

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The City of Kansas City, Missouri,)	
)	
The Planned Industrial Expansion Authority)	
of Kansas City, Missouri,)	
)	
Boulevard Brewing Associates Limited)	
Partnership, a Missouri limited partnership, d/b/a)	
Boulevard Brewing Company,)	
)	
Complainants,)	
)	
v.)	<u>Case No. EC-2006-0332</u>
)	
Kansas City Power & Light Company,)	
)	
Respondent.)	

Concurring Opinion of Commissioner Steve Gaw

I concur in the conclusions of the majority in this case. I write this concurrence, however, to clarify my analysis of the facts and law.

Electric lines may be located along the right of ways of municipal streets if the city (or county as the case may be) has granted the authority under a franchise agreement with the utility. Common law is well established in Missouri that generally when a street or roadway is changed in such a way that the removal of an existing transmission or distribution line is necessary, the cost of that removal is borne by the utility. This is because the utility's privilege to use the city's right of way is entirely derived from the initial granting of the franchise and is conditioned on the primary right of the city to control and operate its streets for the public to which the utility's rights are subservient.

This right of the city is superior, however, only so long as the primary purpose in the alteration to the streets requiring the removal of the lines is public in nature. If not, the general rule no longer applies and the utility must be compensated for the removal of the line. *Home Builders Ass'n of Greater St. Louis v. St. Louis County Water Co.*, 784 S.W.2d 287 (Mo.App. E.D. 1989); *City of Bridgeton v. Missouri-American Water Co.*, Case No. ED 86292 (Mo.App. E.D. March 28, 2006).

In this case there is no dispute that the lines on 26th Street and on Bellevue Avenue are in the City's right-of-way. The question then that first must be answered is whether the primary purpose requiring the removal of any lines is public or proprietary. An argument could be made that the analysis for this question on 26th Street is different than on Bellevue Avenue. The question of the public versus private purpose could be made for each, separately determining the particular purpose of the alteration. Ignoring the nature of the development project itself, under such an analysis the arguments in favor of a public purpose appear stronger on 26th Street than on Bellevue Avenue. The evidence is convincing that the need for the widening of the roadway on 26th Street benefits Boulevard Brewing but also has substantial benefit to the health and safety of travelers on 26th Street due to increased traffic – not just from the development at the Boulevard Brewing site - but from other public improvement projects also in the general vicinity¹. However, the closure of Bellevue Avenue appears when examined in isolation, to have significant private benefit to Boulevard Brewing – allowing its use by the company as a private road and parking facility. This Commissioner believes that Missouri precedent does not provide for such a separate study of the purpose of Bellevue Avenue and 26th Street.

¹ Vol. 1, Tr. 85, line 23 – Tr. 89, line 13.

In *Union Electric Co. v. Land Clearance For Redevelopment Authority of City of St. Louis*, 555 S.W.2d 29 (Mo. banc 1977), the Court, in facts very similar to those in the case at hand, found that the lynchpin of the determination of the primary purpose was that the City had utilized the statutory powers granted it under Missouri law to engage in an urban redevelopment project having declared the area blighted. The Court did not take a piecemeal approach to portions of the project but instead looked at the project's overall purpose. The Court said:

This relocation of facilities required of Union Electric was necessitated by an urban renewal project: the DeSoto Carr Urban Renewal Project said by Union Electric's petition to include the Convention Plaza and a privately owned and operated hotel as a part of St. Louis' new downtown Convention Center to be developed under authority of the Land Clearance for Redevelopment Authority Law. The primary purpose of the project, the redevelopment or renewal of what is implicitly a blighted area of the city, has been declared legislatively to be a public purpose. The vacation of this block of the city thoroughfare and the requirement that Union Electric remove its facilities therefrom to make the thoroughfare available for use as part of this project were acts of the City and the Authority in the exercise of a governmental rather than a proprietary function. [555 S.W.2d at 33.]

In this case, Kansas City has used a similar action declaring the project area blighted pursuant to Missouri law. Both the widening of 26th Street and the vacating of Bellevue Avenue are the result of the redevelopment of an area Kansas City declared to be blighted. Under the reasoning in the Union Electric case no separate analysis of Bellevue Avenue and 26th Street appears appropriate. The Union Electric case establishes that the statutorily authorized redevelopment project is primarily for a public purpose, and, therefore, the street changes are primarily public in nature as well.

While the analysis of 26th Street concludes with this finding (other than the majority's determination as to the portion of the street east of the alley with which I agree), further discussion is warranted on Bellevue Avenue.

The record does not convince this Commissioner that the City has ordered the removal of the electric lines along this vacated street. Kansas City, in fact, specifically reserved the utility easements in its vacation order. If the order to remove the lines would have been issued, KCPL would be required to move the lines and to pay for their removal. However, KCPL's responsibility to Kansas City stops there. The utility is under no obligation under common law to comply with any requirement to bury the lines as has been suggested by the Complainants. As explained in the *Union Electric Co. v. City of Crestwood*, 499 S. W.2d 480 (Mo. 1973), it is the utility's responsibility under the supervision of the Public Service Commission, not the City's, to determine the method of delivering electricity safely and reliably unless the City reserved such powers unto itself in the original franchise. The Court stated:

Section 71.520 relates to the granting of utility franchises by municipalities. It provides that privileges granted in such ordinances shall be subject to the rules, regulations and conditions expressed in the ordinance. In other words, a city may say to a utility that if you want a franchise in this city, we will grant it on certain specified conditions, and the parties then agree thereon. Thus, in *Missouri Valley Realty Co. v. Cupples Station Light, Heat and Power Co.*, 199 S.W. 151 (Mo. 1917); *Frolichstein v. Cupples Station Light, Heat and Power Co.*, 201 Mo.App. 162, 210 S.W. 90 (1919) and *State ex rel. McAllister v. Cupples Station Light, Heat & Power Co.*, 283 Mo. 115, 223 S.W. 75 (Mo. banc 1920), all cited and relied on by Crestwood, the ordinance involved was a franchise ordinance passed by the City of St. Louis and accepted by the utility company. It provided for underground cables in certain locations and this court upheld the validity of that ordinance. In the case now under consideration, however, we do not deal with that kind of situation. Instead, UE holds a previously granted franchise and Crestwood now seeks to eliminate rights granted therein and to require all subsequent construction, even of high voltage lines carrying power through the city on private right-of-way for use by other communities, be placed underground. Section 71.520 is not applicable and does not authorize Ordinance No. 1119. [Id. at 484.]

In the case at hand no such reservation was made by Kansas City in the original franchise to KCPL. Thus, there is no requirement that can now be made on KCPL barring acquiescence by the utility. The utility has in its tariff, however, consented to the orders of Kansas City regarding burial of electric lines. This consent is conditioned upon Kansas City paying for the burial of the lines.

Based on the foregoing, KCPL is responsible for the removal of lines along 26th Street. It is not responsible for the removal of lines on Belleview Avenue since no removal has been ordered. If Kansas City wishes to have the lines along Belleview Avenue removed and placed underground, then KCPL must comply but only if the costs are paid by Kansas City pursuant to the KCPL tariffs. For the foregoing reasons, I concur.

Respectfully Submitted



Steve Gaw, Commissioner

Dated at Jefferson City, Missouri,
on this 7th day of April, 2006.