IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

NEIGHBORS UNITED AGAINST AMEREN'S POWER LINE Appellant, v. PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Respondent.	Case No. WD79883

BRIEF OF RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI IN RESPONSE TO BRIEF OF APPELLANT NEIGHBORS UNITED AGAINST AMEREN'S POWER LINE

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the use by the general public. The CCN granted by the Commission involves an analysis of whether or not the construction is in the public interest, which is an inquiry that involves consideration of many factors beyond the use of the public roads. Both kinds of authority are required. The Commission's decision in this case is consistent with *Burton* because the Commission made obtaining the county assents under Section 229.100 a condition precedent to exercising the authority granted to ATXI under Section 393.170. See, *Burton*, 379 S.W.2d at 599.

2. ATXI's position on the necessity of Section 229.100 assents for the project.

ATXI argued to the Commission that another reading of the cases and statutes is possible. (LF 1404). There are two kinds of certificates of convenience and necessity available under Section 393.170. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 770 S.W.2d 283, 285 (Mo. Ct. App. W.D. 1989). Subsection 1 of the statute provides for a "line certificate" and is needed for construction of new facilities. *Id.* Subsection 2 provides for an "area certificate" and is required before a utility can provide service to customers within a service area. *Id.*[7] The two kinds of certificates do not serve the same purpose and are not interchangeable. *Id.*

A "franchise" generally refers to the right granted to utility by a municipality to use public roadways in a manner that is different from the ordinary use by the public.

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[7] The language of Section 393.170.2 refers to obtaining consent from the appropriate "municipal authority." The Commission has interpreted this to include the acquisition of assent from the county commission where required by Section 229.100.

Union Elec. Co., 770 S.W.2d at 285. The municipal authority to use the public roadways in a manner not available to the general public and the authority granted by a "line certificate" under Section 393.170 are likewise not the same and are not interchangeable. *Id.* This Court has held that it is not necessary for a utility to obtain a line certificate to build a transmission line in a service area where it already had an area certificate. *State ex rel. Harline v. Pub. Serv. Comm'n*, 343 S.W.2d 177, 180-81 (Mo. Ct. K.C. App. 1960). A utility must, however, obtain a line certificate if it wants to build transmission lines beyond its certificated service area. *State ex rel. Cass County v. Pub. Serv. Comm'n*, 259 S.W.3d 544, 552n.6 (Mo. Ct. App. W.D. 2008).

Only the area certificate language of subsection 2 of Section 393.170 explicitly requires prior approval by the proper municipal authority. The line certificate language of subsection 1 has no such requirement. ATXI argued that because it does not intend to provide retail service in Missouri, it needs only a line certificate. Because ATXI does not require an area certificate to serve customers, it argues that a line certificate can be issued without assent from the counties under Section 229.100. (LF 1405).

The Commission declined to adopt ATXI's argument on this issue and imposed a condition on the CCN requiring that county assent under Section 229.100 be obtained before ATXI exercises its construction authority under the certificate. (LF 1404). The Commission declined to extend the holdings of the cases cited by ATXI to cover the present situation, where a company without an area certificate wants to build transmission lines. (LF 1404). The Commission found that in ATXI's case, both a line certificate and assent from the affected counties is required. (LF 1404). The Commission

also stated that if a reviewing court found that county assents were unnecessary, the condition would become null and void. (LF 1404).

3. The Commission's findings regarding the public interest of the project

The Commission has statutory authority to grant an application for a certificate of convenience and necessity when it is in the public interest to do so. Section 393.170.3, RSMo (2000) (Cum. Supp. 2013). The Commission has the discretion to determine when the evidence indicates that the public interest would be served by awarding the certificate. *State ex rel. Ozark Elec. Co-op v. Pub. Serv. Comm'n*, 527 S.W.2d 390, 392 (Mo. Ct. App. W.D. 1975). It is not necessary to find that a project is "essential" or "absolutely indispensable" to meet the public convenience or necessity criteria in the statute. *State ex rel. Beaufort Transfer Co. v. Clark,* 504 S.W.2d 216, 219 (Mo. App. K.C. 1973). The standard is whether the proposed project would be "an improvement justifying its cost." *Id.*

The Commission found that the public interest standard was met here. It applied its five-part *Tartan* criteria to the project and found that the project met those criteria. (LF 1403). Specifically, the Commission found that ATXI was entitled to a CCN because ATXI has shown a need for the project. (LF 1403). ATXI has also shown its qualification to own and operate it, the financial ability to build it, the economic feasibility of building it, and the public interest in building it. (LF 1403). The Commission found that there is a benefit to the ratepayers from the project. (LF 1403). The Commission also found that the project was in the public interest based on a balancing of interests between individual property owners and the broader public. (LF 1403). The Commission found that the

project is in the public interest because it: promotes grid reliability, relieves congestion, promotes renewable energy, meets local load serving needs, and provides downward pressure on rates. (LF 1404). The record evidence supports the Commission's finding that the project is necessary or convenient for the public service within the meaning of the statute and that the project provides benefits that exceed its costs.

The report and order is lawful because the Commission has the statutory authority to issue a certificate of convenience and necessity when it determines that the CCN is in the public interest. The public interest of the project was demonstrated in this case. The Commission also has the statutory authority to impose "reasonable and necessary" conditions on the CCN under Section 393.170.3. The report and order is reasonable because making the grant of the CCN conditional upon the acquisition of assent from the affected counties is supported by the evidence in the record showing that ATXI had not obtained the county assents at the time of the hearing. The report and order is lawful and reasonable and should be affirmed on this point.

II. The report and order granting ATXI a conditional certificate of convenience and necessity to construct the Mark Twain Transmission Line must be affirmed because it is lawful and reasonable within the meaning of Section 386.510 in that the report and order does not violate the right to engage in farming and ranching practices as guaranteed by Article I, Section 35 of the Missouri Constitution. (Responds to Point II of Appellant's Points Relied On).

1. The Right to Farm Amendment and Missouri Eminent Domain Laws

In 2014, Missouri voters passed a "right to farm" amendment to the Missouri Constitution.[8] The amendment provides that "the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri."[9] MO. CONST., Art. I, Sec. 35.[10] In deciding a challenge to the ballot language used when the issue was put to voters, the Supreme Court of Missouri observed that the right preserved

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[8] Because the amendment is only recently adopted, there is very little case law interpreting its scope. A case involving the amendment is currently pending before the Supreme Court of Missouri (Case No. SC96008). In that case, it was asserted that the right to farm amendment protects the cultivation of marijuana. In the judgment on appeal, the circuit court found that the amendment did not encompass the growing of marijuana. If the judgment is affirmed, it will further support the conclusion that the amendment is not an absolute bar to regulation.

[9] Article VI includes a grant of eminent domain authority to certain cities. MO. CONST., Art. VI, Sec. 21.

[10] The Commission does not have the authority to determine constitutional questions. *Fayne v. Dept. of Soc. Serv.,* 802 S.W.2d 565, 567 (Mo. Ct. App. W.D. 1991). However, a challenge to the constitutionality of an action taken by the Commission must be raised at the earliest opportunity to preserve it on appeal. *State ex rel. Mo. Gas Pipeline, LLC v. Pub. Serv. Comm'n,* 395 S.W.3d 562, 568 (Mo. Ct. App. W.D. 2013).

in this amendment is not absolute because even constitutional rights are subject to regulation. *Shoemyer v. Sec. of State,* 464 S.W.3d 171, 175 (Mo.banc 2015). The phrase ". . .'shall not be infringed' does not imply that the right would be unlimited or completely free of regulation, as no constitutional right is so broad as to prohibit all regulation." *Id. Shoemyer* did not specify which regulations that land used for farming or ranching could be subject to after passage of the amendment, but it is reasonable to assume that the right of eminent domain is one such regulation.

The right of eminent domain rests with the state. *City of North Kansas City v. K.C. Beaton Holdings Co., LLC.*, 417 S.W.3d 825, 831 (Mo. Ct. App. W.D. 2014). "The power of eminent domain is inherent in sovereignty and exists in a sovereign state without necessity of mention, and is superior to property rights." *State ex rel. St. Louis Union Trust Co. v. Ferriss*, 304 S.W.2d 896, 898-99 (Mo. 1957) (internal citations omitted). Article I, Sections 26 and 28 contain the only constitutional limitations on the power of eminent domain.[11] *Id.* "Operating together, these constitutional provisions allow the State to exercise its inherent power of eminent domain so long as the purpose for

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[11] The power of eminent domain may be used to acquire "property, or rights in property, in excess of that actually to be occupied by the public improvement or used in connection therewith, as may be reasonably necessary to effectuate the purposes intended, and may be vested with fee simple title thereto, or the control and use thereof, and may sell such excess property with such restrictions as shall be appropriate to preserve the improvements." MO. CONST., Art. I, Sec. 27.

which land is to be taken is a public purpose and the State pays just compensation." *City of Kansas City v. Powell,* 451 S.W.3d 724, 734 (Mo. Ct. App. W.D. 2014).

A public utility can use the eminent domain process only when that right is delegated to it by the state. *Id.* An "electrical corporation" may bring a condemnation action in circuit court for the purpose of obtaining the power of eminent domain for the construction of transmission lines. Section 523.010.1, RSMo (2000) (Cum. Supp. 2013). A CCN from the Commission can be used to demonstrate that a public utility's request to make use of eminent domain is for a public purpose. *Mo. Cities Water Co. v. Hodge*, 878 S.W.2d 819, 825n.3 (Mo.banc 1994). The right to farm amendment cannot be read to remove the Commission's statutory authority to grant a certificate of convenience and necessity under Section 393.170, RSMo (2000).

The report and order standing alone does not delegate the power of eminent domain to ATXI. (LF 1403). The report and order only finds that the proposed transmission line is in the public interest as required under Section 393.170.3, RSMo (2000). (LF 1403). While it is true that ATXI may rely on the CCN to show that the public use requirement is met, it is also true that ATXI would have to obtain a circuit court order before any property could be condemned to allow for construction of the transmission line. (LF 423). The fact that the Commission's report and order could be used by ATXI as meeting part of its burden of proof in a condemnation action is not, of itself, enough to find that the report and order is in violation of the right to farm amendment. Furthermore, although the question is one of first impression, the right to farm amendment, like other constitutional amendments, should be read in such a way that

allows for reasonable regulation on the right conferred by the amendment. The power of eminent domain, which resides in the state, is one such reasonable regulation of land use that has not been superseded by the right to farm amendment.[12] This reading of the amendment also gives effect to Article I, Sec. 28 of the Missouri Constitution. The property owners' rights are subservient to the state's right as sovereign and the right of eminent domain supersedes property rights of individual landowners.

This reading of the right to farm amendment is also supported by the numerous findings made by the Commission showing that the farming and ranching activities of the affected landowners will not be substantially infringed. The Commission found that only one acre of actual farmland will be removed from production for the entire line in Missouri. (LF 1393). The monopole structure will permit most of the 523 acres within the easement area to be used for production. (LF 1393). The monopole structure also minimizes the structure's contact with the ground and allows for better maneuverability around the structure. (LF 1393). The Commission found that there should be no impact on farming operations outside the easement area and only minimal impacts inside the easement area around the footings, as farmers may continue to use the land under the transmission lines. (LF 1394). The Commission also found that it was unlikely that

[12] Various bills that would affect the use of eminent domain for the construction of electric transmission lines have been prefiled with the General Assembly in advance of the 2017 legislative session. The bills are HB 72 and HB 84 (Appendix pages 98 and 101).