STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, d/b/a AmerenCIPS	)	
	)	Docket No. 07-0532
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 Madison County, Illinois.	)	

REPLY BRIEF ON EXCEPTIONS OF CENTRAL ILLINOIS PUBLIC SERVICE COMPANY D/B/A AMERENCIPS

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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 Central Illinois Public Service Company d/b/a AmerenCIPS ("AmerenCIPS") with regard to the Administrative Law Judges' Proposed Order ("ALJPO") issued in this proceeding on March 12, 2009. This Reply Brief on Exceptions responds to the Briefs on Exceptions ("BOE") of the Staff ("Staff") of the Illinois Commerce Commission ("Commission").

II. SUMMARY OF REPLY

Staff's Exceptions I and II should be rejected in their entirety[1], and the ALJPO should be adopted as proposed. As AmerenCIPS explained in its Initial Brief (pp. 2-7) and Reply Brief (pp. 1-2), and as the ALJPO correctly concludes (p. 7), the criteria for issuance of a Certificate for the Transmission Lines under Section 8-406 of the Act have been met. Thus, there is no dispute among the parties that the ALJPO has correctly determined that a Certificate should be issued for the Transmission Lines for the primary routes proposed by AmerenCIPS. The only contested issues in this case relate to the assertion by Staff that an order should not be issued under Section 8-503 of the Public Utilities Act ("Act"), 220 ILCS 5/8-503, for the transmission line COP Sub Tap 1 –Primary ("Line 1").

In Staff's BOE, Staff asserts that the ALJPO should be modified so that a Section 8-503 Order would not be issued for Line 1. (Staff BOE, pp. 2-11.) Staff's assertion is based on the argument that Line 1 is only being provided to the Wood River Refinery ("WRR") at WRB Refining LLC's ("WRB") request (Exception I, see Staff BOE, pp. 2-4), which Staff claims is an insufficient reason to grant a Section 8-503 order, and that a Section 8-503 order would

[1] AmerenCIPS does not object to Staff's Exception III, as discussed herein.

effectively give AmerenCIPS authority exercise eminent domain with respect to Line 1. (Exception II, see Staff BOE, pp. 4-11.) In support of these assertions, however, Staff relies on a number of statements that are not supported by the record in this proceeding; indeed, no record citations are even offered and so the entirety of the related arguments by Staff should be disregarded.[2] These unsupported assertions include:

- With respect to Line 1 being an extension of the 138 kV line that presently supplies BOC Gases, the statement: "This extension, if built, would actually add exposure to the very short existing 138 kV line, thus reducing reliability for BOC Gases." (Staff BOE, p. 3.) No witness testified in this proceeding that reliability would be reduced for BOC Gases.

- The statement: "Identical improvement to AmerenCIPS' 34 kV system would occur regardless of whether AmerenCIPS supplies WRR with one, two, three, or more 138 kV transmission lines." (Staff BOE, p. 3.) The record does not discuss whether there would be identical improvements to AmerenCIPS' 34 kV system if only one, or three, lines were built to the WRR.

- The statement: "What is effective, however, is a notice received by a landowner regarding a Section 8-509 proceeding, 220 ILCS 5/8-509, because it is titled, 'Eminent Domain'." (Staff BOE, p. 4.) No evidence was presented in this case regarding the effectiveness of such a notice.

With respect to the purpose of Line 1, as the record in this case shows (Ameren Ex. 1.0, p. 6), and as the ALJPO (pp. 13-14) correctly points out, Line 1 is necessary both to provide adequate and reliable service to the WRR and to improve reliability in the surrounding area. (The improvements in capacity and reliability that will result from the Transmission Lines are in fact needed urgently: as AmerenCIPS and WRB stated in testimony, the proposed transmission lines are designed to serve increased electric load at the Wood River Refinery, and this load will begin coming on line in late 2009. (AmerenCIPS Ex. 1.0, pp. 4-5; WRB Ex. 1, p. 3.)) Thus, a Section 8-503 Order is warranted for Line 1. Staff's suggestion that Line 1 is not needed

[2] As required by 83 Ill. Adm. Code § 200.830(e), "Statements of fact in briefs on exception and replies to briefs on exception should be supported by citation to the record."

because WRB requested it appears to be driven mainly by Staff's concerns about the granting of eminent domain authority. Staff's assertions about eminent domain authority in its BOE, however, are unfounded as well.

Staff's arguments on the eminent domain issue (Staff BOE, pp. 4-11), and particularly Staff's reference to "recent Commission orders" completely ignores the Commission's most recent and authoritative pronouncement on the issue of eminent domain: Illinois Power Co. & Ameren Ill. Trans. Co., Docket 06-0706, Final Order, pp. 88-90 (March 11, 2009) ("Docket 06-0706 Order"). Staff was apparently aware of this decision, as it was entered and served prior to the filing of Staff's BOE in this docket and Staff referred to it in their BOE in a footnote.[3] (Staff BOE, p. 7.) Staff's failure address the Docket 06-0706 Order's findings is not only surprising, therefore, but serves to make additional and unnecessary work for the parties, the ALJ, and the Commission.

In the Docket 06-0706 Order, the Commission clarified what "is appropriate in dockets concerning Sections 8-406, 8-503, and 8-509." Docket 06-0706 Order, p. 88. In the Docket 06-0706 Order, the Commission rejected Staff's argument in that case that issuance of a Section 8-503 order would automatically result in a grant of eminent domain authority. The Commission stated, "Petitions filed under Sections 8-406 and, particularly, 8-503 do not contain some implicit request for eminent domain authority and should not be read as such." Id. Moreover, the Commission confirmed that a "petitioner need not seek relief under Sections 8-406, 8-503, and 8-509 simultaneously," and then approved the utilities' approach in that proceeding of seeking Section 8-406 and Section 8-503 authority concurrently, while returning to the Commission if

[3] The Final Order in Docket 06-0706 was issued on March 11, 2009 and served by mail on March 12, 2009. Counsel for AmerenCIPS obtained a copy of the Final Order from the Commission's e-docket on March 13, 2009. AmerenCIPS notes that the rehearing period for the Docket 06-0706 Final Order has not expired.

necessary to seek eminent domain authority. Id., p.89. The Commission even stated in the Docket 06-0706 Order that it "appears to the Commission that a Section 8-509 proceeding held after land negotiations might give landowners greater leverage in those negotiations" and "under Ameren's proposal [which, like AmerenCIPS' proposal in this case, sought Section 8-406 and 8-503 relief together] it appears that *landowners may be better served*." Id., p. 89 (emphasis added). Thus, the Docket 06-0706 Order clearly rejects the very arguments that Staff makes in its BOE. Given that the Docket 06-0706 Order directly addresses (and rejects) Staff's assertions regarding eminent domain in this case, it appears that those assertions are past their expiration date. They should be rejected here as well.

In sum, with respect a Section 8-503 order, the ALJPO (p. 14) correctly finds that "AmerenCIPS has presented evidence establishing each of the requirements under section 8-503 for both lines. AmerenCIPS has demonstrated that the conversion of the WRR's service from 34kV to 138kV will provide the added benefit of strengthening the reliability of the distribution system and provide the additional load demand required for additional electric capacity and adequate, efficient and reliable service in the surrounding areas of Hartford, Roxanna, and South Roxanna."

III. REPLY TO STAFF

A. The ALJPO's Conclusion that Line 1 Will Improve Reliability in the Area Around the WRR Is Supported by the Record

Staff argues (Staff BOE, p. 2) that to the "the Proposed Order, without support, rejects Staff's position regarding the need for the second 138 kV transmission line that AmerenCIPS proposes." The ALJPO's conclusion (p. 14) that "the second line proposed by AmerenCIPS is not only necessary to satisfy the needs of its customers but also critical in improving reliability to its customers," however, is in fact supported by the record.

As AmerenCIPS explained in its Initial Brief (pp. 6-7) and Reply Brief (pp. 5-6), AmerenCIPS has demonstrated that both the Transmission Lines are necessary to provide adequate reliable and efficient service to the WRR and, equally importantly, will improve the reliability in and for the surrounding areas of Hartford, Roxanna, and South Roxanna. (See AmerenCIPS Ex. 1.0, p. 6.) WRB, in its Initial Brief (pp. 2-5) and its testimony, confirms that both of the two Transmission Lines are necessary for supplying the WRR and will "strengthen the reliability and efficiency of the distribution system for…the surrounding area." Although it is correct that WRB requested the second line, the testimony of AmerenCIPS' witness Mr. Brownfield confirms that both lines are necessary to provide adequate service to the WRR. Mr. Brownfield testified, "After the new 138 kV supplies are fully functional, the existing seven 34.5 kV feeders from the Roxford Substation will be removed to the extent they are not needed to provide electric service to other customers in the area." (AmerenCIPS Ex. 1.0, p. 6.) The removal of these 34.5 kv lines will improve the reliability in the surrounding area. (Id.) Contrary to Staff's unsupported assertion that "[i]dentical improvement to AmerenCIPS' 34 kV system would occur regardless of whether AmerenCIPS supplies WRR with one, two, three, or more 138 kV transmission lines" (Staff BOE, p. 4), it is the entire proposed project, including both lines, that will ultimately improve reliability in the area.

The ALJPO's conclusion that a Section 8-503 order is required for Line 1 is therefore consistent with the language of Section 8-503, which provides, "Whenever the Commission…shall find that…a new structure or structures is or are necessary and should be erected, to promote the security or convenience of its employees or the public or promote the development of an effectively competitive electricity market, *or in any other way to secure adequate service or facilities*," the Commission shall authorize that such structures be built. 220

ILCS 5/8-503 (emphasis added). As discussed above, construction of Line 1 will help improve reliability in the area. Moreover, Staff appears to acknowledge (Staff BOE, pp. 3, 17), Line 1 will improve reliability to the WRR. Even if Staff were correct that Line 1 would produce no other reliability improvements (which it is not), reliability improvements to AmerenCIPS' customer, WRR, alone would warrant a Section 8-503 Order for Line 1. As a result Staff's Exception I, including Staff's proposed and alternate proposed language, should be rejected.

B. Staff's Assertion that the ALJPO Allows AmerenCIPS to "Manipulate" Eminent Domain Proceedings Is Unfounded

1. Staff Arguments Regarding "Meaningful Participation" Are Not Supported by the Record, Law or Common Sense

Staff asserts that granting of a Section 8-503 Order for Line 1 will deny landowners an opportunity for meaningful participation in eminent domain proceedings at the Commission. (Staff BOE, pp. 4-5.) As AmerenCIPS explained, however, in its Initial Brief (pp. 10-11) and Reply Brief (pp. 4-5), Staff's concern that property owners would have lost their opportunity to present evidence in opposition to a line route once an order is issued pursuant to Section 8-503 is unfounded. A property owner with a concern about a potential transmission line route would not wait until an eminent domain proceeding was filed to present evidence about the route; rather, such a property owner would present evidence about the route at the first opportunity, a Certificate proceeding. (AmerenCIPS Ex. 8.0, p. 2; see, e.g., Illinois Power Company d/b/a AmerenIP, Docket 06-0179, Order, pp. 13-17 (describing alternative routing proposals and concerns of landowner interveners in a Certificate proceeding).)

Staff's assertions (Staff BOE, p. 4) that "landowners are unaware of the significance of Section 8-406 and 8-503 proceedings in terms of the potential taking of their property" and that notices announcing Section 8-406 and Section 8-503 proceedings are "not likely to cause landowners to understand that their property is at risk" are unsupported by logic and contradicted

by recent actual experience. In Dockets 06-0179, AmerenIP and Ameren Illinois Transmission Company sought a certificates for certain transmission lines. Numerous landowners intervened *in the Section 8-406 Certificate proceeding* and proposed various alternate routes. Docket 06-0179, Order, pp. 13-16. Similarly, in Docket 06-0706, in which AmerenIP and Ameren Illinois Transmission Company also sought 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 Docket 06-0706 Order, pp. 1-2.

Moreover, 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 the Commission's rules at 83 Ill. Adm. Code Section 200.150(h). (AmerenCIPS Ex. 8.0, p. 2.)

In fact, seeking a Section 8-406 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. Landowners may also challenge the utility's good faith negotiations in a later Section 8-509 eminent domain proceeding.

As the Docket 06-0179 and Docket 06-0706 proceedings show, even though the utilities were not seeking eminent domain authority, a large number of landowners have intervened in the

proceeding to represent their interests. Moreover, as discussed above, the Docket 06-0706 Order finds that it may actually benefit landowners for a utility to wait and seek eminent domain authority under Section 8-509 at a later date. Docket 06-0706 Order, p. 89. Thus, Staff's concerns about lack of meaningful participation by landowners are unfounded.

2. Staff Misinterprets the Recktenwald Decision

Staff also argues that the ALJPO is inconsistent with "long-standing case law" in Illinois, namely the decision in Public Service Co. of N. Ill. v. Recktenwald, 290 Ill. 314 (1919). (Staff BOE, pp. 5-7.) Staff's BOE, however, misreads the Recktenwald opinion. 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. Recktenwald, 290 Ill. at 317. 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.

3. The ALJPO's Findings on Eminent Domain Are Consistent with the Public Utilities Act and Commission Precedent

Staff states that that the ALJPO's "disagreement with 'Staff's argument that issuing an order pursuant to 8-503 in essence guarantees eminent domain against landowners' is contrary to assertions in recent Commission Final Orders." (Staff BOE, p. 8.) In making this statement, however, as discussed above, Staff fails to address the Docket 06-0706 Order, which unequivocally states that "Petitions filed under Sections 8-406 and, particularly, 8-503 do not contain some implicit request for eminent domain authority and should not be read as such." Docket 06-0706 Order, p. 88. The Docket 06-0706 Order goes on to state that, "granting relief under Sections 8-406 and 8-503 does not render a later request under Section 8-509 a mere formality. While it is true that authority under Section 8-503 is specifically required before eminent domain authority can be granted under Section 8-509, a showing must also be made that the utility made a reasonable attempt to acquire the property before it will be allowed to exercise eminent domain authority in circuit court." Id. Thus, the Commission has fully rejected Staff's arguments about the relationship between Sections 8-503 and 8-509.[4]

Nevertheless, Staff, in its BOE, continues to claim that a Section 8-503 order provides eminent domain authority without further action on the part of the utility. (Staff BOE, p. 8.) As AmerenCIPS explained in its Initial Brief (pp. 8-12) and Reply Brief (pp. 2-5), a utility seeking eminent domain authority must show more than receipt of a Section 8-503 order. To obtain Commission approval, the utility must also show that it has negotiated in good faith with the affected property owners and that the utility has diligently sought to acquire the necessary land

[4] In addition, in Docket 08-0291, a proceeding in which AmerenIP and Ameren Illinois Transmission Company are seeking eminent domain authority pursuant to Section 8-509, Staff moved to strike the utilities' evidence on the grounds that a Section 8-503 order had been previously issued and the evidence was unnecessary. The motion to strike was denied, and the Commission denied Staff's subsequent Petition for Interlocutory review of the order denying the motion to strike. See Docket 08-0291, Notice of Commission Action, Feb. 4, 2009.

rights. TransCanada Keystone Pipeline, Docket 06-0458 (April 4, 2007). This is consistent with the language of Section 8-509, which 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, under Section 8-509, a utility seeking eminent domain authority must show that eminent domain is "necessary for the construction" of alterations, additions, extensions or improvements. 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. As a result, the ALJPO (p. 14) correctly concludes that "if it were AmerenCIPS intent to receive eminent domain, it must make this request under Section 8-509. At which time, AmerenCIPS must establish that proper negotiations have been made with landowners in addition to satisfying this Commission that the construction of facilities is necessary." As discussed in Section III.B.4, below, longstanding Commission precedent confirms these requirements of Section 8-509.

Staff's citation to the Commission's orders in Docket 05-0188 and Docket 07-0310 do not change this conclusion. In discussing these two dockets, Staff ignores the key point about them: that the utility in each case sought eminent domain authority, and the Commission considered evidence in those cases related to landowner negotiations. 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. Likewise, the Docket 07-0310 Order (p. 6, 28), the Commission considered evidence regarding negotiations and concluded that the "evidence shows that ComEd

has tried diligently to acquire the right-of-way necessary for the project, but so far has been unable to do so." Thus, Dockets 05-0188 and 07-0310 support the conclusion that to obtain eminent domain, a utility must request such authority and present evidence that eminent domain will be required – eminent domain does not just arise automatically from a Section 8-503 order.

Staff further cites a number of Commission decisions as examples of cases where the Commission "automatically" granted eminent domain authority following issuance of a Section 8-503 order. (Staff BOE, p. 9.) 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. See 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); Commonwealth Edison Co., Docket 96-0410 (May 6, 1998) (utility requested eminent domain authority).

Staff also argues that AmerenCIPS should be required to file for eminent domain authority under Section 8-509 simultaneously with a filing under Section 8-406 and Section 8-503. As AmerenCIPS explained in its Reply Brief (pp. 12-13), this could be impractical. AmerenCIPS must be permitted to maintain flexibility with regard to when it seeks Section 8-503 authority and when it determines that eminent domain authority is needed, because until the

Commission grants a Certificate, AmerenCIPS does not know what route it will be authorized to build, and so does not know for which parcels it will need eminent domain authority.

4. The ALJPO Does Not Impose a Requirement Not Found in Section 8-509

Staff argues that Section 8-509 does not contain a requirement that the Company "must establish that proper negotiations have been made with landowners in addition to satisfying this Commission that the construction of facilities is necessary." (Staff BOE, p. 10, citing ALJPO, p. 14.) As discussed above however, Section 8-509 requires a showing that eminent domain is necessary, and evidence that the utility has negotiated in good faith is part of this "necessary" showing. The Commission's requirement that a utility show 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). Therefore, Staffs contention must be rejected.

C. AmerenCIPS Does Not Object to Staff's Proposed Language Regarding Financing

In Exception III (Staff BOE, pp. 11-12), Staff recommends that an additional paragraph be included at the end of the Commission Conclusion section on page 14 of the ALJPO imposing the condition that all costs for the project are borne by WRB Refining, LLC, or its successor. AmerenCIPS agreed to this condition in testimony. (AmerenCIPS Ex. 6.0, p. 5.) Therefore, AmerenCIPS has no objection to including the condition, or Staff's replacement language regarding this condition.

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WHEREFORE, AmerenCIPS requests that Staff's Exceptions I and II be rejected, and the ALJPO adopted as proposed.

April 1, 2009

Respectfully submitted,

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY d/b/a AmerenCIPS

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