

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

ILLINOIS POWER COMPANY,)
d/b/a AmerenIP and AMEREN ILLINOIS)
TRANSMISSION COMPANY)
) Docket No. 06-0706
Petition for a Certificate of Public Convenience and)
Necessity, pursuant to Section 8-406 of the Illinois)
Public Utilities Act, to construct, operate and maintain)
new 138,000 volt electric lines in LaSalle County,)
Illinois.)

**REPLY BRIEF ON EXCEPTIONS OF
ILLINOIS POWER COMPANY D/B/A AMERENIP
AND AMEREN ILLINOIS TRANSMISSION COMPANY**

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**REPLY BRIEF ON EXCEPTIONS OF ILLINOIS POWER COMPANY, D/B/A
AMERENIP AND AMEREN ILLINOIS TRANSMISSION COMPANY**

I. INTRODUCTION

This is the Reply Brief on Exceptions of Illinois Power Company d/b/a AmerenIP (“AmerenIP”) and Ameren Illinois Transmission Company (“AITC”) (together, “Petitioners”) with regard to the Administrative Law Judges’ Proposed Order (“ALJPO”) issued in this proceeding on November 25, 2008. This Reply Brief on Exceptions responds to the Briefs on Exceptions of: (1) the Staff (“Staff”) of the Illinois Commerce Commission (“Commission”); and (2) Safety and Health of our Community and Kids (“SHOCK”).

II. ARGUMENT

Reply to Staff

A. Staff Exception 1: “Least Cost and the Proposed Line Routes” (Section V)

In their first exception (Staff BOE, pp. 2-3), Staff notes that modifying the stipulated Ottawa-Wedron transmission line route to place it on the same route as the LaSalle-Wedron transmission line near the Wedron substation could create reliability concerns. As Petitioners noted in their Brief on Exceptions (p. 5), Petitioners agree that this is a concern. As Petitioners also stated in their Brief on Exceptions, however, Petitioners do not object to the proposed modification of the Stipulated Route set forth in the ALJPO.

B. Staff Exception 2: “Financing the Proposed Construction” (Section VII)

Staff disagrees with the ALJPO’s conclusion (p. 80) that the joint financing proposal between AITC and AmerenIP meets the requirements of Section 8-406(b)(3) of the Act. Staff appears to accept that, as the ALJPO correctly concluded (p. 79), “The question for consideration under the Act, therefore, is whether [Ameren]IP, AITC, or their customers would suffer significant adverse financial consequences as a result of the proposed financing arrangement.”

That is, the proper question is not whether AmerenIP can finance 100% of the project, but whether the financing proposal as made by Petitioners – AmerenIP finances 10% and AITC finances 90% - meets the requirement of Section 8-406(b)(3). Staff’s proposed exceptions instead focus on AITC’s ability to finance 90% of the project. Staff makes three arguments as to why AITC’s financing of 90% of the project does not meet the requirements of the Act: (1) adverse consequences stemming from AITC’s funding 90% of the project could affect AmerenIP’s retail customers; (2) AITC’s short-term financing for the project is not sufficient; and (3) the record does not support the ALJPO’s conclusion that the Ameren Corporation money pool structure is sufficient to protect ratepayers in the event that AITC defaults on money pool loans.

As a general matter, as Petitioners explained in their Initial Brief (pp. 10-18) and Reply Brief (pp. 1-6), AITC is capable of financing its portion of the project cost (estimated at \$26.1 million). Moreover, the Commission in May, 2008 issued an interim order in Docket 08-0174 (the “Docket 08-0174 Order”) approving an agreement under which Ameren Corporation may provide short-term loans to AITC up to a maximum aggregate amount of \$125 million. Thus, it is clear that AITC has access to sufficient fund to finance the project. As a result, and as explained in detail below, all of Staff’s exceptions regarding Petitioners’ ability to finance the project should be rejected.

1. There Will Be No Adverse Consequences for AmerenIP Retail Customers.

As the ALJPO (p. 80) correctly notes, “even assuming AITC was adversely affected by incurring the debt necessary to finance 90% of the project, there does not appear to be any likelihood that those adverse consequences for its ‘customers’ would involve actual harm to ratepayers.” Staff, however, in its Brief on Exception (pp. 4-5), asserts that an adverse financial

impact on AITC could result in harm to AmerenIP's ratepayer customers. Staff believes that such harm would arise because AITC's "failure to complete the project due to lack of funding after one year of construction" could adversely impact AmerenIP's retail customers who require the project be completed in order to receive adequate and reliable service. (Id.) Staff's concerns should be rejected for several reasons. First, there is no evidence in the record of this proceeding that AITC might fail to complete the project for lack of funding; to the contrary, the record states that Petitioners expect that AITC's available funding for the project will be more than adequate. (Ameren Ex. 19.2, p. 4.)

Second, as discussed above, the Docket 08-0174 Order approved an agreement under which Ameren Corporation may provide short-term loans to AITC up to a maximum aggregate amount of \$125 million. Thus, AITC has access to sufficient funding to construct the project, and so there is no concern that AITC would fail to complete the project due to lack of funding.

Finally, the Joint Ownership Agreement ("JOA") between AmerenIP and AITC also contains provisions that allow AITC to transfer its ownership interest to AmerenIP or some other entity. (See Petition Exhibit A, p. 6, Sec. 7.1.) Thus, even assuming that AITC were to experience some "lack of funding" (and the record does not suggest that it would), AmerenIP could take over the project if necessary to complete it and so provide the required service to its customers. Also according to provisions of the JOA, any such transfer of ownership interest is done at book value, so there can be no increase or decrease in value that affects ratepayers. As a result, there is no basis for Staff's assertion that AmerenIP ratepayers might be harmed by AITC's financing of 90% of the project.

2. AITC Has Access to Sufficient Funds to Finance Its Portion of the Project.

Staff also asserts that it “is not convinced by Petitioners’ arguments that AITC’s short-term borrowing arrangements will be sufficient for its share of the project.” (Staff BOE, p. 5.) Although Staff raises its concerns about the short term nature of AITC’s proposed financing methods for the first time in its Brief on Exceptions (pp. 5-6), the record makes clear that AITC will have sufficient funds to finance its portion of the project, either through borrowings from Ameren Corporation or access to the Ameren Illinois Utilities’ money pool. (Ameren Ex. 19.0, pp. 4-5.) Moreover, there is nothing in the record that suggests short-term financing is in any way “an insufficient financing tool,” as Staff’s proposed exceptions (Staff BOE, p. 10) suggest. As discussed above, AITC has an agreement with Ameren Corporation, approved in the Docket 08-0174 Order, to obtain up to \$125 million in financing – more than enough to fund its \$26.1 million share of the project. As stated in the Docket 08-0174 Order, AITC will be able to borrow from Ameren Corporation to fund the roll-over of notes coming due, so there is no basis for concern regarding AITC’s ability to use short-term financing to construct the project.

Staff also asserts that “the record provides no analysis, or even discussion, of Ameren Corporation’s financial ability to fund AITC’s share of the project.” This is incorrect. The evidence shows that AITC’s financing is supported by Ameren Corporation’s \$1.15 billion credit facility and that Ameren Corporation anticipates that there would be more than adequate source of funds to fully pay for AITC’s share of the project. (Ameren Ex. 19.2 (Rev.), p. 4.) Therefore, Staff’s concerns about AITC’s ability to obtain funds for the project should be rejected.

3. There Is No Basis for Staff’s Concerns Regarding the Protections Provided by the Commission’s Money Pool Rules.

Staff asserts (Staff BOE, pp. 6-8) that the ALJPO incorrectly concludes that “structure of the AIU money pool is sufficient to protect IP ratepayers in the event that AITC defaults in

paying back its loan from the money pool.” Petitioners believe that Staff misreads the ALJPO in this respect. The ALJPO states that, “The Commission... understands the structure of the money pool to be sufficient to protect IP ratepayers in the event that AITC defaults in paying back its loan from the money pool.” (ALJPO, p. 80.) Thus, the ALJPO is referring to the structure of money pool arrangements in general, which are governed by Commission rules (83 Ill. Adm. Code Part 340) and any conditions the Commission may impose when granting a utility authority to participate in a money pool. While Staff is correct that the Part 340 rules have different requirements for loans from affiliates to utilities and loans from utilities to affiliates, the Part 340 rules nevertheless do set out certain minimum requirements for utility borrowers, including a requirement that a utility cannot borrow from an affiliate if the utility determines that it can borrow at lower cost directly from banks or other financial institutions or through the sale of its own commercial paper (83 Ill. Adm. Code § 340.30(b)), interest rate limits (83 Ill. Adm. Code § 340.30(c)), and requirements for reporting and documentation (83 Ill. Adm. Code § 340.60).

Moreover, these requirements are minimum requirements, and AITC’s participation is subject to Commission review and approval. As Staff correctly notes (Staff BOE, p. 7), AITC’s participation in the Ameren Illinois Utilities’ money pool is under consideration in Docket 08-0174. If Staff has concerns about the level of protection offered by the Part 340 rules in this case, Staff may raise such concerns in that docket. Nevertheless, the ALJPO reasonably concludes that the Commission’s existing rules governing money pool arrangements provide sufficient protection. Moreover, as discussed above, the funding arrangement approved in the Docket 08-0174 Order already provides AITC with access to \$125 million, more than enough to fund its share of the project.

Staff also argues that (Staff BOE, pp. 7-8) the ALJPO incorrectly concludes that the likelihood of AmerenIP funding more than 10% of the project through loans of excess cash to the money pool is low. Staff asserts that the “record contains no testimony or analysis from Petitioners regarding the likelihood of [Ameren]IP indirectly funding more than 10% of the proposed construction.” (Staff BOE, p. 7.) As Petitioners explained in their Reply Brief (p. 2), however, under the regulated money pool arrangement AmerenIP, AmerenCIPS or AmerenCILCO only contribute to the money pool when they have surplus funds. Record evidence demonstrates that, as of October, 2007, AmerenIP’s cash balance was zero. (Ameren Ex. 19.2 (Rev.), p. 4.) Thus, it is reasonable for the ALJPO to conclude, based on the record, that AmerenIP would not have surplus funds to contribute to the money pool and thus indirectly fund the project.

4. References to AmerenIP’s Financial Condition Should Not Be Deleted from the ALJPO.

Staff also recommends deleting the phrase from the ALJPO (pp. 79-80) “in light of [Ameren]IP’s financial condition and other circumstances of record” from the ALJPO because, Staff asserts, this statement is not supported by the record and could be misinterpreted as the Commission concluding AmerenIP is not capable of funding 100% of the proposed construction. (Staff BOE, p. 8.) This recommendation should be rejected. Although it is correct that Petitioners acknowledge that AmerenIP could fund 100% of the project, as Petitioners explain in their Initial Brief (pp. 11-14) and Reply Brief (pp. 3-4), important AmerenIP financial ratios are eroded as a result of financing 100% of the project. Staff acknowledges (see Staff Init. Br., p. 12) that incurring new debt and reducing cash flow may weaken certain financial metrics of AmerenIP. Thus, AmerenIP’s financial metrics may be harmed as a result of financing 100% of the Project. (AmerenIP Ex. 19.0, pp. 2-4.) This could have the result of delaying the timing of

any future rating upgrade, limiting the level of an upgrade, and increasing the level of any improvement in financial performance the rating agencies would need to observe in order to facilitate any upgrade. (Id.) Financing 90% of the project at AITC alleviates a source of negative influence on the ability of AmerenIP's ratings to improve, and thus its cost of capital to be reduced. (Id.) As a result, it is appropriate for the ALJPO to conclude that, "While [Ameren]IP could finance the entire project, in light of [Ameren]IP's financial condition and other circumstances of record, forcing [Ameren]IP to do so does not appear to be warranted assuming an alternative is available and is otherwise reasonable."

5. Staff's Concerns about "Ratepayer Risk" in Granting a Certificate to AITC Should Be Rejected.

Staff also asserts (Staff BOE, p. 8) that "the record shows that there is a risk that ratepayers will pay higher costs from AITC being granted a Certificate in this case." Petitioners thoroughly refuted Staff's concerns that granting AITC a Certificate poses risks to ratepayers in their Initial Brief (pp. 46-50) and Reply Brief (p. 6), and that discussion is not repeated here. Moreover, in the Final Order in Docket No. 06-0179, the Commission considered and rejected many of the same "ratepayer risk" arguments Staff makes regarding granting a Certificate to AITC in this case. As the ALJPO correctly finds (p. 80), in this case both AmerenIP and AITC would be public utilities under the jurisdiction of the Commission, and so Staff's concerns about ratepayer risk due to the affiliate relationship are eliminated. Therefore, the ALJPO (p. 80) properly concludes that, "[i]n this instance...upon consideration of the nature of the transaction and the terms of the JOA approved in Docket No. 06-0179, it does not appear that the potential for such adverse impacts on customers is more significant than in other affiliated interest transactions subject to Commission oversight." Staff has not demonstrated any basis for its

concerns about “self-dealing” between AITC and AmerenIP (and, as Petitioners have explained, there is none), and Staff’s concerns in this regard should be rejected.

C. Staff Exception 3: “Section 8-503” (Section VIII)

1. Overview

With regard to Section 8-503 of the Act, 220 ILCS 5/8-503, Staff’s chief concern in its Brief on Exceptions appears to be that, if a utility seeks an order under Section 8-503 separately from eminent domain authority under Section 8-509, 220 ILCS 5/8-509, landowners may not have an opportunity to participate in a proceeding which may affect their property rights. (Staff BOE, p. 16.) In particular, Staff believes that a landowner could choose not to participate in a Certificate proceeding, and instead wait until there is the possibility that the landowner’s property will be subject to eminent domain before getting involved. (Staff BOE, pp. 22-23.) Staff therefore wants the Commission to require that a utility simultaneously apply for a Certificate under Section 8-406 of the Act, for authority to construct under Section 8-503, and for eminent-domain authority under Section 8-509. (Staff BOE, pp. 27, 30.) Staff suggests that Section 8-406 or Section 8-503 proceedings do not adequately signal to landowners the possibility of eminent-domain proceedings against their property.

Staff’s concerns are misplaced, particularly given the ALJPO’s proposed additional notice requirements. As the ALJPO notes (pp. 87-88) (and as Staff appears to acknowledge (Staff BOE, p. 21.)), Sections 8-406, 8-503 and 8-509 of the Act are individual statutory requirements that must be considered separately. As the ALJPO correctly finds, “a petitioner need not seek relief under Sections 8-406, 8-503, and 8-509 simultaneously.” (ALJPO, p. 88.) As Petitioners explained in their Initial Brief (pp. 53-55) and Reply Brief (pp. 7-9), it makes sense to separate Section 8-406 and Section 8-503 proceedings from Section 8-509 proceedings because the nature of the evidence is different: Section 8-406 and Section 8-503 proceedings

consider the need for the project and where the route should be, while Section 8-509 proceedings examine the utility's attempts to acquire needed property. It is logical that the eminent domain inquiry under Section 8-509 will be more limited in focus because it typically deals with a subset of properties for which negotiations for land rights were not successful and eminent domain is required. (See Pet. Reply Br., pp. 8-9.)

Moreover, the experience of the instant case contradicts Staff's assertions about landowner participation: although Staff states that landowners do not often participate in Commission proceedings (Staff BOE, p. 15), in this case hundreds of landowners and other interested parties formed groups and intervened to comment on the proposed transmission line routes and offer alternatives, without waiting for an eminent domain proceeding. As a matter of common sense, a landowner opposed to a transmission line route across his property will intervene in the Certificate proceeding and seek to have the route changed, not wait until the eminent domain phase to challenge the route. See Ameren Illinois Power Co. d/b/a AmerenIP, Docket 06-0179, Final Order, pp. 13-16 (describing positions of numerous landowners who intervened in Certificate proceeding and supported alternate routes); cf. Ameren Illinois Power Co. d/b/a AmerenIP, Docket 08-0291 (Section 8-509 proceeding to obtain eminent domain authority for portion of transmission line route approved in Docket 06-0179 where no landowners have intervened).

The Commission's current rules afford landowners adequate notice of proposed transmission-line projects across their property. See 83 Ill. Adm. Code 200.150(h). Both logic and recent experience confirm that self-interest motivates landowners to intervene at the Certificate stage. Further, the ALJPO's proposal for enhanced notice language alleviates any concern regarding the awareness and consequent agency of affected landowners.

Further, Staff's recommended approach is impracticable. While Section 8-406 and Section 8-503 proceedings focus on the same issues – the necessity of the project – and may thus be efficiently combined in many cases, it may not be practical to add a concurrent Section 8-509 inquiry examining the utility's negotiations with the affected landowners where a route has not been selected. As Petitioners explained in their Initial Brief (p. 55) and Reply Brief (pp. 8-9), to require that the utility negotiate with all potentially affected landowners along each and every proposed primary and alternate route before a route is selected, and so expend resources acquiring potentially unnecessary options and other property rights would be the truly inefficient approach.

Staff's recommended approach is also inconsistent with the language of Section 8-509 and Commission precedent, as explained below. According to Staff, a Section 8-509 proceeding is limited to determining whether the Commission has granted the project authority under Section 8-503. This reading of the statute reduces Section 8-509's function to requiring a rubber stamp following successful Section 8-503 petitions. As the ALJPO recognizes, however, a Section 8-509 proceeding is not "a mere formality," but a distinct undertaking that must be accorded due attention. (ALJPO, p. 88.) In fact, in many cases a separate Section 8-509 proceeding may be the more efficient option.

Moreover, Petitioners are not seeking eminent domain authority in this proceeding. As Petitioners point out in their Reply Brief (p. 9), there is no record evidence regarding attempts to acquire property on the stipulated IL 71 Resistor's route. Thus, there is no basis for Staff's proposal (Staff BOE, p. 15) that the Commission grant Petitioners eminent domain authority for that route. Despite advocating landowner participation and a requirement that a utility show reasonable attempts to acquire property in order to receive eminent domain authority, Staff is

proposing to grant Petitioners authority that they did not request and for which landowner input was not obtained. For these reasons, and those discussed below, Staff's position on Section 8-503 should be rejected.

2. Staff's Reading of Section 8-509 Is Not Correct.

Staff asserts that the language of Section 8-509 "leads to the conclusion that a separate proceeding to apply for eminent domain authority would be limited to making a determination as to whether the Commission has entered an order under Section 8-503." (Staff BOE, p. 18.)

Staff's reading of Section 8-509, however, ignores the plain language of the statute. Section 8-509 reads, in pertinent part:

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 property in the manner provided for by the law of eminent domain.

The statute clearly contemplates that the project must be authorized under Section 8-503, but it does not require that the Commission's analysis stop there. The operative language of Section 8-509 states that a public utility may exercise eminent domain, "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," 220 ILCS 5/8-509 (emphasis added). Thus, in addition to showing that "alterations, additions, extensions or improvements" have been authorized under Section 8-503, a utility seeking eminent domain authority must show that eminent domain is "necessary for the construction" of such alterations, additions, extensions or improvements. In other words, the utility must obtain approval of the project under Section 8-503, and then, if the utility is unable to acquire the needed land rights via negotiation, it must show that use of eminent domain is required to complete the construction.

If, as Staff asserts, a Section 8-509 proceeding requires no more than the existence of an order under Section 8-503, the grant of eminent domain authority would be nothing more than a rubber stamp following the grant of a Section 8-503 order. As the ALJPO rightly points out, “granting relief under Sections 8-406 and 8-503 does not render a later request under Section 8-509 a mere formality.” (ALJPO, p. 88.) In fact, as the ALJPO clarifies, while “authority under Section 8-503 is specifically required *before* eminent domain authority can be granted under Section 8-509,” a further, independent evidentiary showing must be made (via the Section 8-509 proceeding) before the utility may exercise this authority. (*Id.*) (emphasis added). As Petitioners explained in their Initial Brief (pp. 52-54), Staff’s interpretation of Section 8-509 as requiring nothing more than an order under Section 8-503 is inconsistent with the Commission’s past precedent, which makes clear that a utility must make two showings: that the project is necessary, and that the utility has conducted good-faith negotiations to acquire the necessary land rights but such negotiations have not been fruitful. The focus of the inquiry is on the nature and extent of negotiations with landowners:

In order to arrive at a determination that the authority to seek the entry of a condemnation order is appropriately granted, the Commission generally looks to the following: the continued need for the project under consideration, including least cost considerations; the number and nature of contacts between the entity seeking the authority and those whose property will be encumbered; the basis for any monetary or other offers made; and the likelihood that further negotiations would prove useful in arriving at negotiated settlements.

Central Ill. Pub. Serv. Co., Docket 95-0484 (July 17, 1996), p. 13. The Commission’s requirement that a utility show the continuing need for a project and good-faith negotiations to obtain eminent domain authority is long-standing. (See Pet. Init. Br., pp. 52-54; Pet. Reply Br., pp. 7-8.)

Staff's suggestion for a conflated Section 8-406, 8-503 and 8-509 proceeding transforms the independent inquiry into land-right negotiations into a clerical exercise: as Staff explains, under their approach, to succeed, "a petition for Section 8-509 eminent domain authority would simply need to reference the prior Commission order under Section 8-503." (Staff BOE, p. 18.) This reading of the statute is not only inconsistent with the plain language of the statute, it is also contrary to the Commission's prior interpretation of the statute. The Commission has interpreted Section 8-509 as mandating that "a utility obtain[s] an order under Section 8-503 prior to being granted an order authorizing the exercise of eminent domain." Quantum Pipeline Co., Docket 96-0001 (December 17, 1997), p. 90 (emphasis added). Similarly, the Commission has ruled that if, after an 8-503 order is entered, a utility "determine[s] there is a need to seek eminent domain," then the utility must obtain Commission authorization before exercising condemnation authority. Illinois Power Co. d/b/a AmerenIP, Docket 06-0179, p. 40. Thus, Staff's reading of Section 8-509 specifically conflicts with longstanding Commission precedent.

Staff argues that the utility's attempts to acquire property would be examined in a Section 8-503 proceeding. Section 8-503 does not refer to acquisition of property, however, but addresses whether a project is necessary and should be authorized to be constructed, while Section 8-509 expressly deals with eminent domain. As explained above, the evidentiary inquiries under Sections 8-406 and 8-503 (the need for the project) are distinct from the inquiries in a proceeding to obtain eminent domain authority under Section 8-509 (good faith negotiations). Moreover, Staff's reliance on the language of Appendix A to Part 300 to support its statutory interpretation of Section 8-509 (that examination of a utility's attempts to acquire property rights are associated with Section 8-503, not Section 8-509) is improper. (Staff BOE, p. 18.) Although Appendix A refers to Section 8-503, it is not controlling authority in the face of

plain statutory language. Staff reads Appendix A to suggest that the utility's ability to obtain eminent domain authority is properly determined under Section 8-503. If that were the case, Appendix A would contradict both statute (because Section 8-509 governs the grant of eminent domain authority) and Commission precedent. The statute, however, not Appendix A, controls: "In case of a conflict between a statute and regulation, the statute governs and the regulation is invalid." Owens-Illinois Inc. v. Bowling, 99 Ill. App. 3d 1117, 1125 (1st Dist. 1981). See also Panhandle Eastern Pipe Line Co. v. Illinois E.P.A., 314 Ill. App. 3d 296, 301 (4th Dist. 2000) (explaining that "[i]f an agency promulgates rules beyond the scope of the legislative grant of authority, the rules are invalid, as are any rules that conflict with the statutory language under which the rules are adopted.") Thus, Staff cannot rely on Appendix A as an end-run around the plain meaning of Section 8-509.

3. A Separate Proceedings for Eminent Domain Authority Will Not Diminish the Opportunity for Meaningful Landowner Participation.

Staff asserts that separate proceedings will reduce landowners' opportunity for meaningful participation. (Staff BOE, pp. 20-25.) Logically, however, the earliest of the proceedings (the Certificate proceeding) will trigger involvement from potentially affected landowners. Landowners along a proposed route receive notice at the outset of the proceedings, as required by Commission rule. (83 Ill. Admin. Code 200.150(h).) This notice sufficiently informs landowners of the proposed project and its implications; as the ALJPO rightly notes, "landowners currently receive appropriate notice." (ALJPO, p. 89.) Self-interest should – and indeed, as discussed above, does – motivate the landowners to participate in the Certificate proceeding, as they deem necessary to represent their property interests. Landowners also receive notice of a utility's desire to acquire land rights under the Commission's Part 300 rules, 83 Ill. Adm. Code Part 300.

Recent experience provides empirical evidence to confirm that landowners are aware and involved in Certificate proceedings. Over 50 landowners intervened in the recent Section 8-406/8-503 proceedings in Petitioners' Prairie State transmission case, Docket No. 06-0179. Similarly, landowners intervened in the Section 8-406/8-503 proceedings initiated by Commonwealth Edison in Docket No. 02-0838 and in AmerenCIPS' Certificate proceeding in Docket 07-0532. In this case, four separate groups – PROTED, SHOCK, Illinois 71 Resisters and SOLVE – along with the City of LaSalle, the City of Ottawa and the LaSalle-Peru school district, intervened in the current proceeding, representing the interests of 200 landowners and other concerned residents along the proposed routes. The vigorous participation of these individuals demonstrates that the current notice and public filing procedures required for a Section 8-406/8-503 proceeding clearly inform landowners potentially affected by the proposed project, and that those landowners are not waiting for an eminent domain proceeding to get involved.

Nor do issues become “more limited” from a Section 8-503 proceeding to a Section 8-509 proceeding. (Staff BOE, p. 21.) In fact, the inquiries are distinct, and therefore, the relevant issues are quite dissimilar from each other. The Section 8-503 proceeding, much like a Section 8-406 proceeding, focuses on the need for the project. As part of this proceeding, landowners have the opportunity to contribute in meaningful ways to the ultimate selection of the routes for the project. The Section 8-509 proceeding focuses on the need for the use of eminent domain to build these routes. As part of this proceeding, landowners can intervene to challenge whether the utility's attempts at negotiation have been reasonable, and whether, given the utility's attempts at negotiation, an exercise of eminent-domain authority is warranted.

In recommending that the Section 8-406, 8-503 and 8-509 inquiries be combined into a single proceeding, Staff is ignoring the practical needs of these separate inquiries. Staff acknowledges that a utility must provide evidence of its attempts to acquire the properties for which it seeks eminent-domain authority. (See Staff BOE, pp. 23, 27-28.) However, as the ALJPO correctly notes, until a certificate is granted, a utility cannot know precisely which properties the transmission lines will run along. (ALJPO, p. 88.) Thus, under Staff's scheme, the utility is left with two equally unsatisfactory options: making an educated guess as to what set of routes the Commission will approve (and negotiating with the landowners along those routes), or negotiating with landowners along every possible primary and alternate route being proposed or evaluated. This would result in an expensive, diffuse and largely superfluous series of negotiations. In this docket, for example, Petitioners would have had to negotiate with landowners along six possible Lasalle-Wedron routes, and four possible Ottawa-Wedron routes (as well as along variants of those routes proposed during the proceeding).

Petitioners believe that, in some cases, a more efficient approach is to have a separate Section 8-509 proceeding after the Section 8-406/8-503 inquiries are done. This would allow Petitioners to focus its resources on negotiating land rights with a small and confirmed set of affected landowners. This would allow Petitioners to allocate more resources to these negotiations, since it no longer has to spread its resources across negotiations along all of the possible alternate routes.

In addition, separate proceedings would also allow the Commission to respond actively to the landowners' concerns. At the Section 8-406 Certificate/Section 8-503 order stage, the Commission could select or reject proposed routes based on the landowners' testimony, much as it has done in this case or in Docket 06-0179. At the Section 8-509 stage, were the Commission

not convinced that the utility had negotiated in good faith, it could deny eminent domain and require the utility to renegotiate with the affected landowners. Thus, as Petitioners explained in their Initial Brief (pp. 55-56), separate proceedings actually enhance the significance of landowner participation, providing, in concert with the ensuing circuit-court eminent domain proceeding, multiple opportunities for the landowners to participate.

4. The ALJPO's Proposed Additional Notice to Landowners Is Sufficient to Address Staff's Concerns.

Staff suggests that the “most efficient way to add transparency” to a transmission project is to combine the Section 8-406, 8-503 and 8-509 proceedings. (Staff BOE, p. 27.) However, as Petitioners explained in their Initial Brief (p. 55) and Reply Brief (pp. 8-9), combining inquiries with separate evidentiary bases – project characteristics versus landowner negotiations – and separate aims – project necessity versus eminent-domain necessity – could be impractical, and would deny the utility flexibility in pursuing the necessary relief. Moreover, the additional notice language proposed by the ALJPO addresses Staff's concerns. It enhances the notice being received by landowners along a proposed route by communicating the fundamental point: that the utility may “seek authority to acquire property rights through eminent domain” and thereby acquire rights to the landowners' property. (ALJPO, p. 88-89.)

Although Petitioners agree with the ALJPO that its proposed notice sufficiently enhances the notice to landowners, Petitioners do not oppose the expanded notice statements set forth in Staff's Brief on Exceptions at pages 26-27 and 41-42 (subject to the exceptions of Petitioners in their Brief on Exceptions, pages 9-10). Accordingly, Petitioners would accept the use of Staff's proposed alternate language in notices to landowners, subject to two modifications. First, Staff's language for the first proposed notice (for Section 8-406 and/or Section 8-503 proceedings) states that “Landowners are advised that the utility is seeking rulings that the proposed project is

necessary and that utility is authorized or directed to construct the project.” (Staff BOE, p. 26.)

Petitioners believe that the language should be modified to state “the proposed project is necessary and in the public interest”, to better track the statutory language found in Sections 8-406 and 8-503 of the Act. Second, Staff’s language for both proposed notices state that “Any person who wishes to present evidence...must intervene and present that evidence in this proceeding.” (Emphasis added.) Petitioners do not believe that the Commission can require landowners to intervene, or advise them that intervention may be appropriate, and therefore propose that this sentence be revised in each notice to state: “The Commission will consider evidence regarding [necessity /location or reasonable attempts] in this proceeding.” This revised sentence would follow the first paragraph. With these two changes, Staff proposed notice would read as follows. For Section 8-406 and/or Section 8-503 proceedings:

Landowners are advised that the utility is seeking rulings that the proposed project is necessary and in the public interest and that the utility is authorized or directed to construct the project. In addition the utility is seeking a ruling determining where the project will be constructed.

The Commission will consider evidence regarding the necessity for or the location of the project in this proceeding.

If the requested rulings are issued, the utility may file a petition stating that it has made reasonable attempts, but has been unable to acquire the property necessary for the construction of the project. Upon proof thereof the utility can be authorized to acquire property rights through eminent domain for the purpose of constructing the facilities at issue at the location determined in this proceeding.

For Section 8-503 and Section 8-509 proceedings, or a proceeding under Section 8-509 alone:

Landowners are advised that the utility has filed a petition stating that it has made reasonable attempts, but has been unable to acquire the property necessary for the construction of a project which it has been authorized or directed to construct, and is seeking authorization to acquire property rights through eminent domain for the purpose of constructing the facilities at the location indicated.

The Commission will consider evidence regarding the reasonableness of the utility’s attempt to acquire property for this purpose in this proceeding.

5. Petitioners Would Not Object to a “Reasonable Attempts to Acquire the Property” Standard for the Grant of Eminent Domain Authority Under Section 8-509.

Staff asserts that use of the phrase “good-faith negotiations,” as opposed to “reasonable attempts to acquire property,” somehow estops landowners from raising the issue of good-faith negotiation in a circuit-court proceeding. (Staff BOE, p. 29.) However, Staff’s estoppel argument is entirely unsupported. Staff does not explain why a Commission decision on this issue would have a preclusive or collateral estoppel effect, and cites no cases in support of its theory. Nor does Staff explain why a Commission determination of good-faith negotiations would meet the elements of the collateral estoppel doctrine. In fact, the Commission is not a judicial body, which undermines any conclusion that its decisions have preclusive effect. See Metro Utility Co. v. Illinois Commerce Comm’n, 262 Ill. App. 3d 266 (2d Dist. 1994) (agreeing that collateral estoppel does not apply to Commission rate orders because the Commission is not a judicial body and its orders are not *res judicata*); Illinois Power & Light Corp. v. Illinois Commerce Comm’n, 320 Ill. 427, 431 (1926) (“The Commission is not a judicial tribunal and its orders are not judgments”).

Ameren believes a “good-faith negotiations” finding by the Commission could operate as a “rebuttable presumption,” just as evidence that the Commission has granted a certificate of public convenience creates a rebuttable presumption that the project is necessary for a public purpose. See 735 ILCS 30/5-5-5. Should the Commission determine that it should reverse its past practice and make “reasonable attempts to acquire the property” the standard, however, Petitioners would not oppose the change. That said, Petitioners discern little difference between the two standards.

In summary, Staff's concern regarding the effective participation of landowners in eminent domain proceedings is overstated. Potentially affected landowners along a transmission route already receive sufficient notice of the possibility of eminent domain being exercised over their properties, and respond by actively intervening in such proceedings. Moreover, the ALJPO's proposed notice requirement eliminates any additional concerns Staff might have.

In addition, Staff's proposal to create an omnibus Sections 8-406, 8-503 and 8-509 proceeding is impractical, and inconsistent with the statutes and Commission precedent. A Section 8-509 proceeding focuses on the nature of utility-landowner negotiations, and thus requires evidentiary showings different from Section 8-406/8-503 proceedings. Staff's proposal would essentially require the utility to seek eminent domain before the transmission line route was even known. Accordingly, Petitioners concur with the ALJPO, which notes in its order that "a petitioner need not seek relief under Sections 8-406, 8-503, and 8-509 simultaneously." (ALJPO, p. 88.) Petitioners also agree with the ALJPO's conclusion that the Commission is "not persuaded that utilities should be required to take the serious step of seeking to take property before they are even certain what route their facility will follow." (*Id.*) Petitioners have not requested eminent-domain authority in this proceeding. Should Ameren determine a need to condemn certain properties along the approved routes, it may, as the ALJPO states, bring a separate proceeding under Section 8-509 for that purpose. (ALJPO, p. 89.) Therefore, Staff's proposed exceptions regarding Section 8-503 (except for the expanded notice provisions as discussed above) should be rejected.

D. Staff Exception 4: "Accounting and Reporting Issues" (Section IX)

Petitioners do not object to Staff's exceptions regarding "Accounting and Reporting Issues", with one change. Staff's Brief on Exceptions (p. 44) states that the language regarding "Facilities B" would be inserted into Exhibit A of the JOA as follows: "Replacing the language

describing Facilities A with the following language describing Facilities B.” The language for “Facilities B,” however, is meant to be in addition to the language for “Facilities A,” not its replacement. (See Ameren Ex. 14.0, pp. 7-8; ICC Staff Exs. 3.0, p. 3; 8.0, p. 3.) Therefore, the ALJPO should state:

4. Petitioners will submit as a compliance filing within 60 days of entry of this Order an amended JOA reflecting the following clarifying language in Exhibit A to the JOA.

- Re-titling Exhibit A from “Ownership Interest and Facilities “ to “Ownership and O&M Interest and Facilities”
- ~~Replacing the language describing Facilities A with the following~~ Adding the following language describing Facilities B:
“Facilities B.

The Facilities will consist of two new 138 kV lines, extending from the North LaSalle and Ottawa Substations to the new Wedron Fox River Substation, and related facilities in LaSalle County Illinois. The first 138 kV line, approximately 24 miles in length, will be between AmerenIP's North LaSalle Substation and the Wedron Fox River Substation. The second line, approximately 9 miles in length, will be between AmerenIP's Ottawa Substation and the Wedron Fox River Substation.

Owners	Ownership Interest
AmerenIP	10%
Transco	90%”

Reply to SHOCK.

E. SHOCK Exception 1:

Petitioners do not oppose the exceptions raised by SHOCK.

III. CONCLUSION

For the reasons set forth above and in their Brief on Exceptions, Petitioners request the Commission adopt the Exceptions set forth in the respective sections of Appendix A to Petitioners’ Brief on Exceptions.

Dated: January 5, 2009

Respectfully submitted,

ILLINOIS POWER COMPANY d/b/a
AmerenIP, and
AMEREN ILLINOIS TRANSMISSION
COMPANY

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