

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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WISCONSIN PUBLIC SERVICE CORPORATION,

Petitioner,

MEMORANDUM AND ORDER

v.

05-C-151-S

HOWARD SHANNON, DENNIS A. PUNKE,  
VERIZON NORTH, INC.,  
KEVIN HIEBL, BRIDGET HIEBEL,  
WILLIAM KNETTER, SUSAN KNETTER,  
FARM CREDIT SERVICES OF NORTH AMERICA FLCA,  
CARL KALLBERG, LESTER KALLBERG,  
CYNTHIA ROLAND, CLARK D. TURNER  
and TERRI L. TURNER

Respondents.

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Plaintiff Wisconsin Public Service Corporation, having obtained a certificate of public convenience and necessity from the Wisconsin Public Service Commission for an electrical transmission utility easement, filed these eight condemnation petitions in the circuit courts for Clark and Marathon Counties, Wisconsin pursuant to Wis. Stats. §§ 32.06 and 32.12. Defendants removed the actions to this Court pursuant to 28 U.S.C. § 1446 alleging 28 U.S.C. § 1331 as the sole grounds for removal. The matter is presently before the Court on plaintiff's motion to remand.

BACKGROUND

Plaintiff, jointly with the Minnesota Power Company, sought and received from the Wisconsin Public Service Commission a

certificate of convenience and necessity to construct Electric Transmission lines known as the Arrowhead-Weston Project. Plaintiff proceeded to file actions in state court under state statutes to complete condemnation of the necessary easements for the project and to obtain possession of the easements. Defendants removed the condemnation proceedings to this Court asserting that the condemnation proceedings were claims arising under federal law.

#### MEMORANDUM

Plaintiff moves to remand and for the costs of removal and remand on the basis that its claims were based exclusively on state law. Defendants argue that the Federal Power Act has completely preempted the field thereby by rendering the claims federal for purposes of removal.

Generally, removal is appropriate only if a federal district court has original jurisdiction over the action. Doe v. Allied-Signal, Inc., 985 F.2d 908, 911 (7th Cir. 1993). Defendant bears the burden to establish federal jurisdiction, removal statutes are construed narrowly and any doubt regarding jurisdiction is resolved in favor of the states. Id. The existence of a defense based on federal law is not a basis for removal even though both parties concede that the federal issue is the only real issue in the case. Id. However, if the true nature of the plaintiff's claim is federal, it will be removable notwithstanding artful pleading to avoid federal court. Id.

The petitions for condemnation which were removed are based exclusively on Wisconsin statutes and contain no hint of a federal claim. Accordingly, if they are to be found removable they must fall under the "complete preemption" doctrine. Blackburn v. Sunstrand Corp., 115 F.3d 493, 495 (7th Cir. 1997). That is, the plaintiff's claims, though artfully pled as state claims, must in truth be federal claims, as when an ERISA plan participant pleads a state law breach of contract claim although the exclusive claim for benefits is pursuant to ERISA. Id.

The issue here is whether the Federal Power Act has displaced the right of states to regulate the siting of electrical generation and transmission facilities and particularly the right to condemn easements for the construction of facilities. Defendants offer no support for the proposition that it has. Far from occupying the entire field of electrical utility regulation, the FPA expressly takes only a limited role, preserving state regulation for remaining legal issues:

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend

only to those matters which are not subject to regulation by the States.

16 U.S.C. § 824(a).

Defendants cite no federal statute, regulation or order displacing the states as the source of condemnation powers and proceedings for siting electrical facilities. Federal law expressly provides for federal condemnation proceedings in the limited circumstances of power dams. 16 U.S.C. § 814. Federal law also authorizes the use of federal eminent domain powers in federal court to acquire easements for natural gas pipelines. 15 U.S.C. § 717f(h). Notably absent from defendants' submission is reference to any provisions for federal condemnation proceedings for electrical transmission facility easements. The inescapable conclusion is that the condemnation authority for such easements remains with the states. Plaintiff's state court petitions are the appropriate method by which to obtain possession of the easements. There is no federal preemption of the condemnation actions nor even a federal forum to pursue them.

The Federal Power Act applies to the "transmission of electrical energy in interstate commerce and to the sale of electrical power at wholesale in interstate commerce." 16 U.S.C. § 824(b). It also provides for exclusive jurisdiction over actions relating to violations of rules, regulations or orders under the Act. 16 U.S.C. § 825p. Consistent with this federal role the ninth circuit court of appeals held preempted state law claims

brought by a regulated electrical utility alleging damages from a federal ruling which affected that allocation of interstate transmission capacity between various utilities. Transmission Agency of Northern California v. Sierra Pacific Power Company, 295 F.3d 918 (9th Cir. 2002) ("TANC"). Defendants rely on TANC as supporting their right to remove these actions.

TANC is readily distinguishable from the present actions for at least two reasons. First, TANC was not removed from state court on the basis of a federal question, but rather was removed by a federal agency defendant pursuant to its right of removal under 28 U.S.C. § 1442(a)(1). Id. at 924. Therefore the case does not call into question the established law that an action is not removable based on a federal preemption defense. Second, though pled in state law terms the action was in fact a collateral challenge to the federal order allocating interstate transmission capacity - one of the limited issues over which federal courts have exclusive jurisdiction under 16 U.S.C. §825p. In contrast, plaintiff's condemnation proceedings certainly are not disguised challenges to a federal regulation or order which would trigger exclusive federal jurisdiction.

Defendants also assert California ex rel. Lockyer v. Dynegy, Inc., 375 F.3d 831 (9th Cir. 2004), as supportive of their right to remove. In Dynegy the State of California commenced an action in state court alleging state unfair competition claims. In truth, the actions were an effort to enforce federal tariffs, a matter

that goes precisely to the federal regulatory scheme and which is expressly within the exclusive federal jurisdiction. Id. at 839. Defendants offer nothing to suggest that enforcement of or challenge to federal regulations or orders are the real basis of plaintiff's condemnation actions. They are not disguised claims of any kind. They are state condemnation actions which rely on a state administrative agency determination. Defendants may have viable federal defenses to the condemnation which they are free to pursue in state court, however they have no basis for removal.

Plaintiff seeks its costs and attorneys fees incurred as a result of removal pursuant to 28 U.S.C. § 1447(c). A party that succeeds in obtaining a remand on the basis that removal is improper is presumptively entitled to recover its fees. Garbie v. DaimlerChrysler Corp., 211 F.3d 407, 411 (7th Cir. 2000). If removal was unjustified under settled law defendant is entitled to recover fees and costs. Id. at 410. Defendant suggests that the law is unsettled concerning whether removal is unjustified "in a case involving subject governed exclusively by the Federal Power Act." However, defendants have offered no legal authority for the proposition that the condemnation of an electrical transmission facility easement is governed by the FPA. Accordingly, plaintiff is entitled to recover its attorneys fees and costs.

#### ORDER

IT IS ORDERED that plaintiff's motion to remand is GRANTED.

IT IS FURTHER ORDERED that plaintiff's request for attorney's fees and costs pursuant to 28 U.S.C. § 1447(c) is GRANTED.

IT IS FURTHER ORDERED that plaintiff shall have until April 25, 2005 to submit an itemization of attorneys fees and costs and that defendants shall have until May 5, 2005 to respond.

IT IS FURTHER ORDERED that these matters are remanded to the Circuit Courts for Clark and Marathon Counties as appropriate.

Entered this 15th day of April, 2005.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge