

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

ILLINOIS POWER COMPANY,)
d/b/a AmerenIP, and)
AMEREN ILLINOIS TRANSMISSION)
COMPANY) Docket No. 10-0173
)
Petition for an Order pursuant to Section 8-509)
of the Public Utilities Act approving)
Petitioners' use of eminent domain power.)
)

**REPLY BRIEF ON EXCEPTIONS OF
ILLINOIS POWER COMPANY, D/B/A AMERENIP,
AND AMEREN ILLINOIS TRANSMISSION COMPANY**

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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 Illinois Power Company d/b/a AmerenIP and Ameren Illinois Transmission Company (together, “Petitioners”), responding to the Brief on Exceptions of Staff of the Illinois Commerce Commission (“Commission”).

II. Response to Staff

Petitioners take no position on Staff’s exceptions (Staff BOE, p. 5) regarding the Administrative Law Judge’s Proposed Order’s (“ALJPO”) discussion of suggested inquires Staff could make regarding the reasonableness of a utility’s attempts to acquire land rights for which it seeks eminent domain.

Petitioners strongly oppose Staff’s exceptions related to the application of Section 8-509 of the Public Utilities Act (“Act”), 220 ILCS 5/8-509, however, and whether a utility should seek eminent domain authority concurrently with a request for a Certificate of Public Convenience and Necessity (“CPCN”) under Section 8-406 of the Act, 220 ILCS 5/8-406, or an order under Section 8-503 of the Act, 220 ILCS 5/8-503. Petitioners share the ALJPO’s frustration (p. 14) with Staff’s continued insistence on raising this issue in the face of clear Commission findings in numerous recent cases completely rejecting Staff’s position. Petitioners believe that this sort of relitigation of issues, if undertaken by other parties that come before the Commission, would not be tolerated, and Staff should be no exception. Undue time and resources have been consumed. Moreover, Petitioners note that Staff’s analysis fails to address (or even mention) at least four Commission decisions rejecting Staff’s arguments that were issued subsequent to the Commission’s order in Docket 07-0310 (dated October 8, 2008). These decisions were cited and explained in Petitioners Reply Brief (pp. 7-8.)

Staff makes two contentions. The first is that rather than undertaking a separate and sequential proceeding to address an eminent domain request under Section 8-509, eminent domain should be addressed concurrently with the determinations regarding siting and ordering of the certificated projects under Section 8-406 and the necessity for the improvements under Section 8-503. (Staff BOE, p. 2.) Staff believes that separate evaluations will disadvantage landowners. (Id.) Petitioners do not dispute that a request for a CPCN under Section 8-406, a request for a Section 8-503 order, and a request for relief under Section 8-509 may be brought in a single proceeding (as ComEd did in Docket 07-0310). There is no legal requirement, however, that relief under these three sections be sought concurrently. The Commission has expressly found that “the statute does not require a utility company to request relief under Sections 8-406, 8-503 and 8-509 simultaneously.” Docket 07-0532, Final Order, p. 13 (May 6, 2009). As explained in the Commission’s order in Docket 06-0706 (p. 89), there may also be reasons (such as the fact that a route has not yet been approved) why a separate proceeding for eminent domain authority makes sense.

The provision of the Act that governs eminent domain is Section 8-509. See Lakehead Pipeline Co. v. Illinois Commerce Comm’n, 296 Ill. App. 3d 942 (3d Dist. 1998) (stating eminent domain is authorized by Section 8-509 of the Act). Parties may choose to file 8-509 actions concurrently with 8-503 or Section 8-406 actions, but this is not mandated by the Act. Moreover, the language of Sections 8-406 and 8-503 does not address the granting of eminent domain authority. Thus, there is no statutory basis for Staff’s assertion that Sections 8-503 and 8-406 must be coupled with Section 8-509 and relief sought under all Sections simultaneously. The Commission has recognized as much for years, finding that the eminent domain inquiry under Section 8-509 is separate and distinct from the inquiry under Section 8-503. See Central

Ill. Pub. Serv. Co., Docket 90-0206.

Staff's argument that landowners will be disadvantaged by separate Section 8-406/8-503 and Section 8-509 proceedings should also be rejected. First, the record in this case does not support such an argument – no witness testified that landowners are disadvantaged by a separate Section 8-509 proceeding. In fact, the active participation of landowners in both Docket 06-0706 and this docket (including some, like Mr. Bennett, who participated in both) suggests the opposite conclusion is true. Moreover, the Commission found in Docket 06-0706 that:

it appears to the Commission that a Section 8-509 proceeding held after land negotiations *might give landowners greater leverage in those negotiations*. Ameren proposes to seek eminent domain authority from the Commission after attempting to negotiate, in good faith, the purchase of, or access rights to, property along the approved route. To avoid the costs associated with an eminent domain authority proceeding, Ameren (knowing that it already had the ability to file for eminent domain with the circuit court) may offer a landowner more money for their property than Ameren would offer if it already possessed eminent domain authority. Thus, *under Ameren's proposal it appears that landowners may be better served*.

Docket 06-0706, Final Order (March 11, 2009), p. 89 (Emphasis added). Thus, Staff's first contention must be rejected.

Staff's second contention is that, "[t]he language of Section 8-509 establishes no prerequisite for a public utility exercising the power of eminent domain but for the utility having received a Section 8-406 certificate and a Section 8-503 order," so that once a Section 8-503 order is entered, "the litigation process before the Commission is effectively over." (Staff BOE, pp. 3-4.) This interpretation misreads Section 8-509 and is inconsistent with longstanding Commission decisions. Section 8-509 applies to "alterations, additions, extensions or improvements ordered or authorized under Section 8-503," thus requiring that a utility receive a Section 8-503 Order in order to obtain eminent domain. The operative language of Section 8-509, however, states: "*When necessary for the construction* of any alterations, additions,

extensions or improvements ordered or authorized under Section 8-503 or 12-218 of this Act, any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain.” 220 ILCS 5/8-509 (emphasis added). Thus, in addition to showing that “alterations, additions, extensions or improvements” have been authorized under Section 8-503, a utility seeking eminent domain authority must show that eminent domain is “necessary for the construction” of such alterations, additions, extensions or improvements. In other words, the inquiry under Section 8-509 is two-part: a utility must receive a Section 8-503 order and the utility must show that eminent domain is “necessary.” Demonstrating that eminent domain is “necessary” requires evidence that a utility has made reasonable attempts to acquire property rights, but that such negotiations will not be successful and so the necessary land rights can only be obtained by eminent domain. The plain language of Section 8-509 therefore belies the conclusion that the issuance of a Section 8-503 order automatically equals a grant of eminent domain authority.

The Commission’s requirement that a utility address the reasonableness of its negotiations with landowners in order to obtain eminent domain authority is long-standing, irrespective of whether eminent domain authority was sought in conjunction with Section 8-406 and/or Section 8-503 relief. See Interstate Water Co. v. Adkins, 327 Ill. 356, 358 (1927) (Commission order granting eminent domain authority found “an effort had been made by appellant to agree with the owners as to the just compensation to be paid to them for their lands, but it had been unable to reach an agreement with them”); Central Ill. Pub. Serv. Co., Docket 88-0342 (April 18, 1990) (reviewing 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 utility had made “diligent effort to acquire right-of-way

through negotiations with land-owners”); Mt. Carmel Pub. Util. Co., Docket 91-0113 (May 16, 1991) (granting utility eminent-domain power where utility had made diligent efforts to acquire right-of-way through negotiations); Illinois Power Co., Docket 92-0306 (December 16, 1992) (reviewing 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 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); 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). The ongoing validity of this requirement has been confirmed in at least four recent cases (see Petitioners Reply Brief, pp. 7-8). Thus, in Docket 06-0706 (Final Order, p. 88), the Commission found: “...granting relief under Sections 8-406 and 8-503 does not render a later request under Section 8-509 a mere formality.” Likewise, in Docket 07-0532 (Final Order, pp. 13-14) the Commission found: “... this Commission does not agree with Staff’s argument that issuing an order pursuant to 8-503 in essence guarantees eminent domain against landowners and further rejects Staff’s argument that in a later 8-509 proceeding the utility company need only reference the prior Commission order under Section 8-503 to receive eminent domain. To the contrary, *the Commission believes that an 8-503 order does not conclusively render a later 8-509 proceeding a mere formality in obtaining eminent domain against property owners.*” (Emphasis added.).

As Staff’s own Brief on Exceptions (p. 4) acknowledges, the Commission in Docket 07-0310 considered ComEd’s attempts to diligently acquire land rights from landowners. Likewise, in Docket 05-0188, the other docket cited by Staff (Staff BOE, pp. 3-4), the utility 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 the cases cited by Staff support the conclusion that eminent domain authority is not somehow “automatic” following a Section 8-503 Order, but to obtain eminent domain a utility must present evidence regarding negotiations with landowners.

Staff cites to a recent, not yet published, case, Kreutzer, et al. v. Illinois Commerce Commission, --- N.E.2d ----, 2010 WL 3623599 (2nd Dist., September 16, 2010)), for proposition that “[t]he Appellate Court’s analysis of the relationship between Section 8-406, 8-503, and 8-509 is consistent with Staff’s analysis and recommendations.” (Staff BOE, p. 4.) Staff quotes Kreutzer (which is in turn simply quoting Illinois Power Company v. Lynn, 50 Ill. App. 3d 77, 79 (4th Dist., 1977)) as noting, “[Section 8-509] authorizes the utility, armed with the certificate and order, to use the power of eminent domain through the courts to acquire , the land necessary for the project.” 2010 WL 3623599 at 15. Kreutzer, however, does not stand for the proposition Staff cites it for. Kreutzer did not examine or rule on what the proper inquiry by the Commission under Section 8-509 should be - rather the question before the court in Kreutzer was whether the evidence before the Commission in Docket 07-310 demonstrated the need for the amount of a landowner’s property that the Commission's order authorized ComEd to seek through condemnation. 2010 WL 3623599 at 16-17. Specifically, Kreutzer addressed the question of whether the easement width sought by ComEd was supported by the Commission’s order. In providing background for its analysis, the court discussed Sections 8-406, 8-503 and 8-509 of the Act, citing Illinois Power Co. v. Lynn as quoted by Staff (Staff BOE, p. 4). Illinois Power Co. v. Lynn, however, did not examine or rule on the question of what criteria the Commission must

review in granting eminent domain authority either - rather Illinois Power Co. v. Lynn addressed the question of whether a court might review a Commission determination that a utility project was a “public use”. Of significance in Kreutzer, the court stated that “sections 8-406, 8-503, and 8-509 *require distinct showings of necessity*...section 8-509 requires necessity for the ‘means of obtaining easements for right-of-way for the additions and improvements.’” Kreutzer, 2010 WL 3623599 at 16 (emphasis added, internal citations omitted). In other words, even in Kreutzer, the court recognized that the inquiry under Section 8-509 was “distinct” and requires an evidentiary inquiry into the necessity of the “means of obtaining” (i.e., the “means” of eminent domain) easements or rights of way. This inquiry into the utility’s efforts to obtain property rights by negotiation, in order to determine that eminent domain authority is indeed a “necessity,” is the very inquiry the Commission now performs and has performed for decades when considering a request for eminent domain authority. As a result, Kreutzer does not support Staff’s position, but rather confirms that the ALJPO has it right. Staff’s position on the role of Section 8-509 should be rejected.

III. Conclusion

For the foregoing reasons and as set forth in their Brief on Exceptions, Petitioners respectfully request that the replacement language set forth in Petitioners’ Brief on Exceptions be adopted.

Dated: October 14, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Albert D. Sturtevant, an attorney, hereby certify that on October 14, 2010, I served a copy of the foregoing **Reply Brief on Exceptions of Illinois Power Company, d/b/a AmerenIP, and Ameren Illinois Transmission Company** by electronic mail, or where indicated below, via U.S. Mail, first class postage prepaid, from 77 W. Wacker, Chicago, Illinois 60601, to the individuals on the Commission's Service List for Docket 10-0173.

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