

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

**IN RE ENBRIDGE PIPELINES )  
(ILLINOIS) LLC, )  
)  
) **07-0446**  
)  
**Petition pursuant to Section 8-503, 8-509, )  
15-101 and 15-401 of the Public Utilities Act )  
for a certificate by pipeline, and for entry of )  
an order authorizing and directing construction )  
and operation of a petroleum pipeline and )  
requesting authority to exercise eminent domain )****

**MEMORANDUM IN SUPPORT OF MOTION OF PLIURA INTERVENORS TO  
STRIKE TESTIMONY AND OTHER RELATED EVIDENCE WHICH DOES NOT  
SUPPORT ILLINOIS PUBLIC CONVENIENCE AND NECESSITY FOR THE  
SOUTHERN ACCESS EXTENSION**

NOW COME the PLIURA INTERVENORS, by and through their counsel of record, LIVINGSTON, BARGER, BRANDT & SCHROEDER and THOMAS J. PLIURA, who move to strike testimony and other related evidence offered by ENBRIDGE PIPELINES (ILLINOIS) LLC (“Applicant”) which does not support that the Southern Access Extension Pipeline will not statutorily meet or satisfy an Illinois public convenience and necessity, and states as follows:

**I. INTRODUCTION**

Applicant seeks the certification of “common carrier pipeline” for the construction and operation of the Southern Access Expansion Pipeline, originating at storage facility in Flanagan, Illinois and traveling south terminating storage facility in Patoka, Illinois, for the transportation of heavy Canadian crude oil product. The Illinois Commerce Commission (“ICC”) must find that such construction and operation will champion and is warranted by an Illinois public convenience and necessity. 220 ILCS 5/15-401. In support of its application Applicant has

submitted testimony from various witnesses and by various responses to data request from the ICC Staff addressing the public need of the Southern Access Extension in terms of the need of the Midwest Region, PADD II, the United States and globally without the ability to delineate specific benefits to the citizens of the State of Illinois. Plura Intervenors would submit that such evidence is not competent for consideration by the ICC and should be stricken.

## **II. EVIDENCE PRESENTED**

Dale W. Burgess presented testimony as the Director of the Southern Access Expansion Pipeline. Throughout his testimony, Burgess responded to questions regarding the public need of the project in terms of PADD II, Midwest Regional, national or global needs without differentiation with regard to the specific public benefits of Illinois citizens. Such testimony is found at:

<b>Ex. 1</b>	Page 5	Ins	94 – 97
	Page 6	Ins	122 – 125
		Ins	133 – 138
	Page 7	Ins	143 – 146
<b>Ex. 1A</b>	Page 5	Ins	95 – 97
		Ins	99 – 105
		Fnt	1
	Page 6	Ins	121 – 129
	Page 9	Ins	188 – 191
	Page 10	Ins	198 – 199
		Ins	211 – 213
	Page 12	Ins	254 – 256
	Page 15	Ins	323 – 324
	Page 16	Ins	342 – 344
	Page 17	Ins	363 – 372
	Page 20	Ins	432 – 434
Page 22	Ins	466 – 467	
<b>Ex. 1B</b>	Page 4	Ins	78 – 82
		Ins	89 – 91
	Page 5	Ins	92 – 93
		Ins	107 – 109
	Page 6	Ins	116 – 123

Page 8	Ins	174 – 176
ENG 1.1	7A	
ENG 1.2	7B	
ENG 1.4	7D	
ENG 1.20	7T	
ENG 1.19	7S	

Pliura intervenors move to strike this testimony.

In addition, Douglas B. Aller, Lands and Right-of-Way Supervisor for Enbridge Energy Co., Inc. testified that, “...allow shippers improved flexibility in delivering to numerous refineries in southern Petroleum Administration Defense District II and the Gulf Coast.” (Ex. 2, p. 3, lines 63 – 64.) Pliura intervenors move to strike his testimony.

### **III. LAW AND ARGUMENT**

The ICC is vested with authority to regulate public utilities by statute through the Illinois Public Utilities Act. 220 ILCS 5/2-101 *et seq.* The ICC, “because is a creature of the Legislature, derives its power and authority solely from the statute creating it, and its acts or orders which are beyond the purview of the statute are void.” *City of Chicago v. Illinois Commerce Commission*, 79 Ill. 2d 213, 217 – 18 (1980) citing *People ex. rel. Illinois Highway Transportation Company v. Biggs*, 402 Ill. 401, 409 (1949).

The Public Utilities Act was created by the Illinois General Assembly to protect the “health, welfare and prosperity of all Illinois Citizens” by providing for adequate, efficient, reliable environmentally safe and least-cost public utilities balanced against long term costs for such services equitable to all citizens of the state of Illinois. 220 ILCS 5/2-102. Such policy includes the providing of reliable energy services at the least possible cost to the “citizens of the State”; and that the fair treatment of consumers and investors requires weighted consideration of the impact of regulatory actions on all sectors “of the State.” 220 ILCS 5/2-102 (a) and (d)(vii).

The Illinois General Assembly enacted the Public Utilities Act and empowered the ICC for the benefit of the citizens of the State of Illinois.

The ICC has regulatory authority over common carriage pipelines, which include any owner, operator or manager of pipeline used for common carriage, *within the State of Illinois*. 220 ILCS 5/15-201. In so certifying or licensing a pipeline as a common carrier by pipeline, the ICC must determine whether an Illinois public convenience and necessity exists, and sanctions receipt of evidence on this issue from other *Illinois* regulatory and state agencies. 220-5/15-401(b)(1)-(7). The intent of the General Assembly is clear from the plain language of the Public Utilities Act-the statute was expressly enacted to regulate public utilities for the convenience and necessity of the citizens of that State of Illinois. Such public utilities include common carrier by pipeline meeting the requirements of public convenience and necessity within the State of Illinois. To that end, the applicant must present evidence which supports an *Illinois* public convenience and necessity.

To ascertain the legislature's intent, the Illinois Supreme Court has repeatedly and unequivocally stated that “[c]ourts should first look to the statutory language as the best indication of the intent of the drafters.” *County of DuPage v. Graham, Anderson, Probst & White, Inc.*, 109 Ill.2d 143, 151 485 N.E.2d 1076, 1174 (1985). Traditionally, the Illinois Courts have declined to search beyond the plain and unambiguous language of a statute, recognizing that “ ‘[t]here is no rule of construction which authorizes a court to declare that the legislature did not mean what the plain language of the statute imports.’ ” *People ex rel. Scott v. Schwulst Building Center, Inc.* 89 Ill.2d 365, 371, (1982), quoting *Western National Bank v. Village of Kildeer*, 19 Ill.2d 342, 350, (1960). The rule that, if a statute's commands are expressed in plain and unambiguous language, the courts are to effectuate those commands without searching

elsewhere for legislative intent has been declared by the Illinois Supreme Court to be “the first test for statutory interpretation.” *Fitzsimmons v. Norgle*, 104 Ill.2d 369, 373 (1984).

In determining convenience to the public, the ICC has looked at simplification of service planning in Illinois, fairness and reasonableness to shareholders of public utilities in Illinois, interest of the ratepayers in Illinois, and incremental costs of service provided in Illinois. *Illinois Power Company et al. v. Illinois Commerce Commission*, 111 Ill. 2d 505, 514 (1986) . In the context of discussing public necessity and convenience, Illinois Commerce Commission has turned to Illinois Supreme Court for guidance. In *Roy v. Illinois Commerce Commission*, 322 Ill. 452, 458 (1926), the Court stated that the “convenience and necessity required to support an order of the Commission is that of the public and not any individuals or number of individuals.” In *Roy* the Supreme Court rejected the Commerce Commission’s Certificate of Convenience and Necessity for construction of a new a railroad projected to operate from one point to another on existing rail line as it did not meet the convenience or needs of the Illinois citizens exposed to the threat of property foreclosure through eminent domain power. *Id.* at 458-460. The Court noted that “[i]n every application of this kind, the primary controlling interest to be considered is the public interest. Individuals or corporations may determine with themselves what their interest demand, but the convenience and necessity required to support an order of the Commission is that of the public, and not of any individual or number of individuals.” *Roy*, 322 Ill. at 458. (citation omitted).

The ICC has adopted this broad approach determining that the public is larger than a limited number of market players and the need of a few does not in and of itself establish a public need. *Lakehead Pipeline Company v. Illinois Commerce Commission*, 296 Ill. App. 3d 942, 956 (3<sup>rd</sup> Dist. 1998). In taking a cue from *Lakehead*, Applicant now embraces a regional,

national and global approach to defining public need. But, such evidence is not competent for consideration by the ICC in determining, pursuant to its authority under the Public Utilities Act, whether an Illinois public convenience and necessity for the Southern Access Extension exists. Applicant must present evidence, standing alone, of convenience and necessity of the Southern Access Extension to the citizens of the State of Illinois, whose land is at peril if common carrier status is bestowed and Applicant is empowered with eminent domain. As stated in *Lakehead* '[t]he public need aspect of the statute serves to protect and restrict the exercise of such powers as eminent domain. 269 Ill. App. 3d at 952. In order to ascertain whether applicant has met its burden, the ICC must consider the public need of Illinois citizens, not Midwesterner, United States citizens or citizens of the world. The State is not required to provide condemnation powers and without proof that the statutory prerequisites of the common carrier by pipeline law have been met, certification and condemnation authority should not follow. *Lakehead*, 269 Ill. App. 3d at 952.

The evidence submitted by Applicant as outlined above does not address the convenience and necessity of the pipeline for the Illinois public. Rather, the evidence submitted speaks to aggregate public benefits in general, regional, national or even at times global terms. Such evidence does not support and is not competent to assist the ICC in determining whether an Illinois public convenience and necessity exists, which warrants the issuance of eminent domain power for the Southern Access Extension pipeline. As such, the evidence should be stricken from the record.

#### **IV. ADOPTION AND INCORPORATION OF THOSE ARGUMENTS AND LAW OFFERED BY SHELBY HOLDING INTERVENORS**

Pliura Intervenors hereby adopt and incorporate as if plead herein the law and argument submitted on behalf of the Shelby Holdings Intervenors.

## V. CONCLUSION

Considering the foregoing facts, law and argument PLIURA INTERVENORS move to strike the testimony and other related evidence offered by ENBRIDGE PIPELINES (ILLINOIS) LLC which does not support that the Southern Access Extension Pipeline an Illinois public convenience and necessity.

Respectfully Submitted,

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## **PROOF OF SERVICE**

The undersigned certified that on this 8<sup>th</sup> day of August, 2008, she served a copy of the foregoing document upon counsel of record for the parties via electronic mail.

s/BARBARA G. TAFT

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