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**ILLINOIS COMMERCE COMMISSION**

STATE OF ILLINOIS

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**ILLINOIS COMMERCE COMMISSION**

CenterPoint Energy - Illinois Gas  
Transmission Company

Petition for a Certificate authorizing  
and direction construction, abandonment,  
and operation of a natural gas pipeline  
and granting authority to exercise eminent

No. 09-0054

**REPLY BRIEF**

Julie K. Massey, intervenor, of 7018 Gable Court, Glen Carbon, IL 62034, files this Reply Brief to respond to the arguments of CenterPoint Energy---IGTC ("IGTC") and the Staff of the Illinois Commerce Commission ("Commission") regarding the Commission's authority to terminate and return the abandoned easement to the landowners along the 55 miles of pipeline that IGTC intends to abandon under the Illinois Public Utility Act ("Act").

ILLINOIS  
COMMERCE COMMISSION  
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- 1. The Commission Did Not Show that the Commission Does Not Have the Authority to Terminate and Return the Abandoned Easement Along the 55 Miles of Pipeline that IGTC Intends to Abandon under the Act.**

The Commission maintains that it does not have the authority to make determinations regarding the easement along the 55 miles of pipeline that IGTC intends to abandon. We disagree for the reasons set forth below.

First, the Commission argues that according to *Business & Professional People* and *Daniels*, the Commission possesses only powers granted to it by the legislature. And that any action it takes must be specifically authorized by statute.

To the contrary, we argue that the provisions of the Act give the Commission broad powers of supervision and regulation over utilities. (*Klopf v. Illinois Commerce Commission*) In *Wilcox v. Illinois Commerce Commission*, the Supreme Court upheld the Commission's order issued under the Gas Act to use eminent domain even though nothing in the legislation specifically authorized condemnation for temporary purposes. Additionally, in *Gernand v. Illinois Commerce Commission*, the court relied on *Wilcox* and held that the Commission had the authority to issue orders to give a utility a temporary easement under Section 5-803 and 8-509 even though it lacked the clear expressed authority to do so under the Act.

Specifically, the Commission states in its Initial Brief that it does not have the expressed authority to "order a regulated holder of a property interest to convey that interest." We disagree. We argue that because the Act gives the Commission broad powers of supervision and regulation over utilities, it does have the authority to order a regulated holder of property interest to convey that interest. Our argument is supported by *Klopf v. Illinois Commerce Commission*. In that case, the court ruled that the Commission was correct in ordering the public utility to

convey its easement to the Department of Conservation. Thus, we contend that the Commission does have the authority to return the abandoned easement to the landowners.

Additionally, the Commission itself does not always require that its authority be “specifically authorized by statute.” In its Initial Brief, the Commission states that it has the requisite authority to remove the abandoned pipeline in accordance with the landowners’ wishes under Section 8-503. Although we agree with the Commission’s interpretation of its authority under Section 8-503, we contend that Section 8-503 does not give the Commission the *expressed authority* to “remove abandoned pipelines in accordance with the landowners’ wishes.” In its Initial Brief, the Commission cites “the breadth of the quoted language from Section 8-503” and “undertakings of the IGTC” as reasons to support the Commission’s authority to order the removal of the pipeline. We argue that for the same reasons the Commission finds it has the requisite authority to remove the pipeline in accordance with the landowners’ wishes; it should find that it has the requisite authority to return the abandoned easement along the 55 miles of pipeline to the landowners in accordance with their wishes.

The easement along the 55 miles of pipeline is part of IGTC’s facilities, and the abandonment of the pipeline and easement constitutes a “change in” the facilities of a public utility under Section 8-503. The return of the easement is also in “the public interest and necessary and ought reasonably to be made” pursuant to Section 8-503. IGTC argued in its Second Amended Petition and Testimony that it would be in the “public interest” to abandon and remove the 55 miles of deteriorated pipeline. The Commission agrees. The only way to protect the “public interest” after the Commission approves the abandonment and removal of the pipeline is to also return the

abandoned easement to the landowners. Thus, we conclude that the Commission does have the authority under Section 8-503 to order IGTC to return the abandoned easement to the landowners in accordance with their wishes.

Furthermore, the Commission argues in its Initial Brief that it would be appropriate to order all of the “changes” at the same time. We agree with the Commission’s assessment, but we contend that it erred in limiting the “changes” to just the construction of the new pipeline and the removal of the old pipeline. As we argued above, the abandonment of the easement constitutes a “change in” IGTC’s facilities under Section 8-503. Thus, because the Commission contends that it is appropriate to order all of the “changes” at the same time, it should also order IGTC to return the abandoned easement to the landowners in accordance with their wishes.

The Commission also argues that the Illinois Appellate Court has ruled that even if an easement holder seeks and receives Commission permission to abandon the property under Section 8-508 of the Act, this is not determinative of whether there has been an “abandonment” for purposes of construing language conveying an easement. The Commission cites *URS Corp. v. Ash* to support its argument. However, we contend that our case is different from *URS Corp.*

In *URS Corp.*, Peoples conveyed its easement for natural gas underground storage to URS Corp. to store compressed air. Ash argued that Peoples abandoned the easement because documents it presented before the Commission to get approval under Section 8-508 included the word “abandonment”. In *URS Corp.*, URS Corp. argues that there was no non-use because the

easements were assigned to it by Peoples and that the documents before the Commission related to the abandonment of the project, not of the easements.

Our case is different from *URS Corp.* in several ways. First, we are not arguing that IGTC abandons its easement because it receives Commission approval to abandon service under Section 8-508. IGTC is not just abandoning service under Section 8-508; IGTC is actually abandoning and removing the pipeline. The Illinois courts hold that an easement terminates upon the abandonment of its use. (*Schnabel v. County of Du Page*, *Diaz v. Homes Federal Savings & Loan Association of Elgin*, *Kelly v. Enbridge*) And that abandonment is non-use accompanied by acts which manifest an intention to abandon and destroy the object for which the easement was established. (*Schnabel v. County of Du Page*, *Diaz v. Homes Federal Savings & Loan Association of Elgin*, *Kelly v. Enbridge*) Cessation of operations and removal of utility facilities constitutes acts which manifest an intention to abandon. (*Schnabel v. County of Du Page*, *Diaz v. Homes Federal Savings & Loan Association of Elgin*) *URS Corp.* actually supports this understanding of easement abandonment, and states that “it is true that an easement granted for a particular purpose terminates as soon as such purpose ceases to exist, is abandoned, or is rendered impossible to accomplish.”

In our case, the easement was conveyed to IGTC for the sole purpose of transporting of oil, petroleum or any of its products, gas, water and other substances. We contend that IGTC abandons the easement when it no longer transports oil, petroleum or any of its products, gas, water and other substances. IGTC and the Commission state that the pipeline is no longer suitable or safe for the purposes for which the easement was conveyed. IGTC and the

Commission further contend that it is necessary to abandon the existing pipeline and construct a new one. We contend that IGTC's abandonment of the pipeline constitutes non-use.

Additionally, IGTC stated in its Second Amended Petition, Testimony, and Initial Brief, that it will cease operations and remove the existing pipeline. We contend that IGTC's cessation of operations and removal of the pipeline constitute affirmative acts to destroy the pipeline for which the easement was established. Thus, when IGTC abandons and removes the pipeline, it is also abandoning the easement.

Secondly, in *URS Corp.*, Peoples conveyed its easement to another public utility. That is not the case here. IGTC is not conveying its easement to another public utility. According to its testimony, IGTC has no plans to convey the pipeline and easement to another public utility. In *URS Corp.*, the Commission was asked to determine whether the new public utility falls within the scope of the easement conveyance. In our case, we are asking the Commission to return an abandoned utility easement to the landowners. Thus, we contend that *URS Corp. v. Ash* does not address the issue of the Commission's authority to return an abandoned utility easement to landowners.

In conclusion, for the reasons stated above, we contend that the Commission did not show that it does not have the authority to terminate and return the abandoned easement along the 55 miles of pipeline.

**2. IGTC Did Not Show that the Commission Does Not Have the Authority to Terminate and Return the Abandoned Easement Along the 55 Miles of Pipeline that IGTC Intends to Abandon under the Act.**

IGTC maintains that the Commission does not have the authority to make determinations regarding the easement along the 55 miles of pipeline that it intends to abandon.

IGTC argues that the Commission does not have jurisdiction “to entertain an easement dispute.”

IGTC cites *Crawley v. Peoples Gas Co.* to support its argument. In *Crawley*, the landowners constructed additions to their homes that encroached on Peoples’ utility easement. Instead of having the additions removed, Peoples decided to move the gas main to a different location. Peoples obtained permission from the Townhouse Association President to construct the new gas main. *Crawley* argued to the Commission that Peoples violated her property rights when they entered onto her property without benefit of an easement to construct the new gas main. In *Crawley*, the Commission stated that it did not have jurisdiction to determine the existence or location of a utility easement.

We contend that our case is different from *Crawley*. In *Crawley*, the Commission was asked to decide whether an easement existed and whether a public utility violated a landowner’s property rights when it moved its gas main. In our case, we are arguing that when IGTC abandons and removes its pipeline it also abandons its easement, and that the Commission has the authority to return the abandoned easements to the landowners. We contend that the Commission has the authority to make determination involving the reconfiguration of IGTC’s pipeline, which includes the abandoned easement along the existing pipeline. Thus, we argue that the Commission’s conclusion regarding its jurisdiction in *Crawley* has no bearing on whether the Commission has jurisdiction over our case because the issues the Commission was asked to determine in *Crawley* are not the issues before the Commission in our case.

IGTC further contends that there is no general principle that abandonment of utility facilities constitutes abandonment of the underlying easement. IGTC states that mere non-use does not constitute abandonment. They cite *National Bank of Bloomington v. Norfolk & Western Railway* to support their argument. In *National Bank*, a man died after a train collided with his vehicle. The plaintiff argued that the collision was in part caused by overgrown trees and shrubbery on the railroad's easement. The railroad claimed that it never used the easement nor did it express any claim to that portion of the right-of-way. The court found that railroad had not abandoned its right-of-way by mere non-use. Our case is different from *National Bank*.

Unlike in *National Bank*, we are not arguing that IGTC is abandoning its easement because of "mere non-use". In our case, we are arguing that IGTC abandons the easement when it abandons the purpose for which the easement was conveyed. As stated in Section 1 of this Brief, Illinois courts hold that an easement is abandoned when non-use is accompanied by acts which manifest an intention to abandon and destroy the object for which the easement was established (*Schnabel v. County of Du Page*, *Diaz v. Homes Federal Savings & Loan Association of Elgin*, *Kelly v. Enbridge*). Cessation of operations and removal of utility facilities constitutes acts which manifest an intention to abandon (*Schnabel v. County of Du Page*, *Diaz v. Homes Federal Savings & Loan Association of Elgin*). *URS Corp.* states that "an easement granted for a particular purpose terminates as soon as such purpose ceases to exist, is abandoned, or is rendered impossible to accomplish."

In our case, the easement was conveyed to IGTC for the sole purpose of transporting of oil, petroleum or any of its products, gas, water and other substances. We contend that IGTC abandons the easement when it no longer transports oil, petroleum or any of its products, gas, water and other substances. IGTC and the Commission state that the pipeline is no longer suitable or safe for the purposes for which the easement was conveyed. IGTC and the Commission further contend that it is necessary to abandon the existing pipeline and construct a new one. We contend that IGTC's abandonment of the pipeline constitutes non-use. Additionally, IGTC stated in its Second Amended Petition, Testimony, and Initial Brief, that it will cease operations and remove the existing pipeline. We contend that IGTC's cessation of operations and removal of the pipeline constitute affirmative acts to destroy the pipeline for which the easement was established. Thus, when IGTC abandons and removes the pipeline, it is also abandoning the easement.

In conclusion, for the reasons stated above, we contend that IGTC did not show that the Commission does not have the authority to terminate and return the abandoned easement along the 55 miles of pipeline.

### **3. Conclusion**

For the reasons stated above and for the reasons stated in my Initial Brief, I request that the Commission find that it has the requisite authority to return the abandoned utility easement to the landowners.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Julie K. Massey". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Julie K. Massey  
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Dated: August 27, 2009

A signed copy has been sent to the Chief Clerk's office by US Postal mail.

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Certificate of Service

I sent this brief to all on this service list through electronic mail or through the US Postal Service.

Sincerely,

A handwritten signature in black ink, appearing to read "Julie Massey", with a long, sweeping flourish extending to the right.

Julie Massey

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