

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 26, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP1427**

**Cir. Ct. No. 2009CV425,  
2009CV428, 2009CV691,  
2009CV808, 2009CV1444**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STOLEN FARMS, INC.,**

**PLAINTIFF-APPELLANT,**

**v.**

**AMERICAN TRANSMISSION COMPANY LLC AND ATC MANAGEMENT, INC.,**

**DEFENDANTS-RESPONDENTS.**

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**HOWARD LIEN & SONS, INC.,**

**PLAINTIFF,**

**v.**

**AMERICAN TRANSMISSION COMPANY LLC AND ATC MANAGEMENT, INC.,**

**DEFENDANTS.**  
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**DAVID GUNNULSON,**

**PLAINTIFF,**

**V.**

**AMERICAN TRANSMISSION COMPANY LLC AND ATC MANAGEMENT, INC.,**

**DEFENDANTS.**

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**SCOTT N. MICKELSON AND JULIE M. MICKELSON,**

**PETITIONERS,**

**V.**

**AMERICAN TRANSMISSION COMPANY AND ATC MANAGEMENT, INC.,**

**RESPONDENTS.**

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**OREN HAMMES,**

**PLAINTIFF,**

**V.**

**AMERICAN TRANSMISSION COMPANY LLC,**

**DEFENDANT.**

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APPEAL from an order of the circuit court for Dane County:  
MARYANN SUMI, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Blanchard, JJ.

¶1 VERGERONT, P.J. This appeal arises out of five consolidated cases brought by landowners<sup>1</sup> challenging the condemnation of their property by American Transmission Company LLC and ATC Management, Inc. (collectively, ATC). The landowners challenge ATC's right to condemn portions of their properties by obtaining easements for the purpose of upgrading a high voltage transmission line. The circuit court granted summary judgment in favor of ATC on all of the landowners' claims, and the landowners appeal.

¶2 We resolve three issues on this appeal. The first issue is whether the guidelines ATC distributed to the landowners misrepresented the law and thus violated ATC's duty to negotiate in good faith before making jurisdictional offers to purchase. We conclude ATC's guidelines did not misrepresent the law. The second issue is whether ATC's jurisdictional offer was insufficient because it did not list all available statutory items of loss or damage. We conclude the offer was not insufficient on this ground. The third issue is whether the proposed easements grant rights to ATC that impermissibly exceed the scope of the certificate of public convenience and necessity. We conclude they do not. Accordingly, we affirm.

## BACKGROUND

¶3 ATC condemned portions of the landowners' property in order to add a high-voltage circuit to an existing transmission line on the landowners' properties. ATC initiated the condemnation process when it applied for a certificate of public convenience and necessity from the Public Service Commission of Wisconsin (PSC). The PSC issued ATC a certificate of public

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<sup>1</sup> The landowners are: Stolen Farms, Inc., Howard Lien & Sons, Inc., David Gunnulson, Scott and Julie Mickelson, and Oren Hammes.

convenience and necessity as a part of its final decision. ATC then entered into negotiations with the landowners. Negotiations with the landowners failed. ATC subsequently issued jurisdictional offers to each of the landowners. The landowners brought actions under WIS. STAT. § 32.06(5) (2009-2010),<sup>2</sup> contending that ATC had not satisfied the statutory requirements for condemnation and seeking injunctions preventing the condemnation. The individual actions were consolidated in the circuit court by stipulation.

¶4 With the parties' agreement, the circuit court treated the landowners' actions as motions for summary judgment. The court granted summary judgment in favor of ATC on all issues.

#### DISCUSSION

¶5 On appeal the landowners argue that the circuit court erred in granting summary judgment in favor of ATC for the following reasons: (1) ATC failed to negotiate in good faith prior to submitting jurisdictional offers to the landowners because it provided them with guidelines that misrepresented the law; (2) ATC's jurisdictional offers were insufficient because they did not list all categories of loss or damage authorized by statute; and (3) the proposed easements granted ATC more property rights than it was allowed under the certificate of public convenience and necessity.

¶6 We review de novo the grant of summary judgment, employing the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 314-16, 401 N.W.2d 816 (1987). When, as here, there are no

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<sup>2</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

genuine issues of material fact, the question is which party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶7 Condemnation proceedings are governed by WIS. STAT. ch. 32. Our review of the issues in this case requires us to construe statutory provisions and apply these provisions to the undisputed facts of the case. The interpretation of a statute and its application to undisputed facts are questions of law, which we review de novo. *State v. Tremaine Y.*, 2005 WI App 56, ¶9, 279 Wis. 2d 448, 694 N.W.2d 462.

#### I. Failure to Negotiate in Good Faith

¶8 Pursuant to WIS. STAT. § 32.05(2a), a condemnor must negotiate in good faith with the property owner prior to issuing a jurisdictional offer to purchase. *Warehouse II, LLC v. DOT*, 2006 WI 62, ¶5, 291 Wis. 2d 80, 715 N.W.2d 213. Before attempting to negotiate, the condemnor is required to provide to the landowner a copy of the Wisconsin Department of Commerce (DOC) publication describing the condemnation process. § 32.06(2a). This publication is prepared by DOC pursuant to § 32.26(6), which obligates DOC, with the cooperation of the attorney general, to prepare a publication that explains the condemnation process in understandable language. ATC provided this publication to the landowners as required.

¶9 In addition to providing the DOC publication to the landowners, ATC provided them with a document prepared by ATC: “Property Owner Appraisal Guidelines.” The landowners contend that these guidelines misrepresent the law and that this misrepresentation constitutes a violation of ATC’s duty to negotiate in good faith. According to the landowners, ATC’s

guidelines misrepresent the law in two ways. First, the landowners assert, ATC's guidelines impermissibly add conditions to its statutory obligation to reimburse the landowners for independent appraisals. Second, the landowners assert, the guidelines do not specify all the items of loss or damage to which a landowner may be entitled.<sup>3</sup>

¶10 Reimbursement to landowners for an independent appraisal is addressed in WIS. STAT. § 32.06(2)(b). This statute provides that a landowner “may obtain an appraisal by a qualified appraiser of all property proposed to be acquired, and submit the reasonable costs of the appraisal to the condemnor for payment. The owner shall submit a full narrative appraisal to the condemnor within 60 days after the owner receives the condemnor’s appraisal.”

¶11 The landowners’ first argument is that the guidelines add conditions not authorized by WIS. STAT. § 32.06(2)(b). However, they do not identify what specific conditions in the guidelines are unauthorized. The guidelines state that ATC will pay landowners for appraisals done on their properties only if the appraisal is done by a qualified appraiser within sixty days of receipt of the condemnor’s appraisal and for a reasonable cost, and if the appraiser submits a full narrative appraisal to ATC. These conditions are consistent with § 32.06(2)(b).

¶12 ATC’s guidelines also list a number of items that the full narrative appraisal “should include.” It appears the landowners object to this detail because it does not appear in WIS. STAT. § 32.06(2)(b). However, they do not explain why any particular listed item is not reasonably considered part of a “full narrative

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<sup>3</sup> For purposes of discussion, we assume without deciding that, if ATC’s guidelines did misrepresent the law to the landowners, that would be evidence, or at least create a reasonable inference, that ATC did not negotiate in good faith.

appraisal.” The DOC publication defines a “full narrative appraisal” as “[a] detailed and comprehensive description of the process an appraiser uses to reach a documented conclusion of a property’s fair market value. The report must contain the appraiser’s rationale for determining value and be documented by market data which supports the appraiser’s rationale.” DEPARTMENT OF COMMERCE, THE RIGHTS OF LANDOWNERS UNDER WISCONSIN EMINENT DOMAIN LAW 3. The publication explains that a landowner has the right to have its “own full narrative appraisal of the property” and that one of the conditions for payment by the condemnor is that the “appraisal meets the standards set forth in sec. 32.09 of Wisconsin statutes.” *Id.* at 4. Without a more developed argument by the landowners that identifies specific items and explains why they are beyond the scope of §§ 32.06(2)(b) and 32.09, we cannot conclude that ATC’s guidelines add impermissible conditions.

¶13 The landowners’ second argument focuses on potential items of loss or damage that are available under WIS. STAT. § 32.09 but are not specifically identified in ATC’s guidelines. Section 32.09(6g), which governs compensation for easements, provides:

In the case of the taking of an easement, the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the items of loss or damage to the property enumerated in sub. (6)(a) to (g) where shown to exist.<sup>4</sup>

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<sup>4</sup> WISCONSIN STAT. § 32.09(6) provides:

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In the case of a partial taking of property other than an easement, the compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, assuming the completion of the public improvement and giving effect, without allowance of offset for general benefits, and without restriction because of enumeration but without duplication, to the following items of loss or damage to the property where shown to exist:

(a) Loss of land including improvements and fixtures actually taken.

(b) Deprivation or restriction of existing right of access to highway from abutting land, provided that nothing herein shall operate to restrict the power of the state or any of its subdivisions or any municipality to deprive or restrict such access without compensation under any duly authorized exercise of the police power.

(c) Loss of air rights.

(d) Loss of a legal nonconforming use.

(e) Damages resulting from actual severance of land including damages resulting from severance of improvements or fixtures and proximity damage to improvements remaining on condemnee's land. In determining severance damages under this paragraph, the condemnor may consider damages which may arise during construction of the public improvement, including damages from noise, dirt, temporary interference with vehicular or pedestrian access to the property and limitations on use of the property. The condemnor may also consider costs of extra travel made necessary by the public improvement based on the increased distance after construction of the public improvement necessary to reach any point on the property from any other point on the property.

(f) Damages to property abutting on a highway right-of-way due to change of grade where accompanied by a taking of land.

(g) Cost of fencing reasonably necessary to separate land taken from remainder of condemnee's land, less the amount allowed for fencing taken under par. (a), but no such damage shall be allowed where the public improvement includes fencing of right-of-way without cost to abutting lands.



The relevant provisions in ATC’s guidelines (listed among the items that a full narrative appraisal “should include”) are:

9. An explanation of reasoning for any loss, damages, or benefit to remainder.

....

11. In the case of the taking of an easement, the estimated compensation to be paid shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of valuation, assuming completion of the project. If it is concluded that there are severance damages [as] the result of the partial taking, such damages shall be identified and described separately.

¶14 The landowners contend that provision 11 is deceptive because it does not refer to the items of loss or damage in WIS. STAT. § 32.09(6)(a)-(g), as does § 32.09(6g). However, the language of provision 11 tracks the language in the DOC publication: “When an easement over your property is acquired, the compensation required is the difference between the value of your property immediately before the date of evaluation and its value immediately after the date of evaluation. Severance damages may also be paid where such damages exist and are allowed by statute.” DEPARTMENT OF COMMERCE, THE RIGHTS OF LANDOWNERS UNDER WISCONSIN EMINENT DOMAIN LAW 6. This paragraph is preceded by a paragraph that summarizes § 32.09(6) (partial takings that are not easements) and uses the phrase “after giving effect to severance damages set forth in sec. 32.09 of Wisconsin Statutes.” *Id.* The DOC publication is evidently using the term “severance damages” to include the items of loss or damage in § 32.09(6)(a)-(g). See *Justmann v. Portage County*, 2005 WI App 9, ¶9, 278 Wis. 2d 487, 692 N.W.2d 273 (using the term “severance damages” to describe the items of loss or damage in § 32.09(6)(a)-(g)). The landowners do not explain

how ATC's guidelines can misrepresent the law when they track the authorized DOC publication that explains the law to landowners. We conclude the omission of a reference to § 32.09(6)(a)-(g) in the guidelines does not constitute a misrepresentation.

¶15 Because we conclude that the guidelines do not misrepresent the law, we conclude that ATC did not fail to negotiate in good faith.

## II. Sufficiency of the Jurisdictional Offers

¶16 After negotiations between ATC and the landowners failed, ATC submitted jurisdictional offers to each of the landowners pursuant to WIS. STAT. § 32.06(3). The jurisdictional offers each stated:

That purchaser hereby offers compensation for the easement premises in the lump sum of [amount], itemized as follows:

Permanent Easement Interests	[same amount]
Total Compensation	[same amount]

¶17 The landowners contend that these jurisdictional offers are insufficient because they fail to itemize damages as required by statute. They argue that ATC was required to itemize damages for each of the factors in WIS. STAT. § 32.09(6)(a)-(g), regardless of whether any damages attributable to each factor had been shown to exist. (See footnote 4 for text of § 32.09(6)(a)-(g).) The landowners argue that this itemization is necessary in order to alert landowners to their rights under the condemnation process and to facilitate fair negotiations. ATC responds that jurisdictional offers need only itemize damages in § 32.09(6)(a)-(g) that exist, and, because there is no evidence that any damages under those paragraphs exist, it was not required to identify these categories of damages.

¶18 Jurisdictional offers in condemnation proceedings are governed by WIS. STAT. § 32.06(3), which incorporates by reference the requirements of § 32.05(3). Pursuant to § 32.05(3)(d), a jurisdictional offer must state “the amount of compensation offered, itemized as to the items of damage as set forth in s. 32.09....” As we have already noted, the subsection in § 32.09 governing easements requires that in determining compensation the condemnor must “giv[e] effect ... to the items of loss or damage to the property enumerated in sub. (6)(a) to (g) *where shown to exist.*” § 32.09(6g) (emphasis added). The only reasonable reading of §§ 32.05(3)(d) and 32.09(6g) is that an itemization is required of the losses and damages in § 32.09(6)(a)-(g) that exist and are included in the compensation offered. The landowners do not argue that any particular item of loss or damage in § 32.09(6)(a)-(g) should have been included but was not.<sup>5</sup>

¶19 The landowners also appear to argue that the jurisdictional offer must separately identify and itemize damages under WIS. STAT. § 182.017(7)(b) included in the offer. Section 182.017(7) applies to any easement for right-of-way for high-voltage transmission lines and provides:

In determining just compensation for the interest under s. 32.09, damages shall include losses caused by placement of the line and associated facilities near fences or natural barriers such that lands not taken are rendered less readily accessible to vehicles, agricultural implements and aircraft

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<sup>5</sup> The landowners rely on *Wisconsin Town House Builders, Inc. v. City of Madison*, 37 Wis. 2d 44, 154 N.W.2d 232 (1967), in support of their argument that damages must be itemized, regardless of whether any compensation is attributable to a particular item of damage. We do not agree that this case supports the landowners’ argument. In *Wisconsin Town House Builders*, the jurisdictional offer’s description of the property taken included a property right the landowner did not own. The compensation offered was described as: “for the above mentioned interest in the said land.” *Id.* at 54. The court explained that the itemization of damages required by WIS. STAT. § 32.05(3)(d) was intended to avoid the misconception the landowner would naturally have—expecting that the compensation offered included compensation for the identified property right that the landowner did not in fact own. *Id.* *Wisconsin Town House Builders* does not address the issue presented in this case.

used in crop work, as well as damages resulting from ozone effects and other physical phenomena associated with such lines, including but not limited to interference with telephone, television and radio communication.

§ 182.017(7)(b).

¶20 We do not agree with the landowners' reading of WIS. STAT. § 182.017(7)(b). Nothing in this paragraph reasonably suggests that damages described here and included in the jurisdictional offer must be separately identified and itemized. The landowners do not contend that ATC did not consider the damages described in this paragraph in making its jurisdictional offer.

¶21 The landowners appear to assume that the jurisdictional offer is intended as the mechanism by which property owners become aware of the relevant factors to be considered in determining compensation. However, this assumption is not supported by the statutory scheme. As we have already explained, condemners are required to provide landowners with the DOC publication describing their rights in the condemnation process. WIS. STAT. § 32.06(2a). This publication, not the jurisdictional offer, is the means prescribed by the legislature for informing landowners of the damages potentially available under the statute.

¶22 We conclude ATC's jurisdictional offers to the landowners were not insufficient for failing to list the items of loss or damage under WIS. STAT. § 32.09(6)(a)-(g).

### III. Scope of the Easements

¶23 The landowners contend that the easements ATC seeks to acquire through condemnation give ATC rights not described in the certificate of public

convenience and necessity. They claim that the easements exceed the scope of the certificate by giving ATC the right to: (1) relocate the power line; (2) use materials that ATC did not seek permission to use; and (3) hang fiber for communications not necessary to the power line. ATC responds that the first two easement rights fall within the authority granted by the certificate and that the easement does not allow ATC to hang fiber for communications not necessary to the power line.<sup>6</sup> We agree with ATC and conclude that the proposed easements are consistent with the certificate.

¶24 Pursuant to WIS. STAT. § 196.491(1)(e)-(f),<sup>7</sup> ATC's transmission line is considered a "facility," therefore ATC was required to apply for and obtain a certificate of public convenience and necessity from the PSC before proceeding with the project. §§ 196.491(3), 196.01(2m). An application for this certificate must satisfy the requirements of § 196.491(3) and WIS. ADMIN. CODE § PSC 111.51-.55 (May 2008).<sup>8</sup>

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<sup>6</sup> Alternatively, ATC asserts that, if the certificate does not describe these rights, ATC is still entitled to exercise them because they are reasonably necessary. Because we agree that the challenged rights fall within the authority granted by the certificate, we need not address ATC's alternative argument.

<sup>7</sup> WISCONSIN STAT. § 196.491(1)(e)-(f) provides:

(e) "Facility" means a large electric generating facility or a high-voltage transmission line.

(f) Except as provided in subs. (2)(b)8. and (3)(d)3m., "high-voltage transmission line" means a conductor of electric energy exceeding one mile in length designed for operation at a nominal voltage of 100 kilovolts or more, together with associated facilities, and does not include transmission line relocations that the commission determines are necessary to facilitate highway or airport projects.

<sup>8</sup> All references to the Wisconsin Administrative Code are to the May 2008 version unless otherwise noted.

¶25 ATC obtained a certificate of public convenience and necessity for its construction of this project. This certificate “constitute[s] the determination of the necessity of the taking for any lands or interests described in the certificate.” WIS. STAT. § 32.07(1). The certificate authorizes ATC to construct the facilities described in ATC’s application, subject to the conditions in the certificate. One of these conditions is that ATC must notify the PSC if its “plans for the scope, design, or location of the project change significantly.”

¶26 The landowners’ challenge is primarily based on the premise that ATC cannot include in the easement any right of interest it did not specifically request in its certificate application. However, the statute and regulations governing applications for certificates of public convenience and necessity do not require this level of specificity. *See* WIS. STAT. § 196.491(3) and WIS. ADMIN. CODE § PSC 111.53-.55. In addition, the certificate expressly allows ATC the flexibility to change its plans, and ATC need only notify the PSC of changes if they are significant.

¶27 The landowners’ challenge also overlooks the fact that ATC’s application, which the certificate adopts “subject to the conditions specified in [the PSC’s] Final Decision,” does address the location and materials issues. First, the application indicates that “[m]odifications to existing easements will be sought to accommodate the new 345 kV transmission circuit.” This language permits ATC to modify the easements to allow for relocation of the line. Second, while the application indicates that the proposed transmission line will be constructed “primarily on weathering steel monopole ... structures,” it specifically states that some segments of the line will include “new wood pole structures” and states that

the structures described in the application are the “expected structure type[s].” Thus, the application does not limit ATC to steel monopole structures.

¶28 With respect to the right to hang fiber, contrary to the landowners’ argument, the easements do not allow ATC to hang fiber for communications that are unnecessary to the power line. The easements allow ATC to hang “wires, including associated appurtenances for the transmission of electric current, communication facilities and signals appurtenant thereto....” An “appurtenance” is “[s]omething that belongs or is attached to something else,” and “appurtenant” is defined as “[a]nnexed to a more important thing.” BLACK’S LAW DICTIONARY 118 (9th ed. 2009). This easement language thus plainly allows ATC to install only communication facilities that are needed for the operation of the transmission lines.

#### CONCLUSION

¶29 We affirm the circuit court’s grant of summary judgment in favor of ATC.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

