

STATE HIGHWAY COMMISSION: Powers to admit utilities to right-of-way.

November 20, 1940

11/23

Honorable Louis V. Stigall
Chief Counsel
State Highway Commission
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion under date of November 19, 1940, in which you inquire whether or not the Stanolind Oil Company has the unqualified right to construct a pipe line along and across public highways under the jurisdiction of the State Highway Commission, which will carry only the product of such company, or whether the State Highway Commission has the discretionary power to admit or exclude said company from the right-of-way.

It is evident that neither public nor private utilities have the right to condemn, under general powers of eminent domain, easements or rights-of-way across land already taken by the State or any of its political subdivisions for a public purpose. This proposition is supported by many decisions in this State, a distinct case being that of the City of St. Louis vs. Moore, 269 Mo. 430, in which we find the following in the Court's opinion at l. c. 436:

"As regards the first. Can property devoted to a public use, that is more strictly speaking for State purposes, be condemned for other public use, exercised by a municipal corporation? In support of the negative of that question we are cited to the following authorities: Elliott, Roads and Streets, secs. 238, 245; St. L., H. & K. C. Ry. Co. v. Hannibal Depot Co., 125 Mo. 82;

Edwardsville v. Madison County, 251 Ill. 265, 37 L. R. A. (N. S.) 101; Moline v. Green, 252 Ill. 475; Matter of Utica, 73 Hun (N. Y.), 256; In re Rosebank Ave., 162 App. Div. (N. Y.) 332; McCullough v. Board of Education, 51 Cal. 418; In re Milwaukee Southern R. R., 124 Wis. 490. Those authorities in effect hold that the power of a city to condemn property for street purposes is limited to private property, and does not extend to property of the State or property held by a subordinate agency of the State, for the State, as distinguished from other corporations.

"In our opinion these authorities announce the correct doctrine; and if public policy demands a different rule, the remedy is with the Legislature, and not the courts."

This decision was cited with approval in a later case, Cochran v. Wilson, 287 Mo. 210, l. c. 227, where we find the following:

"* * * This being true, there could have been no condemnation of the property for a public highway, on the ground that it was already devoted to a public use; and, as we held in St. Louis v. Moore, 269 Mo. 430, being already so devoted, it could not for this reason be condemned as a highway. * * *"

It is therefore necessary that any public or private utility obtain permission from the General Assembly, or from some agent properly authorized by it, before being entitled to an absolute right to use the rights-of-way of the highways under the control of the State through the

Highway Commission. We are able to find only two instances where this absolute right has been given by the General Assembly.

Section 4921, R. S. Mo. 1929, gives to telephone and telegraph companies, which are domestic corporations organized under Article 6, Chapter 32 of said statutes, an absolute right in the following language:

"Companies organized under the provisions of this article, for the purpose of constructing and maintaining telephone or magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, across or under any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such roads, streets and waters: Provided, any telegraph or telephone company desiring to place their wires, poles and other fixtures in any city, they shall first obtain consent from said city through the municipal authorities thereof."

Section 4962, R. S. Mo. 1929, gives to those public utilities, which furnish gas, electricity or water to the public, an absolute right-of-way over the roads of the State, provided, that such companies are organized under Article 7, Chapter 32, R. S. Mo. 1929. That section is as follows:

"Any corporation formed under the provisions of this article for the purpose of supplying any town, city or village with gas, electricity or water shall have full power to manufacture and sell and to furnish such quantities of gas, electricity or water as may be required by the city, town or village, district or neighborhood where located for public

or private buildings or for other purposes, and such corporations shall have the power to lay conductors for conveying gas, electricity or water through the streets, alleys and squares of any city, town or village with the consent of the municipal authorities thereof under such reasonable regulations as such authorities may prescribe, and such companies are authorized to set their poles, piers, abutments, wires and other fixtures along, across or under any of the public roads, streets and waters of this state in such manner as not to incommode the public in the use of such roads, streets and waters."

These sections apply only to domestic corporations. This view being sustained by State ex rel. v. Western Union Telegraph Company, 165 Mo. 502, l. c. 518, where we find:

"Ever since 1865 (R. S. 1865, ch. 65, p. 349, sec. 5) there has been a statute in this State authorizing any telegraph company organized under the laws of this State, to place its poles and wires along, over and upon the public highways. But there is not now and never has been any law of this State granting any such franchise or permission to any foreign telegraph company. * * *"

Summarizing, the following have an absolute right to a use of the public highways under the control of the State Highway Commission: (1) domestic telephone companies, (2) domestic telegraph companies, (3) domestic gas companies supplying a portion of the public, (4) domestic electric power companies supplying the public, (5) domestic water companies supplying the public, and none of these may be arbitrarily excluded by the State Highway Commission. This

position has been sustained by State Ex Inf. McKittrick v. Southwestern Bell Telephone Company, 338 Mo. 617, 92 S. W. (2d) 612, with regard to telephone companies, the Court basing its decision on Section 4921, supra, and by State ex rel. Highway Commission v. Kansas City Power and Light Company, 232 Mo. App. 308, 105 S. W. (2d) 1085, and State ex rel. Highway Commission v. Union Electric Company of Missouri, 142 S. W. (2d) 1099, with regard to electric power lines.

In each of the two latter cases the defendant companies had entered into a contract with the State Highway Commission to pay to it an annual rental for the privilege of using the right-of-way. The Court, in each instance, held that the Commission had no authority to collect a fee under a contract since there was no consideration given by the Commission to the defendant companies, because the Legislature had previously granted them an absolute right to the use of the highways. We find in these decisions some very broad statements with regard to the power of the Highway Commission over its rights-of-way, but these are, in each instance, dicta, and, in our opinion, are much too broad to have been made after a specific consideration of the right of the Highway Commission to control utilities other than those just previously mentioned.

An indication of the intention of the Legislature with regard to the use of the county roads of the State by pipe line companies is found in Section 7924, R. S. Mo. 1929, as follows:

"No person or persons, association, companies or corporations shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public roads or highways of any county of this state, without first having obtained the assent of the county court of such county therefor; and no poles shall be erected or such pipes, conductors, mains and con-

duits be laid or maintained, except under such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county court."

This statute gives an absolute right to the county court of any county to permit the erection of pipe lines and power lines along and across county roads.

After the passage of the legislation creating the State Highway Commission, the Legislature discovered that a similar grant of power was necessary to govern construction of pipe lines, or power lines, by utilities along the rights-of-way under control of the State Highway Commission and, to obviate the necessity of the passage of legislation in each particular instance, the Legislature passed Section 8109, R. S. Mo. 1929, as follows:

"The location and removal of all telephone, telegraph and electric light and power transmission lines, poles, wires, and conduits and all pipe lines and tramways, erected or constructed, or hereafter to be erected or constructed by any corporation, association or persons within the right of way of any state highway, in so far as the public travel and traffic is concerned, and in so far as the same may interfere with the construction or maintenance of any such highway, shall be under the control and supervision of the state highway commission. The commission or some officer selected by the commission shall serve a written notice upon the person or corporation owning or maintaining any such lines, poles, wires, conduits, pipe lines, or tramways, which notice shall contain a plan or chart indicating the places on the right of way at which such lines, poles, wires, conduits, pipe lines or tramways may be maintained. The notice shall also state the time when

the work of hard surfacing said roads is proposed to commence, and shall further state that a hearing shall be had upon the proposed plan of location and matters incidental thereto, giving the place and date of such hearing. Immediately after such hearing the said owner shall be given a notice of the findings and orders of the commission and shall be given a reasonable time thereafter to comply therewith: Provided, however, that the effect of any change ordered by the commission shall not be to remove all or any part of such lines, poles, wires, conduits, pipe lines or tramways from the right of way of the highway. The removal of the same shall be made at the cost and expense of the owners thereof unless otherwise provided by said commission, and in the event of the failure of such owners to remove the same at the time so determined they may be removed by the state highway commission, or under its direction, and the cost thereof collected from such owners, and such owners shall not be liable in any way to any person for the placing and maintaining of such lines, poles, wires, conduits, pipe lines and tramways at the places prescribed by the commission. The commission is authorized in the name of the state of Missouri, to institute and maintain, through the attorney-general, such suits and actions as may be necessary to enforce the provisions of this section. Any corporation, association or the officers or agents of such corporations or associations, or any other person who shall erect or maintain any such lines, poles, wires, conduits, pipe lines or tramways, within the right of way of such roads which are hard surfaced, which are not in accordance with such orders of the commission, shall be deemed guilty of a misdemeanor."

The position that these two statutes are parallel grants of power is sustained by the following quotation from State ex rel. Highway Commission v. Kansas City Power and Light Company, 105 S. W. (2d) 1085, l. c. 1088:

"The opinion does not hold either directly or inferentially that there is conflict 'in the authority of two separate state agencies.' The authority of county courts and highway engineers is by section 7924 limited to public roads which are not a part of the state highway system. The authority of the state highway commission, in so far as the location of the lines of utilities is concerned, is limited by section 8109 to roads which are a part of the state highway system. There is no conflict in the authority of those agencies."

The first sentence in Section 8109, supra, and those parts relating to pipe lines, reads as follows: "The location and removal of all * * * pipe lines * * * shall be under the control and supervision of the State Highway Commission." The only limitation on this power is found in the proviso in the latter part of this section, which prohibits the Commission from arbitrarily removing such line once it has been established. This prohibition is made in the following language: "* * * Provided, however, that the effect of any change ordered by the commission shall not be to remove all or any part of such lines, poles, wires, conduits, pipe lines or tramways from the right of way of the highway. * * *"

Section 8109, supra, was also considered in the case of State On Inf. of McKittrick, ex rel. City of California v. Missouri Utilities Company, 96 S. W. (2d) 607. In that case respondent, in an action seeking removal of its poles from city streets, set up the defense that such streets were a part of the state highway system and that the poles could be removed only on order of the Commission. The

Court, by way of dictum, stated, at l. c. 614:

"* * * Orders under section 8109 are limited to those necessary to prevent interference with traffic on the highways and with highway construction. In matters immediately concerned with the construction of paving of the highways and their maintenance, the commission has jurisdiction. * * *"

Although this language and some of the language found in the Kansas City Power and Light Company case and the Union Electric Company case, supra, is purely dictum, it may be construed to indicate an inclination on the part of the courts to limit the extent of power delegated to the Highway Commission under Section 8109, they are meaningless when we stop to consider that the Highway Commission in the first instance could not have obtained any of its rights-of-way unless same were necessary for the construction or maintenance of the public highways, and the true effect of these decisions is to give the Commission absolute power over utilities on the rights-of-way except as qualified by the legislative grants first above set out.

CONCLUSION.

It is, therefore, the conclusion of this Department that the State Highway Commission may admit to its rights-of-way or exclude foreign corporations engaged in the telephone, telegraph, electric power transmission, gas, water, or pipe line businesses, whether public or private, and domestic pipe line or tramway corporations, but cannot exclude domestic telephone, telegraph, electric power and gas or water companies where the latter are public utilities, and said Commission has the right and authority in each and every instance to indicate the places on the right-of-way

Hon. Louis V. Stigall

-10-

Nov. 20, 1940

where the instrumentalities of all of the foregoing corporations may be located.

It is the further opinion of this Department that, having once permitted location of such instrumentalities along the rights-of-way of the Commission, changes in location may be ordered, but in no case may complete removal of all or any part of such instrumentalities be required by the Commission.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

RLH:CP