

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

IN RE: ENBRIDGE PIPELINES)
(ILLINOIS) L.L.C.)
)
) **07-0446**
)
Application pursuant to Sections 8-503, 8-509,)
15-101 and 15-401 of the Public Utilities Act/)
Common Carrier by Pipeline Law to construct)
and operate a petroleum pipeline,)
and for an order granting authority to take)
Private Property by Eminent Domain.)

**PLIURA INTERVENORS' BRIEF ON EXCEPTIONS
TO PROPOSED ORDER**

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NOW COME the various landowner and farmer Intervenors in the above-referenced cause who throughout these proceedings have been jointly referred to for convenience purposes as “Pliura Intervenors”, by and through their attorneys, Thomas J. Pliura, and Livingston, Barger, Brandt & Schroeder, and pursuant to 83 Ill. Adm. Code Section 200.830 (b)(2), respectfully offer the following “Brief on Exceptions” in support of the alternative language proposed in “Pliura Intervenors’ Exceptions to Proposed Order” filed contemporaneously herewith.

With all due respect to the Administrative Law Judge’s obviously carefully drafted and detailed proposed order filed May 22, 2009, Pliura Intervenors must respectfully take issue with certain findings that are fundamental to the proposed order. First, whereas Enbridge Pipelines (Illinois) L.L.C. (“Enbridge Illinois”) is the sole applicant to this petition, it has failed to demonstrate that it possesses, independent of non-party affiliates, the fitness, willingness and ability to proceed with the proposed project. Second, whereas the record fails to establish a discrete public benefit attributable to the proposed project, a finding of public benefit is not supportable. Lastly, there is no evidence of record that the proposed project provides a discrete and/or unique public benefit beyond that which has already be attributed to other, earlier segments of this pipeline. Without this evidence of public benefit, the petition must fail. While construction of the pipeline segment is not dependent upon approval of the petition, the request for condemning authority under Eminent Domain is dependent upon a positive finding. Consequently, Pliura Intervenors agree with the propose order to the extent that it denies the Eminent Domain request. However, Pliura Intervenors respectfully disagree that Applicant should be granted the right to re-petition for condemning authority after further negotiations.

1. On the Fitness, Willingness and Ability of the Applicant

The Proposed Order finds the sole applicant, Enbridge Illinois, fit, willing and able, based entirely on the financial position and experience of its parent, Enbridge, Inc., and its other affiliates. The Proposed Order is conditioned upon Enbridge Inc. “fulfill[ing] its commitments to provide such financial support as is reasonably necessary for the construction and operation of the proposed pipeline, as described in the record.” This condition, imposed by the Proposed Order, clearly acknowledges that as a stand-alone applicant, Enbridge Illinois has failed to provide the necessary evidence to support a finding that it is fit, willing and able. Instead, it must rely upon the strength of its parent and affiliates to support its obligations. However, there is no evidence of a legally binding commitment for the parent or affiliate organizations to provide this support. There is nothing in the record to establish an enforceable financial relationship or indemnification agreement between Enbridge Illinois and Enbridge, Inc. Enbridge, Inc. is not a party to this application.

The law contemplates an actual, thorough supervision, in the manner authorized by the Public Utilities Act, of every corporation engaged in conducting a public utility in Illinois. “Therefore every corporation applying for a certificate of convenience and necessity must show both its intention and ability, financial and otherwise, to render the service which asks for authority to undertake.” *Roy v. Illinois Commerce Commission ex Rel.*, 322 Ill. 452, 461 (1926) (the Supreme Court set aside the issuance of a certificate in good standing because the record lacked evidence to show Northern Shore Connecting Railroad had the financial ability to provide the service at issue). Applicant’s assertions, not backed by evidence of record, that its non-party parent and/or affiliates will voluntarily and irrevocably provide their “full faith and credit” to this application is legally insufficient and is an unsupported finding, contrary to well-settled law. “It

is not consistent with the purpose of the Public Utilities Act to bring under public control, for the common good, property applied to the public use in which the public has an interest, that a corporation nominally organized for independent service as a public utility, but having actually no other object than to act for and under the control of another, should be granted a certificate of public convenience and necessity for the operation of a public utility.” *Roy* 322 Ill. at 459.

Therefore, Pliura Intervenors have proposed alternative language in their Statement of Exceptions that reinforces the Applicant’s failure to provide individualized evidence of its fitness, willingness and ability. The Proposed Order at Section IV (f) conditions the positive fitness finding on “Enbridge Inc. fulfill[ing] its commitments to provide such financial support as is reasonably necessary for the construction and operation of the proposed pipeline, as described in the record.” Such a condition, however, does not legally support that *Enbridge Illinois* has the financial ability to render the service, which it asks for authority to undertake. Further, such a condition is not legally enforceable against a non-party, when the record contains no evidence that a contractual obligation exists to be enforced.

Pliura Intervenors have proposed alternative language which states,

“Therefore, As a condition of this Order before a positive finding can be made as to Applicant’s fitness, willingness and ability, applicant must secure as a co-applicant or otherwise provide sufficient evidence of a binding agreement that Enbridge Inc. or any other necessary affiliated organization shall fulfill its commitments to provide such financial support and liability indemnification as is reasonably necessary for the construction and operation of the proposed pipeline, as described in the record.”

The alternative language takes fully into consideration the Proposed Order's findings as to the fitness of Enbridge, Inc., but conforms to the law and the Commission's authority with respect to the fitness of a non-party.

2. On the Question of Need/Public Benefit

The Proposed Order incorrectly and inappropriately considers the potential benefit of a line from Canada to Patoka, when determining benefit. There has been a great deal of discussion in the briefs of the parties about the proper scope of public benefit relevant to this application. Intervenors, some relying *inter alia* upon the *Lakehead* decision, have urged that the Commission limit the scope of public benefit to Illinois. Applicant has urged a more global evaluation. In the instant case, however, this dispute is off the mark. The proposed project is only a line from near Pontiac, Illinois, to Patoka, Illinois. Any benefit from bringing Canadian Synthetic Crude from Canada, through Wisconsin, to the current terminus at the Flannigan Station near Pontiac, Illinois has already been attributed by the ICC in previously approving the line subject to No. 06-0470. In that application (06-0470), the Applicant argued the pipeline project was needed to transport petroleum to the Chicago-land area. In this application (07-446), Applicant now proposes to use the very same petroleum that it previously told the ICC it would transport to the Chicago area, and instead transport it to Patoka. The lengthy discussion in the Application and the Proposed Order of this segment of the pipeline is of no relevance to the public benefit determination of Pontiac to Patoka segment. Neither the Applicant, nor staff, nor the Proposed Order offers any evidence to support a finding that adding a pipeline from Pontiac to Patoka will generate any demonstrable and discrete public benefit. The Proposed Order states,

“As Staff suggests, “bringing Canadian petroleum to this [Patoka] hub would provide not only our state, but our nation, with additional crude oil supplies from a friendly and

reliable country.” The Commission also agrees with Staff that “Illinoisans are also citizens of the United States, and a project that provides access to a secure and reliable energy supply and helps to meet our country’s energy needs is a project that benefits Illinois citizens, whether directly or indirectly” and that “[t]he changing landscape requires us as a nation to re-evaluate our energy supply and transmission network and make sure that it is as reliable and redundant as possible.”

Whether this finding is correct or not, it is predicated on the incorrect finding that the instant project “brings Canadian Petroleum to Patoka”. The Canadian Petroleum is already in Illinois. Any benefit to bringing Canadian Petroleum into Illinois to Pontiac is not the proper subject of consideration for the instant application. Applicant elected to present this project in segments. Thus each segment must have a discrete public benefit. In order to reach a positive finding on public benefit for Illinois that is not arbitrary and capricious, the Proposed Order must identify a discrete public benefit in bringing **from Pontiac**, Canadian-origin Synthetic Petroleum, **to Patoka**. The decision fails to do so.

The decision acknowledges that the Applicant has failed to demonstrate a discrete benefit to this segment.

“Petitioner did not provide an adequate response to the “double-counting” and related concerns identified by Intervenors and Staff, and Petitioner said very little about the analysis in its initial brief. Whether an allocated portion of those purported benefits to the proposed line would be appropriate, had one been presented, is a question not reached by the Commission.”

But in spite of making this finding, the Proposed Order makes an improper and unsupported leap of faith in deciding that the record supports a finding of public benefit. In summary fashion, the decision states, “[B]ased on the record in the case, including the location of the pipeline which would carry Canadian crude to the major pipeline hub at Patoka, the capacity of the pipeline, the current environment as described by Staff and other evidence presented, the Commission agrees with Staff that there is a public need for the proposed

pipeline.” But there is no evidence to support this finding. Instead, everything referenced in the discussion that precedes the finding implicates the concept of “double-counting”.

In fact the record is void of any public benefit to moving the Canadian Crude to Patoka for storage. While Patoka does represent a significant hub for pipeline activity in PADD II, the Applicant failed to offer any evidence that the Canadian heavy crude product would be transported through existing pipelines to Midwest refineries. To the Contrary, the evidence overwhelmingly supports the fact that Midwest refineries are operating at full capacity and are “saturated” with Canadian Heavy Crude. Despite unsupported argument that the Midwest refineries will modify to accommodate the Canadian Crude, the record reveals that no refinery is or will upgrade to process additional Canadian Crude product. In addition, as noted by the Administrative law Judge, the record supports that the pipeline configuration at Patoka is currently used to full capacity to supply product to various refineries in PADD II. Therefore, the pipeline at issue will any transport Canadian Crude in Pontiac to be stored in Patoka. Simply changing storage facilities within the state of Illinois does not support the finding of public benefit as sought by the Applicant.

Pliura Intervenors have suggested striking language that bases a public benefit finding on the “double-counting” of alleged benefit from Canada to Pontiac and the mere relocation of stored Canadian Crude. Intervenors have instead suggested the following alternative language at section V (a)(7) that acknowledges the proper scope of consideration for discrete public benefit:

“Based on the record in the case, including the location of the pipeline which would carry Canadian crude from a point already in Illinois to the major pipeline hub at Patoka, the capacity of the pipeline, the current environment as described by Staff and other evidence presented, the Commission ~~agrees~~ disagrees with Staff that there is a public need for the proposed pipeline. The proposed project is only a line from near Pontiac, Illinois 170 miles south to near Patoka, Illinois. Neither the Applicant, nor staff offers any evidence to support a finding that adding a pipeline segment from Pontiac to Patoka will generate any demonstrable public benefit discrete from the benefits attributable to the previously

approved line (06-0470). Applicant and staff can not use the same economic analysis to support approval of this minor intrastate extension. This project, standing along, must be supported by discrete economic analysis showing that the public, including the citizens of Illinois, directly benefit from transportation of petroleum from the current terminus near Pontiac to the hub near Patoka. The only disputed public benefit to transporting the Canadian Crude to Patoka is to take advantage of the extensive pipeline connections there, but the record does not support the availability of the existing pipelines for further transport. Rather the record evidences that the Canadian Crude will simply be moved to Patoka for storage. Such activity does not support the finding of public benefit. Instead, the evidence has been limited to touting the benefits (globally, nationally, and/or locally) to the larger completed project. It is not appropriate to attribute the benefits of the entire Southern Access Project to this minor segment. To do so would not only require the Commission to ignore the law and its own rules, but would attribute benefit to Applicant, Enbridge Illinois, related exclusively to projects where Enbridge Illinois is not an applicant, and vice versa. Absent public benefit discrete to the only segment of the project before the Commission, a positive finding on this Applicant can not be reached. It is therefore not necessary for the Commission to reach a definitive conclusion on the issue of whether public need must be specific to citizens of Illinois or whether, as citizens of the world, broader public benefit is sufficient. That conclusion will be left for another day, when the issue is squarely before the Commission.”

When searching the record for evidence of public benefit attributable or properly apportioned to the instant proposed project, it is clear that a negative finding on public benefit is mandated. It matters not whether public benefit is to be assessed on a global basis, regional basis, statewide, or locally. There simply is no evidence of record, at any scale, to support a finding of discrete properly apportioned public benefit for the only proposal presented in the Application.

3. Eminent Domain

Firstly on this issue, the nature of the project, a pipeline to transport refined synthetic crude oil from Pontiac, Illinois to Patoka, Illinois, does not meet the statutory definition of “Public Utility”. The Commission’s authority to grant to a “common carrier by pipeline” Eminent Domain authority is limited to Public Utilities. Not all common carriers by pipeline qualify as a Public Utility. Pursuant to 220 ILCS 5/3-105, a Public Utility is defined as follows:

“Public utility” means and includes, except where otherwise expressly provided in this Section, every corporation, company, limited liability company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever that owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in:

- a. the production, storage, transmission, sale, delivery or furnishing of heat, cold, power, electricity, water, or light, except when used solely for communications purposes;
- b. the disposal of sewerage; or
- c. the conveyance of oil or gas by pipe line.”

The project proposed by Applicant is strictly for the construction and operation of a pipeline from near Pontiac, Illinois, to Patoka, Illinois for the purpose of serving as a common carrier by pipeline of “synthetic crude”; a hydrocarbon by-product obtained from the biochemical refinement of “bitumen” via a process known as "upgrading". These upgraded hydrocarbon by-products are not “gas” or “oil” as defined by Illinois Law , are not produced at the well in liquid form, are not natural hydrocarbons, and the methods by which the product is mined prior to upgrading does not constitute an “ordinary production method”.

Secondly, even if the project was eligible for “Public Utility” status, as discussed above, the instant application has failed to demonstrate the required public convenience. Enbridge Illinois must demonstrate that the project and use of eminent domain will promote security and convenience. “In every application of this kind the primary and controlling interest is to be considered is the public interest. Individuals or corporations may determine for themselves what their interests demand, but the convenience and necessity required to support an order of the commission is that of the public and not of any individual or number of individuals.” *Roy v. Illinois Commerce Commission ex Rel.*, 322 Ill. 452, 458 (1926). When properly viewing this application as a Pontiac to Patoka extension, there is no showing of enhanced security or convenience to the public, whether viewed globally, nationally, regionally, or locally, discrete to

the instant application. Simply stated application has failed to advance any public conveyance during Canadian Crude from Pontiac take stand in Patoka. The record, silent on this point, can not support a security and convenience finding.

To that end, Pliura Intervenors have proposed the following language for Section VII

(F):

“In the current proceeding, the record does not support a finding that Applicant is entitled to an order granting eminent domain authority. Firstly, the nature of the project, a pipeline to transport refined synthetic crude oil from Pontiac, Illinois to Patoka, Illinois, does not meet the statutory definition of “Public Utility”. The Commission’s authority to grant a common carrier by pipeline Eminent Domain authority is limited to Public Utilities. Secondly, even if the project was eligible for “Public Utility” status, as discussed above, the instant application has failed to demonstrate the required public convenience. Enbridge Illinois must demonstrate that the project and use of eminent domain will promote security and convenience. When properly viewing this application as a Pontiac to Patoka extension, there is no showing of enhanced security or convenience to the public, whether viewed globally, nationally, regionally, or locally, discrete to the instant application.

More troubling is the evidence introduced into the record as Exhibit G to the January 25, 2008 Supplemental Testimony of Intervenor Carlisle Kelly. That exhibit is a transcript from the annual meeting of the shareholders of Applicant’s parent, Enbridge, Inc. There, Enbridge Executive Vice President for Liquids Pipelines, Richard Bird, commenting on the use of Eminent Domain authority, stated, “[a]nd I should say that on many projects we seek the right of expropriation and we’ve been successful so far in getting in. To actually resort to expropriation is really the last resort and if anything we like to have it there so there is a little more leverage on our side in negotiations to keep things reasonable.” The Commission believes the threat of expropriation of private property through the power of eminent domain should never be sought or used for the purpose of negotiation leverage over Illinois landowners.”

Additionally, the Proposed Order appropriately denies Eminent Domain at this time, but inadvertently creates a disincentive for the Applicant to engage in meaningful negotiations. The Proposed Order appropriately acknowledges, “the adversarial relationship that appears to exist between Petitioner and many landowners or their representatives, who view various actions and rhetoric by some representatives of Petitioner as disrespectful and counter-productive. All things considered, it is not particularly surprising that the negotiations to date have been somewhat

unproductive.” By suggesting to Applicant that a continued impasse in negotiations would justify a future granting of eminent domain, the ICC is inadvertently dis-incentivizing the Applicant from entering into meaningful negotiations now. Instead, while denial of Eminent Domain is clearly appropriate (as discussed above in the Public Benefit section), even assuming that leave to reapply is later deemed appropriate, it would aid future negotiations between the Applicant and landowners for the ICC to impose additional conditions on Applicant’s future ability to seek Eminent Domain. Such conditions could include, for example, a requirement that Applicant provide actual evidence (rather than its self-serving but unsubstantiated claims) of fair market fee value offers to every landowner along the route.

Applicant touts its benevolence but offers no evidence beyond its own self-serving argument that it has engaged in good faith negotiations with land owners. Evidence on this point was necessary to the granting of Eminent Domain. Where is the evidence that Applicant has offered fee value for its easements? How was fee value computed? By whom was fee value computed? Was an independent appraiser consulted in determining fee value? To whom and when was it offered? What was the response? How many holdouts remain along the line? What offers have been made? How were they computed? The record is void of this information. A strong indication of the Applicant’s negotiation efforts would be the willingness of various land owners to accept the proposals. Eminent Domain, then, would be limited only to unreasonable hold-outs. Applicant has offered no evidence as to the number of easements it has negotiated. Applicant has offered no evidence to demonstrate unreasonable expectations or greed of any hold-out landowners.

Eminent domain is a powerful tool that runs contrary to most property rights. Its use should be greatly limited and sparingly unleashed, especially when using it for the taking of

private property for a private use. In determining if Applicant has demonstrated an entitlement to receiving this powerful tool, the Commission must look beyond the unsupported and self-serving statements of the Applicant. It must look to the Record to see if Applicant has proven a compelling public need for this Pontiac to Patoka extension, and if Applicant has demonstrated the need for Eminent Domain to meet this compelling need. Pliura Intervenors submit that Applicant has failed in both instances. The Proposed Order makes no reference to public benefit in a Pontiac to Patoka extension. The Proposed Order references no evidence, beyond Applicant's own unsupported claims, that Eminent Domain authority may be warranted and necessary for the limited purpose of addressing a handful of unreasonable holdouts.

Further, the Proposed Order accepts, as fact, Applicant's unsupported assertion that it has engaged in good faith negotiations with all land owners, but makes no mention of the numerous law suits Applicant has filed against landowners in Federal Court (now consolidated into *Enbridge Pipelines (Illinois) LLC v. Preiksaitis et al*, CDIL, 08 CV 2215 and *Enbridge Pipelines (Illinois) LLC v. Burris et al*, SDIL, 08 CV 697) in which Applicant is seeking to enforce the terms of the various 1939 easements it acquired from CIPC. If successful in these efforts, Applicant will claim the authority to provide a shockingly insignificant amount of compensation, far below fair market fee value, to landowners over 80% of the proposed route. These pending suits are wholly inconsistent with the position Applicant has taken with the ICC and contrary to the ICC's characterization of the status of negotiations as described in the Proposed Order. Pliura Intervenors respectfully suggest that if Applicant is entitled to return to the ICC at a future date to secure eminent domain authority to resolve the remaining holdouts, it should be required to produce to the ICC actual property-specific evidence of the status of fair market fee values negotiations.

All of this assumes, however, that Applicant can demonstrate that it is entitled to a granting of Eminent Domain authority. However, as stated above, Applicant has failed to do so.

4. Adoption of the Briefs of the Parties

Finally, Pliura Intervenors acknowledge that there are numerous other issues that have been identified by staff and the co-intervenors which argue against approval of the application, issuance of a certificate of need, and granting of Eminent Domain authority. In the interest of brevity, those positions as detailed in the briefs, replies and exceptions of the co-intervenors are not restated here, but are hereby adopted by Pliura Intervenors and incorporated herein as additional arguments in opposition to the Application.

5. Conclusion

By reason of the forgoing, Pliura Intervenors respectfully urge the Illinois Commerce Commission to adopt the proposed deletions and alternative language in Pliura Intervenors' Exceptions filed contemporaneously herewith. Therein, Pliura Intervenors urge the Commission to reject any attempt by the Applicant to hollowly bolster its Application by cleverly replacing the true Applicant for a generic "Enbridge" made up of non-applicant affiliates outside the authority of the Commission. Intervenors further urge the Commission to reject any attempt to falsely confer upon the proposed Pontiac to Patoka extension the alleged benefits of an international pipeline bringing new product into the state. When properly viewing the Applicant and the Application itself, it is clear that the Proposed Order, as written, requires the revisions sought by Pliura Intervenors.

Respectfully Submitted,

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