

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

IN RE ENBRIDGE PIPELINES (ILLINOIS) L.L.C.)	
)	
APPLICATION PURSUANT TO SECTIONS 8-503,)	Dkt. No. 07-0446
8-509, AND 15-401 OF THE PUBLIC UTILITIES)	
ACT/THE COMMON CARRIER BY PIPELINE LAW)	
TO CONSTRUCT AND OPERATE A PETROLEUM)	
PIPELINE AND, WHEN NECESSARY, TO TAKE)	
PRIVATE PROPERTY AS PROVIDED BY THE LAW)	
OF EMINENT DOMAIN)	

TO THE COMMISSION:

MOTION FOR LEAVE TO FILE SUR-REPLY
AND
SUR-REPLY OF APPLICANT ON MOTION TO DISMISS

Applicant Enbridge Pipelines (Illinois) L.L.C. (Enbridge) respectfully seeks leave to file this Sur-Reply to the Reply filed by the Kelly Intervenors on the motion to dismiss. This Sur-reply is necessary because the intervenors' reply filing improperly raises new -- and grossly mistaken -- assertions not disclosed in their initial filing to which Enbridge could not respond due to the non-disclosure. Intervenors should have advanced their newly-made assertions in their initial pleading, and could easily have done so. Instead, finding their original arguments of no avail, they assert new theories in their reply that cannot be rebutted unless Enbridge is allowed a sur-reply. Such sandbagging is improper and warrants relief such as sought herein. *See, e.g.,* Supreme Court Rule 341(h)(7); *Dept. of Transportation v. Drobnick*, 54 Ill. App.3d 987, 370 N.E.2d 242 (2nd Dist. 1977).

For its Sur-reply, Enbridge states as follows:

1. The Kelly Intervenors now assert that the Commission cannot grant eminent domain authority to Enbridge because (a) Section 8-509.5 of the Public Utilities Act (Act) is not referenced in Section 15-101 of the Common Carrier by Pipeline Law (CCPL), and (b) because allegedly the "Eminent Domain Act specifically authorizes only Public Utilities to seek eminent domain." Reply at 2. Both assertions are simply wrong.¹

2. As the Enbridge and Staff Responses to the motion demonstrate, the Commission's ability to grant eminent domain authority to a common-carrier-by-pipeline is clearly established by Section 15-101 and Sections 8-503 and 8-509 of the Act. Section 8-509.5 of the Act in no way distracts from that authority. Rather, it merely provides, as is clear on its face, that any grant of eminent domain authority must be exercised in accord with the requirements of the Eminent Domain Act. Intervenors' attempt to construe the provision as a revocation of the provisions of Sections 8-503, 8-509, and 15-101 is absurd. Wishful thinking is not proper statutory interpretation.²

¹ Intervenors' entire motion is essentially pointless because they pretend that only part of the Public Utilities Act -- the definition section -- is of import here. They either ignore or cannot understand that the Common Carrier by Pipeline Law is part of the Public Utilities Act -- in fact, Article XV thereof -- and must be given effect. As well, and as Enbridge has noted, they base their "natural crude" contention on a statute utterly without application here. Being unable apparently to reply to the demonstrations by Enbridge and Staff that intervenors' definitional argument is wrong, intervenors came up with the arguments now addressed.

² The legislative history of the 2006 revisions of the Eminent Domain Act, which include Section 8-509.5 of the Act and Section 15-5-25 of the Eminent Domain Act, makes clear that reference therein to authority under the Public Utility Act includes authority granted under the CCPL. IL H.R. Tran. 2006 Reg. Sess. No. 122, April 19, 2006, at 14.

3. Intervenor's argument about the Eminent Domain Act is equally absurd. No one reading that Act could make such an assertion in good faith. The Eminent Domain Act is Article VII of the Code of Civil Procedure; it is not a grant of substantive powers. The section of the Eminent Domain Act that intervenors rely upon is merely a part of a list of sections of the Illinois Compiled Statutes that include express grants of condemnation authority. In the very beginning of Part 5 of Article VII of the Eminent Domain Act, which creates and constitutes the "List of Eminent Domain Powers," it is made perfectly clear to anyone reading the statute that the list neither creates nor invalidates any grant of eminent domain power. Thus Section 15-5-1 states that (735 ILCS 30/15-5-1):

"... Inclusion in the list does not create a grant of power Omission from the list of a statute that includes an express grant of power to acquire property by condemnation or eminent domain does not invalidate that grant of power."

Accordingly, intervenor's assertion is again simply wrong. The disingenuous nature of their argument, and the error of their statement that the Commission's decisions in *Transcanada Keystone* and *Enbridge Energy Partners* are of "no bearing" (Reply at 3) on their challenge to the Commission's jurisdiction, is laid bare by the Commission's action in granting eminent domain authority to two common-carriers-by-pipeline on April 4 of this year, after the effective date (1/1/07) of the two statutory sections relied upon by intervenors! Inasmuch as the Commission may be assumed properly to understand its authority and to be the best primary judge thereof, no credence can be given to the intervenor's newly-made, and entirely false, assertions.

CERTIFICATE OF SERVICE

I, Gerald A. Ambrose, an attorney, certify that I caused copies of the Motion for Leave to File Sur-Reply and Sur-Reply of Applicant on Motion to Dismiss, filed on behalf of Enbridge Pipelines (Illinois) L.L.C. (“Enbridge”), to be served on each of the parties listed on the service list via electronic or regular mail, this 9th day of November, 2007.

/s/ Gerald S. Ambrose

One of Its Attorneys

ENBRIDGE PIPELINES (ILLINOIS) L.L.C.

Gerald A. Ambrose
G. Darryl Reed
Sidley Austin LLP
One South Dearborn
Chicago, Illinois 60603
(312) 853-7000