

IN THE CIRCUIT COURT OF COLE COUNTY  
STATE OF MISSOURI

AMEREN TRANSMISSION )  
COMPANY OF ILLINOIS, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
PUBLIC SERVICE COMMISSION )  
OF MISSOURI, )  
 )  
Defendant. )  
 )

Cause No. 12AC-CC00499  
Div. 2  
October 6, 2014

**MOTION TO DISMISS**

COME NOW Defendants, Gena Briggs and Billy Briggs, David Schaefer and Beth Schaefer, Margaret Hollenbeck, Clifford Hollenbeck and Aaron Hollenbeck, Richard and Jeanette Gregory and William and Kamra DeFries (“Property Owners”) and for their Motion to Dismiss Plaintiff’s First Amended Petition, state to the Court:

**INTRODUCTION**

1. Defendants are the fee simple owners of various properties located within the County of Adair, Missouri.
2. The current litigation is for a declaratory judgment initiated by the Plaintiff, a foreign corporation existing under the laws of the state of Illinois, against the Missouri Public Service Commission (“PSC”), a state governmental agency. The Defendants to this Motion were added as intervenors as to Count II of the Plaintiff’s First Amended Petition.

3. In Count II of its First Amended Petition, the Plaintiff seeks a declaration that the PSC does not have siting authority as to the construction and location of two high-voltage power line projects within the State of Missouri known as the “Mark Twain Project” and the “Illinois Rivers Project” (“Projects”) and that the Plaintiff has authority to construct the aforementioned projects through the use of eminent domain without first obtaining approval for the Projects or receiving the designation as a public utility from the Defendant.

4. The Property Owners move to dismiss that portion of the Plaintiff’s Petition that seeks a declaration relating to Plaintiff’s authority to use the power of eminent domain in the furtherance of its Projects for the following reasons:

- **Improper Proceedings:** The authority to used eminent domain can only be determined in eminent domain actions.
- **Lack of Necessary Parties:** All necessary parties have not been named to determine the Plaintiff’s authority to use eminent domain.
- **Improper Venue:** This County is not the proper venue to determine the Plaintiff’s authority to use eminent domain for the reason that the properties that are affected by the Plaintiff’s projects are located outside of Cole County.

### **ARGUMENT**

The power to use eminent domain to acquire private property is never assumed, even for the State. Eminent domain statutes are strictly construed in the favor of property owners. This is particularly true when an entity other than that State is

exercising the power. “In Missouri, ‘the right of eminent domain rests with the state and does not naturally inhere in counties, municipalities or public service corporations.’ *State ex rel. Mo. Cities Water Co. v. Hodge*, 878 S.W.2d 819, 820 (Mo. banc 1994). ‘The right to condemn,’ therefore, ‘can be exercised only upon delegation from the state.’ *Id.* ‘[A] statute delegating [the power of eminent domain] must be strictly construed, and the person or body claiming the right to exercise such delegated power must be able to point to the statute which either expressly or by necessary implication confers that right.’ *Id.* at 821.” *City of N. Kansas City v. K.C. Beaton Holding Co., LLC*, 417 S.W.3d 825, 830 (Mo. Ct. App. 2014).

1. **A condemnation action is the only proper proceeding in which to determine the authority of an entity to use eminent domain.**

Condemnation actions are governed by carefully structured *sui generis* proceedings. “The first branch [of the proceedings] is a non-jury hearing in which the sufficiency of the petition and the necessity of condemnation are determined. The judgment of the court following this first hearing goes to the very propriety of the condemnation itself. ... The jury trial on damages is the second branch of the condemnation proceeding.” *Washington Univ. Med. Ctr. Redevelopment Corp. v. Komen*, 637 S.W.2d 51, 53-54 (Mo. Ct. App. 1982)(citations omitted). During the first stage, “It is well-settled that in a condemnation action, the court must initially determine whether the condemnation is authorized by law i.e.: is there jurisdiction over the condemnation proceeding. *State ex rel. Devanssay v. McGuire*, 622 S.W.2d 323, 325 (Mo.App.1981). This determination may involve one or more of several requirements: is

there constitutional, statutory or ordinance authority for the exercise of eminent domain; is the taking for a public use; has the condemning authority complied with the conditions precedent to bringing the action.” *City of St. Charles v. DeVault Management*, 959 S.W.2d 815, 821 (Mo.App. E.D. 1997).

The present action finds the Plaintiff, a private company, requesting this Court to make a preliminary determination of that it has statutory authority to employ eminent domain for its Projects. In doing so, the Plaintiff is attempting to use declaratory judgment to circumvent the condemnation statutes and rules which provide that this determination be made during the first stage of *condemnation proceedings*. There is no precedent where the authority to use eminent domain was determined by declaratory judgment initiated by the would-be condemning authority with without involvement of the threatened property owners. Condemnation proceedings are dealt with exclusively with Rule 86: “Other rules of civil procedure apply in condemnation proceedings only when they are consistent with Rule 86.” *State ex rel. Washington Univ. Med. Ctr. Redevelopment Corp. v. Gaertner*, 626 S.W.2d 373, 377 (Mo. 1982) abrogated on other grounds by *Clay Cnty. Realty Co. v. City of Gladstone*, 254 S.W.3d 859 (Mo. 2008). It would be inconsistent with Rule 86 for this Court to make a preliminary determination of the Plaintiff’s right to use eminent domain when Rule 86 and cases applying the rule clearly state that this is a determination to be made at the initial state of condemnation proceedings. A ruling here as to the Plaintiff’s authority to use eminent domain separate from a condemnation action is contrary to the notion that “The condemnation proceeding is a special, statutory action ... is a single proceeding with *two intimately related parts*.”

*Washington Univ. Med. Ctr. Redevelopment Corp. v. Komen*, 637 S.W.2d 51, 54 (Mo. Ct. App. 1982). Since the two parts are intimately related, they cannot be separated. There is no precedent to permit a would-be condemning entity to precede a condemnation proceeding with a declaratory judgment that relates to and of the questions of jurisdiction that are reserved for condemnation proceedings. The use of declaratory judgment for those purposes should be dismissed as inconsistent with condemnation procedures as established by Rule 86 and Chapter 523.

2. **The parties necessary to litigation establishing the right of an entity to use eminent domain have not been added to this action.**

As previously stated, a declaratory judgment action is not the proper means to determine if an entity or agency has the power to use eminent domain. For the sake of argument, assuming these proceedings were proper, it stands to reason that the same persons that are necessary in a condemnation action would be required to be joined in this action. However, there are literally hundreds of parties that were not included in this litigation (including the Defendants herein) that would have to be joined in eminent domain proceeding and who's rights may be prejudiced by a decision by this Court on this matter. In condemnation actions, it is necessary to join all persons that are either 1) in actual possession of the property claiming title, or 2) have title to the property appearing of record. Rule 86.03; Section 523.010(3) Similarly, with regard to declaratory judgments, "all persons shall be made parties who have or claim any interest which would be affected by the declaration...." Section 527.110. The Mark Twain Transmission project, alone, is over 100 miles long. Even in rural areas with larger

parcels such a route would impact hundreds of parcels of land. For each parcel, there would be at least one owner of record and many may have tenants in possession. The rights of all such parties may be affected by this action but have not been afforded the opportunity to have notice or to be joined to participate as required in both eminent domain and declaratory judgment proceedings. Without all necessary parties according to the requirements of eminent domain and declaratory judgment proceedings, the Defendant's motion to dismiss should be granted.

3. **Cole County is not the property venue to determine the rights of the Plaintiff to use eminent domain in other counties.**

Assuming, again, that declaratory judgment is a proper means to decide whether the Plaintiff has the right to use eminent domain to acquire properties in connection with its two named Projects, the proper venue for such a determination is in the counties where the properties are located. "In case land, or other property, is sought to be appropriated by ... electrical corporation ... such corporation may apply to the circuit court of the county of this state where such land or any part thereof lies by petition....." Mo. Ann. Stat. § 523.010 (West). "Section 523.010 requires the condemnation suit to be filed in the county where the land or any part thereof lies ...." *State ex rel. State Highway Comm'n v. Swink*, 537 S.W.2d 556, 558-59 (Mo. 1976). This section extends to govern venue for inverse condemnation actions, as well. *Id.* There is no indication by the legislature that a condemnation action may be bifurcated into two parts where the power to take is decided in one county and the damages assessed in another, separate action in another county. Filing this declaratory judgment in Cole County, where none of the

properties affected by the Plaintiff's Projects are located, is not consistent with the venue requirements for condemnation actions.

### **CONCLUSION**

In the end, it is the position of the Defendants that a decision here has no precedential or binding effect on any future condemnation actions against properties in furtherance of the Plaintiff's Projects. However, it is almost assured that if the Plaintiff obtained judgment here in its favor on Count II of its declaratory judgment, that it would use such judgment to influence other circuit judges to rule in its favor as to its authority to condemn with assurances that the issue was already fully litigated and decided. Furthermore, in the event that there is an appeal from this court's decision, an appellate decision may have a direct, precedential impact on future eminent domain proceedings in other circuit courts.

When a governmental or private entity asserts the right to use the power of eminent domain, the question has been and always should be determined in the confines of a condemnation action. Condemnation practice and procedure was created and designed to ensure that eminent domain proceeding are brought in the proper venue, with all essential parties and decided in real terms of what rights are being acquired instead of in the form of a hypothetical academic exercise. The present proceedings should be dismissed to the extent that Plaintiff seeks a determination and declaration of its right to use eminent domain in the State of Missouri for the reasons that such determination must be made in condemnation actions, that not all necessary parties are present and because this is an improper venue for such a determination.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing was served by operation of the Missouri Electronic Filing Rules of the Missouri Supreme Court (if applicable), or by fax or by U.S. Mail, first class, postage fully prepaid, this 6<sup>th</sup> day of October, 2014 to:

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