BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Ameren Transmission Company of Illinois for Other Relief or, in the Alternative, a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Maintain and Otherwise Control and Manage a 345,000-volt Electric Transmission Line from Palmyra, Missouri, to the Iowa Border and Associated Substation Near Kirksville, Missouri.[1]	))))))))	File No. EA-2015-0146

ATXI'S RESPONSE IN OPPOSITION TO
NEIGHBORS UNITED'S MOTION FOR RECONSIDERATION

COMES NOW Ameren Transmission Company of Illinois ("ATXI" or the "Company"), by and through counsel, and for its response in opposition to Neighbors United Against Ameren's Power Line's (the "Neighbors") Motion for Reconsideration ("Motion"), states as follows:

The Motion raises nothing new. Like the original Motion to Dismiss, it points to facts outside the Company's Application (claimed impacts on farm land) that the Commission cannot consider in ruling on a Motion to Dismiss. Moreover, it reargues and continues to misapply the same cases[2] it cited in its original motion in support of its claim that all a litigant before an administrative body must do to render powerless the administrative body's ability to entertain the case at all is *claim* that the administrative body's processing of a case will violate the litigant's constitutional rights. The cases the Neighbors rely upon say no such thing, and the absurdity of the Neighbors' position is obvious, as explained at pages three to six of ATXI's Response in Opposition to Neighbors United's Motion to Dismiss.

[1] The project for which the CCN is sought in this case also includes a 161,000-volt line connecting to the associated substation to allow interconnection with the existing transmission system in the area.
[2] *Duncan* and *Fayne*, which we address further below.

1. The Commission Cannot Determine if a statute *is* constitutional, but the Commission must, in the first instance, apply the law (statutory and constitutional), as written, to the facts before it.

Duncan and *Fayne*[3] both involved judicial review of actions of state agencies against professionals practicing in the state. In both cases, the actions were based on statutory or rule-based authority claimed by the agencies. In both cases, the professional raised claims before the agencies that the actions the agencies were taking in the cases before them would violate a provision of the state or federal constitutions, an argument premised upon a claimed constitutional infirmity in the statutes or the rule at issue. *Duncan*, citing *City of Joplin v. Industrial Comm'n of Missouri*, 329 S.W.2d 687 (Mo. *banc* 1959), stands for the proposition that an administrative agency cannot determine *if* a statute is constitutional: "[a]dministrative agencies lack the jurisdiction to determine the constitutionality of statutory enactments." *Duncan*, 744 S.W.2d at 530-31. ATXI agrees. In the case of the "right to farm" amendment, this Commission cannot determine, for example, whether the amendment may conflict with another provision of the Missouri Constitution or is unconstitutional under the United States Constitution. Of course, the constitutionality of the "right-to-farm" amendment is not an issue here, and *Duncan* cannot be relied upon to deprive the Commission of jurisdiction over this CCN proceeding.

Fayne cites *Duncan*. The question in *Fayne* was whether the agency's action, pursued under the agency's rule, violated Fayne's due process rights. On review, the circuit court had

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[3] *Duncan v. Missouri Bd. of Architects, Professional Engineers & Land Surveyors*, 744 S.W.2d 530 (Mo. App., E.D. 1988); *Fayne v. Dept. of Soc. Svcs.*, 802 S.W.2d 565 (Mo. App., W.D. 1991).

failed to decide the constitutional question but simply affirmed the agency's action. The Court of Appeals properly remanded the case to the circuit court "with instructions to review the constitutional claims." *Fayne*, 802 S.W.2d at 567. *Fayne*, under even the most liberal of readings, does not stand for the proposition that an administrative agency cannot proceed to decide the matter before it simply because a constitutional issue is placed before it; indeed, in *Fayne* the agency *did* decide the case on the merits, and the Court of Appeals found no error in it having done so. All *Fayne* stands for is the proposition that at the end of the day, it must be the courts and not the administrative agencies that decide the constitutional question that a litigant may raise. This is true of *every* legal determination an administrative agency makes.[4]

2. Whether the elements necessary to condemn an easement are met is solely a matter for judicial determination.

The Application in this case does not ask the Commission to "grant" ATXI eminent domain authority. Indeed, the Commission cannot do so.[5] The authority to exercise eminent domain is inherent in the sovereign[6] – the state of Missouri – and the discretion to exercise it, or to delegate the power to exercise it to private or public entities, rests with the General Assembly.[7] Any such delegation is subject to the constitutional requirement that private property

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[4] The Commission's citation to *Missouri Southern R. Co. v. Pub. Serv. Comm'n*, 214 S.W. 379 (Mo. 1919) was an apt one. Just as occurred in *Fayne* and in *Duncan* and just as occurs in cases before the Commission itself, litigants sometimes claim that the action before the agency will violate a constitutional provision. The agency's ruling on such a claim is not final – it must be reviewed *de novo* – but that does not deprive the agency of all power to process the case.

[5] The Commission fully recognizes this. See, e.g., Tr., EA-2015-0146, Vol. 3, p. 5, l. 3-6 (Judge Pridgin) ("The Commission cannot decide any questions about eminent domain. Those questions can only be addressed in Circuit Court.").

[6] *Chicago, B & Q. R. Co. v. McCooey*, 200 S.W. 59, 61 (Mo. 1917); *Board of Regents v. Palmer*, 204 S.W.2d 291, 293 (Mo. 1947).

[7] *State ex rel. St. Louis Union Trust Co. v. Ferriss*, 304 S.W.2d 896, 898 (Mo. 1957)("The right to exercise the power is exclusively a legislative prerogative[.]"); *Southwestern Bell Tel. Co. v. Newingham*, 386 S.W.2d 663, 665 (Mo. App. 1965)("The discretion to exercise the sovereign power of eminent domain is in the Legislature and those to whom it delegates such function by statute."); *Annbar Assoc. v. Westside Redevelopment Corp.*, 397 S.W.2d 623, 647 (Mo. *banc* 1965) ("Courts cannot and should not" second guess the legislature's delegation). As it pertains to ATXI, that delegation is found in Section 523.010.1, RSMo. (Cum. Supp. 2013), delegating eminent domain

cannot be taken for a "public use" without the payment of just compensation.[8] Under Article I, Section 28 of the Missouri Constitution, whether a condemnation involves a public use "shall be judicially determined without regard to any legislative declaration that the use is public." Insofar as this Commission exercises legislative authority (notwithstanding that it performs quasi-judicial functions in its role of deciding contested cases before it),[9] this Commission is not a court and does not decide the public use question that a circuit court will later have to decide[10] if petitions to condemn property for the Mark Twain Project are filed. In this case, this Commission will decide whether ATXI should be allowed to construct the project, assuming ATXI otherwise obtains the land rights it needs to do so. In any condemnation case, the courts will decide if ATXI's exercise of its delegated condemnation rights is proper.

Consequently, the Commission was exactly right when it concluded that the Neighbors "fail . . . to distinguish between the legal significance of granting a CCN based upon a determination that the proposed project is in the public interest and the taking of property through eminent domain proceedings." *Order Regarding Motion to Dismiss*, at p. 4. If ATXI obtains easements on this project, it will do so either through a voluntary agreement, in which case the easement grantor's "right-to-farm" could not possibly be infringed, no matter what the "right-to-farm" amendment means, or it will do so after a court of competent jurisdiction determines that a proposed condemnation is authorized by law,[11] in which case the court (if the landowner raises the argument) will have to decide if the condemnation action violates the

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authority to "any electrical corporation organized for the manufacture or transmission of electric current for light, heat or power. . .."

[8] Mo. Const. Art. I, §26.

[9] *State ex rel. Laundry, Inc. v. Pub. Serv. Comm'n*, 34 S.W.2d 37, 43 (Mo. 1931) (The Commission is an "administrative agency or committee of the legislature . . ..").

[10] *City of Kansas City v. Powell*, 451 S.W.3d 724, 734 (Mo. App. W.D. 2014) (The court must determine whether the condemning authority has complied with conditions precedent to bringing the action, one of which is that the taking is for a public purpose.).

[11] *Id.* ("First, the court must determine whether the condemnation is authorized by law[.]").

"right-to-farm" amendment. If the court sides with the Neighbors on the right-to-farm argument, then there will be no "violation" of the amendment. If the court sides with ATXI, then there is no violation of the amendment. Either way, what this Commission rules on the Application before it has nothing to do with the question.[12]

3. Conclusion

The Commission got it right when it denied the Neighbors Motion to Dismiss. It should similarly deny the Neighbors' Motion for Reconsideration.

WHEREFORE, ATXI respectfully requests that the Commission deny the Neighbors' Motion.

Respectfully submitted,
/s/ James B. Lowery

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[12] The Commission has recognized this before in a CCN case. *See, e.g.*, *In the Matter of Missouri Edison Company*, 24 Mo. P.S.C. (N.S.) 199 (Feb. 17, 1981) (Where the Commission granted a CCN, and in doing so, noted that "[t]he [landowners] will have their day in court upon the Company's filing a condemnation proceeding.").

and

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the public version of the foregoing Motion to Compel Discovery has been e-mailed, this 23rd day of November, 2015, to counsel for all parties of record.

/s/ James B. Lowery

An Attorney for Ameren Transmission Company of Illinois