

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Enbridge Pipelines (Illinois), L.L.C.,)	
)	
Application Pursuant to Section 8-503, 8-509 and)	
15-401 of the Public Utilities Act/The Common)	07-0446 Reopened
Carrier by Pipelines Law to Construct and Operate)	
a Petroleum Pipeline and When Necessary to Take)	
Private Property As Provided by the Law of)	
Eminent Domain.)	

Reply by Turner Interveners to the Enbridge Response to Motion to Dismiss

The Enbridge Response to the Motion to Dismiss is support for, rather than a rebuttal of the corruption assertions contained in the Motion to Dismiss. Unapologetically, the first known point in time when the corruption commenced is acknowledged by Enbridge in footnote 3 of its Response. The ex parte communication and deception by Enbridge is neither denied nor justified. The quantum of proof of deception and corruption is weighty, placing a heavy burden on Enbridge when responding. Nothing in the Motion to Dismiss was based on conjecture. There is direct evidence of protracted “backroom deal making” by Enbridge’s Chicago based lawyers and the ICC Staff. There is direct evidence of Enbridge’s willful failure to disclose material, case controlling changes in its plans for the SAX to the ICC.

Therefore, what was called for was an Enbridge response was at least an equal quantum of counterbalancing fact, by setting forth a compelling explanation which would legally justify its actions. Instead Enbridge dances around the perimeter. It blames others. It continues to attack both the intelligence and motives of the Turner Interveners. It makes excuses unrelated to its arrogantly flaunted deception and unlawful conduct. It misrepresents fact. And it misstates the

law. Throughout, the Enbridge response is insufficient. If that was Enbridge's best shot, its request to downsize should be denied by the granting of the Motion to Dismiss.

Delay is a Straw Issue

Enbridge's first point is that the "goal" of the Motion to Dismiss is to "delay". This argument is weak, for many reasons. First, it is irrelevant, and has nothing to do with Enbridge/ICC corruption and a failure of Enbridge disclosure.

Second, a dismissal ends the case, creating no delay.

Third, the schedule for this case has ample room for a decision on the Motion to Dismiss without any delay of any other step in the process or a delay in the final decision.

Fourth, it was Enbridge which delayed its request to reopen the 2007 case for 9 weeks after March 11, 2014 when it allegedly ordered the 24" pipe from its Canadian manufacturer. The record has established that Enbridge has refused to produce the purchase order. With Enbridge's well-established, lengthy history of material misrepresentation, accepting March 11th as the day of decision on blind faith requires a degree of credulity which Enbridge expects from the rural Interveners and their counsel. Confirming the day of decision would be entirely unnecessary if Enbridge would simply make a full disclosure in discovery and produce the Marathon contracts and the purchase order. But even giving Enbridge the benefit of the doubt, it is still disingenuous for Enbridge to blame some other party for causing delays after it fiddled around for 9 weeks.

Fifth, it was Enbridge's Chicago law firm, and its many qualified lawyers, which had unexplained excuses for delaying the proffer of the intervener testimony. The Turner Interveners were available on all of the times and 13 days proposed by the ALJ. All of the other lawyers in the case were required to specifically state why they had conflicts but for Enbridge's. Enbridge lawyers were able to delay the Enbridge case by merely "being out of the office", a somewhat

curious response when these same lawyers were seeking a decision on July 18th at the first scheduling conference for the reopened case.

And sixth, just like it created its initial construction schedule, by unilateral act before it had obtained its Certificate of Good Standing, Enbridge has now announced a new construction start date of April 1, 2015. Therefore, the rush to judgment caused by the factually and legally irrelevant construction schedule, can now become a simple but thoughtful analysis, based on all of the pertinent facts, after a full disclosure which is yet to be made. The focus can be sharpened. The issue is both simple and narrow. Whether Enbridge can meet the prerequisites for a Certificate of Good Standing for a 24" pipeline project, which is unlike what Enbridge proposed in 2007, is the question, if this Motion to Dismiss is denied.

Corruption Has Been Established and Has Not Been Rebutted

Next Enbridge says that the factual basis for the Motion to Dismiss is not supported by the record. This argument ignores the sworn testimony of Mark Maple, the production of the Staff Memo to Jerry, the Staff's written disclosure of three conference calls, and the Staff's two attempts to exculpate itself by responding with outrage over the use of the word "grease". Reinforcing what has been disclosed is the failure of Enbridge to provide a single fact which would rebut the claims contained in the Motion to Dismiss.

Since the Memo to Jerry refers to at least one other communication with Jerry, and since it was likely the subject of an immediate responsive communication, coupled with the fact that no one named Jerry participated in the three disclosed conference calls, there were surely other communications. Regardless of how extensive the communication was, no additional evidence of ex parte communication, or the content of the ex parte communication, is needed for an immediate dismissal of the reopened Case 07-0446.

The goal of the Turner Interveners is not to destroy careers, which additional probing might cause. It is however reasonable for the Turner Interveners to expect a fair proceeding, where the outcome was not fixed weeks in advanced of the case ever being filed. The granting of this Motion can correct the wrong created when a case was fixed and end the debate of corruption. Doing so will allow the ICC to maintain its dignity and clear the air. And it will create a just result.

Despite how solidly the written evidence of corruption establishes misconduct, it takes a bit of discussion to assemble. Both the ICC Staff and Enbridge have disregarded their obligations to file documents which completely set forth all of the well-grounded fact and law. Both have aggressively acted to block the Interveners from discovering the truth. However, the documents speak for themselves, and reveal a long pattern of corruption infecting two ICC proceedings.

A chronological reply to the Enbridge claim of insufficient evidence, reveals the following:

On August 19, 2014, Enbridge made a discovery response as follows:

Turner Interveners'' Data Request

10. Please state the shipping commitment volume made by Marathon Oil Company and all affiliates of Marathon Oil Company for the SAX.

Response prepared by:

Name: Randy Rice

Title: Project Director

Address: 4628 Mike Colalillo Drive

Duluth, MN 55807

See IEPC Response to ICC Staff Data Request ENG 1.9 (May 21, 2014). No affiliate of Marathon Oil Company has made a shipping commitment for the SAX pipeline, only an affiliate of Marathon Petroleum Corporation. [Emphasis by Turner Interveners.]

On August 20, 2014, in the following email, the Enbridge response to ENG 1.9 was found, when the ICC Staff explained that it occurred as a result of a Staff request made prior to May 21, 2014:

Cooperation Motion Attachment 4

To: Mercer Turner <mercerturner@aol.com>; Feeley, John <jfeeley@icc.illinois.gov>; Maple, Mark <mmaple@icc.illinois.gov>; Freetly, Janis <jfreetly@icc.illinois.gov>; @ Pliura, Thomas J. <tom.pliura@zchart.com>; @ Knapp, Don <Don.Knapp@mcleancountyil.gov>; @ Holstine, Andrew <aholstine@zrfmlaw.com>

Subject: RE: Enbridge response to a May 21, 2014 Staff Data Request

Date: Wed, Aug 20, 2014 11:46 am

Attachments: 07-0446_ENG_1.9_and_ENG_1.24.pdf (720K)

Mercer,

We are not sure if you were served these or not, but please find attached a copy of the DR responses sent to ENG 1.9 and 1.24 on May 21, 2014. Staff had asked Enbridge to update the responses to ENG 1.9 and 1.24 from the original 07-0446 docket during a phone conversation with Enbridge prior to May 21, 2014.

Jim and John

A certificate of mailing by Enbridge states that these data request responses were mailed by Enbridge to the service list for Case 07-0446 on May 21, 2014, at a time when there was no open proceeding.

Then on August 27, 2014, the Turner Interveners asserted in a filing on e-Docket as follows:

Recent revelations of *ex parte* April, 2014 communications between the ICC and Enbridge, near the time that Enbridge had moved to reopen 07-0446, show that the ICC staff was providing the grease for Enbridge's skids.

On August 29, 2014, the Staff filed on the e-Docket the following Response:

5. Staff learned in mid April 2014 that the Enbridge Illinois intended to construct a smaller pipeline than that approved on July 8, 2009, by the Illinois Commerce Commission ("Commission") in Docket No. 07-0446.

6. Staff and Staff counsel soon thereafter informed counsel for Enbridge Illinois and its representatives that Staff believed Enbridge Illinois would need to amend its certificate granted in Docket No. 07-0446. ...

9. Nothing in the Commission's Rules of Practice nor the Illinois Public Utilities Act prohibits Commission Staff and its attorney "who are engaged in investigatory, prosecutorial or advocacy functions" from talking to parties in pending cases let alone closed cases as Staff did in April 2014 and the months thereafter when it had discussions with Enbridge Illinois. (83 Ill. Admin Code, Section 200.710)

13. Staff suggested to Enbridge Illinois that to support an amended certificate, Enbridge Illinois should address: [followed by 16 issues copied from the Memo to Jerry, hereinafter more fully discussed.]

This August 29, 2014 Staff Response now stands as no less than one of several more discoveries, which comprises an admission of misconduct. It discloses material information, the need to change the Certificate of Good Standing, by the ICC Staff which was not voluntarily made a part of the e-Docket record in the reopened case 07-0446, not disclosed to the service list for either 13-0446 or 07-0446, not disclosed in an e-Docket ex parte filing by the Staff in Case 13-0446, and not reported to the ICC at a time when Case 13-0446 was undecided. It claims that the communication was made during a lawful function, but provides no justification for the ICC Staff unlawfully failing to report on e-Docket any ex parte communications occurring while Case 13-0446 was undecided, a violation of Section 200.710(c). Instead, the Staff commits further deception by omitting the precise timing of the ex parte communication, preserving a plausible implication that the ex parte communications might have commenced after the decision in Case 13-0446. The timing was eventually disclosed on September 15, 2014 by a production requested during the September 11, 2014 hearing, which establishes the beginning point of the known misconduct, disclosing that the ex parte communications began before the decision in Case 13-0446.

On September 7, 2014, the Turner Interveners made the following assertions in an e-Docket filing:

i. The ICC Staff should not have supported eminent domain for either an abandoned project or a newly downsized project which did not have a Certificate of Good Standing, for many reasons. ...

m. All of the private discussions related to neutralizing the valid defense raised by the Pliura Interveners, ie) the absence of a relevant Certificate of Good Standing. There was no reason independently existing other than the Pliura Interveners' defense, which would cause the ICC Staff to determine *sui sponte* that a Certificate of Good Standing was needed for a downsized project with a 24" pipeline. Enbridge had not disclosed its downsized project and pipeline, instead wanting to sneak by.

On September 10, 2014, the ICC Staff made this e-Docket filing:

5. Staff's response: The Turner Interveners fail to identify what was "inappropriate action" by Staff "on several levels." In addition, the Turner Interveners fail to disclose the relevant facts around the Staff filing and the Pliura Interveners filing. The filing Staff made in Docket No. 13-0446, was a response supporting an Enbridge Pipelines (Illinois) L.L.C., n/k/a Illinois Extension Pipeline Company, L.L.C. ("IEPC") motion to strike the reply brief on exceptions of the Pliura Interveners. The Turner Interveners' fail to mention that the basis for the Enbridge Motion was that the Pliura Interveners' reply brief on exceptions was non responsive to the briefs on exceptions filed by IEPC and Staff. The Turner Interveners' fail to acknowledge that Staff and IEPC had only technical corrections/ exceptions to the proposed order. The Turner Interveners' fail to acknowledge that the Pliura Interveners reply brief on exception was in essence a brief on exceptions. The Turner Interveners fail to acknowledge that in effect, the Pliura Interveners' brief was filed out of order. The Turner Interveners' fail to address the fact that the Commission's Rules of Practice, clearly provide that the order of filing briefs after the proposed is issued are first the filing of exceptions and second, the filing of reply exceptions, not two rounds of exceptions. (83 Ill. Admin Code

200.830(d)) In addition, the Turner Interveners' fail to acknowledge that under the Commission's Rules "Parties and Staff shall not raise an argument in their replies to briefs on exception that is not responsive to any argument raised in any other party's or Staff's brief on exception." (83 Ill. Admin Code 200.830(d)).

This Response avoided the point. What was not at issue was a step-by-step technical analysis of procedure. The Turner Interveners had raised a case controlling issue, which was that the ICC Staff supported Enbridge in an action seeking eminent domain after the ICC Staff knew that Enbridge was ineligible to receive a decision for eminent domain for the construction of a 24" pipeline. It made no difference whether the Enbridge decision to downsize its project was technically proper in a Brief on exceptions. The ICC Staff possessed the information. Instead of instantly advising the ICC that Enbridge was ineligible for eminent domain via a Section 200.870 filing, the Staff allowed a corrupt decision to be made by the ICC. It was like capital punishment being completed after the prosecutor received, post-conviction, incontrovertible evidence that the defendant was innocent. Sitting on the truth is simply not the right thing to do. Rather than stopping a corrupt decision unwittingly made by the ICC voting body, ICC Staff chose to hold a series of backroom discussions and deal making, reinforcing Enbridge's plan to deceive the ICC. This was corruption in its purest form.

Then on September 11, 2014 at the live hearing, Mr. Maple's memory failed him 24 times. This was a curious condition for a Staff engineer, especially since patent efforts to conceal the truth will only increase the effort to eventually out the misconduct. Mr. Maple could have also considered in advance of his testimony the history he personally participated in, since the topics of his cross-examination has been well-disclosed in advance. Here is what was provided the ICC Staff in response to an inquiry about whether Mr. Maple would be cross-examined:

Here are areas which will be covered in cross: the ICC knowledge about Marathon's role, whether Marathon has offered its line reservation to the public shippers, whether the ICC gave Enbridge tentative approval, or a suggestion of no opposition, of the diameter change prior to the case being reopened, whether Marathon's full interest was known during the 13-0446 proceeding, whether Enbridge's safety conduct has improved, whether he is aware of a specification question raised by PHSMA regarding the FSP construction, and questions along these lines.

But Mr. Maple was unwilling to forget the conference calls he had been requested to participate in and an email. This then led to the production on September 12, 2014 of the Memo to Jerry and the September 15, 2014 disclosure of three conference calls, with the earliest one occurring before the decision in Case 13-0446. The Memo to Jerry establishes that Enbridge and the ICC Staff were engaged in case staging, to fix the outcome in Enbridge's favor in reopened 07-0446, a direct violation of Standards of Behavior for Commissioners and Commission Employees in Sections 100.20 (a) and (b) (2), (4) and (6) and Rules of Practice Section 200.25 (a). It does not speak of any investigatory, prosecutorial or advocacy functions. It was not done to confirm the truth or the existence of the prerequisites of eligibility. It does not test the facts against the legal concepts. It was not disclosed to the other parties in either Case 07-0446 or 13-0446. When the ICC Staff makes a backroom deal, and then follows this up with conduct designed to secure a favorable Enbridge decision, neither the ALJ nor the voting members of the ICC can be expected to either detect the corruption or be persuaded by Intervener opposition.

The highlighted Memo to Jerry, which follows, is incontrovertible evidence of a conspiracy to fix the outcome of a case, weeks before it was filed. Instead of seeking the facts, or testing the facts, a case was corruptly staged to fix the outcome. Obviously a part of the backroom deal was that the ICC Staff would not investigate or consider any issue which would impair the outcome. This is why the ICC Staff made no effort to consider the issue of whether Marathon's contract made the SAX line ineligible, because it became a private contract line.

Feeley, John

From: Feeley, John
Sent: Wednesday, April 30, 2014 10:57 AM
To: @ Ambrose, Gerald; @ Reed, G. Darryl; @ Thomas, Dale
Cc: Olivero, James
Subject: 13-0446/07-0446, Enbridge Pipeline

Jerry, Dale and Darryl

Set forth below are topics which Staff believes Enbridge needs to address in testimony regarding Enbridge's plan to amend its original certificate. As we mentioned to Jerry, Staff would like a preview of the filing.

Also, Staff believes all landowners along the route should be served with the filing(s).

John and Jim.

LIST OF TOPICS TO BE ADDRESSED BY ENBRIDGE

- Specify the exact size and characteristics of the pipe (24" diameter)
- Explain why a 36" pipe is now too large.
- Explain why a 24" pipe is the correct size.
- Explain why a pipe smaller than 24" would not be suitable.
- Explain the benefits of building a smaller pipe as opposed to over sizing it for future expansion.
- Will the 24" line transport less product? If so, how does that affect Enbridge's demand study?
- Will Enbridge have to change any of its other permits from other agencies? What about the AIMA?
- Has Enbridge lost shippers since the '07 order was issued? If so, how many and are the remaining shippers firm?
- Compare shipping commitments from 2007 case to current request (volumes not names)
- Does changing the pipe size affect any of the easements currently obtained or do they have more flexible language?
- Does changing the pipe size affect any of the payouts to landowners?
- Will the smaller pipe be constructed, operated, or maintained in a different fashion than the original 36" line?
- Explain if the number or sizes of compressors are affected by the pipe size change.
- Explain if the product being shipped changed (more Bakken versus oil sands) and any operational issues with this change.
- Explain if operating pressure of pipeline has changed due to use of smaller diameter pipe.
- Discuss or commit to safety enhancements originally discussed in Docket No. 12-0347.

The only way the ICC Staff could have investigated the Marathon issue was to engage in even more unlawful ex parte communication. However, despite being made aware of this issue in early August, the Staff did not ask what the terms of the Marathon/Enbridge relationship was, with respect to the amount of a guaranteed shipping space for Marathon. Compounding its corrupt role even further, however, was coming to a conclusion about this issue in testimony. The only evidence in the record was what the Interveners were able to uncover despite being restrained in discovery and by time. The Staff's written testimony was filed on e-Docket at a time when it had no idea whether the Marathon contract guaranteed Marathon all of the shipping space on the SAX. However, knowing for sure would have been as easy as falling off a log. All the Staff had to do was ask, and the entire terms of the Marathon contract would have been disclosed, even if a Motion to Compel was needed.

It cannot be denied that the Staff has a much wider berth to operate from, than the Interveners. The Staff's actions are case controlling. In this case, the ICC Staff did not conduct a smidgeon of discovery. This inactivity suggested that there were no issues to litigate, which caused the Interveners to be disregarded, and unjustly restrained. The collective efforts of the Interveners amounted to 8 separate Motions designed to either compel the production of information or to give them more time to conduct discovery. All of these Motions were premised on discovering what the terms of the Marathon/Enbridge contract were, especially since Marathon became a 35% owner of the SAX on August 1, 2014, in addition to being the anchor shipper. Marathon's capital contribution was nearly \$300,000,000.00. Except for a favorable decision on three interrogatories, all 8 motions were denied. The potential for the anchor shipper to become the sole shipper was never explored, except by the Interveners, whose hands were tied behind their backs.

Enbridge's long-held reasons to abandon its plans previously approved when receiving its 36" pipeline Certificate of Good Standing was the major theme of its case in reopened Case 07-0446. The allegedly overwhelming public demand for its proposed project in July of 2008 when Enbridge's high ranking employees testified in person in the first official ICC hearing for 07-0446, vanished days later, according to Enbridge, when in August of 2008 the USA economy suffered an economic reversal due to the home mortgage crisis. Whether Enbridge recognized this in 2008 is not the point. However, what is certain is that well before the decision in case 13-0446, Enbridge knew that common carrier demand for a 36" pipeline project did not exist, whether the economic downturn caused a diminution of crude oil refining in the USA or not. Enbridge had conducted three failed Open Seasons to measure the demand. Yet, despite the horribly negative results of the Three Open Seasons, Enbridge did not disclose to the ICC during 13-0446 that its three Open Seasons were a total bust. Marathon's contractual commitment came before any of the three Open Seasons, but this too could not be disclosed in detail because it would reveal that Marathon's only interest was as a private shipper, not as a common carriage shipper. Therefore, the ex parte communications began while 13-0446 was undecided, when Enbridge was engaged in material deception before the ICC with respect to major elements of its intentions, including a decision to order 24" pipe for construction of the SAX, when Enbridge did not have a Certificate of Good Standing for a 24" pipeline, and after which no ex parte disclosure in the e-Docket for case 13-0446 was made by the ICC Staff. These facts summarize why the decision in Case 13-0446 was corrupt, even though the voting body of the ICC had no way to know it and were entirely innocent, when voting to grant eminent domain for a then 5-year-old Certificate of Good Standing which was not going to be used. The misconduct was entirely confined in two parties, Enbridge and the ICC Staff.

The reason for failing to file an e-Docket report of ex parte communication was consequential, albeit an illegal one. Not only was the Staff then required to disclose there were ex parte communications, it was also required to disclose the subject matter during a pending proceeding. 200.710(c). But, the disclosure of the subject matter would directly conflict with the Staff's unconditional and absolute support of Enbridge's application for eminent domain. Therefore, the ICC Staff's conduct became illegal, by promoting a corrupt outcome in both Case 13-0446 and the reopened Case 07-0446. The reopened Case 07-0446 was a product of the unreported ex parte communications commencing during Case 13-0446, which would fix its outcome. And the decision the ICC unwittingly made in Case 13-0446 was corrupt because at no time did either Enbridge or the Staff report to the ICC that Enbridge was ineligible for eminent domain authority for a 24" pipeline project, for which Enbridge had made a final decision to construct.

The 13-0446 case should have been dismissed, since a decision to grant eminent domain authority for an undisclosed project is improper. It is axiomatic. Enbridge is not a sovereign unit of government. While Enbridge might be able to claim a proprietary interest in a certificate of good standing for a completed operating project, Enbridge possessed no proprietary claim to eminent domain authority. This is reserved to sovereign units of government. For Enbridge, authority to exercise eminent domain could only attach to a specific project, requested either simultaneously in an application for a certificate of authority or subsequently thereto, not beforehand. The major issue when the ex parte communication began was not a rebound of the US economy, or the demand for light crude, or whether Enbridge had a commitment to pipeline safety. The important issue was whether or not Enbridge was going to construct a 36" pipeline. A 36" pipeline has a volume which is greater than two 24" pipelines, which an ICC lawyer might

not instantly recognize. But the engineer, Mr. Maple certainly did. A de minimus change was not the case, when downsizing from 36” to 24”. Now armed with this knowledge, the Staff should have done the right thing, and move for the dismissal of case 13-0446. Failing to do this was an outrageous disregard of the Public Trust. It was also disgustingly disrespectful to the ALJ and the ICC voting body to allow them to make decisions in a case corrupted by back room discussions, and illegal conduct. Both depend on the ICC Staff and the Applicant Enbridge to be honest.

Instead of investigating, the ICC Staff was conspiring with Enbridge’s Chicago lawyers to create two corrupt ICC decisions. Fixing the outcome of two cases, while the worse part of the corruption, was not the end of the ICC Staff corruption. Once the revelations about Marathon became known, the ICC Staff conducted no investigation. And doing so created a trap, which further established the corruption between Enbridge and the ICC Staff. Both a certificate of good standing and eminent domain are reserved, in this case, for a common carrier by pipeline. A common carrier by pipeline is one who provides nondiscriminatory carriage. The Marathon shipping contract and the tiny shipping contract of the nameless shipper created anything but common carriage shipping. The Enbridge contractual guarantees of shipping space are discriminatory. However, the most curious part of the ICC Staff conduct, other than its failure to investigate what Marathon and Enbridge had contracted to create, was the ICC Staff testimony on this topic. It was impossible for the ICC Staff to come to any well-reasoned conclusion about the Marathon shipping arrangement without knowing what the terms of the contract were and what the volume of the shipping commitment and reciprocal guarantee by Enbridge were. It was also impossible for the ICC Staff to know whether any common carriage shipping would occur in the future without knowing what the results of the three Enbridge Open Season were. These facts were disclosed for the first time at the hearing on September 11, 2014, although no one was

allowed to probe very deeply, and the full extent of the Marathon arrangement has been hidden. Despite this not being revealed until September 11, 2014, the ICC had reached its conclusion, that the shipping contracts and the absence of any demand for common carrier shipping was no impediment to qualification. The fact that in 2007, the SAX pipeline was going to be a common carrier pipeline has no relevance in 2014. The 2014 project now the subject matter of reopened 07-0446 is a new project. Enbridge does not own the right-of-way for major sections of the proposed route. No construction has occurred to put a new Enbridge pipeline in the ground. The ICC Staff decision on the common carriage issue is the product of nothing less than a willingness to overlook a material deficit in meeting the fundamental prerequisites for a certificate of good standing. This major issue was overlooked because of the underlying corruption to fix the outcome. The ICC Staff decision regarding common carriage certainly has no basis in fact or law and could not have been reasonably made before September 11, 2014 without the facts.

Exoneration of the ALJ

While the ALJ can see plainly the assertions made in the Motion to Dismiss, Enbridge is false when it contends that the ALJ was accused of wrongdoing. In fact, the Motion to Dismiss made multiple attempts to exclude the ALJ from the corruption.

Significance of Case 13-0446

The exclusion of landowners in case 13-0446 establishes how inverted the entire process has become due to Enbridge manipulation, and Enbridge's ability to get the ICC to stand on its head. One must also have keep his or her eye on the ball to understand what was involved. Eminent domain is rooted in both the US and Illinois Constitution, not in the Common Carrier by Pipeline Law. While the ICC has a wide latitude to establish procedural precedents for the amendment of existing Certificates of Good Standing, it has no such control over eminent domain.

220 ILCS 5/8-509.5. Even though the focus seems to be on a Certificate of Good Standing for a 24” pipeline, the success of receiving a Certificate of Good Standing is to Enbridge a hollow victory, if it also does not have attached to it the authority to exercise eminent domain. Therefore, consideration of the due process rights of the landowners who are potentially subject to eminent domain must be considered. While technically the reopened Case 07-0446 is not an eminent domain case, Enbridge and the Staff view it as such. A decision made relative to a Certificate of Good Standing in reopened 07-0446 based on new material information revealed for the first time in reopened 07-0446 however neither cures the defects contained in case 13-0446, nor has a relation back to case 13-0446. The affected landowner have received no notice that reopened 07-0446 is an eminent domain case, as required by 220 ILCS 5/15-401(d).

Enbridge intentionally sought its decision for eminent domain for a Certificate of Good Standing for a 36” pipeline, intentionally avoiding any disclosure of its plan to downsize. In the context of a common carrier by pipeline, eminent domain is not a discretionary right which can be exercised for any new subsequent project created by the whims of a pipeline company, without a public hearing where affected landowners are invited to participate in a hearing set for consideration of the issue of eminent domain. The substantive basis for an authority to exercise eminent domain are not presumed in an ICC proceeding. It must be supported by the evidence. The statute is unambiguous. The authority to exercise eminent domain can be requested only in two circumstances. These are simultaneously with an Application for a Certificate of Good Standing or subsequently thereto. 220 ILCS 5/15-401. Since there is no request now pending in reopened 07-0446 for eminent domain authority, Enbridge will have abandoned its authority to exercise the power of eminent domain earlier approved in case 13-0446, if it indeed proceeds with a 24” pipeline project.

ICC Procedures Cannot Diminish Substantive Illinois Eminent Domain Law

While the factual considerations for an application for a Certificate of Good Standing and eminent domain authority are described in Section 15-401 to be identical, the legal basis for each is not. 220 ILCS 5/15-401. Eminent domain is improper in Illinois for limited private purposes. *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 199 Ill.2d 225, 768 N.E.2d 1 (2002). On the other hand, a Certificate of Good Standing is issued to a one engage in common carriage. 220 ILCS 5/15-201. Common carriage is a nondiscriminatory transportation service. *Beatrice Creamery Co. v. Fisher*, 291 Ill.App. 495, 10 N.E.2d 220 (4th Dist. 1937).

While in the instant case, there is no evidence of any demand for the common carriage transportation of crude oil, which should block the approval of the 24" diameter pipeline project, at this stage, the legal analysis must go deeper. There could be a circumstance when eminent domain would be improper, notwithstanding evidence of common carriage shipping serving a narrow private business purpose supporting a properly approved Certificate of Good Standing. Such would be the case in the reopened 07-0446 if Marathon proposed to use the SAX pipeline and forfeited its contractually created guarantee of space, and instead was treated like a common carrier. If the SAX was primarily for a narrow business purpose, whether for a common carrier shipper or a contract shipper, eminent domain would be improper.

More improper would be an ICC procedural process to transfer the eminent domain authority granted in case 13-0446 for a failed 5-year-old project described in the original Application and decision in Case 07-0446 to the new pipeline project which is the subject matter of reopened 07-0446, without prior notice and a hearing. Such a result would circumvent *Southwestern Illinois Development Authority* and both the US and Illinois Constitution. An ICC

hearing in a proper circumstance could result in the ICC approving eminent domain authority. But eminent domain authority could never be transferred from project to project by the ICC through the accepted practices authorizing changes to an existing operating pipeline, where the acquisition of the right-of-way is not an issue.

The reason for this is obvious. When a pipeline company makes changes to an operating pipeline, the ICC and pipeline company are changing an infrastructure owned by the pipeline company existing within a real estate interest owned by the pipeline company, pertaining to an infrastructure owned by the pipeline company. On the other hand, when eminent domain authority is considered, land rights, protected by both the US and Illinois Constitution from innocent members of the public are a concern. The ICC regulates the first and the Constitution protects the latter. Therefore, it would violate the due process rights of the affected landowners for a hearing announce for a limited purpose to amend a Certificate of Good Standing is used to sneak in an entirely new project, with one or two contract shippers, to avoid consideration of whether eminent domain would be proper for the new project, under *Southwestern Illinois Development Authority*. Amending the eminent domain authority also exceeds the scope of 220 ILCS 5/8-503, which is the basis for this proceeding.

The case of *Talty v. Commonwealth Edison Company*, 38 Ill. App. 3d 273 (1976) is therefore not pertinent to the existing case because it is not factually similar. *Talty* not only provides no defense to corruption, it also is easily distinguished. In *Talty*, Commonwealth Edison was intensifying its use of an existing right-of-way which it owned and which had existed for approximately 50 years. Had the facts in *Talty* instead been for an entirely new project, for a right-of-way not yet acquired, the landowner would have prevailed, if the construction was not adhering

to an existing Certificate of Good Standing and existing authority to exercise eminent domain which attached to the Certificate.

Neither are the changes approved by the ICC for the existing and operating 42” Southern Access pipeline running between Superior, Wisconsin and Pontiac, Illinois precedent for this case. The addition of pumps to increase its capacity to 1.2 million barrels per day was for a pipeline in a right-of-way entirely owned by Enbridge, and for an operating system, which provides nondiscriminatory common carriage. The ICC procedure for modification of Certificates of Good Standing to allow material changes to an existing operational pipeline, is not available in the instant case. The statute which allows for a request of eminent domain authority requires notice to the affected landowners. The addition of pumps for the 42” line north of Pontiac did not involve the exercise of eminent domain authority.

Corruption is Not Avoided by Unrelated Acts and Intentions

The fact that Enbridge was publicly acknowledging that the SAX line might have various diameters at one or many times prior to or during case 13-0446 does not acquit it of corruption. It was Enbridge’s Chicago lawyers, not its public relations department, which conspired with the ICC Staff. Publishing comments which described an uncertain pipeline diameter in trade publications is not the same thing as asserting it in an ICC proceeding.

Falsely Asserted Expectations of Enbridge Do Not Rebut Corruption

Furthermore, blaming the ICC Staff for not telling Enbridge that it did not have inherent authority to change the pipeline diameter until April, 2014 is not a defense to corruption. Instead it is a falsely stated assertion. Enbridge should not have had any expectation that the ICC Staff would be advising it about procedures to lawfully change the diameter for its proposed new pipeline project, when the ICC had not been informed by Enbridge that Enbridge had made a final

decision on March 11, 2014 to change the pipeline diameter. It was Carlisle Kelley who told the ICC, not Enbridge, of the downsized project.

Significant changes in its project would never be accompanied with by an authority to exercise eminent domain, without a new hearing and notice to the affected landowners. Eminent domain is not a property right like a Certificate of Good Standing. Furthermore, the ICC Staff had at least two procedural options when at the 11th hour the truth about the pipeline diameter of the SAX line was revealed before the decision in Case 13-0446. It is also not persuasive that neither Enbridge's Chicago lawyers nor ICC counsel Feeley were able recognize case controlling factual substance existing above the procedural morass. There could have been either a Section 200.870 application or a simple Section 200.190 Motion to Dismiss under the Rules of Practice. Therefore, the existing procedural constraints of the Rules of Practice did mute either Enbridge or the ICC Staff and do not create a defense to corruption for either. And Enbridge's guilt has more mass. Enbridge was sitting on a March 11, 2014 decision at the time it filed a proposed Eminent Domain Order to the ICC, which was substantively misleading with respect to a case controlling material fact, ie) the downsizing. The Enbridge Response at no time attempts to justify its dishonesty before the ICC in Case 13-0446, other than to say it wanted to wait until the last minute to make the decision about the downsizing. But this is not a defense to the submission of a misleading order to the ICC, since Enbridge has a full 7 weeks to inform the ICC of what the real facts were. When the decision was made, the ICC should have been immediately informed. The 11th hour disclosure by an intervener would then not have led to corruption in two ICC proceedings.

FERC Does Not Create a Defense to Corruption

FERC has no authority over Enbridge's construction of a new pipeline or to change its 2007 plans for the SAX, other than for rate setting. No federal preemption exists over the Illinois

state law procedure providing a path for Enbridge to eminent domain authority. FERC admits to such even as late October 3, 2014. <http://www.ferc.gov/industries/oil/enviro.asp>. If eminent domain was not the sole goal of Enbridge, there would be no ICC action requested. Enbridge would claim interstate commerce law allows it to circumvent the ICC.

The Illinois Law of Common Carriage Is a Case Controlling Legal Issue

Illinois law has long held that the ICC does not serve private purposes. The Illinois Supreme Court in *Roy v. Illinois Commerce Comm'n ex rel. North Shore Connecting R.R.*, 322 Ill. 452, 153 N.E. 648 (1926) said it this way:

It is not consistent with the purpose of the Public Utilities Act (Smith-Hurd Rev. St. 1925, c. 111 2/3) 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.

This describes what has been missed in the case by a corrupt ICC Staff and an Applicant who engages in deception and a failure to disclose case controlling fact. Based on the inadequate disclosures by Enbridge, for which there should be no need to request, if Enbridge would simply be honest, then coupled with an ICC Staff which agreed to the outcome before the case was even filed, what Marathon purchased for \$300,000,000.00 will never be known. However, for the purpose of granting this Motion to Dismiss, it is not necessary. The whole process of avoiding case controlling issues has a sufficient quantum to justify dismissal.

Ex Parte Discussion Have Risen to a Level to Deny the Interveners a Fair Hearing

Although arising in another circumstance and venue, the analysis used in *Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority*, 685 F.2d 547 (C.A.D.C., 1982) provides one appropriate analysis upon which to base a dismissal:

Under the case law in this Circuit, improper ex parte communications, even when undisclosed during agency proceedings, do not necessarily void an agency decision. Rather, agency proceedings that have been blemished by ex parte communications have been held to be voidable. See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 58 (D.C.Cir.), cert. denied, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977); *United Air Lines v. CAB*, 309 F.2d 238, 240-41 (D.C.Cir.1962); *WORZ, Inc. v. FCC*, 268 F.2d 889, 890 (D.C.Cir.1959). In enforcing this standard, a court must consider whether, as a result of improper ex parte communications, the agency's decision making process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency was obliged to protect. In making this determination, a number of considerations may be relevant: the gravity of the ex parte communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefited from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose. Since the principal concerns of the court are the integrity of the process and the fairness of the result, mechanical rules have little place in a judicial decision whether to vacate a voidable agency proceeding. Instead, any such decision must of necessity be an exercise of equitable discretion.

As explained earlier, the conduct of the ICC Staff in this case to fix the outcome and to then conduct themselves in a manner to have the decision made consistent with ex parte communications, has unreasonably constrained the Turner Interveners in discovery, in seeking the approval of schedule extensions to conduct further investigation, and in being persuasive with the ICC that the existing plan of Enbridge is far more than a new concept for light crude oil with a smaller diameter. Rather than common carriage, the proposed project is predominantly for a single shipper who was willing to pay \$300,000,000.00 for this right. Approving this is not a purpose of the ICC. But for the purpose of this Motion to Dismiss, the important consideration is not approval but investigation and evaluation by the ICC Staff. This did not occur because of a plan with the Applicant to fix the decision in the case.

Wherefore, the Turner Interveners pray that this matter be dismissed permanently and that Enbridge be forever barred from seeking approval for the SAX project.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused copies of this Reply to be served on the ICC service list attached hereto for this case by email or US postal delivery on this 3rd day October, 2014.

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