

COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY STATE BOARD ON
ELECTRIC GENERATION AND TRANSMISSION SITING

In the Matter of:

APPLICATION OF SOUTHERN INDIANA
GAS & ELECTRIC CO., D/B/A VECTREN
ENERGY DELIVERY OF INDIANA, INC.
FOR A CONSTRUCTION CERTIFICATE TO
CONSTRUCT AN ELECTRIC TRANSMISSION
LINE FROM ITS A.B. BROWN PLANT TO THE
BIG RIVERS EHV STATION

CASE NO. 2010-00223

RECEIVED
KENTUCKY STATE BOARD ON

SEP 16 2010

ELECTRIC GENERATION AND
TRANSMISSION SITING

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The City of Henderson, Henderson Municipal Power & Light, and Henderson Water Utility (hereinafter "Intervenors"), by counsel, in support of their Motion to Dismiss the Application that is the subject of this matter, state as follows:

Southern Indiana Gas & Electric Co., d/b/a Vectren Energy Delivery of Indiana, Inc. ("Vectren") filed an application for a certificate to construct a nonregulated electric transmission line ("Application") before the Kentucky State Board on Electric Generation and Transmission Siting ("Siting Board") on July 15, 2010. The Intervenors strenuously object to the proposed route of the transmission line for the reasons set forth in their pleadings filed in this case. With respect to the instant Motion, the Intervenors submit that the Application is deficient on its face, incomplete, and therefore must be dismissed. Further, the transmission line cannot be constructed in accordance with "all applicable legal requirements." KRS 278.714(3). As a result, the Siting Board should deny the

Application or condition approval of the Application upon relocation of the route of the line.

I. Vectren's Application is Deficient, Incomplete and Must be Dismissed.

Pursuant to KRS 278.714(2)(b), a completed application shall include "[a] full description of the proposed route of the transmission line and its appurtenances." Such description shall include a map or maps showing:

1. The location of the proposed line and all proposed structures that will support it;
2. The proposed right-of-way limits;
3. Existing property lines and the names of persons who own the property over which the line will cross; and
4. The distance of the proposed line from residential neighborhoods, schools, and public and private parks within one (1) mile of the proposed facilities.

The foregoing requirements in KRS 278.714(2)(b) contemplate that Vectren must describe the property and the rights-of-way over which the proposed transmission line will cross. By necessary implication, Vectren must possess a legal right or at least demonstrate that it can obtain the right to enter, occupy, construct and maintain the property upon which its line will cross. Otherwise, a trespass or unlawful conversion occurs.

Here, Vectren cannot show that it has the right or that it can obtain the right to construct and maintain its line over the Intervenor's properties. The Intervenor's have expressly indicated to Vectren that they will not grant an easement or right-of-way over

their respective properties that would be affected by the proposed route.¹ Further, Vectren lacks the power of eminent domain with respect to the public property owned by the City, and consequently may not condemn such property.

In the absence of valid property rights, Vectren may not construct and maintain the transmission line. If Vectren desires to raise a dispute with respect to purported property rights, the correct forum for adjudication of such rights is the local circuit court, not the Siting Board. *See* KRS 23A.010. This well-established principle is illustrated through various Kentucky court and administrative decisions, primarily in the mining context, but should nonetheless apply to the instant matter. *See Dept. for Natural Resources v. Stearns Coal*, 563 S.W.2d 471, 473 (Ky. 1978) (restating fundamental rule of administrative law, “It is fundamental that administrative agencies are creatures of statute and must find within the statute warrant for the exercise of any authority which they claim.”) (citation omitted). In *Kentucky Southern Coal Corporation v. Kentucky Energy and Environment Cabinet*, 2009 WL 4723197 (Ky. App. 2009), the Court held that the Energy and Environment Cabinet (“Cabinet”) lacked authority to adjudicate a property dispute between a surface owner and mineral owner. In that case, the mineral owner attempted to renew a surface coal mining permit opposed by the surface owner. In its permit application, the mining company was required to state the source of its legal right to mine coal on the property affected by the permit. The Court determined a property dispute existed and stated that any dispute as to property rights must be

¹ “Obtaining easements and rights-of-way necessary to extend service shall be the responsibility of the utility.” 807 KAR 5:006. This regulation falls under the general rules applicable to electric utilities subject to the jurisdiction of the Public Service Commission (“PSC”). While this authority relates to the performance of service by the utility, the principle that a utility is responsible to obtain necessary easements and rights-of-way should apply to a utility proposing to transmit electricity.

adjudicated in the court of general jurisdiction in which the real estate is located. *Id.* at *4-5. The burden was held to be on the permit applicant to resolve such issues prior to applying for, or obtaining, a permit. *Id.* at *4. Absent a valid lease, deed, contract, judgment, or otherwise written consent, the Cabinet had no basis for finding that the mining company had a legal right to mine. *Id.* at *4-5.

Numerous Cabinet cases hold that the Cabinet has an affirmative obligation to make a determination as to the completeness and accuracy of mining permit applications; however, neither the Cabinet nor the Hearing Officer has the authority to resolve property disputes. *See, e.g., Anderson v. Environmental and Public Protection Cabinet, et al.*, 2007 WL 2155852 at *9 (Ky. Envir. Pub. Prot. Cab. 2007); *Johnson v. Environmental and Public Protection Cabinet, et al.*, 2007 WL 198731 (Ky. Envir. Pub. Prot. Cab. 2007). In this context, the Cabinet is required to review right of entry information submitted by a permit applicant and make a determination as to whether the applicant had made an adequate, or “*prima facie*” showing that it had a right to mine the property. *Right of Entry Determinations*, Memorandum from Phillip J. Shepherd (November 19, 1992).

While the instant matter is presently before the Siting Board, the Siting Board is “attached to the Public Service Commission for administrative purposes.”² KRS 278.702(3). The Siting Board has an obligation to review Vectren’s Application and

² The Siting Board is an agency within the Cabinet and is charged with reviewing applications for high-voltage transmission lines that are not regulated by the PSC. The Siting Board consists of five permanent *ex officio* members, which include the three members of the Kentucky Public Service Commission, and two *ad hoc* members appointed by the Governor. KRS 278.702(1). The chairman of the PSC serves as Chairman on the Siting Board. KRS 278.702(5).

determine whether it is administratively complete. 807 KAR 5:110, Section 3(3).³ An application cannot be administratively complete unless the applicant describes the property, and by necessity, shows a legal right or the ability to obtain a legal right to the property, over which the applicant's transmission line will cross. Otherwise stated, even though the Siting Board does not have jurisdiction to adjudicate property rights or a potential property dispute, it does have an obligation at minimum to require the applicant to make a *prima facie* showing that the applicant has the right or can obtain the right to construct its transmission line.

Applying these principles here, Vectren has a statutory obligation to describe the property over which its line will cross. Obviously, Vectren cannot cross such property without valid property rights. As a result, as part of its permit application, Vectren is obligated to make a *prima facie* showing that it has a legal right to enter, occupy, construct and maintain the subject property. Vectren, however, cannot obtain those property rights over the City-owned public property. As a result, it has failed to show its legal right to construct the transmission line. Vectren's Application is, therefore, deficient, incomplete and must be dismissed.

II. The Siting Board Must Deny Vectren's Application Because Vectren Cannot Construct its Line in Accordance with "Applicable Legal Requirements."

Vectren's Application must be denied because construction of the line along the proposed route without the Intervenor's consent will violate Sections 163 and 164 of the

³ The Siting Board may reject for filing any document that on its face does not comply with an administrative regulation of the board." 807 KAR 5:110, Section 3(4).

Kentucky Constitution. Accordingly, the Siting Board must make a determination that Vectren cannot comply with “all applicable legal requirements” in constructing its transmission line.

KRS 278.714(3) states, in pertinent part:

Within ninety (90 days) of receipt of the application, or one hundred twenty (120) days if a local public hearing is held, the board shall, by majority vote, grant or deny the construction certificate either in whole or in part. *Action to grant the certificate shall be based on the board's determination that the proposed route of the line will minimize significant adverse impact on the scenic assets of Kentucky and that the applicant will construct and maintain the line according to all applicable legal requirements. . . .* If the board determines that locating the transmission line will result in significant degradation of scenic factors or *if the board determines that the construction and maintenance of the line will be in violation of applicable legal requirements*, the board may deny the application or condition the application's approval upon relocation of the route of the line, or changes in design or configuration of the line.

(Emphases added).

It is impermissible for Vectren to construct the electric transmission line, as proposed, within the City of Henderson without consent from the City. Ky. Const. Section 163 states, in relevant part,

No . . . electric light company, within a city or town, shall be permitted or authorized to erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply.

Further, Ky. Const. Section 164 provides a city with authority and discretion to grant a franchise. A “franchise” is a right or privilege granted by the government to a party to do some act which that party could not otherwise do. *Eastern Kentucky Resources v. Arnett*,

934 S.W.2d 270 (Ky. 1996). Sections 163 and 164 of Kentucky's Constitution must be read together -- the right to occupy the streets and public ways conferred by Section 163 can only be granted in the manner provided in Section 164. *Rural Home Telephone Co. v. Kentucky & Indiana Telephone Co.*, 107 S.W. 787 (Ky. 1908). Through these constitutional provisions, a city's or municipality's legislative board is afforded the discretion, through the grant of a franchise, to allow a public utility to use and occupy its streets or public grounds for the delivery of light and power. *See City of Florence v. Owen Elec. Co-op., Inc.*, 832 S.W.2d 876 (Ky. 1992); *Kentucky Utilities Co. v. City of Paris*, 179 S.W.2d 676 (Ky. 1944).

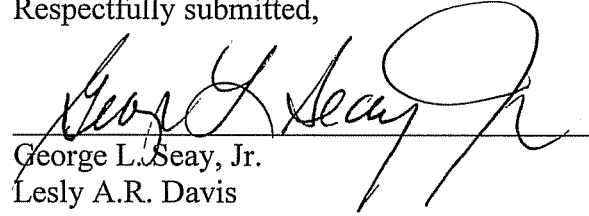
With respect to property belonging to a city, a utility must obtain the city's consent to use its streets and public grounds. *See City of Nicholasville v. Blue Grass Rural Electric Cooperative Corp.*, 514 S.W.2d 414 (Ky. App. 1974). Under Kentucky law, only cities have the right of final decision as to whether a public utility may use or occupy its streets. *Whitaker v. Louisville Transit Co.*, 274 S.W.2d 391 (Ky. 1954). Generally, courts may not interfere with or enjoin a municipality's legislative board in the exercise of discretion in granting a franchise to a utility. *Kentucky Utilities Co. v. City of Paris*, 179 S.W.2d 676 (Ky. 1944).

Applying these principles to the matter at hand, Kentucky law requires Vectren to obtain the Intervenor's consent through issuance of a franchise before it will be authorized to construct and erect its proposed transmission line "along, over, under or across" the city streets or public grounds. The Intervenor has not and will not grant any such consent to Vectren as it stands with respect to the proposed route. As a result, Vectren cannot construct its transmission line in accordance with "all applicable legal

requirements” and, therefore, should not be permitted to do so in the manner proposed in its Application.

WHEREFORE, the Intervenors pray that their Motion to Dismiss be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

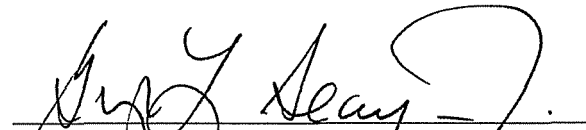
This is to certify that the original and ten true and correct copies of the foregoing has been served upon the following, by hand delivery, at the filing office of the Kentucky Public Service Commission, on this the 16th day of September, 2010:

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