

**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

**STOP THE POWER LINES COALITION’S REPLY IN SUPPORT OF ITS MOTION
FOR THE ADMINISTRATIVE LAW JUDGES TO TAKE ADMINISTRATIVE NOTICE
OF CERTAIN GOVERNMENTAL DOCUMENTS**

Stop the Power Lines Coalition (“Coalition”) submits this reply in support of its Motion for the Administrative Law Judges to Take Administrative Notice of Certain Governmental Documents.

I. Introduction

The memorandum that the Ameren Transmission Company of Illinois (“ATXI”) submitted in response to the Coalition’s motion can most charitably be described as remarkable. It is remarkable because of ATXI’s brazen audacity in attempting to cast an impregnable veil over the true facts concerning the federal floodplain easement area in Clark County, Illinois.

ATXI was on notice before it filed its Petition in this case that the federal floodplain easement was a problem, and that ATXI might not be able to acquire the federal floodplain easement interests required to construct ATXI’s proposed transmission line on the Primary Route in Clark County on the segment between the Kansas substation and the Indiana state line. STPL Cross Ex. 8 (email from NRCS employee D. Hiatt to Ameren’s L. Morris). But ATXI elected to

wait until April 26, 2013, in its rebuttal evidence, to explain how it could cross or go around the federal floodplain area. D. Murphy Rebuttal Testimony, ATXI Ex. 13.0 at 65:1407 to 66:1421; J. Hackman Rebuttal Testimony, ATXI Ex. 12.0 at 32:675 to 33:686. Having sought to keep a lid on the issue by depriving parties of the ability to file testimony challenging ATXI's purported solution to the federal floodplain easement area, ATXI now is seeking to prevent the introduction of public records that demonstrate the multiple fatal flaws in ATXI's approach.

II. ATXI Has Proffered A Misleading And Absurd Standard For Application In This Proceeding.

In an attempt to prevent the introduction into evidence of the true facts from public records, ATXI offers a selective, edited quote to lead the Administrative Law Judges to apply an incorrect legal standard. According to ATXI, “[a] court will not take judicial notice of...evidence that may be significant in the proper determination of the issues between the parties.” ATXI Response at 4, quoting *Cook Cty. Bd. of Review v. Prop. Tax Appeal Bd.*, 339 Ill. App. 3d 529, 542 (1st Dist. 2002). Otherwise stated, according to ATXI, the proper legal standard is that it is improper to take judicial notice if the facts are significant. Under ATXI's view of the world, apparently only facts which are relevant but not significant may be the subject of judicial notice. Fortunately, that absurd proposition is not the correct legal standard.

The issue before the court in the *Cook Cty. Bd. of Review* case was whether it was appropriate to take judicial notice of the Illinois Department of Revenue's sales tax ratio studies. The court found in the paragraph immediately preceding the ATXI partial quote that sales tax ratio studies do not reflect technical or scientific facts, and that their methodology and results are both subject to interpretation. *Id.* In the next paragraph (containing the ATXI partial quote), the court concluded “that because the sales ratio studies did not reflect commonly known facts or facts readily verifiable from sources of undisputable accuracy, they were not the proper subject

of judicial notice.” *Id.* The full quote that ATXI abbreviated was: “A court will not take judicial notice of critical evidentiary material not presented in the court below or of evidence that may be significant in the proper determination of the issues between the parties.” *Cook Cty. Bd. of Review*, 339 Ill. App. 3d at 442. The court certainly did not mean to imply that only facts that do not really matter are subject to judicial review, nor do the cases string cited in the *Cook Cty. Bd. of Review* opinion immediately after the quote support that proposition. *See People v. Mehlberg*, 249 Ill. App. 3d 499 (5th Dist. 1993); *Vulcan Materials Co. v. Bee Constr.*, 96 Ill. 2d 159 (1983). And no case cited in ATXI’s response supports ATXI’s proffered peculiar standard.

III. The Coalition’s Proof Satisfies The Standard Governing Judicial Notice Of Public Records.

Instead, the proper legal standard governing judicial notice of public records was set forth and applied by the appellate court in the *Village of Riverwoods v. BG Ltd.*, 276 Ill. App. 3d 720, 724 (1st Dist. 1995). In that case, the appellate court upheld the trial court’s decision to take judicial notice of a 1929 deed reflecting the State’s property rights in the property at issue. In reliance upon the 1929 deed, the court dismissed the plaintiff’s claims because the Court of Claims has exclusive jurisdiction over the determination of the State’s property rights. The court’s decision succinctly set forth the appropriate legal standard:

Judicial notice is proper where the document in question is part of the public record and where such notice will aid in the efficient disposition of a case.

Id.

The documents for which the Coalition has requested that administrative notice be taken are all public records, and they certainly will aid in the disposition of part of this case. ATXI witness Donnell Murphy testified variously at the hearing that ATXI did not give notice of this

proceeding to the federal government because: (1) the federal government was not shown as a landowner of record on the taxpayer records in the Supervisor of Assessments Office in Clark County; or (2) the federal government's easement rights were not the equivalent of being a landowner. ATXI Rev. Ex. 13.0 at 65:1392-1404; 5/16/13 Tr. At 882:8-22. The public property tax record obtained from the Office of the Supervisor of Assessments of Clark County, Illinois, for the Robinson property on which the EWFPP federal floodplain easement is located contains references to the EWP purchased on April 20, 2010 for \$576,000. *See* STPL Ex. 17.0 attached to the Coalition's Motion.

Donnell Murphy testified that prior notice was given to all landowners owning property on the Modified Route that ATXI developed to avoid the federal floodplain easement area, which ATXI now calls the "Alternate Pole Placement." *See* STPL Cross Ex. 2. Ms. Murphy also testified that one of the affected landowners was Thomas Hutchings. *See* STPL Cross Ex. 4.

However, the public property tax records for Thomas Hutchings' property obtained from the Office of the Supervisor of Assessments of Clark County, Illinois reflect that the landowners of record for tax purposes for the Hutchings' property are actually "Thomas A. Hutchings and Deborah L. Hutchings, et al." *See* STPL Ex. 16.0 attached to the Coalition's Motion. Exhibit C to ATXI's Petition, which lists the potentially affected landowners who were sent notice of this proceeding, does not list Deborah L. Hutchings. Furthermore, Ms. Murphy admitted that she knew the Latin phrase in the public property tax record for the Hutchings' property "et al." means "and others."

Had ATXI representatives done the logical thing and checked the public records in the Office of the Clerk and Recorder of Clark County, Illinois once ATXI saw that others had an ownership interest in the Hutchings' property, they would have found STPL Ex. 11.0, also

attached to the Coalition's motion. STPL Ex. 11.0 is a certified copy of a Warranty Deed from Marietta Martin to "Thomas A. Hutchings and Deborah L. Hutchings, et al." The warranty deed itself reflects that Thomas Hutchings only owns an individual one tenth ownership in the Hutchings' property, and that there are nine other owners of an undivided nine-tenths interests in the Hutchings' property. None of the other nine owners are named in the potentially affected landowners' list in Exhibit C of ATXI's Petition; consequently, none of them were sent notice of this proceeding. And if ATXI had any question about how the public property tax records based on tax identification numbers were located with respect to the federal floodplain area, ATXI representatives could have asked the Office of the Supervisor of Assessments of Clark County, Illinois for a map of the area reflecting the location of the various properties based on tax identification numbers in the area of the federal floodplain easement, and they would have been given a copy of the aerial map obtained from that office and marked as STPL Ex. 12.0 attached to the Coalition's motion.¹

ATXI's Jeffrey Hackman, who on cross examination testimony, views the federal floodplain easement as a "piss ant" issue, testified that he could avoid touching the federal floodplain easement area by constructing taller tower structures on either side of the federal floodplain easement area, such that the transmission would come no closer than 100 feet to the ground in the federal floodplain easement area. 5/17/13 Tr. at 1000:10-14; ATXI Ex. 12.0 at 33:680-686.

However, ATXI representatives did not do what any reasonably prudent transmission engineer or person would do, which is to go to the local office of the owner of the federal

¹ An aerial map from the Office of the Clark County Supervisor of Assessments depicting the federal floodplain easement was attached to Perry D. Baird's Direct Testimony as Exhibit 1.15. It was admitted without objection by ATXI.

floodplain easement, the Natural Resources Conservation Service (“NRCS”), to ask for public records reflecting what the terrain in the area was like or what use the NRCS was making of the federal floodplain easement area. Had ATXI done so, they would have been given copies of the topographical maps marked as STPL Ex. 13.0 and the certified report to the NRCS marked as STPL Ex. 14.0, both of which are attached to the Coalition’s motion.

Had ATXI done so, they would have realized there are significant elevation changes in the area, that NRCS had planted 435 seedling trees per acre, and that the height of some of those trees could exceed Mr. Hackman’s 100 foot limit.

The courts routinely take judicial notice of public records. Judicial notice is taken with respect to property deeds maintained by the County Recorder’s office. *E.g., Village of Riverwoods*, 276 Ill. App. 3d at 724. Judicial notice is taken of Secretary of State’s public records. *E.g., Country Cos. V. Universal Underwriters Ins. Co.*, 343 Ill. App. 3d 224, 229 (3d Dist. 2003) (judicial notice taken by appellate court). And judicial notice is taken of public records of the Department of Corrections. *E.g., Ashley v. Pierson*, 339 Ill. App. 3d 733, 739 (4th Dist. 2003). The public records at issue in this instance, obtained from the office of Supervisor of Assessments of Clark County, Illinois, the office of the County Clerk and Recorder of Clark County, Illinois, and the Martinsville, Illinois NRCS office, are certainly at least as reliable as the 1929 deed or the state agency records at issue in the above cited cases. Like the 1929 property deed at issue in the *Village of Riverwoods* case, judicial notice is proper where the documents in question are part of the public record and notice will aid in the efficient disposition of the case.

IV. The Public Records Submitted By The Coalition Satisfy The Applicable Evidentiary Standard.

Under Rule 200.310(b) of the Commission's Rules of Practice, 83 Ill. Adm. Code 200.610(b), "[i]n contested cases,...,the rules of evidence and privilege applied in civil cases in the Circuit Courts of the State of Illinois shall be followed. However, evidence not admissible under such rules may be admitted if it is of a type commonly relied on by reasonable prudent persons in the conduct of their affairs." Under Rule 201 of the Illinois Rules of Evidence, "a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See also Cleary & Graham's Handbook on Illinois Evidence Sections 202.1 and 202.2 (8th ed. 2004). The public records offered into evidence by the Coalition satisfy both Rule 201 of the Illinois Rules of Evidence and Rule 200.610(b) of the Commission's Rules of Practice.

It is well established that a court or an administrative agency "may take judicial notice of public documents that are capable of being readily verifiable." *Muslim Community Center v. Village of Morton Grove*, 392 Ill. App. 3d 355, 359 (1st Dist. 2009). *See People v. Henderson*, 171 Ill. 2d 124, 134 (1996) (making same point). In this case, the Clark County Clerk and Recorder is the government official charged by law with responsibility for maintaining evidence of property ownership in Clark County. *See generally* Division 3-5 of the Counties Code, 55 ILCS 5/3-5001, *et seq.* The Clark County Supervisor of Assessments is the government official charged by law with maintaining the property tax records that the Commission's Rules of Practice contemplate will be used for notice purposes. *See* 83 Ill. Adm. Code §200.150(h).

Section 3-5036 of the Counties Code provides that the records in the County Recorder's office shall be available for public inspection and copying at no charge. 55 ILCS 5/3-5036.

Section 9-20 of the Property Tax Code provides in relevant part with respect to property record cards:

Property record cards. In all counties, all property record cards maintained by a ...chief county assessment officer shall be public records, and shall be available for public inspection during business hours, subject to reasonable rules and regulations of the custodian of the records. Upon request and payment of such reasonable fee established by the custodian, a copy or printout shall be provided to any person.

35 ILCS 200/9-20. Section 9-45 of the Property Tax Code provides in relevant part with respect to maps reflecting property index numbers:

Property index number system. ...[S]ubject to the approval of the county board, the chief county assessment officer or recorder, in counties of less than 3,000,000 inhabitants, may establish a property index number system under which property may be listed for purposes of assessment, collection of taxes or automation of the office of the recorder...The system shall describe property by township, section, block, and parcel or lot, and may cross-reference the street or post office address, if any, and street code number, if any. The county clerk, county treasurer, chief county assessment officer or recorder may establish and maintain cross indexes of numbers assigned under the system with the complete legal description of the properties to which the numbers relate. Index numbers shall be assigned by the county clerk in counties of 3,000,000 or more inhabitants, and, at the direction of the county board in counties with less than 3,000,000 inhabitants, shall be assigned by the chief county assessment officer or recorder. Tax maps of the county clerk, county treasurer or chief county assessment officer shall carry those numbers. The indexes shall be open to public inspection and be made available to the public.

35 ILCS 200/9-20, 9-40 and 9-45.

There is no better source of information on these subjects. The Clark County public records at issue are readily verifiable by walking into the appropriate public office and asking for a copy of the relevant records, which is exactly what Mr. Baird did.

Similarly, there is no better source of information about a federal government's use of its easement property rights than the public agency's own records. If ATXI wanted to verify the

accuracy of the NRCS records, an ATXI representative could have requested a copy from NRCS, as Mr. Baird did.

In an effort to cast doubt on the reliability of the public records at issue, ATXI suggests, without explanation or justification, that the facts in the certified warranty deed are not “undisputed facts.” ATXI Response at 6.² That unsupported assertion should be categorically rejected. ATXI also asserts that the property tax records (STPL Ex. 16.0 and 17.0) are in handwriting and not certified. Mr. Baird’s statements, which were certified to be true and accurate in accordance with Illinois law, are that the property tax cards were obtained from the office of Supervisor of Assessments of Clark County, Illinois. Apparently, that office maintains property tax records in handwriting, which does not contradict, or even cast doubt, on the question of whether the records are readily verifiable or inaccurate. ATXI also suggests that the property tax records might be old records. *Id.* at 7. There is, of course, no reason to believe that the Clark County Supervisor of Assessments, whose statutory duty is to maintain current property tax record cards, does not keep the property tax cards with up-to-date information. *See* 35 ILCS 200/9-40.

ATXI also suggests that the aerial map reflecting property locations (STPL Ex. 12.0) is not readily verifiable because it does not have a county logo on it—the lack of such logo does not mean that the map is not a readily verifiable public record. ATXI also suggests that precise locations of city lots and the like are not proper subjects of judicial notice, citing *People v. Clark*, 406 Ill. App. 3d 622, 632-33 (2d Dist. 2010). *People v. Clark* actually found that judicial notice

² While ATXI has suggested that other public records are not certified, certification obviously is irrelevant to ATXI. The Coalition believes Mr. Baird’s Verification should be sufficient. If the ALJ’s are concerned about the certification, the Coalition believes that the property tax and related records cannot be “certified,” but a statement can be obtained from a public official attesting to the validity of the public records that Mr. Baird obtained from the Office of the Supervisor of Assessments for Clark County, Illinois.

of Google maps available on the Internet was appropriate to prove that a park was north of a particular street intersection. *Id.* That case did not remotely involve facts concerning judicial notice of an aerial map, other than to cite with approval numerous cases approving judicial notice of Internet maps. *Id.*

V. ATXI's Timing Arguments Should Fall On Deaf Ears.

ATXI also suggests that it is too late for the ALJ's to take administrative notice of public records. ATXI is the one who created the timing issues by failing to address known problems with the federal floodplain easement on its Petition and opening direct testimony. Furthermore, there is no support in the law for ATXI's position.

Judicial notice of public records can be taken on appeal for administrative review. In *Muller v. Zollar*, 267 Ill. App. 3d 339, 341 (3d Dist. 1994), the court held that notwithstanding the provisions of Section 3-110 of the Administrative Review Act, 735 ILCS 5/3-110, which limits court review in administrative cases to the evidence before the administrative agency, an appellate court can take judicial notice of public records:

Notwithstanding the limitations of section 3-110, Illinois courts recognize that documents containing readily verifiable facts capable of instant and unquestionable demonstration may be judicially noticed. Judicial notice is proper where the document in question is part of the public record, and where such notice will aid in the efficient disposition of a case. Moreover, this court may take judicial notice regardless of whether such notice was sought at the trial court level.

Id. (multiple citations omitted). ATXI's timing arguments are not supported by law.

VI. ATXI's Attempts To Cast Doubt On Mr. Baird's Verification Are Meritless.

Throughout its response, ATXI attempts to cast doubt on the validity of Mr. Baird's verification by referring to it as "unsworn" and a "Verification." ATXI Brief at 3, 6 and 9. As

stated in paragraph 6 of his Verification, Mr. Baird certified his statements in accordance with Section 1-109 of the Illinois Code of Civil Procedure, 735 ILCS 5/1-109. Section 1-109 of the Code of Civil Procedure states in relevant part:

Any pleading, affidavit or other document certified in accordance with this Section may be used in the same manner and with the same force and effect as though subscribed to and sworn under oath.

Id. Section 200.610(b) of the Commission’s Rules of Practice provides in relevant part that in contested cases, “the rules of evidence and privilege applied in civil cases in the circuit courts of the State of Illinois shall be followed.” Thus, use of a certification instead of a notary public was appropriate. Either ATXI is not familiar with Illinois law, or its efforts to cast doubt on Mr. Baird’s statements reflect the depths to which ATXI is willing to sink in order to defeat the Coalition’s motion.³ Neither reflects well on ATXI.

VII. The ALJ’s Should Not Fall Prey To ATXI’s Strategy.

ATXI apparently recognized that it had to concede some evidence, so it made a calculated decision without explanation to “not contest notice of the published NRCS policy circular.” ATXI Response at 5. This purported “concession” should not be justification to deny the Coalition its right to have administrative notice taken of other public records.

ATXI also suggests in its prayer for relief that if the motion is granted, ATXI should be entitled to take discovery related to the documents, to file responsible testimony related to the documents and to call Mr. Baird for cross-examination related to the documents. *Id.* at 9. The

³ Curiously, ATXI previously failed to object to the use of Section 1-109 certifications in previous affidavits tendered to support testimony. *See* STPL Ex. 9.0, 10.0 and 18.0; Reed Interests Ex. 2.0; and Coles County Landowners Ex. 4.0 and 5.0.

request to delay the case and keep the record open is designed to encourage the ALJ's to rule on the Coalition's motion for reasons unrelated to the merits of the motion.

As noted above, the theory behind taking judicial notice of public records is to truncate the evidentiary process by taking notice of public records where the facts in the record are readily verifiable. If ATXI wanted to verify the facts in the public records, its representatives could have gone to the appropriate government offices in Clark County and done their own research to verify the records and facts in the record at any time, and satisfy themselves that the Clark County officials were in fact performing their statutory duties. The proffered records are readily verifiable, and there is no reason to engage in any additional discovery or to take additional evidence concerning the public records.

Furthermore, ATXI knew that Mr. Baird had knowledge of the relevant records when it withdrew its request to cross examine Mr. Baird. For ATXI to now suggest that it needs to cross examine Mr. Baird without even specifying what the subject matter would be or what benefit it might be is a reflection of a tactic that has nothing to do with any legitimate need to cross examine Mr. Baird.

While the Coalition is confident that the ALJ's will rule on the merits of its motion, the Coalition felt compelled to highlight ATXI's tactics.

VIII. Conclusion

For all the reasons set forth above and in Stop the Power Lines Coalition's Motion for Administrative Law Judges to Take Administrative Notice of Certain Government Documents, the Motion should be granted.

Dated: May 23, 2013

Respectfully Submitted,
STOP THE POWER LINES COALITION

_____/s/ Edward R. Gower

Edward R. Gower
One of Its Attorneys

Adam Guetzow
Hinshaw & Culbertson LLP
222 N. LaSalle St.
Suite 300
Chicago, IL 60601-1081
aguetzow@hinshawlaw.com

Edward R. Gower
Hinshaw & Culbertson LLP
400 South Ninth, Suite 200
Springfield, IL 62701
(217) 528-7375
egower@hinshawlaw.com