

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

AMEREN TRANSMISSION COMPANY OF)
ILLINOIS)
) Case No. 15-0237
Petition for an Order Pursuant to Section 8-509)
of the Public Utilities Act Authorizing Use of Eminent)
Domain Power)

**INITIAL BRIEF OF GABRIEL FARMS, INC.
AND JAMES AND CHELLI BRANYAN**

COMES NOW, GABRIEL FARMS, INC. JAMES BRANYAN and CHELLI BRANYAN, pursuant to Section 200.800 of the Rules of Practice of the Illinois Commerce Commission, 83 Ill. Admin.Code § 200.800 and for their Initial Brief state as follows:

I. INTRODUCTION

On November 7, 2012, Ameren Transmission Company of Illinois, also known as “ATXI”, filed a petition with the Commission seeking a Certificate of Public Convenience and Necessity pursuant to Sections 8-406.1 and 8-503 of the Public Utilities Act. Subsequently, the Commission granted ATXI a Certificate of Public Convenience and Necessity in Docket 12-0598. 220 ILCS 5/1-101 *et seq.* Pursuant to its Second Order on Rehearing, the Commission held that the transmission line must be built along the Approved Route in 12-0598. The Commission described the Approved Route as follows:

THENCE Northerly, generally along or near US Highway 51 and the common lines of the following sections:

Said Sections 11 and Section 12, Township 11 North, Range 1 East of the Third Principal Meridian, Shelby County, Illinois;

Sections 1 and 2, Township 11 North, Range 1 East of the Third Principal Meridian, Christian County, Illinois to a point at or near

the common line of said Sections 1 and 2, Township 11 North, Range 1 East of the Third Principal Meridian, Christian County, Illinois, and the Southeast corner of the Northeast Quarter of the Northeast Quarter of said Section 2;

THENCE Northerly, generally along or near US Highway 51 and over and across said Section 2, Township 11 North, Range 1 East, to a point at or near the common South corner of said Sections 35 and Section 36, Township 12 North, Range 1 East of the Third Principal Meridian, Christian County, Illinois; (Emphasis Added)

As explained herein, ATXI has failed to comply with that order and has substantially deviated from the Approved Route (**“along or near”** US Highway 51) by approximately 900 feet to the east of US Highway 51 at Assumption. *See* ICC Staff Exhibit 1.0 – Attachment C (Illustrating the current route proposed by ATXI as a solid green line that sharply deviates from US Highway 51)

In the current Docket, 15-0237, ATXI seeks eminent domain authority pursuant to 220 ILCS 5/8-509 to allow ATXI to acquire the necessary land rights from landowners identified in the pleadings. Specifically, ATXI seeks to acquire the necessary land rights from Gabriel Farms, Inc. for property located in Christian County, Illinois, and east of Assumption between County Roads 1150 and 1200. Additionally, ATXI seeks to acquire the necessary land rights from James & Chelli Branyan for property located in Christian County, Illinois, and northeast of Assumption and north of County Road 1200. Gabriel Farms, Inc. and James & Chelli Branyan are collectively referred to herein as the “Landowners.” Such authorization to pursue necessary land rights via eminent domain from the Commission is without a basis in law because ATXI has exceeded the scope of the Approved Route, revised the route without authority, and failed to afford landowners and the Commission an opportunity to review the revision and be heard in a meaningful way. Moreover, during cross examination at the evidentiary hearing, counsel for ATXI attempted to contort the plain language of the Commission’s order so that what amounts to

its Revised Route would appear to be within the bounds of the Approved Route. Finally, Commission Staff has raised the same concerns about the scope of and authority for ATXI's request for authorization to pursue eminent domain.

II. STAFF ROUTE CONCERNS NEAR ASSUMPTION

The Direct Testimony of Greg Rockrohr, Senior Electrical Engineer, Illinois Commerce Commission Staff shows ATXI's request for eminent domain authority "along a route that does not clearly coincide with the route that the Commission approved in the Commission's February 2, 2015, Second Order on Rehearing in Docket 12-0598" is not appropriate. ICC Staff Exhibit 1.0 p.11. Mr. Rockrohr stated that he understood the Commission's order to require ATXI to construct its transmission line "along" US Highway 51, but ATXI appeared to be taking the position that greater flexibility was to be given to the meaning of the words "near" and "along." Furthermore, Mr. Rockrohr expressed concerns regarding ATXI's position in this case when he posited the question whether it would be "reasonable for the Commission to grant eminent domain authority to ATXI in this docket for parcels whose owners had no opportunity to contest the line or testify about proposed routes in Docket No. 12-0598, the original certificate case?" ICC Staff Exhibit 1.0 p.3. In an effort to insulate itself from the argument that it had modified the Approved Route, counsel for ATXI sought to clarify what "along" and "near" meant during cross examination of Mr. Rockrohr and whether it was the subject properties that must be along US Highway 51 or the transmission line itself. Mr. Rockrohr's testimony established that it was staff's position that it was the transmission line that had be along or near the highway. Furthermore, Illinois caselaw would agree with Mr. Rockrohr's reading of "along or near". Therefore, granting of eminent domain authority is improper with respect to the Landowners submitting this brief.

ATXI acknowledged it initially considered pursuing the Approved Route “along or near” the West and East sides of U.S. Highway 51. However, according to the admissions of its own witnesses, including Mr. Murbarger, ATXI deviated from the Approved Route due to economic considerations (“Costs”) and potential construction delays. *See* ATXI Exhibit 6 pp. 12 & 13. Where ATXI has taken the liberty of redrawing the route for a segment of the Illinois Rivers Project in the past, the Commission has held that “an order in another docket approving a route modification is necessary before ATXI can lawfully construct the complete Pana-Mt. Zion segment”. 2014 Ill. PUC LEXIS 517, 18 (Ill.C.C.). Similarly, in the current proceeding, ATXI has submitted testimony that it has been forced by concerns over cost and delay to deviate from the Approved Route “along or near” Highway 51 to avoid a “pinch point.” *See* ATXI Exhibit 3.0 p. 6, ll. 102-105 (stating that using taller structures might have permitted the line to be located on the west side of Highway 51, but those structures are significantly more expensive); *See also* ATXI Exhibit 3.0 p. 6, ll. 112-116 (stating that crossing Highway 51 would result in additional expense); ATXI Exhibit 6.0 (citing increased cost numerous times for avoiding a route along either the east or west side of Highway 51).

On its own initiative, ATXI chose an alternative route for the transmission line that traverses the fields of the Landowners, both Gabriel Farms, Inc. and the Branyans, in a location and orientation that no other landowner near Assumption has encountered. In both Landowners’ positions, the transmission line crosses their fields on a diagonal, isolating odd shaped pieces of their property, and intruding into their properties to a greater extent than other landowners along this segment of the route. In the case of Gabriel Farms, the line intrudes into the property line approximately nine hundred (900) feet. This alternative route is not along or near US Highway 51.

During cross-examination, ATXI attempted to make the case that this Revised Route was still along or near US Highway 51. Ascertaining the meaning of the words used by the Commission is straightforward. Courts generally favor giving words their ordinary meaning, and allow aids such dictionaries in determining those ordinary meanings. *See City of Champaign v. Madigan*, 2013 IL App (4th) 120662 *citing In re M.T.*, 221 Ill. 2d 517(2006) (stating that courts give words their plain and ordinary meanings and that the use of dictionary definitions to illustrate the commonly understood meaning of a term is well accepted). Black's Law Dictionary defines "near" as "Close to; not far away, as a measure of distance." near, Black's Law Dictionary (10th ed. 2014). Moreover, Illinois courts have held that the meaning of near is synonymous with adjacent and contiguous. *See Langlois v. Cameron*, 201 Ill. 301 (1903) (listing adjacent and contiguous as having similar meanings); *See also People ex rel. Sackmann v. Keechler*, 194 Ill. 235 (1901) (listing both near and contiguous as possible meanings of adjacent). Accordingly, the Commission's order, when read using the plain and ordinary meaning of the terms "along" and "near", requires that the Approved Route for the transmission line be close to, adjacent, or contiguous to U.S. Highway 51.

As one can tell, the meaning of "near" deals with distance, but the meaning of "along" speaks to direction. Merriam-Webster defines "along" as "in a line matching the length or direction of." Along. *In Merriam-Webster.com*. Retrieved April 28, 2015, from <http://www.merriam-webster.com/dictionary/along>. Illinois courts have similarly defined "along." *See County of Cook v. Great W.R. Co.*, 119 Ill. 218 (1887) (defining "along" as "By the length of, as distinguished from across.") *See also People ex rel. Shrontz v. Astle*, 337 Ill. 253 (1929) (defining "along" as "by the length of; lengthwise of, ... at or near, the side of). These readings of "along" would require that the Approved Route of the transmission line to run in a

line matching the direction of US Highway 51 by the length of the highway rather than crossing or breaking from such a line.

ATXI and its witnesses would have the Commission believe that its Revised Route is both along and also near. However, even a cursory viewing of the exhibits admitted in this proceeding indicate that it is neither along or near. *See* ICC Staff Exhibit 1.0 – Attachment C; *See also* ATXI Exhibit 2.3 Parts Q & R. South of County Road 1150 the Revised Route deviates from US Highway 51. Instead of following alongside the highway, the transmission line angles eastward away from the highway. North of County Road 1150 the transmission line angles back towards US Highway 51 across the Gabriel Farms, Inc. property. At County Road 1200, the transmission line takes a severe angle across the Branyan property to reconnect with the Approved Route. This transmission line would not run parallel or close in proximity to the highway at Assumption. Therefore, this Revised Route east of Assumption is neither along nor near US Highway 51.

Additionally, ATXI would have the Commission believe that because the **parcels** affected by the transmission line and owned by the Landowners are “along or near” U.S. Highway 51, that they are in compliance with the Commission’s Order (Commission Hearing Testimony, April 27, 2015 by Jerry A. Murbarger). This conclusion is absurd. The Commission’s order set forth an Approved Route for the transmission line. The Order did not provide for an approved range of parcels to be affected. It is the transmission line that is to be routed, not the parcels. For example, the Gabriel Farms, Inc. property extends east of US Highway 51 approximately one –quarter mile. Assuming arguendo that the Commission intended its order to reflect parcel location rather than transmission line location, then ATXI would be able to deviate from the Approved Route by a quarter mile with no additional regulation or procedure. That is

only one direction. If ATXI is free to move easterly from US Highway 51, then it would only be fair to assume it could also move the transmission line westerly from the highway. As a result, ATXI would have unilateral authority to move the transmission line within a half mile corridor. This is unreasonable and must be rejected by the Commission.

ATXI's divergence from US Highway 51 is a deviation from "along or near." *See* ICC Staff Exhibit 1.0 at lines 355-358. Surely, ATXI's deviation from "along or near" the highway "thwarts the Commission's ability to (1) inform landowners that their interests may be at stake, (2) fully apprise itself of route advantages and disadvantages, and (3) fulfill its obligation under the Act to evaluate and approve the location of such utility facilities." 2014 Ill. PUC LEXIS 517, 18 (Ill.C.C.). If the Commission fails to conduct its due diligence and authorizes ATXI to proceed with eminent domain, ATXI may pursue eminent domain proceedings in circuit court to obtain easements across portions of properties for which it has no authority under the Approved Route. *See* 2014 Ill. PUC LEXIS 517, 18 (Ill.C.C.) (Commission held that if "ATXI may proceed in circuit court to obtain easements across properties that it does not need to construct the transmission line" such action would be improper).

The Commission's acceptance of the alternate Assumption/Corzine Route took into consideration that U.S. Highway 51 right-of-way will be included in ATXI's easement (Curt Corzine, owner of Gabriel Farms, Inc. is not related to Mr. Leon Corzine that is referenced in the Assumption/Corzine Route). The Landowners, due to the activity of ATXI and its representatives, were led to believe the Approved Route would cross other landowners' properties immediately adjoining the highway right-of-way. *See* Corzine Exhibit 1.0 (Direct Testimony) at lines 96-109 and Branyan Exhibit 1.0 (Direct Testimony) at lines 193-197; *See also* Attachment 1. Similarly, Commission Staff had understood the Approved Route to overlap

the existing highway right-of-way adjacent to the roadway and gave their support for that route in Docket No. 12-0598. Their support was based on an understanding similar to that of the Landowners' – that the route would be next to US Highway 51. The Landowners had no objection to the transmission line in the Approved Route, other than verifying reasonable valuation of the property affected, if the intended route would have followed the right-of-way line of U.S. Highway 51.

It is the position of the Landowners that ATXI's deviation from the Approved Route by approximately 900 feet to reduce its costs, notwithstanding ATXI's alleged purpose, constitutes a substantial Route modification from the Commission's Order. ATXI, prior to seeking eminent domain authority must address, in an appropriate application, its authority for the Route modification and afford all affected Landowners the opportunity to respond to ATXI's Revised Route and be heard. *See* 2014 Ill. PUC LEXIS 517, 18-21 (Ill.C.C.) (Modifying the route of the transmission line to affect property owners who had no prior notice or opportunity to be heard is not a modification "of a minor nature", but rather, a modification that affects these property owners' substantial rights... Accordingly, the Commission finds that an order in another docket approving a route modification is necessary before ATXI can lawfully construct the complete Pana-Mt. Zion segment).

For the above stated reason, the Commission should deny ATXI's petition for authority to pursue use of eminent domain power with respect to the properties of Gabriel Farms, Inc. and James and Chelli Branyan.

III. STATUTORY AUTHORITY AND STANDARD OF REVIEW

A. Contact with Landowners

After ATXI established its Revised Route sometime prior to April of 2014, which cut diagonally across the Landowners properties, Mr. Corzine (again, no relation to Leon Corzine) with Gabriel Farms, Inc., still did not receive notice or any offer until approximately six (6) months after other similarly situated property owners between Pana and Mt. Zion received their offers. *See* Corzine Exhibit 1.0. This is unreasonable.

Additionally, ATXI conduct has put Mr. Corzine and Mr. Branyan in a timetable that forces him to deal with negotiations and Commission proceedings at the same time he is required to be in his fields to sustain his livelihood. This is unfair to these landowners.

B. Explanation of Compensation Offer

The Landowners do not have a position as to the reasonableness of ATXI's explanation of compensation offers.

C. Reasonableness of Compensation Offers

ATXI, through the testimony of Rick Trelz, went to great lengths to explain its formula for producing "reasonable" compensation offers. *See* ATXI Exhibit 1.0 pp. 10-12. Furthermore, he explained that ATXI applied its formula to all the landowners so they would receive relatively similar offers based upon certain factors and the valuation of the appraisal. This does not necessarily guarantee reasonable compensation offers. To the contrary, if a party is vastly differently situated then it is unreasonable to assume that a standardized uniform formula would produce a reasonable offer. The Landowners, Gabriel Farms, Inc. and the Branyans, are the only ones in the Pana to Mt. Zion segment that are being impacted by such a severe deviation from the approved route. Unique compensation to match the unique deviation would make for a reasonable offer.

D. Responsiveness to Landowner Concerns

The major concern raised by Gabriel Farms, Inc. and the Branyans has been the transmission line route. The issue of transmission line route was raised with ATXI and alternatives were proposed by the landowners. However, ATXI asserted the same issues of cost and delay as they assert now before the Commission. As discussed above, those issues are not valid defenses to exceeding the scope of the Approved Route.

Furthermore, the Landowners have testified that they had no idea the transmission would cross through their properties in the manner currently proposed by ATXI. *See* Corzine Exhibit 1.0 (Direct Testimony) at lines 96-109 and Branyan Exhibit 1.0 (Direct Testimony) at lines 193-197. Additionally, no detailed explanation was given by ATXI for doing so until ATXI filed its petition and testimony in this proceeding. This conduct is unreasonable and did not advance negotiations.

E. Usefulness of Further Negotiations

The usefulness of further negotiations with ATXI will depend on the Commission's final course of action in this matter. If the Commission directs ATXI to pursue a route along, near, and/or adjacent to the **west** side of U.S. Route 51, then at least Gabriel Farms, Inc. may find itself unaffected by the route of the transmission line. The Branyans would still be affected by the route, but some of their concerns about the transmission line may be addressed by such a route and further negotiations would likely prove useful. If the Commission directs ATXI to pursue a route along, near, and/or adjacent to the **east** side of U.S. Route 51, then both landowners would find some of their concerns allayed, and further negotiations would likely prove useful.

IV. CONCLUSION

WHEREFORE, the Landowners respectfully request that the Illinois Commerce Commission:

- A. Dismiss or otherwise postpone these proceedings; and
- B. Adopt the recommendations of Greg Rockrohr dated April 20, 2015 in Docket

No. 15-0237 (Page 19) as follows:

(1) Since ATXI could construct its line on the west side of Hwy 51 at County Road 1150N, despite its preference not to do so, the Commission could simply reaffirm that ATXI is to construct its transmission line along Hwy 51 rather than angling cross agricultural land, as it plans to do, or

(2) The Commission could approve ATXI's modified route in a separate proceeding. I believe that requiring a separate proceeding to contemplate such an approval would allow affected landowners an opportunity to provide important information about their properties, and would be consistent with the Commission's decision in Docket 14-0522.

C. Or, in the alternative, grant ATXI permission to construct its line parallel and adjacent to the East side of Highway 51.

Respectfully submitted,

GABRIEL FARMS, INC. and
JAMES AND CHELLI BRANYAN, Intervenors

By: /s/ Jason E. Brokaw
One of its Attorneys

Herman G. Bodewes, Reg. #0241563
hbodewes@giffinwinning.com
Jason E. Brokaw, Reg. #6305541
jbrokaw@giffinwinning.com
Giffin, Winning, Cohen & Bodewes, P.C.
One W. Old State Capitol Plaza
Myers Building – Suite 600
Springfield, IL 62701
Phone: (217) 525-1571
Fax: (217) 525-1710

CERTIFICATE OF SERVICE

I, Jason E. Brokaw, an attorney, certify that on April 29, 2015, I caused a copy of the foregoing INITIAL BRIEF OF GABRIEL FARMS, INC. AND JAMES AND CHELLI BRANYAN to be served by electronic mail to the individuals on the Commission's Service List for Docket 15-0237.

/s/ Jason E. Brokaw

Attorney for Gabriel Farms, Inc. and
James and Chelli Branyan