

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

AMEREN TRANSMISSION COMPANY OF)
ILLINOIS)
)
Petition for a Certificate of Public Convenience)
and Necessity, pursuant to Section 8-406.1 of)
the Illinois Public Utilities Act, and an Order)
pursuant to Section 8-503 of the Public Utilities)
Act, to Construct, Operate and Maintain a New)
High Voltage Electric Service Line and Related)
Facilities in the Counties of Adams, Brown,)
Cass, Champaign, Christian, Clark, Coles,)
Edgar, Fulton, Macon, Montgomery, Morgan,)
Moultrie, Pike, Sangamon, Schuyler, Scott and)
Shelby, Illinois.)

Docket No. 12-0598

REPLY IN SUPPORT OF MOTION TO COMPEL

Stop the Power Lines Coalition (“Coalition”) submits this response in support of its Motion to Compel or in the Alternative to Bar Testimony.

I. The Parties To This Proceeding Are Entitled To Know Whether ATXI Believes It Has Lawful Authority To Build On The Only Primary Route ATXI Has Identified In This Proceeding.

ATXI’s response does not challenge the fact that the Primary Route from the Kansas Substation to the Indiana state line that was the subject of ATXI’s Petition, and the testimony of its witnesses, is designed to cross over a floodplain easement owned by the federal government. Based on the language in the federal floodplain easement and communications to ATXI from federal officials, one of which was received before ATXI ever filed its petition, it does not appear that ATXI can build its proposed 345 kV transmission line on the Primary Route proposed by ATXI. See the Federal Floodplain Easement, attached as Exhibits 1 and 2, respectively, to the Coalition’s Motion to Compel (“Federal Floodplain Easement”) and ATXI Response to STPL Data Request 4.05 and Attachments 1 and 2 (federal official correspondence).

In its motion to compel, the Coalition candidly acknowledged that legal opinions are not ordinarily a proper subject for discovery. However, because ATXI has the statutory burden to identify the route proposed for construction of its proposed transmission line, it is ATXI's burden to show that it has lawful authority to build the line where it has proposed to build it. Otherwise, the parties in this proceeding, including Staff and the ALJ's, are wasting their time evaluating a Primary Route that cannot be built.

In response, ATXI has cited cases which support the general principle of law that legal opinions are not the proper subject of discovery. Specific legal and factual circumstances often preclude application of general legal principles. In this case, given ATXI's statutory burden of proof under 8-406.1 of the Public Utilities Act to identify the route on which it contends it should be authorized to build its transmission line, it only makes sense to require ATXI to explain what lawful authority it has to build the line when public records and the federal government indicate that ATXI lacks legal authority to build the route it has proposed.

ATXI calls the Coalition's argument concerning Section 8-406.1 "absurd." ATXI Response at 5. However, ATXI understandably cites no legal authority in its discussion of Section 8-406.1 because there is no precedent addressing this issue or a similar factual situation.

This is admittedly an unusual situation. As reflected in ATXI's Attachment 1 to STPL 4.05, federal official Dave Hiatt sent an October 17, 2012 email to an Ameren spokesperson for ATXI's transmission line project in which Mr. Hiatt advised Ameren and ATXI that with respect to the Federal Floodplain Easement in Clark County and a similar easement in Brown County:

These easements must be avoided. There is very little to no authority for the NRCS to modify the terms of these conservation easements. The rights acquired under these conservation easements are quite inclusive and will be superior to any rights Ameren might obtain for an over head power line right-of-way.

Normally, when a federal official tells a utility that in all likelihood the utility cannot build a transmission line on federal property, the utility does not proceed to file a petition proposing to construct its transmission line on the federal property that the utility was told it likely could not use. But that is what ATXI did. Under the circumstances, the Coalition submits that it is entirely appropriate to ask ATXI in discovery if it believes that it has the lawful authority to construct its Primary Route in Clark County on the Federal Floodplain Easement property and, if so, why.

II. The V-Shaped Drawing Produced By ATXI In Discovery Is Irrelevant.

In an effort to deflect attention from the real issues, Ameren argues that it produced a V-shaped “modified route” in response to STPL Data Request 4.04, and that is sufficient to show that ATXI can construct its Primary Route between the Kansas Substation and the Indiana state line. The so-called “modified route” was merely produced in discovery by ATXI late in the evening on March 28, the day before Good Friday when Staff and Intervenors Direct Testimony was due. ATXI has not formally proposed locating its transmission on the so-called “modified route”, nor has ATXI introduced any testimony supporting use of the so-called “modified route.” The fact that Ameren produced a V-shaped drawing in discovery is irrelevant to the question of whether ATXI is required in discovery to respond to questions whether it has lawful authority to construct its proposed transmission line on the only Primary Route it has proposed, given the seemingly insurmountable legal problems posed by a Federal Floodplain Easement that was called to ATXI’s attention before it filed its Petition.

III. ATXI’s Peculiar “Standing” Argument Has No Legs.

ATXI makes a very peculiar “standing” argument, an argument which also is made in ATXI’s pending Motion to Strike Certain Intervenors’ Direct Testimony and for an Expedited

Ruling. While the argument is addressed more extensively by the Coalition in response to ATXI's motion to strike, it is addressed briefly below.

Standing is a concept that pertains to a person's or entity's right to participate as a party in a civil lawsuit or administrative proceeding. To have standing, a person or entity seeking to participate in a proceeding as a party must present an actual controversy between adverse parties, as to which controversy the plaintiff is not curious or concerned about the outcome, but possesses some personal claim, status or right, a distinct and palpable injury which is fairly traceable to another's conduct and substantially likely to be prevented or redressed by the grant of requested relief. *Westwood Forum v. City of Springfield*, 261 Ill. App. 3d 911, 921 (4th Dist. 1991). The purpose of a standing requirement is to assure sufficient sharpness in defining issues so that the court may be aided in deciding the case; it is meant to preclude uninterested persons from suing, but it is not meant to preclude a valid controversy from be litigated. *Westwood Forum*, 261 Ill. App. 3d at 921. Moreover, "a nonparty has standing to appeal if he or she has a direct and substantial interest in the subject matter which would be prejudiced by the judgment or benefitted by its reversal." *Lake County Forest Preserve Dist. v. First Nat'l Bank of Waukegan*, 213 Ill. App. 3d 309, 314 (2d Dist. 1991). Pursuant to Section 2-408(f) of the Illinois Code of Civil Procedure, once a non-original party has been permitted to intervene in a case, he, she or it shall have all the rights of an original party. 735 ILCS 5/2-408(f); *Johnson v. Johnson*, 97 Ill. App. 3d 634, 635 (3d Dist. 1981).

The members of the Coalition petitioned to intervene in this proceeding because they all had rights that would be impacted by the location of ATXI's proposed transmission line on the Primary Route between the Kansas Substation and the Indiana state line. The Administrative Law Judges properly recognized that the Coalition members had standing to intervene because

they had rights that could be impacted by the outcome of this proceeding, and granted them request to intervene. See ALJ December 31, 2013 and January 25, 2013 Orders. ATXI never challenged the Coalition members' standing to intervene.

Having been granted leave to intervene to protect their interests, the Coalition members are entitled to present reliable evidence based on personal knowledge as to why the proposed ATXI transmission line should not be located on the Primary Route in Clark County. See Rule 601 of the Illinois Rules of Evidence. ATXI's suggestion that the topic of the Federal Floodplain Easement, which appears to be a fatal impediment to construction of the Primary Route in Clark County, is an impermissible subject of Coalition discovery because the Coalition members do not have "standing" to testify about someone else's property is, to use ATXI's own words, absurd.

IV. The Coalition Complied With The Requirements Of The Commission's Rules Of Practice And The Supreme Court Rules Concerning Discovery Disputes.

ATXI accused the Coalition of not complying with Supreme Court Rule 201(k) and the Commission's Rule 200.350, which require a statement that, after personal consultation, the parties were unable to resolve their discovery differences. ATXI Response at 9. See Ill. S. Ct. R. 201(k) at 83 Ill. Adm. Code §200.350. As reflected in Exhibit 3 to the Coalition's motion to compel, the Coalition's counsel sent ATXI's counsel an email requesting that ATXI's counsel call to discuss ATXI's responses to STPL Data Requests 4.02 and 4.03. Copies of the ATXI responses at issue were attached to the email. The email included times and alternate telephone numbers where the Coalition's counsel could be reached. ATXI's counsel never called the Coalition's counsel. Instead for the next two and a half days, the ATXI counsel responsible for ATXI's discovery sent out hundreds of data requests to the Coalition and other Intervenors.

When ATXI's counsel did design to respond two and a half days later, he did so by email and stated unequivocally:

At this time, ATXI will be standing on its objections to STPL concerning the EWPP Floodplain Easement.

Ex. 4 to Coalition Motion. While ATXI's counsel then went on to reference that in addition to the objections to the data requests, ATXI had provided information concerning a "modified route" in response to STPL Data Request 4.04, ATXI's counsel's response was plain and unequivocal: ATXI is "standing on its objections" to the Coalition Data Request that are the subject of this motion.

Section 200.350 of the Commission's Rules of Practice requires that:

Every motion to compel formal discovery or to invoke Section 206.370 shall incorporate a statement showing that consultation and reasonable attempts to resolve differences have failed.

83 Ill. Adm. Code §200.350. The emails sent and received in an effort to initiate consultation and resolve the discovery dispute were described in the Coalition's Motion to Compel and attached as Exhibits 3 and 4 to the Motion.

Section 200.350 of the Commission's Rules of Practice and Supreme Court Rule 201(k) both require efforts at consultation and a reasonable attempt to resolve discovery disputes. They do not require the movant's counsel to beg opposing counsel to talk to him after his request for a discussion is met by an email that brushes off any meaningful discussion and states that ATXI is "standing on" its objection.

V. Request For Alternative Relief

The Coalition will defer its request for a ban on evidence and argument concerning the Federal Floodplain Easement unless and until such time as ATXI refuses to comply with an order directing ATXI to respond to STPL Data Requests 4.02 and 4.03.

VI. Conclusion

For all the reasons set forth above and in the Coalition's motion to compel, ATXI should be directed to answer the Coalition's data requests number STPL 4.02 and 4.03.

Respectfully submitted,

Dated: April 18, 2013

STOP THE POWER LINES COALITION

/s/ Edward R. Gower

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