

SOUTHERN ILLINOIS POWER )  
COOPERATIVE, an Illinois not-for-profit )  
Corporation and an electric cooperative, )  
For Authority to exercise the right of ) No. 10-0711  
eminent domain pursuant to 220 ILCS 30/13 )  
and 30/13.5 of the Electric Supplier Act. )

ILLINOIS COMMERCE  
COMMISSION  
2012 MAY 25 11:13:14  
CHIEF CLERK'S OFFICE

**BRIEF ON EXCEPTIONS BY SOUTHERN ILLINOIS POWER COOPERATIVE**  
**TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**  
**SERVED MAY 11, 2012**

Southern Illinois Power Cooperative, an Illinois not-for-profit corporation (SIPC) by its attorneys, GROSBOLL, BECKER, TICE, TIPPEY & BARR, Jerry Tice of Counsel and SORLING, NORTHRUP, HANNA, CULLEN & COCHRAN, Ltd., Gary Brown of Counsel, files herewith its Brief on Exceptions to the Administrative Law Judge's Proposed Order served May 11, 2012 and in support thereof states as follows:

I. INTRODUCTION

SIPC does not take exception to the Proposed Order of the Administrative Law Judge (ALJ) and the ultimate finding that SIPC should be granted authority as authorized by the Electric Supplier Act (220 ILCS 30/13 and 30/13.5) to proceed to take the property pursuant to the Eminent Domain Act (EDA) necessary for the easements required by the proposed 161kV electric transmission line. However, SIPC does take exception to the ALJ's Proposed Order to the extent the Proposed Order excludes parcel No. 45 owned by Richard Morgan and Allan Morgan from the grant of authority to SIPC to proceed under the EDA to acquire the transmission line easements.

II. SIPC'S EXCEPTIONS TO THE ALJ'S PROPOSED ORDER AND ARGUMENT IN SUPPORT OF EXCEPTIONS.

EXCEPTION NO. 1

IV. PARTIES' POSITIONS

B. Beasley Position

The last sentence commencing in the last paragraph on page 6 and continuing on the top of page 7 of the discussion in the Proposed Order entitled "Beasley Position" reads as follows:

"SIPC suggests that the passage of years from the initial contact in 2003 reflects poorly on SIPC's efforts to acquire an easement."

SIPC suggests that such sentence should read as follows:

"Beasleys suggest that the passage of years from the initial contact in 2003 reflects poorly on SIPC's efforts to acquire an easement."

ARGUMENT REGARDING EXCEPTION NO. 1:

SIPC suggests the change because it was Beasleys who argued at pages 11-17 of Beasleys (Opening) Initial Brief that the lapse of time between SIPC's first contact with Beasleys to obtain an easement from Beasleys and the time of the evidentiary hearing in this docket evidenced that SIPC had not been diligent in seeking an agreement with Beasleys regarding the requested easement. SIPC did not suggest that it had not been diligent but in fact opposed Beasleys' claim that SIPC had failed to act diligently. See SIPC Reply Brief page 13-15.

EXCEPTION NO. 2:

V. COMMISSION CONCLUSION:

The last sentence of the first full paragraph of Part V COMMISSION CONCLUSION on page 8 which reads as follows:

"With the possible exception of Parcel 45 on Ex.G, when considering Ex. G and all of the testimony together, the Commission is satisfied that sufficient contact (or at least effort at such) has been made with the owners of the unsigned properties."

SIPC suggests such sentence should read as follows:

“When considering Ex. G and all of the testimony together, the Commission is satisfied that sufficient contact (or at least effort at such) has been made with the owners of the unsigned properties.”

EXCEPTION NO. 3:

#### V. COMMISSION CONCLUSION

The first sentence of the last full paragraph of Part I COMMISSION CONCLUSION at page 9 reads as follows:

“Accordingly, with the exception of parcels 45 and 48, the Commission finds that SIPC should be granted authority to seek easements for its proposed 161 kV transmission line in Williamson and Saline Counties through the EDA.”

SIPC suggest that such sentence should read as follows:

“Accordingly, with the exception of parcel 48 which is owned by the State of Illinois acting through the Illinois Department of natural Resources (IDNR) and which is a public body and not subject to the power of eminent domain exercised pursuant to the EDA, the Commission finds that SIPC should be granted authority to seek easements for its proposed 161 kV transmission line in Williamson and Saline Counties through the EDA.”

EXCEPTION NO. 4:

#### V. COMMISSION CONCLUSION

The sixth and seventh sentences of the last full paragraph of Part V COMMISSION CONCLUSION at page 9 read as follows:

“Parcel 45 is excluded from the grant of authority because the record is not clear on the negotiation effort by SIPC. The only entry on EX G for Parcel 45 is that a certified letter and appraisal had not been sent pending negotiations between the parties’ attorneys.”

SIPC suggest that the sixth sentence be deleted and the seventh sentence should read as follows:

“While the only entry for Parcel 45 on Ex. G states that a certified letter and appraisal had not been sent pending negotiations between the parties’ attorneys, the testimony indicates that contacts have been made with the owners of Parcel 45 regarding an easement for the 161kV transmission line.”

EXCEPTION NO. 5:

V. COMMISSION CONCLUSION

The twelfth and thirteenth sentences of the last full paragraph of Part V COMMISSION CONCLUSION at page 9 read as follows:

“The status of negotiations and the amount of effort put into the negotiations regarding parcels 45 and 48 are unclear. Under the circumstances, the Commission will not grant eminent domain authority to SIPC for parcels 45 and 48.”

SIPC suggests that the twelfth sentence be deleted and the thirteenth sentence should read as follows:

“Since parcel 48 is owned by the State of Illinois acting through IDNR and since the power of eminent domain cannot be exercised against the State of Illinois as a public body, the Commission will not grant eminent domain authority to SIPC for parcel 48.”

EXCEPTION NO. 6

VI. FINDINGS AND ORDERING PARAGRAPHS

The proposed Findings and Ordering Paragraph No. 7 reads as follows:

“(7) SIPC should be granted authority to take the property identified in the attached Appendix in accordance with the EDA.”

SIPC’s petition in this docket is brought pursuant to the authority of the Electric Supplier Act Sections 30/13 and 30/13.5 (220 ILCS 30/13 and 30/13.5) requesting the right to proceed to exercise eminent domain under the Eminent Domain Act (EDA). Therefore, SIPC suggests that the Findings and Ordering paragraph (7) should read as follows:

“(7) SIPC should be granted authority pursuant to 220 ILCS 30/13 and 30/13.5 to take the property identified in the attached Appendix in accordance with the EDA”.

In addition, SIPC suggests that in view of the undisputed evidence, Parcel 45 should be added to the Appendix attached to the Proposed Order.

ARGUMENT REGARDING EXCEPTIONS NO. 2, NO. 3, NO. 4, NO. 5 and NO. 6:

The proposed order finds that SIPC has made sufficient contact with the owners of the undersigned parcels, without success in obtaining a signed easement for the 161 kV transmission line. Therefore, the Commission concludes that SIPC should be granted authority to proceed with eminent domain in Circuit Court to obtain the necessary easements. SIPC agrees with that general conclusion. However the Commission excludes Parcel 45 from that grant authority. It is the exclusion of Parcel 45 from the grant of authority that SIPC takes exception to.

The evidence in the record regarding Parcel 45 shows and the proposed order states that:

(1) Mr. Livesay testified that SIPC's general counsel, John Brewster, has been negotiating (stated in the plural) with an attorney representing the landowners of Parcel 45, Richard Morgan and Allan Morgan (Sentence 8, last full paragraph of COMMISSION CONCLUSION at page 9 of Proposed Order);

(2) Livesay's testified that:

"There were occasions when Mr. Brewster would have direct contact with an attorney representing the unsigned landowner regarding the easements for the 161 kV transmission line. Those contacts were made with respect to Property #45 owned by Richard and Allen (Allan) Morgan. The negotiations regarding the Richard and Allen (Allan) Morgan property were conducted by Mr. Brewster as Southern Illinois Power Cooperative's attorney with the attorney for Richard Morgan which negotiations have been ongoing."

(Livesay Supp Direct Test SIPC Ex 3 page 6 lines 6-12).

(3) The negotiations between SIPC's John Brewster and the attorney representing Richard Morgan and Allan Morgan as the owners of Parcel 45 have been ongoing (Livesay Supp Direct Test SIPC Ex 3 page 6 lines 9-12).

(4) On October 1, 2011, the owners of Parcel 45 received a letter of appraisal (Livesay's Reply Test to Rashid's Direct Test SIPC Ex 5 page 4 lines 12-13; Sentence 9, last full paragraph of COMMISSION CONCLUSION at page 9 of Proposed Order).

The above evidence regarding Parcel 45 is undisputed. It shows negotiations regarding the easement for Parcel 45 have been ongoing between John Brewster, general counsel of SIPC, and the attorney for Richard Morgan and Allan Morgan. The evidence indicates these negotiations have not resulted in a signed easement. Further, the evidence is undisputed that SIPC provided the owners of Parcel 45 with a letter of appraisal. A sample of the letter provided Richard and Allan Morgan is attached as SIPC Ex E to the Direct Testimony of Michael Livesay SIPC Ex 2 and a complete copy of the Appraisal for Parcel 45 was attached to the letter of appraisal (Livesay Direct Test SIPC Ex 2 page 11 lines 19-22, page 12 line 1). The letter provided notice of the amount of compensation offered as established by the appraisal which had been determined by an independent appraiser. The letter of appraisal also provided the owners of Parcel 45 the name and address of a person to contact at SIPC regarding SIPC's offer. (SIPC Ex E, Livesay's Direct Test SIPC Ex 2 page 11 lines 16-22). This evidence was not contradicted. Neither Richard Morgan nor Allan Morgan intervened, appeared or testified at the evidentiary hearing. The Commission Staff witness did not dispute the above evidence regarding Parcel 45 nor did the Commission staff counsel question SIPC's witnesses about the contacts by SIPC representatives with Richard Morgan and Allan Morgan or their attorney regarding Parcel 45. Thus, the foregoing evidence regarding Parcel 45 is undisputed.

The Illinois Supreme Court in The Forest Preserve District of DuPage County v First National Bank of Franklin Park 2011 Ill 110759; 961 NE 2d 775, 356 Ill Dec 386, 403-405 (Dec 2011) (Forest Preserve) has determined that the providing of an offer of compensation for an easement based upon an appraisal made by an independent appraiser is, as a matter of law, sufficient evidence to show the party seeking to exercise eminent domain authority has met its good faith negotiation requirement as a precursor to commencing eminent domain proceedings under the Eminent Domain Act (735 ILCS 30/1-1-1 et seq). In the Forest Preserve case, the

issue was whether the governmental body's letter offer of 90% of the value determined by appraisal conducted by a qualified appraiser constituted a good faith negotiation. The offer was rejected and there was no evidence of additional negotiations. The trial court determined the issue on summary judgment in favor of the government body and the Supreme Court affirmed that determination. The court also held the condemning body was not required to attach a copy of its appraisal to the letter offer. With regard to Parcel 45, the undisputed evidence is that John Brewster, SIPC's general counsel, had ongoing negotiations with the attorney representing Richard Morgan and Allan Morgan regarding an easement across Parcel 45. On October 1, 2011, Richard Morgan and Allan Morgan received SIPC's letter appraisal regarding the easement (Livesay's Reply Test to Rashid's Direct Test, SIPC Ex 5 page 4 lines 12-13 filed January 23, 2012). The letter appraisal contained SIPC's offer of compensation, explained the project requiring the easement and that the offer of compensation was established by an appraisal conducted by an independent fee appraiser. The appraisal report was attached to the letter. The letter also provided the contact information for the SIPC representative and advised the Morgans that unless SIPC heard from them within 14 days of the letter date, SIPC would assume the offer had been rejected (SIPC Ex E attached to Livesay's Direct Test SIPC Ex 2 page 11 lines 8-22). While Livesay did not specifically testify that the Morgans had refused the offer of compensation in the October 1, 2011 letter appraisal, Livesay did testify in general that the parcels of property listed on SIPC's Second Revised Exhibit C contained the parcels, by number, for which CIPS had not obtained a signed easement by the time of the evidentiary hearing. Second Revised Exhibit C listed Parcel 45 as an unsigned parcel (Livesay Supp Direct Test SIPC Ex 3 page 3 lines 7-17). It is certainly reasonable to conclude that Richard Morgan and Allan Morgan have not signed an easement for Parcel 45. It is also reasonable to conclude that SIPC has held sufficient negotiations with the Morgans to satisfy the requirement as announced by the Supreme

Court in Forest Preserve, supra at pages 403-405, to establish that SIPC engaged in good faith negotiations with the owners of Parcel 45.

It appears that the Proposed Order establishes a more stringent rule than the rule established by the Illinois Supreme Court regarding the number of contacts necessary to show that good faith negotiations have occurred prior to proceeding with eminent domain. The Commission staff correctly notes that the Guidelines for Right-of-Way Acquisitions 83 Ill. Adm. Code 300 do not apply to SIPC. However, SIPC did follow the guidelines in 83 Ill. Adm. Code 300.30(c) regarding the letter appraisal delivered to the owners of Parcel 45 (See SIPC Ex E attached to Livesay's Direct Test SIPC Ex 2 page 11 lines 11-22). In addition, counsel for the Commission Staff did not question SIPC's testimony to the effect that the contacts between SIPC's general counsel and the attorney representing the owners of Parcel 45 had been ongoing indicating there were more contacts between SIPC and the owner's of Parcel 45 than just the appraisal letter. Thus, there was no apparent reason, at the time of the evidentiary hearing to question Mr. Livesay in more detail about those contacts. There is no rule establishing the minimum number of contacts that must occur before SIPC can proceed with eminent domain except the Illinois Supreme Court's ruling in Forest Preserve, supra at pages 403-405. Even in Harrisonville Telephone Company Ill Com Comn No. 86-0250 (July 15, 1987), there were only three discussion between Harrisonville and the land owners (page 3 of the Order). In this docket, SIPC's general counsel was engaged in ongoing negotiations with the attorney representing the owners of Parcel 45 prior to their receipt of SIPC's letter appraisal and offer of compensation on October 1, 2011. It is certainly reasonable to assume there had been at least three contacts between SIPC's representatives and the owners of Parcel 45 and matching the number of contacts in the Harrisonville Order. Given the ruling established by the Supreme Court in Forest Preserve, a good faith effort to negotiate an easement has been established by SIPC as a matter of

law by providing the letter offering as compensation the appraisal amount established by an independent fee appraiser to the landowner without subsequent success in obtaining a signed easement.

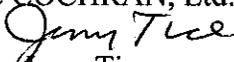
The proposed order appears to require SIPC to establish more negotiating contacts with a landowner than the Illinois Supreme Court requires before the Commission will grant authority under the Electric Supplier Act (220 ILCS 30/13 and 30/13.5) to proceed to exercise the right of eminent domain pursuant to the EDA. The implementation of this more stringent rule as proposed, without any definitive guide as to the number of contacts the Commission would deem necessary, is contrary to the current applicable law.

WHEREFORE, Southern Illinois Power Cooperative requests the proposed order be modified in accordance herewith and authority be granted to Southern Illinois Power Cooperative to proceed with eminent domain as to Parcel 45.

Respectfully submitted,

SOUTHERN ILLINOIS POWER COOPERATIVE  
An Illinois not-for-profit Corporation and an  
electric cooperative,

By GROSBOLL, BECKER, TICE, TIPPEY & BARR  
and SORLING, NORTHRUP, HANNA, CULLEN  
& COCHRAN, Ltd.

  
By Jerry Tice

PROOF OF SERVICE

I, JERRY TICE, hereby certify that on the 25th day of May, 2012, I e-mailed a copy of the **BRIEF ON EXCEPTIONS BY SOUTHERN ILLINOIS POWER COOPERATIVE TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER SERVED MAY 11, 2012** and attached hereto, addressed to the following persons at the e-mail addresses set opposite their names:

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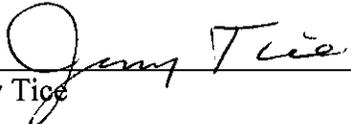
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