

ORIGINAL

IN THE SUPREME COURT OF OHIO

09-2278

Ohio Power Company, :  
:   
Appellee, : On Appeal from the Hocking County  
: Court of Appeals,  
v. : Fourth Appellate District  
: Appellate District  
Charles R. Ogle, et al., : Court of Appeals  
: Case No. 09 CA1/09AP1  
Appellants. :

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MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANTS, CHARLES R. OGLE AND MELANIE A. OGLE

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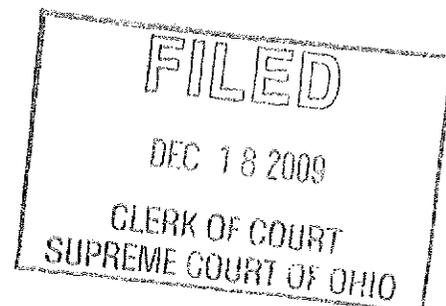


TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST	1
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	7
<u>Proposition of Law No.I:</u> Evidence that an appropriate authority will use the property to be appropriated in a manner that will cause environmental harm than other alternatives is evidence of an "abuse of discretion: in the determination of a public necessity that will overcome the prima facie evidence of such a necessity created solely by a resolution adopted by such authority on that issue.	7
CONCLUSION	10
PROOF OF SERVICE	11
APPENDIX	

TABLE OF CONTENTS

Opinion of the Court of Appeals of Ohio Fourth Appellate District, Hocking County (November 3, 2009)	1
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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case involves two significant interests that are of great general or public concern and are affected by the power of eminent domain. These interests include the original and fundamental right of private property and the strong interest of being assured that corporations are not unnecessarily damaging the environment in ways that can potentially affect the health and safety of an entire community.

In this case, a public utility sought the appropriation of an electric line easement over, across and through the Appellants' property, claiming a public necessity for the easement, which included the installation of the poles and lines above ground. In order to demonstrate the public necessity of the easement and the plans for the construction of the poles and lines, the public utility merely presented a corporate resolution stating that a public necessity existed.

The court of appeals accurately framed the dispute between the parties on this issue when it stated:

The parties fundamentally disagree about the meaning of the term "public necessity." Ohio Power [Appellee] argues the only relevant question is whether the project furthers a public purpose. In contrast, while not denying that Ohio Power's project may serve a public purpose, Appellant argues that a determination of public necessity also requires an examination into the manner in which the project is to be implemented. Essentially, the Ogles [Appellants] argue that it is not necessary for Ohio Power to put the power line above ground when a less intrusive method, burying the line, is available. See, Decision and Judgment Entry attached hereto as Appendix A at page 6.

The court of appeals noted that the introduction of the utility's corporate resolution with its bare pronouncement of "public necessity" constituted "prima facie evidence" of the necessity and that the Appellants were required to show an abuse of discretion on the utility's part in making this determination in order to overcome this evidence. See, R.C. Section 169.09(B). The Appellants say that they did overcome the Appellee's prima facie evidence by showing that there were three (3) possible routes for the installation of the Appellee's electric line, two of which were underground

and more environmentally conscientious than the above ground route selected by Appellee. The court of appeals said that the existence of alternate plans for the installation of the lines demonstrated that Appellee made a reasoned and good faith effort to exercise its discretion by considering various methods of implementation. However, there was no evidence presented as to why two (2) feasible and more environmentally palatable alternatives were passed over in favor of a plan that required the cutting down of numerous trees. It is Appellants' position that the protection of the environment is of such great general interest that an appropriating body should be called upon to demonstrate its reasoning for selecting the least environmentally friendly alternative for installing an improvement on appropriated property in order to support its claim to "public necessity". In other words, a court should accept as evidence of "an abuse of discretion" the fact that the least environmentally acceptable alternative for the installation of an improvement on appropriated property was selected. On the basis of such evidence, a court should call upon the appropriating authority to demonstrate the necessity of creating a negative impact on the environment at the risk of the health and safety of the general public. As Appellants said in their appellate briefs, public necessity should not to be judged merely on the basis of what the appropriating agency is trying to accomplish. There is authority, contrary to the position accepted by the court of appeals in this case that indicates that "where" the action is being taken and "how" the action is being taken are also important to the consideration of "public necessity". This is especially the case where the protection of the environment is concerned.

## STATEMENT OF THE CASE AND FACTS

Appellee, Ohio Power Company, commenced an appropriation action in the Common Pleas Court, Hocking County, Ohio in June, 2007, pursuant to Chapter 163 of the Ohio Revised Code to appropriate an easement across real property owned by Appellants, Charles and Melanie Ogle, for the purpose of constructing, operating and maintaining a power line across the Appellants' property to serve a telecommunications tower being constructed by Ohio Power on property adjacent to and south of the Appellants' property.

Pursuant to applicable statutes, the case was bifurcated for trial. The first portion of the case was limited to the issue of whether there was a public necessity for the proposed taking pursuant to Revised Code Section 163.09. The issue of compensation for any allowed appropriation was reserved for a later jury trial. The trial court ruled in favor of the Appellee on the issue of "public necessity" the appropriation, but an appeal to the Court of Appeals, Hocking County, Ohio, Fourth Appellate District, had to wait until the issue of compensation was adjudicated. The decision on compensation was journalized on December 11, 2008, and the Appellants filed a timely appeal.

As noted in their appellate brief, Appellants own real estate located in Good Hope Township, Hocking County, Ohio. This property is essentially bisected by Donaldson Road, which runs from the northern boundary of the Appellants' property to the southern boundary of the property. About one-half of the Appellants' property lies on either side of Donaldson Road, which is a one lane road that was lined with mature trees. Appellants acquired this property in 1990.

In 1991, the Appellants commenced the construction of their home on the subject property on the west side of the road. At that time, the Appellants contacted Appellee about extending electric service to the Appellants' property. The Appellants wanted a quote for installing the electric service underground for safety purposes and for preserving the trees on their property for aesthetic

and environmental purposes. Appellee gave the Appellants a quote for installing a power line to their property, but because the quote was for a line that would be above ground and because of the expense of the project, the Appellants declined to have Appellee extend electric service to their property.

As an alternative to having Appellee extend centralized electric service to their property, the Appellants instead developed an alternative source of electric power by building up a solar power plant on their property. This personal solar power plant provides the Appellants with all their electric power needs. They have not asked Appellee to supply them with electric power.

In 2005, approximately fourteen (14) years after the Appellants first tried to obtain electric power through Appellee, a representative of Appellee indicated to them that Appellee intended to run an electric line along Donaldson Road to serve a telecommunications tower to be constructed on property adjacent to and south of the Appellants' land. The proposed electric line was to run from an area north of the Appellants' property on Donaldson Road to the telecommunications tower site. Appellee was repeatedly told by the Appellants that they would not consider having an electric line cross their property if the electric line was not going to be put underground.

Thereafter, Appellee tried to circumvent dealing with the Appellants by attempting to get the Good Hope Township Trustees to give it permission to put the power line underground within the bounds of what Appellee understood to be the right of way for Donaldson Road. A Township Trustee indicated to Appellee that the Township could not grant an easement to Appellee to put the power line within the bounds of Donaldson Road and that Appellee would have to deal directly with the Appellants.

Thereafter, Appellee no longer discussed putting the power line underground with the Appellants and presented them with a plan for putting the power line above ground. Appellee never

gave the Appellants an explanation as to why it had changed its plan from putting the electric line underground as opposed to overhead. In addition to the underground installation plan developed by Appellee and presented to the Township Trustees, Appellants made a proposal to the Appellee to install the electric line underground through an open field on their property. Notwithstanding the fact that the power line could be installed either within the bounds of Donaldson Road or on the Appellants' property with their consent and without affecting the trees on the Appellants' property, Appellee continued to seek the appropriation of an easement consistent with the overhead plan.

Even though the power company was aware of the fact that the Appellants did not need or want power supplied to their property from Appellee, even though Appellee was aware of the concerns of the Appellants about having the power line run above ground as opposed to underground, and even though the line was only going to service a privately owned telecommunications tower located about half way between the northern and southern ends of Donaldson Road, Appellee deemed the acquisition of the power line a necessity. In order to demonstrate the "necessity" of the line, Appellee simply introduced a resolution adopted by Appellee on February 27, 2007, indicating that the acquisition of the power line was necessary. This resolution was passed more than a year after Appellee opened its discussions with the Appellants about this line and became aware of all of the Appellants' concerns.

Despite the fact that the plans for the underground installation of the electric line would cause much less environmental damage, the trial court and the court of appeals held that the Appellee's resolution of "public necessity" did not need to be supplemented by additional evidence produced by Appellee in order to find in its favor on this issue. The Appellants say that the court of appeals erred in not finding that the selection of the least environmentally acceptable alternative for the installation of an improvement on appropriated property was evidence of "an abuse of discretion"

that overcame a resolution of “public necessity” by the appropriating authority, requiring such authority to demonstrate the necessity of creating a negative impact on the environment at the risk of the health and safety of the general public.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law: Evidence that an appropriating authority will use the property to be appropriated in a manner that will cause more environmental harm than other alternatives is evidence of an “abuse of discretion” in the determination of a public necessity that will overcome the prima facie evidence of such a necessity created solely by a resolution adopted by such authority on that issue.**

In its Appellate Brief, Appellee took the position that it can hide behind a simple corporate resolution to establish “public necessity” for an appropriation. Essentially, the Appellee said that what it wanted to do, i.e., install an above ground electric line across the Appellants’ property was a public necessity because “we said so.” The statute governing this appropriation indicates that such a resolution is sufficient for that purpose, unless it can be shown that there was an abuse of discretion in the in the determination of that necessity. The issue is whether a showing that the proposed location or manner of installing or constructing the improvement for which property is being appropriated is more environmentally damaging than other alternatives is sufficient to demonstrate such an abuse of discretion. Appellants contend that there is more substance to public necessity than merely establishing that some public interest may be served by the proposed appropriation. It is the Appellants’ position that public necessity also addresses the issues of “where” and “how”.

The Appellants say that case law, as well as governing statutes relating to eminent domain, clearly suggest that the appropriateness of the use of the power of eminent domain is not to be judged merely on the basis of what the appropriating agency is trying to accomplish. The courts and the legislature have indicated that “where” the action is being taken and “how” the action is being taken are also important to the consideration of “public necessity”.

As the courts in Cleveland Electric Illuminating v. Scapell, 44 Ohio App. 2d 13, 336 N.E. 2d 637 (1975) and in Ohio Edison v. Cook, 84-LW-3279 (11<sup>th</sup> District Court of App, Portage County (1984)) noted, consideration needs to be given to alternative routes, disruption of homes and land

values, relative burdens on communities, aesthetics, safety and environmental concerns. That is, while it is extremely important that the purpose of the appropriating agency's actions be public as opposed to private (Norwood v. Horney, 110 Ohio St.3d 353, 2006-Ohio-3799), the impact and effect of an appropriating agency's actions on surrounding properties and the community are equally significant. Cleveland Electric Illuminating v. Scapell, *supra*, and Ohio Edison v. Cook, *supra*.

This concept of including factors other than "what" the appropriating agency has in mind in determining necessity is also incorporated into the statutes governing appropriation. Ohio Revised Code Section 163.59 sets forth the State's policy for land acquisition. In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many state and federally assisted programs, and to promote public confidence in public land acquisition practices, R. C. Section 163.59, provides that heads of acquiring agencies shall do or ensure the acquisition satisfies numerous conditions. One of those conditions is that the owner shall be given a reasonable opportunity to consider the offer of the acquiring agency for the real property, to present material that the owner believes is relevant to determining the fair market value of the property, **and to suggest modification in the proposed terms and conditions of the acquisition. The acquiring agency shall consider the owner's presentation and suggestions.** (Emphasis added).

So, it is clear that the courts and the legislature look beyond the sole issue of whether an appropriation fulfills a public purpose. Neither the legislature nor the courts give an appropriating agency the authority to run roughshod over the rights of neighboring property owners. There has to be some showing that not only is the action of the appropriating agency necessary to fulfill a public purpose, but also that the manner in which that purpose is going to be fulfilled is necessary too. That

is, the agency has to demonstrate that it made a reasoned and good faith effort to exercise the discretion given it by the Ohio Revised Code.

In this case, the Appellants contend that Appellee may have selected a project that serves some public purpose, but the manner in which it proposes to carry out that project shows that Appellee has abused its discretion in deciding how to proceed with the project notwithstanding Appellee's resolution of "public necessity".

From the very first encounter that the Appellants had with Appellee back in 1991, they made it clear that they wanted to have any power lines crossing their land to be buried underground. They wanted this done even though they might be the responsible for the cost of doing that. Because the Appellants were not presented with an underground installation plan in 1991 and because the cost of installing the lines was going to be too expensive in any event, the Appellants came up with their own plan for supplying their electrical needs by employing solar energy. They became energy self-sufficient and did not need the services of Appellee when they were approached fourteen years later in 2005 by Appellee about putting the subject line across their property. The Appellants reiterated the requirement that any line must be installed underground and even indicated an area where Appellee could install the line through an open field by way of a trench. Appellee ignored the Appellants requests and suggestions and even tried to circumvent dealing with the Appellants by going to the Township Trustees to get permission to install the line **underground** within the boundaries of what Appellee thought was a dedicated township road.

When the Township Trustees told Appellee that they could not help the company and that Appellee would have to deal with the Appellants, the plans for installing the line underground—a plan that Appellee was willing to pursue and pay for if it could avoid dealing with the Appellants—was abandoned. At that point, Appellee simply decided to move forward with

an above ground installation plan no matter how it might hurt the Appellants' interests. The Appellants have had a long standing interest in living in harmony with the environment.

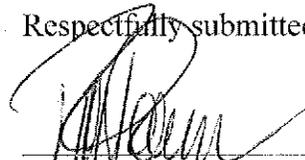
That is, notwithstanding the public policy found within the decisions of the courts and the statutes created by the legislature, Appellee decided not give consideration the Appellants' presentations and suggestions for modifications in the proposed terms and conditions of the acquisition. Appellee merely decided that the project served a public purpose and determined that it was going to install the line where it wanted to and how it wanted to even though it had demonstrated a willingness to do otherwise so long as it could avoid working with the Appellants.

The unexplained abandonment of a plan to bury the electric line as proposed to the Township Trustees is evidence of Appellee's lack of concern for the disruption to be caused to the environment. The general public has a strong interest in being assured that corporations are being environmentally conscientious because a company's failure to do so potentially affect the health and safety of an entire community. See, Hale v. Volunteers of America, 158 Ohio App.3d 415, 2004-Ohio-4508 (Court of Appeals of Ohio, First District, Hamilton County).

#### CONCLUSION

Even though the Appellee had adopted a resolution claiming that the subject project was a public necessity, there was evidence that the Appellee was selecting the least environmentally conscientious method of carrying out the project, which demonstrated an abuse of discretion on Appellee's part and overcame the prima facie evidence created by the resolution. As a consequence, the Appellee should have been required to support its choice of location and methods of construction with more than a simple resolution in light of the great general interest in protecting the environment.

Respectfully submitted,



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Ray R. Michalski  
Counsel of Record



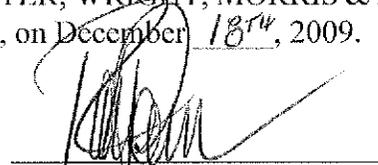
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D. Joe Griffith (0055499)

COUNSEL FOR APPELLANTS,  
CHARLES R. OGLE AND  
MELANIE A. OGLE

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for Appellees, Brian L. Buzby, PORTER, WRIGHT, MORRIS & ARTHUR, LLP, 41 South High Street, Columbus, Ohio 43215-6194, on December 18<sup>TH</sup>, 2009.



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Ray R. Michalski (0015793)

COUNSEL FOR APPELLANTS,  
CHARLES R. OGLE AND  
MELANIE A. OGLE

# **APPENDIX**



trial court erred in failing to instruct the jury that there was no evidence of such damage.

{¶2} Because the Ogles fail to show that Ohio Power abused its discretion in determining the easement is necessary for a public use, their assignment of error fails. In our view, because the jury could have reasonably concluded the taking of the easement created a diminution in value of the residue, Ohio Power's assignments of error also fail. Accordingly, we overrule both parties' assignments of error and affirm the decision of the trial court.

#### I. Facts

{¶3} Ohio Power Company commenced this action in June 2007 to obtain an easement across real property owned by the Ogles. Ohio Power sought the easement in order to install a power line which would serve a communications tower being constructed on property adjacent and to the south of the Ogles' property. The purpose of the proposed tower is to facilitate Ohio Power's communications with its employees in the field. When approached about the possibility of an easement, the Ogles told Ohio Power they would not consent to having power lines cross their property unless the installation was underground.

{¶4} The Ogles' property, consisting of approximately 88 acres, is bisected by Donaldson Road, running north and south through the length of

the property. Since purchasing the land in 1990, the Ogles have improved the property by building their residence there and in constructing various outbuildings, fenced pastureland and other amenities. The Ogles' electricity needs are completely met by their own solar power plant and they are not connected to any outside electrical source. Ohio Power's easement and proposed power line would run along the length of Donaldson Road as it runs through the property.

{¶5} Pursuant to R.C. 163.09, the trial court bifurcated the matter, first holding a hearing to determine if the proposed easement was a public necessity and reserving for later the issue of compensation. Ohio Power's easement would be approximately 1,500 feet long and 30 feet wide, constituting approximately one acre in total. After a full hearing on the matter, the trial court determined the taking was necessary. Subsequently, a jury trial was held to determine the amount of compensation the Ogles would receive for the easement and for the damage to the residue.

{¶6} After a two-day trial on the issue of compensation, Ohio Power moved for a directed verdict on the issue of damage to the residue of the property and, in the alternative, moved that the trial court issue an instruction that the jury could not award damages on the residue. The trial court denied both motions. The jury then awarded the Ogles \$4,000 for the

market value of the granted easement and \$50,000 for damages to the residue of the property.

{¶7} Subsequent to the jury's decision, the Ogles timely filed the current appeal and Ohio Power timely filed their cross-appeal.

## II. Assignment of Error

- I. THE TRIAL COURT ERRED, AS A MATTER OF LAW AND FACT, IN DETERMINING THAT THE APPELLEE'S APPROPRIATION OF AN ELECTRIC LINE EASEMENT OVER AND ACROSS THE REAL ESTATE OF THE APPELLANTS IS NECESSARY FOR A PUBLIC USE.

## III. Cross-Assignments of Error

- I. THE TRIAL COURT ERRED IN DENYING OHIO POWER'S MOTION FOR DIRECTED VERDICT ON THE ISSUES OF DAMAGES TO THE RESIDUE.
- II. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT IT COULD NOT AWARD DAMAGES FOR DAMAGE TO THE RESIDUE.

## IV. Assignment of Error

{¶8} In their sole assignment of error, the Ogles argue the trial court erred in determining the easement granted to Ohio Power was necessary for a public use. The Ogles do not dispute that, under R.C. Chapter 163, Ohio Power is a public utility which has the right, under certain circumstances, to appropriate property for public service. Rather, the sole basis for their argument is that, in this instance, the appropriation was not a public necessity.

{¶9} When Ohio Power filed its appropriation petition, R.C. 163.09(B) stated that, when an answer to such a petition denies the necessity for the appropriation: “Upon those matters, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of that necessity in the absence of proof showing an abuse of discretion by the agency in determining that necessity.”<sup>1</sup>

{¶10} Ohio Power adopted a resolution of necessity for the appropriation. Thus, under R.C. 163.09(B), the burden of proof fell upon the Ogles to demonstrate that the appropriation was not necessary. Further, the Ogles concede that, in order to find that there was no necessity for the power line, the trial court would have had to determine that Ohio Power abused its discretion. In reviewing the trial court’s conclusion that there was no such abuse of discretion, we are limited to determining whether the decision was supported by competent and credible evidence. *City of Toledo*

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<sup>1</sup> {¶ a} R.C. 169(B) has been amended since the filing of the case sub judice. Under current R.C. 169(B), regarding the burden of proof, the statute now reads, in pertinent part:

{¶ b} “(1) \* \* \* Upon those matters, the burden of proof is upon the agency by a preponderance of the evidence except as follows:

{¶ c} “(a) A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation creates a rebuttable presumption of the necessity for the appropriation if the agency is not appropriating the property because it is a blighted parcel or part of a blighted area or slum.”

*v. Kim's Auto & Truck Service, Inc.*, 6th Dist. No. L-02-1318, 2003-Ohio-5604, at ¶10; *Erie-Ottawa-Sandusky Regional Airport Authority v. Orris* (Sept. 13, 1991), 6th Dist. No. 90-OT-039, at \*4.

{¶11} Neither party disputes the following: Ohio Power sought to obtain an easement directly from the Ogles, but the parties were unable to come to terms which were mutually satisfactory; Ohio Power is a public utility entitled to appropriate land pursuant to Ohio Law; because Ohio Power adopted a resolution of necessity, the Ogles bear the burden of proof of showing the appropriation was not necessary; the trial court's relevant inquiry was whether Ohio Power abused its discretion in appropriating the Ogles' property. As such, the only point of contention between the parties is whether the taking was a public necessity.

{¶12} The parties fundamentally disagree about the meaning of the term "public necessity." Ohio Power argues the only relevant question is whether the project furthers a public purpose. In contrast, while not denying that Ohio Power's project may serve a public purpose, Appellant argues that a determination of public necessity also requires an examination into the manner in which the project is to be implemented. Essentially, the Ogles argue that it is not necessary for Ohio Power to put the power line aboveground when a less intrusive method, burying the line, is available.

However, because the Ogles failed to meet their burden of proof, we overrule this assignment of error.

{¶13} As previously stated, Ohio Power adopted a resolution that the easement was necessary. Under R.C. 163.09(B), after adopting such a resolution, the burden of proof shifts. As such, Appellant was presumed to have acted regularly and in a lawful manner until the contrary was shown. Thus, the Ogles needed to offer proof that Ohio Power abused its discretion in determining the taking was necessary. However, at the necessity hearing, the Ogles put forth no evidence suggesting Ohio Power did not make a reasoned decision. In their brief, the Ogles state that Ohio Power did not introduce any evidence showing that a number factors, such as anticipated load increases, aesthetics, and environmental impact, were taken into consideration before it passed the resolution of necessity. However, this argument mistakes the burden of proof. Ohio Power had no duty to rebut the claim unless the Ogles presented evidence that Ohio Power failed to consider such factors. The Ogles simply failed to do so.

{¶14} The Ogles also seem to argue that the existence of a prior plan conceived by Ohio Power, to install the line below ground, shows it abused its discretion in deciding, ultimately, to install the line aboveground. However, the existence of an alternate plan may also be construed as

demonstrating that Ohio Power made a reasoned and good faith effort to exercise its discretion by considering various methods of implementation. Further, the Ogles failed to present evidence demonstrating Ohio Power's reasoning, or lack thereof, in ultimately deciding to install the line aboveground. It's possible that Ohio Power determined aboveground installation was prohibitively expensive, or that underground installation was untenable because of complications specific to the property in question. Because no evidence was presented on the matter, we simply do not know the factors Ohio Power considered, or did not consider, in deciding to install the line aboveground instead of below.

{¶15} Finally, the existence of alternate routes or methods of implementation is not proof that a taking is unnecessary. "Where two lines for an electric transmission line are possible it is discretionary with the appropriating agency to select the route it will follow, and in the absence of fraud, bad faith or gross abuse of discretion, such determinations will not be disturbed by the court." *Cincinnati Gas and Electric Company v. Davies* (June 30, 1975), 1st Dist. Nos. CA 74-10-0086, CA 74-10-0087, at \*4, citing *Ohio Edison Co. v. Gantz* (1958), 109 Ohio App. 127, 159 N.E.2d 478. "Appellants essentially argue that an alternative route could have been chosen. However, the existence of alternative routes to the one selected

does not show that a necessity, i.e., reasonable public use, did not exist for that selection. In such instances, choice of routes is discretionary.” *Ferencz v. City of Toledo* (Dec. 30, 1988), 6th Dist. No. L-87-379, at \*3.

{¶16} Accordingly, because Ohio Power passed a resolution of necessity, and because the Ogles failed to meet their burden of proof that the taking was unnecessary, the trial court had competent and credible evidence to find in favor of Ohio Power. As such, the Ogles assignment of error is overruled.

#### V. First Cross-Assignment of Error

{¶17} Ohio Power, in its first assignment of error on cross-appeal, asserts the trial court erred in denying its motion for a directed verdict on the issue of damage to the residue of the Ogles’ property. Initially, we state the appropriate standard of review.

{¶18} “A motion for a directed verdict \* \* \* does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence.” *Wright v. Suzuki Motor Corp.*, 4th Dist. Nos. 03CA2, 03CA3, 03CA4, 2005-Ohio-3494, at ¶96, quoting *O’Day v. Webb* (1972), 29 Ohio St.2d 215, paragraph three of the syllabus. Accordingly, we apply a de novo standard of review. *Wright* at ¶96; *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶4.

{¶19} Further, when a trial court rules on a motion for a directed verdict, it must consider neither the weight of the evidence nor witness credibility. *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, 847 N.E.2d 405, at ¶31, citing *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284, 423 N.E.2d 467. A trial court should not grant a directed verdict unless, after construing the evidence most strongly in favor of the party against whom the motion is directed, “reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party.” *Groob v. Keybank*, 108 Ohio St.3d 348, 843 N.E.2d 1120, 2006-Ohio-1189, at ¶14; quoting Civ.R. 50(A)(4).

{¶20} In the case sub judice, after the trial court concluded the taking of Appellants’ property was a public necessity, a jury trial was conducted to determine compensation. Ohio Power called one witness, Dan Singer, a real estate appraiser. Singer testified that he was hired to determine the value of the proposed easement; determining the diminution in value of the residue was not part of his appraisal. Singer concluded that, according to his evaluation, the fair market value of the land encompassing the easement was approximately \$3,600. He further testified that, in his opinion, the power poles and power lines which would run along the

easement would not diminish the value of the real property. Thus, he testified that there would be no damage to the residue.

{¶21} Charles and Melanie Ogle also testified regarding the value of their property. Each testified that, over the years, they had made significant improvements to the property including: their residence, a log home; a solar power system which met all of their electricity needs; an underground telephone line; a greenhouse; a large garage; a barn and various outbuildings; a water well and septic system; a natural gas system; and fencing and pastureland. Charles Ogle stated that, in his opinion, the property was worth approximately \$15,000 an acre. He testified that he arrived at that figure based upon his relatively recent purchase of two lots in close proximity to the property in question:

{¶22} “Well, the basis for that opinion if you look at the lots that we purchased and the tax cards, they are public record. Lot 6 that we purchased we paid \$10,025 per acre for that lot. Okay. And lot 5 that we purchased right here, we paid \$17,064.84 per acre.” \* \* \* “I would put a value of \$15,000 an acre on my property because that property to the south is worth \$15,000 an acre. In fact, some property sold for more than \$15,000 an acre.”

{¶23} Melanie Ogle testified that, based upon what she knew about property values in the area, Singer's estimate was “absolutely not” an

accurate valuation of the property. She noted that another property along Donaldson Road had sold for \$215,000, and that was for approximately 43 acres of unimproved land. In her view, her property, consisting of 88 acres with the improvements noted above, was worth at least \$750,000. "I guarantee you I wouldn't have any problem selling it for that."

{¶24} The Ogles also testified that the installation of an aboveground power line, running the length of Donaldson Road, would decrease the value of the residue of their property. Currently, Donaldson Road, which bisects the Ogles' property, is tree-lined and free of power and telephone lines and poles. Ohio Power did not contest that installing the aboveground power line would require the removal of certain trees along the easement. The Ogles placed into evidence numerous photos, including the trees which would be removed along Donaldson Road and views from various vantage points on the property which would be degraded by the installation of power poles and lines. The Ogles testified that the proposed aboveground installation would seriously affect the aesthetics of the property and, thus, significantly affect the value of the residue. Melanie Ogle stated that, in her opinion, it would decrease the value of the property by, at least, ten percent.

{¶25} When there is a partial taking of real property, the landowner is entitled to receive compensation both for the appropriated property and for any damage to the remaining property. Such damage to the residue is the difference between the fair market value of the residue before and after the taking. *Wray v. Goeglein* (Dec. 2, 1998), 4th Dist. No. 97 CA 9, at \*7, citing *Englewood v. Wagoner* (1987), 41 Ohio App.3d 324, 326, 535 N.E.2d 736, 739. Further, under the “owner-opinion rule,” because property owners are assumed to be so closely acquainted with their property as to be aware of its market value, they are deemed competent to testify as to that value. Such testimony does not require a specific foundation as would that of an expert witness. *Smith v. Padgett*, 32 Ohio St.3d 344, 513 N.E.2d 737; *Conkle v. Southern Ohio Med. Ctr.*, 4th Dist. No. 04CA2973, 2005-Ohio-3965, at ¶16. “In the context of establishing the market value differential, the ‘owner-opinion rule’ permits appellee to offer his opinion of the value of the property after the injury.” *Fox v. Williams* (May 28, 1996), 4th Dist. No. 95 CA 38, at \*2.

{¶26} In the case sub judice, Ohio Power argues the Ogles’ testimony regarding the property’s value, and the diminution of value to the residue after the taking, was unsubstantiated and merely speculative, and

that the only basis for determining valuation was provided by Ohio Power's expert, Dan Singer. We disagree.

{¶27} In an appeal based upon a motion for a directed verdict, we consider neither the weight of the evidence nor witness credibility. Here, Ohio Power and the Ogles presented conflicting evidence as to both the value of the property as a whole and the damage, or lack thereof, to the residue. As the finder of fact, the jury was free to believe or disbelieve, in whole or in part, the testimony of Singer and the Ogles related above. The jury may have believed, for instance, because Ohio Power did not ask Singer to prepare an appraisal of the diminution of value of the residue, and because Singer admittedly did not consider the Ogles' improvements to the property, his opinion that there was no diminution was not convincing. The jury may also have chosen to give weight to the Ogles contention that the culling of trees and the installation of power poles would significantly impact the aesthetics of the property and, thus, diminish the value of the residue.

{¶28} After construing the evidence most strongly in favor of the Ogles, we find that reasonable minds could have come to the conclusion that the removal of trees and the installation of aboveground power lines and poles on the Ogles' property could result in a diminution of value to the

residue in the amount of \$50,000. Accordingly, Ohio Power's first cross-assignment of error is overruled.

#### VI. Second Cross-Assignment of Error

{¶29} Ohio Power's second cross-assignment of error states that the trial court erred in failing to instruct the jury that it could not award damages for damages to the residue of the property. In this assignment of error, Ohio Power simply states that for the reasons cited in its first assignment of error, the trial court should have instructed the jury that it could not award such damages. Accordingly, following our rationale in Ohio Power's first assignment of error, we also overrule its second assignment of error.

#### VII. Conclusion

{¶30} For the foregoing reasons, we overrule the assignment of error of Charles and Melanie Ogle and the cross-assignments of error of Ohio Power. The Ogles' argument fails because they did not meet the required burden of proof. That is, they failed to show that Ohio Power abused its discretion in determining the taking of the easement was necessary for a public use. Ohio Power's cross-assignments of error fail because, when the evidence is considered in a light most favorable to the Ogles, reasonable minds could conclude the property suffered a diminution in value to the residue. Accordingly, we affirm the judgment of the court below.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee/Cross-Appellant recover of Appellants/Cross-Appellees costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

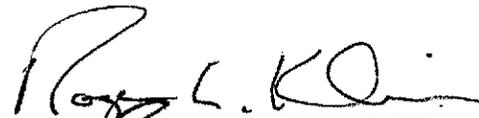
It is ordered that a special mandate issue out of this Court directing the Hocking County Common Pleas Court to carry this judgment into execution.

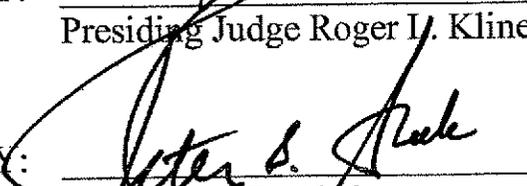
Any stay previously granted by this Court is hereby terminated as of the date of this entry.

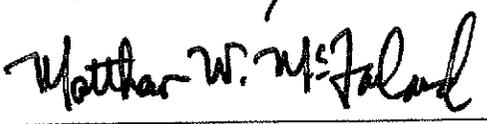
A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.  
Exceptions.

Kline, P.J., Abele, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court,

BY:   
Presiding Judge Roger I. Kline

BY:   
Judge Peter B. Abele

BY:   
Judge Matthew W. McFarland

**NOTICE TO COUNSEL**

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.