

**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.)	

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

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I. SUMMARY OF PETITIONERS' REPLY

Illinois Power Company, d/b/a AmerenIP and Ameren Illinois Transmission Company (jointly, "Petitioners") hereby respond to the Initial Briefs of the Staff of the Illinois Commerce Commission ("Commission") and Dynegy Midwest Generation, Inc. ("Dynegy").

No party disputes the conclusion that eminent domain should be granted to Petitioners in this case. As Staff's brief illustrates, the only issue in this case is a legal question about the requirements for eminent domain authority. Staff argues extensively about the interrelation of Sections 8-406, 8-503 and 8-509 of the Act, but appears to miss the point that, in order to obtain eminent domain authority, a utility must make certain showings before the Commission. As Petitioners explained in their Initial Brief (pp. 8-18), 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. As further explained in Petitioners Initial Brief (pp. 18-24), Petitioners evidence in this case demonstrates that the criteria for a grant of eminent domain authority have been met.

Staff's main argument in its Initial Brief is that Petitioners should be required in future to seek a Certificate of Public Convenience and Necessity ("Certificate") under Section 8-406 of the Public Utilities Act ("Act"), a Section 8-503 order, and eminent domain authority under Section 8-509 of the Act in one omnibus proceeding. (Staff Init. Br., p. 7.) Staff establishes no legal basis for such a proposal, however (and many past Commission cases have featured separate Certificate and eminent domain proceedings). Staff also ignores the practical concerns such an approach would entail: namely how the utility would (particularly for long transmission lines) identify the parcels for which eminent domain was needed and develop the necessary

evidentiary support before the Commission has even approved a route. Staff also argues that separate Section 8-406/8-503 and eminent domain proceedings “result[] in unnecessary additional administrative and financial costs to the utility, its ratepayers, and taxpayers of the State of Illinois,” and the Commission should find as such. There is no basis in the record for this conclusion however, and Petitioners’ evidence, discussed below, establishes the opposite: that separate proceedings enhance efficiency. As a result, Staff’s omnibus proceeding proposal should be rejected.

Staff also asserts that these consolidated cases need never have been initiated. (Staff Init. Br., p. 2.) Staff believes that had Petitioners requested Section 8-509 authority for the transmission lines in Docket No. 06-0179, the Commission’s Order in that case (“Docket 06-0179 Order”) would have included eminent domain authority. This argument is speculative, and ignores the fact that, as the Docket 06-0179 Order makes clear, the question of the nature and extent of Petitioners’ negotiations with landowners and of the need for eminent domain was not fully investigated and reviewed by the Commission in Docket 06-0179. Petitioners in Docket 06-0179 could not submit the full scope of evidence regarding landowner negotiations required to obtain eminent domain authority, as Petitioners did not know the final route alignment of the Baldwin Rush Line until the Docket 06-0179 Order was issued. Thus, Staff’s assertions are baseless.

II. RESPONSE TO STAFF

A. A Requirement that Section 8-406, Section 8-503 and Section 8-509 Relief Be Sought in an Omnibus Proceeding Is Not Supported by Law and Would Be Impractical (Staff Initial Brief, Section II)

Staff’s overarching argument in its Initial Brief is that Section 8-509 proceedings should be combined with Section 8-406 Certificate and Section 8-503 proceedings, resulting in a single, omnibus proceeding. (Staff Init. Br., p. 2.) Staff, however, ignores the practical problems with

such an omnibus proceeding. Staff also fails to establish any legal basis for requiring such an omnibus proceeding in transmission line cases.

As explained in Petitioners' Initial Brief, it may be impractical to seek eminent domain authority at the same time as a Certificate, because at the outset of a Certificate proceeding the utility will not know the route along which the line is to be built. (Pet. Init. Br., pp. 8-9, 18.) As discussed below and in Petitioners Initial Brief (pp. 8-18), a utility must submit evidence regarding negotiations with landowners in order to obtain eminent domain authority. Thus, Staff's omnibus proposal would require Petitioners to negotiate with multiple groups of landowners along all primary and alternate proposed routes, as well as any potential alternative routes that may be proposed by Staff or interveners during the Certificate proceedings. (Id.) Petitioners could not rely simply on negotiation with landowners along its preferred primary route, since experience shows that the Commission may eventually approve an alternate route (as happened in Docket 06-0179, where the Commission approved an alternate route for the Baldwin switchyard – Kaskaskia River portion of the Baldwin-Rush Line proposed for the first time in Staff's direct testimony). See Docket 06-0179, Final Order, pp. 16-17. This is particularly true in cases with long routes that cross many properties, where the time and expense of landowner negotiations may be high. Under Staff's proposal, would interveners be tempted to propose numerous alternate routes, to force the utility to enter into expensive negotiations with many landowners? Adopting Staff's omnibus proposal could lead to an increase in obstructive intervention by parties opposed to the routing of any additional power lines through a particular region. Such parties could delay project construction by the mere expedient of filing testimony suggesting frivolous "alternative routes."

Moreover, the question of eminent domain is separate and distinct 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 discussed in Petitioners' Initial Brief (pp. 8-9, 18), 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 (such as whether the public necessity requires the Project and whether the utility is capable of financing and building it), while the evidence needed to support a grant of eminent domain authority is quite different. Thus, 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, because the inquiry under Sections 8-406 and 8-503 examines similar factors. 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). Keeping the Certificate and eminent domain proceedings separate gives Petitioners crucial flexibility that would allow the utility to pursue relief in the most efficient manner. (See Pet. Init. Br., p. 18.) As Petitioners' witness Dr. Pflaum explained, it is also administratively efficient to consider the question of eminent domain separately from the grant of a Certificate. (Ameren Ex. 3.0-BR (Rev.), p. 5.)

Staff argues that, "Up until this point, the practice of requesting simultaneous certification/order to construct/eminent domain authority has been employed by Illinois public utilities and common carriers by pipeline." (Staff Init. Br., p. 7.) While this may be the case in some proceedings, it is also common for utilities to seek eminent domain authority separately. Staff's own brief (p. 7) cites to a docket where eminent domain was sought separately from a Certificate. See Central Ill. Pub. Serv. Co., Docket 90-0022 (October 3, 1990) (granting utility's

request for eminent-domain authority, where a Section 8-406 Certificate had already been granted earlier in Docket 86-0086). Other cases confirm that utilities seek eminent domain authority separately from Certificates. See Central Ill. Pub. Serv. Co., Docket 88-0342 (April 18, 1990) (granting eminent domain authority to utility that had received Certificate in prior Docket 87-0322); Central Ill. Pub. Serv. Co., Docket 90-0206 (January 9, 1991) (granting eminent domain authority to utility that had received Certificate in prior Docket 87-0382); Mt. Carmel Pub. Util. Co., Docket 91-0113 (May 16, 1991) (granting eminent domain authority where Section 8-406 Certificate was granted in prior Docket 90-0294); Central Ill. Pub. Serv. Co., Docket 95-0484 (approving eminent domain authority for utility that had already acquired a Certificate in prior Docket 94-0356).

Staff claims that, “[i]f Ameren had requested Section 8-509 authority for these transmission lines in Docket No. 06-0179, the Commission’s May 16, 2007 Order would have included Section 8-406, 8-503 and 8-509 authority, and that would have completely concluded the matter.” (Staff Init. Br., p. 2.) This contention is speculative. As the Docket 06-0179 Order makes clear, the question of the nature and extent of Petitioners’ negotiations with landowners and of the need for eminent domain was not fully investigated and reviewed by the Commission in Docket 06-0179. Petitioners in Docket 06-0179 did not submit the full scope of evidence regarding landowner negotiations required to obtain eminent domain authority, nor could they have, as Petitioners did not know the final route alignment of the Baldwin Rush Line until the Docket 06-0179 Order was issued. As a result, what Staff suggests is that the Commission could have granted eminent domain authority without having conducted the review required by the Act, Commission precedent, and basic principles of fairness to the affected landowners.

Staff's next contention is equally unfounded: that Petitioners' choice to undertake a separate Section 8-509 proceeding "results in unnecessary additional administrative and financial costs to the utility, its ratepayers, and taxpayers of the State of Illinois." (Staff Init. Br., p. 3.) This claim is unsupported by the record evidence in this case and should be disregarded. There is no evidence in the record to suggest that any unnecessary cost would result from separate Section 8-509 proceedings or that a combined omnibus proceeding would be any less expensive. In fact, the only relevant evidence in the record comes from Petitioners' witness Dr. Pflaum, who explained that it is more efficient to consider the question of eminent domain separately from the grant of a Certificate. (Ameren Ex. 3.0-BR (Rev.), p. 5.) Not only would an omnibus proceeding require the utility to needlessly expend resources negotiating for potentially unnecessary easements, explained Dr. Pflaum, but it would require landowners along the ultimately rejected alternate routes to bear the expense of participation. (Id.) Thus, the record actually supports the exact opposite conclusion from the one that Staff asserts.

1. Section 8-509 Requires More than a Rubber Stamp that Authority Was Granted Under Section 8-503

Staff views a Section 8-509 proceeding as nothing more than a clerical exercise following a successful Section 8-503 petition. (Staff Init. Br., p. 4.) This notion is mistaken. As Petitioners explained in their Initial Brief (pp. 14-18), Staff's conclusion is contrary to the plain language of Section 8-509, which requires a two-part inquiry for a grant of eminent domain authority: has the utility received a Section 8-503 order for the construction of facilities; and has the utility shown eminent domain is "necessary" for the construction (by demonstrating the continuing need for the project and that the utility has negotiated in good faith with landowners). Staff's view also ignores longstanding Commission precedent traditionally requiring these two showings. (Pet. Init. Br., pp. 12-14.) Moreover, Staff's arguments about the purpose of Section 8-509 have been

rejected by the ALJ twice, in his rulings on Staff's Motions to Strike, and by the Commission in denying Staff's Petition for Interlocutory Review in Docket 08-0291. There is no legal or policy basis on which to conclude that proceedings must be filed concurrently under Sections 8-503 and 8-509. (Id., pp. 16-18.)

Staff's Initial Brief also misreads the Recktenwald opinion. (Staff Init. Br., pp. 3-4) Recktenwald is not a case about the substance of a Section 8-509 proceeding or the standards and procedures to be used in a hearing under that statute. Instead, it is a case regarding the constitutionality of the two sections, and focuses on two issues quite irrelevant to this case: whether the sections as drafted violate the "single-subject" rule, Ill. Const. Article IV, § 8(d), and whether the delegation of eminent-domain power in these sections is constitutionally permissible. Public Service Co. of N. Ill. v. Recktenwald, 290 Ill. 314, 317 (1919). The court is merely stating that the two sections deal with the same subject matter – the regulation of a public utility by requiring additions and improvements to the system – and as part of that explanation, notes that the two sections are linked, since Section 8-509 provides the means (eminent domain) by which improvements, changes or new structures authorized under Section 8-503 may, if necessary, be effected. (Id. at 319-320.) What the court does not do, however, is hold that Section 8-509 is somehow perfunctory, requiring no separate inquiry into negotiations between land-owner and utility. (Id.) Staff's out-of-context use of the language from Recktenwald misleadingly implies that the court held that Section 8-509 exists only to rubber-stamp a Section 8-503 order.

2. The Grant of Eminent Domain Authority Is Not Governed by Section 8-503

Staff, in reliance on the proceedings in Commonwealth Edison, Docket 05-0188, argues that eminent domain is properly addressed under Section 8-503. (Staff Init. Br., pp. 5-6.) As Petitioners explained in their Initial Brief (pp. 11-12, 16-17), 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). 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 must be addressed separately from Petitioner’s request for authority to take property pursuant to Section 8-509). As discussed above, the inquiry under Section 8-503 has more in common with the inquiry under Section 8-406.

Staff’s citation to Commonwealth Edison Co., Docket 05-0188, does not suggest otherwise. In that case, the utility was requesting eminent domain authority and presented evidence that it had negotiated in good faith. Docket 05-0188, Order, p. 4. The Docket 05-0188 Order (p. 7), in authorizing use of eminent domain, expressly found that the utility had attempted to acquire the necessary property “by voluntary sale on reasonable terms,” but had not been successful in doing so. Thus, even Docket 05-0188 supports the conclusion that to obtain eminent domain, a utility must present evidence regarding negotiations with landowners. Moreover, Docket 05-0188 confirms that the “need” inquiry and good-faith negotiations inquiry have distinct evidentiary requirements, and are really two separate inquiries: in that case, the proceeding was bifurcated to consider the question of eminent domain after an interim order was entered granting a Section 8-406 certificate.

Staff also asserts 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. (Staff Init. Br., p. 15.) As Petitioners explained in their Initial Brief (pp. 15-16), however, the reference to Appendix A is inapposite. Appendix A may refer to Section 8-503, but that reference does not transform Appendix A into controlling authority. The statute, and not Appendix A, controls. Owens-Illinois Inc. v. Bowling, 99 Ill. App. 3d 1117, 1125 (1st Dist. 1981).

3. Staff’s Citation to Dockets Where the Commission Ordered “Automatic” Grants of Section 8-509 Authority Is Misleading

Staff lists a series of proceedings wherein, according to Staff, the Commission has “automatically granted Section 8-509 authority” even though the utility in each case had not “specifically requested” Section 8-509 authority. (Staff Init. Br., pp. 7-8.) Staff’s reference to these cases is misleading, however, because in these cases, the petitioners either *explicitly requested* eminent domain authority, or presented evidence of good-faith negotiations with landowners, which the Commission duly reviewed in granting eminent domain authority. Thus, Staff’s examples are of cases where the utility sought eminent domain authority, and the question of eminent domain was reviewed by the Commission, not “automatically” granted as an outgrowth of some other request for relief. See Commonwealth Edison Co., Docket 07-0310, Order, p.1 (Oct. 8, 2008) (utility expressly sought eminent domain authority); Commonwealth Edison Co., Docket 05-0188 Order, p.2 (Feb. 23, 2006) (utility expressly sought eminent domain authority); Commonwealth Edison Co., Docket 96-0410 (May 6, 1998) (utility requested eminent domain authority); Central Ill. Pub. Serv. Co., Docket 90-0427 (April 3, 1991) (utility expressly sought eminent domain authority); see also Central Ill. Pub. Serv. Co., Docket 88-0342 (April 18, 1990) (utility provided evidence regarding landowner negotiations); Central Ill. Pub.

Serv. Co., Docket 90-0206 (Jan. 9, 1991) (same); Mt. Carmel. Pub. Util. Co., Docket 91-0113 (May 16, 1991) (reviewing evidence of landowner contacts, comparable offers, and diligent negotiations conducted by utility).

In Docket 06-0179, however, there was no Commission review of Petitioners' attempts to acquire necessary land rights or conduct good-faith negotiations with affected landowners, as is required for a grant of eminent domain authority. Docket 06-0179 Order, pp. 39-40 As the ALJ pointed out in this proceeding, "[t]he Order in 06-0179 did not contain analysis and findings on these issues." (Docket 08-0291, February 3, 2009 ALJ Memorandum to Commission, p. 5.) Thus, Staff's suggestion that "the Commission could have granted Section 8-509 authority in Docket No. 06-0179, even though eminent domain was not specifically requested by Petitioners" (Staff Init. Br., p. 8) is unsupported: Petitioners neither requested eminent domain authority in that case nor provided all of the necessary evidence to support such a grant, and so the Commission could not have made the required findings for eminent domain authority.

4. A Stand-alone Section 8-509 Proceeding Can Be Appropriate

In arguing that the Commission's authorization of a "future stand-alone Section 8-509 proceeding" is inconsistent with prior Commission proceedings and is generally improper (Staff Init. Br., p. 9), Staff ignores Commission precedent, and overlooks the practical benefits of such a stand-alone proceeding. In addition, Staff ignores the general requirement that a utility must demonstrate to the Commission that eminent domain is warranted to obtain eminent domain authority. As explained above, having a separate Section 8-509 proceeding also allows a utility to focus its resources on negotiations with a list of affected landowners (rather than negotiating with multiple sets of alternate-route landowners), thus reducing the ultimate time and expense of the utility's good-faith negotiations. Petitioners' witness Dr. Pflaum testified that it can be efficient to consider the question of eminent domain separately, and that it can be wasteful and

impractical to negotiate with landowners before the route is set. (Ameren Ex. 3.0-BR (Rev.), pp. 5-6.)

In addition, there is no legal reason why an eminent domain proceeding under Section 8-509 cannot be separate. As explained in Petitioners Initial Brief (pp. 16-17), relief can be sought under Sections 8-503 and 8-509 separately. Clearly, relief can be sought under Section 8-406 separately. Staff's response to its concern about a stand-alone Section 8-509 proceeding is to propose to create an omnibus Sections 8-406, 8-503 and 8-509 proceeding. As explained above, however, this 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.

5. A Stand-alone Section 8-509 Proceeding Does Not Prevent Meaningful Participation by Affected Landowners

Staff's assertion that landowners will not "understand the implication" of Section 8-406 or 8-503 proceedings, but will clearly comprehend the import of a Section 8-509 eminent domain proceeding (Staff. Init. Br., p. 9) is unsupported by logic and contradicted by recent actual experience. In Docket 06-0179, numerous landowners intervened *in the Certificate proceeding* and proposed various alternate routes. Docket 06-0179, Final Order, pp. 13-16. By comparison, no landowners intervened in instant Docket 08-0291, while the few landowner intervenors (other than Dynege) in Docket 08-0449 have not been active participants. Similarly, in Docket 06-0706, in which Petitioners are also seeking a transmission line certificate, 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. (See discussion in Illinois Power Co. d/b/a AmerenIP and Ameren Illinois Transmission Co., Docket 06-0706, ALJ's Proposed Order, pp. 1-2, 10-65 (issued Nov. 25, 2008).)

Logic dictates this outcome: a landowner opposed to a transmission line route across his property will intervene as early as possible, such as in the Certificate proceeding. Self-interest may cause a landowner to seek to have a route changed away from his property, rather than wait until the eminent domain phase to challenge the route. (Ameren Ex. 3.0-BR (Rev.), p. 6.) The empirical observations above support this logical position, rather than Staff's view that landowners are generally unable to comprehend the nature of proceedings under Sections 8-406 or 8-503.

All landowners affected by a transmission line route receive notice of a certificate proceeding or Section 8-503 proceeding and thus have the opportunity to participate at that stage. While there is no requirement that landowners participate in Commission Certificate proceedings, or that the Commission mandate their participation, affected landowners are, in fact, given full notice and an opportunity to participate under 83 Ill. Adm. Code Section 200.150(h):

A person filing an application under Section 8-406 of the Public Utilities Act for a Certificate of Public Convenience and Necessity to construct facilities upon or across privately owned tracts of land, or filing under Section 8-503 of that Act [220 ILCS 5/8- 503], shall include with the application when filed with the Commission a list containing the name and address of each owner of record of the land as disclosed by the records of the tax collector of the county in which the land is located, as of not more than 30 days prior to the filing of the application. The Commission shall notify the owners of record of the time and place scheduled for the initial hearing upon the application.

Petitioners do not believe that a landowner would fail to understand the implication of a notice under 83 Ill. Adm. Code Section 200.150(h).

Staff also asserts that it “is not aware of any argument that could be raised by a landowner to effectively challenge the use of eminent domain for a piece of property on the approved route.” (Staff Init. Br., p. 15.) However, seeking a Certificate and Section 8-503 order separately from eminent domain authority actually provides landowners two opportunities to challenge a grant of eminent domain. Since a Section 8-503 order is a prerequisite for eminent domain authority, including such a request in Certificate petition under Section 8-406 alerts the landowner to the possibility of eminent domain, and allows a landowner to intervene with concerns about routing or other issues. As the Docket 06-0179 proceeding shows, even though Ameren was not seeking eminent domain authority, a large number of landowners have intervened in the proceeding. These landowners could have later challenged a petition for eminent domain authority before the Commission on the grounds that the utility has not negotiated in good faith (but, as discussed above, landowner participation in the instant consolidated dockets has been limited). The landowner can further contest the grant of eminent domain (and the valuation of the property) in the circuit court eminent domain proceeding. In fact, a landowner’s ability to challenge an eminent domain approval in a separate proceeding provides Petitioners with a significant incentive to begin good faith negotiations sooner. If Petitioners can successfully conclude good faith negotiations, it avoids the time and expense of having to go to the Commission to seek eminent domain approval in a second proceeding (much less the time and expense of a circuit court eminent domain proceeding). (Ameren Ex. 3.0-BR (Rev.), pp. 15, 21-22.)

6. Staff’s Recommendations Should Be Rejected

Staff recommends that, because statutory language limits a Section 8-509 proceeding to verifying that the Commission has actually entered an 8-503 order, so eminent domain should be granted on that basis in this case. (Staff Init. Br., p. 10.) Although Petitioners agree eminent

domain should be granted, Staff's position is an incorrect interpretation of the standard of approval needed for a Commission grant of eminent-domain authority under Section 8-509. (Pet. Init. Br., pp. 8-14.) An 8-509 proceeding requires a two-part showing: that an 8-503 order has been entered, and that eminent domain is necessary to complete the project. (Id., p. 8.) This second prong requires evidence of the continued need for the project and of the utility's good-faith negotiations with the affected landowners. As longstanding Commission precedent indicates; eminent domain can not be granted without Commission review of these factors.

Staff's other recommendation – that the Commission hold that Petitioners' "process of filing separate Section 8-406/8-503 and Section 8-509 proceedings is duplicative and inefficient" – is baseless. As discussed above, there is no evidence in the record to support this proposition. In fact, the undisputed testimony of Petitioners' witness Dr. Pflaum supports the opposite conclusion: that it is *more* efficient to consider eminent domain separately from the grant of a Certificate. (Ameren Ex. 3.0-BR (Rev.), p. 5.) Separate proceedings save resources for both the utility and for landowners. (Id.) The Commission must make its decision on the record before it. 220 ILCS 5/10-103. The Commission cannot make a finding of "inefficiency" that is contradicted by undisputed record evidence, and that has not a scintilla of record evidence to support it.

B. Petitioners Evidence Regarding Need for the Project, Route Design and Construction Schedules Is Appropriate (Staff Initial Brief, Section III)

Staff states that it is "perplexed to discover at-length discourses in Petitioners' direct and rebuttal testimony regarding such matters as route, design, schedule, and need for the Prairie West and Baldwin Rush Lines, as this information would not serve as the basis for a correct and legally sustainable decision with respect to Section 8-509 of the Act." (Staff Init. Br., p. 12.) Staff then urges the Commission "not to use the testimony regarding transmission line route,

design, schedule and need in the instant proceeding in an effort to re-determine the very issues that were examined and approved in Docket No. 06-0179” and “not to use the testimony as an update regarding the status of the Prairie West or Baldwin Rush Lines, as this is completely unnecessary.” (Id.) Such suggestions are inappropriate. As Petitioners explained in their Initial Brief (pp. 6-8), Staff’s Motions to Strike were denied, as was their Petition for Interlocutory Review in Docket 08-0291. Staff’s efforts to relitigate its Motions to Strike in its Initial Brief are not appropriate. The Commission’s decisions must be based on the record. 220 ILCS 5/10-103. The Commission can not simply ignore, or “not use” evidence. Music Zone v. Peoples Gas Light and Coke Co., Docket 02-0472 (cons.), Final Order, p. 5 (Oct. 20, 2004).

Nevertheless, the information regarding route, design, schedule, and need for the Prairie West and Baldwin Rush Lines, is relevant for at least two reasons. First, the Commission, pursuant to its past precedent, must determine that there is a continuing need for the project. The testimony Staff refers to is directly responsive to this context. See Central Ill. Pub. Serv. Co., Docket 95-0484 (July 17, 1996) (“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...”). Staff’s view that this evidence is intended to “re-determine” issues that were settled in earlier proceedings is incorrect. (Staff. Init. Br., pp. 11-12.) As discussed above, the question of eminent domain was not determined in Docket 06-0179. As the ALJ pointed out in his rulings on Staff’s Motions to Strike, “[t]he Order in 06-0179 did not contain analysis and findings on these issues.” (See Docket 08-0291, February 3, 2009 ALJ Memorandum to Commission, p. 5.) Accordingly, the testimony at issue is intended to resolve a hitherto unaddressed issue that must be decided before eminent-domain authority may be granted.

Second, Petitioners requested expedited treatment for their eminent-domain petitions, on the basis that delays will be costly and will prevent the delivery of reliable electric service as needed by Petitioners' customers. (08-0291 Petition, p. 6, ¶ 16; 08-0449 Petition, p. 6, ¶ 16.) The evidence Staff refers to – regarding route design and construction schedule – is directly supportive of this request, and is therefore appropriate for the Commission to consider.

C. A Finding that Petitioners Engaged in “Good Faith Negotiations” Is Required to Obtain Eminent Domain Authority (Staff Initial Brief, Section IV)

Staff argues in its Initial Brief (p. 13) that “there is no requirement whatsoever in the Act that requires the Commission to find that the utility has engaged in good faith negotiations with landowners before it can confer Section 8-509 authority.” This is incorrect. As discussed in Petitioners' Initial Brief (pp. 10-12, 15-16), the plain language of Section 8-509 requires a determination that eminent domain is “necessary.” In determining if eminent domain is necessary, the Commission has consistently required, in numerous cases and for many years, that a utility show it has engaged in good faith negotiations with landowners. See Pet. Init. Br., pp. 12-14; see, e.g., Central Ill. Pub. Serv. Co., Docket 90-0206 (Jan. 9, 1991) (“In proceedings requesting authority under Section 8-509 of the Act and its predecessor, the Commission has focused on whether the utility has made a diligent effort to acquire right-of-way through negotiations with landowners.”). (That such an inquiry could be re-labeled to examine whether a utility engaged in “reasonable attempts to acquire the property” is immaterial – the inquiry is the same.) The ALJ's rulings on Staff's Motions to Strike confirm as much, stating 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.” (See Docket 08-0291, Dec. 30, 2008 ALJ Ruling, p. 1.)

Staff goes on to argue that the Commission cannot make a finding regarding good faith negotiations in this docket because such a finding is the purview of the Circuit Court. (Staff Init. Br., pp. 13-14.)) Staff asserts that a determination of “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. (Id., p. 14.) 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 the basic inquiry into whether eminent domain authority can be granted should be labeled “reasonable attempts to acquire the property”, however, Petitioners would not oppose the change. That said, Petitioners discern little difference between the two standards.

Staff also suggests that Docket 06-0179 could be reopened. (Staff Init. Br., p. 16.) The suggestion, however, does not make sense. Petitioners request eminent domain authority in the instant proceedings for 42 parcels of land, and have proffered the necessary evidence to support that request, consistent with the Act and Commission precedent. Staff proposes to transfer the testimony from this case to a reopened Docket 06-0179, where Petitioners did not request eminent domain authority, but which addressed the need for a Certificate for three transmission lines covering hundreds of parcels. Not only would this be contrary to the provisions of the Act and Commission precedent, it would impose an unnecessary administrative burden on the Commission and Petitioners. The instant proceeding is the proper proceeding to consider Petitioners' request for eminent domain authority. To reopen Docket 06-0179 would potentially reopen a "can of worms" and possibly lead to relitigation of settled issues. Staff's suggestion should therefore be rejected.

D. Petitioners Agree that the Commission's Final Order Should Indicate the Specific Parcels for which Eminent Domain is Granted (Staff Initial Brief, Section V)

Staff suggests that the Final Order in the instant proceeding should indicate the specific parcels for which Petitioners are being granted eminent domain. Petitioners agree. For that reason, Paragraph 7 of the "Finding and Ordering Paragraphs" of Petitioners Suggested Order, filed February 27, 2009, contains the following statement: "Petitioners now seek authority under Section 8-509 of the Act to exercise eminent domain to acquire all necessary land rights across the Unsigned Parcels (as identified in Ameren Exhibits 4.0-PW (Rev.), p. 2 & 4.0-BR (Rev.), pp. 2-3) on the Prairie West Line and Baldwin Rush Line, including rights of way approximately 150 ft. in width for the lines, as well as construction easements where necessary."

III. RESPONSE TO DYNEGY

In its Initial Brief, Dynegy states that “the final Order for this case should reflect that Petitioners no longer need nor seek eminent domain authority with respect to the property owned by [Dynegy].” Petitioners agree that such a finding is appropriate.

IV. CONCLUSION

For the foregoing reasons, and the reasons stated in their Initial Brief, Petitioners respectfully request that the Commission, pursuant to Section 8-509 of the Illinois Public Utilities Act, grant eminent domain authority for the Unsigned Parcels on the Baldwin Rush and Prairie West Lines.

Dated: March 6, 2009

Respectfully submitted,

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