

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	
Application of COMMONWEALTH EDISON	:	No. 05-0188
COMPANY, for a Certificate of Public	:	
Convenience and Necessity, pursuant to Section 8-	:	
406, and an order, pursuant to Section 8-503, of the	:	
Illinois Public Utilities Act, authorizing and	:	
directing the Petitioner to construct, operate and	:	
maintain new 345,000 and 138,000 volt electric	:	
transmission lines, and to expand an existing	:	
electric substation in Cook County, Illinois.	:	

INITIAL POST-HEARING BRIEF OF
PETITIONER COMMONWEALTH EDISON COMPANY

Petitioner Commonwealth Edison Company (“ComEd”), by its attorneys, submits this post-hearing brief in support of its request for an order pursuant to Section 8-503 of the Illinois Public Utilities Act (the “Act”), 220 ILCS 5/8-503. For the reasons stated herein, the Illinois Commerce Commission (the “Commission”) should issue ComEd an order authorizing and directing ComEd, pursuant to Section 8-503 of the Act, to complete the approved construction of certain transmission lines and associated facilities, using eminent domain if necessary.

Introduction

In this docket ComEd seeks orders from the Commission under two sections of the Act. First, ComEd seeks an order under Section 8-406(b) approving the construction of new transmission lines and associated facilities, before construction begins. Illinois public utilities do not have the general right of eminent domain, nor does the approval under Section 8-406(b), by

itself, carry with it eminent domain authority. ComEd also seeks an order under Section 8-503, authorizing and directing ComEd to complete the project, which would empower ComEd to use eminent domain if necessary. *See* 220 ILCS 5/8-509 (a utility that has been issued a directive under Section 8-503 has the authority to use the power of eminent domain when necessary to complete the project).[†]

The Certificate of Public Convenience and Necessity (“CPCN”), requested pursuant to Section 8-406(b) of the Act to permit the proposed construction, is not in dispute, and will be the subject of a separate Interim Order. The CPCN is not addressed in this brief except insofar as it relates to the issue under Section 8-503. The Staff of the Illinois Commerce Commission (“Staff”) supports the issuance of a CPCN to approve the proposed construction, and also supports the issuance of an order under Section 8-503, but only as to a single parcel of property and not to the other four privately owned parcels along the route, which ComEd has not yet acquired. (These parcels are depicted on the maps attached to ComEd Ex. 4.0.) The issue for decision here is whether the Commission should limit its Section 8-503 order so as to withhold eminent domain authority as to some of the parcels on the approved right-of-way.

Requirements of Section 8-503

Section 8-503 of the Act provides as follows:

Whenever the Commission, after a hearing, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any 2 or more public utilities are necessary and ought reasonably to be made or that a new structure or structures is or are necessary and should be erected, to

[†] Once the Commission has issued an order under Section 8-503, a utility can commence a condemnation action in the circuit court to set the price of a parcel of property and to obtain a judgment for possession. Section 8-509 does not grant a utility “quick-take” authority, and the utility does not receive title to the property until the court enters its judgment.

promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order authorizing or directing that such additions, extensions, repairs, improvements or changes be made, or such structure or structures be erected at the location, in the manner and within the time specified in said order....

220 ILCS 5/8-503. So, the key elements that the Commission must find for an order under Section 8-503 are that the proposed facilities are “necessary” and “ought reasonably to be made” to promote the convenience of the public. Upon making such a finding, the Commission issues an order to the utility, “authorizing or directing” that the improvements be made. Pursuant to Section 8-509, “[w]hen necessary for the construction of any alterations, additions, extensions or improvements ordered or authorized under Section 8-503 or 12-218 of this Act, any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain.” 220 ILCS 5/8-509. In effect, Section 8-509 recognizes that if a utility is commanded to complete a project in the public interest, it should have at its disposal the necessary authority to carry it out.

ComEd Has Satisfied the Statutory Elements for a Section 8-503 Order

The record demonstrates that ComEd is entitled to an order under Section 8-503. ComEd introduced evidence, which was not contested by any party, that the project is necessary to preserve adequate, efficient, and reliable electric service to its customers. (Sterling, ComEd Ex. 1.0 at 8-18, 20.) ComEd also introduced uncontested evidence that the proposed construction is the least cost means to accomplish the needed reinforcement. (Sterling, ComEd Ex. 1.0 at 19; Ransom, ComEd Ex. 2.0 at 8; ComEd Ex. 2.1.) And, the record contains uncontested evidence that the route ComEd proposed for the new transmission lines, and the site for the expansion of the Crawford Substation, are reasonable and the best available among the

alternatives. (Ransom, ComEd Ex. 2.0 at 9-16.) The project therefore promotes the public convenience.

This evidence is not contested by Staff; to the contrary, Staff agrees. Under cross-examination, Staff witness Ronald Linkenback agreed that the project was “necessary for the public convenience.” (Linkenback, Tr. 80.) He further agreed that the project “reasonably ought to be constructed.” (Linkenback, Tr. 80.) These are the statutory elements necessary for an order under Section 8-503. As the Act says, whenever the Commission finds that a project is necessary and reasonably ought to be constructed, the Commission should order the utility to complete the project. Given the unanimous evidence meeting the exact statutory standard, an order pursuant to Section 8-503, authorizing and directing ComEd to complete the proposed project, is warranted.

The Section 8-503 Order Applies to the Entire Project

As noted above, Staff supports the issuance of a Section 8-503 order in this docket. However, Staff takes the novel position that the Section 8-503 order in this docket should apply only to a single parcel of property adjacent to the Crawford Substation, and not to the other portions of right-of-way necessary to complete the project. While conceding that the project as a whole meets the factors discussed in Section 8-503 itself, Staff argues that ComEd has not proved that each of these individual parcels is necessary to the project. Staff’s recommendation is at odds with the law and established Commission practice; it would also be poor public policy. As discussed below, upon finding that a Section 8-503 order is warranted, the Commission consistently grants utilities authority to acquire all outstanding parcels.

First, Staff’s argument that the Commission can and should limit its Section 8-503 order to just one of several parcels of property required finds no support in the Act. Section 8-

503 does not address the specific real estate requirements, and does not require a discussion or proof of parcel-by-parcel real estate alternatives. Rather, any analysis of alternatives occurs when the Commission considers whether to issue the CPCN under Section 8-406, where cost comparisons are mandated. 220 ILCS 5/8-406(b) & (d). Section 8-503, on the other hand, requires proof that the project, as a whole, is so necessary to the public convenience as to warrant a mandatory directive. If the project is important enough that it reasonably ought to be completed, the Commission orders the utility to undertake it. A project, therefore, either is or is not the subject of a Section 8-503 order. Given the necessity for an entire transmission line to be built for it to function at all, it would be nonsensical for the Commission to find that certain sections of a transmission line are necessary, while others are not.

Staff's argument for a partial Section 8-503 order similarly is inconsistent with virtually every Commission decision on this issue in recent years. A survey of the past twenty years of Commission decisions on Section 8-503 petitions shows that, in each case, if the Commission finds the project necessary, but that, despite diligent efforts, portions of the right-of-way remain unobtained, the Commission issues a single order directing that the project be completed. The Section 8-503 order in each case carries with it the authorization to condemn any outstanding property on the right-of-way approved in the CPCN. *Marathon Ashland Pipe Line*, ICC Dkt. No. 98-0687 (Nov. 1, 2000) (order granted for both outstanding parcels); *Commonwealth Edison Co.*, ICC Dkt. No. 96-0410 (May 6, 1998) (order granted for all outstanding parcels), *aff'd in unpublished order*, No. 2-98-0889 (Ill. App. 2d Dist. May 3, 1999); *Central Illinois Pub. Serv. Co.*, ICC Dkt. No. 95-0484 (July 17, 1996) (order granted for all 28 outstanding parcels); *Northern Illinois Water Corp.*, ICC Dkt. No. 95-0044 (June 21, 1995) (order granted for the only outstanding parcel); *Northern Illinois Gas Co.*, ICC Dkt. No. 94-0029

(June 8, 1994) (order granted for all outstanding parcels); *Northern Illinois Water Corp.*, ICC Dkt. No. 93-0208 (July 21, 1993) (order granted for all eight outstanding parcels); *Illinois Power Co.*, ICC Dkt. No. 92-0306 (Dec. 16, 1992) (order granted for all 26 outstanding parcels); *Central Illinois Pub. Serv. Co.*, ICC Dkt. No. 91-0355 (Mar. 10, 1992) (order granted for all six outstanding parcels); *Mt. Carmel Public Utility Co.*, ICC Dkt. No. 91-0113 (May 16, 1991) (order granted for all four outstanding parcels); *Central Illinois Pub. Serv. Co.*, ICC Dkt. No. 90-0427 (Apr. 3, 1991) (order granted for all five outstanding parcels); *Central Illinois Pub. Serv. Co.*, ICC Dkt. No. 88-0342 (Apr. 18, 1990) (order granted for all four outstanding parcels); *Northern Illinois Gas Co.*, ICC Dkt. No. 86-0290 (Jan. 21, 1987) (order granted for both outstanding parcels). None of these cases required the utility to prove that adjacent parcels were not available or that the utility had negotiated with alternate landowners. In each of these cases, the Commission granted all necessary eminent domain authority for the utility to complete the certified project on the route approved in the CPCN. At the hearing, Mr. Linkenback conceded that he was not aware of any occasion on which the Commission has granted a utility eminent domain authority for only a portion of the property needed to complete the proposed construction. (Tr. 91.)

Rather than Staff's proposed required extra showing, the common theme among the cases is the necessity of the project, and whether the utility had diligently and reasonably pursued voluntary sales – a standard of proof that ComEd has clearly met here. The following description of a utility's evidence, presented in support of an 8-503 order to complete 45 miles of gas pipeline across five counties, is representative:

Petitioner presented evidence which established that the Company may require the power of eminent domain in order to complete the Volo/Troy Grove Project in a timely fashion. Mr. Streicher testified that through voluntary negotiations with individual

landowners and Commonwealth Edison Company, NI-Gas has acquired the property rights which it requires for a substantial number of the parcels necessary for construction, operation and maintenance of the Volo/Troy Grove Project. Mr. Streicher further testified that the Company has been offering landowners payment of what it believes to be the fair market value of the property rights being acquired. Mr. Streicher explained that, while the Company is committed to continue to use its best efforts to acquire the necessary property rights for the required parcels on a reasonable bases by voluntary negotiations, it is possible that, in spite of these good faith negotiations, the Company may not be able to acquire the necessary property rights for all of the required parcels by voluntary negotiation. Thus, it may be necessary for Petitioner to exercise the right of eminent domain in order to acquire some of the needed property rights.

Northern Illinois Gas Co., ICC Dkt. No. 94-0029 (June 8, 1994) (Lexis Op. at *5 - *6). There is no indication that the utility proved that there were no alternative routes that would reduce or avoid eminent domain, as Staff would require of ComEd here. There is also no indication that the utility was at a negotiations impasse with every landowner. However, based on the evidence the utility presented, the Commission issued an order under Section 8-503 granting the utility “the power of eminent domain for purposes of acquiring the property interests or rights that Northern Illinois Gas Company requires for construction, operation and maintenance of the proposed gas transmission facilities....” (*Id.* at *10 - *11.)

Similarly, in Docket No. 96-0410, ComEd sought a CPCN and eminent domain authority to build a new transmission line in McHenry County. ComEd’s evidence was similar to that presented in the *Northern Illinois Gas* docket, and to the evidence presented here: some easements had been obtained but others had not; ComEd continued to negotiate for voluntary sales; despite those efforts, there would likely be some holdouts that would make eminent domain necessary to complete the project. (Lexis Op. at *10.) Based on this evidence, the Commission found that ComEd had demonstrated that eminent domain authority was necessary to serve the public, and ordered ComEd, pursuant to Section 8-503 and 8-509, to acquire through

eminent domain the right-of-way needed for the project. (*Id.* at *51-*52.) As it turned out, ComEd did in fact need to file numerous condemnation suits to complete the project on time. (Jones Reb., ComEd Ex. 4.0 at 4.)

This is just the sort of evidence that ComEd has introduced here: ComEd has been negotiating in good faith with the landowners along the proposed route; ComEd has reached the point in negotiations where it seems likely that eminent domain will be necessary; ComEd has proposed a reasonable and least cost route. (Jones Dir., ComEd Ex. 3.0 at 7; Jones Reb., ComEd Ex. 4.0 at 2.) Staff specifically agreed that ComEd had proposed appropriate routes. (Linkenback, Tr. 80.) Staff also agreed that “ComEd has been negotiating in good faith for all the parcels in question.” (Linkenback, Tr. 91.) Staff also inquired of ComEd whether ComEd could complete the project without eminent domain authority. ComEd responded that, if the Commission issued ComEd a CPCN specifying a route, but did not allow eminent domain, ComEd could only complete the project if all landowners along the specified route sold ComEd easements voluntarily. (Staff Ex. 1.0, Schedule 1.5.) In other words, absent eminent domain authority, a holdout landowner could frustrate this project which is necessary for ComEd to serve the public. The Commission, having found that the project is necessary and ought to be completed, should not handicap ComEd by withholding eminent domain authority.

The Commission Should Not Adopt Staff’s New Procedure

Consistent with the preceding section, Staff’s witness agreed at the hearing that his proposed “test” for whether a Section 8-503 order was appropriate was not set forth in the statute, any Commission regulation, or in any past decision of which he was aware.

(Linkenback, Tr. 87-88.) Staff is apparently advocating a brand new super-requirement for Section 8-503 orders.[†]

To the extent that it is even consistent with the Act, Staff's proposed departure from past Commission practice is not in the best interest of utility customers, and should not be adopted. The result would be significant delay in, and increased cost of, the construction of projects that the Commission has found necessary. Under Staff's proposal a utility would obtain eminent domain authority for only a portion of the certified route. If a parcel of property later met Staff's special new definition of "necessary," the utility would need to file a new docket to request eminent domain for that parcel as well. Only after the resolution of the new Section 8-503 petition could the utility file its action in the circuit court to set the price and obtain the property. The multiple rounds of Commission dockets and circuit court condemnation actions would be time consuming, expensive and wasteful. (Jones Reb., ComEd Ex. 4.0, at 1-2, 4.) These delays may encourage some landowners to insist on a higher price, and a utility might have to choose between an exorbitant price and meeting the required service date.

Alternatively, forcing ComEd to obtain the property without eminent domain authority could cause the purchase price to increase. (Jones Reb., ComEd Ex. 4.0, at 2.) Absent a Section 8-503 order, a utility is required, pursuant to Commission regulations, to inform landowners explicitly that the utility does *not* have the right of eminent domain. 83 Ill. Admin. Code Part 300. Understandably, some landowners in this situation will refuse to sell, while others will insist on higher than fair market value. Since overpaying for a utility's rights-of-way

[†] Under Mr. Linkenback's test, ComEd would have the additional burden of proving, for each individual parcel that : (1) ComEd has a reasonable need for the parcel of land to complete this project; (2) ComEd considered alternative routes that would eliminate the need for eminent domain for the parcel of land; (3) ComEd considered alternative routes that would reduce the encumbrance needed for each parcel of land; and (4) ComEd negotiated in good faith with the owner of the land (Staff Ex. 1.0 at 15.)

would have the effect of inflating its rate base and increasing rates, Mr. Linkenback of Staff agreed that such overpayments would not promote the public convenience. (Linkenback, Tr. 86.)

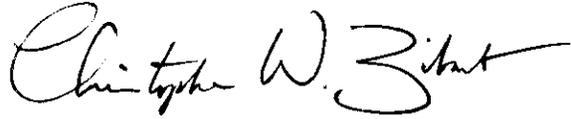
Conclusion

The evidence demonstrates that ComEd has satisfied the statutory requirements for the issuance of a Section 8-503 order in this docket. Staff's suggestion that additional requirements be added to those in the statute would negatively affect the public and should be rejected. ComEd therefore requests that the Commission issue the requested order applicable to the entire project.

Dated: October 18, 2005

Respectfully submitted,

COMMONWEALTH EDISON COMPANY



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One of the attorneys for
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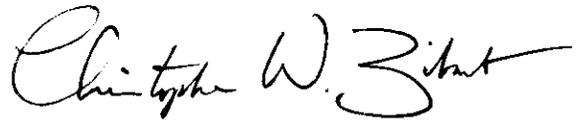
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NOTICE OF FILING

TO: Elizabeth Rolando, Chief Clerk All Parties on the
Illinois Commerce Commission Attached Service List
527 East Capitol Avenue
Springfield, Illinois 62706

Please take note that on October 18, 2005, we caused to be filed with the Clerk of the Illinois Commerce Commission, 527 E. Capitol Ave., Springfield, Illinois 62701, Commonwealth Edison Company's Initial Post-Hearing Brief of Petitioner Commonwealth Edison Company in the above-captioned regulatory proceeding, copies of which are attached and hereby served upon you.

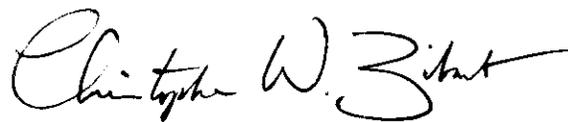
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the above Notice, together with copies of the documents referred to therein, have been served upon all parties on the attached Service List via electronic mail, from Chicago, Illinois, on the 18th day of October, 2005.

A handwritten signature in black ink that reads "Christopher W. Zibart". The signature is written in a cursive style with a horizontal line extending from the end of the name.

Christopher W. Zibart

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ICC DOCKET NO. 05-0188

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