

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

St. Louis Pipeline Corporation :
 :
Petition pursuant to Section 8-503, :
8-509, 15-101 and 15-401 of the :
Public Utilities Act for a certificate :
authorizing operation as a : **02-0664**
common carrier by pipeline, and :
for entry of an order authorizing :
and directing construction and :
operation of a petroleum pipeline :
and granting authority to exercise :
eminent domain. :

PROPOSED ORDER

By the Commission:

I. INTRODUCTION

On October 8, 2002, St. Louis Pipeline Corporation (“Petitioner”) filed with the Illinois Commerce Commission (“Commission”) a petition requesting a certificate pursuant to Section 15-401 of the Public Utilities Act (“Act”), 220 ILCS 5/1-101 et seq., authorizing Petitioner to operate as a common carrier by pipeline a pipeline extending from Hartford-Woodriver, Illinois to the Illinois/Missouri border at or near the Chain of Rocks-Mississippi River Bridge (all of said pipeline being located in Madison County, Illinois), for the transportation of refined petroleum products in interstate commerce. Petitioner further requests that the Commission enter an order pursuant to Section 8-503 of the Act authorizing and directing Petitioner to construct, install, and maintain the aforesaid pipeline. Finally, Petitioner seeks authorization pursuant to Section 8-509 of the Act to exercise the power of eminent domain to acquire a permanent easement under and through certain property traversed by the pipeline.

Pursuant to due notice, several hearings were held in this matter before a duly authorized Administrative Law Judge of the Commission at the offices of the Commission in Springfield, Illinois.¹ The Metro East Sanitary District (“MESD”) filed a petition to intervene, which was granted by the Administrative Law Judge. The City of Madison and the Wood River Drainage and Levee District each entered an appearance but did not petition to intervene or otherwise participate in the docket. Commission Staff

¹ In light of extensive discovery and settlement efforts, numerous status hearings were held on December 4, 2002, February 20, 2003, August 13, 2003, September 25, 2003, November 14, 2003, December 9, 2003, January 9, 2004, February 4, 2004, May 11, 2004, May 26, 2004, June 29, 2004, August 6, 2004, September 8, 2004, and October 14, 2004.

("Staff") participated as well. At the February 23, 2005 evidentiary hearing, counsel for Petitioner, MESD, and Staff each entered an appearance. Donald Hopgood, Petitioner's general manager, Robert Rose, Petitioner's president and owner, and Dennis Kallash, owner of Fitch & Associates,² offered testimony on behalf of Petitioner. Walter Greathouse, the maintenance supervisor for that portion of MESD covering Madison County, testified on behalf of MESD. Mark Maple, an energy engineer in the Engineering Department of the Energy Division of the Commission's Public Utilities Bureau, and Phil Hardas, a financial analyst in the Finance Department of the Financial Analysis Division of the Public Utilities Bureau, testified on behalf of Staff. At the end of the February 23, 2005 evidentiary hearing, the record was marked "Heard and Taken."

Prior to the submission of briefs, on September 16, 2005 MESD filed a pleading entitled "Request for a Declaratory Ruling, or in the Alternative, Motion to Dismiss for Want of Jurisdiction, as to the Exercise of Eminent Domain over Property Owned by the Metro East Sanitary District, a Municipal Corporation." Petitioner and Staff each filed a response, to which MESD filed a reply. A Proposed Interim Order was served on the parties. Petitioner and Staff each filed a Brief on Exceptions. MESD filed a Brief in Reply to Exceptions. On February 8, 2006, the Commission entered an Interim Order dismissing with prejudice that portion of the petition requesting authority to take property pursuant to Section 8-509 of the Act to the extent that it applies to public property. Thereafter, Petitioner, MESD, and Staff each filed an Initial Brief and Reply Brief addressing the remaining issues. A Proposed Order was served on the parties.

Petitioner is a corporation organized under the laws of the State of Missouri, with its principal office located in Sarasota, Florida. Petitioner is authorized to conduct business in the State of Illinois. Petitioner is engaged in the business of transporting refined petroleum products by pipeline between points in Illinois and Missouri. The pipeline at issue is currently utilized by Petitioner to transport jet fuel from the Illinois Petroleum Supply Corporation tank farm, at or near Hartford-Wood River, Illinois to Lambert International-St. Louis Municipal Airport ("Lambert"), located in Missouri. The entire length of the pipeline is approximately 22.5 miles, only eight miles of which lies within Illinois. Petitioner and its predecessors in interest have maintained the pipeline pursuant to agreements negotiated with various land owners since 1969.

In approximately July of 1996, Petitioner states that the Illinois Department of Transportation ("IDOT") directed it to move its pipeline approximately twenty feet from a State right-of-way along and upon Illinois Route 3 near the intersection thereof with New Poag Road in Madison County. At this point, the pipeline rises above the levies on either side of the Cahokia Diversion Canal but passes beneath the canal itself. Moving the pipeline was considered prudent to avoid damage to it during the construction of bridges over the Cahokia Diversion Canal. Petitioner believed that it had an easement agreement with MESD by which it maintained its pipeline. During the planning process for moving the pipeline, however, Petitioner and MESD discovered that the easement agreement expired. The easement agreement is encompassed in MESD Ordinance 719 and covered the period from 1970 to 1995. In October of 1998, Petitioner began

² Fitch & Associates is a surveying and engineering firm.

work to move its pipeline to accommodate IDOT. Petitioner believed that it had permission from MESD to do so pursuant to a letter from MESD dated October 1, 1998.³ Petitioner completed the move of its pipeline in December of 1998. As it turns out, however, the October 1, 1998 MESD letter did not represent an agreement between Petitioner and MESD. Although the pipeline is in place and operating, no easement agreement has been reached between Petitioner and MESD despite repeated efforts to come to an agreement. According to Petitioner, the obstacle to coming to an agreement is MESD's insistence on a minimum five feet wide nonexclusive easement and MESD's insistence on receiving an annual fee viewed as excessive by Petitioner. The length of the easement (regardless of width) that Petitioner needs from MESD is 627 feet. Because Petitioner finds the fee amount unreasonable, it now comes to the Commission seeking eminent domain authority over that part of the pipeline route on land claimed by MESD. Petitioner hopes to use eminent domain to obtain an easement on better terms. Petitioner indicates that it has easement agreements with the other property owners along the pipeline route.

II. REQUESTED RELIEF

A. Section 15-401

Section 15-401 of the Act provides in relevant part:

- (a) No person shall operate as a common carrier by pipeline unless the person possesses a certificate in good standing authorizing it to operate as a common carrier by pipeline. No person shall begin or continue construction of a pipeline or other facility, other than the repair or replacement of an existing pipeline or facility, for use in operations as a common carrier by pipeline unless the person possesses a certificate in good standing.
- (b) Requirements for issuance. The Commission, after a hearing, shall grant an application for a certificate authorizing operations as a common carrier by pipeline, in whole or in part, to the extent that it finds that the application was properly filed; a public need for the service exists; the applicant is fit, willing, and able to provide the service in compliance with this Act, Commission regulations, and orders; and the public convenience and necessity requires issuance of the certificate.

* * *

In its written order, the Commission shall address all of the evidence presented, and if the order is contrary to any of the evidence, the Commission shall state the reasons for its determination with regard to that evidence. The provisions of this

³ The October 1, 1998 MESD letter is included in the record as MESD Exhibit 1.6.

amendatory Act of 1996 apply to any certificate granted or denied after the effective date of this amendatory Act of 1996.

1. Petitioner's position

In support of its request for a Certificate in Good Standing, Petitioner asserts in its Initial Brief that no serious argument has been made by MESD that a certificate should not be granted. Petitioner states that the application was properly filed. Petitioner maintains that it demonstrated a public need—that being the public need to have jet fuel supplied to Lambert. Petitioner contends that it is fit, willing, and able to provide service. Petitioner also asserts that it has substantial assets and has substantial experience in the operation of petroleum pipelines. Finally, Petitioner argues that the public convenience and necessity requires the issuance of the certificate. If it is unable to transport the jet fuel through its pipeline, Petitioner contends that the public would be inconvenienced by shortage of the product, leading to travel and shipment delay, as well as higher operating costs. Petitioner points out that there exists only one other pipeline that supplies jet fuel to Lambert. That pipeline is owned and operated by the Buckeye Pipeline Corporation (“Buckeye”) and transports jet fuel from the nearby Conoco-Phillips refinery to Lambert. According to Petitioner, there are occasions when the Buckeye pipeline is out of service. The alternative to pipeline transportation is truck transportation. Mr. Hopgood testified on behalf of Petitioner regarding the advantage and increase in general safety to the public from the use of pipelines as opposed to putting additional trucks on the highways. In discussing the criteria set forth in Section 15-401(b) for the issuance of a certificate, Petitioner notes Staff’s concurrence and recommendation that a certificate be granted.

Petitioner also relies on a statement by MESD in its October 3, 2005 reply to Petitioner’s response to MESD’s September 8, 2005 motion. At paragraph 24 in its reply, MESD states:

That in the event the Illinois Commerce Commission grants the Metro East Sanitary District's Request for a Declaratory Ruling, or in the alternatively [sic], its motion to dismiss, the Metro East Sanitary District will withdraw its opposition to that portion of St. Louis Pipeline Corporation's Petition herein seeking a certificate authorizing operation as a common carrier by pipeline and for entry of an order authorizing and directing construction and operation of a petroleum pipeline, and would not oppose the eminent domain issue, with the understanding that the order would not have any effect on property that is owned by or held and devoted to a public use by the Metro East Sanitary District.

In light of the Interim Order entered on February 8, 2006, Petitioner did not anticipate any opposition from MESD regarding its request for a Certificate in Good Standing. Petitioner was therefore taken aback by MESD’s argument in its Reply Brief that Petitioner should not be granted a certificate. Specifically, MESD claimed that Petitioner was not fit, willing, and able and failed to demonstrate a public need for the

service. Because these criteria for the issuance of a certificate were not previously litigated and because Petitioner does not consider the claims responsive to the Initial Briefs, Petitioner sought to strike such arguments from MESD's Reply Brief through its March 3, 2006 motion to strike.

With regard to the area to be covered by the certificate, Petitioner's Exhibits 3.3 through 3.6 roughly identify the path of the pipeline within Illinois. With the exception of the property claimed by MESD, Petitioner has secured easements for the pipeline along its entire length in Illinois. Within the property claimed by MESD, Petitioner seeks an exclusive one foot wide, 627 feet long easement which is more fully described in Exhibit A attached to the petition. Petitioner explains that it always prefers an exclusive easement because it eliminates safety concerns stemming from other utilities being granted the right to use the same land. Throughout the eight miles of the pipeline in Illinois, the diameter of the pipe is four, six, or eight inches depending on the specific portion of the pipeline. The pipe through the MESD property measures six inches with an outside diameter of six and five-eighths inches. Regardless of the diameter of the pipe at any point within Illinois, Petitioner currently has no one foot wide easements. The record does not reflect the width of the various easements obtained in Illinois.

As noted above, Petitioner requests a one foot wide easement in order to limit the fees demanded by MESD. Petitioner relates that in 1998, MESD was seeking a charge of \$.50 per square foot for a minimum five feet wide nonexclusive easement. In 2002, MESD revised its assessments for a 25-year nonexclusive easement to \$1.00 per square foot for a minimum five feet wide easement for the first five years, \$1.50 per square foot for the next five years, \$2.00 per square foot for the next five years, \$2.50 per square foot for the next five years, and \$3.00 per square foot for the final five years. Petitioner does not believe that MESD has been able to get a pipeline operator to agree to this fee structure. Furthermore, Petitioner does not see any correlation between the proposed fee and what MESD must do as a result of a pipeline operator having a pipeline on MESD property.

Petitioner argues that a one foot wide exclusive easement is appropriate because its six inch pipe easily fits within a one foot easement. Although it would need a temporary maintenance easement from MESD to work on the pipeline, Petitioner asserts that this is true even with a five feet wide easement. Absent contact with a backhoe or a catastrophic accident, Mr. Hopgood testified that there is no need for repairs or periodic maintenance of the buried pipeline. The projected life of the pipe is 50 to 75 years.

Mr. Hopgood also testified that the rules of the United States Department of Transportation Pipeline and Hazardous Materials Safety Administration ("USDOT") require a minimum of 12 inches between Petitioner's pipeline and any other buried pipeline. He added that 18 inches from any other buried facility is preferable to both Petitioner and USDOT. (Tr., pp.242, 247) Petitioner agrees that the USDOT rules have the effect of an exclusive easement.

2. Staff's position

After conducting discovery and reviewing the evidence, Staff concludes that Petitioner has satisfied the criteria for issuance of a Certificate in Good Standing under Section 15-401 of Act. Staff states that Petitioner properly filed its petition. Staff witness Maple also testified that the Petitioner has demonstrated a public need for the pipeline. He agreed that the Buckeye pipeline is the only other pipeline that provides Lambert with jet fuel. Mr. Maple testified that it is his understanding that Allied Aviation is responsible for receiving and storing jet fuel for use by the airlines at Lambert. Allied Aviation also provides the fueling trucks and equipment for the airport. Each day, Allied Aviation brings in jet fuel on both pipelines. Although Allied Aviation has storage tanks, Mr. Maple stated that they are only able to store about one day's worth of fuel. He explained that this storage is relatively small compared with other airports, such as New York, where storage is large enough to maintain a seven-day supply. So on any given day, he added, Allied Aviation tries to bring in all of the fuel it needs off the pipelines, leaving the storage as a buffer in the case of an emergency.

Mr. Maple opined that the pipeline in question is needed even though Lambert is also served by Buckeye's pipeline. He stated that the pipelines often have planned maintenance outages as well as unplanned outages. The existence of two pipelines lets the pipeline operators coordinate the scheduled maintenances so that one pipeline is always operating. In the case of unplanned outages, two pipelines minimize the chance that the airport would unexpectedly have its supply cut off. There has been at least one occurrence when one of the pipelines had an unexpected outage that caused a temporary shortage of fuel at the airport. Without a second pipeline to minimize the damage, Mr. Maple testified that the impact of an outage could be devastating to the airport and to the public. He noted further that the existence of two pipelines, which are served by two different sources, benefits the airlines by giving them choice and creating a somewhat competitive marketplace. Without both pipelines, Mr. Maple observed that the remaining pipeline would have a monopoly at Lambert.

With regard to whether Petitioner is fit, Staff witness Hardas testified that one aspect of fitness to undertake a project under Section 15-401(b) is the petitioner's financial capability to complete and operate the proposed project on an on-going basis. Mr. Hardas concluded in the instant proceeding that an analysis to determine Petitioner's financial capability to complete and operate the project is unnecessary. He reached this conclusion because Petitioner does not need financial resources to complete and operate the project because the pipeline already exists. Although Petitioner is currently in negotiations with MESD over right-of-way costs, Mr. Hardas opined that those costs are not large enough to cause a concern. Therefore, the only remaining financial concern would be Petitioner's ability to deal with financial liabilities it might incur as the result of an accident or other catastrophic event that causes a leak or loss of structural integrity on its pipeline. In the event of such an occurrence, Mr. Hardas reported that Petitioner is covered by a liability insurance policy along with Tampa Pipeline and several affiliates.

As for being willing, Staff believes that Petitioner has shown its willingness to provide service by initiating this proceeding and by attempting to secure land easements to ensure future use of the pipeline. With regard to being able, Staff points out Petitioner's representation that it has substantial assets and substantial experience in the operation of petroleum pipelines. Additionally, the same persons who are currently operating the pipeline have been doing so for many years and will continue to operate the pipeline in the future.

The public convenience and necessity are also served by the issuance of a certificate, according to Staff. As noted, the pipeline serves the public by transporting jet fuel, which is essential to the operation of Lambert. If the Petitioner was unable to transport fuel, Staff states that the public would be inconvenienced by shortages of fuel, possibly leading to travel and shipment delays as well as higher operating costs. Using trucks to transport jet fuel, Staff continues, would further congest traffic and lessen the public's safety, making it infeasible to deliver the necessary jet fuel to Lambert. In fact, Staff reports, the largest number of trucks used at Lambert during a pipeline shutdown in recent history is 40 per day. Staff states that this would be about the maximum number that could be handled by the airport. Since there are only six unloading positions for the entire airport, Staff asserts that one can not simply add more trucks to meet the demand. Thus, Staff concludes, having the fuel shipped by pipeline as opposed to shipment by truck benefits the public.

In response to MESD's opposition in its Reply Brief to the granting of a certificate, Staff points out in its own Reply Brief⁴ that MESD committed to withdraw its opposition to Petitioner's request for a certificate if its September 16, 2005 motion to dismiss was granted. Staff also contends, contrary to MESD's position in its Reply Brief, that Petitioner was under no obligation to seek a Certificate in Good Standing under Section 15-401 to operate as a common carrier by pipeline. Staff states that Section 4-303 of the Act actually bars the Commission from requiring certificates for interstate pipeline operations. In addition, Staff takes exception to MESD's suggestion that it has "rubber-stamped" Petitioner's request for a certificate. Staff states that it conducted discovery and reviewed the record. As evidence that it has not "rubber-stamped" the petition, Staff points out that it disagrees with Petitioner on the appropriate width of an easement. In contrast to its own conduct, Staff observes that MESD has not offered any evidence explaining why Petitioner is not fit, willing, and able to operate the pipeline. Staff wonders why MESD waited until the end of this proceeding to confront the parties with this position and the unfounded allegations of Staff's indifference.

Concerning the area to be covered by the certificate, Staff limits its discussion to the property claimed by MESD. In his discussion of Petitioner's requested one foot wide easement, Mr. Maple contended that if the pipeline were to require repair, replacement, or other maintenance, Petitioner would have almost no physical room inside such a narrow easement in which to perform the work. He stated that it is difficult to imagine that a person could dig, even with hand tools, and keep his or her body, the

⁴ Because MESD served its Reply Brief prior to the date on which it was due, Staff was able to discuss MESD's Reply Brief in its own Reply Brief.

equipment, and the excess dirt all confined to a one foot wide space. While the pipeline may now be in good working order, all pipelines have a limited lifespan and will eventually need repairs and/or replacement. Mr. Maple testified that he believes that eventually Petitioner will need the extra width in order to adequately perform this work. He added that in his experience, he has not encountered a pipeline of this type and size having an easement width of less than five feet. Mr. Maple testified that in his expert opinion in this instance, good practice and safety mandate an easement that is, at a minimum, five feet wide. He therefore recommended that Petitioner be required to obtain an exclusive easement that is, at a minimum, five feet wide. Mr. Maple also acknowledged the testimony of MESD witness Greathouse, who claimed that a wider easement ensures that the integrity of this pipeline and other pipelines is not compromised by installing other pipelines directly adjacent to Petitioner's pipeline.

3. MESD's position

Although MESD does not object to the issuance of a Certificate in Good Standing in its testimony or Initial Brief, in its Reply Brief it questions whether Petitioner has met certain of the criteria specified in Section 15-401. Specifically, MESD contends that Staff's analysis of whether Petitioner is fit, willing, and able to provide service amounts to a "rubber-stamp" by Staff. While it "does not necessarily object to [Petitioner's] Petition for a certificate of good standing," MESD states that it anticipated a more objective review of the criteria by Staff. (MESD Reply Brief, p.3) For this reason, MESD offers what it considers to be an objective view. In this vein, MESD contends that the evidence is uncontradicted that since at least 1996, Petitioner has conducted its pipeline operations with indifference to the Act and Commission rules and orders. MESD argues that Petitioner has operated and profited for many years without the required certificate, has constructed and relocated its pipeline without first seeking Commission permission, and has continuously trespassed on MESD's property without compensation to MESD. MESD maintains that Petitioner's record in this regard shows that in the past it has not been in "substantial compliance" with the Act. Nor, MESD continues, has Petitioner offered any explanation of its failure or refusal to comply with the clear statutory requirements set forth in Section 15-401. MESD contends that this repeated failure or refusal to comply with the statutes, regulations, and orders demonstrates that Petitioner is unfit, unwilling, or unable to operate its pipelines according to the rules and does not respect the rights of property owners through which its pipeline runs. MESD states that the Commission should not allow Petitioner to disregard the Act and Commission regulations and orders when they pose an inconvenience and then allow Petitioner to condemn property under the auspices of the Commission and the State of Illinois.

MESD also questions whether a public need for the pipeline exists. MESD argues that the quantity of fuel supplied by Petitioner to Lambert is small enough that it could be transported to Lambert via eight or nine tanker trucks each day. This number of additional trucks on the roads each day does not, in MESD's opinion, significantly increase traffic congestion. MESD states further that the Buckeye pipeline is available to supply the fuel that Petitioner now supplies to Lambert. MESD adds that *Lakehead Pipeline Co. v. Illinois Commerce Commission*, 296 Ill.App.3d 942, 696 N.E.2d 345 (3rd

Dist. 1998), requires that a consideration of the public need go beyond the need of a few market players.

As noted above, MESD favors a minimum five feet wide, nonexclusive easement. According to MESD witness Greathouse, MESD has required a five feet wide easement for every pipeline since the late 1970's or early 1980's. MESD states that the reason for requiring five feet wide easements is for the protection of its levees. By requiring the five feet width minimum, MESD asserts that it can limit the number of pipelines in and through its levees thereby preserving the structural integrity of the levee for the purpose for which it was intended, i.e., the protection of residents within MESD and their property from generally preventable flooding.

Regardless of the easement width obtained by Petitioner, MESD asserts that all pipelines are subject to USDOT rules that restrict other utilities from encroaching on the pipeline in question for a distance of 18 inches from the outside of the pipeline. MESD points out that the pipeline in question is six and five-eighths inches wide. Adding 18 inches to all sides of the pipeline results in a circle with a diameter of 42 5/8 inches. MESD calculates the resulting area of this circle to be approximately 9.9 square feet. Even with a five feet wide nonexclusive easement, MESD concludes that the area surrounding the pipeline is necessarily exclusive in light of USDOT regulations. MESD states that it could not permit other easements within the area of any easement granted to Petitioner. Even with a nonexclusive easement, MESD asserts that third parties would still have to go through MESD before work could be performed on any easement, which MESD believes provides additional protection. From MESD's standpoint, a problem arises with granting exclusive easements because there are already other utilities that cross the area of any proposed easement which would contain Petitioner's pipeline, regardless of the size of the proposed easement. MESD adds that a one foot easement is just a way to keep Petitioner's own costs down and has nothing to do with safety.

4. Commission conclusion

The Act requires that each of the criteria in Section 15-401 of the Act be met before Petitioner receives a Certificate in Good Standing. In reviewing the record, the Commission finds that Petitioner properly filed its petition in accordance with the Act and 83 Ill. Adm. Code Part 200 and Part 300. The Commission is also satisfied that a public need for the provision of jet fuel by Petitioner to Lambert exists. As an airport in a major metropolitan area, a great deal of commerce occurs at and through Lambert affecting a great number of people both within and beyond Illinois. A reliable supply of jet fuel, whether it comes from one or more sources, is important for that commerce to continue. While it may be true that the Buckeye pipeline alone could supply Lambert with enough fuel, there is no guarantee that the Buckeye pipeline will always be able to do so or that tanker trucks from other locations could compensate in the event that Buckeye is inoperable. Indeed, history indicates that the Buckeye pipeline has experienced unplanned outages and logistics indicate that there is a limit to the number of tanker trucks that Lambert can accommodate. Furthermore, two pipelines provide at

least a minimal level of competition in this limited market. The Commission is persuaded that the public need calls for the continued operation of Petitioner's pipeline. The Commission finds as well that Petitioner is fit, willing, and able to provide service in compliance with the Act and Commission regulations and orders. The facts that the pipeline is already in operation, there is no evidence of an adverse impact on Petitioner, and Petitioner has secured insurance against failure of the pipeline indicate that Petitioner is fit to provide service. There is no doubt that Petitioner is willing to provide service. Petitioner's history of pipeline operations indicates that it is able to provide service. The public convenience and necessity also requires the issuance of a certificate for many of the same reasons that a public need for the service exists. Additionally, regardless of the number of tanker trucks needed to replace the fuel delivered by Petitioner, the absence of those trucks from the busy interstates and roads surrounding Lambert clearly conveniences the public.

With regard to MESD's objections in its Reply Brief to granting a certificate, the Commission admonishes MESD for waiting until so late in this proceeding to take issue with previously uncontested aspects of this docket. Opportunities existed earlier to object to the certificate request or to raise concerns about Staff's efforts (concerns which the Commission does not share). Whatever the reason for the delay, MESD's decision to wait until its Reply Briefs to raise such concerns does not serve it well. The Commission accords little weight to MESD's concerns regarding certain of the criteria in Section 15-401. Moreover, the Commission points out that pursuant to Section 4-303 of the Act, the Commission can not require Petitioner to obtain a certificate before operating an interstate pipeline.

In light of the foregoing, the Commission will grant Petitioner a Certificate in Good Standing. The area to be covered by the certificate, however, requires further discussion. The eight mile length of the pipeline in Illinois is evident and represents the appropriate length of the certificated area. As for the width of the certificated area, the only portion of the pipeline that's width was discussed lies within the property claimed by MESD. Nevertheless, the Commission believes that the width of the certificated area should be uniform along its entire length for ease of administration and will therefore be driven by the width discussion regarding MESD's property. As an initial matter, the Commission finds that any need for future maintenance of the pipeline should not dictate the width of the certificated area. Petitioner and MESD both recognize that whether the width is one foot or five feet, a wider temporary construction easement would be necessary to undertake any work on the pipeline. Moreover, MESD indicates that it would be willing to provide such an easement should it be necessary.

Setting aside this repair and maintenance aspect, the Commission turns to Petitioner's and MESD's discussion of USDOT regulations. Neither cited the specific USDOT rule that they say establishes a minimum clearance around buried pipelines. In the absence of any citation by the parties, the Commission takes notice of Title 49 of the Code of Federal Regulations, Part 195 "Transportation of Hazardous Liquids by Pipeline." Pursuant to Section 195.2 of Part 195, hazardous liquids include petroleum

products, such as jet fuel. Section 195.250 concerns clearance between pipe and underground structures and states:

Any pipe installed underground must have at least 12 inches (305 millimeters) of clearance between the outside of the pipe and the extremity of any other underground structure, except that for drainage tile the minimum clearance may be less than 12 inches (305 millimeters) but not less than 2 inches (51 millimeters). However, where 12 inches (305 millimeters) of clearance is impracticable, the clearance may be reduced if adequate provisions are made for corrosion control.⁵

If Petitioner's pipe within MESD's property has an outside diameter of six and five-eighths inches, the addition of 12 inches on both sides of the pipe results in a "clearance" area 30 5/8 inches across. This distance represents the narrowest "clearance" area around Petitioner's pipeline. Because the pipeline also has segments that are eight inches in diameter, the pipeline's widest "clearance" area is roughly 32 inches across (exact distance depends on outside diameter of the eight inch pipe). To maintain a uniform width along the length of the certificated area, the Commission will use the widest "clearance" area of roughly 32 inches and round that distance to 36 inches for ease of identifying and administering the certificated area. The Commission believes that this is a reasonable means of determining the width of the certificated area because this method recognizes the area around the pipeline that a property owner is prohibited from making other use of. In other words, if the existence of Petitioner's pipeline prohibits MESD or any other property owner from making any other use of this essentially three feet wide area, Petitioner should be obligated to compensate the property owner for this area. The Commission does not find MESD's arguments for a wider, nonexclusive easement persuasive.

Accordingly, the Commission will grant Petitioner a Certificate in Good Standing covering an area three feet wide and extending the entire eight mile length of Petitioner's pipeline. In the absence of a legal description of this area in the record, the Commission requires Petitioner to make a Compliance Filing within 30 days of the entry of this Order consisting of the legal description of the certificated area. Any negotiations by Petitioner for easements wider than three feet are independent from and have no impact on the Certificate in Good Standing.

B. Section 8-503

Section 8-503 of the Act provides in relevant part:

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

⁵ How MESD determined that USDOT regulations require a minimum of 18 inches of clearance is not discernable.

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 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; ...

Although it has already constructed the pipeline in question, Petitioner states that if a Certificate in Good Standing is granted, continued maintenance or repairs of the pipeline would require Commission approval under Section 8-503. Petitioner asserts in its Initial Brief that no argument has been made that it should not be allowed to continue to operate its pipeline. Staff is of the opinion that "Petitioner has satisfied the requirements contained in Section 8-503." (Staff Initial Brief, p.8)

Because Petitioner uses the word "maintain" in its request for relief under Section 8-503 and the word "maintain" is not used in Section 8-503, MESD argues in its Reply Brief that the Commission lacks authority to authorize Petitioner to "maintain" its pipeline pursuant to Section 8-503. MESD also argues in its Reply Brief that the Act envisions a request under Section 8-503 being made prior to the anticipated construction taking place. In this instance, MESD observes that the pipeline has already been constructed and has been operational for some time. MESD contends that Petitioner is seeking a retroactive rubber stamp of the construction that took place over 35 years ago and the relocation of the pipeline that took place in 1998 on property owned by MESD. MESD argues that no legal authority allows such an ex post facto order. The only reason Petitioner is requesting relief under Section 8-503, MESD continues, is that it is a prerequisite to an order authorizing the use of eminent domain under Section 8-509. Because it does not consider the request for relief under Section 8-503 properly raised at this time, MESD concludes that the relief should be denied.

Petitioner objects to MESD's concerns regarding Section 8-503. Because the issues raised by MESD in its Reply Brief were not previously litigated and because Petitioner does not consider the claims responsive to the Initial Briefs, Petitioner sought to strike such arguments from MESD's Reply Brief through its March 3, 2006 motion to strike. Staff finds MESD's arguments in its Reply Brief to be untimely and without merit.

Pursuant to Section 8-503, the Commission may authorize additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility whenever it finds that such are necessary and ought reasonably to be made to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities. Although MESD is correct that "maintain" is not used in Section 8-503, the Commission interprets "repair," which is used in Section 8-503, to encompass maintenance of plant, equipment, apparatus, etc. Additionally, despite MESD's statements to the contrary, the

plain language of Section 8-503 contemplates both existing and yet to be constructed facilities. Furthermore, as noted above, the Act did not require Petitioner to obtain a certificate 35 years ago, nor does it do so today either. Had MESD raised its concerns earlier in this proceeding, it may have been persuaded by Petitioner and Staff that they need not be contested. Instead MESD waited until its Reply Briefs and is again admonished by the Commission for its delay. Having accorded MESD's concerns the appropriate weight, the Commission finds that the continued repair and maintenance of the existing pipeline facilities in question necessary and ought reasonably be made to promote the convenience of the public.

C. Section 8-509

Section 8-509 of the Act provides in relevant part that:

When 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.

The issue to be decided is whether Petitioner should be able to condemn an easement from MESD in the manner provided for by the law of eminent domain.

Petitioner asserts in its Initial Brief that this is a case about money. Petitioner acknowledges that it and MESD have been unable to agree upon the amount that Petitioner should pay MESD for an easement, which has led Petitioner to request relief under Section 8-509. This is not a case, Petitioner avers, where MESD is arguing that the condemnation of the property in question will interfere with a public use. In fact, Petitioner continues, MESD seeks to force Petitioner to take, and more importantly, pay for more of MESD's property than Petitioner finds necessary. Despite the Commission's findings in the Interim Order, Petitioner also suggests that the property in question is at this time devoted to a private use (Petitioner's transportation of jet fuel to Lambert), and that it should therefore be granted authority to condemn an easement on public property. Staff does not object to Petitioner's request under Section 8-509 to the extent that it is limited to private property.

MESD contends that the only reason Petitioner seeks relief under Section 8-503 is that Section 8-503 is a prerequisite to an order authorizing the use of eminent domain under Section 8-509. According to the plain language of Section 8-509, MESD continues, eminent domain can only be authorized when necessary for the construction of any alterations, additions, extensions, or improvements ordered or authorized under Section 8-503. In the present case, MESD observes that the entire pipeline is already in place and has been operational for quite some time. Petitioner has not alleged that it requires the property for any additional construction to take place. Since the pipeline is already in place and there are no future projects planned, MESD argues that eminent domain can not be necessary for the construction of any alterations, additions, extensions, or improvements. MESD maintains that Section 8-509 simply does not

authorize the exercise of eminent domain absent the necessity for future construction. Instead, MESD asserts, Petitioner desires authority to exercise eminent domain solely as a post-construction bargaining tool. MESD contends, however, that Section 8-509 does not confer eminent domain on utilities just because they fail to successfully renegotiate expired easements. MESD concludes that the Commission does not have the jurisdiction to enter an order that would grant a public utility the authority to exercise eminent domain over public property, or property held for any public use, nor does the Commission have the authority to order eminent domain absent the utility demonstrating its necessity for future construction. MESD urges the Commission to deny Petitioner's request under Section 8-509.

As recognized in the February 8, 2006 Interim Order, the Commission may only grant authority to a public utility to take private property. Therefore, the Commission's conclusion on this issue only applies if MESD does not own the land where the pipeline is located.⁶ MESD is correct that Section 8-509 contemplates future activity by a public utility. In this situation, however, a misunderstanding seems to have occurred in October of 1998 when Petitioner believed that it had permission to relocate the pipeline. The Commission does not believe that this misunderstanding warrants denial of relief under Section 8-509. As discussed above, the public convenience and necessity call for the continued operation of Petitioner's pipeline. In light of Petitioner being unable to secure an easement for its pipeline at what it believes to be a reasonable price, the Commission is persuaded to grant Petitioner authority to condemn an exclusive easement three feet wide in the manner provided for by the law of eminent domain. The three feet width is appropriate because this is the width of the certificated area, as discussed above. The easement should also be exclusive since this is the area which is already essentially exclusive as a result of the USDOT rules. To be clear, this granting of relief under Section 8-509 applies only to the property claimed by MESD. Petitioner states that it has already secured easements along the remaining length of the pipeline (in Illinois); therefore the Commission does not believe that eminent domain is warranted in those areas.

III. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record, is of the opinion and finds that:

- (1) Petitioner is a Missouri corporation authorized to conduct business in the State of Illinois with its principal Illinois office located in Hartford-Wood River, Illinois;

⁶ Additionally, consistent with *City of Chicago v. Sanitary District of Chicago*, 272 Ill. 37, 111 N.E. 491 (1916), the conclusion on this issue will also apply if the property is owned by MESD but is not devoted to a public use. As noted in the Interim Order, however, the Commission is not of the opinion that MESD has allowed the area in question to be put to private use. The fact that Petitioner's pipeline currently exists there does not trigger *City of Chicago v. Sanitary District of Chicago* in light of MESD's ongoing objections to the pipeline's presence.

- (2) the Commission has jurisdiction over the parties hereto and the subject matter hereof;
- (3) the recitals of fact and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;
- (4) as required by Section 15-401, Petitioner has properly filed its petition, shown that a public need for the service in question exists, and demonstrated that it is fit, willing, and able to provide service in compliance with the Act, Commission regulations, and Commission orders;
- (5) as further required by Section 15-401, the public convenience and necessity require issuance of a Certificate in Good Standing authorizing Petitioner to operate as a common carrier by pipeline; the area to covered by the certificate should consist of a three feet wide strip extending approximately eight miles along the route roughly identified in Petitioner's Exhibits 3.3 through 3.6;
- (6) Petitioner should be required to file within 30 days from the entry of this Order a Compliance Filing in this docket providing the legal description of the area covered by the certificate granted herein;
- (7) the continued repair and maintenance of the existing pipeline facilities in question are necessary and ought to reasonably be made to promote the convenience of the public, pursuant to Section 8-503;
- (8) pursuant to Section 8-509 of the Act, Petitioner is authorized to exercise eminent domain to obtain a permanent three feet wide exclusive easement in the area where its pipeline currently exists on property claimed by MESD, to the extent that that area is private property; and
- (9) any objections, motions, or petitions filed in this proceeding that remain unresolved should be disposed of in a manner consistent with the ultimate conclusions contained in this Order.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that St. Louis Pipeline Corporation be, and is hereby, granted a Certificate in Good Standing pursuant to Section 15-401 of the Act to operate as a common carrier by pipeline and that said Certificate in Good Standing shall be the following:

CERTIFICATE IN GOOD STANDING

IT IS HEREBY CERTIFIED that St. Louis Pipeline Corporation is authorized pursuant to Section 15-401 of the Public Utilities Act to operate as a common carrier by pipeline within an area three feet wide and extending approximately eight miles along the route roughly identified in Petitioner's Exhibits 3.3 through 3.6 in Docket No. 02-0664; said area is more fully described in the Compliance Filing in Docket No. 02-0664.

IT IS FURTHER ORDERED that St. Louis Pipeline Corporation shall file within 30 days from the entry of this Order a Compliance Filing in this docket providing the legal description of the area covered by the certificate granted herein.

IT IS FURTHER ORDERED that the continued repair and maintenance of the existing pipeline facilities in question are necessary and ought to reasonably be made to promote the convenience of the public, pursuant to Section 8-503 of the Public Utilities Act.

IT IS FURTHER ORDERED that, in the manner provided for by the law of eminent domain, St. Louis Pipeline Corporation is authorized to condemn a three feet wide exclusive permanent easement within the property claimed by Metro East Sanitary District to the extent that such property is private property.

IT IS FURTHER ORDERED that any objections, motions, or petitions filed in this proceeding that remain unresolved are hereby disposed of in a manner consistent with the ultimate conclusions contained in this Order.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED: March 28, 2006.

Briefs on Exceptions must be received by April 11, 2006.

Briefs in Reply to Exceptions must be received by April 18, 2006.

Administrative Law Judge