

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

ILLINOIS POWER COMPANY,)	
d/b/a AmerenIP, and)	
AMEREN ILLINOIS TRANSMISSION)	
COMPANY)	Docket No. 08-0291
)	
Petition for an Order pursuant to Section 8-509)	
of the Public Utilities Act approving)	
Petitioners' use of eminent domain power.)	
)	(Consol.)
ILLINOIS POWER COMPANY,)	
d/b/a AmerenIP, and)	
AMEREN ILLINOIS TRANSMISSION)	
COMPANY)	Docket No. 08-0449
)	
Petition for an Order pursuant to Section 8-509)	
of the Public Utilities Act approving)	
Petitioners' use of eminent domain power.)	

**INITIAL BRIEF OF
ILLINOIS POWER COMPANY, d/b/a AmerenIP,
and AMEREN ILLINOIS TRANSMISSION COMPANY**

Christopher W. Flynn
Albert D. Sturtevant
JONES DAY
77 West Wacker Drive
Chicago, IL 60601-1692
Telephone: (312) 782-3939
Facsimile: (312) 782-8585
cwflynn@joneday.com
adsturtevant@jonesday.com

Edward C. Fitzhenry
Managing Associate General Counsel
Ameren Services Company
One Ameren Plaza
1901 Chouteau Avenue
St. Louis, Missouri 63166
Telephone: (314) 554-3533
Facsimile: (314) 554-4014
efitzhenry@ameren.com

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I. SUMMARY OF PETITIONERS' POSITION

In this consolidated proceeding (and in accordance with the Illinois Commerce Commission's ("Commission") Final Order in Docket 06-0179), Illinois Power Company, d/b/a AmerenIP and Ameren Illinois Transmission Company (jointly, "Petitioners") are seeking authority under Section 8-509 of the Illinois Public Utilities Act ("Act"), 220 ILCS 5/8-509, to exercise the power of eminent domain with respect to certain parcels of land necessary for the construction of two electric transmission lines (the Baldwin Rush Line and the Prairie West Line, defined below). A Certificate of Public Convenience and Necessity ("Certificate") and an order authorizing the construction of the transmission lines under Section 8-503 of the Act, 200 ILCS 5/8-503, were issued in Docket 06-0179. In support of their request, Petitioners filed the direct testimony of three witnesses, which discussed the continuing need for the transmission lines, the status of the construction of the lines, and Petitioners' good faith efforts to acquire property from affected landowners by negotiation, including the nature and extent of contacts with landowners and the reasonableness of Petitioners' offers of compensation.

As will be discussed in detail below, Section 8-509 of the Act and longstanding Commission precedent require that a utility seeking eminent domain authority show that eminent domain is necessary to complete a project authorized under Section 8-503 of the Act, and show that the utility has negotiated in good faith with the affected property owners to acquire the necessary land rights. In determining whether to grant eminent domain authority, the Commission generally looks at the following factors: the continued need for a project; the number and nature of contacts between the entity seeking the authority and those whose property will be encumbered; the reasonableness of offers of compensation; and the likelihood that further negotiations would prove useful in arriving at negotiated settlements.

As discussed below, Petitioners evidence in this case demonstrates that the criteria for a grant of eminent domain authority have been met. Moreover, no party disputes the conclusion that eminent domain should be granted. Therefore, Petitioners believe that there is no dispute about the outcome of the case: the Commission should grant eminent domain authority. Based on positions taken by Commission Staff, however, in certain motions discussed below, Petitioners' Initial Brief discusses the standard of review for granting eminent domain authority under Section 8-509 of the Act and addresses what Petitioners' believe is a purely legal issue raised by Staff.

Commission Staff did not file testimony in this proceeding, but instead filed the Affidavit of Ronald Linkenback, which concluded by recommending that the Commission grant Petitioners eminent domain authority. (Docket 08-0291, ICC Staff Ex. 1.0, p. 2, ¶ 6; Docket 08-0449, ICC Staff Ex. 1.0, p. 2, ¶ 6.) In both Dockets 08-0291 and 08-0449, however, Staff moved to strike substantially all of Petitioners' testimony, on the grounds that the only showing required by the Petitioners in order to obtain eminent domain authority was that a Section 8-503 order had been obtained in Docket 06-0179. This reasoning was rejected, and the motions to strike were denied, by the Administrative Law Judge ("ALJ"), as discussed below. Staff also filed a Petition for Interlocutory Review of the ALJ's denial of the motion to strike in Docket 08-0291, which was also denied by the Commission. For the reasons discussed below, and because Staff's legal position regarding the grant of eminent has been rejected by the ALJ and the Commission, there is no legal basis for Staff's contention that the only showing required by the Petitioners to obtain eminent domain authority was that a Section 8-503 order was previously obtained or that Petitioners' request for eminent domain authority is otherwise legally or procedurally flawed.

II. ARGUMENT

A. Background

In 2001, AmerenIP was notified by Prairie State Generating Company, LLC, an independent power producer, that it was developing an electric generating facility in Washington County, Illinois (“Prairie State Facility”). (Ameren Ex. 1.0-BR (Rev.), p. 3.) In order to accommodate the Prairie State Facility, and as required by FERC Order No. 2003, Petitioners proposed to construct three 345 kV transmission lines (the Prairie South Line, the Prairie West Line and the Baldwin Rush Line) and related facilities (together, the “Project”). Petitioners sought a Certificate under Section 8-406 of the Act, 220 ILCS 5/8-406, and an order authorizing the Project to be built under Section 8-503 of the Act, 220 ILCS 5/8-503, in Docket 06-0179.

On May 16, 2007 the Commission in Docket 06-0179: (i) granted Petitioners a Certificate for the Project and approved the routes for the three transmission lines; and (ii) authorized Petitioners to construct the Project pursuant to Section 8-503 of the Act. The Commission noted in Docket 06-0179, with respect to eminent domain, that “[s]hould Petitioners subsequently determine there is a need to condemn certain property in order to construct the Project, they will seek Commission approval to exercise eminent domain authority in a separate proceeding.” Docket 06-0179, Final Order, p. 40. The Commission then required Petitioner, if there was a need to seek eminent domain, to obtain Commission authorization before doing so. Id.

These consolidated proceedings involve Petitioners’ request for eminent domain authority with respect to two of the transmission lines authorized in Docket 06-0179: the 7.5 mile transmission line route from the Prairie State Facility west to AmerenIP’s existing Baldwin-Stallings 345 kV line (the “Prairie West Line”) and the 30 mile transmission line route from the Baldwin Power Plant Switchyard west to AmerenUE’s switchyard at the Rush Island Power Plant (the “Baldwin Rush Line”). In Docket 06-0179, the Commission ordered that the Baldwin

Rush Line be built on the route shown in Ameren Exhibit 1.1-BR and the Prairie West Line be built on the route shown on Ameren Exhibit 1.1-PW. (Ameren Ex. 1.0-BR (Rev.), p. 3.)

1. Prairie West Line

On May 1, 2008, Petitioners filed a Petition requesting eminent domain authority with respect to certain parcels of land in order to allow them to acquire necessary rights-of-way along the Prairie West Line. (Ameren Ex. 1.0-PW (Rev.), p. 2.) The Prairie West Line crosses 35 parcels of land. (Id., p. 4.) Petitioners have acquired, by negotiation, easements from most landowners. The easements acquired cover 31 parcels of land. (Ameren Exs. 3.0-PW (Rev.), p. 5; 4.0 (Rev.), pp. 2-3.) Petitioners are now seeking eminent domain authority with respect to the remaining four parcels, owned by two landowners (the “PW Unsigned Parcels”). (Ameren Ex. 4.0-PW (Rev.), pp. 2-3.) The Unsigned Parcels are primarily parcels of agricultural land, ranging from 40 to 80 acres in size. (Ameren Ex. 1.0-PW (Rev.), p. 5.) Petitioners are seeking rights of way approximately 150 ft. in width across the Unsigned Parcels for the construction of the Prairie West Line, as well as construction easements where necessary. (Id.)

The design of the Prairie West Line has been completed. (Ameren Ex. 2.0-PW (Rev.), p. 3.) Right-of-way clearing started October 1, 2008 and will continue through April 1, 2009 (right of way clearing must take place in fall and winter months to avoid potential impacts on Indiana bat habitat). (Id., p. 5.) Foundation construction also started on October 1, 2008 in areas where tree clearing is not required. (Id.) Line construction (placement of towers and actual transmission lines) started December 29, 2008. (Id.) The target completion date for the Prairie West Line is November 20, 2009. (Id.)

If Petitioners are unable to acquire the needed easements for the Prairie West Line, the construction schedule will be delayed. (Ameren Ex. 2.0-PW (Rev.), p. 6.) Such a delay could

have substantial implications for the successful completion of the Prairie West Line, as well as the completion of the entire Project. (Id.)

2. Baldwin Rush Line

On July 23, 2008, Petitioners also filed a petition requesting eminent domain authority with respect to certain parcels of land (the “BR Unsigned Parcels,” together with the PW Unsigned Parcels, the “Unsigned Parcels”) along the Baldwin Rush Line. (Ameren Ex. 4.0-BR (Rev.), pp. 2-3.) The Baldwin Rush Line crosses 116 parcels of land. (Ameren Ex. 1.0-BR (Rev.), pp. 3.) Petitioners have acquired, by negotiation, easements covering 49 parcels of land. (Ameren Ex. 4.0-BR (Rev.), p. 2.) Petitioners are now seeking eminent domain authority with respect to the 38 BR Unsigned Parcels, which are primarily parcels of agricultural and forested land of various sizes. (Ameren Ex. 1.0-BR (Rev.), p. 5.) Petitioners are seeking rights of way 150 ft. in width across the BR Unsigned Parcels for the construction of the Baldwin Rush Line, as well as construction easements where necessary. (Id.)

The design of the Baldwin Rush Line has been completed. (Ameren Ex. 2.0-BR (Rev.), p. 3.) Right-of-way clearing started on January 5, 2009 and will continue through March 31, 2009. (Id.) Foundation construction is also scheduled to start on February 17, 2009 in areas where tree clearing is not required. (Id.) Line construction for the Baldwin Rush Line (placement of towers and actual transmission lines) is scheduled to start on June 1, 2009. (Id., pp. 4-5.) The target completion date for the Baldwin Rush Line is October 1, 2010. (Id., p. 5.)

As Petitioners witness Ms. Dencker explained, if Petitioners are unable to acquire the needed easements, the construction schedule will be delayed. (Ameren Ex. 2.0-BR (Rev.), p. 6.) Such a delay could have substantial implications for the successful completion of the Baldwin Rush Line, as well as the completion of the entire transmission line Project approved in Docket No. 06-0179. (Id.) Delay in completing the transmission line would lead to delay in start-up and

testing of the generation units of the Prairie State Facility plant, which would ultimately lead to delay in full commercial operation of the plant. (Id.)

B. Staff's Motions to Strike

1. Prairie West Line (Docket 08-0291)

Petitioners filed a Petition and direct testimony in Docket 08-0291 sought an order pursuant to Section 8-509 authorizing the use of eminent domain authority to acquire rights-of-way across the PW Unsigned Parcels. Staff responded with the affidavit of Mr. Linkenback, in which Mr. Linkenback agreed to that eminent domain should be granted. (Docket 08-0291, ICC Staff Ex. 1.0, ¶ 6). After petitioners filed rebuttal testimony on September 10, 2008, Staff filed a motion ("08-0291 Motion To Strike") to strike the entirety of the testimony of Petitioners' witnesses Ms. Dencker and Dr. Pflaum, as well as most of Mr. Trelz's testimony, on the basis that an 8-509 proceeding should be "limited to making a determination as to whether the Commission has entered an Order under Section 8-503 of the Act." (Docket 08-0291, Motion to Strike, p. 2.)

The Administrative Law Judge ("ALJ") denied the 08-0291 Motion To Strike, explaining that Commission orders in proceedings seeking eminent domain authority "have contained analysis and findings as to whether petitioners had engaged in diligent, good faith negotiation efforts with landowners or had made reasonable attempts to acquire the necessary land rights through negotiations with landowners." Because these required findings had not been addressed in Docket 06-0179 (or anywhere else), Petitioners' evidence was proper. (Docket 08-0291, Dec. 30, 2008 ALJ Ruling, p. 1.)

Staff petitioned for interlocutory review of the Commission's decision. (Docket 08-0291, Petition for Interlocutory Review (January 9, 2009).) The Commission denied Staff's petition, thereby confirming that Petitioners' evidence was properly admissible to support Petitioners'

request for eminent domain authority under Section 8-509. (See Docket 08-0291, Notice of Commission Action (February 4, 2009), p. 1.)

2. Baldwin Rush Line (Docket 08-0449)

Similarly, Petitioners filed a Petition and direct testimony in Docket 08-0449 that sought an Order pursuant to Section 8-509 authorizing the use of eminent domain authority to acquire rights-of-way across the BR Unsigned Parcels. Staff responded with the affidavit of Mr. Linkenback, which, as in Docket 08-0291, recommended that eminent domain be granted. (Docket 08-0449, ICC Staff Ex. 1.0, ¶ 6.) Staff filed a motion (“08-0449 Motion to Strike”) to strike the entire testimony of Petitioners’ witnesses Ms. Dencker and Dr. Pflaum, as well as most of Mr. Trelz’s testimony, once again on the basis that an 8-509 proceeding should be “limited to making a determination as to whether the Commission has entered an Order under Section 8-503 of the Act.” (Docket 08-0449, Motion to Strike (January 13, 2009), p. 2.) (Staff’s Motions to Strike in Dockets 08-0291 and 08-0449 are collectively referred to as the “Motions to Strike”.)

The ALJ also denied the 08-0449 Motion to Strike, again explaining that “Commission orders in proceedings seeking eminent domain-related authorizations have consistently contained analysis and findings as to whether petitioners had engaged in diligent, good faith negotiation efforts with landowners or had made reasonable attempts to acquire the necessary land rights through negotiations with landowners,” and such findings are a “prerequisite to obtaining eminent domain-related relief.” (Docket 08-0449, February 6, 2009 ALJ Order, p. 2.) The ALJ concluded that, because these necessary determinations had not been made in Docket 06-0179, Petitioners evidence was properly admissible. (Id.)

C. The Standard of Approval for a Commission Grant of Eminent Domain Authority Pursuant to Section 8-509 of the Act

1. Introduction

Commission approval is required before a utility seeks to condemn. Illinois Bell Tel. Co. v. Lewis, 117 Ill. App. 3d 72 (4th Dist. 1983). Section 8-509 of the Act governs the grant of eminent domain authority by the Commission. Section 8-509 provides:

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.

To obtain Commission approval to exercise eminent domain authority under Section 8-509, therefore, Petitioners must show: (i) that they have received a Section 8-503 order authorizing construction of a project; and (ii) that eminent domain is necessary to complete the authorized construction. This “necessary” showing requires the utility to show that they have negotiated in good faith with the affected property owners to acquire the necessary land rights.

Even with a Section 8-503 order in hand, a utility must request and obtain Commission approval authorizing the use of eminent domain authority. See Illinois Power Company d/b/a AmerenIP, Docket 06-0179, Order, p. 40 (finding that the requirements for a Section 8-503 order had been met and stating that “[i]f Petitioners later determine there is a need to seek eminent domain, they will need to obtain Commission authorization before doing so”). The exercise of eminent domain can therefore not occur until a utility expressly requests and receives Commission approval pursuant to Section 8-509.

The question of eminent domain is separate from the inquiry into whether a Certificate should be granted under Section 8-406 of the Act, 220 ILCS 5/8-406, or whether a Section 8-503 order should be granted. As will be discussed below, the type of evidence required to support a

Section 8-406 Certificate is similar to the type of evidence needed to obtain a Section 8-503 order, while the evidence needed to support a grant of eminent domain authority is quite different. For practical reasons, it may make sense for a utility (as is the case with Petitioners here) to seek a Certificate first, and then seek eminent domain later. For example, the utility will not know what route the transmission line will take until a route is approved by the Commission in a Certificate proceeding. If there are alternative route proposals (as there were in Docket 06-0179), the utility will not know where to seek eminent domain until the route is approved. Thus, it may make sense to wait to seek eminent domain until a route is identified and negotiations undertaken with landowners, as the eminent domain proceeding will then be more narrowly focused on just the parcels where eminent domain is needed.

As Petitioners' witness Dr. Pflaum explained, it is efficient to consider the question of eminent domain separately from the grant of a Certificate. (Ameren Ex. 3.0-BR (Rev.), p. 5.) First, it is not always practical, and it is typically more costly, to negotiate for an easement without knowing exactly what property will be crossed. (Id.) It would be wasteful to require landowners who ultimately are not affected by a route and are only concerned with the reasonableness of compensation to bear the expense of participating in the Certificate proceeding. The utility would also bear unnecessary expense if it were required to negotiate easements with all potentially effected landowners prior to Certificate. (Id.)

In addition, determining the "best" route is an entirely different question than examining the reasonableness of the process by which a utility attempts to negotiate price with landowners. (Ameren Ex. 3.0-BR (Rev.), p. 6.) The procedure for litigating route selection before the Commission can be complicated and highly technical and involve numerous parties, and, as Dr. Pflaum testified, considering eminent domain in a more focused docket may be preferable. (Id.)

Many of the questions that arise in route selection are of the sort that are of broad public concern that raise questions related to community impact. These are the same types of questions that concern state agencies, environmental and economic development groups - public policy questions. The question of eminent domain for specific individual parcels is a narrower question.

Staff discounts the distinction between the showing needed for a Certificate or Section 8-503 order and the showing needed to obtain eminent domain authority. Staff appears to believe that once a Section 8-503 order has been issued, Commission approval of eminent domain authority amounts to nothing more than a Commission rubber stamp that the Section 8-503 order was received. (Docket 08-0449, Motion to Strike, p. 3; Docket 08-0291, Petition for Interlocutory Review, p. 3). Contrary to Staff's assertions, however, a utility seeking eminent domain authority must show more than just receipt of a Section 8-503 order. To obtain Commission approval the utility must show that it has negotiated in good faith with the affected property owners to acquire the necessary land rights. The demonstration of good-faith negotiations is distinct from the requirement that the utility show that construction is necessary (which can be satisfied by a Section 8-503 order). As explained below, this conclusion is supported by both the plain language of Section 8-509 and the Commission's long-standing precedent and practice with respect to applications for eminent domain authority.

2. Section 8-509 of the Act Sets Forth the Standard for the Commission's Grant of Eminent Domain Authority

As indicated above, Section 8-509 applies to "alterations, additions, extensions or improvements ordered or authorized under Section 8-503," thus requiring that a utility receive a Section 8-503 Order (as Petitioners did in Docket 06-0179) in order to obtain eminent domain. The operative language of Section 8-509, however, states: "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.” 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 inquiry under Section 8-509 is two-part: a utility must receive a Section 8-503 order for construction of facilities and the utility must show that eminent domain is “necessary” for the construction. Demonstrating that eminent domain is “necessary” requires evidence that a utility has negotiated in good faith with landowners, but that such negotiations will not be successful and so the necessary land rights can only be obtained by eminent domain. The plain language of Section 8-509 therefore belies the conclusion that the issuance of a Section 8-503 order automatically equals a grant of eminent domain authority (as suggested by Staff in the Motions to Strike).

Contrary to Staff’s arguments in the Motions to Strike, eminent domain is considered under Section 8-509, not Section 8-503. Section 8-503 does not even mention “eminent domain”; instead, eminent domain authority is governed by Section 8-509 of the act. 220 ILCS 5/8-509; see Lakehead Pipeline Co. v. Illinois Commerce Comm’n, 296 Ill. App. 3d 942 (3d Dist. 1998) (stating eminent domain is authorized by Section 8-509 of the Act); St. Louis Pipeline Corp., Docket 02-0664, Final Order, pp. 15-16 (“pursuant to Section 8-509 of the Act, Petitioner is authorized to exercise eminent domain to obtain a permanent three feet wide nonexclusive easement...”).

Moreover, the Commission has confirmed that the eminent domain inquiry under Section 8-509 is separate and distinct from the inquiry under Section 8-503. See Central Ill. Pub. Serv.

Co., Docket 90-0206 (reviewing request for authority under Section 8-509 separately from request under Section 8-503); see also St. Louis Pipeline Corp., Docket 02-0664, Interim Order, p. 8 (stating that request for authorization to construct a pipeline pursuant to Section 8-503 of the Act was pending, and separately, “in case the property claimed by MESD is in fact private property, Petitioner’s request for authority to take property pursuant to Section 8-509 must still be addressed”). In fact, the Commission has recognized that the inquiry under Section 8-503 has more in common with the inquiry under Section 8-406. See Quantum Pipeline Co., Docket 96-0001, 1997 Ill. PUC LEXIS 873, *91 (December 17, 1997) (“the practice of the Commission in judging applications under Section 8-503 has been to examine the Project primarily in terms of its value to the public, in a manner akin to judging requests for certification under the ‘public convenience and necessity’ standard found in Section 8-406 of the Act.”) Clearly, the proper statutory provision governing review eminent domain authority is Section 8-509.

3. Longstanding Commission Precedent Defines the Evidentiary Showing Required To Obtain Eminent Domain Authority Under Section 8-509

In granting eminent domain authority, the Commission traditionally has required a utility to make two showings: that a project continues to be necessary, and that, while the utility has conducted good-faith negotiations to acquire the necessary land rights, 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 Central Ill. Pub. Serv. Co., Docket 88-0342 (April 18, 1990) (reviewing necessity of Project and negotiation efforts by utility in granting eminent-domain authority); Central Ill. Pub. Serv. Co., Docket 90-0022 (October 3, 1990), p. 10, 23 (granting utility eminent-domain power where there was a “continuing need” for the Project, and the utility had made “diligent effort to acquire right-of-way through negotiations with land-owners”); Central Ill. Pub. Serv. Co., Docket 90-0206 (January 9, 1991) (same); Central Ill. Pub. Serv. Co., Docket 90-0427 (April 3, 1991) (granting eminent-domain authority on the basis of Project need and unsuccessful outcome of diligent negotiation efforts by utility); Mt. Carmel Pub. Util. Co., Docket 91-0113 (May 16, 1991) (granting utility eminent-domain power where there was a need for the Project and the utility had made diligent efforts to acquire right-of-way through negotiations); Illinois Power Co., Docket 92-0306 (December 16, 1992) (reviewing Project necessity and utility’s efforts to negotiate land rights before granting an 8-509 order); Northern Ill. Gas Co., Docket 94-0029 (June 8, 1994) (granting eminent-domain authority where utility could not secure land rights for necessary Project despite good-faith negotiations); Commonwealth Edison Co., Docket 96-0410 (May 6, 1998) (finding that eminent-domain authority was necessary where good-faith negotiations had not sufficed to provide land rights for necessary Project); TransCanada Keystone Pipeline, Docket 06-0458 (April 4, 2007) (evaluating necessity of Project and good-faith nature of negotiations in granting eminent-domain authority); Enbridge Energy Partners, L.P., Docket 06-0470 (April 4, 2007) (concluding that eminent-domain grant was warranted where applicant had negotiated in good faith to acquire easements for a necessary Project); Commonwealth Edison Co., Docket 07-0310 (October 8, 2008)

(granting eminent-domain power where Project was necessary and utility had diligently negotiated to acquire necessary easements).

The ALJ's rulings on the Motions to Strike confirm the Commission's longstanding view of eminent domain authority. The ALJ's ruling on Staff's Docket 08-0449 Motion to Strike stated: "Commission orders in proceedings seeking eminent domain-related authorizations have consistently contained analysis and findings as to whether petitioners had engaged in diligent, good faith negotiation efforts with landowners or had made reasonable attempts to acquire the necessary land rights through negotiations with landowners." (See Docket 08-0449, February 6, 2009 ALJ Order, p. 2.) Such findings are a "prerequisite to obtaining eminent domain-related relief." (Id.)

4. Staff's Position in the Motions to Strike that a Section 8-503 Order Is Sufficient for a Grant of Eminent Domain Authority Is Incorrect

In the Motions to Strike, Staff's argued that "a proceeding to apply for eminent domain authority at the Commission would be limited to making a determination as to whether the Commission has entered an Order under Section 8-503 of the Act." (Docket 08-0449, Motion to Strike, p. 2; see also Docket 08-0291, Petition for Interlocutory Review, p. 3.) Staff's position is that the Section 8-503 order granted by the Commission to Petitioners in Docket 06-0179, by itself, amounts to a grant of eminent domain authority, and that no further evidence is needed. (Id.) Staff's arguments in the Motions to Strike were rejected by the ALJ, and, in Docket 08-0291, by the Commission. To the extent Staff seeks to advance its assertions on eminent domain, even after the denial of the Motions to Strike, Staff's theory is inconsistent with the Act and with Commission precedent, and it should be rejected.

Staff appears to believe that review of a utility's attempts to acquire land rights properly belongs in a Section 8-503 proceeding. (Docket 08-0291 Petition for Interlocutory Review, p.

5.) As discussed above, however, Section 8-509 of the Act governs the grant of eminent domain authority. The plain language of Section 8-509 clearly requires that the Commission consider more than whether a order has been granted under Section 8-503. Longstanding Commission precedent sets forth the required showing to receive a grant of eminent domain authority, namely that the utility show it has engaged in good faith negotiations with landowners. This analysis is properly made under Section 8-509, not Section 8-503.

(a) Staff's Position Ignores the Plain Language of Section 8-509 of the Act

Staff incorrectly asserts that the Commission considers the question of attempts to acquire property and eminent domain authority under Section 8-503. (Docket 08-0449, Motion to Strike, pp. 4-6; Docket 08-0291, Petition for Interlocutory Review, pp. 5-6.) Section 8-503 does not even mention eminent domain. Instead, as explained above, the provision of the Act that governs eminent domain is Section 8-509.

Staff argues (Docket 08-0449, Motion to Strike, pp. 2-6; Docket 08-0291, Petition for Interlocutory Review, pp. 2-3) that Section 8-509 of the Act supports a conclusion that the issuance of a Section 8-503 order automatically equals a grant of eminent domain authority. As explained above, however, the inquiry under Section 8-509 is two-part: a utility must receive a Section 8-503 order for the construction of facilities and the utility must show that eminent domain is “necessary” for the construction by demonstrating that the utility has negotiated in good faith with landowners.

Staff, in the Motions to Strike, also argues that Appendix A to 83 Ill. Adm. Code Part 300 (“Appendix A”) requires Commission consideration of landowner negotiations and eminent domain be made under Section 8-503. (Docket 08-0449, Motion to Strike, pp. 5-6; Docket 08-0291, Petition for Interlocutory Review, pp. 4-5.) The reference to Appendix A, however, is inapposite. Appendix A may refer to Section 8-503, but that reference does not transform

Appendix A into controlling authority in the face of the plain language of the Act, under which Section 8-509 governs the grant of eminent domain authority.

Were Staff correct, Appendix A would contradict both statute (because Section 8-509 governs the grant of eminent domain authority) and Commission precedent. By law, however, the statute, and 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.”)

(b) Staff’s Position Ignores the Commission’s Long-standing Precedent Regarding the Evidentiary Showing Required To Obtain Eminent Domain Authority

As explained above, to be consistent with Commission precedent, a utility seeking eminent-domain authority under Section 8-509 must show continued need for a project as well as the conduct of good-faith negotiations to acquire the necessary land rights. Staff’s position is inconsistent with this approach.

(c) Section 8-503 and Section 8-509 Relief May Be Sought Separately

Staff’s position appears to be that since Section 8-503 and 8-509 proceedings have been conducted simultaneously in some cases, a Section 8-509 proceeding should be conducted simultaneously with an 8-503 proceeding. (Docket 08-0291, Petition for Interlocutory Review, pp. 2-3 (“A Section 8-509 eminent domain request is traditionally coupled with a request pursuant to Section 8-503 of the Act.”); see Docket 08-0449, Motion to Strike, pp. 4-6.) There is no legal or policy basis, however, on which to conclude that proceedings must be filed under Sections 8-503 or 8-509 (or Section 8-406) concurrently. These three statutory sections are

separate, and address separate inquiries, and so Petitioners need not seek relief under these sections simultaneously.

The provision of the Act that governs eminent domain is Section 8-509. See Lakehead Pipeline Co. v. Illinois Commerce Comm'n, 296 Ill. App. 3d 942 (3d Dist. 1998) (stating eminent domain is authorized by Section 8-509 of the Act). Parties may choose to file 8-509 actions concurrently with 8-503 actions, but this is not mandated by the Act. As noted above, the language of Section 8-503 does not address the granting of eminent domain authority. Thus, there is no statutory basis for Staff's assertion (Docket 08-0291, Petition for Interlocutory Review, p. 2) that Section 8-503 must be coupled with Section 8-509 and relief sought under both Sections simultaneously. The Commission has recognized as much, finding that the eminent domain inquiry under Section 8-509 is separate and distinct from the inquiry under Section 8-503. See Central Ill. Pub. Serv. Co., Docket 90-0206 (reviewing request for authority under Section 8-509 separately from request under Section 8-503).

As a practical matter, a utility may find it better to seek a Section 8-503 order in conjunction with a Section 8-406 Certificate, while eminent domain authority is sought separately. As discussed above, an inquiry under Sections 8-406 and 8-503 examines similar factors, and requires similar evidence, such as whether the public necessity requires the Project and whether the utility is capable of financing and building it. See Quantum Pipeline Co., Docket 96-0001, 1997 Ill. PUC LEXIS 873, *91 (December 17, 1997) (finding review of applications under Section 8-503 to be similar to review of requests for certification under the "public convenience and necessity" standard found in Section 8-406).

The good faith negotiations inquiry under Section 8-509, by contrast, focuses on the contacts between the utility and landowners, whether the utility has a reasonable basis for the

compensation offered to landowners, and the likelihood that further negotiations would prove useful in arriving at negotiated settlements. Mt. Carmel Pub. Util. Co., Docket 91-0113 (May 16, 1991); Central Ill. Pub. Serv. Co., Docket 95-0484 (Jul 17, 1996); Central Ill. Pub. Serv. Co., Docket 90-0022 (Oct. 3, 1990). Thus, while it may makes sense, due to the similarity of evidence required, to obtain a Section 8-406 Certificate or Section 8-503 order together, it is equally sensible to wait to seek eminent domain authority under Section 8-509 only for those parcels where negotiations have not been successful. See Commonwealth Edison, Docket 05-0188 (proceeding was bifurcated to consider the question of eminent domain after an interim order was entered granting a Section 8-406 certificate).

Moreover, it may not be practical for a utility to determine what parcels will be needed for a route until a Certificate has been granted and a route selected. (Id.) Further, a utility will not know what specific parcels eminent domain will be required for until the utility has negotiated with landowners. Thus, it is crucial for a utility to be able to maintain flexibility as to when it requires relief under Section 8-406, 8-503 or 8-509, in order for the utility to pursue such relief in the most efficient manner.

D. Petitioners Have Demonstrated that Eminent Domain Authority Should Be Granted for the Unsigned Parcels

Petitioners have met the standard for the grant of eminent domain authority discussed above. After numerous contacts with landowners, Petitioners have made fair and reasonable offers of compensation. All along, Petitioners have engaged in good-faith negotiations. Further, none of the parties to this action have objected to Petitioners' request for eminent domain.

1. No Party Disputes the Conclusion that Eminent Domain Authority Should Be Granted to Petitioners

In the evidence filed in this proceeding, no party has objected to Petitioners being granted the eminent domain authority they have requested. Staff filed identical affidavits in both dockets,

recommending that the Commission “grant Petitioners eminent domain authority” for the Baldwin Rush and Prairie West lines, respectively. (See Docket 08-0291, ICC Staff Ex. 1.0, p. 2.; Docket 08-0449, ICC Staff Ex. 1.0, p. 2.) Similarly, Dynegy Midwest Generation, intervenors in Docket 08-0449, presented no objection to the grant of eminent-domain authority to Petitioners. (Docket 08-0449, DYN Ex. 1, pp. 1-3.) Therefore, the question of whether Petitioners should receive eminent domain authority is not contested.

2. Petitioners Have Shown that They Should Receive Eminent Domain Authority for the Unsigned Parcels

Although no party contests the conclusion that Petitioners should be granted eminent domain authority, Petitioners have nevertheless offered substantial evidence supporting the conclusion, under Section 8-509 of the Act and established Commission precedent, that the Commission should grant eminent domain authority to the Petitioners for the Unsigned Parcels.

(a) Petitioners’ Have Had Numerous Contacts With Landowners

Prior to Petitioners’ filing for a Certificate in Docket No. 06-0179, landowners along the Baldwin Rush and Prairie West Lines were invited to an informational workshop to view and discuss the proposed line route, the need for the transmission line, the proposed facilities and the area and alternatives considered by Petitioners in defining the proposed routes. (Ameren Exs. 1.0-BR (Rev.), p. 5; 1.0-PW (Rev.), p. 5.) The workshop was for informational purposes only and no easement negotiations were permitted. (Id.)

Next, landowners were sent a letter and “Statement of Information from the Illinois Commerce Commission Concerning Acquisition of Rights of Way by Illinois Utilities” at least fourteen (14) days prior to any contact by Petitioners’ representatives for the purpose of seeking right of way, in compliance with the requirements of 83 Ill. Administrative Code Part 300.

(Ameren Exs. 1.0-BR (Rev.), pp. 5-6; 1.0-PW (Rev.), p. 6.) No contact with these owners was initiated by Petitioners for at least fourteen subsequent days.¹ (Id.)

After the fourteen-day notice period, Petitioners contacted landowners along the Baldwin Rush and Prairie West Lines, in person if possible, and discussed the Project in full detail, informing them of the reason for the contacts and the purpose of the Project. (Ameren Exs. 1.0-BR (Rev.), p. 6; 1.0-PW (Rev.), pp. 6-7.) Compensation was offered and the basis of that compensation explained. (Ameren Exs. 1.0-BR (Rev.), p. 6; 1.0-PW (Rev.), p. 7.) Petitioners or its representatives were available for discussion and negotiations as required by each landowner. (Ameren Exs. 1.0-BR (Rev.), p. 7; 1.0-PW (Rev.), p. 7.) As Petitioners witness Mr. Trelz explained, each landowner on the Baldwin Rush and Prairie West Lines has been contacted at least 14 times, by letter, phone and in person. (Ameren Exs. 1.0-BR (Rev.), p. 7; 1.0-PW (Rev.), p. 8.) Thus, Petitioners' contacts with landowners have been extensive.

(b) Petitioners' Offers of Compensation Have Been Fair and Reasonable

Petitioners' initial offer for the right-of-way easement right over each property was 75% of the appraised fee simple value of each parcel, with an extra 10% for the option to purchase the land in the future. (Ameren Exs. 1.0-BR (Rev.), p. 8; 1.0-PW (Rev.), pp. 8-9.) In response to the concerns of the owners of the Unsigned Parcels, Petitioners hired third-party local appraisers to re-value those parcels, and then revised the offers of compensation. (Ameren Exs. 1.0-BR (Rev.), p. 9-10; 1.0-PW (Rev.), p. 10.) In those instances where the appraised property values were higher than the initial offers, Ameren increased the easement compensation offers to reflect the amount of the appraiser's opinion of value for the easement acquisition. (Ameren Ex. 3.0-BR (Rev.), p. 14.) In those instances where the appraised property values were lower than the

¹ Landowners were also sent official notice of the Docket No. 06-0179 proceeding by the Commission. (Ameren Exs. 1.0-BR (Rev.), p. 6; 1.0-PW (Rev.), p. 6.)

initial offers, Ameren did not reduce its offers to reflect the lower values. (Id.) Instead, the offers were increased to reflect compensation levels being offered to other landowners. (Id.)

Ameren's method of determining initial offers of compensation is reasonable because it recognizes that Ameren is obtaining an easement, not the full fee value of the land. (See Ameren Ex. 3.0-BR (Rev.), pp. 12-15.) The 0.75 factor represents recognition of the fact that the rights conveyed are easement rights for a specific purpose (the transmission lines) and does not represent the full fee value of the easement land. (Id.) The landowner retains all other property rights. As discussed above, Ameren has offered more than 75% of fee value of the easement areas for easement rights. (Id., pp. 14-15.) As Dr. Pflaum explained, the fair market value of an easement would be 25-50% of fee value for the underlying land, because under an easement the landowner retains all other rights to the land. (Id., p. 15.) Since almost all of the parcels at issue here are agricultural land and the effect of the line on the ability to farm is *de minimis*, the price paid exceeds any reasonable measure of the economic harm, which appears to me as a layman to be the measure of damage under Illinois law. Ameren's high offers of compensation are essentially an incentive to landowners to resolve the easement acquisition process through negotiations. (Id.)

The offers of compensation that have been accepted by landowners are similar to the offers that have been rejected by the owners of the Unsigned Parcels. (Ameren Exs. 1.0-BR (Rev.), p. 11; 1.0-PW (Rev.), p. 11.) Given the numerous contacts with the landowners of the Unsigned Parcels, and their refusal to accept fair and reasonable offers of compensation, there is no reason to believe that further negotiation will be fruitful. (Ameren Exs. 1.0-BR (Rev.), p. 12; 1.0-PW (Rev.), pp. 11-12.) Therefore, eminent domain is necessary to acquire the Unsigned Parcels.

(c) Petitioners Have Engaged In Good-faith Negotiations With Landowners

Petitioners retained professional, experienced land agents, who met repeatedly with landowners. (Ameren Exs. 3.0-BR (Rev.), p. 11; 3.0-PW (Rev.), p. 11.) As Petitioners' expert witness Dr. Pflaum explained, Petitioners' offers are reasonable, and in some cases well above the expected reduction in use-value of these properties post-Project. (Ameren Exs. 3.0-BR (Rev.), pp. 11-12; 3.0-PW (Rev.), p. 11.) Petitioners retained local counsel to negotiate with landowners' counsel, and responded promptly to landowner requests regarding resurvey, access to the parcels and movement of poles, and landowners' counter-offers. (Ameren Exs. 3.0-BR (Rev.), p. 12; 3.0-PW (Rev.), pp. 11.-12) Where requested, Petitioners revised the text of the easement to soothe landowners' concerns regarding the breadth of the right being granted. (Ameren Ex. 3.0-BR (Rev.), pp. 13-14.) As Dr. Pflaum concluded: (1) Ameren has negotiated for rights-of-way across the Unsigned Parcels in good faith, (2) Ameren can not reasonably expect to acquire rights-of-way for the Unsigned Parcels through negotiation, and (3) the Commission should authorize the exercise of eminent domain for the Unsigned Parcels. (*Id.*, p. 23.) Accordingly, Petitioners have conducted negotiations in good faith, and made reasonable attempts to gain the necessary easement rights. (Ameren Exs. 3.0-BR (Rev.), p. 3; 3.0-PW (Rev.), p. 3.) Petitioners have therefore demonstrated that they should receive eminent domain authority pursuant to Section 8-509 of the Act.

(d) Concern Over "Hold-out" Behavior by Landowners Supports Granting Petitioners the Requested Eminent-Domain Authority

As Petitioners' witness Dr. Pflaum explained, a holdout is a seller who tries to extract some of the profit of the buyer through a high asking price. (Ameren Exs. 3.0-BR, pp. 17-18; 3.0-PW, pp. 17-18.) In many instances, a buyer could simply go elsewhere, but in circumstances where a defined area of land is required for a project (such as a network of parcels for an electric

transmission line, gas pipeline, roadway, etc.), a holdout is a problem. A landowner realizes that he has the power to block a highly valued project and attempts to extract from that project all value above cost by exercising his locational monopoly. (Ameren Exs. 3.0-BR, p. 18; 3.0-PW, p. 18.) Holdouts are landowners who individually or as a group refuse reasonable offers for easements and make extravagant monetary and other demands for the use of their property. (Ameren Exs. 3.0-BR, p. 17; 3.0-PW, p. 17.) Hold-outs can result in failure to complete a utility transmission route (because of the limits to the path that a transmission line can take), increased expense (because even a new route away from the original hold-outs can result in new hold-outs), and crucially, power supply disruptions for customers. (Ameren Exs. 3.0-BR, p. 18; 3.0-PW, p. 18.) The solution to the holdout concern is eminent domain: where the holdouts are blocking a public necessity, eminent domain is exercised to give them the incentive to negotiate reasonably or, in the alternative, to have the value of the property interest set by a court of law. (Ameren Exs. 3.0-BR, p. 19; 3.0-PW, p. 19.)

As Dr. Pflaum explained, owners of the Unsigned Parcels are indeed exhibiting hold-out behavior. (Ameren Exs. 3.0-BR, p. 19; 3.0-PW, pp. 18-19.) Certain landowners have been unresponsive, have made unreasonable demands regarding access to their property for surveys, and have in cases asked for disproportionately large sums of compensation, as high as three times the appraised value of their entire property. (Ameren Exs. 3.0-BR, p. 19; 3.0-PW, p. 18.) To avoid the disadvantages arising from such hold-out behavior, the appropriate response is grant petitioners eminent domain over these parcels. (Id.) Authorizing eminent domain gives these landowners an incentive to bargain in good faith, because of the possibility that the circuit court condemnation action may result in a lower award than the reasonable value being offered by Petitioners. (Ameren Exs. 3.0-BR, p. 21; 3.0-PW, pp. 20-21.) Thus, the presence of the

holdout concern represents another reason why, as Petitioners' evidence demonstrates, the grant of eminent domain authority is appropriate.

III. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Commission grant eminent domain authority for the Baldwin Rush and Prairie West Lines, under Section 8-509 of the Illinois Public Utilities Act.

Dated: February 25, 2009

Respectfully submitted,

ILLINOIS POWER COMPANY, d/b/a
PetitionersIP, and PETITIONERS ILLINOIS
TRANSMISSION COMPANY

By: /s/ Albert D. Sturtevant
Albert D. Sturtevant
One of their attorneys

OF COUNSEL:

Christopher W. Flynn
Albert D. Sturtevant
JONES DAY
77 West Wacker Drive
Chicago, IL 60601-1692
Telephone: (312) 782-3939
Facsimile: (312) 782-8585
cwflynn@joneday.com
adsturtevant@jonesday.com

Edward C. Fitzhenry
Managing Associate General Counsel
Petitioners Services Company
One Petitioners Plaza
1901 Chouteau Avenue
St. Louis, Missouri 63166
Telephone: (314) 554-3533
Facsimile: (314) 554-4014
efitzhenry@Petitioners.com