

**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) Docket No. 12-0598
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.)

**AMEREN TRANSMISSION COMPANY OF ILLINOIS’ BRIEF IN RESPONSE TO THE
ADMINISTRATIVE LAW JUDGE RULING OF APRIL 19, 2013**

The Administrative Law Judges ("ALJs") have directed Ameren Transmission Company of Illinois ("ATXI") to file a legal brief responding to two questions concerning an Emergency Watershed Protection Program ("EWPP") Floodplain Easement in Clark County, Illinois. This brief responds to that directive.

A. Introduction

Before addressing the ALJs’ questions, ATXI would make two points.

First, the gist of the ALJs’ questions is whether the EWPP Floodplain Easement (the “Easement”) erects an absolute bar to the construction of any transmission line along ATXI’s Primary Route for the Kansas to State Line segment of the Illinois Rivers Project (the “Project”). While these are valid questions, definitive answers cannot be given at this time because the evidentiary record remains open. The legal significance of the terms of the Warranty Easement Deed depends on facts, and the facts in this case continue to unfold. The analysis in this brief necessarily depends on the facts known at this time. If these facts change, the analysis may change as well.

Second, utilities routinely obtain a certificate of public convenience and necessity (“CPCN”) for a given route before acquiring land rights and securing permits. This practice is a reflection of two practical realities: (i) a project should be determined necessary and a route designated before a utility begins the costly and time-consuming process of acquiring land rights and securing permits; (2) the Commission is not a permitting agency or enforcer of land rights. *See Walsh v. Champaign Cty. Sheriff's Merit Comm'n*, 404 Ill. App. 3d 933, 938 (4th Dist. 2010) (“Because an administrative agency can only act pursuant to its statutory authority, any action beyond that authority is void.”) The Commission cannot modify or even interpret an easement and more importantly in this context, must allow the utility to work with the parties to the Easement, and attempt to resolve issues through the process outlined below.

Issues concerning permits or approvals, as with any permit or land right acquisition, will be resolved within the relevant state and federal agencies after the Project as a whole has been determined to be in the interests of public convenience and necessity. This is true in every instance where a Project of this nature is to be constructed. There is a federal administrative process regarding interpretation of federal watershed easements. We assume the ALJs' ruling does not mean to circumvent this process, and will defer to the relevant agencies.

B. Questions Presented:

1. With regard to the property at issue in the Coalition Data Requests 4.02 and 4.03, does ATXI agree that the proposed use of the property subject to the Emergency Watershed Protection Program Floodplain Easement for construction of the proposed transmission line is inconsistent with the Prohibitions specified in Part III.A of the EWPP Floodplain Easement? If ATXI's answer is anything other than an unqualified yes, please explain how ATXI plans to construct a transmission line without (a) digging or destroying vegetative cover in violation of Subpart III.A.2 of the EWPP Floodplain Easement and (b) building structures in the easement area in violation of Subpart III.A.7 of the EWPP Floodplain Easement.

The prohibitions recited in the question are only one section of the Easement and the Easement, construed as a whole, does not prevent the construction of a transmission line.

The Easement is a contract between certain landowners¹ and the United States of America, acting through the Natural Resources Conservation Service (“NRCS”). An easement should be interpreted as would be any agreement between the parties. *See River's Edge Homeowners' Ass'n v. City of Naperville*, 353 Ill. App. 3d 874, 878 (2d Dist. 2004). Consequently, the Easement should be interpreted as a whole, giving equal weight and meaning to each and every provision of the contract, and presuming that each clause is necessary to effectuate the intent of the parties. *See, e.g., J.B. Esker & Sons, Inc. v. Cle-Pa's P'ship*, 325 Ill. App. 3d 276, 285 (5th Dist. 2001) (citing *Coles-Moultrie Elec. Coop. v. City of Sullivan*, 304 Ill. App. 3d 153, 159 (4th Dist. 1999) (“Contract terms and clauses should not be disregarded as surplusage, as it is presumed that language is not employed idly.”).

Part IV(A) of the Warranty Easement Deed states that the “United States may authorize . . . the use of the easement area for compatible economic uses.” The Warranty Easement Deed defines a “compatible use” as a use that is “consistent with the long term protection and enhancement of the floodplain, riparian, wetland, and other natural values of the easement area.” Warranty Easement Deed, Part IV(B). A floodplain easement (“FPE”) is designed “for runoff retardation and soil-erosion prevention . . . to safeguard lives and property from floods, drought, and the products of erosion on any watershed whenever fire, flood, or any other natural occurrence is causing or has caused a sudden impairment of that watershed.” 16 U.S.C.A. § 2203. Because ATXI’s proposed installation of a transmission line over the Easement area would not interfere with runoff retardation or soil-erosion prevention, the transmission line is a compatible economic use of the Easement area and is expressly allowed by the Warranty Easement Deed. *Duresa v. Commonwealth Edison Co.*, 348 Ill. App. 3d 90, 101

¹ The landowners named in the Easement Deed are Carolyn S. Robinson, Stephen Robinson, Lesley Ann Robinson, Gregory T. Robinson, and Aimee Susan Janssen-Robinson. None of these individuals have intervened in this proceeding.

(1st Dist. 2004) (“A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments. In the construction of instruments creating easements, it is the duty of the court to ascertain and give effect to the intention of the parties.” (citation omitted)); *see also* *Buck v. Garber*, 261 Ill. 378, 386 (Ill. 1913) (“The presumption is in favor of the written contract, and its terms must control . . .”).

As noted in the question, Part III.A of the Warranty Easement Deed generally prohibits the landowner from engaging in certain activities, including “building or placing buildings or structures on the easement area.” But that tells only part of the story. Part III.A also allows the government to authorize activities that are otherwise prohibited: “it is expressly understood that the rights to the following [prohibited] activities and uses have been acquired by the United States and, *unless authorized by the United States under Part IV*, are prohibited of the Landowner on the easement area.” (*See* Exhibit A.) Part IV.A of the agreement provides that the United States may authorize use of the easement area for “compatible economic uses, including, *but not limited to*, managed timber harvest, periodic haying, or grazing.” (Emphasis added.) This list of compatible economic uses is expressly non-exclusive. Other compatible uses may be authorized at the discretion of the United States.

There are at least two ways to build the transmission line over the Easement area in a manner that is compatible with the goals of the Easement. First, the transmission line structures can be constructed outside the Easement area so that the line crosses the area, but the supporting structures are not located within the Easement area. If the line and structures are not “on the easement area,” (Part III.A.) their presence in the vicinity of the Easement area does not affect the floodplain protection and is not a prohibited use.

Likewise, even if towers were built “on the easement area” or were otherwise considered a prohibited use, the government has the authority to authorize this construction as a “compatible use” that does not interfere with floodplain protection or erosion control. In fact, a transmission line easement could have been specifically listed as an acceptable use, just as the water utility line is currently listed. In other words, compatible use is already occurring on the property by virtue of an easement granted to a water utility. (*See Exhibit B.*) The water utility easement allows for removal of trees and brush on the property, which is an activity that would otherwise be prohibited by the terms of the Warranty Easement Deed (Exhibit B, p. 1). The government allowed the water utility easement to remain on the land, and, similarly, the government could decide that ATXI’s proposed use is also compatible with floodplain protection.

ATXI’s evidence in this proceeding will demonstrate that it is possible to construct the transmission line so that there would be no interference with the goals of the Easement – that is, floodplain protection, runoff and erosion control, and maintenance of vegetative cover. The only impact to the Easement property would be overhanging wires. As discussed above, even if overhanging wires are deemed to fall within the prohibitions of Part III.A, the presence of these wires is compatible with the government’s stated purpose for the Easement and its use of the property and can be allowed pursuant to Part IV.A.

And even without employing the compatible use provisions contained in the Warranty Easement Deed, the Easement does not prevent installation of a transmission line over the Easement area because Illinois law allows for the modification or termination of an easement where both parties to the easement agree to modify or terminate. *Standard Steel & Wire Corp. v. A. Finkl & Sons Co.*, 7 Ill. App. 3d 32, 35 (5th Dist. 1972) (easement terminated by subsequent contract between grantor and grantee). As the Stop the Power Lines Coalition (“STPL”) notes,

the NRCS itself has no statutory or regulatory authority to unilaterally modify or terminate a floodplain easement; however, this does not prevent the United States, as a party to the Easement, from negotiating a modification or termination directly with the landowner pursuant to common law theories governing property law.

Additionally, the United States, as the beneficiary of the Easement, has the power to unilaterally terminate the Easement. *Beloit Foundry Co. v. Ryan*, 28 Ill.2d 379 (Ill. 1963) (an easement “may be extinguished by surrender or release from the dominant owner to the servient owner”). Thus, the United States could unilaterally terminate the Easement to allow ATXI access to the Easement area even though the Warranty Easement Deed on its face states that it is “perpetual.”

2. With regard to the property subject to the aforementioned EWPP Floodplain Easement referenced in the Coalition Data Requests 4.02 and 4.03, does ATXI contend that it has the ability to acquire an easement that is superior to the EWPP Floodplain Easement or otherwise extinguishes the EWPP Floodplain Easement? If ATXI’s answer is anything other than an unqualified no, please explain the answer in light of the provisions of the EWPP Floodplain Easement itself and 7 C.F.R. §624.10, which is the applicable federal regulation governing floodplain easements acquired by the United States, acting by and through the Natural Resources Conservation Service.

Although ATXI does not believe it is necessary to acquire superior easements or extinguish the government’s existing Easement (for the reasons discussed above), there are at least two circumstances in which this could occur.

First, 7 C.F.R. § 624.10 provides that EWPP FPEs may not be modified or terminated - except in the circumstance of a land exchange. STPL witness Mr. Baird acknowledges, “land exchanges are permissible in limited situation.” (STPL Ex. 1.0, p. 14.) Thus, if the land subject to the Easement is exchanged, the government’s FPE will terminate.

Second, the NRCS Deputy Chief for Programs is authorized to “waive any provision of these [floodplain] regulations when the agency makes a written determination that such waiver is

in the best interest of the Federal government.” 7 C.F.R. § 624.11. The regulations at 7 C.F.R. § 624.10 govern the terms of FPEs. Factors the government might consider in determining its “best interests” may include MISO’s designation of the Project as a component of its MVP portfolio. Any evaluation of the “best interests” of the federal government should be conducted by the federal government – not the Commission. ATXI must, and will, apply to the appropriate federal agencies after receiving a CPCN in this proceeding, and those federal agencies are well-equipped to assert their interests.

Once an FPE is recorded, the process for changing the easement to effectuate a determination that federal interests are best served is not simple but it is not prohibited. 7 C.F.R. § 624.10 govern the terms of easements. Through a consultation and negotiation process with the federal, state and private interests, the NRCS may find that the continuing Easement interferes with the public interest. In that instance, the NRCS could unilaterally withdraw from the Easement; alternatively, the consultation could conclude that the Easement be modified or converted to a Wetlands Reserve Program easement instead, specifically allowing for the utility easement.

C. The Modified Route will resolve all the issues raised by the existence of the EWPP Easement.

ATXI will propose, and will support in its Rebuttal Testimony, a slight modification to the Primary Route that avoids the area subject to the Easement entirely, while not affecting landowners who have not previously received notice of this proceeding. (*See Exhibit C.*) Contrary to STPL’s assertion, this minor modification does not constitute an entirely new route, and all landowners impacted by the modification have received notice of the Project.

Dated: April 26, 2013

Respectfully submitted,

Ameren Transmission Company of Illinois

/s/ Albert D. Sturtevant

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CERTIFICATE OF SERVICE

I, Albert D. Sturtevant, an attorney, certify that on April 26, 2013, I caused a copy of the foregoing *Ameren Transmission Company of Illinois' Brief in Response to Administrative Law Judge Ruling of April 19, 2013* to be served by electronic mail to the individuals on the Commission's Service List for Docket 12-0598.

/s/ Albert D. Sturtevant

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