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**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Extension Pipeline Company, L.L.C.	:	
	:	
	:	
Application pursuant to Sections 8-503, 8-509 and 15-401 of the Public Utilities Act – the Common Carrier by Pipeline Law to Construct and Operate a Petroleum Pipeline and when necessary, to Take Private Property at Provided by the Law of Eminent Domain.	:	Docket No. 07-0446 (Reopen)

**INITIAL BRIEF ON REOPENING
OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION**

Staff of the Illinois Commerce Commission (“Staff”), by and through its counsel, pursuant to Section 200.800 of the Rules of Practice (83 Ill. Adm. Code 200.800) of the Illinois Commerce Commission (“Commission”), respectfully submits its Initial Brief on Reopening (“IB”) in the above-captioned matter.

I. INTRODUCTION/STATEMENT OF THE CASE

The Commission reopened this matter for a very limited purpose. That purpose being to make a determination as to whether it should amend the certificate in good standing (“CGS”) granted in Docket No. 07-0446 to Enbridge Pipelines (Illinois) L.L.C. (“Enbridge Illinois,” “Petitioner” or “Applicant”) now known as Illinois Extension Pipeline Company (“IEPC”)¹ to construct, operate, and maintain the Southern Access Extension

¹ Based upon a review of public records of the Illinois Secretary of State, it is Staff’s understanding and belief that Enbridge Illinois merely changed its name to that of Illinois Extension Pipeline Company and that Enbridge Illinois is legally the same entity as Illinois Extension Pipeline Company.

Pipeline (“SAX” or “SAX pipeline”) as a pipeline 24 inches in diameter instead of a pipeline 36 inches in diameter.

Enbridge Illinois relied upon its Verified Motion to Reopen and Amend and its Verified Reply to Responses to its Motion to support its request. Staff filed the direct testimony of Staff witness Mark Maple. The Intervenors, Pliura and Turner, filed limited testimony. While the scope of this matter is limited based on the ruling in the Notice of Corrected Commission Action of June 27, 2014, the Pliura Intervenors and Turner Intervenors have refused to acknowledge that fact. Both Intervenors ignore prior case law and Commission rules of practice in their filings. The Turner Intervenors rather than base their case in opposition to the Enbridge Illinois’s request upon facts, have chosen the tactic of repeatedly attacking Staff, the ALJ, and the Commission in their filings. The Turner Intervenors’ arguments are all based upon false accusations and are unsubstantiated. The Turner Intervenors state among other things that Staff is corrupt, greased the skids and made a backroom deal with Enbridge Illinois. The Turner Intervenors also attack the Commission claiming that the narrow scope of Reopened 07-0446 is a product of backroom dealmaking. (Turner September 15, 2014 Motion to Dismiss, p. 7, par. 9)

Staff is confident that after the Commission reviews the actual facts in this matter, it will reject the Pliura Intervenors’ and Turner Intervenors’ arguments and will adopt the recommendation of Staff witness Mark Maple that the order and CGS previously granted by it, be amended as requested by Enbridge Illinois.

II. PROCEDURAL BACKGROUND

A. Certificate Awarded in Docket No. 07-0446

On August 16, 2007, Enbridge Illinois filed, with the Commission, an application for the issuance of a Certificate in Good Standing (“CGS”) pursuant to Section 15-401 of

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the Common Carrier by Pipeline Law, 220 ILCS 5/15-401(a) (“CCPL”) which is part of the Illinois Public Utilities Act, 220 ILCS 5/1-101, et seq. (“PUA” or “Act”). The application also requested authorization under Section 8-503 of the PUA to construct the pipeline facilities described in the application and authorization under Section 8-509 of the Act, when necessary for the construction of said pipeline facilities, to enter upon, take, or damage private property in the manner provided by the law of eminent domain. (Petition, 1)

On July 8, 2009, Enbridge Illinois’ petition was granted in part and denied in part.

The Commission’s order stated in part that:

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Enbridge Pipelines (Illinois) L.L.C. is hereby, granted a Certificate in Good Standing pursuant to Section 15-401 of the Common Carrier By Pipeline Law to operate as a common carrier by pipeline and that said Certificate in Good Standing shall be the following:

CERTIFICATE IN GOOD STANDING

IT IS HEREBY CERTIFIED, subject to the conditions imposed in this order, that Enbridge Pipelines (Illinois) L.L.C. is authorized, pursuant to Section 15-401 of the Common Carrier By Pipeline Law, to construct, operate and maintain the proposed 36-inch pipeline as described in this order and to operate as a common carrier by pipeline within an area sixty feet wide and extending approximately 170 miles along the route identified in Attachments A and B to the petition in Docket No. 07-0446.

IT IS FURTHER ORDERED that the proposed pipeline is necessary and should be constructed, to promote the security or convenience of the public, pursuant to Section 8-503 of the Public Utilities Act.

IT IS FURTHER ORDERED that Petitioner’s request under Section 8-509 of the PUA for authorization “to take or damage private property in the manner provided for by the law of eminent domain” is not granted in this docket.

(Enbridge Illinois, ICC Order Docket No. 07-0446, 70, (July 8, 2009) (“July 8, 2009 Order”) (emphasis added))

B. Enbridge Illinois Motion to Reopen and Amend Order

On May 19, 2014, pursuant to Section 10-113 (220 ILCS 5/10-113) and Section 8-503 (220 ILCS 5/8-503) of the Public Utilities Act, Enbridge Illinois filed a motion to (1) reopen Docket No. 07-0446 and (2) to amend the CGS granted in Docket No. 07-0446 to Enbridge Illinois to construct, operate, and maintain the SAX pipeline as a pipeline 24 inches in diameter instead of a pipeline 36 inches in diameter per the July 8, 2009 Order. (Enbridge Illinois Motion to Reopen and Amend)

C. JUNE 27, 2014 Commission Action

On June 27, 2014, the Commission issued the following notice:

Notice is hereby given that the Commission in conference on June 26, 2014, GRANTED the Motion to Reopen filed by Enbridge Pipelines on May 19, 2014.

D. JUNE 27, 2014 Corrected Commission Action

On June 27, 2014 the Commission issued a Notice of Corrected Action to the parties which stated:

Notice is hereby given that the Notice of Commission Action previously served today in the above captioned docket was incomplete. It should have stated the following:

Notice is hereby given that the Commission in conference on June 26, 2014 REOPENED the proceeding, pursuant to Section 10-113(a) of the Public Utilities Act and 83 Ill. Adm. Code 200.900, for the limited purpose of allowing Parties to address whether the Order should be amended in the manner described in the Motion to Reopen and Amend Order Concerning Diameter of the Southern Access Extension Pipeline filed by Enbridge Pipelines (Illinois) L.L.C. on May 19, 2014.

E. Motions

Numerous motions have been filed by the parties in this proceeding. While the Commission's rules certainly allow parties to file motions as they see appropriate and do not put limitations on the number of motions that can be filed (83 Ill. Admin. Code Section 200.190), those same rules do not permit parties to make unsupported false allegations against others in their motions as the Turner Intervenors have done repeatedly in this proceeding. The Turner Intervenors have filed several motions attacking the integrity and competence of Staff, Staff counsel, the ALJ, and even the Commission. A partial list of the unsubstantiated accusations by the Turner Intervenors includes the following:

- **Staff is greasing the skids for Enbridge** (Turner August 27, 2014 Motion to Compel, Vacate, Continue and Suspend, p. 3);
- **Staff is laying down for Enbridge** (Turner September 7, 2014 Motion to Cancel Hearing and Revise Schedule, p. 4);
- **ICC Staff turned its back on the public** (Turner September 15, 2014 Motion to Dismiss, p. 5, par 7);
- **Staff back room deal** (Id.);
- **[Turner Intervenors] know with certainty a backroom deal was made.** (Id.);
- **The ALJ was unwilling to permit a thorough investigation.** (Id., p. 6, par 8);
- **While making no suggestion that the ALJ was also in the backroom** (Id.);
- **The narrow scope of Reopened 07-0446 is another product of backroom deal making** (Id., p. 7, par. 9);
- **Participation in backroom dealmaking is heavyweight misconduct.** (Id., p. 8, par. 11);

- **The outcome of Docket No. 07-0446, Reopened was fixed** (Turner October 6, 2014 Reply to Staff Response to Turner September 15 Motion to Dismiss, p. 2);
- **Even though Chicago has a well-deserved reputation for corruption in a vast range of governmental decision-making processes, there can be no assertion made at this point that the corruption discovered in discovery in the reopened Case 07-046 had a criminal implication. A criminal intent also cannot be ruled out either.** (Id.); and
- **The ICC Staff and Enbridge conspired in the backroom.** (Id., p. 7)

While Staff has responded to these baseless, false and reckless attacks by the Turner Intervenors and those responses either in this IB or Staff's previously filed responses to the various motions are part of the record in this matter, the Commission and ALJ have not had an opportunity to have their say and respond to the claims against them in the record. While the ALJ and Commission certainly do not need Staff to tell them when or how they should defend their honor against these unsupported accusations made against them by the Turner Intervenors, Staff recommends that the Commission and ALJ do so, in the Administrative Law Judges Proposed Order and Commission Final Order in this matter.

F. Evidentiary Record and Hearings

Prefiled direct testimony was offered into evidence by Staff, the Pliura Intervenors and the Turner Intervenors. Enbridge Illinois offered no pre-filed direct testimony but instead relied upon its Motion to Reopen and Amend (Ex. 1) and its Reply on that Motion (Enbridge Ex. 1 and 2, respectively) (Tr. 1114)² to support its request. Enbridge Illinois did make available Mr. Lee Monthei, Vice-President of Execution of

² At the September 11, 2014 hearing, Enbridge Illinois also sought admission of Enbridge Illinois' response to data requests from the Pliura Intervenors and the Turner Intervenors. At the hearing on October 2, 2014, Enbridge Illinois subsequently withdrew its motion to admit those data request responses.

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Major Projects in the U.S., for cross examination. Enbridge Exhibits 1 and 2 were admitted into evidence without objection on September 11, 2014. (Tr. 1130-1131)

Staff offered the direct testimony on reopening of Mr. Mark Maple, an engineer in the Energy Engineering Program in the Safety & Reliability Division of the Commission. (Staff Ex. 4.0) At the hearing on September 11, 2014, Mr. Maple was made available for cross examination and in fact, was subject to extensive cross examination by the Pliura Intervenors and the Turner Intervenors' counsel. Mr. Maple's testimony was subsequently admitted into evidence on October 2, 2014 without objection. (Tr. 1368)

Pliura Intervenors offered the testimony of Carlisle Kelly. (Pliura Intervenors Exhibit 1.0) This testimony was admitted into evidence on October 2, 2014, but is subject to a pending Motion to Strike. (Tr. 1385-1386)

Turner Intervenors offered the testimony of Timothy C. Kraft a farm owner. (Turner Intervenors Exhibit 1.0) This testimony was admitted into evidence on October 2, 2014, but is subject to a pending Motion to Strike. (Tr. 1375)

III. STATUTES, COMMISSION RULES AND REVELANT CASE LAW

The following sections from the PUA, the Illinois Administrative Procedure Act, Commission rules and case law addressing: (a) CCPL, (b) Ex parte Communications, and (c) reopening of records, are relevant and will be of use for the Commission when reviewing Enbridge Illinois' request in this matter and the reading of parties briefs in this reopened matter.

A. 220 ILCS 5/15-101

Section 15-101 of the PUA provides as follows:

Except to the extent modified or supplemented by the specific provisions of this Article, Articles I to IV,¹ Sections 5-101, 5-201, 5-202, 5-203, 8-101, 8-503, 8-509, 9-221, 9-222, 9-222.1, 9-222.2, and 9-250, and Article X are fully and equally applicable to common carriers by pipeline, their rates and services, and the regulation thereof.

(220 ILCS 5/15-101)

This section of the PUA makes it clear that not all sections of the PUA apply to CGS that are granted under the CCPL. In particular, the requirement under Section 8-406(f) that certificates be exercised within 2 years from the grant thereof or else they are null and void (220 ILCS 5/8-406(f)) is not among the sections of the PUA applicable to CCPL CGS such as the Enbridge Illinois' CGS.

B. 220 ILCS 5/15-401

Section 15-0401 of the PUA provides as follows:

(a) No person shall operate as a common carrier by pipeline unless the person possesses a certificate in good standing authorizing it to operate as a common carrier by pipeline. No person shall begin or continue construction of a pipeline or other facility, other than the repair or replacement of an existing pipeline or facility, for use in operations as a common carrier by pipeline unless the person possesses a certificate in good standing.

(b) Requirements for issuance. The Commission, after a hearing, shall grant an application for a certificate authorizing operations as a common carrier by pipeline, in whole or in part, to the extent that it finds that the application was properly filed; a public need for the service exists; the applicant is fit, willing, and able to provide the service in compliance with this Act, Commission regulations, and orders; and the public convenience and necessity requires issuance of the certificate. Evidence encompassing any of the factors described in items (1) through (9) of this subsection (b) that is submitted by the applicant, any other party, or the Commission's staff shall also be considered by the Commission in determining whether a public need for the service exists under either current or expected conditions. The changes in this subsection (b) are intended to be confirmatory of existing law.

In its determination of public convenience and necessity for a proposed pipeline or facility designed or intended to transport crude oil and any alternate locations for such proposed pipeline or facility, the Commission shall consider, but not be limited to, the following:

(1) any evidence presented by the Illinois Environmental Protection Agency regarding the environmental impact of the proposed pipeline or other facility;

(2) any evidence presented by the Illinois Department of Transportation regarding the impact of the proposed pipeline or facility on traffic safety, road construction, or other transportation issues;

(3) any evidence presented by the Department of Natural Resources regarding the impact of the proposed pipeline or facility on any conservation areas, forest preserves, wildlife preserves, wetlands, or any other natural resource;

(4) any evidence of the effect of the pipeline upon the economy, infrastructure, and public safety presented by local governmental units that will be affected by the proposed pipeline or facility;

(5) any evidence of the effect of the pipeline upon property values presented by property owners who will be affected by the proposed pipeline or facility, provided that the Commission need not hear evidence as to the actual valuation of property such as that as would be presented to and determined by the courts under the Eminent Domain Act;

(6) any evidence presented by the Department of Commerce and Economic Opportunity regarding the current and future local, State-wide, or regional economic effect, direct or indirect, of the proposed pipeline or facility including, but not limited to, property values, employment rates, and residential and business development;

(7) any evidence addressing the factors described in items (1) through (9) of this subsection (b) or other relevant factors that is presented by any other State agency, the applicant, a party, or other entity that participates in the proceeding, including evidence presented by the Commission's staff;

(8) any evidence presented by a State agency or unit of State or local government as to the current and future national, State-wide, or regional economic effects of the proposed pipeline, direct or indirect, as they affect residents or businesses in Illinois, including, but not limited to, such impacts as the ability of manufacturers in Illinois to meet public demand for related services and products and to compete in the national and regional economies, improved access of suppliers to regional and national shipping grids, the ability of the State to access funds made available for energy infrastructure by the federal government, mitigation of foreseeable spikes in price affecting Illinois residents or businesses due to sudden changes in supply or transportation capacity, and the likelihood that the proposed construction will substantially encourage related investment in the State's energy infrastructure and the creation of energy related jobs; and

(9) any evidence presented by any State or federal governmental entity as to how the proposed pipeline or facility will affect the security, stability, and reliability of energy in the State or in the region.

In its written order, the Commission shall address all of the evidence presented, and if the order is contrary to any of the evidence, the Commission shall state the reasons for its determination with regard to that evidence.

(c) An application filed pursuant to this Section may request either that the Commission review and approve a specific route for a pipeline, or that the Commission review and approve a project route width that identifies the areas in which the pipeline would be located, with such width ranging from the minimum width required for a pipeline right-of-way up to 500 feet in width. The purpose for allowing the option of review and approval of a project route width is to provide increased flexibility during the construction process to accommodate specific landowner requests, avoid environmentally sensitive areas, or address special environmental permitting requirements.

(d) A common carrier by pipeline may request any other approvals as may be needed from the Commission for completion of the pipeline under Article VIII or any other Article or Section of this Act at the same time, and as part of the same application, as its request for a certificate of good standing under this Section. The Commission's rules shall ensure that notice of such a consolidated application is provided within 30 days after filing to the landowners along a proposed project route, or to the potentially affected landowners within a proposed project route width, using the notification procedures set forth in the Commission's rules. If a consolidated application is submitted, then the requests shall be heard on a consolidated basis and a decision on all issues shall be entered within the time frames stated in subsection (e) of this Section. In such a consolidated proceeding, the Commission may consider evidence relating to the same factors identified in items (1) through (9) of subsection (b) of this Section in granting authority under Section 8-503 of this Act. If the Commission grants approval of a project route width as opposed to a specific project route, then the common carrier by pipeline must, as it finalizes the actual pipeline alignment within the project route width, file its final list of affected landowners with the Commission at least 14 days in advance of beginning construction on any tract within the project route width and also provide the Commission with at least 14 days notice before filing a complaint for eminent domain in the circuit court with regard to any tract within the project route width.

(e) The Commission shall make its determination on any application filed pursuant to this Section and issue its final order within one year after the date that the application is filed unless an extension is granted as provided in this subsection (e). The Commission may extend the one-year time period for issuing a final order on an application filed pursuant to this Section up to an additional 6 months if it finds, following the filing of initial testimony by the parties to the proceeding, that due to the number of affected landowners and other parties in the proceeding and the complexity of the contested issues before it, additional time is needed to ensure a complete review of the evidence. If an extension is granted, then the schedule for the proceeding shall not be further extended beyond this 6-month period, and the Commission shall issue its final order

within the 6-month extension period. The Commission shall also have the power to establish an expedited schedule for making its determination on an application filed pursuant to this Section in less than one year if it finds that the public interest requires the setting of such an expedited schedule.

(f) Within 6 months after the Commission's entry of an order approving either a specific route or a project route width under this Section, the common carrier by pipeline that receives such order may file supplemental applications for minor route deviations outside the approved project route width, allowing for additions or changes to the approved route to address environmental concerns encountered during construction or to accommodate landowner requests. Notice of a supplemental application shall be provided to any State agency that appeared in the original proceeding or immediately affected landowner at the time such supplemental application is filed. The route deviations shall be approved by the Commission within 45 days, unless a written objection is filed to the supplemental application within 20 days after the date such supplemental application is filed. Hearings on any such supplemental application shall be limited to the reasonableness of the specific variance proposed, and the issues of public need or public convenience or necessity for the project or fitness of the applicant shall not be reopened in the supplemental proceeding.

(g) The rules of the Commission may include additional options for expediting the issuance of permits and certificates under this Section. Such rules may provide that, in the event that an applicant elects to use an option provided for in such rules; (1) the applicant must request the use of the expedited process at the time of filing its application for a license or permit with the Commission; (2) the Commission may engage experts and procure additional administrative resources that are reasonably necessary for implementing the expedited process; and (3) the applicant must bear any additional costs incurred by the Commission as a result of the applicant's use of such expedited process.

(h) Duties and obligations of common carriers by pipeline. Each common carrier by pipeline shall provide adequate service to the public at reasonable rates and without discrimination.

(220 ILCS 5/15-401) (emphasis added)

The underlined language from this section of the PUA sets forth the requirements for the granting of a CGS under the CCPL.

C. 220 ILCS 5/10-103

Section 10-103 of the PUA provides as follows:

In all proceedings, investigations or hearings conducted by the Commission, except in the disposition of matters which the Commission is authorized to entertain or dispose of on an ex parte basis, any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case, which shall include only the transcript of testimony and exhibits together with all papers and requests filed in the proceeding, including, in contested cases, the documents and information described in Section 10-35 of the Illinois Administrative Procedure Act.¹

The provisions of Section 10-60 of the Illinois Administrative Procedure Act shall apply in full to Commission proceedings, including ratemaking cases, any provision of the Illinois Administrative Procedure Act to the contrary notwithstanding.

The provisions of Section 10-60 shall not apply, however, to communications between Commission employees who are engaged in investigatory, prosecutorial or advocacy functions and other parties to the proceeding, provided that such Commission employees are still prohibited from communicating on an ex parte basis, as designated in Section 10-60, directly or indirectly, with members of the Commission, any hearing examiner in the proceeding, or any Commission employee who is or may reasonably be expected to be involved in the decisional process of the proceeding. Any commissioner, hearing examiner, or other person who is or may reasonably be expected to be involved in the decisional process of a proceeding, who receives, or who makes or knowingly causes to be made, a communication prohibited by this Section or Section 10-60 of the Illinois Administrative Procedure Act as modified by this Section, shall place on the public record of the proceeding (1) any and all such written communications; (2) memoranda stating the substance of any and all such oral communications; and (3) any and all written responses and memoranda stating the substance of any and all oral responses to the materials described in clauses (1) and (2).

The Commission, or any commissioner or hearing examiner presiding over the proceeding, shall in the event of a violation of this Section, take whatever action is necessary to ensure that such violation does not prejudice any party or adversely affect the fairness of the proceedings, including dismissing the affected matter.

(220 ILCS 5/10-103) (emphasis added)

The above underlined section of the PUA makes it clear that Staff counsel and Staff employees, such as Mr. Maple, are specifically allowed to have ex parte communications with parties to a proceeding such as Enbridge Illinois. Throughout this proceeding, the Pliura Intervenors and Turner Intervenors have repeatedly ignored this section of the PUA.

D. 5 ILCS 100/10-60 Illinois Administrative Procedure Act

Section 10-60 of the Illinois Administrative Procedure Act provides as follows:

(a) Except in the disposition of matters that agencies are authorized by law to entertain or dispose of on an ex parte basis, agency heads, agency employees, and administrative law judges shall not, after notice of hearing in a contested case or licensing to which the procedures of a contested case apply under this Act, communicate, directly or indirectly, in connection with any issue of fact, with any person or party, or in connection with any other issue with any party or the representative of any party, except upon notice and opportunity for all parties to participate.

(b) However, an agency member may communicate with other members of the agency, and an agency member or administrative law judge may have the aid and advice of one or more personal assistants.

(c) An ex parte communication received by any agency head, agency employee, or administrative law judge shall be made a part of the record of the pending matter, including all written communications, all written responses to the communications, and a memorandum stating the substance of all oral communications and all responses made and the identity of each person from whom the ex parte communication was received.

(d) Communications regarding matters of procedure and practice, such as the format of pleadings, number of copies required, manner of service, and status of proceedings, are not considered ex parte communications under this Section.

(5 ILCS 100/10-60)

This section of the Administrative Procedure Act sets forth the general law on ex parte communications. Of course, as discussed above, the PUA specifically allows investigatory Staff and counsel to have ex parte discussions with parties to a proceeding. In addition, ex parte communications can only occur while a matter is open before the Commission.

E. 220 ILCS 5/10-113

Section 10-113 of the PUA provides as follows:

(a) Anything in this Act to the contrary notwithstanding, the Commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any rule, regulation, order or decision made by it. Any order rescinding, altering or amending a prior rule, regulation, order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original rules, regulations, orders or decisions. Within 30 days after the service of any rule or regulation, order or decision of the Commission any party to the action or proceeding may apply for a rehearing in respect to any matter determined in said action or proceeding and specified in the application for rehearing. The Commission shall receive and consider such application and shall grant or deny such application in whole or in part within 20 days from the date of the receipt thereof by the Commission. In case the application for rehearing is granted in whole or in part the Commission shall proceed as promptly as possible to consider such rehearing as allowed. No appeal shall be allowed from any rule, regulation, order or decision of the Commission unless and until an application for a rehearing thereof shall first have been filed with and finally disposed of by the Commission: provided, however, that in case the Commission shall fail to grant or deny an application for a rehearing in whole or in part within 20 days from the date of the receipt thereof, or shall fail to enter a final order upon rehearing within 150 days after such rehearing is granted, the application for rehearing shall be deemed to have been denied and finally disposed of, and an order to that effect shall be deemed to have been served, for the purpose of an appeal from the rule, regulation, order or decision covered by such application. No person or corporation in any appeal shall urge or rely upon any grounds not set forth in such application for a rehearing before the Commission. An application for rehearing shall not excuse any corporation or person from complying with and obeying any rule, regulation, order or decision or any requirement of any rule, regulation, order or decision of the Commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the Commission may by order direct. If, after such rehearing and consideration of all the facts, including those arising since the making of the rule, regulation, order or decision, the Commission shall be of the opinion that the original rule, regulation, order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may rescind, alter or amend the same. A rule, regulation, order or decision made after such rehearing, rescinding, altering or amending the original rule, regulation, order or decision shall have the same force and effect as an original rule, regulation, order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original rule, regulation, order or decision unless so ordered by the Commission. Only one rehearing shall be granted by the Commission; but this shall not be construed to prevent any party from filing a petition setting up a new and different state of facts after 2 years, and invoking the action of the Commission thereon.

(b) Notwithstanding any contrary or inconsistent provision in the Illinois Administrative Procedure Act, the Commission may, in accordance with this Section, make a change in a rule or regulation adopted or modified pursuant to Section 5-40 of the Illinois Administrative Procedure Act, upon consideration of an application for rehearing of the Commission's order directing that the rule or regulation be filed with the Secretary of State and published in the Illinois Register pursuant to subsection (d) of Section 5-40.

The Commission shall provide the parties to the original hearing in which the rule was adopted or modified no less than 7 days notice to provide responses to the change the Commission proposes to make. Any such change shall be based upon evidence submitted in the record in the original hearing or in the rehearing. If the Commission makes such a substantive change in the rule or regulation pursuant to this subsection, it shall provide notice of the amendment to the rule or regulation to the Joint Committee on Administrative Rules in accordance with subsection (c) of Section 5-40, and shall thereafter comply with the requirements of subsection (d) of Section 5-40 with respect to the rule or regulation as amended. The running of the time period specified in subsection (e) of Section 5-40 of the Illinois Administrative Procedure Act for completing a rulemaking proceeding shall be tolled for the period of time necessary for the Commission to receive and consider an application for rehearing and to conduct any proceedings on rehearing, provided, that such tolling shall not serve to extend any of the time periods provided for in subsection (a) of this Section.

(220 ILCS 5/10-113) (emphasis added)

The underlined language above from the PUA provides that the Commission can reopen a matter, as it has done in this case, so long as notice and opportunity to be heard are provided to the parties before rescinding, altering or amending any rule, regulation, order or decision made by it. Despite Intervenors claims that the Commission has no jurisdiction to grant the relief request (Pliura Response in Opposition to Motion to Reopen and Amend, June 12, 2014, p. 5), the PUA does allow the Commission to reopen this matter and exercise its jurisdiction as it has done so in this case. Besides this matter, the Commission most recently exercised the same jurisdiction in two previously closed dockets, Docket No. 07-0566 (Commonwealth Edison Co., ICC Second Order on Remand Docket No. 07-0566, September 18, 2014) and Docket No. 13-0553 (Commonwealth Edison Co., ICC Order Docket No. 13-0553, November 26, 2013).

F. 83 Ill Admin Code 200.710

Section 200.710 of the Commission's rules provides as follows:

a) Unless waived by written stipulation of the parties in the proceeding as provided by Section 10-70 of the Illinois Administrative Procedure Act [5 ILCS 100/10-70], once notice of hearing has been given in a contested case or licensing proceeding, Commissioners, Commission employees and Hearing Examiners shall not communicate directly or indirectly with:

- 1) Any party to the proceeding on any issue in the proceeding; or
 - 2) A party's representative on any issue in the proceeding; or
 - 3) Any other person concerning an issue of fact in the proceeding;
- without notice and opportunity for all parties to participate.

b) The following communications are not subject to subsection (a) of this Section:

1) *Communications between Commission employees who are engaged in investigatory, prosecutorial or advocacy functions and other parties to the proceeding, provided that such Commission employees are still prohibited from communicating on an ex parte basis, as designated in subsection (a), directly or indirectly, with members of the Commission, any Hearing Examiner in the proceeding, or any Commission employee who is or may reasonably be expected to be involved in the decisional process of the proceeding (this language derived from Section 10-103 of the Public Utilities Act [220 ILCS 5/10-103] and applies only to proceedings under that Act);*

2) *Communications between a Commissioner and other Commissioners, and between a Commissioner or hearing examiner and one or more personal assistants. [5 ILCS 100/10-60]*

c) *Any Commissioner, Hearing Examiner, or other Commission employee who is or may reasonably be expected to be involved in the decisional process of a proceeding, who receives, or who makes or knowingly causes to be made, a communication prohibited by Section 10-60 of the Illinois Administrative Procedure Act as modified by Section 10-103 of the Public Utilities Act [220 ILCS 5/10-103] shall place on the public record of the proceeding:*

- 1) *All such written communications;*
- 2) *Memoranda stating the substance of all such oral communications; and*

3) *All written responses and memoranda stating the substance of all oral responses to the materials described in subsections (c)(1) and (2).* [220 ILCS 5/10-103]

d) The material specified in subsection (c) shall be disclosed to the parties of record by:

1) service on the parties at the next hearing; or

2) if no hearing is scheduled within the next seven days, service by mail on all parties of record.

(83 Ill. Admin Code Section 200.710) (emphasis added)

As set forth in the PUA pursuant to Section 10-103, the underlined language from the Commission's rules provide that Staff counsel and Staff employees, such as Mr. Maple, are specifically allowed to have ex parte communications with parties to a proceeding such as Enbridge Illinois. Throughout this proceeding, similar to neglecting the provisions of Section 10-103 of the PUA, the Pliura Intervenors and Turner Intervenors have repeatedly ignored this language from the Commissions rules, and instead, have based most of their arguments on the rationale that these conversations were somehow improper and thus tainted the entire docket. As discussed below, Staff was under no duty to disclose those discussions to anyone given that the discussion concerned no pending matter before the Commission at the time the discussions took place.

G. Kreutzer v. Illinois Commerce Com'n and Albin v. Illinois Commerce Com'n

The two cases, Kreutzer v. Illinois Commerce Com'n and Albin v. Illinois Commerce Com'n, make clear that certificate cases are different from eminent domain cases. This is a significant matter of law which the Pliura Intervenors and Turner

Intervenors refuse to acknowledge and accept. The appellate court in *Albin* explained that sections 8–406, 8-503, and 8-509 require distinct showings of necessity. As explained by the *Kreutzer* court, “Section 8–406 requires necessity for the project in general. i.e. the provision of “more reliable electrical service” to the subject area; section 8-503 requires necessity for “the additions and improvements to implement the more reliable service”; and section 8-509 requires necessity for the “means of obtaining easements for right-of-way for the additions and improvements.” *Albin*, 87 Ill.App.3d at 439, 42 Ill.Dec. 436, 408 N.E.2d 1145.)(*Kreutzer v. Illinois Commerce Com’n*, 404 Ill.App.3d 791, 810 (2010))³

The *Kreutzer* case and *Albin* case are important in showing that the Pliura Intervenors and Turner Intevenors’ argument that Staff had ex parte reportable communications with Enbridge Illinois prior to the time that the Commission reopened Docket No. 07-0446 is without merit. Since Staff’s discussions with Enbridge Illinois did not concern the subject matter of eminent domain which was at issue in Docket No. 13-0446, the only docket pending before the Commission, but rather concerned the certificate issued in Docket No. 07-0446, which had not been reopened, Staff was under no duty to disclose those discussions to anyone.

IV. CONTESTED ISSUE – SHOULD THE CERTIFICATE PREVIOUSLY AWARDED TO ENBRIDGE ILLINOIS BE AMENDED FROM A PIPELINE 36 INCHES IN DIAMETER TO ONE 24 INCHES IN DIAMETER

The Commission should amend the order and CGS as requested by Enbridge Illinois. Staff’s position supporting an amended order and CGS is based upon the

³ While this Reopened matter concerns a Section 15-401 certificate as opposed to a certificate issued pursuant to Section 8-406 which was the case in *Albin* and *Kreutzer*, the relevant common element is that all matters involved certificates which must be obtained from the Commission before eminent domain authority can be granted.

testimony of Mr. Mark Maple. Mr. Maple reviewed Enbridge Illinois' supplemental responses to Staff data requests ENG 1.9 and ENG 1.24, Enbridge Illinois' Motion to Reopen and Amend Order, as well as all of the subsequent filings by Enbridge Illinois and the intervening parties to reach his position.

Under the Article XV of the PUA, CCPL, essentially there are four criteria for obtaining a certificate in good standing to operate as a common carrier. The four criteria are: (1) the application must be properly filed, (2) a public need exists for the service, (3) the applicant is fit, willing, and able to provide the service and (4) the public convenience and necessity requires the issuance of the certificate. (220 ILCS 5/15-401(b)) Staff witness Maple testified that a change in pipeline diameter would in no way change Enbridge Illinois' ability to meet the four criteria necessary for a certificate in good standing. He further testified that only one of the four criteria is even potentially affected by the diameter change proposed by Enbridge Illinois and that would be the issue of public need. (Staff Ex. 4.0, 2)

With respect to public need, Mr. Maple testified that reducing the diameter of the pipeline would not prohibit Enbridge Illinois from meeting the criterion of public need. As part of his analysis and review of Enbridge Illinois' request, Staff requested that Enbridge Illinois supplement its responses to previously served Staff Data Requests. Mr. Maple then reviewed Enbridge Illinois' responses to those Staff data requests. In response to a Staff data request ENG 1.24, Enbridge Illinois stated the product that will be shipped on the pipeline is still liquid petroleum, as has always been the case. The route has not changed; therefore, the regions being served by the pipeline have not changed. In response to Staff data request ENG 1.9, Enbridge Illinois indicated that it

has long-term shipper commitments for the proposed pipeline. Mr. Maple also testified that the construction, operation, and maintenance of the new, smaller pipeline will be the same as the larger pipeline originally approved in this docket. (Id., 3) In Mr. Maple's opinion, essentially, nothing has changed other than the physical size of the pipe and that change does not affect the Enbridge Illinois' ability to continue to meet the public need criterion. (Id.) Mr. Maple concluded that he found no reason to deny Enbridge Illinois' request to amend the Commission's Order to change the diameter of the pipeline referenced in the order to 24 inches from 36 inches in diameter.

V. CONCLUSION

Staff respectfully requests that the Illinois Commerce Commission approve Staff's recommendations in this docket.

Respectfully submitted,

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