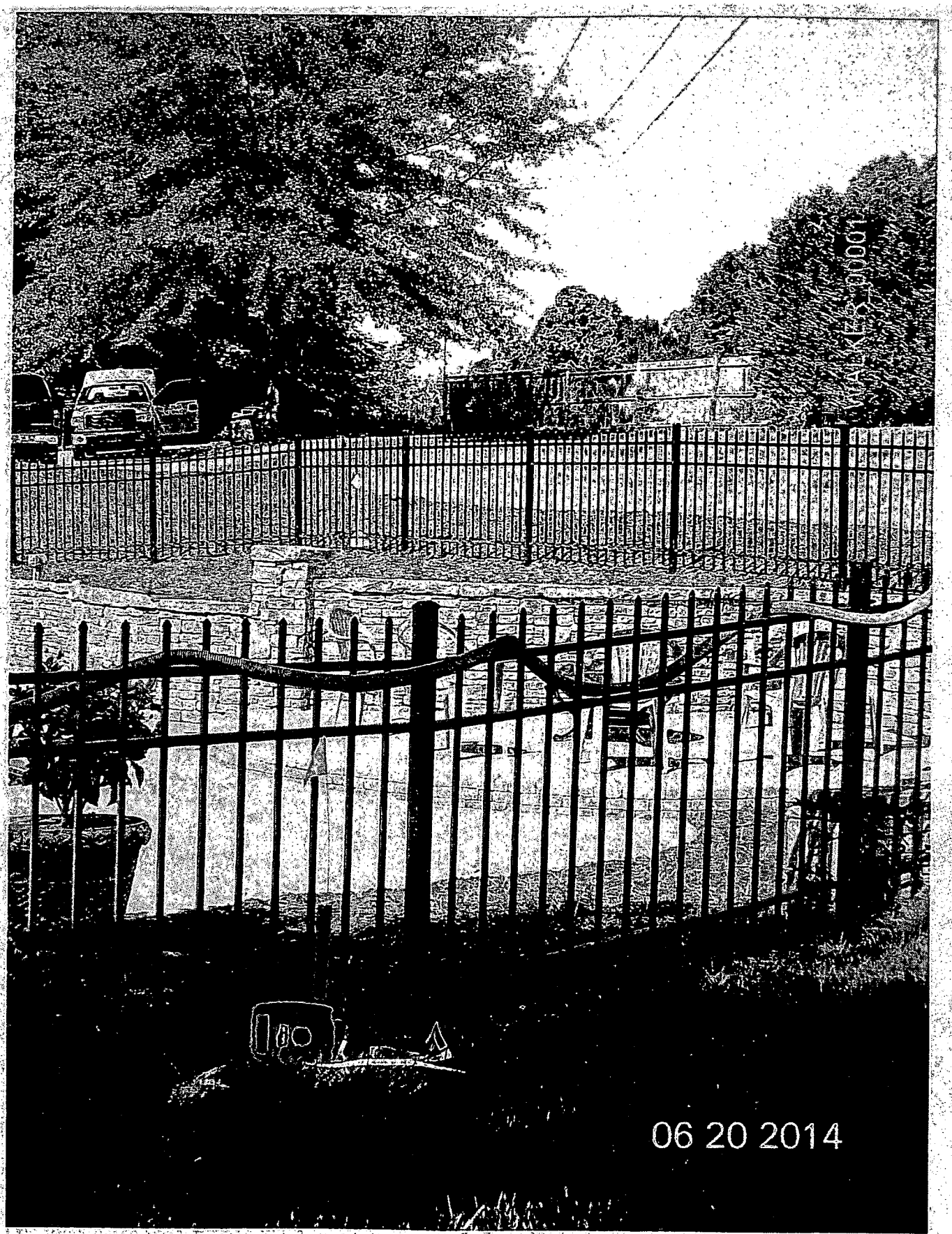


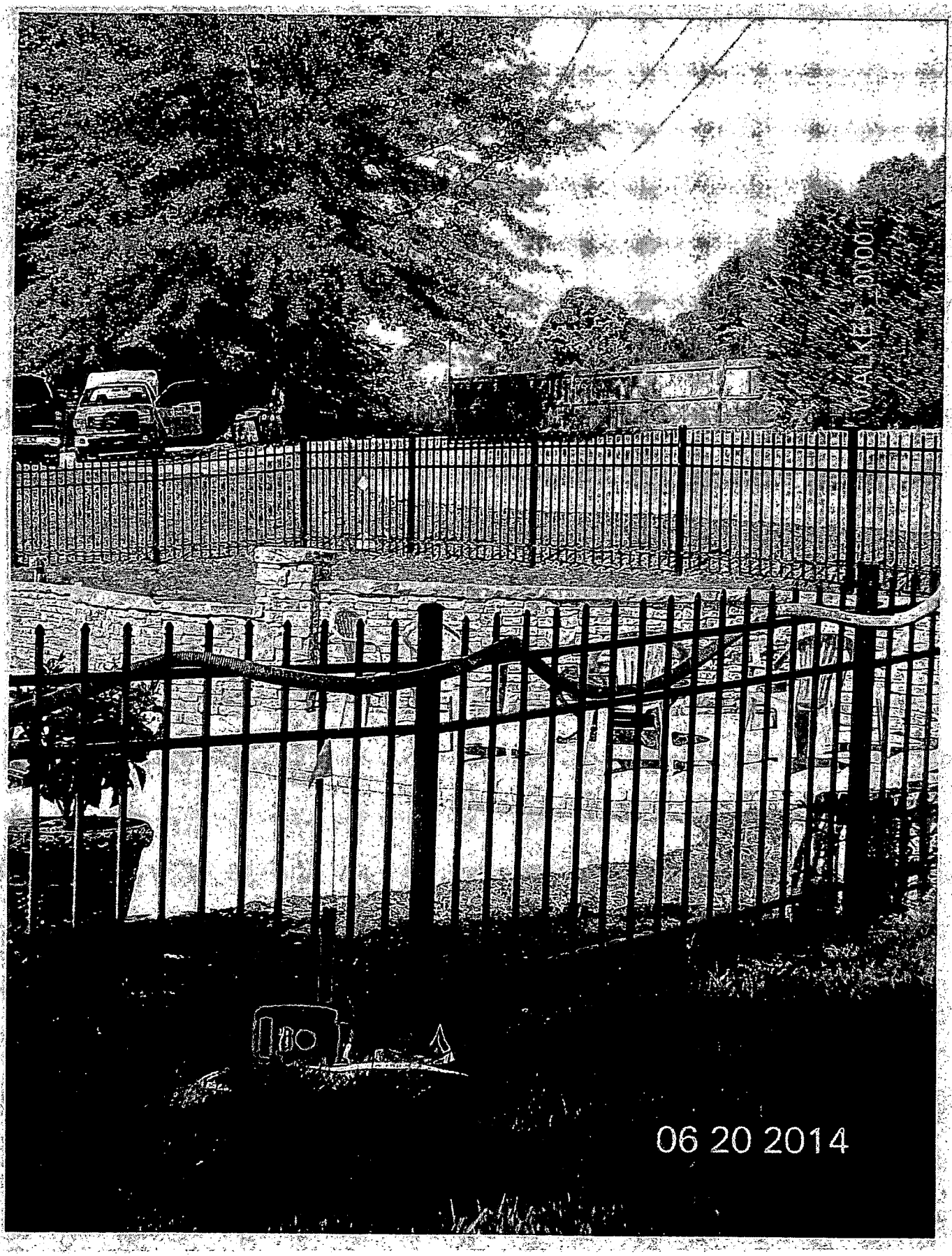


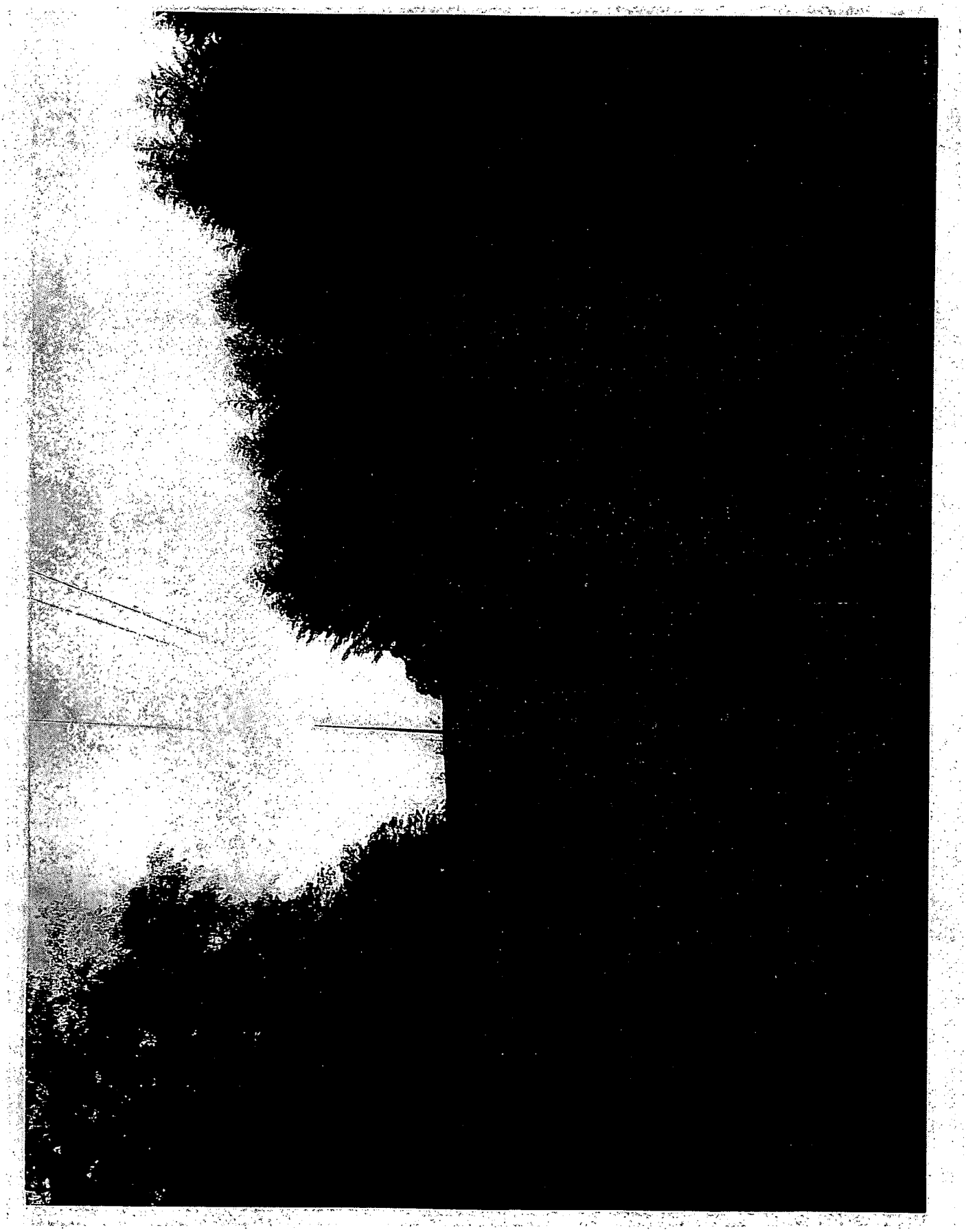

WALKER 000007



06 20 2014
WALKER_000010


06 20 2014


WALKER ROAD
06 20 2014



401

402

403

WALKER 000019

Attention: Brenda James

Greenville County
Freedom of Information Request Form

RECD JUN 03 2014

Greenville County Square
301 University Ridge, Suite 4100, Greenville SC 29601-3686
Phone (864) 467-7060 Fax (864) 467-7222

DATE: June 3, 2014

(Please Print)

Name (Mr., Mrs., Ms.): Joshua D. Spencer, Esq.

Company Name: Haynsworth Sinkler Boyd, P.A.

Address: One North Main, 2nd Floor

City, State, Zip: Greenville, S.C. 29601

Telephone #: 864-240-3275

Email: jspencer@hsblawfirm.com

Under the Freedom of Information Act (FOIA), I would like to request the following:

All permits to build a swimming pool, retaining wall, and/or fence at or near 239 N. Rutherford Road, Greer, S.C. 29651.

Email: jspencer@hsblawfirm.com

Correspondence

As a public body under the South Carolina Freedom of Information Act, Greenville County may collect fees not to exceed the actual cost of searching for and making copies of requested records.

Request should be mailed or faxed to Greenville County Codes Enforcement, Attn: Brenda James, 301 University Ridge, Suite 4100, Greenville, SC 29601; Telephone (864) 467-7357; Fax (864) 467-7222.

Email: bjames@greenvillecounty.org

CHARGES WILL APPLY TO ALL FOIA REQUEST

FOR OFFICE USE ONLY:

RESEARCH TIME: _____ **TOTAL # OF COPIES** _____

TOTAL COST: _____

TE21000104C3

DEFENDANT'S EXHIBIT 4

WALKER_000023

COUNTY OF GREENVILLE
301 UNIVERSITY RIDGE SUITE 4100
GREENVILLE, SC 29601
(864) 467-7060
AUTOMATED INSPECTION SYSTEM (864) 467-5660

Application Number	13-00001287	Date	3/07/13
Property Address	239 N RUTHERFORD RD		
TAX MAP NUMBER	T021.00-01-104.03		
TAX DISTRICT	289		
Tenant nbr, name	INGROUND POOL 20X40		
Application description	SWIMMING POOL		
Subdivision Name			
Property Use	DWELLING		
Property Zoning	R-S - RES SUBURBAN		
Application valuation	24900		

Owner	Contractor
WALKER CHRISTINA T	ARTISTIC POOLS & SPAS LLC
WALKER CALEB E	486 CHANDLER RD
239 N RUTHERFORD RD	PELZER SC 29669
GREER SC 29651	(864) 243-3060

Structure Information INGROUND POOL 20X40

Setback distances cited below are those minimums established by Greenville County Zoning Ordinance/Land Development Regulations. Please be aware that properties may be subject to private deed restrictions and covenants in excess of those shown on this permit.

Occupancy Type	RESIDENTIAL SINGLE FAMILY
Flood Zone	OUTSIDE FLWAY & FLPLAIN

Permit	ELECTRICAL		
Additional desc	INGROUND POOL 20X40		
PHOSH ACCESS CODE	2287274		
Permit Fee	30.00	Plan Check Fee	.00
Issue Date	3/07/13	Valuation	0
Expiration Date	9/03/13		

Qty	Unit Charge	Per		Extension
			BASE FEE	30.00

Special Notes and Comments
WADE HAMPTON BLVD TURN LEFT ONTO
FAIRVIEW RD TURN ONTO N RUTHERFORD RD
HOUSE ON RIGHT
ARTISTIC POOLS & SPAS LLC 243-3060

Fee Summary	Charged	Paid	Credited	Due
Permit Fee Total	30.00	30.00	.00	.00
Plan Check Total	.00	.00	.00	.00
Grand Total	30.00	30.00	.00	.00

Skip Lumbaker

Validity of Permit: Every permit issued shall become invalid unless the work is commenced within 180 days from issuance, or if the work is suspended or abandoned for a period of 180 days. At a minimum a progress inspection must be requested to verify the continuance of the work within the 180 day period from the date of last inspection request

WALKER_000024

Greenville County

Greenville County Square
301 University Ridge, Suite 4100, Greenville SC 29601-3686
Phone (864) 467-7060 Fax (864) 467-7407
permits@greenvillecounty.org

RESIDENTIAL ADDITION/ALTERATION APPLICATION

APPLICATION MUST BE COMPLETED PRIOR TO REQUESTING PERMIT

Date: 3/7/2013	Property Owner's Name: Christina T. & Caleb E. Walker			Phone No. [redacted]	
Exact Address of Property: 239 N. Rutherford Road		City: Greer		State/Zip: SC 29651	
Subdivision Name: Mill Valley Creek	Lot No.: 1	Tax Map No.: T021000110403			
Project Valuation: $ 24,900.00	Additional Square footage?			Is this a Corner Lot:	
Description of work: 20 x 40 Lazy L vinyl inground pool					
If Re-roof/roof type?	If Detitle/M-	Demo Permit?		Pool? In ground or	In ground
Existing or Active Permit No.?				Mobile Phone No: [redacted]	

CONTRACTOR **faxing application, also fax a copy of the contractor's license**

Name: Thomas S. Bryant	Co. Name: Artistic Pools & Spas, LLC.		License No.: 36303	Exp. Date: 06/2013	
Mailing Address: 486 Chandler Road		City: Pelzer		State/Zip: SC 29669	
Phone No.: 864.243.3060	Mobile No: 864.303.4586		Fax No.: 864.243.3639		
Email: artisticpools@charter.net					

ELECTRICAL CONTRACTOR

Name:	Co Name:		License No.	Exp. Date:	
Mailing Address:	City:		State/Zip:		
Phone No.:	Mobile No:		Fax No.:		
New Service Information:	No. of Amps:	No. of Breakers:	Name of Power Company:		
☐ Existing Panel	☐ Upgrade	No. of Amps being added:	No of Breakers being added:		

MECHANICAL CONTRACTOR

Name:	Co. Name:		License No.	Exp. Date:	
Mailing Address:	City:		State/Zip:		
Phone No.:	Mobile No:		Fax No.:		
No. of Heating Units of each type:	Gas:	Propane:	Heat Pump:	Wood	
No. of Water Heaters of each type:	Gas:	Electric:	Name of Gas Company:		
Ductwork:	Any Gas Appliances (including but not limited to; gas logs, gas grill, gas stove, give description on next line)				

PLUMBING CONTRACTOR

Name:	Co. Name:		License No.:	Exp. Date:	
Mailing Address:	City:		State/Zip:		
Phone No.:	Mobile No:		Fax No.:		
No. of Plumbing Fixtures:	(Including but not limited to; bathroom fixtures, kitchen sink, dishwasher, hot water heater, washer, laundry				
Septic Tank: ☐	OR	Sewer: ☐			

EXACT DIRECTIONS TO SITE (from a main road) **Turn left onto S. Church St; bear left onto Fairview Road; Bear left onto N. Rutherford Road; the hous is on the right # 239.**

Applications must be faxed to the Permit Application Center 48 hours in advance of permit pick up. For information regarding culverts, driveways, or encroachment permits, contact 467-7016 if the property is on a county road or 241-1224 if the property is on a state road.

The applicant hereby certifies and agrees as follows: 1) That he/she is authorized to make this application; 2) That he/she has read the above information and it is true and correct; 3) That he/she will comply with all County of Greenville ordinances, laws and regulations, all State and Federal Laws and regulations regulating the use of land and structures and the construction of structures; 4) That he/she will perform only the work outlined above at the property indicated above; 5) That he/she grants the right of entry to the property to the Building Official or employees of the County of Greenville for the purpose of inspections, and posting of notices. If any of the information supplied by the owner and/or owner's agent is incorrect, the permit may be revoked.

THIS PERMIT WILL BECOME INVALID WITHIN 6 MONTHS FROM DATE OF ISSUE IF: WORK HAS NOT COMMENCED, IF AN INSPECTION HAS NOT BEEN REQUESTED, OR IF WORK HAS BEEN SUSPENDED FOR A PERIOD OF 6 MONTHS.

This permit is permission to proceed with construction and shall not be construed as authority to violate, alter or set aside any of the provisions of the Building Code and any other applicable laws or ordinances, nor shall the issuance of this permit prevent the Building Official from requiring correction of errors in construction documents or of violations of the Building Code of the County of Greenville, South Carolina.

DATE: 3/7/2013 BY OWNER OR AUTHORIZED AGENT: Deborah E Bryant

Permit No: _____ Cost of Permit: $ _____

Customer prefers processed permit to be Emailed ☐ Faxed ☐ or picked up ☐

H drive/P Wright/Fillable Forms/March - 2010

3000

WALKER 000025

Greenville County

Grading/Erosion Control Acknowledgement
Single Family Residential Construction

Site Location Address: 239 N. Rutherford Road Simpsonville SC 29651

Tax Parcel Number: T021000110403

Subdivision Name: Mill Valley Creek **Lot #:** 1

Owner or General Contractor: I certify that I will follow the Stormwater Pollution Prevention Plan (SWPPP) for the subdivision or comply with the requirements outlined in the *"Single Family Residential Erosion/Sediment Control Standards"*. I am responsible for implementing, maintaining and monitoring effectiveness of the SWPPP during construction on the lot(s) listed above. I understand and agree to implement required erosion and sediment control measures described in the *"Single Family Residential Construction Erosion/Sediment Control Standards"*. I also understand that I may need to supplement or modify implemented protection measures as site conditions develop to control on-site erosion and ensure all site runoff is adequately treated by stormwater controls. I will also be responsible for actions of all subcontractors and delivery personnel at the worksite as they relate to the SWPPP and *"Single Family Residential Construction Erosion/Sediment Control Standards"*. I further understand that if this lot is a part of a larger common plan without developer provided NOI coverage I must apply for NOI coverage as required by SC DHEC in Suite 5800 or if I am disturbing over 1 acre of land and not a part of a larger common development, I will obtain a land disturbance permit in Suite 3900.

Artistic Pools + Spas LLC — Company Name or Property Owner (please print)
4826 Chandler Road — Street Address
Pelzer — City
SC — State
29669 — Zip Code
243-3060 — Telephone
243-3639 — Fax
Deborah E. Bryant — Contact Name (if owner is company -please print)
Deborah E Bryant — Signature

Building Permit Number: 13-1282 Issued By: [signature] Date: 3-7-13

Jurisdiction: ☒ Unincorporated ☐ Fountain Inn ☐ Mauldin ☐ Simpsonville ☐ Travelers Rest

Revised: 9/2011

WALKER_000026

COUNTY OF GREENVILLE
BUILDING SAFETY DIVISION
301 UNIVERSITY RIDGE STE 4100
GREENVILLE SC 29601

DATE: 3/07/13
TIME: 14:17:58

RECEIPT #: 0000153909
CASHIER: VMILLER

APPLICATION NBR: 13-00001282

ITEM DESCRIPTION	PAID
PERMIT FEES	30.00

TOTAL AMOUNT PAID: 30.00
PAYMENT TYPE: CHECK
CHECK NBR: 000001031

WALKER 000127

PREPARED 6/07/14, 12:51:53 INSPECTION HISTORY REPORT PAGE:
PROGRAM: BPS211L 0/00/00 THRU 0/00/00
COUNTY OF GREENVILLE

APPLICATION / STRUCTR	PROPERTY ADDRESS / PERMIT	TAX MAP NUMBER / INSPECTION	TAX DISTRICT / RESULT	DATE/STATUS	INSPECTOR
10000282	0335 S RUTHERFORD RD	T021.00-01-104.01	289		
001.001	EL 00 ELECTRICAL PERMIT	EL13 0001 ELEC GROUND/BOND POLE		5/27/13 APPROVED	054
	RES CONX T/S 05/27/2013 12:16 PM DFAULKNER				
001.001	EL 00 ELECTRICAL PERMIT	EL13 0001 ELEC ELECTRICAL FINAL		6/14/13 APPROVED	093
	RES CONX T/S 06/14/2013 08:04 PM DFAULKNER				

WALKER_000123

410

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS
Duke Energy Carolinas, LLC, Plaintiff, vs. Caleb E. Walker and Christina T. Walker, Defendants.	)	Case Number: 2014-CP-23-05816 **PLAINTIFF'S ANSWERS TO DEFENDANTS' FIRST INTERROGATORIES**

TO: CALEB E. WALKER AND CHRISTINA T. WALKER AND THEIR ATTORNEY, R. MILLS ARIAIL, JR., ESQ.:

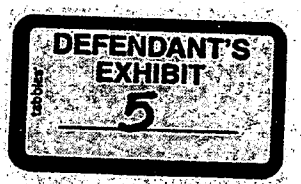
Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Plaintiff Duke Energy Carolinas, LLC ("Duke Energy"), answers Defendants' Interrogatories as follows:

GENERAL OBJECTIONS

1. Duke Energy objects to Defendants' Interrogatories to the extent they seek to impose a burden on Duke Energy to provide supplemental responses in excess of that imposed by South Carolina Rule of Civil Procedure 26.

2. Duke Energy objects to Defendants' Interrogatories to the extent they seek documents containing legal or factual opinions or conclusions.

3. Duke Energy objects to Defendants' Interrogatories to the extent they seek or may be deemed to seek or require the production or disclosure of information or documents subject to the attorney/client, joint defense or other privileges, the work product doctrine or the protection afforded mental impressions, conclusions, opinions or legal theories of Duke Energy's attorneys or its representatives as defined in South Carolina Rules of Civil Procedure 26(b).



4. Duke Energy objects to Defendants' Interrogatories to the extent they seek or may be deemed to seek or require the production or disclosure of information or documents created or generated after and/or as a result of this lawsuit being filed.

5. Duke Energy objects to Defendants' Interrogatories to the extent they seek to impose upon Duke Energy a duty to ascertain or secure information which it does not have in its possession, custody or control.

6. Duke Energy objects to Defendants' Interrogatories to the extent they seek information relating to or in the possession of entities other than Duke Energy.

INTERROGATORIES

1. Give the names and addresses of persons known to parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

1. **Caleb E. Walker (Owner of the property)**

Defendant is believed to have knowledge of the facts of this case, including the construction of the encroachments in Duke Energy's Right of Way. Duke Energy is not aware of any written or recorded statements taken from Mr. Walker.

2. **Christina T. Walker (Owner of the property)**

Defendant is believed to have knowledge of the facts of this case, including the construction of the encroachments in Duke Energy's Right of Way. Duke Energy is not aware of any written or recorded statements taken from Mrs. Walker.

3. **Steven Pryor (Duke Energy employee)**

Mr. Pryor is the Duke Energy Asset Protection representative for the area that includes the Walkers' property. He has had communications with the Walkers regarding the encroachments. Duke Energy is not aware of any written or recorded statements taken from Mr. Pryor.

4. **R. Daniel Proctor (Piedmont Surveying)**

Mr. Proctor is a surveyor with Piedmont Surveying. At Duke Energy's request, he surveyed the Walkers' property and executed an affidavit in connection with his findings.

2. Set forth a list of photographs, plats, sketches, or other prepared documents, in possession of the party that relate to the claim or defense in the case.

ANSWER: Responsive, non-privileged documents in Duke Energy's possession, custody, or control are being produced herewith.

3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

ANSWER: None.

4. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by Plaintiff.

ANSWER: Duke Energy's causes of action seek to have any and all encroachments removed from its easements over the property that is the subject of this action. Accordingly, Duke Energy is not seeking money damages. However, Duke Energy reserves the right to seek attorney's fees and costs or its expenses in removing the encroachments should the Walkers fail to do so.

5. List the names and addresses of any expert witness whom the party proposes to use as a witness at the trial of the case and set forth a summary of the specific opinions held by each expert and the basis for their opinions.

ANSWER: None have been identified at this time. Duke Energy will supplement this response in the event it later identifies an expert witness or witnesses.

6. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witnesses, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: See response to Interrogatory No. 1.

7. Identify the name(s) and address(es) and the official capacity of all persons furnishing information used to answer these interrogatories and state the source of each person's knowledge, listing the particular interrogatory for which the individual provided information.

ANSWER: Steven Pryor.

8. Identify the name(s) and address(es) of any and all Plaintiff's employees, agents, or third-party contractors used by Plaintiff to photograph and/or inspect the Right of Way and Easement during the Alleged Encroachment Period.

ANSWER: Steven Pryor identified the encroachments on January 27, 2014. R. Daniel Proctor surveyed and photographed the property on March 12, 2015.

9. Identify with specificity all facts, witnesses, and documentation that support your assertion in Paragraph 9 of the Complaint that "[t]he Line has been continuously, openly, and notoriously used and maintained on the Property ... for at least sixty (60) years, without interruption[.]"

ANSWER: **Duke Energy or its predecessor have owned a right of way over and across the Walkers' property since 1939 as evidenced by the Right of Way Agreement attached as Exhibit A to the Summons and Complaint. Duke Energy has maintained the right of way and has installed and operated a transmission line in the right of way since that time.**

10. Identify with specificity all facts, witnesses, and documentation that support your assertion in Paragraph 11 of the Complaint that "Duke Energy is informed and believes that, in 2013, the Walkers constructed, placed, and maintained a retaining wall, patio, and iron fence within Duke Energy's Right of Way."

ANSWER: **Defendants responses to Plaintiff's Request to Admit, coupled with the building permit application filed with Greenville County on the Walkers' behalf, show the encroachments were constructed in 2013. Moreover, the survey conducted by R. Daniel Proctor clearly shows the retaining wall, patio, and iron fence within Duke Energy's right of way.**

11. Identify with specificity all facts, witnesses, and documentation that support your assertion in Paragraph 12 of the Complaint that the alleged Encroachment "materially and unreasonably interfere[s] with Duke Energy's use and enjoyment of its Easement."

ANSWER: **The Right of Way Agreement provides, in part, as follows:**

> **The grantee [Duke Energy], its successors and assigns, is also granted the right to keep said right of way clear of all trees, structures and other objects except those placed thereon by the grantee, together with the further right to cut away and keep clear any trees outside of said 68-foot strip that might in any way endanger the proper maintenance and operation of the structures and other property placed upon said right of way by the grantee.**

In Duke Energy's assessment, the encroachments are in violation of this language and therefore are a material and unreasonable interference with Duke Energy's use and enjoyment of its easement.

12. Identify with specificity all facts, witnesses, and documentation that support your assertion in Paragraph 13 of the Complaint that "[o]n or about February 3, 2014, Duke Energy notified the Walkers that the existence of the Encroachments on the Right of Way constituted a violation of Duke Energy's rights[.]"

ANSWER: **On January 27, 2014, Mr. Walker spoke with Steven Pryor, a representative of Duke Energy, regarding the encroachments. That conversation was followed by a letter from Pryor to the Walkers dated February 3, 2014. On both occasions, Defendants were informed the encroachments must be removed. All responsive, non-privileged documents in Duke Energy's possession or control are being produced herewith.**

13. Identify with specificity all facts, witnesses, and documentation that support your assertion in Paragraph 13 of the Complaint that "Duke Energy demanded that the Walkers remove the Encroachments."

ANSWER: **See response to Interrogatory No. 12.**

14. Identify any documentation between you and the Walkers from January 1, 2013 until the present date regarding the Encroachment, Right of Way, the Plaintiff's property, fence, patio, or anything else relevant to the subject matter of this lawsuit.

ANSWER: **See response to Interrogatory No. 12.**

15. From January 1, 2013 until the present date, identify all lawsuits that Plaintiff has filed in Greenville County regarding easements or rights of way owned by Plaintiff wherein Plaintiff has claimed that the Defendants have encroached upon Plaintiff's easement or right of way.

ANSWER: **Duke Energy objects to this request as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The rights of**

way speak for themselves as to Duke Energy's interest in the subject property. The information requested from this interrogatory is not relevant to the encroachment of the Right of Way on Defendants' property.

16. From January 1, 2013 until the present date, identify all demands that Plaintiff has made in South Carolina where Plaintiff has demanded that an allegedly-breaching party has violated the terms of an easement or right of way.

ANSWER: Duke Energy objects to this request as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The right of way speaks for itself as to Duke Energy's interest in the subject property. The information requested from this interrogatory is not relevant to the encroachment of the Right of Way on Defendants' Property.

17. Identify all encroachments within 1 mile of Plaintiff's residence to the Duke Energy Power Line referenced in Paragraph 8 of Plaintiff's Complaint. For each encroachment, please identify the type of encroachment, specifics surrounding the encroachment, location of the encroachment, whether Duke Energy Power requested that the encroachment be removed by the owner and when the request was made, and whether the encroachment was removed and the date it was removed.

ANSWER: Duke Energy objects to this request as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The right of way speaks for itself as to Duke Energy's interest in the subject property. Duke Energy does not maintain the information sought by this interrogatory and it is not relevant to the encroachment of the Right of Way on Defendants' property.

[SIGNATURE BLOCK FOLLOWS]

HAYNSWORTH SINKLER BOYD, P.A.

Joshua D. Spencer (S.C. Bar No. 74782)
Sarah P. Spruill (S.C. Bar No. 68337)
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Greenville, SC 29602
Phone: (864) 240-3200
Fax: (864) 240-3300

Attorneys for Plaintiff Duke Energy Carolinas, LLC

August 25, 2015
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

DUKE ENERGY CAROLINAS, LLC,

Plaintiff,

vs.

CALEB E. WALKER AND CHRISTINA T. WALKER,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2014-CP-23-05816

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the herein below listed documents was served upon all counsel of record by depositing a true and correct copy thereof in the United States Mail, proper postage affixed thereto, on the 25th day of August, 2015.

DOCUMENTS: Plaintiff's Answers to Defendants' First Interrogatories; Plaintiff's Responses to Defendants' First Requests for Production of Documents; Documents Bates stamped DUKE_00001 through DUKE_00051; and Plaintiff's Privilege Log

PARTIES SERVED: R. Mills Ariail, Jr., Esq.
Law Office of R. Mills Ariail, Jr.
11 North Irvine Street, Suite 11
Greenville, S.C. 29601

Crystal D. Orr

Crystal D. Orr, Paralegal

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS
Duke Energy Carolinas, LLC, Plaintiff, vs. Caleb E. Walker and Christina T. Walker, Defendants.	)	Case Number: 2014-CP-23-05816 **PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANTS' FIRST INTERROGATORIES**

TO: CALEB E. WALKER AND CHRISTINA T. WALKER AND THEIR ATTORNEY, R. MILLS ARIAIL, JR., ESQ.:

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Plaintiff Duke Energy Carolinas, LLC ("Duke Energy"), answers Defendants' Interrogatories as follows:

GENERAL OBJECTIONS

1. Duke Energy objects to Defendants' Interrogatories to the extent they seek to impose a burden on Duke Energy to provide supplemental responses in excess of that imposed by South Carolina Rule of Civil Procedure 26.

2. Duke Energy objects to Defendants' Interrogatories to the extent they seek documents containing legal or factual opinions or conclusions.

3. Duke Energy objects to Defendants' Interrogatories to the extent they seek or may be deemed to seek or require the production or disclosure of information or documents subject to the attorney/client, joint defense or other privileges, the work product doctrine or the protection afforded mental impressions, conclusions, opinions or legal theories of Duke Energy's attorneys or its representatives as defined in South Carolina Rules of Civil Procedure 26(b).

DEFENDANT'S EXHIBIT 6

4. Duke Energy objects to Defendants' Interrogatories to the extent they seek or may be deemed to seek or require the production or disclosure of information or documents created or generated after and/or as a result of this lawsuit being filed.

5. Duke Energy objects to Defendants' Interrogatories to the extent they seek to impose upon Duke Energy a duty to ascertain or secure information which it does not have in its possession, custody or control.

6. Duke Energy objects to Defendants' Interrogatories to the extent they seek information relating to or in the possession of entities other than Duke Energy.

INTERROGATORIES

1. Give the names and addresses of persons known to parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

1. Caleb E. Walker (Owner of the property)

Defendant is believed to have knowledge of the facts of this case, including the construction of the encroachments in Duke Energy's Right of Way. Duke Energy is not aware of any written or recorded statements taken from Mr. Walker.

2. Christina T. Walker (Owner of the property)

Defendant is believed to have knowledge of the facts of this case, including the construction of the encroachments in Duke Energy's Right of Way. Duke Energy is not aware of any written or recorded statements taken from Mrs. Walker.

3. Steven Pryor (Duke Energy employee)

Mr. Pryor is the Duke Energy Asset Protection representative for the area that includes the Walkers' property. He has had communications with the Walkers regarding the encroachments. Duke Energy is not aware of any written or recorded statements taken from Mr. Pryor.

4. R. Daniel Proctor (Piedmont Surveying)

Mr. Proctor is a surveyor with Piedmont Surveying. At Duke Energy's request, he surveyed the Walkers' property and executed an affidavit in connection with his findings.

SUPPLEMENTAL ANSWER:

In addition to the above:

5. Doug Gould (Duke Energy employee)

Mr. Gould is the Duke Energy Asset Protection manager for the area that includes the Walkers' property. It is anticipated that he will provide testimony regarding Duke Energy's rights-of-way and safety-related issues therein. Duke Energy is not aware of any written or recorded statements taken from Mr. Gould. He may be contacted exclusively through the undersigned.

HAYNSWORTH SINKLER BOYD, P.A.

Joshua D. Spencer (S.C. Bar No. 74782)
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Attorneys for Plaintiff, Duke Energy Carolinas, LLC

December 9, 2015
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

DUKE ENERGY CAROLINAS, LLC,

Plaintiff,

vs.

CALEB E. WALKER AND CHRISTINA T. WALKER,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2014-CP-23-05816

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the herein below listed documents was served upon all counsel of record by depositing a true and correct copy thereof in the United States Mail, proper postage affixed thereto, on the 9th day of December, 2015.

DOCUMENTS: Plaintiff's Supplemental Answers to Defendants' First Interrogatories

PARTIES SERVED: R. Mills Ariail, Jr., Esq.
Law Office of R. Mills Ariail, Jr.
11 North Irvine Street, Suite 11
Greenville, S.C. 29601

Crystal D. Orr

Crystal D. Orr, Paralegal

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS
Duke Energy Carolinas, LLC, Plaintiff, vs. Caleb E. Walker and Christina T. Walker, Defendants.	)	Case Number: 2014-CP-23-05816 **PLAINTIFF'S SECOND SUPPLEMENTAL ANSWERS TO DEFENDANTS' FIRST INTERROGATORIES**

TO: CALEB E. WALKER AND CHRISTINA T. WALKER AND THEIR ATTORNEY, R. MILLS ARIAIL, JR., ESQ.:

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Plaintiff Duke Energy Carolinas, LLC ("Duke Energy"), answers Defendants' Interrogatories as follows:

GENERAL OBJECTIONS

1. Duke Energy objects to Defendants' Interrogatories to the extent they seek to impose a burden on Duke Energy to provide supplemental responses in excess of that imposed by South Carolina Rule of Civil Procedure 26.

2. Duke Energy objects to Defendants' Interrogatories to the extent they seek documents containing legal or factual opinions or conclusions.

3. Duke Energy objects to Defendants' Interrogatories to the extent they seek or may be deemed to seek or require the production or disclosure of information or documents subject to the attorney/client, joint defense or other privileges, the work product doctrine or the protection afforded mental impressions, conclusions, opinions or legal theories of Duke Energy's attorneys or its representatives as defined in South Carolina Rules of Civil Procedure 26(b).

4. Duke Energy objects to Defendants' Interrogatories to the extent they seek or may be deemed to seek or require the production or disclosure of information or documents created or generated after and/or as a result of this lawsuit being filed.

5. Duke Energy objects to Defendants' Interrogatories to the extent they seek to impose upon Duke Energy a duty to ascertain or secure information which it does not have in its possession, custody or control.

6. Duke Energy objects to Defendants' Interrogatories to the extent they seek information relating to or in the possession of entities other than Duke Energy.

INTERROGATORIES

1. Give the names and addresses of persons known to parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

1. Caleb E. Walker (Owner of the property)

Defendant is believed to have knowledge of the facts of this case, including the construction of the encroachments in Duke Energy's Right of Way. Duke Energy is not aware of any written or recorded statements taken from Mr. Walker.

2. Christina T. Walker (Owner of the property)

Defendant is believed to have knowledge of the facts of this case, including the construction of the encroachments in Duke Energy's Right of Way. Duke Energy is not aware of any written or recorded statements taken from Mrs. Walker.

3. Steven Pryor (Duke Energy employee)

Mr. Pryor is the Duke Energy Asset Protection representative for the area that includes the Walkers' property. He has had communications with the Walkers regarding the encroachments. Duke Energy is not aware of any written or recorded statements taken from Mr. Pryor.

4. R. Daniel Proctor (Piedmont Surveying)

Mr. Proctor is a surveyor with Piedmont Surveying. At Duke Energy's request, he surveyed the Walkers' property and executed an affidavit in connection with his findings.

5. Doug Gould (Duke Energy employee)

Mr. Gould is the Duke Energy Asset Protection manager for the area that includes the Walkers' property. It is anticipated that he will provide testimony regarding Duke Energy's rights-of-way and safety-related issues therein. Duke Energy is not aware of any written or recorded statements taken from Mr. Gould. He may be contacted exclusively through the undersigned.

SUPPLEMENTAL ANSWER:

In addition to the above:

6. Frederick M. Brooks, P.E. (Brooks, Jackson & Little, Inc.)

Mr. Brooks is the President and an engineer with Brooks, Jackson & Little, Inc. It is anticipated that he will provide expert testimony on electrical engineering-related matters. The subjects of Mr. Brooks' anticipated testimony are summarized in a supplemental response to Interrogatory No. 5.

5. List the names and addresses of any expert witness whom the party proposes to use as a witness at the trial of the case and set forth a summary of the specific opinions held by each expert and the basis for their opinions.

ANSWER: None have been identified at this time. Duke Energy will supplement this response in the event it later identifies an expert witness or witnesses.

SUPPLEMENTAL ANSWER:

Duke Energy objects to this Interrogatory to the extent it seeks information beyond that required by Rule 26, SCRCP. Subject thereto, Duke Energy identifies:

Frederick M. Brooks, P.E.
Brooks, Jackson & Little, Inc.
2380 O'Neal Lane, Suite F
Baton Rouge, LA 70816
(225) 755-3212

Mr. Brooks' CV is being served herewith. The following is a summary of the opinions he is expected to give at the trial of this action:

1. The State of South Carolina has adopted Part 2 of the National Electrical Safety Code ("NESC") "as minimum standards of accepted good engineering practice" for electric utilities, including Duke Energy. S.C. Code Ann. Regs. 103-361. The South Carolina Public Service Commission has also recognized that Part 2 of the NESC is an acceptable reference. S.C. Code Ann. Regs. 103-362.

2. "The purpose of Part 2 of [the NESC] is the practical safeguarding of persons during the installation, operation, or maintenance of overhead supply and communication lines and their associated equipment." Rule 200, 2012 NESC.

3. Rule 213 of the 2012 NESC requires that an electric utility have ready access to its facilities. Rule 214(A)(5)(a) requires that a utility periodically inspect its lines and make appropriate corrections. Anything that would interfere with either of these abilities, including encroachments that restrict the utility's full use of the right-of-way, necessarily interferes with the ability of the utility to properly access and promptly correct, disconnect, or isolate its equipment.

4. The South Carolina Public Service Commission requires that an electric utility "shall make all reasonable efforts to avoid interruptions of service, but when interruptions occur, service shall be re-established within the shortest time practicable, consistent with safety of its employees, customers, and of the general public." S.C. Code Ann. Regs 103-381. The Commission also requires that "[e]ach electrical utility shall exercise reasonable care to reduce the hazards to which its employees, its customers and the general public may be subjected." S.C. Code Ann. Regs 103-391.

5. Generally, there are three classes of electric power lines used to distribute electricity—distribution lines, sub-transmission lines, and transmission lines. These lines are distinctive in that they operate at different voltages and have different

reliability requirements. In this hierarchy, transmission lines operate at the highest voltages and have the highest reliability requirements. Distribution lines serve customers in a finite geographic area; sub-transmission lines extend over greater areas than distribution lines and serve not only residential and commercial customers but industrial customers as well. Transmission lines are cross-country, high-power lines which connect substations that supply both sub-transmission and distribution lines and may supply very large industrial customers. The higher the voltage of the power line, the greater the demand for reliability and in-service availability. In other words, whereas distribution and sub-transmission lines may serve a block of customers, transmission lines supply entire counties, states, and inter-connect to form grids to provide reliable and adequate power for entire regions of the United States. Such lines are governed by more extensive regulation, particularly at the federal level (e.g. FERC) and are important not only to the utility operating the lines, but also to the safety and security of the interconnected utilities within regional portions of the United States. The line at issue here is a 100,000 volt (100kV) line that falls into the transmission category and thus requires the greatest level of reliability and in-service availability.

6. Reliability requirements are of the highest order, and the operating utility must maintain and operate its system so that outage time is kept to a minimum. This requires complete and unimpeded access to the facilities at all times.

7. "The importance of [electric utility rights-of-way], and the ability to manage them, has become critical to the economic and security interests of electric utilities and the publics they serve in North America. The ability of electric utilities to control and manage transmission line [rights-of-way], identify risks to system reliability, and mitigate identified risks is key to providing a reliable transmission grid." Electric Power Research Institute, *Electric Transmission Rights-of-Way Uses and Risks*.

8. Power line outages create a risk of harm or death for a variety of reasons. Examples would be traffic signals that fail to function, life support systems that depend upon electricity, hospitals, nursing homes, etc. Loss of transmission systems during storm events can result in major outages throughout large geographic areas, creating significant economic loss and property damage. All prudent electric utilities minimize their exposure to major transmission outages and maximize their ability to respond to equipment damage or lines down in easements. This is precisely why utilities obtain property easements of right-of-way and establish transmission corridors so that reliability can be maximized.

9. Utilities throughout the United States and South Carolina, including Duke Energy, establish acceptable right-of-way widths for their transmission lines based upon the knowledge of the utility and of the industry as to the amount of space needed to properly maintain and operate the line in keeping with the above-referenced reliability requirements and accepted good utility practice. A key element related to the establishment of a proper right-of-way width is accessibility. Accessibility is needed not only for normal operations, which include maintenance and inspection, but for abnormal repair and maintenance that would occur in the event of manmade or natural events causing damage to the line so as to necessitate

immediate response and repair (e.g. floods, storms, etc.). In this case, Duke Energy determined that the subject line required a 68 foot right-of-way. This right-of-way width is consistent with the utility's requirements for access for both normal and abnormal maintenance and repair and is consistent with right-of-way widths for similar facilities through the United States. Any encroachment that significantly interferes or conflicts with the ability of the utility to have full access to the entire width of its right-of-way must be removed.

10. In this case, the Walkers have placed within the Duke Energy right-of-way a patio, fence, and retaining wall that encroach significantly into Duke Energy's right-of-way, taking up about 20 to 25% of its width. Based upon the transmission line installation present in this case, these encroachments are close to being under certain transmission conductors as they pass through the right-of-way. The patio, fence, and retaining wall each significantly interfere and conflict with the ability of Duke Energy to have full access to the entire width of its right-of-way and, as a matter of electrical utility operation and maintenance safety, must be removed.

11. The retaining wall placed in the right-of-way by the Walkers poses a significant safety risk to personnel of Duke Energy and its contractors who may be called to perform maintenance or repair work in the right-of-way, particularly in an emergency situation. The retaining wall also significantly interferes and conflicts with Duke Energy's use of the right-of-way. Namely, it significantly alters the landscape of the area and poses a significant hazard to any vehicles that personnel of Duke Energy or its contractors may operate in the right-of-way. The area around the Walkers' driveway is a natural access point for any Duke Energy or contractor crews needing access to the right-of-way. However, in that area, the terrain drops significantly, including in the area of the retaining wall, posing a significant risk that a vehicle could encounter it and potentially result in damage to personnel and property.

12. The fence placed in the right-of-way by the Walkers poses a significant safety risk to personnel of Duke Energy and its contractors, the Walkers', the Walkers' home, and any other members of the public who might enter the right-of-way. The fence also significantly interferes and conflicts with Duke Energy's use of the right-of-way. Namely, the fence encroaches significantly into the right-of-way and is in close proximity to the transmission conductors hanging above it. In the event that one or more of the conductors fell in a storm, or other similar event, a ground fault may occur that could migrate to the fence electrifying it. The line could also fall directly onto the fence, electrifying it. Because the fence terminates at the Walkers' home, this presents a significant electric hazard, personnel hazard, and fire hazard.

The bases for Mr. Brooks' opinions include his knowledge and experience in the electric utility industry (including specific knowledge of applicable codes and standards, including the National Electrical Safety Code), the requirements of the South Carolina Public Service Commission, and his review of documents and other information related to case.

Duke Energy reserves the right to supplement this response as more information, testimony, and/or documents become available.

Duke Energy further reserves the right to seek expert or opinion testimony from any other witnesses it has identified in this case within the scope of their expertise.

HAYNSWORTH SINKLER BOYD, P.A.

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Attorneys for Plaintiff, Duke Energy Carolinas, LLC

January 21, 2016
Greenville, South Carolina

RESUME

FREDERICK M. BROOKS, P.E.

Date of Birth: November 17, 1943

Education:

Louisiana State University
B.S., Electrical Engineering - 1967
Post Graduate Study Toward MBA - 1968

Certifications:

Licensed Professional Engineer, Electrical, Louisiana and Mississippi
Certified Fire and Explosion Investigator
Prior OSHA authorized Instructor of Construction Safety
Board Certified Forensic Examiner

Experience:

Over forty-five years experience in project engineering, construction project management, corporate management, design engineering and forensic engineering. Project engineering and design engineering background includes projects for electric utility companies, industrial plants, petrochemical facilities, institutional concerns, commercial buildings, and governmental agencies.

Formerly chief operating officer for engineering/ architectural design firm ranked in the Engineering News Record top 500 design firms in the U. S. Participated in all aspects of project work from conception through construction for multi-disciplined projects both domestically and abroad. Thoroughly familiar with construction contracts and owner/ contractor/subcontractor/design professional interrelationships. Major clientele has included electric utility companies, chemical, and petrochemical operations.

Broad forensic engineering experience in accident investigation, equipment failure analysis, electric utility reliability analysis, product liability, fire cause and origin, illumination engineering, and architect/ engineer construction document interpretation. Appeared as an expert witness in multiple jurisdictions in over 30 states. Particularly experienced in electrical engineering topics, electric utility operations and maintenance, interpretation of the National Electrical Safety Code, the National Electrical Code, and OSHA Safety Regulations. Certified Fire and Explosion Investigator. Prior OSHA authorized Instructor of Construction Safety. NESC Subcommittee Member.

Employment History:

1992 - Present — **Brooks Jackson & Little, Inc.**
Baton Rouge, Louisiana

Chairman of the Board. Actively engaged in forensic engineering. Participates in investigative work in the areas of product failure, equipment failure, electrical accidents, electric utility operations, electrical code compliance, and fire and explosion origin and cause. Provides expert witness testimony on related topics. Conducts seminars and provides training in the areas of electrical codes and standards, electrical and construction safety, and accident investigation and reconstruction.

1983 - 1992 — **Brooks-Harbour & Associates, Inc.**
Baton Rouge, Louisiana

Principal. Responsible for administration and overall project management. Actively involved in project work for electric utility companies and petrochemical plants. Participated as a project manager for selected industrial projects. Active in the field of forensic engineering and expert witness testimony providing services to major electric utility companies and a wide range of clientele in several states.

Brooks-Harbour and its subsidiary company, Barbay Engineering Services, Inc., employed approximately 250 persons. Barbay Engineering Services is engaged in maintenance and construction services for the petrochemical industries.

In November of 1987, Brooks-Harbour acquired the business of Barbay Engineers and merged the two companies.

1968 - 1983 — **Barbay Engineers, Inc.**
Baton Rouge, Louisiana

Executive Vice President. Chief operating officer for a multi-disciplined architectural/engineering firm responsible for administration policy setting and implementation, resource management, operating procedures, salary administration, loss prevention, and overseeing the project management, financial and sales functions of the corporation.

Barbay Engineers was an Engineering News-Record top 500 design firm having a peak employment of approximately 225 persons during this time period. The company provided engineering services to most major petrochemical facilities on the Mississippi River corridor.

Barbay Engineers, Inc. (Cont'd.)

Considerable work in forensic engineering and expert witness testimony particularly in the application of the various codes and standards utilized in the electric utility, industrial, petrochemical, and construction industries.

Previous positions as Vice President with similar duties and as Project Manager with responsibilities for planning and engineering projects in the electric utility industry and for engineering projects in the industrial, institutional, and commercial fields. Experienced in overseas work predominantly in the sugar industry.

1967 - 1968

Ingram-Barbay, Inc.
Baton Rouge, Louisiana

Project engineer and design engineer on various projects for electric utility companies, architectural electrical design and electrical and control systems for industrial facilities.

1966 - 1967

Crown Zellerbach, Inc.
St. Francisville, Louisiana

Electrical Engineer in paper mill operation working predominantly on small capital projects.

Professional Memberships:

National Society of Professional Engineers
Louisiana Engineering Society
Consulting Engineers Council
Institute of Electrical and Electronics Engineers
Professional Engineers in Private Practice
Illuminating Engineering Society
National Fire Protection Association
National Electrical Safety Code Subcommittee
Instrument Society of America
The American Board of Forensic Examiners
American Society of Safety Engineers
National Association of Fire Investigators

Current Address

2380 O'Neal Lane
Suite F
Baton Rouge, Louisiana 70816
(225) 755-3212

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2014-CP-23-05816

DUKE ENERGY CAROLINAS, LLC,

Plaintiff,

vs.

CALEB E. WALKER AND CHRISTINA T. WALKER,

Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the herein below listed documents was served upon all counsel of record by Email and by depositing a true and correct copy thereof in the United States Mail, proper postage affixed thereto, on the 21st day of January, 2016.

DOCUMENTS: Plaintiff's Second Supplemental Answers to Defendants' First Interrogatories

PARTIES SERVED: R. Mills Ariail, Jr., Esq.
Law Office of R. Mills Ariail, Jr.
11 North Irvine Street, Suite 11
Greenville, S.C. 29601

Crystal D. Orr

Crystal D. Orr, Paralegal

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAR 15 2017
SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

C.A. No.: 2014-CP-23-5816

Duke Energy Carolinas, LLC ..... Appellant,

v.

Caleb E. Walker and Christina T. Walker ..... Respondents.

CERTIFICATE OF APPELLANT

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that all material complies with the April 15, 2014 Order of the South Carolina Supreme Court Relating to personal data identifiers.

[SIGNATURE ON NEXT PAGE.]

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



H. Sam Mabry III (SC Bar No. 3490)
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Attorneys for Appellant
Duke Energy Carolinas, LLC

March 14, 2017
Greenville, South Carolina