STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
R. Lawton McIntosh, Circuit Court Judge

Appellate Case No.: 2016-001037

Oien Family Investments, LLC, ...Appellant

v.

Piedmont Municipal Power Agency, ...Respondent

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Ten upstate municipalities that own or operate their own electric utilities formed a joint action agency, Piedmont Municipal Power Agency ("PMPA"), to purchase from Duke Energy ("Duke" or Duke Power") wholesale electrical power to supply to their members. The City of Newberry ("Newberry") is a member of PMPA.

In February, 2013, the Board of Directors for PMPA voted to build a new transmission line from Duke's line to a new substation in Newberry. Based on a joint effort by PMPA's engineer, Mike Frazier ("Frazier"), a professional engineer specializing in municipal utilities, Alan Cobb ("Cobb"), Newberry's Utilities Director Marc Regier ("Regier") and Newberry's electrical foreman Todd Guy ("Guy"), the route tentatively selected for the transmission line to tap Duke's line and connect to the new substation crossed one or two contiguous parcels of land owned by Oien Family Investment, LLC. Lynn and June Oien are the principals of the Oien Family Investment Trust, LLC ("Oien" or "Oiens").

After several months of failed negotiations with the Oiens as to the exact location of the new transmission line, PMPA served a Notice of Condemnation and Tender of Payment on or about March 6, 2015.

Oien timely filed a Complaint challenging the condemnation pursuant to §28-2-470, S.C. Code, 1976, as amended. Grounds for the Complaint were:

a) The proposed taking is not necessary;

b) The proposed taking is not reasonably calculated to fulfill a public purpose; rather, the proposed taking has been initiated to further arbitrary and capricious decisions and actions taken by the defendant;

c) The proposed taking is not for a public use; and

d) There are less intrusive means available to the defendant to accomplish its intended objectives and to comply with South Carolina law, including aesthetics and the fact that the taking crosses an existing easement when another means of taking would not do so.

PMPA filed an Answer and Counterclaim on March 26, 2015 denying the relief requested by Oien and counterclaiming for attorney's fees and costs of litigation. Oien filed a Reply on April 9, 2015.

Trial was held before the Honorable R. Lawton McIntosh on March 28 and 29, 2016. At the onset of the trial, Oien announced it would go forward on two grounds. They were: (1) the proposed taking was not for public use; and (2) PMPA abused its discretion when deciding on the route of the transmission line. At the close of the case, Oien abandoned its allegation the condemnation was not for public use. PMPA moved for a directed verdict which was held in abeyance until PMPA presented its case.

On April 27, 2016 Judge McIntosh issued his Order which denied Oien relief and granted a directed verdict for PMPA.

On May 6, 2016, Oien filed a Motion to Alter or Amend Judge McIntosh's Order. On May 9, 2016 Judge McIntosh issued an Amended Order and on May 17, 2016 Oien filed another Motion for Reconsideration, and Motion to Alter or Amend.

In a Form 4 Order dated May 16, 2016, Judge McIntosh denied the first Oien Motion to Alter or Amend and an additional Form 4 Order denying the second Oien Motion to Reconsider, Alter or Amend.

On May 18, 2016, Oien filed its Notice of Appeal.

The right-of-way sought to be condemned by PMPA runs generally in a straight line along the common property line of the two parcels of the Oien properties. The Oiens want the right-of-way to bend and cross a pond on the bottom of one of its parcels.[1] In support of the pond or "southern" route, the Oiens claim PMPA did not adhere to what Oien claims are certain requirements mandated by Southern Development v. SCPSA, 311 S.C. 29, 426 S.E.2d 748 (1993).

STATEMENT OF FACTS

As a member of PMPA, Newberry receives wholesale electricity from Duke Energy. The electrical energy comes to Newberry from three delivery points that convey the electricity to a large transformer substation owned by Duke and leased to Newberry. (Transcript p. 75, 76).

As early as 2000, Newberry began considering upgrading its electrical system. This upgrade would utilize land already owned by Newberry for a substation which would eliminate rent paid to Duke for Duke's substation. In addition, the new substation would allow Newberry to make repairs on malfunctions at the substation instead of

[1] The reason the Oiens want the southern route is so they will not see the transmission line from a house they claim they will eventually build.

relying on Duke to come and make repairs to its substation. By making its own repairs, Newberry could shorten the time its electrical system was down due to malfunctions. The need to upgrade became more urgent when Kraft Foods, Inc., a large Newberry customer, announced plans to expand its facilities which would require more electrical capacity. The new transmission line would supply that additional electricity.

To assist in the upgrade, Newberry engaged Alan Cobb, a professional engineer who primarily works for municipalities who own their own utilities.

Cobb began working with Newberry utility officials and the engineer for PMPA to find a suitable route for a new line to the planned substation. Because Duke Energy owned the transmission lines from the origin of the electrical power, it was necessary for Newberry to determine where along its line Duke Energy would permit Newberry to place a new tap. Cobb determined there were two possible points for a new tap on Duke Energy's lines to connect to the new substation. (Transcript p. 345).

One possible tap was ruled out very quickly because it was twice the length and ran through urban and commercial property. (Transcript p. 346).

The other possible route considered by Cobb, PMPA and Newberry ran across the two properties of Oien. One of the Oien parcels was basically undeveloped woodlands and fields. The other Oien parcel had a 2,000 sq. ft. house overlooking a fairly large pond estimated to be four or more acres.

After conducting his investigation, Cobb presented a report to the PMPA Board in February, 2013. (Transcript p. 359). The PMPA Board voted to build the line by resolution (Ex. Def. 1). A general route for the line was referred to in the resolution. The Board gave the General Manager or his designee authority to proceed. After approval by

the Board, Cobb began to engineer various lines from a permissible Duke Energy tap point to the Newberry substation in consultation with PMPA's engineer and Newberry.

Once the decision was reached to build the new transmission line and its approximate location, Newberry began to contact the affected fifteen (15) landowners over whose land the line would pass. Newberry electrical foreman, Todd Guy, was tasked with informing the landowners of the project. Guy was a native of Newberry and knew most of the landowners.

The principals of Oien Family Investment Trust, LLC, Lynn and June Oien, are residents of Florida and visit their property in Newberry as infrequently as quarterly (Transcript p. 125, l. 11-12). Nevertheless, Guy contacted the Oiens in early 2013 by phone and made arrangements to meet the Oiens on their property. (Transcript p. 421, l. 1 – p. 422, l. 18).

At his meeting with the Oiens on their property, Guy showed a proposed route along the property line of the two Oien parcels which was basically in the middle of the Oien property if the two parcels are treated as one. This route became identified as the "middle route". Lynn Oien objected to this route and requested the line be run on the bottom of the parcel that contained the house and pond. (Transcript p. 423 l. 1 – p. 424, l. 17). This route became identified as the "southern route".

As a result of Lynn Oien's request to Guy, Newberry, PMPA and Cobb explored and made drawings of the southern route proposed by Oien. Guy met again with the Oiens and displayed the drawings. The Oiens now rejected the southern route because it would take away the buffer of trees between the Oien property and the neighborhood. (Transcript p. 424, l. 11 – p. 425, l. 13).

After Oien rejected the southern route, Guy obtained drawings of the proposed line on the northern side and presented it to the Oiens. The Oiens wanted the line further north so Guy obtained another drawing which the Oiens also rejected and asked that the line go back to the middle route. (Transcript p. 428, l. 16 – p. 429, l. 15). Guy arranged for the middle route to be surveyed.

Marc Regier, the utilities director for Newberry, along with Todd Guy, met Lynn Oien on the property and showed him maps of the line on the middle route. Regier showed Oien pictures of poles. Regier showed Oien the approximate location of the line. (Transcript p. 440, l. 15 – p. 442, l. 25).

Oien was concerned about saving some trees on the middle route so Regier had a surveyor go back on the property to angle the line so as not to clip the trees. (Transcript p. 442, ll. 3-14).

In June, 2013, Oien engaged Paul Major ("Major") to take over contact with Newberry. Major is a forester and real estate appraiser who had done two right-of-way appraisals and had never been qualified as an expert (Transcript p. 198, ll. 5-12). Major relied on two jury verdicts as part of his appraisal (Transcript p. 206, ll. 13-22). After Major came on the scene, the relationship became adversarial and Todd Guy stopped any contact with the Oiens. (Transcript p. 442, ll. 9-16). Major acknowledged meeting with Newberry officials at least in September and November, 2013 concerning the route, compensation and the timber on the land.

Through Major, the Oiens wanted a right-of-way agreement to review. Regier provided one. (Transcript p. 446). Major wanted the cost of timber and other costs included so Regier asked for permission to survey the middle route. (Transcript p. 448,

l. 16 – p. 449, l. 21). After the survey of the middle route, Regier gave Major the survey and PMPA's appraisal of the costs of obtaining the right-of-way. Paul Major next advised Regier that the Oiens wanted to change back to the southern route. By this time the substation had been built and the right-of-ways of the other property owners had been obtained. (Transcript p. 456, l. 20 – p. 457, l. 20).

At the November, 2013 meeting, PMPA and Newberry officials were given the impression by the Oiens that they wanted the line to go in the middle of their two parcels along the joint property line on one of the two proposed middle routes.

After the November, 2013 meeting, Lynn Oien left a voice message on the phone of PMPA's engineer, Mike Frazier, which Frazier took to be the Oien's approval of the middle route. (Ex. 3). A title problem delayed further action until August, 2014 when a right-of-way agreement for the middle route was sent to Oien which was rejected. (Transcript p. 150).

After PMPA sent the Notice of Condemnation to Oien another meeting was held with the Newberry City Manager between the Oiens and Regier. By this point Newberry would not change the route of the line again. (Transcript p. 456, ll. 6-12).

The substation was completed in April, 2014.

ARGUMENT

I. THE LOWER COURT DID NOT ERR IN REFUSING TO GRANT INJUNCTIVE RELIEF TO THE APPELLANT BECAUSE THE RESPONDENT DID NOT ABUSE ITS DISCRETION IN SELECTING THE ROUTE FOR ITS TRANSMISSION LINE.

The Oiens appeal the order of the trial judge that found PMPA did not abuse its discretion in selecting one route over another upon which to build its transmission line over their property. Oien asserts PMPA's choice of routes lacked a factual basis because

no adequate written study was done by PMPA to compare land acquisition and engineering costs of the route preferred by Oien.

In support of their position that written, alternate route studies are necessary before PMPA can exercise its discretion on a factual basis, Oien cites So. Dev. Land & Golf Co. v. SC Pub. Serv. Auth., 305 S.C. 507, 409 S.E.2d 428 (Ct. App., 1991) (Southern I) aff'd as modified, 311 S.C. 29, 426 S.E.2d 748 (1993) (Southern II).

In Southern I, the Court of Appeals considered a Master-in-Equity's decision that the condemning authority, Santee Cooper, did not consider the land acquisition costs in determining where to place its line and therefore the decision was an abuse of discretion. According to the Master, the route chosen by Santee Cooper had a land acquisition cost of $5,762,000 while the alternate route had land acquisition costs of $1,284,000 and $1,315,000. The Master also found the alternate routes were somewhat safer and more aesthetically pleasing. The decision in Southern I does not make clear how the Master determined the land acquisition costs.

The Master relied on a Florida case for the factors he considered is his decision. In Florida Power & Light Co. v. Berman, 429 So.(2d) 79 (Fla. Dist. Ct. App. 1983) the court held that a condemning authority had to weigh the following criteria in determining a condemnation: (1) availability of an alternate route; (2) cost; (3) environmental factors; (4) long-range planning; and (5) safety considerations. An abuse of discretion occurs when a route is selected without weighing and considering these factors.

In the Florida case, the condemning authority was not allowed to condemn its chosen route because of the environmental impact. The court held, "If the transmission lines go along Old Sherman Road, there will be substantial destruction of this unique

ecological niche because of the removal of trees and the intrusion of sunlight, which will allow many weeds to grow which do not grow in that area at this time. It will then cause a change in the ecological character of the road area." Id. at p. 80.

In reviewing the Master's decision in Southern I, the Court of Appeals observed that there were no South Carolina cases finding the condemning authority had abused its discretion. In the reported cases there was no outline of what constituted a clear abuse of discretion in the condemnation context.

The Court of Appeals went on to hold that Santee Cooper had established legitimate criteria for rational decision making by utilizing the factors of safety, reliability, aesthetics, and cost. The Court of Appeals held this list was not exclusive and there may be other criteria utilized. In the Santee Cooper case, however, the failure to consider land acquisition costs indicated a lack of a factual basis.

In remanding the case to the Master, the Court Appeals said:

> We vacate this portion of the master's decision and remand with instruction that the master direct Santee Cooper to reevaluate its proposed route and the alternate routes proposed by Southern. In this evaluation, Santee Cooper should consider its criteria of safety, reliability, aesthetics, and costs along with any other appropriate factors such as environmental conditions and long range area planning by public authorities. The cost factor should include land acquisition cost. Santee Cooper should then exercise its discretion in the choice of a route based upon a reasoned analysis of the relevant factors. By this opinion we do not imply that any route previously considered is eliminated from the consideration process or that any new route cannot be considered. We simply hold that a condemning authority must exercise its discretion by a rational decision making process which is supported by facts. (Southern I at 516, 517)

In Southern II, the Supreme Court addressed the abuse of discretion issue with this comment:

> Accordingly, we affirm the Master's order enjoining Santee Cooper from proceeding with the condemnation of the easement in question. Although

> we agree with the Court of Appeals' analysis of the issue of abuse of discretion, in light of our holding on the question of estoppel, we find the remand as ordered by the Court of Appeals unnecessary. (Southern II at 751)

Most of Oien's arguments are based on flawed or doubtful interpretations of the Southern cases. For example, in its Argument I(a) Oien states that a basic requirement of Southern is that PMPA "must have some writing to support 'a rational decision-making process'". Apparently this conclusion is based on the comment by the Court of Appeals found on page 516, So. Dev. Land & Golf Co. v. SC Pub. Serv. Auth., 305 S.C. 507, "When Santee Cooper employees considered the alternate routes proposed by Southern, their cost estimates presented to the board of directors did not include land acquisition costs. No notes or memoranda were kept by Santee Cooper employees of their analysis."

If the Court of Appeals wanted writing to be a basic requirement in condemnation cases, it certainly did not say so.

Another example of Oien's overreach on its interpretation of the Southern cases is found in Argument II(B) which Oien contends the Southern cases overruled Bookhart v. Central Electric Power Co-op, 219 S.C. 414, 65 S.E.2d 781 (1951). The Bookhart decision stated at p. 432:

> 'Economic and engineering considerations require such lines to be constructed as nearly straight as practicable, and there is no other feasible route for the line except the route across the lands in question, because any other route would increase the length of the line by several miles, and the cost would be substantially increased by reason of the additional guy wires, anchors and appropriate structures which would be necessitated at each of four additional angles.' The factual issue of the necessity is for trial by the Court, an impartial tribunal, which satisfies the State and Federal constitutional requirements of due process of law and affords equal protection of the law.

The Bookhart decision is not mentioned in either Southern opinion.

The Oien argument that PMPA abused its discretion is primarily based on the lack of a written alternate route study of the southern route. In its attempt to make Oien facts fit the Southern criteria, Oien relies on the testimony of its witness, William Rogers, who testified the southern route land acquisition cost was cheaper than the middle route.

In regard to land acquisition costs, Alan Cobb, the utility engineer, initially estimated land acquisition costs at $100,000 based on land value of $5,000 per acre (Transcript p. 372, l. 21 – p. 373, l. 13). The value per acre is essentially the same as found by Oien's appraiser, Paul Major, who valued the land at $5,200 per acre (Transcript p. 187, l. 17). David Graydon, an MAI appraiser and stipulated to be an expert real estate appraiser (Transcript p. 309, ll. 9-10), valued Oien's property at $5,000 per acre (Transcript p. 312, ll. 4-8).

By all testimony the preliminary middle route passed over undeveloped fields and woodlands. This route was selected after consultation between PMPA's engineer Frazier, Cobb, and Newberry's utilities manager, Regier (Transcript p. 343, ll. 5-18). After the tentative route was selected, the record makes clear that Oien was consulted. After several changes were requested by Oien, Cobb walked the southern route which crossed over the pond. He concluded that PMPA could not tap the Duke Energy line where Oien wanted it tapped (Transcript p. 362, ll. 4-18). He also concluded the southern route would be very difficult and more costly. The southern route had at least two turns, one about 45 degrees and the about 30 degrees (Transcript p. 47, ll. 14-20). Frazier estimated the additional turns would add $30,000 to $40,000 expense (Transcript p. 61, ll. 22-25). The additional pole and installation cost for the southern route was estimated to be

$200,000 (Transcript p. 363, ll. 10-24). Finally, crossing the Oien pond could cause Corp of Engineers and environmental problems (Transcript p. 363, l. 25 – p. 366, l. 12).

Oien attempted to overcome the increased cost of the southern route in two ways. The first was to have its appraiser Major testify he would damage the entire 116 acre tract an average of 10 to 20 percent or more if the line is on the middle route. At 20 percent damage to the entire 116 acres the damages would be $116,000 (Transcript p. 190, l. 5 – p. 191, ll. 11-13). In other words, Major damaged acreage from which the transmission line cannot be seen.

On the southern route Major did not damage any of the remainder (Transcript p. 192, l. 2 – p. 193, l. 8), even though the line would be easily visible across the pond from the existing structure.

Major's appraisal relies upon subjective feelings of the landowner and should be rejected out of hand. It flies in the face of reason, experience and common sense to damage the entire 116 acre tract the same percent regardless of how far the acreage is from the power line. While estimates differ as to the distance of the line from the proposed home site, PMPA's appraiser Graydon testified the proposed home site to be over 300 feet. Major estimated the distance at 400 feet (Transcript p. 188, l. 25 – p. 189, l. 5). Oien estimates 250 to 300 feet (Transcript p. 140, ll. 1-2).

PMPA's appraiser Graydon testified that in his studies he found that unless a house is within 300 feet or less to a transmission line, the remainder did not lose value (Transcript p. 313, ll. 3-22).

The proposed southern route takes the line near the Oiens' existing residence and over a four (4) acre pond. Reason cannot reconcile why the line on the southern route

does not damage any acreage. Lynn Oien himself was ambivalent concerning the damages from the southern route. When asked, he first said there was no damage (Transcript p. 148, ll. 11-13). On cross examination he damages the remainder at $30,000 (Transcript p. 170, l. 24 – p. 171, l. 7).

The Oiens rely on the testimony of their main witness, William Rogers (Rogers) to make their argument that the land acquisition costs of the southern route are less than the middle route. In addition, his testimony supports the Oiens' contention that the southern route was cheaper overall than the middle route and that PMPA did not comply with the Southern I criteria. Rogers was qualified as an expert on procedure for land acquisition and condemnation (Transcript p. 229, ll. 13-24). He testified that he has no experience in land valuation or engineering. He submitted a report as to his alternate route studies. (Ex. 40)

According to Rogers' route study, the middle route is 2,200 feet+/- in length and requires 3.95 +/- acres at $5,200 per acre for a right-of-way cost of $182,960. This figure includes damaging the remaining 112 acres 15 percent. Rogers damaged the "proposed residential development at $75,000", which he stated was from Major's report (Ex. 40, p. 2). In fact, Major's report (Def. Ex. 28, p. 5) only uses the figure of $75,000 once and with this comment, "Also, the Oiens have spent in excess of $75,000 for preparation of their planned home site, including drilling a well, grading the home site, and obtaining buried electrical service from Newberry Electric Cooperative for this home site which would not be useable if the northern route were selected." [Emphasis added].

According to Rogers' route study the southern route contains approximately 5.51 acres and is 3,200 feet +/- in length. Rogers does not damage any remainder because

Oien told him not to (Transcript p. 260, ll. 13-17). Thus Rogers found the southern route right-of-way costs $28,650. The total southern route right-of-way cost according to Rogers is $29,100.

Rogers did not use Cobb's estimate of the costs of construction in his report although Cobb is an engineer with a lifetime of experience in costs of construction for utilities and had actually walked the southern route. Instead Rogers used the costs of a line built by another utility. Rogers did not factor in the additional costs of going over a pond. By using the average cost from another line and applying it to the current length of the middle route and to the southern route, Rogers found the middle route had less construction and engineering costs but was more expensive because of the land acquisition costs.

Thus Rogers' alternate route study of the costs of the middle route contains an error in costs of $75,000 which according to Major belongs only to the northern route. Correcting the error brings Rogers' cost analysis down to $107,960 ($182,960 - $75,000 = $107,960).

By correcting Rogers' error in his costs, Rogers total cost for the middle route was $289,200 versus $292,710 for the southern route. If one adds Cobb's estimated additional costs of $200,000 to $240,000 to Rogers' figures for the southern route, one gets a huge cost differential in favor of the middle route.

The trial court had before it two estimates of the land acquisition costs – PMPA's Graydon of $21,075 and Oiens' Major of $107,960. As Rogers testified no one really knows for certain what the land acquisition cost will be until a jury speaks (Transcription p. 249, ll. 21-24).

Given the conflicting evidence of the costs of the project, the trial court did not err in finding that PMPA had a factual basis for choosing the middle route as regards costs to include land acquisition costs.

The Oiens used Rogers to opine that PMPA did not comply with the criteria in the Southern cases. The basis for this contention is that PMPA did not do an adequate alternate route study. Rogers testified that such a study would include bringing in design engineers, environmental engineers, consultant biologists that would do a wetland study and also consider wetland resource implications (Transcript p. 238, ll. 17-20). All these experts would add costs to the project and would come to the same conclusion Cobb reached – the southern route was longer, required more construction costs and may have wetland issues. It cannot rationally be argued that choosing a shorter, less expensive route does not have a factual basis.

It is not uncommon to have dueling experts in court cases. It is Hornbook law that the trier of fact may give such weight to an expert's opinion as the trier concludes that opinion deserves.

In conclusion, the Oiens argue that no rational decision can be made unless there is written paperwork to support it. Thus the writing becomes more important than the knowledge, experience, on the ground observations, and collaborations among the responsible parties who make the decision.

In selecting the middle route, PMPA chose a shorter, cheaper, and less costly route to construct line which currently is not visible from any existing residence closer than 600 feet. While the land acquisition costs are disputed, PMPA has Graydon's appraisal which it relied on and certainly PMPA's decision cannot be said not to have a

factual basis. Further, PMPA could not have relied on Major's report even if it was accurate because Major's report was completed after this case was filed. In that regard, much of the Oiens land acquisition costs comes from their contention that they could see the power line from a house they have yet to build. Yet their choice of the southern route will place the line near homes that are already built and occupied by families that will be closer to the line than the Oiens.

The burden is on the Oiens to prove PMPA made its decision for the middle route without a factual basis and they failed to do so. Sease v. City of Spartanburg, 242 S.C. 520, 131 S.E.2d 683 (1963).

II. THE TRIAL COURT DID NOT MAKE ERRONEOUS FINDINGS OF FACT AND CONCLUSIONS OF LAW BECAUSE THE TRIAL COURT CORRECTLY INTERPRETED THE HOLDING THE SOUTHERN CASES.

A. The Oiens complain because the trial court referred to the Oiens' restriction of access to their land. Lynn Oien complained that a surveyor had gone on the property without permission and he considered that a trespass (Transcript p. 144 ll. 2-25) (Transcript p. 158 l. 11 – p. 159, l. 9). Oiens' forester, Major, called Todd Guy and wanted to know who gave Guy permission to be on the Oien property (Transcript p. 429, l. 17 – p. 430, l. 13).

After the November, 2013 meeting, PMPA received permission to survey the middle route.

Certainly the trial court could conclude that Major and the Oiens did not want PMPA or Newberry coming on the property. Even if the trial court's finding was in error, the Oiens do not argue that it had any impact on the question of abuse of discretion by PMPA.

B. The Oiens hold that the Southern I case overruled Bookhart v. Central Electric Power Co-op, 219 S.C. 414, 65 S.E.2d 781 (1951) and that the trial court erred in relying on Bookhart, which stated an obvious fact concerning power lines in general. Power lines are cheaper and easier to construct if run in a straight line. The Oiens do not say why this element, as well as the other elements set out in Southern I was error and what impact it had.

C. The Oiens complain because the trial court did not accept their witness Rogers as establishing the legal standard for alternate route studies which PMPA must comply with or abuse its discretion.

Robert was not an attorney, judge or qualified to give an expert opinion on legal matters. Rogers gave his opinion on right-of-way acquisition and the proper procedure for alternate route studies. While Rogers can give his opinion, the trial court can give that opinion such weight as it deems fit.

D. The Oiens contend the trial court erred in finding their witness Rogers admitted PMPA complied with Southern I if it "mentally" did an alternate route study.

Rogers testified that his studies were in writing (Transcript p. 274, ll. 18-25). When asked if as long as the study is done, does that comply with Southern I, he replied that he did not know (Transcript p. 275, ll. 1-4). When pressed, Rogers testified that if PMPA could go through the consideration of alternate route studies without writing, then PMPA would comply with his interpretation of Southern I (Transcript p. 286, l. 9 – p. 287, l. 6).

E. The Oiens complain that the trial court found the Oiens brought this action because they do not want the line on their property.

Lynn Oien was asked the following question:

> Q. So you guys don't really want any transmission line on your property at all?
>
> A. We already have one that spans the entire width of the property. We just didn't want another one.

(Transcript p. 175, ll. 22-25).

Given the repeated change of mind and the allegations of their Complaint, the trial court was justified in its finding.

F. The Oiens reject the trial court's finding the intent on their behalf in forcing the transmission line off their property.

The record reflects that the Oiens purchased the property and took some steps toward erecting an expensive residence on the property in 2008. Up until the trial in 2016 the Oiens took no further steps to build the residence. After the passage of eight years the trial court could question whether or not a residence would ever be built.

There were conflicts in the testimony as to the dealings between the Oiens, Major, Todd Guy, Rogers, Frazier, and Coleman Smoak. For example, Frazier and Smoak came away from the September, 2013 meeting thinking the Oiens were seriously considering an agreement as to the middle route. PMPA was granted permission to go on the Oien property for the purpose of a final survey of the middle route.

A short time after the September, 2013 meeting, Lynn Oien left the following voice message with Mike Frazier, PMPA's engineer:

> Michael, it's Lynn Oien. We met with you the other day in regards to the power line coming through our property. We walked it. We made the decision that we want to stay with you have right now that you have originally drawn up *originally* as opposed to changing it so you can move forward and get the final surveying done and finish it up. My number here is 561-891-0831 in case you have any questions. I would appreciate a call

just to let me know that you did get this and that everything is okay. Alright. Thanks. Bye. [Emphasis added] (Def. Ex 3)

The term "originally" cannot be twisted to mean any but the middle route. Oien's Ex. 7, an email dated February 25, 2013 from one Misty West, so reflects. In the email Ms. West provided Oien a GIS map which reflected the original route will "... cut your property in half – note the 'hash dot line' line. That would run across your garden area, near the new house site."

West suggested the line go on the southern route.

Todd Guy showed Oien the proposed center line at his final meeting with Lynn Oien (Transcript p. 423, ll. 2-10).

After several changes, PMPA surveyed the middle route to what it believed was Oiens' agreement.

From this testimony the trial court could conclude the Oiens' intent was to delay or move the line.

III. THE LOWER COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION FOR AN INJUNCTION WHILE SIMULTANEOUSLY GRANTING RESPONDENT'S MOTION FOR A DIRECTED VERDICT.

In its order the trial court ruled:

Now, therefore, it is Ordered, Adjudged and Degreed as follows:

1. PMPA's Motion for directed Verdict is granted.
2. Oien's request for an injunction is denied; and
3. Each party shall be responsible for its own attorney's fees and costs.

Oiens cites the correct law regarding a directed verdict. After the evidence was all in, PMPA renewed its motion for a directed verdict. The trial court granted a verdict for PMPA.

Of more substance, however, the trial court denied the Oiens' request for an injunction which was the heart of the case. While the wrong description of the outcome of the trial may be accurate, the verdict conforms with the issue raised at trial.

CONCLUSION

Reduced to its basic facts, PMPA had more than enough factual basis for selecting the route for its transmission line. The chosen route is shorter, cheaper to construct, and requires less of the landowners' land. While these facts are undisputable, the land acquisition costs will ultimately be determined by settlement or a jury. In considering the land acquisition cost, PMPA engaged a highly qualified appraiser to give his opinion of the expected costs.

PMPA's approach is routinely used in condemnation cases. If every condemning authority is required to conduct full blown alternate route studies of all other routes, then form replaces substance. Experience, common sense, and judgment are replaced by a cookie cutter application of requirements.

The well-reasoned decision of the trial court should be upheld.

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