

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003250-MR

EAST KENTUCKY POWER COOPERATIVE, INC.

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE WILLIAM HALL, JUDGE
ACTION NO. 97-CI-00114

PAUL F. HILPP AND
KATHERINE M. HILPP, HIS WIFE

APPELLEES

AND: NO. 1997-CA-003252-MR

EAST KENTUCKY POWER COOPERATIVE, INC.

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE WILLIAM HALL, JUDGE
ACTION NO. 97-CI-00116

CARL BRADSHAW AND
MARGARET BRADSHAW, HIS WIFE

APPELLEES

AND: NO. 1997-CA-003253-MR

EAST KENTUCKY POWER COOPERATIVE, INC.

APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE WILLIAM HALL, JUDGE
ACTION NO. 97-CI-00117

JAMES W. MATTINGLY, JR.,
AND DIANE MATTINGLY, HIS WIFE

APPELLEES

OPINION

REVERSING AND REMANDING

** ** *

BEFORE: EMBERTON, GARDNER, AND MILLER, JUDGES.

MILLER, JUDGE: East Kentucky Power Cooperative, Inc. (EKPC), brings these consolidated appeals from October 25, 1997, interlocutory judgments of the Marion Circuit Court. We reverse and remand.

The facts are these: In June 1997, EKPC filed petitions in the Marion Circuit Court seeking to condemn portions of appellees' properties located in Marion County, Kentucky. EKPC, a rural electric cooperative corporation, is statutorily endowed with the power of eminent domain. KRS 279.110(4); see Craddock v. University of Louisville, Ky., 303 S.W.2d 548 (1957). The actions were, thus, practiced in accordance with the Eminent Domain Act of Kentucky, codified as Ky. Rev. Stat. (KRS) 416.540-.670. EKPC specifically sought right-of-way easements upon appellees' respective lands in order to "construct, inspect, operate, repair, rebuild and maintain its electric transmission line" The easements would span appellees' properties and

be 100 feet wide. In addition, EKPC sought "access rights" of ingress and egress

. . . over said property of . . . [appellees] while in the exercise of the rights and privileges granted herein, provided, however, that in exercising said right of ingress and egress . . . [EKPC] will, if reasonably accessible, confine said right of ingress and egress to the easement itself, and if not, then, whenever practicable to do so, use regularly established highways or farm roads.

In its petitions, EKPC also sought "the right to locate necessary guying facilities adjacent to said right of way as required" [Emphasis added.] EKPC identified same as "guying rights."

Appellees filed answers challenging EKPC's condemnations of the properties. KRS 416.600. The circuit court entered interlocutory judgments pursuant to KRS 416.610(4). Therein the court concluded that EKPC was entitled to condemn 100 ft. right-of-way easements together with the above-described access and guying rights. Appellees filed exceptions thereto, and on October 25, 1997, the circuit court entered amended interlocutory judgments. The court decided that EKPC acted arbitrarily in seeking to condemn

. . . collateral privileges including the privilege of locating guying facilities off of the right-of-way, and the further reservation onto . . . [EKPC] of the utilization, at its discretion, of any part of the property of . . . [appellees] as a means of access from public highways to the defined right-of-way condemned herein

The court held that EKPC was entitled to condemn 100 ft. right-of-way easements specifically described in its petitions. Specifically, the court concluded that EKPC

. . . shall not travel upon or otherwise utilize portions of . . . [appellees'] property other than that right-of-way referred to and described . . . for purposes of accessing or otherwise utilizing that described right-of-way

In effect, the court determined that the petitions did not sufficiently describe access and guying rights so as to justify acquisitions of those interests. Dissatisfied with the amended interlocutory judgments, EKPC pursued these appeals.¹

Resolution of this case focuses upon the crucial question of whether the taking of properties as set forth in EKPC's petitions are sufficiently definite and accurate to comply with our law of eminent domain. It is well established that the petitions must sufficiently describe the taken property interests so as to permit evaluations of just compensation to the condemnees. Appellees believe, as does the circuit court, that the access and guying rights were not sufficiently described in EKPC's petitions so as to permit such evaluations. We first consider the issue of "access rights."

EKPC sought general and unlocated rights of ingress and egress over appellees' properties for the purpose of accessing its primary 100 ft. right-of-way easements. Appellees objected to such access rights as being too indefinite and uncertain. If EKPC required ingress and egress to its right-of-way easements, appellees contend that EKPC should have specifically defined and condemned such access routes. We think appellees' contention is erroneous.

¹These appeals were consolidated by order of this Court entered July 27, 1998.

It is axiomatic that a right-of-way easement for an electrical transmission line necessarily includes the right to maintain and service that line. 27 Am. Jur. 2d Eminent Domain §914 (1996); see Virginia Electric and Power Company v. Webb, 196 Va. 555, 84 S.E.2d 735 (1954); and Otter Tail Power Company v. Malme, 92 N.W.2d 514 (N.D. 1958). The general right of ingress and egress to access a primary easement for maintenance and service has been identified as a secondary or unlocated easement. 3 Julius L. Sackman, **NICHOLS ON EMINENT DOMAIN** §9.03[3][e] (Rev. 3d ed. 1998). Such secondary easement has been expressly recognized as naturally flowing from the primary right-of-way easement for construction of electrical transmission lines:

. . . A utility which acquires a right of way to construct a high voltage transmission line also has the right to acquire a secondary easement of ingress and egress to construct, operate and maintain the transmission line. [Footnote omitted.] The right to enter is an incident of the easement, and the utility is not required to specify in its notice of taking the specific location of points of ingress and egress because each would depend on the exigencies then existing. [Footnote omitted.]

Id.

The acquisition of an easement or right of way for an electric powerline carries with it a reasonable right of access to enable the utility to construct and service the facility, even though the right of access is not expressly defined in the condemnation proceedings. [Footnote omitted.] Thus, a transmission company may acquire by condemnation an unlocated or secondary easement of ingress or egress over land for the purposes of construction and maintenance of its transmission lines on such land. [Footnote omitted.]

27 Am. Jur. 2d Eminent Domain, §914 (1996). This Commonwealth has recognized, by judicial fiat, the existence of a "secondary" or "unlocated" easement. See Farmer v. Kentucky Utilities Company, Ky., 642 S.W.2d 579 (1982) (recognizing secondary easement as is necessary and reasonable for the use of a primary easement).

As a secondary ingress and egress easement is incident to the enjoyment of a primary easement, we view the secondary easement as passing automatically, by operation of law, upon conveyance of the primary easement. See Otter Tail Power Company, 92 N.W.2d 514. It exists as an implied concomitant to the primary easement. We additionally observe that the location of such secondary ingress and egress easement defies specific designation. The location is dependent upon various factors including: season, time, and existing exigencies. It is, thus, unnecessary that the secondary easement of ingress and egress be mentioned in a condemnation petition, as the secondary easement passes upon the description of the primary easement.

Upon the foregoing, we view EKPC's petitions as sufficient in the descriptions of access rights. We note that said rights, as secondary ingress and egress easements, are incident to the primary easements and are elements of consideration in fixing just compensation. See Tennessee Gas Transmission Company v. Million, 314 Ky. 137, 234 S.W.2d 152 (1950) (holding that a general right of ingress and egress over an entire tract of land for purposes of accessing an easement thereon constituted an encroachment upon the dominion which

reduced the land's market value and constituted compensatory damage in a condemnation action.) We now turn to the matter of "guying rights."

EKPC sought to condemn the rights to locate and anchor guy wires adjacent to the primary right-of-way easements. In its petitions, EKPC did not describe the location, size, or number of said guy wires. EKPC simply sought "the right to locate necessary guying facilities adjacent to said right of way as required" EKPC argues that the exact number and location of the guy wires cannot be determined with specificity until erection of the transmission line. The appellees perceive EKPC's descriptions of guying rights insufficient so as to permit just evaluations of the properties taken. We disagree.

Upon this issue, we are inclined to agree with and adopt herein the reasoning of United States v. 39.20 Acres of Land, 143 F. Supp. 623 (N.D. 1955). Therein, the United States sought to condemn the right to place and maintain guy wires off the primary easement "where reasonably necessary to support line." The complaint was challenged as being insufficient in its description of property to be condemned. In an erudite opinion, the Court held that the petition was sufficient and reasoned as follows:

. . . The right to locate guys and anchors "where reasonably necessary" seems as susceptible of definition as does the right to cut trees "now or hereafter growing" which might constitute a danger. No one can determine with absolute certainty at the present time just what trees might constitute a danger ten years hence, or what guys or anchors might be "reasonably necessary" ten years hence. Each situation involves a

certain amount of speculation, but . . . the uncertainty or vagueness is "largely illusory." In both situations the Government seeks an easement in a definite strip of land for the installation of transmission lines. In both instances they seek additional rights outside the defined strips which might be necessary for the proper protection and maintenance of the lines. The rights sought in both instances are subject to definition, and are defined in the declarations as definitely as the circumstances will allow.

Id. at 626. We are thus of the opinion that EKPC's petitions sufficiently described guying rights under our eminent domain law.

In sum, we are of the opinion that EKPC's petitions sufficiently described access and guying rights so as to enable just compensation therefor. EKPC may thus condemn such rights in appellees' properties. We hold that the circuit court erred in amending the September 17, 1997, interlocutory judgments and in entering the amended interlocutory judgments from which these appeals spring.

For the foregoing reasons, the October 25, 1997, judgments of the Marion Circuit Court are reversed, and these causes are remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Sherman Goodpaster III
Foster J. Collis
Winchester, KY

BRIEF FOR APPELLEES/HILPPS and
MATTINGLYS:

Robert Spragens Jr.
Lebanon, KY

BRIEF FOR APPELLEES/BRADSHAW:

Joseph H. Mattingly
Lebanon, KY