

FILED

OCT 05 2012

COLE COUNTY
CIRCUIT COURT

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

AMEREN TRANSMISSION COMPANY)
OF ILLINOIS,)

Plaintiff,)

v.)

PUBLIC SERVICE COMMISSION)
OF MISSOURI,)

Defendant.)

Case No. 12AC-CC00499

**MOTION FOR LEAVE TO FILE
FIRST AMENDED PETITION FOR DECLARATORY JUDGMENT**

COMES NOW plaintiff Ameren Transmission Company of Illinois (“ATXI”), by and through counsel, and for its Motion for Leave to Amend Petition states as follows:

1. On August 8, 2012, ATXI filed this action seeking declaratory judgment in two counts: Count I sought judgment declaring the Missouri Public Service Commission (“the Commission”) does not have jurisdiction, control or regulation over ATXI regarding the construction and operation of transmission lines in Missouri; Count II sought judgment declaring the Commission could not require ATXI to obtain a certificate of public convenience and necessity in order to exercise eminent domain authority and that ATXI had such eminent domain authority under § 523.010.1.

2. On September 7, 2012, the Commission filed a motion to dismiss ATXI’s petition and asserted, among other arguments, that it had not taken a formal position regarding the authority of an interstate electric transmission company to exercise the

power of eminent domain and, therefore, no justiciable controversy existed as to the issue of the ability of ATXI to construct transmission lines in Missouri.

3. ATXI now desires to file its First Amended Petition for Declaratory Judgment to more specifically identify the justiciable controversy between the Commission and ATXI.

4. Mo. R. Civ. P. 55.33(a), provides that a party may amend its pleading with leave of court, which leave "shall be freely given when justice so requires."

5. The purpose of Rule 55.33 is to permit a party to present matters that were overlooked or unknown at the time the party's original pleading was filed. *Baker v. City of Kansas City*, 671 S.W.2d 325, 329 (Mo. Ct. App. 1984). The factors this Court should consider in determining a motion for leave to amend are the hardship to the moving party if leave to amend is denied, the reasons for the moving party's failure to include the new matter in its original pleading, and the injustice, if any, to the opposing party should leave to amend be granted. *Id.* This Court has full discretion to grant leave to amend a party's pleading, and this Court's decision to grant leave to amend will not be disturbed absent a showing of an abuse of discretion. *Id.*

6. The Commission will not be prejudiced by this Court's order granting plaintiff leave to amend because such action will not result in the unnecessary delay of the prosecution of this action; specifically, the action has been on file just over one month and no discovery has been conducted.

7. ATXI will suffer hardship if leave to amend is not granted.

WHEREFORE, plaintiff Ameren Transmission Company of Illinois respectfully requests that this Court sustain its Motion for Leave to File First Amended Petition for Declaratory Judgment (attached as *Exhibit A* to this motion), and to grant such other and further relief as the Court may deem proper under the circumstances.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys or parties of record to the above action

by enclosing same in envelopes addressed to each at the address as disclosed in the pleadings of record herein, with first class postage prepaid and by depositing said envelopes in a U.S. Post Office mailbox in Columbia, Missouri

by leaving same at the business office with a clerk, secretary or another attorney

by transmitting the same by facsimile to him or her at _____ .m. to facsimile number _____

by handing same to him or her

on this 3rd day of October, 2012.

Michael R. Jupp
An Attorney for Plaintiff Ameren
Transmission Company of Illinois

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AMEREN TRANSMISSION COMPANY)
OF ILLINOIS,)

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Case No. 12AC-CC00499

PUBLIC SERVICE COMMISSION)
OF MISSOURI,)

Defendant.)

FIRST AMENDED PETITION FOR DECLARATORY JUDGMENT

Plaintiff Ameren Transmission Company of Illinois (ATXI) brings this action for declaratory judgment pursuant to Missouri’s Declaratory Judgment Act, §§ 527.010, *et seq.*, RSMo.,¹ for the purpose of determining questions of actual controversy involving the jurisdiction of the Public Service Commission of Missouri (the Commission) over ATXI, a private electric transmission company regulated by the Federal Energy Regulatory Commission (FERC) seeking to construct interstate transmission facilities in Missouri. In support of its petition, ATXI states as follows:

Parties

1. Plaintiff Ameren Transmission Company of Illinois is a corporation organized under the laws of Illinois with its principal office at 1901 Chouteau Avenue, St. Louis, Missouri. ATXI is a wholly-owned subsidiary of Ameren Corporation, a Missouri corporation and holding company that owns, among other companies, Union

¹ Statutory references are to the Revised Statutes of Missouri (2000), unless otherwise noted.

Electric Company, d/b/a Ameren Missouri. Ameren Missouri provides retail electric service to the general public in a substantial portion of Missouri.

2. Defendant Public Service Commission of Missouri is an agency of the State of Missouri with offices located at 200 Madison Street, Jefferson City, Missouri. By statute, the Commission exercises jurisdiction, control and regulation of public utilities in Missouri, including electrical corporations that manufacture, sell, or distribute electricity for light, heat and power to the general public within certificated service areas. Ameren Missouri is subject to the jurisdiction of the Commission.

Jurisdiction and Venue

3. This court has original jurisdiction of this case under § 527.010.

4. Venue is proper in this court pursuant to § 508.010.2(1) in that the Commission maintains offices in Cole County, Missouri.

Background

ATXI and its Construction of Transmission Lines in Missouri

5. ATXI is a private electric transmission company incorporated in Illinois and is duly authorized to conduct business in Missouri

6. Under its Amended Articles of Incorporation, ATXI is authorized to engage in the construction and operation of electric transmission lines used for the interstate transmission of electricity in Illinois, Missouri and in other states. *See* Articles of Amendment, attached hereto as **Exhibit A-1**.²

² Because all exhibits referenced herein are the same exhibits attached to Plaintiff's initial Petition, Plaintiff incorporates those exhibits from its initial filing as if they were attached to Plaintiff's First Amended Petition for Declaratory Judgment.

7. ATXI is prohibited by its Amended Articles of Incorporation from engaging in the generation, sale, or distribution of electricity to the general public and from otherwise furnishing electricity to the general public or serving any retail service territories. *See Exhibit A-1* at 2; *see also* State of Missouri Certificate of Authority at 4, attached hereto as **Exhibit A-2**.

8. ATXI is a Transmission Owner member of Midwest Independent Transmission System Operator, Inc. (MISO), a Regional Transmission Organization that operates under the jurisdiction of the FERC. MISO manages the regional electric power grid and plans and approves regional transmission line construction projects in portions of various Midwestern states, including a significant portion of Missouri. *See* MISO Footprint Map, attached hereto as **Exhibit B**.

9. In 2011, MISO's board approved the MISO Transmission Expansion Plan (MTEP11) which is MISO's comprehensive long-term regional plan for the Midwest electric power grid. MTEP11 identified for approval and construction certain transmission projects called Multi-Value Projects (MVPs).

10. The MVPs approved by MISO's board in the MTEP11 include several transmission line projects, some of which will be constructed by ATXI. Among other projects, ATXI will construct the Missouri and Illinois portions of what ATXI refers to as the Illinois Rivers and Mark Twain projects.

11. When complete, the two projects will be part of an additional transmission path in the region across four states with a total distance of approximately 480 miles along a path running generally from Ottumwa, Iowa, into northern Missouri, then

continuing through northeastern Missouri, across the Mississippi River and continuing east across Illinois to western Indiana.

12. More specifically, the Illinois Rivers Project is an addition to the existing 345-kilovolt transmission grid in the Midwest and is primarily located in Illinois, with a portion of it extending from Quincy, Illinois, to Palmyra, Missouri and a portion extending across the Indiana border. In total, this project spans approximately 330 of the approximately 480 miles.

13. The Illinois Rivers Project is scheduled to be in service in segments beginning in 2016 and completed by June 1, 2019.

14. The Mark Twain Project referenced above is also an addition to the interstate transmission grid in the Midwest and will connect to the Illinois Rivers project at a substation located near Palmyra. The Missouri portion of the Mark Twain Project consists of a new 345-kilovolt transmission line that will run from Palmyra to a substation near Adair, Missouri to the Iowa border, and then on to a substation located in Ottumwa, Iowa, with the entire project comprising the remaining approximately 150 miles of the approximately 480-mile overall length.

15. The Mark Twain Project is scheduled to be in service not later than June 1, 2020.

16. ATXI will not generate, sell, or distribute electricity to the general public, and will not otherwise furnish retail electricity to the general public or provide retail service in any retail service territory. ATXI will provide interstate transmission service under the jurisdiction of the FERC.

17. Future interstate transmission lines to be constructed in Missouri or elsewhere are expected to be approved by MISO in the future, and ATXI may be designated to construct some or all of those projects.

18. In order to construct interstate transmission lines, ATXI may obtain rights-of-way or other property rights using eminent domain.

The Commission's Position that it has Jurisdiction over
Interstate Electric Transmission Facilities

19. The Commission has stated in regard to transmission line siting in Missouri that it has “statutory authority, as interpreted by appellate decisions, for the granting of certificates of public convenience and necessity [“CCN”] for the construction of electric plant,³ including transmission lines.”⁴

20. In fact, the Commission takes the position that the siting of interstate electric transmission lines in Missouri is a matter of state jurisdiction and, more particularly, subject to the mandatory approval of the Commission pursuant to Section

³ Section 393.170, states that “[n]o . . . electrical corporation . . . shall begin construction of a[n] . . . electric plant . . . without first having obtained the permission and approval of the commission.”

⁴ *Missouri Public Service Commission's Response to Midwest Governors Association Regarding Regulatory Authority for Cost Recovery for Regional Transmission Projects* at 1 (November 21, 2008). Even more to the point, Commission staff and staff counsel stated their belief that an entity like ATXI would be required to obtain a CCN in order to construct transmission lines in Missouri when Ameren Missouri recently sought approval of the Commission to continue its participation in MISO. See *In the Matter of Application of Union Electric Company for Authority to Continue the Transfer of Functional Control of its Transmission System to the Midwest Independent Transmission System Operator, Inc.*, Case No. EO-2011-0128 (Rebuttal Testimony of Adam C. McKinnie at 20:21-21:6, attached as **Exhibit C**, and Hearing Transcr., Vol. III at 141:20-142:16, attached as **Exhibit D**).

According to the *LUPTF (Land Use Policy Task Force) Summary of Jurisdictional Approvals for Transmission Siting*, the Commission similarly responded to a Southwest Power Pool (another regional transmission system) survey regarding the necessary jurisdictional approvals for transmission siting by stating that either an area certificate or a line certificate (CCN) granted by the Missouri Public Service Commission was necessary in order for interstate transmission lines to be sited and constructed in Missouri.

393.170, RSMo., in that the Commission routinely processes approvals for electrical corporations and has done so for several interstate transmission companies.⁵

21. In addition, the Commission takes the position that a company wishing to construct interstate transmission lines in Missouri must possess a certificate of public convenience and necessity in order to exercise the power of eminent domain.⁶

The Controversy

22. A justiciable controversy exists as there is a genuine disagreement between the parties as to whether the Commission has, as it contends, authority over ATXI to approve or deny the construction of interstate electric transmission lines in Missouri and whether the Commission has siting authority over ATXI.

⁵ In this action, the Public Service Commission of Missouri has asserted this very position:

Section 393.170 directs electrical corporations to obtain PSC permission and approval before constructing or operating facilities. The PSC routinely processes these approvals for electrical corporations and has done so for several interstate transmission companies like ATXI.

FERC and Missouri PSC regulation are not entirely mutually exclusive. Federal and state jurisdiction are determined by subject matter. And FERC does not regulate the siting of transmission facilities except in very narrow circumstances not present in this proceeding. Federal law is silent on the issue of siting transmission facilities subject to FERC Jurisdiction. There is no federal law preempting the states from exercising authority over siting transmission lines.

The absence of federal siting or eminent domain authority for electric utilities under the federal law suggests that federal law contemplates an active role for states in transmission siting. Conversely, federal law specifically grants interstate gas pipeline companies the right of eminent domain pre-empting state authority in siting gas pipelines. 15 U.S.C.A. Section 717f(h). Unlike the interstate pipeline industry, Congress has left the issue of siting authority over interstate electric companies to the states.

Motion to Dismiss for Failure to State a Claim at 4-5 (filed Sept. 7, 2012).

Recently, the Commission exercised this authority in File No. EA-2012-0321 when it granted a Certificate of Convenience and Necessity to Entergy Arkansas, an out-of-state electric utility that does not provide retail electric service in Missouri, was not regulated by the Commission, and which sought only to construct transmission in Missouri to provide wholesale electric service. *Order Granting Certificate of Convenience and Necessity* (issued July 11, 2012). In so doing, the Commission rejected Entergy Arkansas' assertion that a CCN was unnecessary for it to construct transmission lines.

⁶ Missouri Response to OMS Survey "Identifying Public Policy Requirements for Multi-State Facilities" at 3 (January 11, 2012).

23. ATXI has a legally protectable interest at stake in that ATXI is threatened with the imminent and unlawful deprivation of its right to acquire property, construct and own transmission in Missouri absent administrative restraint.

24. This controversy is ripe for judicial determination in that:

a. The controversy involves no factual dispute but only a legal determination of the proper interpretation and application of Missouri statutes that affects the legal rights of ATXI;

b. Absent judicial resolution, ATXI will be placed in the dilemma of having to comply with an unlawful interpretation and application of Missouri statutes or take a potentially more costly alternative of incurring the cost of acquisition of property and construction of transmission lines and risking serious penalties; and

c. The controversy is proper for judicial determination in that a proper interpretation and application of Missouri law requires that ATXI seek determination before this court and precludes it from seeking a determination from the Commission which has no jurisdiction over ATXI.

25. ATXI does not have an alternative, adequate remedy at law in that ATXI has no standing before the Commission because the Commission does not, as a matter of law, have jurisdiction over ATXI; consequently, there are no administrative remedies to exhaust.

26. The declarations sought by ATXI are essential to completely and finally resolve this controversy between ATXI and defendant.

**Count I – Declaration that the Commission does not have jurisdiction,
control, or regulation of ATXI**

For Count I of its action seeking declaratory judgment, ATXI states as follows:

27. Paragraphs 1-26 are incorporated herein by reference as if fully set forth.

28. The Commission “is a creature of statute and can function only in accordance with” its enabling statutes,⁷ and its “powers are limited to those conferred by ... statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted.”⁸

29. The Public Service Commission Law provides that the jurisdiction of the Commission extends to “the manufacture, sale or distribution of electricity for light, heat and power, within the state.” § 386.250(1).

30. ATXI is not subject to the jurisdiction of the Commission because it does not hold itself out as a provider of electricity for light, heat or power to the general public within Missouri, nor does it manufacture, sell, or distribute electricity for light, heat or power within the state.

31. ATXI will construct, own and operate transmission lines used by others to transmit electricity in interstate commerce and will do so under the jurisdiction of the FERC.

⁷ *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 796 (Mo. banc 1986).

⁸ *State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979); see also § 386.040 (creating the PSC and vesting it with “the powers and duties ... specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes” of its governing statutes); *State ex rel. MoGas Pipeline LLC v. Pub. Serv. Comm'n*, 366 S.W.3d 493, 2012 Mo. LEXIS 91 at *6 (Mo. 2012) (“If a power is not granted to the PSC by Missouri statute, then the PSC does not have that power.”).

32. Pursuant to § 386.030, RSMo., the Commission's jurisdiction does not apply to "commerce with foreign nations or commerce among the several states of this union, except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress." *See also MoGas Pipeline LLC*, 2012 Mo. LEXIS 91 at *7 ("As the Missouri legislature has recognized in section 386.030, those powers granted to the PSC by Missouri statute are limited by the doctrine of preemption as to matters affecting interstate commerce.").

33. Because the Commission does not have jurisdiction, control or regulation of ATXI, the Commission cannot require ATXI to seek and obtain, pursuant to § 393.170, the permission and approval of the Commission (i.e., a CCN) before ATXI can begin construction of transmission lines in Missouri.

34. Because the Commission does not have jurisdiction, control or regulation over ATXI, the Commission does not have jurisdiction to file an administrative action against ATXI seeking to require ATXI to obtain a CCN or to assess penalties against ATXI for its failure to obtain a CCN for transmission construction activity in Missouri.

WHEREFORE, for the reasons stated above, Ameren Transmission Company of Illinois respectfully requests that this Court: determine and declare that the Missouri Public Service Commission does not, under Missouri law, have jurisdiction, control or regulation of Ameren Transmission Company of Illinois, a private interstate electric transmission company, regarding the construction and operation of interstate transmission lines in Missouri, and for any and all other relief to which Ameren Transmission Company of Illinois is entitled.

**Count II – Declaration that the Commission does not have siting authority over
ATXI’s construction of interstate transmission lines**

For Count II of its action seeking declaratory judgment, ATXI states as follows:

35. Paragraphs 1-34 are incorporated herein by reference as if fully set forth.

36. The Commission contends that it has siting authority under § 393.170 to approve the construction of interstate transmission lines by interstate transmission companies.

37. ATXI denies that it is required by § 393.170 to obtain a CCN from the Commission in order to site and construct interstate electric transmission lines in Missouri.

38. Moreover, Section 523.010.1, provides that “*any* electrical corporation organized for the manufacture *or* transmission of electric current for light, heat or power” or “other corporation created by the laws of this state” when seeking to construct an “electric line” and unable to reach agreement on the proper compensation to be paid “may seek to condemn property for that use by filing a condemnation action in circuit court” (emphasis added).

39. The delegation of eminent domain authority reflected in § 523.010.1 is not limited to “public utilities”; rather, the only reference to the public in subsection 1 is the requirement that the condemnation of private property be for “the public use.”

40. ATXI is a corporation organized for the transmission of electric current for light, heat or power and seeks to construct transmission lines in Missouri for the public

benefit⁹ and, therefore, is within the classes of corporations to which the authority to exercise the power of eminent domain has been delegated pursuant to § 523.010.1 absent a CCN granted by the Commission pursuant to § 393.170.

41. According to MISO's FERC Electric Tariff, an MVP must meet one of the following:

- Criterion 1. An MVP must enable “the Transmission System to reliably and economically deliver energy in support of documented energy policy mandates or laws”
- Criterion 2. An MVP “must provide multiple types of economic value across multiple pricing zones”
- Criterion 3. An MVP “must address at least one” reliability issue associated with “a NERC or Regional Entity standard and at least one economic-based Transmission Issue that provides economic value across multiple pricing zones.”¹⁰

42. Construction of these MVP transmission projects in Missouri will be for the public use or public benefit in that these projects will benefit the public by improving transmission system reliability and efficiency by reducing losses and congestion both within Missouri and between Missouri and the rest of MISO; additionally, these projects will further the public policy goal of Missouri and other states by increasing the availability of electricity produced by renewable energy sources.

⁹ Under Missouri law, “public use” in § 532.010.1 means “public benefit.” *Phillips Pipe Line Co. v. Brandstetter*, 263 S.W.2d 880, 886 (Mo. App. E.D. 1954).

¹⁰ MISO's FERC-approved Open Access Transmission, Energy and Operating Reserve Markets Tariff (“Tariff”) at Attachment FF, Section II.C.2.

43. Because ATXI has been delegated authority to exercise the power of eminent domain in § 523.010.1, the Commission cannot require ATXI to seek and obtain, pursuant to § 393.170, the permission, approval and/or siting authority of the Commission before ATXI can exercise the power of eminent domain authority.

44. Because ATXI has been delegated authority to exercise the power of eminent domain in § 523.010.1, ATXI is not required to seek and obtain from the Commission a CCN, pursuant to § 393.170, in order for the purpose of the exercise of its eminent domain power to be declared for the “public use.”

WHEREFORE, for the reasons stated above, Ameren Transmission Company of Illinois respectfully requests that this Court determine and declare that the Missouri Public Service Commission does not, under Missouri law, have jurisdiction, control, regulation, or siting authority over Ameren Transmission Company of Illinois, a private electric transmission company, so as to require that it obtain a certificate of public convenience and necessity in order to site and construct transmission lines in Missouri, and for any and all other relief to which Ameren Transmission Company of Illinois is entitled.

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