

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Charles Evans Hunnell,	:	
Petitioner	:	
	:	
v.	:	
	:	
Pennsylvania Public Utility	:	
Commission,	:	
Respondent	:	No. 2564 C.D. 2010
	:	Submitted: April 29, 2011

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: June 15, 2011

Charles Evans Hunnell (Hunnell) appeals the November 4, 2010 order of the Pennsylvania Public Utility Commission (Commission) denying Hunnell's exceptions, adopting the initial decision of the Administrative Law Judge (ALJ), granting the application of West Penn Power Company (West Penn) to locate, construct, operate, and maintain certain high voltage electric transmission line facilities, granting the application of West Penn to exercise eminent domain to construct and install the proposed aerial electric transmission line facilities along the proposed route in Pennsylvania, and dismissing Hunnell's protest. Hunnell raises three issues for this Court's review: (1) whether the Commission's order approving West Penn's application and granting eminent domain power was supported by substantial evidence, (2) whether the Commission erred as a matter of law in

approving the application and granting eminent domain power, and (3) whether Hunnell's constitutional rights were violated in granting West Penn's eminent domain petition. For the following reasons, we affirm the Commission's order.

On January 26, 2009, West Penn filed an application with the Commission requesting authority to locate, construct, operate and maintain a 138,000 volt (138kV) electrical transmission line of approximately 2.2 miles in length within a 100-foot wide right-of-way easterly from its proposed Pursley substation in portions of Center and Franklin Townships in Greene County, Pennsylvania (the Pursley Line). West Penn's application stated:

The Pursley Line and related facilities will provide needed electric service enhancements for the expansion of the Cumberland Mine, owned by Foundation Coal Holdings, Inc. [Foundation], and will also serve as an initial step to facilitate the future growth of West Penn's transmission and subtransmission networks in response to current and future expansion of West Penn customer requirements in this portion of Greene County.

Reproduced Record (R.R.) at 1a. The estimated cost of the project was just over \$10 million. There were ten owners whose property was located within 500 feet of the centerline of the proposed Pursley Line, one of whom was Hunnell. West Penn requested that the Commission grant it eminent domain authority in connection with the proposed Pursley Line.

Hunnell filed a timely protest to West Penn's application on March 20, 2009. Cumberland Coal Resources, L.P. (Cumberland) and Greene County Planning Commission filed petitions to intervene, which were granted by the Commission March 31, 2009. West Penn and Cumberland denied the allegations in Hunnell's protest. A hearing was held before the Commission's ALJs on August 4, 2009. On September 21, 2009, Hunnell filed a motion to dismiss West Penn's application.

On January 6, 2010, the ALJs' initial decision granted West Penn's application, and granted West Penn the authority to exercise eminent domain to construct and install its proposed transmission facilities. Following exceptions and replies to exceptions, on May 26, 2010, the Commission remanded the matter to the ALJs for expedited proceedings relative to the allocations of costs, use of the existing right-of-way for the lines, and a site visit. On July 21, 2010, following a site visit, the remand hearing was held. On October 15, 2010, the Commission issued the ALJs' initial decision on remand relative to those limited issues.

On November 4, 2010, the Commission entered an opinion and order granting West Penn's application, and granting West Penn the authority to exercise eminent domain to construct and install its proposed transmission facilities along the proposed route of the Pursley Line. Hunnell appealed to this Court on December 2, 2010. West Penn and Cumberland intervened. On or about December 23, 2010, the Court of Common Pleas of Greene County granted West Penn eminent domain over Hunnell's property.

On January 4, 2011, Hunnell filed a motion for stay of the Commission's order, to which West Penn and Cumberland responded. On February 10, 2011, the Commission denied Hunnell's motion for stay on the basis that it was untimely, and that it failed to satisfy the standards for grant of a stay as established in *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (1983).¹ According to Hunnell, West Penn entered his property and began construction of the Pursley Line on or about March 7, 2011. According to

¹ To the extent that Hunnell's motion sought to stay the order of the Court of Common Pleas relative to the eminent domain proceeding, the Commission deemed it an impermissible collateral attack.

Cumberland, Hunnell sought a stay of the Court of Common Pleas' possession order, which was denied on March 11, 2011.

On March 28, 2011, Hunnell filed an unverified application for stay, pending action on his petition for review. The Commission, West Penn and Cumberland filed answers to Hunnell's application. On April 20, 2011, this Court denied Hunnell's application for a stay. Hunnell's petition for review of the Commission's November 4, 2010 order is currently before this Court.²

Hunnell first argues that the Commission's order approving West Penn's application and granting eminent domain power was not supported by substantial evidence. Specifically, Hunnell contends there is not substantial evidence to support a determination that there is a need for the proposed line or that there is a present and future necessity of the line in furnishing service to the public. We disagree.

"Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Phila. Gas Works v. Pennsylvania Pub. Util. Comm'n*, 898 A.2d 671, 675 n.9 (Pa. Cmwlth. 2006).

J. Craig Fraley (Fraley), a Senior Engineer in Transmission Planning for Allegheny Energy Service Corporation, stated, in a prepared statement, which was subsequently adopted at the hearing before the Commission on August 4, 2009, that the expansion of the Cumberland Mine will necessitate the building of the Pursley substation which has a proposed power of 2 MVA for 2009. However, that will increase to 19 MVA by 2010, 23 MVA by 2013 and 30 MVA by 2020. "The Pursley

² "Appellate review of an order of the Commission is limited to (1) determining whether a constitutional violation or error in procedure has occurred; (2) the decision is in accordance with the law; and (3) the necessary findings are supported by substantial evidence." *Buffalo Valley Tel. Co. v. Pennsylvania Pub. Util. Comm'n*, 990 A.2d 67, 77 (Pa. Cmwlth. 2009).

Line . . . will provide the needed electric transmission service enhancement to Foundation, and also will serve as an initial step to improve electric transmission service reliability to current and prospective customers in the surrounding area.” R.R. at 43a. Fraley further stated in a prepared rebuttal statement, subsequently adopted at the remand hearing before the Commission on July 21, 2010:

Although the most urgent need for the proposed Pursley Line is to provide electric service to Foundation’s Cumberland Mine the proposed line also facilitates:

- [West Penn’s] obligation to extend electric service to customers requesting service in the Holbrook area, and
- Construction of a 138-25 kv and 138-12 kv substation in the Rutan area.

R.R. at 499a. Clearly, this is such relevant evidence that a reasonable mind might accept as adequate to support the Commission’s conclusion that there is a need for the proposed line or that there is a present and future necessity of the line in furnishing service to the public.

Hunnell next argues that the Commission erred as a matter of law in approving the application, and granting eminent domain power. Specifically, Hunnell contends the Commission did not consider the availability of reasonable alternative routes as required by 52 Pa. Code § 57.75(e)(4). Hunnell contends West Penn already has a right-of-way from the same point A to the same point B as the line proposed in the application, and that said right-of-way should have been considered as an available alternative. We disagree.

Hunnell refers to the cross-examination testimony at the remand hearing of Michael Horn (Horn), a Lines Engineer for Allegheny Power in the Transmission Department, to support this contention. However, Horn’s “admissions” do not

support Hunnell's conclusions. Horn testified in his rebuttal statement which was subsequently adopted at the remand hearing before the Commission that:

Mr. Hunnell's analysis of the cost of right-of-way clearing and right-of-way maintenance in open fields compared to forested areas would only be valid if he were comparing these costs for line route alternatives of equal length. In the case of West Penn[']s existing 25 kV line route and the proposed Pursley Line route, this is not the case. The existing 25 kV line right-of-way is approximately 60% longer than the proposed Pursley Line route. Therefore, the construction and right-of-way costs associated with the longer line would far outweigh any savings in right-of-way maintenance costs.

R.R. at 494a. Horn further stated:

Even if the current 25 kV line route were straightened to the maximum extent possible . . . it still would be 25% to 30% longer than the proposed route for the Pursley Line. It still would still [sic] cross through the Pursley Creek floodplain for approximately 1.5 miles, and pass within 500 feet of a cemetery, within 500 feet of five residences, and within 500 feet of a known historical site, the Nettie Woods Covered Bridge. The proposed Pursley Line would still be a much more preferable alternative to the existing 25kV line right-of-way.

R.R. at 495a. Finally, Horn stated:

Once again, I must point out that even if the current 25 kV line route were straightened, it would still be 25% to 30% longer than the proposed route for the Pursley Line. Furthermore, both [Hunnell] and Mr. Niverth appear to be suggesting West Penn reuse an existing right-of-way while at the same time relocating that *same* right-of-way. These two separate suggestions are mutually exclusive.

R.R. at 495a. Horn's testimony during cross examination did not contradict or negate any of these statements. Accordingly, the Commission did not err as a matter of law because it did, in fact, consider the availability of reasonable alternative routes.

Hunnell further contends that the Commission erred as a matter of law in granting the application because the proposed line is not in compliance with the statutes and regulations providing for the protection of the natural resources of the Commonwealth, and the proposed line will not have minimum adverse environmental impact, considering the electric needs of the public, the state of available technology and the available alternatives. Specifically, Hunnell refers to 52 Pa. Code § 57.76(a).

52 Pa. Code § 57.76(a) states, in pertinent part:

The Commission will not grant the application, either as proposed or as modified, unless it finds and determines as to the proposed HV line:

- (1) That there is a need for it.
- (2) That it will not create an unreasonable risk of danger to the health and safety of the public.
- (3) That it is in compliance with applicable statutes and regulations providing for the protection of the natural resources of this Commonwealth.
- (4) That it will have minimum adverse environmental impact, considering the electric power needs of the public, the state of available technology and the available alternatives.

As already established, substantial evidence supports the conclusion that there is a need for the Pursley Line. In addition, the initial ALJs' decision stated that the Commission has held that construction that meets or exceeds the requirements in the National Electric Safety Code (NESC) is a sufficient basis for finding that a line does not create an unreasonable risk of danger to the public. Horn stated in his prepared statement that the Pursley Line has been designed to meet or exceed the NESC safety requirements. Thus, the line does not create an unreasonable risk of danger to the public. Further, the Commission found based on the line route

evaluation prepared by Charles Pascale (Pascale), Manager of the power delivery engineering group of TRC Companies, Inc. (TRC),³ among other evidence, that West Penn had complied or intends to comply with applicable law providing for the protection of the natural resources of this Commonwealth. Finally, Pascale's report also provided evidence that there is an absence of threatened or endangered species in the study area, the route chosen had the least impact on surrounding streams and forested areas, a sufficient consideration of ground and surface waters and an intent to minimize the impacts of the line on those water sources, and an intent to minimize or avoid impacts to wetlands. Accordingly, substantial evidence supports the Commission's determination that the requirements of 52 Pa. Code § 57.76(a) were met by the Pursley Line.

Finally, Hunnell argues that his constitutional rights were violated in granting West Penn's eminent domain petition. Specifically, Hunnell contends that there was no public notice, he was not able to participate in the line selection process, and he was not afforded due process and equal protection of the laws in the remand process. We disagree.

Tracey Bundy (Bundy), General Manager of Allegheny Energy Service Corporation assigned to the Transmission Right-of-Way and Permitting Group of Allegheny Power, stated, in a prepared statement which was subsequently adopted at the hearing before the Commission on August 4, 2009, that "letters were sent on June 20, 2008 via certified mail to each potentially affected landowner, which included a Disclosure of Eminent Domain Power of Electric Utilities." R.R. at 56a. She further stated: "After these letters were sent, a West Penn representative contacted the individual landowners to meet with them, explain the project, and commence

³ TRC is an environmental engineering services company.

negotiations for acquiring the transmission line easement through their properties.” R.R. at 56a. Hunnell concedes that he received said notice as one of the affected property owners.

Moreover, Hunnell participated in the initial proceeding without counsel, and attended the initial prehearing conference on West Penn’s applications. After the ALJs’ initial decision was filed, Hunnell filed exceptions. The Commission granted a remand for an additional evidentiary hearing and site visit. Hunnell, with counsel, participated in all parts of the remand including attending a prehearing conference, filing testimony, attending the site visit, responding to discovery, attending an evidentiary hearing, cross-examining witnesses, and filing briefs and exceptions. Accordingly, Hunnell was afforded due process as well as equal protection of the laws.

This Court notes, that Bundy stated in her rebuttal statement, which was subsequently adopted at the remand hearing before the Commission, that when the proposed corridor had been identified, West Penn contacted the affected landowners to not only begin negotiations to acquire the necessary easements, but also to identify specific land uses or features on their property that would require a re-route of the line. In “Hunnell’s case several possible re-routes were identified, with his input, in an attempt to address his concerns. However, West Penn was not afforded the opportunity to fully evaluate these potential re-routes due to [Hunnell’s] refusal to allow West Penn to enter and survey his property.” R.R. at 379a. She further stated: “So, despite our best efforts to address [Hunnell’s] specific issues regarding the sitting of the Pursley Line on his property, he was not willing to cooperate with us.” R.R. at 380a. We discern no violation of Hunnell’s constitutional rights.

For all of the above reasons, the Commission's order is affirmed.

JOHNNY J. BUTLER, Judge

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	:	
Respondent	:	

ORDER

AND NOW, this 15th day of June, 2011, the November 4, 2010 order of the Pennsylvania Public Utility Commission is affirmed.

JOHNNY J. BUTLER, Judge