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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 ) 07-0446  
AND WHEN NECESSARY, TO TAKE PRIVATE ) (on Reopen)  
PROPERTY AS PROVIDED BY THE LAW OF EMINENT )  
DOMAIN )  
)

**PROPOSED ORDER**

By the Commission:

**I. BACKGROUND AND PROCEDURAL HISTORY**

This reopened Docket No. 07-0446 proceeding commenced when Illinois Extension Pipeline Company (“IEPC” or “Applicant”), formerly known as Enbridge Pipelines (Illinois) L.L.C., filed with the Illinois Commerce Commission (“Commission”) a “Motion To Reopen And Amend Order Concerning Diameter Of The Southern Access Extension Pipeline” (“Motion To Reopen And Amend”) on May 19, 2014. By that filing, Enbridge moved the Commission, pursuant to Sections 10-113 (220 ILCS 5/10-113) and 8-503 (220 ILCS 5/8-503) of the Public Utilities Act (“PUA” or “Act”), to reopen Docket No. 07-0446 and amend the Certificate of Good Standing (“CGS”) granted herein to authorize IEPC to construct, operate and maintain the Southern Access Extension Pipeline (“SAX” or “SAX pipeline”) as a “24-inch pipeline” rather than as a “36-inch pipeline” as now provided in the CGS.

By way of background, prior to reopening, the Commission had entered an Order herein, dated July 8, 2009 (“July 2009 Order”), granting a CGS to IEPC whereby IEPC was “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.” July 2009 Order, at 70. The July 2009 Order also found, *inter alia*, 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.” *Id.* at 68.

Although in the July 2009 Order the Commission did not grant IEPC’s request for eminent domain authority for the SAX pipeline, it specifically found that IEPC could renew its request for such authority if it was unable to obtain the necessary easement rights through the negotiation process. July 2009 Order, at 68. IEPC did, in fact, renew that request by filing, on July 22, 2013, a Petition For Eminent Domain Authority. Upon conclusion of the ensuing proceedings in Docket No. 13-0446, the Commission granted the requested eminent domain authority for the SAX pipeline. Order, Docket No. 13-0446, at 37 (April 29, 2014).

Thus, as matters stood before IEPC filed its Motion To Reopen And Amend, Enbridge had both a CGS to construct, operate and maintain the SAX pipeline as a 36-inch diameter pipeline, and eminent domain authority for those properties on the route of that pipeline where easement negotiations had come to an impasse. Now IEPC seeks by its Motion To Reopen And Amend to obtain authorization from the Commission to construct, operate and maintain the SAX pipeline as a 24-inch diameter pipeline instead of a 36-inch diameter pipeline as appears in the CGS.

The Pliura Intervenors responded to Enbridge Illinois' Motion to Reopen And Amend by filing, on June 12, 2014, "Pliura Intervenors Response In Opposition To Motion To Reopen And Amend Order Concerning Diameter Of The Southern Access Extension Pipeline" ("Pliura

Intervenors' Response"), urging the Commission to deny and dismiss Enbridge Illinois' Motion To Reopen And Amend. The Staff of the Illinois Commerce Commission ("Staff") filed its "Response To Enbridge Illinois' Motion To Reopen And Amend Order Concerning Diameter Of The Southern Access Extension Pipeline" ("Staff Response"), also on June 12, 2014, declaring that "Staff has no objection to Enbridge Illinois' Motion." Staff Response, at 3. In addition, on June 12, 2014, the County of McLean filed a motion seeking an extension of time to Thursday, June 19, 2014.

On June 13, 2014, Administrative Law Judge ("ALJ") Jones ruled that the due date for the filing of any responses to the County of McLean's Motion For Extension Of Time would be June 16, 2014. In addition, on June 13, 2014, IEPC filed its "Reply Of Enbridge Pipelines (Illinois) L.L.C. On Motion To Reopen And Amend Order Concerning Diameter Of The Southern Access Extension Pipeline" ("Enbridge Ill. Reply"), arguing that the Plura Intervenors' unsubstantiated and incorrect assertions should be disregarded, and urging the Commission to grant its Motion To Reopen And Amend. Enbridge Ill. Reply, at 33.

IEPC filed its "Response Of Enbridge Pipelines (Illinois) L.L.C. To Motion For Extension Of Time Filed By County Of McLean," on June 16, 2014, taking no position on the grant or denial of McLean County's Motion, but reaffirming its commitment to work with McLean County in connection with its highway plans. Also on June 16, 2014, McLean County filed its "Response Of McLean County To Enbridge Illinois' Motion To Reopen And Amend Order Concerning Diameter Of The Southern Access Extension Pipeline," complaining that Enbridge had not yet shared its GPS/GIS data of the pipeline route, and urging that if Docket No. 07-0446 were to be re-opened, Enbridge should be required to provide documentation, evidence,

and testimony on a wide range of identified issues going well beyond any connection to the proposed highway.

Staff filed “Staff Of The Illinois Commerce Commission Reply To The Pliura Intervenors’ Response In Opposition To Enbridge Illinois’ Motion To Reopen And Amend Order Concerning Diameter Of The Southern Access Extension Pipeline” (“Staff Reply”), on June 19, 2014, affirming that the Commission has authority to reopen the proceeding and amend the certificate under Section 10-113(a) of the PUA, and denying the Pliura Intervenors' assertion that the certificate for the SAX project has expired.

On June 26, 2014, the Commission reopened Docket No. 07-0446 as requested by IEPC in its Motion to Reopen And Amend. On June 27, 2014, the Commission issued a “Notice Of Corrected Commission Action” which stated: “Notice is hereby given that the Commission in conference on June 26, 2014 REOPENED the proceeding pursuant to Section 10-133(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.”

IEPC filed its “Motion of Enbridge Pipelines (Illinois) L.L.C. For Expedited Treatment On Reopening” on July 1, 2014. Also on July 1, 2014, the ALJ gave notice that there would be a Prehearing Conference on Reopening held at the offices of the Commission in Springfield on July 17, 2014, and that no witness testimony would be taken at that prehearing conference.

On July 17, 2014, a hearing was held in Springfield, Illinois at the offices of the Commission pursuant to due notice given to all parties and intervenors. Representatives from IEPC, Staff, and the Pliura Intervenors participated. The demands made in the Response of

McLean County To Enbridge Illinois' Motion To Reopen And Amend Order Concerning Diameter of the Southern Access Extension Pipeline were denied as outside the scope of the reopened proceeding established by the Commission's Notice of Corrected Commission Action dated June 27, 2014, particularly in light of IEPC's renewed pledge to work with McLean County to avoid conflicts between its proposed road and the SAX pipeline. Evidence concerning whether the 2009 Order should be amended to authorize IEPC to construct a 24-inch diameter pipeline rather than a 36-inch diameter pipeline was provided by both Enbridge Illinois' Motion To Reopen And Amend and by Enbridge Illinois' Reply to the Pliura Intervenors' Response, both of which were verified by Randy Rice, the Project Director for the Southern Access Extension Project. Staff urged the Commission to grant IEPC's request for amendment so the project could go forward, but did not file any testimony or other evidence. The Pliura Intervenors' Response In Opposition To Motion To Reopen was not verified, and hence could not be considered evidence in support of the Pliura Intervenors' opposition, nor was any other evidence proffered by the Pliura Intervenors in support of their opposition to reopening and amendment. At the end of the hearing, the record was marked heard and taken.

On August 7, 2014, the Turner Intervenors filed a motion to add Lincoln Pipeline, LLC to the proceedings, and Enbridge Illinois, by then known as IEPC, responded on August 19, 2014. Pliura Intervenors submitted data requests on August 11, 2014. On August 26, 2014, the Pliura Intervenors filed a motion to compel IEPC to "fully and completely" answer all of their data requests. The next day, on August 27, 2014, Staff, the Turner Intervenors, and the Pliura Intervenors submitted the testimony of Mark Maple, Timothy Kraft, and Carlisle Kelly, respectively. The Turner Intervenors also filed a motion to compel "complete responses" to their data requests on August 28, 2014. The same day, IEPC responded to both the Turner

Intervenors' Motion to Compel and the Pliura Intervenors' Motion to Compel. The Pliura Intervenors and Staff responded to the Turner Intervenors' Motion to Compel on August 29, 2014.

On September 3, 2014, ALJ Jones denied the Pliura Intervenors' Motion to Compel with respect to data requests one through four, six, and seven. ALJ Jones also ruled that IEPC would be required to submit supplemental responses to data requests five and eight through 12. On September 4, 2014, ALJ Jones denied the Turner Intervenors Motion to Add Lincoln Pipeline, LLC to the proceeding. Also on September 4, 2014, ALJ Jones reinstated IEPC's previously approved protective order, which ensured the confidentiality of documents served on the parties during the discovery process. ALJ Jones addressed the Turner Intervenors' Motion to Compel on September 5, 2014, denying the motion with respect to data requests A, B, C, F, and G, but required IEPC to file supplemental responses to data requests D and E. On September 8, 2014, ALJ Jones required Enbridge to answer four questions, and IEPC answered those questions the same day. Also on September 8, 2014, the Pliura Intervenors filed a second motion to compel.

On September 9, 2014, ALJ Jones required IEPC to specify where in IEPC's supplemental data requests responses it identified the percentage of the already-committed 210,000 barrels per day for the SAX pipeline that were attributable to one unidentified committed shipper. Staff responded to the Pliura Intervenors' Second Motion to Compel on September 10, 2014. An evidentiary hearing was held on September 11, 2014. Following the hearing, the Turner Intervenors filed a Motion to Dismiss on September 15, 2014. On September 24, 2014, Pliura Intervenors filed a Motion to Reopen Discovery and Compel staff to respond to data requests as well as a response to the Turner Intervenors' Motion to Dismiss. IEPC responded to the Turner Intervenors' Motion to Dismiss on September 26, 2014. Three days

later, on September 29, 2014, IEPC also filed a Motion to Strike portions of the testimony of Timothy Kraft and Carlisle Kelly, submitted on behalf of the Turner Intervenors and Pliura Intervenors, respectfully. On September 29, 2014, Staff filed its response to the Turner Intervenors' Motion to Dismiss.

On October 2, 2014, a hearing was held at the Commission offices in Springfield, Illinois. At that hearing, the record was kept open subject to ruling on the pending motions in the matter. Following the hearing, the Turner Intervenors filed replies on their Motion to Dismiss on October 3, 2014, and October 6, 2014. Staff responded to the Pliura Intervenors' Motion to Compel on October 7, 2014. On October 8 and 14, 2014, the Pliura Intervenors and Turner Intervenors responded to IEPC's Motion to Strike, and IEPC replied on October 17, 2014. On October 24, 2014, the ALJ denied the Motion to Strike except as to Attachment 16 to Timothy Kraft's testimony.

The parties filed post-hearing briefs on October 27, 2014. On November 6, 2014, IEPC filed its Post-Hearing Reply Brief ("IEPC Post-Hearing Reply Br.") and, as authorized by the ALJ, a draft order approving the requested amendment to the CGS. That draft order was supported by Staff, but opposed by the Pliura Intervenors.

On \_\_\_\_, 2014, a Proposed Order was issued by the ALJ approving the amendment to the CGS for a 24-inch diameter SAX pipeline instead of a 36-inch diameter pipeline. A Brief On Exceptions ("BOEs") was filed by the Pliura Intervenors. No exceptions were taken by IEPC or by Staff. Reply Briefs On Exceptions were filed by Staff and by IEPC.

## **II. STATUTORY PROVISIONS**

Section 10-113 (220 ILCS 5/10-113) of the PUA states, *in relevant part*:

- (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.

Section 8-503 (220 ILCS 5/8-503) of the PUA states, *in relevant part*:

Whenever the Commission, after a hearing, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility . . . are necessary and ought reasonably to be made . . . , to promote the security or convenience of . . . the public . . . or in any other way to secure adequate service or facilities, the Commission shall make and serve an order authorizing or directing that such additions, extensions, repairs, improvements or changes be made, or such structure or structures be erected at the location, in the manner and within the time specified in said order . . .

### **III. ARGUMENTS AND CONCLUSIONS OF THE PARTIES**

#### **A. IEPC**

##### **i. Introduction**

The Commission reopened Docket No. 07-0446 on June 26, 2014. The Commission made clear in its “Notice Of Corrected Commission Action,” issued June 27, 2014, that the reopened proceedings were to be limited in focus and scope: “Notice is hereby given that the Commission in conference on June 26, 2014 REOPENED the proceeding pursuant to Section 10-133(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” (emphasis supplied). *See also* Tr. 1281-82. IEPC contends that the “limited purpose,” as described in IEPC’s Motion To Reopen And Amend, did *not* include a reexamination of whether the SAX pipeline should be certificated. IEPC Post-Hearing Br., at 3. As Staff witness Mark Maple testified:

I don't believe that the amending of a certificate is the same as having to meet the four criteria of a new certificate. To me, amending a certificate is merely fixing an error or changing – making a change to what has already been approved.

Tr. 1310. *See also* Tr. 1343.

IEPC states that the central facts supporting IEPC's request for an amendment to its CGS approving installation by IEPC of a SAX pipeline 24 inches in diameter are straightforward and essentially uncontested. The only change of any significance is the diameter of the pipeline -- from 36 inches to 24 inches. The route is the same; much of the oil will still come from Canada, a more secure and reliable source for imported oil; the oil will still be accessible by Midwestern refineries; except for its diameter, the pipe's manufacture, construction, operation, and maintenance will be the same as approved in the July 2009 Order; the policy, practice, and safety recommendations of the National Transportation Safety Board ("NTSB") based on its investigation of the Marshall, Michigan incident have already been required, in Docket No. 13-0446, to be implemented on the SAX pipeline as they have on other Enbridge pipelines; existing easement agreements, rights, payments, and patrol and maintenance practices will not be changed; and all IEPC-acquired permits, licenses, and agreements identified in the certification proceeding remain in effect and need no modification due to pipe size. Enbridge III. Reply, Ex. 2, at 3; Motion To Reopen And Amend, Ex. 1, at 7, para. 8; Tr. 1321-22. As Staff witness Mr. Maple testified, "I don't believe there are actually that many differences between the two proposed pipelines." Tr. 1311. IEPC Post-Hearing Br., at 3-4.

Additional information was provided by IEPC regarding the manufacture and type of pipe to be used. IEPC states the 24-inch pipe is manufactured as API 5L Grade X70 steel pipe having a standard wall thickness of .375 inches and given a fusion-bonded anticorrosion coating at the pipe mill (wall thickness will be increased at locations such as road and rail-crossing bores

to .500-inch Grade X70 pipe, and at Horizontal Direction Drill locations to .562-inch Grade X65 pipe). Also, IEPC explains that in accord with Enbridge System policy, the line will have an allowed maximum operating pressure corresponding to a 72% stress level of the pipe's specified minimum yield strength (SMYS). The pipe has been manufactured in accord with Enbridge requirements and specifications, including inspections at the pipe mill and after transport, and the entire pipeline will be constructed, emplaced, inspected (e.g., 100% weld inspections), hydrostatically tested to nominally 100% of SMYS, and commissioned in accord with the most current Enbridge procedures, practices, and standards (it will, of course, also be subject to PHMSA inspections). Motion To Reopen And Amend, Ex. 1, at 6.

According to IEPC, the proposed amendment to the Certificate in Good Standing for the SAX pipeline will have no adverse effect on any landowner along the route. First, except for its diameter, the pipe's manufacture, construction, operation, and maintenance will be the same as approved in the July 2009 Order, although average operating pressure may be lower. Second, depth of cover will not change and all appropriate and necessary pipeline appurtenances, such as road markers, signage, etc., will be installed. Third, use of a 24-inch pipe will not require any change in right-of-way easement agreements (including landowner compensation levels agreed to), existing easement rights, or patrol and maintenance practices approved in the July 2009 Order and in the eminent domain Order in Docket No. 13-0446. Motion To Reopen And Amend, Ex. 1, at 6. Fourth, the right-of-way is impressed with easements that allow a pipeline of whatever size IEPC decides "up to" 36 inches in outside diameter or that specify no requirement about or limitation on pipe size. *Id.*, at 7. IEPC asserts that given these facts, the proposed amendment will have no adverse effect on any landowner along the route. IEPC Post-Hearing Br., at 5.

IEPC states that it is expected that the SAX pipeline when completed will initially transport more light oil than heavy crude. Motion To Reopen And Amend, Ex. 1, at 7. However, IEPC also notes that the types of petroleum expected to be shipped -- both light oil and heavy crude -- are among the types of oil specifically identified in IEPC's Application in the initial Docket No. 07-0446 proceedings. Enbridge Ill. Reply, Ex. 2, at 3. The actual grades of crude transported at any given time will depend upon shipper nominations, capacity availability, and market needs. Motion To Reopen And Amend, Ex. 1, at 7.

The initial capacity of the SAX pipeline is now 300,000 barrels per day ("bpd") instead of the originally proposed initial capacity of 400,000 bpd with a 36-inch pipe), a volume that IEPC argues can be readily accommodated by a 24-inch outside diameter pipeline. In total, IEPC has received contractual commitments for SAX from two individual shippers for 10- or 15-year terms for a volume of approximately 210,000 bpd of liquid petroleum that originates in western Canada or North Dakota. This leaves 90,000 bpd of the 300,000 bpd capacity available for other shippers. Tr. 1227-28; 1241-42; 1272-75; 1344. Thus, IEPC explains, the 24-inch SAX pipeline will meet the shipping commitments of Marathon Petroleum Company L.P. ("Marathon") and the second shipper, and allow for additional light and heavy oil movements. Motion To Reopen And Amend, Ex. 1, at 6. IEPC Post-Hearing Br., at 6.

The reasons for the change in the diameter of the pipe, and the resulting reduced initial capacity, were explained in IEPC's Motion To Reopen And Amend (IEPC Ex. 1). IEPC filed its Application For Certificate in Good Standing And Other Relief on August 16, 2007 ("Application"). After a lengthy hearing, IEPC's requests for certification and authority to construct, operate, and maintain the proposed line were granted by the Commission in July 2009. By that time, the "Great Recession" had severely impacted the nation's economy, and

concomitantly, the North American energy market and the derivative demand for transportation of crude oil by common-carrier-pipelines. Motion To Reopen And Amend, Ex. 1, at 3; Tr. 1164-65; 1217-1219.

In addition to the effects of the Great Recession, which continued well past 2009, IEPC states that appeals of the Commission's July 2009 Order and litigation regarding IEPC's right to exercise its existing, so-called "Luxor" easement rights were not completely resolved until well into 2011. Motion To Reopen And Amend, Ex. 1, at 3. Thus, IEPC explains, it was not until early 2012 that such matters were resolved and the economy had rebounded enough to strengthen energy demand as to warrant renewed attention to projects such as the SAX pipeline. IEPC Post-Hearing Br., at 6.

IEPC states that by 2012, shipper interest in moving heavy crude to the Patoka Hub, manifested in 2007-2009, had come to be focused on refineries, such as BP in Whiting, Indiana, that had reconfigured themselves to use more heavy crude by adding coker capacity. Conversely, Patoka had become significant to shippers of light oil sought by refineries capable of processing it. Motion To Reopen And Amend, Ex. 1, at 5. IEPC notes that Marathon, which operates three PADD II refineries, including one in Robinson, Illinois, that are reachable via the Patoka Hub, has committed to have IEPC move light crude to Patoka via the SAX pipeline in order to supply these refineries. *Id.* A second shipper has also committed to have IEPC move light crude to Patoka via the SAX pipeline. Tr. 1227-28; 1233; 1344. IEPC Post-Hearing Br., at 7.

IEPC argues that the fact that the SAX pipeline is now expected initially to carry predominantly light oil from the United States and Canada does not represent a fundamental change in the project. IEPC's Application did not limit the project to the carrying of "heavy" Canadian crude. On the first page of the Application, it states that IEPC is seeking the "entry of

an order authorizing it to construct, operate, and maintain approximately 170 miles of a new 36-inch *liquid petroleum pipeline . . .*” Application, at 1; emphasis supplied. IEPC points out that the term “liquid petroleum pipeline” is not synonymous with a “heavy” crude oil pipeline. Also, IEPC notes that in footnote 4 of the Application, IEPC specifically represented that the SAX pipeline might carry “light, sweet crude” from the U.S. as well as Canada:

In addition to the growing Canadian supply, domestic production in the Williston Basin, which covers large areas of North Dakota, eastern Montana, and parts of Canada, has been growing since 2002, unlike other domestic sources. *The light, sweet crude produced therein flows into Enbridge’s Mainline System at Clearbrook, Minnesota via Enbridge’s North Dakota System (which is also being expanded). From there, it is available to U.S. refiners in the Midwest, including Illinois, via the Southern Access program, including the Extension Project.* No other pipeline systems are acting to expand access to the Williston Basin’s resources.

Application, at 12, emphasis supplied. IEPC further states in the Motion to Reopen and Amend, Ex. 1, the light oil that IEPC seeks to carry under its Light Oil Market Access Program is from “U.S. north central producing formations – e.g., the Bakken – as well as Western Canadian sources, such as the Cardium and Viking formations in Alberta.” Motion to Reopen and Amend, Ex. 1, at 4. IEPC Post-Hearing Br., at 7-8.

IEPC adds that Staff witness Mark Maple confirmed that in Staff’s view, the project has not changed. He testified that “the pipeline . . . as it was ordered, originally didn’t specify a weight of the oil. It was just a petroleum pipeline. So that project has not changed.” Tr. 1351-52. He also testified that the fact that the volume of oil to be shipped at least initially may be closer to 200,000 bpd does not change his opinion that the pipeline is “still a benefit to the public.” Tr. 1350. He further testified that another reason why, in his mind, the SAX pipeline is still a benefit to the public is that it continues to provide benefits that he identified in his original 2007 testimony, including “a redundancy of pipeline network” and the ability to “bring in more

sources of oil from friendly countries, be it Canada or the United States.” Tr. 1350-51. IEPC Post-Hearing Br., at 8.

IEPC contends that the Commission has undoubted authority to grant the relief requested. Indeed, the Commission’s authority to amend its own final orders is well-established. Section 220 ILCS 5/10-113(c) of the PUA specifically provides: “[T]he 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, or decision made by it.” Enbridge Ill. Reply, Ex. 2, at 13.

IEPC further states that on multiple occasions, the Commission has granted an applicant’s motion to amend a final order in response to market conditions or other unforeseen circumstances pursuant to this section of the Public Utilities Act (“PUA” or “the Act”). For example, Enbridge Energy Partners, L.P. (“EEP”) and Enbridge Energy, Limited Partnership (“EELP”) sought and obtained an amendment to their Line 61 certification order authorizing the construction of three additional pumping stations. Order On Reopening, Docket No. 06-0470 (August 6, 2013). The Commission found amendment would be appropriate due to increased volumes of North America-crude demanded by refineries nationwide: “To meet such public needs, ever-greater volumes of crude are being presented for movement . . . which means the capacity of Line 61 must be enhanced.” *Id.*, at 3. IEPC Post-Hearing Br., at 8-9.

IEPC points out that additional Commission decisions reached similar results. In *Ameropan Oil Corporation v. Illinois Commerce Commission*, the appellate court approved the Commission’s decision to grant ComEd’s petition to amend its Certificate of Public Convenience and Necessity to relocate a part of a major transmission line in response to conflicting plans made by the Illinois Department of Transportation. *Ameropan Oil Corp. v. Illinois Commerce*

*Comm'n*, 298 Ill. App. 3d 341 (1st Dist. 1998). The Commission “found in pertinent part that the line was necessary to supply power to the central business district of Chicago and that ComEd's plan would assure continued adequate, reliable and efficient service to that area. It also found that the proposed relocation route was the least-cost feasible means of restoring service to the line.” *Id.* at 345. See also *Wolverine Pipe Line Company*, Docket No. 58727, 1975 WL 351376 (Supplemental Order dated April 16, 1975) (granting Wolverine’s supplemental petition to amend its Certificate of Public Convenience and Necessity and re-route its pipeline in response to difficulties with right-of-way acquisitions and increased development in the area); *Commonwealth Edison Company*, Docket No. 97-04655, 1998 WL 34302221 (Order dated April 8, 1998) (allowing ComEd to amend its Certificate of Public Convenience and Necessity to relocate a portion of an electric transmission line in order to accommodate a highway-widening project). IEPC Post-Hearing Br., at 9-10.

IEPC argues that those prior Commission orders demonstrate, as a matter of law, that the Commission has the authority to grant the Motion to Reopen and Amend IEPC’s Certificate in Good Standing to authorize IEPC to construct, operate, and maintain the SAX pipeline as a pipeline of 24-inches in diameter to reflect unanticipated developments in the energy market. IEPC Post-Hearing Br., at 10.

IEPC concludes that an amendment of the Certificate in Good Standing approved in the July 2009 Order to authorize a SAX pipeline of 24 inches in diameter rather than 36 inches in diameter will reflect market developments since issuance of the original certification order; will enhance the ability of IEPC as a common-carrier-by-pipeline to serve by allowing it to amend a previously granted authorization (as has been done for other Enbridge System projects) to reflect such changes in market developments; and will further IEPC’s efforts to construct and place in

service a pipeline adequate to meet the service requests of crude petroleum shippers and satisfy public need for and convenience in the supply of petroleum product. Motion To Reopen And Amend, Ex. 1, at 1-2. IEPC Post-Hearing Br., at 10.

According to IEPC, a determination of whether to grant the requested amendment does not require a wholly-new, full-scale examination of whether the SAX pipeline should be certificated. IEPC argues that position was *rejected* by the Commission when it reopened the proceeding “for the *limited purpose* of allowing parties to address whether the Order should be amended in the manner described in [IEPC’s Motion To Reopen And Amend].” Notice of Corrected Commission Action, Dkt. 07-0446 (June 27, 2014). That Motion To Reopen And Amend, IEPC states, does not describe a process in which there would be a relitigation of issues, such as certification, already decided by the Commission in Docket No. 07-0446 other than the change in the diameter of the pipe from 36 inches to 24 inches. IEPC Post-Hearing Br., at 10-11.

IEPC agrees with Staff regarding the limited scope of the issue to be determined here. In the Direct Testimony On Reopening Of Mark Maple, ICC Staff Exhibit 4.0, Mr. Maple testified that only one of the four criteria necessary for a Certificate In Good Standing, the issue of public need, “is even potentially affected by the diameter change,” and as to that criteria, Mr. Maple testified that reducing the diameter of the pipeline does not prohibit IEPC from meeting that criterion:

“The Company has 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. Additionally, the Company has long-term shipper commitments for the proposed pipeline. . . . Finally, the construction, operation and maintenance of the new, smaller pipeline will be the same as the larger pipeline originally approved in this docket. . . . Essentially, nothing has changed other than the physical size of the pipe and that change does not affect the Company’s ability to continue to meet the public need criterion.”

Direct Testimony of Mark Maple, ICC Staff Ex. 4.0, at 3-4. *See also* Tr. 1351-52.

IEPC also notes that a decision by the Commission granting IEPC's Motion To Reopen And Amend will not require any amendment of the Commission's Eminent Domain Order in Docket No. 13-0446. The Eminent Domain Order in Docket No. 13-0446 grants eminent domain authority for the "pipeline that was certificated in Docket No. 07-0446." Order, Docket No. 13-0446, at 37 (April 29, 2013). Thus, argues IEPC, if the diameter of the pipeline certificated in Docket No. 07-0446 is amended from 36-inches to 24-inches, the Eminent Domain Order's reference in its Finding And Ordering Paragraphs to "the pipeline that was anticipated in Docket No. 07-0446" is valid without need for any amendment to the Eminent Domain Order. Enbridge III. Reply, Ex. 2, at 8-9.

**ii. Disclosure of Diameter Change**

The Pliura Intervenors claim that IEPC "secretly decided to change the proposed project from what had been presented in the 07-0446 Final Order" and "surreptitiously changed the project without disclosing that fact in applications for eminent domain." Initial Pliura Int. Br., at 3. The Turner Intervenors similarly claim that among the "major facts not disclosed in Case 13-0446 by [IEPC]" is "Enbridge's decision to not construct a 36" pipeline project for the SAX." Initial Turner Int. Br., at 3, 4. IEPC asserts that Intervenors' "secret change" argument has nothing whatever to do with this reopened Docket No. 07-0446 proceeding. IEPC responds that even if, contrary to fact, IEPC had tried to "hide" the change in the diameter of the pipeline, the issue in this reopened Docket No. 07-0446 would be exactly the same, that is, whether or not to approve that change in diameter. Put another way, the issue of whether IEPC should be authorized to install a 24-inch diameter pipeline rather than a 36-inch diameter pipeline does not depend upon when IEPC requested that authorization. IEPC asserts that the evidence relevant to that issue would be the same, regardless of timing. Intervenors' complaint about "hiding" relates

to Docket No. 13-0446, not this reopened Docket No. 07-0446 proceeding. Nonetheless, IEPC points out that regarding Docket No. 13-0446, first, the Pliura Intervenors raised that very issue in their Application For Rehearing in Docket No. 13-0446, and the Commission rejected it, and second, the Turner Intervenors participated in Docket No. 13-0446, did not appeal that decision, and therefore may not collaterally attack that decision in this proceeding. *See, e.g.*, Notice of Commission Action, Docket No. 13-0446, at 1 (June 12, 2014); Memorandum to the Commission from ALJ Jones, June 2, 2014; *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill.2d 520, 528 (1962); *City of Chicago v. Commonwealth Edison Co.*, Dkt. No. 96-0360, 1997 WL 33771836 (Ill. C.C. May 7, 1997); *Illini Coach Co. v. Illinois Commerce Comm'n*, 408 Ill. 104 (1951); *Albin v. Illinois Commerce Comm'n*, 87 Ill. App. 3d 434, 437 (4th Dist. 1980). IEPC Post-Hearing Reply Br., at 4-5.

IEPC argues that the assertion that IEPC deliberately hid the fact that it intended to build a 24-inch diameter pipeline instead of a 36-inch diameter pipeline until it was granted eminent domain authority is contrary to the record. From the time IEPC reenergized the SAX project in late 2012, it made public statements that it was considering installing a 24-inch pipeline, but did not make the final decision to do so until March 11, 2014. Enbridge Ill. Reply, Ex. 2, at 9-12. Mr. Monthei, testifying for IEPC, stated that IEPC's business people wanted to assess market conditions "right up until they're not able to do it," and then "based on that assessment and understanding of market conditions, they're either going to propose to design this pipeline for increased values based upon . . . most current market conditions and market trends or they're going to propose less, smaller values if that's what the market trends demand." Tr. 1254. He further testified that "IEPC was looking at different sizes for the pipeline up until we ordered the

pipeline” and “[w]e actually thought it was going to be 30-inches right up until we made the pipe order.” Tr. 1255.

IEPC points out that additional evidence that IEPC had not firmly decided on a 24-inch diameter pipeline as soon as suggested by Intervenors is set forth in the FERC’s Order, Docket No. OR13-19-000, issued July 31, 2013. The Pliura Intervenors argue that in that Order, “it was pointed out by FERC that Enbridge had long been planning a 24” pipeline.” Initial Pliura Int. Br., at 8. But IEPC argues that what the Pliura Intervenors do not reveal is that in that same Order, FERC expressly noted that “Enbridge Illinois states that it may increase the size of the pipeline to 30 or 36 inches.” Order On Petition For Declaratory Order, Docket No. OR13-19-000, at 1 (July 31, 2013). IEPC Post-Hearing Reply Br., at 6.

IEPC further explains that IEPC did not file to amend its CGS before May 19, 2014 because IEPC believed it had inherent authority to make that change without going back to the Commission. It was IEPC’s belief, based on subsequent Commission orders sanctioning discretion in pipe sizing up to some maximum that it had implicit authority under the certification order in Docket No. 07-0446 to install a smaller pipeline if business conditions and customer demand so warranted. Enbridge Ill. Reply, at 12. IEPC states that that is particularly true where, as here, the changes in the pipeline diameter would not impose any greater burden on landowners. *See Talty v. Commonwealth Edison Company*, 38 Ill. App. 3d 273 (1976). IEPC argues that the reality is that it was ICC Staff, based on phone calls and an email with IEPC in April and May of 2014, *while Docket No. 07-0446, the certification docket, was closed*, that convinced IEPC that it should seek to reopen Docket No. 07-0446 and amend its certificate. Staff’s Response to Turner Intervenors’ Motion of August 27, 2014, Dkt. No. 07-0446, ¶ 6 (Aug. 29, 2014). IEPC Post-Hearing Reply Br., at 6-7.

### **iii. Allegation of a “New Project”**

Both the Pliura Intervenors and the Turner Intervenors assert that the SAX pipeline is now a “new project.” They argue that the change from a 36-inch outside diameter pipe to a 24-inch outside diameter pipe requires a wholly-new, full-scale examination of whether the SAX pipeline should be certificated. *See, e.g.*, Initial Pliura Int. Br., at 1; Initial Turner Int. Br., at 6-7. The Turner Intervenors argue that the proposed 24-inch diameter SAX pipeline “is a new project” for which “there has never been a public hearing on whether the full set of requirements provide for in 220 ILCS 5/15/-401 have been satisfied.” Initial Turner Int. Br., at 2, 3.

IEPC first responds to that argument by pointing out that the position that the reopened Docket No. 07-046 proceeding should entail a full-scale reexamination of whether the SAX pipeline should be certified was rejected by the Commission when it reopened the proceeding “for the *limited purpose* of allowing parties to address whether the Order should be amended in the manner described in [Enbridge’s Motion To Reopen And Amend].” *See* Notice of Corrected Commission Action, Dkt. 07-0446 (Jun. 27, 2014). IEPC argues that the Motion To Reopen And Amend does not describe a process in which there would be a relitigation of issues, such as certification, already decided by the Commission in Docket No. 07-0446 other than the change in the diameter of the pipe from 36 inches to 24 inches. According to IEPC, the Intervenors have never explained how their theories of the proper scope of this proceeding can be reconciled with the words “limited purpose.” IEPC Post-Hearing Reply Br., at 9.

Second, IEPC points out that nowhere represented in its Application for a certificate in Docket No. 07-0446 that the SAX pipeline would be limited to the carrying of “heavy” Canadian crude. On the very first page of the Application, it states that IEPC is seeking the “entry of an order authorizing it to construct, operate, and maintain approximately 170 miles of a new 36-inch

*liquid petroleum pipeline . . . .*” Application, at 1; emphasis supplied. The term “liquid petroleum pipeline” is not synonymous with a “heavy” crude oil pipeline. Thereafter, in the Application, the pipeline is consistently described as meant to carry “crude petroleum.” “Crude petroleum” includes light crude, which is what the pipeline will in fact initially carry. Nowhere in the Application did IEPC represent that the crude oil to be carried by the SAX pipeline would solely be “heavy” crude oil. IEPC Post-Hearing Reply Br., at 9.

IEPC believes its standard easement agreement attached to IEPC’s Application further proves the point. That Agreement, which is Exhibit J to the Application, provides for an easement “for the transportation of crude petroleum, any product, by-product, and derivatives thereof, whether liquid or gaseous, which can be conveyed through a pipeline. . . .” The easement is therefore not limited to the carrying of “heavy” Canadian crude. IEPC Post-Hearing Reply Br., at 10.

IEPC argues that Both the Pliura Intervenors and Turner Intervenors also ignore that of necessity an oil pipeline must be prepared to move oil, of whatever form, to where it is needed. IEPC states that the pipeline cannot be rigidly confined to carrying one type of oil because shipper needs, and the petroleum market, change. Indeed, IEPC argues, adapting to shipper needs is part of the pipeline operator's obligations as a common carrier. As related in IEPC’s Motion To Reopen and Amend, Ex. 1, it is expected that the SAX line will initially transport more light oil than heavy crude, but the actual grades of crude transported at any given time will depend upon shipper nominations, capacity availability, and market needs, and movements of so-called “heavy” crude are anticipated. Motion to Reopen and Amend, Ex. 1, at 7. IEPC Post-Hearing Reply Br., at 10-11.

Third, IEPC states that the contention by the Pliura Intervenors in particular that the SAX pipeline's 36-inch diameter and associated 400,000 bpd capacity were critical to the Commission's and the Appellate Court's finding that the pipeline met the public convenience and necessity standard is demonstrably false. Initial Pliura Int. Br., at 3, 5-7, 9-12; Initial Turner Int. Br., at 12, 15. IEPC argues that a review of the 27-page Application in this Docket reveals that the 36-inch diameter figure is mentioned only in passing on pages 1, 6 and 19 and at no point is that figure linked in any way to the expected benefits of the pipeline. According to IEPC, the 36-inch diameter figure is descriptive, not prescriptive. IEPC also contends that the 36-inch pipeline diameter is also not central to the Commission's determination of the public necessity of the pipeline in its Order in Docket No. 07-0446. The 36-inch diameter is mentioned only six times in the Commission's Docket No. 07-0446 Order (at pp. 1, 6, 19, 47, 53, and 75) ("July 2009 Order"), one of which is in the Certificate itself. IEPC points out that it is not mentioned in the discussion of the parties' arguments on public need/public convenience and necessity other than routing (which, of course, has not changed), and in particular not at all in the analysis of IEPC's or Staff's evidence, nor is it mentioned at all in the Commission's Analysis and Conclusion on those issues. Additionally, IEPC notes the 400,000 bpd capacity figure is mentioned only three times in the Commission's July 2009 Order (at 6, 34, and 38). It does not appear in IEPC's or Staff's arguments on public convenience and necessity other than routing, nor does it appear in the Commission's Analysis and Conclusion section on that issue. IEPC Post-Hearing Reply Br., at 11.

According to IEPC, in the Commission's "Analysis and Conclusions" section on the issue of public need/public convenience and necessity, the Commission relied heavily on Staff arguments that IEPC had demonstrated a public need for the proposed pipeline. The bases of

Staff's support included (1) the SAX pipeline would bring Canadian petroleum to Patoka, which is a major hub for shippers; (2) several refinery expansion projects in the Midwest were underway or being contemplated that would increase the demand for Canadian crude oil; (3) bringing Canadian petroleum to the Patoka hub would provide not only Illinois, but the nation, with additional crude oil supplies from a friendly and reliable country; (4) the entire Southern Access Extension pipeline also provides an alternative supply of petroleum when other sources are not available; and (5) a project that provides access to a secure and reliable energy supply and helps to meet our country's energy needs is a project that benefits Illinois citizens, whether directly or indirectly. July 2009 Order, at 45. Staff also argued that the changing energy market landscape requires the nation to re-evaluate its energy supply and transmission network and make sure it is as reliable and redundant as possible, and that by adding more capacity and lower-cost oil to the region, the proposed pipeline would potentially lower regional prices or mitigate regional price increases. *Id.* at 46. IEPC points out that the Commission expressly agreed with, and adopted, Staff's approach to the public-need determination. *Id.* at 46-47. IEPC Post-Hearing Reply Br., at 12-13.

IEPC argues that all of the benefits identified by Staff and adopted by the Commission as important in the public-need determination are met by the SAX pipeline project as currently proposed with a 24-inch diameter pipeline. That is, the 24-inch diameter SAX pipeline will still bring Canadian petroleum (albeit more "light" oil petroleum) to Patoka; the light oil is still important to refineries in the Midwest; the SAX pipeline will still provide additional oil supplies from a friendly and reliable country; the entire SAX pipeline will still provide an alternate supply of petroleum when other sources are not available; and the SAX project will continue to provide access to a secure and reliable energy supply which will help meet our country's energy needs

and therefore is a project that benefits Illinois citizens. Staff witness Mark Maple testified that the fact that the volume of oil to be shipped at least initially may be closer to 200,000 bpd does not change his opinion that the pipeline is “still a benefit to the public.” Tr. 1350. He further testified that another reason why, in his mind, the SAX pipeline is still a benefit to the public is that it continues to provide benefits that he identified in his original 2007 testimony, including “a redundancy of pipeline network” and the ability to “bring in more sources of oil from friendly countries, be it Canada or the United States.” Tr. 1350-51. IEPC Post-Hearing Reply Br., at 13.

IEPC asserts that nothing in the Pliura Intervenors’ several page quotation (at 5-7) from pages 18-19 of the July 2009 Order contravenes any of these facts. IEPC further states that the Pliura Intervenors make several incorrect statements that are directly contradicted by the record. For example, the Pliura Intervenors allege that “[t]he plan is no longer to carry Canadian crude, but is instead proposing to carry Light Crude from areas other than Canada.” Initial Pliura Int. Br., at 12. IEPC argues that this statement is incorrect in at least two respects: (1) the plan was never to carry only Canadian crude (*see, e.g.*, Application at 12 n. 4; Motion to Reopen and Amend, Ex. 1, at 4); and (2) the light oil that will be carried will be from Canada as well as the United States. *Id.* As another example, the Pliura Intervenors suggest that all expert and non-expert witness testimony in Docket No. 07-0446 solely addressed the carrying of heavy crude from Canada. Initial Pliura Int. Br., at 10. IEPC believes this is also inaccurate. *See, e.g.*, Reply Testimony of Dale W. Burgess, P. ENG, Director, Southern Access Extension Project, Enbridge Ex. 1A, Docket No. 07-0446, at 5 and 6 (referencing the U.S. Williston Basin as a source of crude to be carried by SAX); Appendix G (referencing Northern Rockies as a source of crude oil supplies for Illinois). IEPC Post-Hearing Reply Br., at 13-14.

According to IEPC, the only instance in the Commission’s Analysis and Conclusions section on public need/public convenience and necessity in which the Commission even indirectly addresses the pipeline's diameter is a vague reference to the pipeline's “capacity” in the following sentence: “Based on the record in the case, including the location of the pipeline which would carry Canadian crude to the major pipeline hub at Patoka, the capacity of the pipeline, the current environment as described by Staff, and other evidence presented, the Commission agrees with Staff that there is a public need for the proposed pipeline.” July Order, at 47. IEPC argues that, in context, it is clear that the pipeline's capacity was not the major driver of the Commission's approval of the project. IEPC states that there is no basis for concluding that the Commission would have reached a different conclusion about the project if the “capacity” had been 300,000 bpd with a 24-inch diameter pipeline rather than 400,000 bpd with a 36-inch diameter pipeline. IEPC Post-Hearing Reply Br., at 14.

IEPC explains that the Illinois Appellate Court, in its opinion upholding the Commission’s July 2009 Order, summarized the testimony of IEPC’s economic expert on the benefits to Illinois consumers from the project in a way that makes clear the diameter of the pipeline was not a major factor in achieving those benefits:

With regard to that [SAX] project, the expert noted the following substantial benefits Illinois customers would enjoy: (1) a present value savings of \$407 million based on the mitigating effect increased oil production would have on gasoline prices, distillate, and jet fuel; (2) improved regional security as dependency on uncertain oil supplies from South American [sic] and the Middle East are replaced by a stable flow of Canadian oil; (3) gains in “regional economies” based on planned refinery upgrades, oil storage expansion, and pipeline expansion as the anticipated secure supply of Canadian oil replaces the recent history of foreign oil disruptions; (4) a commitment from Illinois refineries to expand their respective facilities to accommodate the additional oil; (5) increased security and safety benefits through local and expanded oil storage facilities; and (6) additional employment opportunities.

*Pliura Intervenors v. Illinois Commerce Comm'n*, 405 Ill. App. 3d 199, 203 (4th Dist. 2010).

IEPC Post-Hearing Reply Br., at 14-15.

IEPC states that five of the six predicted benefits for Illinois listed are unaffected by the change in the diameter of the pipeline. IEPC continues that although the \$407 million present-value estimate in the first benefit listed “was based on the 400,000 bpd that would flow to Patoka” (405 Ill. App. 3d at 204), it is not credible that the Commission would have ignored the five other benefits and rejected the project if the present value savings had been reduced somewhat simply because of the use of 300,000 bpd capacity in the calculations with a 24-inch diameter pipeline instead of 400,000 bpd capacity in the calculations with a 36-inch diameter pipeline. IEPC Post-Hearing Reply Br., at 15.

IEPC points out that in affirming the Commission’s grant of a certificate in the Docket No. 07-0446 Order, the Court summarized the evidence presented regarding public convenience and necessity on which the Commission relied as “(1) the location of the pipeline extension, (2) the additional oil capacity that pipeline extension would transport, (3) the destination of the oil to a major hub within Illinois for further travel throughout the United States, (4) current market factors affecting the stability of alternate sources of oil, (5) projections of increased oil demands, (6) increased revenues for local economics, and (7) increased market competition resulting in lower prices for petroleum-based products.” *Pliura Intervenors*, 405 Ill. App. 3d at 209. IEPC concludes that on their face, only one of the seven factors identified by the Court has any possible connection to the capacity of the pipeline, and the Intervenors have provided no factual or logical basis for any assertion that the six other factors are any less valid today for the 24-inch diameter pipeline. IEPC continues that even as to the other factor, the additional oil capacity that the pipeline extension would transport, the Intervenors can provide no basis for assuming that the

Commission would not have considered this factor met as well by the 300,000 bpd capacity of a 24-inch diameter pipeline as opposed to the capacity of a larger pipeline. IEPC Post-Hearing Reply Br., at 15-16.

IEPC states that the Pliura Intervenors have attempted in their Initial Brief, as they have in earlier briefs, to direct attention away from the actual bases of the Commission's findings and conclusions on public need by quoting almost exclusively section of the July 2009 Order in which the commission is simply summarizing some of the evidence presented by IEPC. *See, e.g.,* Initial Pliura Int. Br., at 5-7 (quoting from July 2009 Order, at 18-19); 10-11 (quoting from July 2009 Order, at 20). But IEPC responds that the Commission's actual "conclusions" on the public need issue appear at pages 45-57. According to IEPC, although in their Initial Brief the Pliura Intervenors make attempt at one page to quote from the Commission's conclusions on public need in the July 2009 Order (Initial Pliura Int. Br., at 12), they ignore that the context in which these statements were made, and the statements themselves within that context, support IEPC's and Staff's interpretation of the July 2009 Order, not that of the Pliura Intervenors. IEPC therefore argues that the Intervenors' argument that the change in the diameter of the pipeline is somehow inconsistent with the record on public convenience and necessity on which the Commission relied is factually and legally incorrect. IEPC Post-Hearing Reply Br., at 16-17.

IEPC says it is particularly disingenuous for the Turner Intervenors to assert that the change in diameter is a major change requiring a wholesale reexamination of the certification of SAX. At a hearing before Judge Paul Lawrence of the McLean County Circuit Court on Thursday, August 21, 2014, in which various of the Turner Intervenors opposed IEPC's exercise of the eminent domain authority granted in Dkt. 13-0446, counsel for the Turner Intervenors admitted to the Court that the issue at the ICC "doesn't have anything to do with the size" of the

pipe to be installed but rather involves only his contention that because of Marathon's shipping commitment the SAX line is a "private line," not a common carrier line. He argued that it does not matter whether "a smaller pipeline may or may not impact the land of the farmers more or less." Transcript at 14, 15, *Enbridge Pipelines (Illinois) v. Larry Kiefer, et al.*, 14 ED 2, Circuit Ct. of McLean County, 8/21/14. (Attachment A). IEPC Post-Hearing Reply Br., at 17.

### **iii. Marathon Investment**

IEPC also responds to the arguments by both the Pliura and Turner Intervenors that SAX is not a common carrier line, but instead a private line or contract line for the benefit of Marathon Petroleum Company. IEPC first notes that Intervenors' private line theory has two main parts. The first is whether the alleged 35% ownership interest of Marathon in SAX, standing alone, somehow converts it into a private line. The second is whether the shipping commitment of Marathon and another shipper for 210,000 bpd out of the 300,000 bpd capacity of the 24-inch SAX pipeline somehow converts it into a private line.

Effective July 1, 2014, Enbridge (the parent company) and Marathon Petroleum Company reached an agreement whereby Marathon, through its affiliate Lincoln Pipeline LLC, agreed to purchase a 35% equity interest in the SAX project. The other member of the project is Enbridge Energy Company, Inc. As part of this agreement on July 17, 2014, the name of Enbridge Pipelines (Illinois) L.L.C. was changed to Illinois Extension Pipeline Company, L.L.C. This is because the Enbridge name cannot be used in a joint venture with a third party, nothing more. *See* Verified Response of Enbridge Pipeline's (Illinois) L.L.C. To Turner Intervenors' Motion To Add A Party, at 1 n. 1 (August 19, 2014); Enbridge Energy Partners, L.P. Form 10Q, filed August 1, 2014.

IEPC states that the investment of Marathon in the SAX project does not render SAX a private line for the benefit of Marathon. IEPC argues that there is no record support for this argument, which also runs counter to how the business world works. A 35% equity share makes Marathon a minority, not a controlling, shareholder. Thus, in the verified Response Of Enbridge Pipelines (Illinois) L.L.C. To Turner Intervenors' Motion To Add A Party, filed August 19, 2014, IEPC explained that “[t]he equity interest of Lincoln Pipeline LLC is an investment interest only” and that “Enbridge remains in charge of the construction, operation, and maintenance of the SAX pipeline.” *Id.* at 1 n. 1. Consistent with those facts Mr. Monthei testified at the hearing that “if Marathon was not a partner with Enbridge on this pipeline, the pipeline would go forward.” Tr. 1256.

Second, IEPC disputes the argument of the Turner Intervenors that because Marathon has a 35% equity investment in SAX, the SAX pipeline is a private line. *Initial Turner Int. Br.*, at 6, 16-17. IEPC notes that the Turner Intervenors' argument that because Marathon has invested in and acquired a thirty-five percent (35%) stake in IEPC, the SAX line is a private or contract line and IEPC is not a common-carrier-by-pipeline is belied by Commission actions certifying common-carrier pipelines in which major petroleum companies have substantial interests. Recently, for example, the Commission granted a certificate in good standing and authorization to exercise eminent domain power in constructing a new pipeline (incidentally, an “extension” of an existing interstate pipeline) to Explorer Pipeline Company. ICC Dkt. No. 13-0433, ORDER, April 16, 2014 (“Explorer Order”). Therein the Commission found that Explorer Pipeline (EXPL) is owned by a “consortium of different oil companies” including such majors as Chevron, Shell, ConocoPhillips, and Sunoco. *Id.* at 4, 30. Some of those companies were described as holding substantial shares of the certificated entity: The evidence was that Shell

holds 35.97% of EXPL and that Chevron hold 16.69%. *Id.* Altogether, six of the seven owners of EXPL, which include a Marathon entity (MPL Investment LLC), own approximately 93% of the voting stock of EXPL. Several of those oil company owners also ship product on EXPL. The Commission found nothing adverse in the ownership structure of EXPL, including the 35%+ stake held by Shell; found EXPL to be “fit, willing, and able” to provide common-carrier-by-pipeline services; and certificated it as a “common-carrier-by-pipeline.” Explorer Order, at 30-31. IEPC states that that result is consistent with the testimony of Staff witness Maple, who testified: “I don’t know of any Commission rules that specify how many shippers or how much of a percentage such shipper has to have in order to determine whether it’s a private or common carrier. I am also not aware of any other decisions that the Commission has made where there were two or more shippers and the pipeline was deemed to be a private line.” Tr. 1317-18. IEPC Post-Hearing Reply Br., at 20-21.

The Turner Intervenors suggest that “[w]hen FERC made its SAX decision to allow guaranteed shipping priority to shippers making long-term written shipping commitments, FERC had no idea that 35% of the SAX would be completely private, and not engaged in common carriage,” citing to Attachments 1 and 2 to its brief. Initial Turner Int. Br., at 16-17. IEPC argues that the Turner Intervenors misunderstand FERC law. IEPC states that all interstate oil pipelines are common carriers subject to FERC regulation under the Interstate Commerce Act (ICA),<sup>1</sup> with one very limited exception. That exception applies in the case where a pipeline originates at an oil producer’s well and delivers crude oil to that producer’s refinery. Such a pipeline is the only “private” pipeline permitted under the ICA. *See The Pipe Line Cases*, 234

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<sup>1</sup> Under the ICA, “common carriers engaged in ... [t]he transportation of oil ... by pipe line” are subject to regulation. 49 U.S. app. § 1(1). The term “common carrier” is broadly defined to include “all pipe-line companies; ... and all persons, natural or artificial, engaged in such transportation as aforesaid common carriers for hire.” *Id.* at § 1(3).

U.S., 548 (1814). FERC has made clear that the fact that a pipeline transports an affiliate's oil is irrelevant to its status as a common carrier pipeline under the ICA. IEPC argues that even if a pipeline transports only its affiliate's oil, it remains a common carrier subject to the ICA and is required to provide common carrier service to any third party shipper who requests it. *See, e.g. Mark West Pipeline Co.*, 146 FERC ¶ 61,035 (2014); *Ciniza Pipe Line Inc.*, 73 FERC ¶ 61,377 (1995); *Sinclair Oil Corp.*, 4 FERC ¶ 62,062 (1978) (granting temporary waivers of tariff filing and reporting requirements to pipelines transporting only affiliate barrels, but making clear that such pipelines remain subject to ICA common carrier requirements and must provide third-party service upon request). IEPC states the fact that a pipeline may transport significant volumes of oil for "committed shippers" pursuant to transportation service (or "T&D") agreements is irrelevant to its common carrier status. FERC routinely approves oil pipeline common carrier rate structures and terms and conditions of service where 90 percent of the pipeline's capacity is subject to "committed shipper" volumes, with 10 percent set aside for "uncommitted shipper" volumes. *See, e.g., 148 FERC CenterPoint Energy Bakken Crude Services, LLC*, 144 FERC ¶ 61,130 at P 7 (2013); *Shell Pipeline Co.*, 139 FERC ¶ 61,228 at P 7 (2012). IEPC Post-Hearing Reply Br., at 21-22.

The Pliura Intervenors allege that "the investment interest purchased by Marathon Petroleum Company with its decision to lock up 90% of the line made it effectively a private line." Initial Pliura Int. Br., at 13-14. IEPC responds that this claim is false because the record shows that the SAX pipeline has a capacity of 300,000 bpd, and that Marathon and another shipper have committed to a total of 210,000 bpd, leaving 90,000 bpd for other shippers. Tr. 1314-15, 1344-47. IEPC continues that in his cross-examination of Staff witness Maple, attorney Pliura attempted to misrepresent the capacity of the SAX pipeline in his questions, to

which Mr. Maple responded: “It’s not 210,000. You keep saying that. It’s 300,000.” Tr. 1345. IEPC Post-Hearing Reply Br., at 22-23.

**iv. Private Line Argument**

IEPC states that what is most remarkable about the Intervenors’ private line arguments is that not only have they not cited a single case on point, but they ignore the Illinois case law, and the federal precedent, that show that their entire theory is without merit. IEPC argues that the relevant common carrier case law establishes, beyond peradventure, that SAX is a common carrier by pipeline. IEPC Post-Hearing Reply Br., at 23.

A common carrier by pipeline, as with any common carrier, is a carrier that holds itself out to carry the product of any shipper who requests transport and is willing to pay the FERC-approved tariff for interstate movements, so long as there is available capacity. *See, e.g., Doe v. Rockdale Sch. Dist.*, No. 84, 287 Ill. App. 3d 791, 794 (3d Dist. 1997) (“A common carrier undertakes for hire to carry all persons indifferently, who may apply for passage so long as there is room and there is no legal excuse for refusal”). IEPC states that it meets those criteria regarding its SAX pipeline. The fact that despite so holding itself out, at this point in time two committed shippers – one being Marathon – are expected to be using about two-thirds of the pipeline's capacity (Tr. 1344-45) does not, according to IEPC, cause it to cease being a common carrier and instead to be a contract carrier. As stated by the appellate court in *Kenna v. Calumet, H. & C.E.R. Co.*, 206 Ill. App. 17, 27-28 (1st Dist. 1917), *aff’d*, 284 Ill. 301 (1918):

The true test of whether a corporation is or is not a common carrier seems to us to be succinctly stated by the United States Supreme Court in its opinion in the Tap Line Cases, 234 U.S. 1, cited by appellant, in which the court said, at page 24: It is insisted that these roads are not carriers because the most of their traffic is in their own logs and lumber, and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is

the right of the public to use the road's facilities and to demand service of it rather than the extent of its business, which is the real criterion determinative of its character.

IEPC states that a similar conclusion was reached by the same appellate court in a case involving this Commission. In *Holland Motor Exp., Inc. v. Illinois Commerce Comm'n*, 165 Ill. App. 3d 703 (1st Dist. 1987) plaintiffs appealed the trial court's order affirming the defendant's authority as a common carrier. The court held that the defendant was a common carrier despite the fact that the defendant had entered into certain limited contracts and dedicated certain equipment to two shippers. The appellate court stated (internal citations omitted):

The seventh circuit court in *Fleming v. Chicago Cartage Co.*, (7th Cir. 1947), 160 F.2d 992 stated that a common carrier may enter into certain limited written contracts, for instance, to assign some of its equipment and services to a particular shipper for a certain period of time. However, a common carrier must still hold itself out to the public regarding its services. That is, in determining whether a common carrier is acting within its authority, consideration may be made regarding whether anyone has ever been refused any of the services which the carrier purports to furnish.

*Id.* at 714-15.

IEPC contends that the Turner Intervenors not only ignore that Illinois law on what it means to be a common carrier, but they ignore that IEPC was certified to operate as a common carrier pursuant to the Certificate in Good Standing granted by the Commission in Docket No. 07-0446. The certificate, dated July 8, 2008, states that “Enbridge”, now IEPC, is certified “to construct, operate and maintain the proposed 36-inch pipeline [the SAX Pipeline] and to operate as a common carrier by pipeline.” Order, Dkt. No. 07-0446, at 70. IEPC Post-Hearing Reply Br., at 24-25.

IEPC continues that the terms and conditions of common carrier traffic for movements of interstate petroleum shipments are governed by the FERC. According to IEPC, FERC approved

Enbridge's common carrier tariff structure for oil shipments using the SAX pipeline under the very circumstances (*e.g.*, long-term commitments to ship) that the Turner Intervenors claim show that it is not such a carrier. FERC by law has exclusive jurisdiction over the rates to be charged by an interstate common carrier by pipeline under tariffs for shipments of oil. In FERC's "Order On Petition For Declaratory Order," Docket No. OR13-19-000, issued July 31, 2013, it was noted that IEPC told FERC that "the Project currently is sized as a 24-inch pipeline that will provide up to 300,000 barrels per day (BPD) of capacity for crude oil transportation;" that "up to 90 percent of the capacity will be available for committed volumes, while at least 10 percent will be reserved for uncommitted volumes;" that "the Project will require a large capital investment; therefore the success of the Project depends on the support of committed shippers that make long-term ship-or-pay commitments at premium rates;" that "the Commission has recognized the importance of committed shippers to the pipeline's capital financing;" and that while "the Commission has not established a minimum percentage of capacity that must be set aside for uncommitted shippers . . . the Commission has indicated that a reservation of 10 percent of capacity for uncommitted shippers is sufficient to provide reasonable access." Order, Dkt. No. OR 13-19-000, at 1, 3, 5 (July 31, 2013). IEPC points out that FERC accepted these representations and granted the petition of IEPC, thereby approving tariffs establishing such terms. IEPC Post-Hearing Reply Br., at 25.

The Turner Intervenors argue that that the level of commitment by Marathon and one other shipper to use about two-thirds of the 300,000 bpd capacity of the SAX pipeline (*see, e.g.*, Tr. 1344-45), a volume well below the 90-percent level approved by FERC, somehow transforms the service provided into "contract service" and affects the pipeline's status as a common carrier. IEPC says that argument not only ignores Illinois common carrier case law such as *Kenna* and

*Holland Motor Exp., Inc.* discussed earlier, but is an impermissible collateral attack on FERC's approval of a common carrier tariff structure for IEPC. IEPC argues that it is commonplace for common carriers by pipeline to have some of the substantial costs of building pipelines borne by committed shippers is evidenced in FERC's "Order On Petition For Declaratory Order," Docket No. OR13-19-000, at, 5 (July 31, 2013) ("Enbridge Illinois points out that the Commission recognized the importance of committed shippers to the pipeline's capital financing, distinguishing those shippers from uncommitted shippers, which are to required to ship or pay each month"). *See also Id.*, at 7 ("The proposed terms of service and rate structure for committed and uncommitted shippers are permissible under the ICA and are consistent with applicable Commission policy and precedent regarding priority service terms and rates that can be offered to shippers that commit volumes through an open season to support a new infrastructure project"). IEPC Post-Hearing Reply Br., at 26.

In addition, IEPC contends that the Turner Intervenors' contract service argument ignores the testimony of Staff witness Maple. He testified that, in his opinion, SAX is not a private line because "there is already a second shipper on the line"; "there is other capacity that has not been subscribed"; and "I believe the FERC Order that's out there said that for FERC to consider them as a common carrier, they only needed to hold out 10 percent of the capacity to have that distinction . . . [a]nd they seem to be holding out more than 10 percent of their capacity for other shippers." TR. 1313-14, 1316-17. IEPC Post-Hearing Br., at 26.

IEPC further argues that the cases cited by the Turner Intervenors (Initial Turner Int. Br., at 17) are distinguishable and provide further support for the SAX pipeline's common carrier status. In *Beatrice Creamery Co.*, the court found that defendants were private carriers because all the cargo they carried was being transported under a special contract with the plaintiff. 291

Ill. App. at 499. Additionally, the defendants refused to serve other members of the public on several occasions. *Id.* at 498. IEPC says that it, by contrast, has contracted with Marathon to allow Marathon to utilize a *portion* of the SAX pipeline’s capacity. IEPC points out it has not refused service to other shippers and in fact already has another committed shipper. In *Roy v. Illinois Commerce Comm’n*, 322 Ill. 452 (1926), also cited by the Turner Intervenors, the court found that a railroad company was not entitled to a certificate of convenience and necessity to construct a new railroad because no public interest would be served by its construction. *Id.* at 458. The court also held that the appellee railroad company was organized for no other reason than to secure the relocation and certification of a different railroad company’s existing line and thus was ineligible for certification. *Id.* at 459. IEPC states that in this case, it retains control over the operation of the SAX Pipeline and the Commission has already found that the SAX pipeline is in the public interest. Thus, IEPC argues *Roy* has no applicability to this proceeding. IEPC Post-Hearing Reply Br., at 27.

The Turner Intervenors further argue that due to the interests of the two committed shippers in the SAX pipeline, the SAX pipeline only serves a “limited business purpose,” and therefore eminent domain authority was improperly granted in Docket No. 13-0446. Initial Turner Int. Br., at 4. However, IEPC argues that even if the grant of eminent domain authority in Docket No. 13-0446 were subject to such collateral attack in these proceedings (and it is not), the Turner Intervenors’ reliance on *Southwestern Illinois Development Authority* is misplaced. There, the Illinois Supreme Court found that a regional development authority did not have the power to take an automobile recycling facility’s property and convey it to the operator of a racetrack through the exercise of eminent domain authority. *Sw. Illinois Dev. Auth. V. Nat’l City Env’tl., L.L.C.*, 199 Ill. 2d 225 (2002). The court concluded that that conveyance was not made

for a public benefit but “was undertaken solely in response to [the racetrack’s] economic goals and its failure to accomplish those goals through purchasing . . . the land at an acceptable negotiated price.” *Id.* at 241. Moreover, the court found that the exercise of eminent domain authority at issue would entail “using the power of the government for *purely private purposes* to allow [the racetrack] to avoid the open real estate market[.]” *Id.* (emphasis added).

By contrast, IEPC states that the Commission has already concluded that the SAX pipeline “is necessary and should be constructed, to promote the security or convenience of the public.” Final Order, Docket No. 07-0446, at 68 (July 8, 2009). The proceedings have been opened solely for the “limited purpose” of determining whether the certificate should be amended to allow IEPC to build a pipeline of 24 inches in diameter instead of 36 inches in diameter. That change in diameter does not affect the Commission’s determination that the pipeline is in the public interest. The SAX pipeline is still common carrier available for use by the rest of the public. IEPC Post-Hearing Reply Br., at 27-28.

IEPC also states that SAX line is not yet built and operating. Therefore, there is nothing in the currently known facts regarding committed shippers that would preclude SAX from operating as a common carrier when built. IEPC states that the Intervenor would have the Commission speculate that once built, IEPC will operate SAX in a fashion that violates its FERC tariffs, its certificate from this Commission as a common carrier, Illinois law on common carrier obligations, and Enbridge’s long history of operating common carrier pipelines. IEPC concludes there is no warrant or justification for such speculation and it provides no basis for the relief sought. IEPC Post-Hearing Reply Br., at 29.

**v. Alleged *Ex Parte* Contacts**

IEPC also addresses the Intervenor's accusations that IEPC and Staff have engaged in unlawful *ex parte* contacts, "corruption" and "backroom deal-making." *See, e.g.*, Initial Turner Int. Br., at 5, 6, 16, 18, 19, 20; Initial Pliura Int. Br., at 2, 4, 15-16. Staff has explained in detail why, under the rules of the Administrative Procedures Act, none of these communications violated the *ex parte* rules. *See* Staff Of The Illinois Commerce Commission Response To Turner Intervenor's Motion Of August 27, 2014 (August 29, 2014); Staff Of The Illinois Commerce Commission Response To Turner Intervenor's Hearing Memorandum (September 10, 2014); Staff Of The Illinois Commerce Commission Response To Turner Intervenor's September 7, 2014 Motion (September 10, 2014). IEPC contends that neither the Pliura nor the Turner Intervenor's have made any attempt to explain in what respects Staff's exposition of the *ex parte* rules and how Staff's conduct complied with those rules is incorrect, nor can they. IEPC Post-Hearing Reply Br., at 30.

The first of the alleged *ex parte* communications was an email from Staff Attorney James Olivero to Sidley Austin attorney G. Darryl Reed dated April 23, 2014, inquiring whether there had been a "size change of the pipeline for the project." Turner Intervenor's Ex Parte Exhibit 3. There were also three conference calls between Staff and IEPC, one on April 24, 2014, one on May 13, 2014, and one on May 16, 2014. Turner Intervenor's Ex Parte Exhibit 2. Finally, there were four additional emails alleged to be *ex parte* contacts, two on April 25, 2014, one on April 30, 2014, and one on May 16, 2014 when, following a conference call, an email was sent to IEPC on the same day in which Staff counsel identified specific data requests (ENG 1.9 and ENG 1.24) to be updated or supplemented. Turner Intervenor's Ex Parte Exhibits 2, 4, and 5. In sum, the first alleged *ex parte* contact was on April 23, 2014, and the last one on May 16, 2014.

The Commission's Final Order in Docket No. 07-0446 was issued on July 8, 2009. IEPC's Motion To Reopen And Amend that docket was filed on May 19, 2014, and the Commission ordered the docket reopened on June 26, 2014. Thus, each and every one of the alleged *ex parte* communications occurred while Docket No. 07-0446 was closed and, indeed, before IEPC had even moved to reopen that docket. On those facts, IEPC argues that none of the communications in question are, or can be, *ex parte* communications with respect to Docket No. 07-0446 *as a matter of law*. The State Officials and Employees Ethics Act provides that an *ex parte* communication is "any written or oral communication by any person that imparts or requests material information or makes a material argument regarding potential action concerning . . . matters *pending before or under consideration by the agency*. 5 ILCS 430/5-50(b). Additionally, the Illinois Administrative Code specifically prohibits as *ex parte* communications only communications made after "notice of a hearing in a contested case." 83 Ill. Adm. Code 200.710. IEPC concludes that because the proceedings in Docket No. 07-0446 were not reopened until June 26, 2014, all of the communications in question occurred before that date and therefore none can be *ex parte* communications with respect to Docket No. 07-0446. IEPC Post-Hearing Reply Br., at 31-32.

With respect to Docket No. 13-0446, IEPC notes that all but two of the alleged communications occurred *after* the Commission issued its Final Order in Docket No. 13-0446 on April 29, 2014, and hence for that reason alone cannot be *ex parte* contacts *as a matter of law*. That includes the email from Staff counsel to IEPC counsel dated April 30, 2014, which Intervenor has tried to link to the eminent domain proceedings because Mr. Feeley included in the "Subject" line of the email "13-446/07-0446 Enbridge Pipeline." Not only was that email sent *after* the Final Order in Docket No. 13-0446 was issued, but a review of the "topics" listed

in the email makes clear it had nothing to do with whether eminent domain authority was “necessary” to complete the pipeline, the standard for eminent domain under Section 8-509, 220 ILCS 5/8-509. IEPC Post-Hearing Reply Br., at 32.

As to the two other communications, the ALJ had already sent the Proposed Order to the Commission in Docket No. 13-0446 for a decision on April 22, 2014. Memorandum to the Commission, Docket No. 13-0446 (filed April 29, 2014). As Staff witness Mark Maple explained in a hearing on September 11, 2014, by the time of the phone call, “as far as Staff was concerned, [Docket No. 13-0446] was concluded. We had no more . . . analysis to do in that case.” Transcript, Docket No. 07-0446, at 1298:6-8 (Sept. 11, 2014). Moreover, as Maple stated, the phone call “didn’t have anything to do with the ’13 case.” *Id.* at 1298:2-3. Staff has previously explained that after the phone call, Staff decided that the issue of size of the pipeline and a request for an amended certificate did not involve the eminent domain case and therefore did not warrant an *ex parte* report in Docket No. 13-0446. Staff Response to Turner Intervenors’ Motion to Supplement the Evidentiary Record, Docket No. 07-0446, at 3 (Oct. 24, 2014). IEPC Post-Hearing Reply Br., at 32-33.

The Turner Intervenors charged that IEPC’s action in filing a Motion To Reopen And Amend in Docket No. 07-0446 “was undertaken by Enbridge as a result of *ex parte* communications commencing between ICC Staff and Enbridge before a decision was made in Case 13-0446, which communication was not disclosed in e-Docket Case 13-0446 or in any other ICC case.” Initial Turner Int. Br., at 5-6. IEPC contends that this statement simply ignores the facts previously stated. The two communications that occurred prior to the Final Order in Docket No. 13-0446 were after the record had been marked “Heard and Taken” and after the Proposed Order was in the hands of the Commission. IEPC states there was therefore no vehicle

under the Commission's rules for Staff or any other party to raise the 24-inch issue with the Commission even if there had been a legitimate basis for a filing (and IEPC argues there was not) until Applications for Rehearing could be filed in late May 2014. The Pliura Intervenors did in fact file an Application for Rehearing raising the 24-inch issue on May 27, 2014, which was denied. The Turner Intervenors did *not* seek rehearing in Docket No. 13-0446 on that or any other ground, and IEPC argues they are therefore estopped from collaterally attacking the Commission's refusal to continue the proceeding based on the change in diameter. IEPC Post-Hearing Reply Br., at 32-33.

IEPC argues that in any event, Docket No. 13-0446 was not the proper proceeding in which to raise the 24-inch issue. The Order in Docket No. 13-0446 grants eminent domain authority to IEPC to obtain "easement rights along the pipeline that was certificated in Docket No. 07-0446." Order, Docket No. 13-0446, at 37 (April 29, 2014). Thus, IEPC contends that even if one were to assume that the SAX certificate needed to be amended to reflect use of a 24-inch line, the Docket in which to do so was Docket No. 07-0446, the certification docket. IEPC Post-Hearing Reply Br., at 34.

According to IEPC, the communications on which the Intervenors rely are also not *ex parte* communications because Staff's participation was investigatory. The Illinois Administrative Code provides that *ex parte* communications do not include those involving Commission employees engaged in "investigatory, prosecutorial, or advocacy functions." 83 Ill. Adm. Code 200.710(b). Neither the Commission's Rules of Practice nor the Public Utilities Act ("PUA") prohibit *all* communications between Staff and parties in pending cases. Staff explained that the phone call on April 24, 2014, was for the purposes of learning more about the change in pipeline diameter and whether that change would require an amendment to the

Certificate in Good Standing. Staff Response to Turner Intervenors' Motion to Supplement the Evidentiary Record, Docket No. 07-0446, at 3 (Oct. 24, 2014). The email dated April 23, 2014, which precedes it contains a request by Staff for a phone call to determine "what is going on with the size change" and "what may have changed." IEPC argues that Staff was clearly engaged in its investigatory role, and thus those communications are *not ex parte* communications. IEPC Post-Hearing Reply Br., at 34.

**vi. Alleged Corruption and Backroom Dealing**

The Intervenors argue that even if the communications in question were not unlawful *ex parte* communications, those communications, along with other acts or omissions, constituted "corruption," "back-room dealing," or "tainting" of the entire process. IEPC believes these charges of corruption and improper conduct, even if not unlawful *ex parte* conduct, are without foundation. According to IEPC, the Turner Intervenors' allegation that it was somehow the ICC Staff that "constrained" the scope of this proceeding has no evidentiary support whatever. It was the Commission, not the Staff, that on June 27, 2014, issued the "Notice Of Corrected Commission Action" which established that the reopened proceedings were to be limited in focus and scope: "Notice is hereby given that the Commission in conference on June 26, 2014 REOPENED the proceeding pursuant to Section 10-133(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." *See also* Tr. 1281-82. That "limited purpose," as described in IEPC's Motion To Reopen And Amend, did *not* include a reexamination of whether the SAX

pipeline should be certificated, as urged by the Pliura Intervenors in particular, nor an examination of whether SAX is a private line, as urged by the Turner Intervenors.

IEPC contends that the reality is, as Staff witness Mark Maple testified:

“I don’t believe that the amending of a certificate is the same as having to meet the four criteria of a new certificate. To me, amending a certificate is merely fixing an error or changing – making a change to what has already been approved.”

Tr. 1310. *See also* Tr. 1343. IEPC states that as Mr. Maple’s testimony suggests, the Commission was simply following precedent for amendment of previously granted certificates. The Intervenors do not show that the Commission’s Corrected Notice deviated in any way from past precedent. IEPC argues that attorney speculation to the contrary is not evidence, and should be disregarded. IEPC Post-Hearing Reply Br., at 35-36.

IEPC disputes the suggestion that it was somehow inappropriate for Staff to recommend to IEPC that it file a motion to reopen Docket No. 07-0446 and amend its SAX certificate to provide for a 24-inch pipeline rather than a 36-inch pipeline. IEPC explains that until its telephone conversation with Staff on April 24, 2014, it believed it had inherent authority to make the change in the diameter of the SAX pipeline with no need to go back to the Commission. IEPC provides *Talty v. Commonwealth Edison Company*, 38 Ill. App. 3d 273 (1976) and *Weaver v. Natural Gas Pipeline Co.*, 27 Ill. 2d 48 (Ill. 1963) as support for this position. IEPC still believes that as a strict legal matter, that is the law. However, Staff felt there was some doubt on that score and therefore urged IEPC to seek an amendment. Thus, as Staff has pointed out, “[i]t is through Enbridge Illinois’ seeking a reopening of Docket No. 07-0446 and an amended certificate, *at Staff’s urging*, that the Turner Intervenors and others have been afforded the opportunity to raise their concerns in this reopened matter.” Staff Of The Illinois Commerce Commission Response to Turner Intervenors’ Motion Of August 27, 2014, at 12 (Aug. 29, 2014)

(emphasis supplied). IEPC contends that the Turner Intervenors' argument that that is somehow untoward corruption or backroom dealing simply confirms the adage that "No good deed shall go unpunished." IEPC Post-Hearing Reply Br., at 36-37.

Equally puzzling to IEPC are the attacks by Intervenors on Staff's email to IEPC listing possible topics IEPC might address if it filed for an amended certificate. IEPC responds that the list of topics is just that – possible topics. Mr. Maple testified that the topics or questions on the April 30, 2014 email were the product of brainstorming (Tr. 1307-08) and thus "were not necessarily posed in a way that we demanded answers to these." Tr. 1348. He then elaborated:

These were just things that we thought might end up being important. And then once the reopening Order came from the Commission, the limited scope of that made some of the questions irrelevant.

Tr. 1348. *See also* Tr. 1307-08. When asked why the Staff would make such suggestions to IEPC, Mr. Maple testified:

"I think the reason why is if there were going to be a reopening, there would be discovery that Staff would normally do in a new case. And rather than wait and conduct that discovery through numerous writing and answering of data requests, responses, that we put some of our questions in this e-mail, which would shorten the discovery process, basically. Streamline it."

Tr. 1306-07. Mr. Maple further stated that Staff was interested in streamlining the discovery process "[j]ust for efficiency." Tr. 1307. IEPC Post-Hearing Reply Br., at 37-38.

The critical point, according to IEPC, is that Staff did not suggest the answers that should be provided on any of those topics, did not indicate what might happen if IEPC failed to address all of the topics, and did not say that IEPC's motion to reopen and amend would be supported by Staff even if IEPC did provide answers to all of the topics. Thus, IEPC has all along borne the risk that the Staff and the Commission might not find its answers on some or all of those topics

and its overall request for an amendment to be meritorious. IEPC points out that what “guidance” Staff’s list of topics provided is no different than if a prior Commission decision on amending a certificate had listed all of the factors the Commission believed should be addressed by a common-carrier-by-pipeline seeking an amended certificate. IEPC Post-Hearing Reply Br., at 38.

The Turner Intervenors argue that the scope of these proceedings encompasses the grant of eminent domain made in Docket No. 13-0446 (Initial Turner Int. Br., at 10-11) and that the grant of eminent domain authority is also the product of corruption. Initial Turner Int. Br., at 15-18. IEPC contends that argument is without merit for several reasons.

First, IEPC contends that the Turner Intervenors’ argument that the grant of eminent domain authority was “wrongful” constitutes an impermissible collateral attack on the final order in Docket No. 13-0446. IEPC explains that it is well-established that Commission orders may not be collaterally attacked in different proceedings. *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill. 2d 520, 528 91962) (“[O]rders of the Commerce Commission which are within its statutory authority are not void but voidable only, and *such orders are not subject to collateral attack.*”) (emphasis added); *City of Chicago v. Commonwealth Edison Co.*, Dkt. No. 96-0360, 1997 WL 33771836 (Ill. C.C. May 7, 1997) (the Public Utilities Act “generally provides that a party may not collaterally attack Commission orders”). In *Illini Coach Co. v. Illinois Commerce Comm’n*, 408 Ill. 104 (1951) Appellant filed two complaints with the Commission seeking to vacate two Commission orders by which other companies were granted certificates of convenience and necessity. The Appellant failed to file an application for rehearing and did not take a direct appeal from those final orders. The Supreme Court held that Appellant’s new complaints constituted an impermissible collateral attack on the Commission orders:

It is settled by the decision of this court that a judgment rendered by a court having jurisdiction of the parties and the subject matter is not open to attack in any collateral action except for fraud in its procurement, and even if the judgment is so illegal or defective that it would be set aside or annulled on a proper direct application, it is not subject to collateral impeachment so long as it stands unreversed and in force. If a tribunal has jurisdiction of the subject matter and of the parties, nothing further is required . . . We have held that the statutory method for reviewing orders of the Commission is exclusive.

*Id.* at 109-100. Here, IEPC explains that the Turner Intervenors similarly filed no Application for Rehearing and took no appeal of the final order in Docket No. 13-0446. Thus, the Turner Intervenors are prohibited from collaterally attacking in Docket No. 07-0446 the grant of eminent domain authority made in Docket No. 13-0446. *See Albin v. Illinois Commerce Comm'n*, 87 Ill. App. 3d 434, 437 (4<sup>th</sup> Dist. 1980) (holding that plaintiffs waived the merits of a certification proceeding by failing to appeal and could not collaterally attack the certificate in eminent domain proceedings). IEPC Post-Hearing Reply Br., at 38-39.

Second, IEPC asserts that the Turner Intervenors' argument that SAX is a private line and thus the grant of eminent domain authority reflects corrupt practice is equally wrong. IEPC explains that it previously demonstrated that SAX is not a private line under well-established Illinois and federal law, and nothing in the Turner Intervenors' many claims about Marathon's alleged "ownership" interest converts it into a private line in any fashion. IEPC Post-Hearing Reply Br., at 39.

Third, the Turner Intervenors have suggested that the Staff failed in its duties in Docket No. 13-0446 because it allowed the ICC to vote without considering that SAX allegedly had become a private pipeline by virtue of Marathon's purchase, through Lincoln Pipeline LLC, of a 35% interest in SAX. Initial Turner Int. Br., at 15-16. IEPC contends that a major problem with this theory is that the Commission issued its Final Order in Docket No. 13-0446 on April 29,

2014, but as the 10Q filed by Enbridge Energy Partners, L.P. for the quarterly period ending June 30, 2014, states: “[e]ffective July 1, 2014, Enbridge entered into an agreement with Lincoln Pipeline LLC, or Lincoln, an affiliate of MPC, to, among other things, admit Lincoln as a partner and participate in the Southern Access Extension” and that “Lincoln has purchased a 35% equity interest in the project. . . .” Kraft ICC Testimony, page 13. IEPC notes that the Turner Intervenors nowhere explain how Staff was supposed to bring to the Commission’s attention an equity investment effective two months after the Commission’s Final Order in Docket No. 13-0446. IEPC Post-Hearing Reply Br., at 39-40.

IEPC additionally disputes that it misrepresented or withheld any material fact in Docket No. 13-0446 concerning IEPC’s contractual arrangement with Marathon Petroleum which would make Marathon an owner/shipper and the decision to construct a 24-inch diameter instead of a 36-inch diameter pipeline in violation of the Public Utilities Act (220 ILCS 5/5-202.1) which prohibits any misrepresentation or withholding of material information and Illinois Supreme Court Rule 137, which provides that the signature of an attorney signifies that the information within a pleading is grounded in fact. IEPC argues that this allegation is equally wide of the mark. The eminent domain authority granted in Docket No. 13-0446 is not at issue in this proceeding. Nonetheless, IEPC argues it disclosed in Docket No. 13-0446 all facts relevant to the grant of eminent domain authority for the SAX pipeline. First of all, the final decision to use 24-inch pipe was not made until March 11, 2014, after the record in Docket No. 13-0446 was marked “heard and taken” in a hearing on December 16, 2013. Similarly, the agreement with Marathon went into effect on July 1, 2014, long after the final order was entered in Docket No. 13-0446 on April 29, 2014. IEPC Post-Hearing Reply Br., at 40-41.

Moreover, IEPC notes that from the very time the SAX project was reenergized in 2012, Enbridge publicly discussed, published, and otherwise made known that the SAX project was not likely to require a 36-inch diameter pipeline but rather something smaller in diameter, such as 24-inch diameter pipeline. For example, in December 2012, Enbridge issued a news release entitled "Enbridge to Invest \$6.2 Billion in Light Oil Market Access Program." Part of that release specified, "Enbridge will construct the 265-kilometer (165-mile), *24-inch diameter* Southern Access Extension Pipeline from Flanagan to Patoka[.]" Enbridge News Release, at 6 (Dec. 6, 2012). A letter sent to landowners in early February 2013 announced that the project "is approved for up to 36 inches in diameter." Additionally, where a landowner's attorney insisted on some specification of the pipeline diameter in an easement agreement, the SAX pipeline was specified to be "up to 36 inches." IEPC contends that these actions do not signify a party trying to withhold material information. IEPC believed it had implicit authority to install a smaller-diameter pipeline if business conditions warranted it. IEPC notes that in the Line 78 Order (Docket No. 13-0134), for example, the Commission issued a certificate that included the phrase "maximum 36-inch pipeline" even through the evidence in that docket, as in Docket No. 07-0446, was addressed solely to a 36-inch pipeline. Order, Docket No. 13-1034, Apr. 29, 2014. IEPC Post-Hearing Reply Br., at 41.

Finally, the Pliura Intervenors raised the issue of the change in pipeline diameter in their Application for Rehearing in Docket No. 13-0446. In the ALJ's Memorandum to the Commission recommending the denial of that Application, he concluded that the change in diameter would not be material to the grant of eminent domain authority: "Pliura Intervenors do not explain how -- or even allege that -- authorizing a 24-inch pipeline would place more burdens on their property than would the currently certificated 36-inch pipeline." Memorandum to the

Commission, Docket No. 13-0446, at 2 (June 2, 2014). The Commission accepted the ALJ's recommendation and denied the Pliura Intervenors' Application for Rehearing. Therefore, IEPC argues that the Commission was aware in Docket No. 13-0446 that there was a change in the diameter of the pipeline, but concluded that it had no impact on the decision regarding eminent domain authority. IEPC believed it had inherent authority to change the diameter of the pipeline and that the change in diameter was not material to Docket No. 13-0446. Thus, IEPC concludes it did not violate the Public Utilities Act or Illinois Supreme Court 137. IEPC Post-Hearing Reply Br., at 41-42.

According to IEPC, the Turner Intervenors and the Pliura Intervenors also suggest that the Commission should act as if there is a blank slate in this case. As part of this argument, they have previously attempted to distinguish *Talty v. Commonwealth Edison Company*, 38 Ill. App. 3d 273 (1976), which provides support that IEPC would have the right even without the reopened Docket No. 07-0446 proceeding to reduce the diameter of the pipeline on the ground that "landowners rights are still adjudicated in this case." Motion to Dismiss and in the Alternative For Other Relief", at 7 (Sept. 15, 2014). IEPC believes that is incorrect. IEPC responds that it has a valid and lawful certificate for the SAX pipeline and its route based on the July 2009 Order in Docket No. 07-0446. That July 2009 Order was upheld on appeal and has never been stayed. IEPC also states it has a valid and lawful Order in Docket No. 13-0446 granting eminent domain authority for identified tracts along the approved SAX pipeline, an Order which also has not been stayed. Moreover, IEPC has not yet installed any 24-inch diameter pipe. Thus, IEPC argues that as matters now stand, landowners' rights on the SAX route *have* been adjudicated, and IEPC has not violated either Order. IEPC therefore concludes

that the Turner Intervenors' demand that the Commission should act as if there were a blank slate is therefore incorrect. IEPC Post-Hearing Reply Br., at 43.

IEPC concludes that for all of the reasons previously stated, it should be granted an amended Certificate in Good Standing allowing it build a pipeline with a diameter of 24 inches instead of 36 inches.

**B. Staff of the Illinois Commerce Commission**

**C. Pliura Intervenors**

**D. Turner Intervenors**

#### **IV. COMMISSION ANALYSIS AND CONCLUSIONS**

In its July 2009 Order in this Docket, the Commission found, based on an extensive record and consideration of all relevant factors, that a public need exists for the proposed service, and that the public convenience and necessity require issuance of a certificate in good standing for IEPC to construct, operate, and maintain the SAX Pipeline. As reflected in the approved Certificate in Good Standing, the pipeline as then proposed was expected to be 36-inches in diameter.

IEPC has now filed its Motion To Amend And Reopen to change the described outside diameter for the SAX Pipeline in the CGS from 36-inches to 24-inches. The Commission reopened Docket No. 07-0446 on June 26, 2014. The Commission made clear in its "Notice Of Corrected Commission Action," issued June 27, 2014, that the reopened proceedings were to be limited in focus and scope: "Notice is hereby given that the Commission in conference on June 26, 2014 REOPENED the proceeding pursuant to Section 10-133(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.” The Commission has concluded that it has the authority to amend the Certificate in Good Standing granted in Docket No. 07-0446 to allow the change in pipeline diameter. IEPC argues, and the evidence introduced upon reopening supports, that the reduction in the pipeline's maximum diameter from 36 inches to 24 inches is not a material change from the facts in the record before reopening on which the Commission relied in granting the certificate, and does not impose a greater burden on properties impressed with IEPC's easement.

First, the issues directly raised by the change in the maximum diameter of the SAX pipe from 36 inches to 24 inches are narrow. The record on reopening shows that the route of the SAX pipeline is the same; the petroleum to be shipped – heavy crude as well as light oil – is among those specifically identified in IEPC's Application in the proceeding; much of the oil will still come from Canada, a more secure and reliable source for imported oil; the oil will still be accessible by Midwestern refineries; except for its diameter, the pipe's manufacture, construction, operation, and maintenance will be the same as approved in the 2009 Order; the Order in Docket No. 13-0446 mandates that IEPC apply to the SAX pipeline the policy, practice, and safety recommendations of the National Transportation Safety Board (“NTSB”); the existing easement agreements, rights, payments, patrol, and maintenance parties are the same as approved in the 2009 Order; and all Enbridge-acquired permits, license, and agreements identified in the certification proceeding remain in effect and need no modification due to pipe size. Additionally, the proposed amendment will have no adverse effect on any landowner along the route. As Staff witness Mr. Maple testified, “I don't believe there are actually that many differences between the two proposed pipelines.” Tr. 1311. IEPC Post-Hearing Br., at 3-4. In light of those facts, the Commission rejects the efforts of the Intervenor to require the

Commission to treat the reopened proceeding as if it were a full-blown, wholly new certification proceeding.

Second, the Commission finds that the reasons given for the change in the diameter of the pipe, and the resulting reduced initial capacity, were persuasively explained in IEPC's Motion To Reopen And Amend (IEPC Ex. 1). The record shows that by the time of the July 2009 Order, the "Great Recession" had severely impacted the nation's economy, and concomitantly, the North American energy market and the derivative demand for transportation of crude oil by common-carrier-pipelines.

In addition to the effects of the Great Recession, which continued well past 2009, IEPC has pointed out that appeals of the Commission's July 2009 Order and litigation regarding IEPC's right to exercise its existing, so-called "Luxor" easement rights were not completely resolved until well into 2011. Motion To Reopen And Amend, Ex. 1, at 3. Thus it was not until early 2012 that such matters were resolved and the economy had rebounded enough to strengthen energy demand as to warrant renewed attention to projects such as the SAX pipeline. IEPC Post-Hearing Br., at 6.

The record shows that by 2012, shipper interest in moving heavy crude to the Patoka Hub, manifested in 2007-2009, had come to be focused on refineries, such as BP in Whiting, Indiana, that had reconfigured themselves to use more heavy crude by adding coker capacity. Conversely, Patoka had become significant to shippers of light oil sought by refineries capable of processing it. Motion To Reopen And Amend, Ex. 1, at 5. Marathon, which operates three PADD II refineries, including one in Robinson, Illinois, that are reachable via the Patoka Hub, has committed to have IEPC move light crude to Patoka via the SAX pipeline in order to supply

those refineries. *Id.* A second shipper has also committed to have IEPC move light crude to Patoka via the SAX pipeline. Tr. 1227-28; 1233; 1344. IEPC Post-Hearing Br., at 7.

The Commission concludes that in light of those facts, an amendment of the Certificate in Good Standing approved in the July 2009 Order to authorize a SAX pipeline of 24 inches in diameter rather than 36 inches in diameter will reflect market developments since issuance of the original certification order; will enhance the ability of IEPC as a common-carrier-by-pipeline to serve by allowing it to amend a previously granted authorization (as has been done for other Enbridge System projects) to reflect such changes in market developments; and will further IEPC's efforts to construct and place in service a pipeline adequate to meet the service requests of crude petroleum shippers and satisfy public need for and convenience in the supply of petroleum product.

Contrary to arguments raised by the Intervenors, the Commission believes that the fact that the SAX pipeline is now expected initially to carry predominantly light oil from the United States and Canada does not represent a fundamental change in the project. IEPC's Application did not limit the project to the carrying of "heavy" Canadian crude. Additionally, in that respect Staff witness Mark Maple confirmed that in Staff's view, the project has not changed. He testified that "the pipeline . . . as it was ordered, originally didn't specify a weight of the oil. It was just a petroleum pipeline. So that project has not changed." Tr. 1351-52. He also testified that the fact that the volume of oil to be shipped at least initially may be closer to 200,000 bpd does not change his opinion that the pipeline is "still a benefit to the public." Tr. 1350. He further testified that another reason why, in his mind, the SAX pipeline is still a benefit to the public is that it continues to provide benefits that he identified in his original 2007 testimony, including "a redundancy of pipeline network" and the ability to "bring in more sources of oil

from friendly countries, be it Canada or the United States.” Tr. 1350-51. IEPC Post-Hearing Br., at 8.

This decision by the Commission authorizing a reduction in the diameter of the SAX pipeline from 36-inches to 24-inches will not require any amendment of the Commission’s Eminent Domain Order in Docket No. 13-0446. The Eminent Domain Order in Docket No. 13-0446 grants eminent domain authority for the “pipeline that was certificated in Docket No. 07-0446.” Order, Docket No. 13-0446, at 37 (April 29, 2013). Thus, after an amendment to the diameter of the pipeline certificated in Docket No. 07-0446 from 36-inches to 24-inches, the Eminent Domain Order’s reference in its Finding And Ordering Paragraphs to “the pipeline that was anticipated in Docket No. 07-0446” is valid without need for any amendment to the Eminent Domain Order. Enbridge III. Reply, Ex. 2, at 8-9.

The arguments of Intervenors in opposition to the amendment are without merit. First, the Pliura Intervenors claimed that IEPC “secretly decided to change the proposed project from what had been presented in the 07-0446 Final Order” and “surreptitiously changed the project without disclosing that fact in applications for eminent domain.” Initial Pliura Int. Br., at 3. However, the evidence shows that IEPC did not deliberately hide the fact that it intended to build a 24-inch pipeline. Public statements starting in late 2012 indicate that IEPC was considering installing 24-inch pipeline, but did not actually make the final decision to do so until March 11, 2014. IEPC explained that it believed it had inherent authority to make the change without an amendment to the certificate until Commission Staff convinced IEPC otherwise while Docket No. 07-0446 was still closed.

The contention by the Pliura Intervenors in particular that the SAX pipeline’s 36-inch diameter and associated 400,000 bpd capacity were critical to the Commission’s and the

Appellate Court's finding that the pipeline met the public convenience and necessity standard is also incorrect. The evidence shows that all of the benefits identified by Staff and adopted by the Commission as important in the public-need determination are met by the SAX pipeline project as currently proposed with a 24-inch diameter pipeline. That is, the 24-inch diameter SAX pipeline will still bring Canadian petroleum (albeit more "light" oil petroleum) to Patoka; the light oil is still important to refineries in the Midwest; the SAX pipeline will still provide additional oil supplies from a friendly and reliable country; the entire SAX pipeline will still provide an alternate supply of petroleum when other sources are not available; and the SAX project will continue to provide access to a secure and reliable energy supply which will help meet our country's energy needs and therefore is a project that benefits Illinois citizens.

The Intervenors also allege that Marathon's ownership interest in the pipeline and commitment for a portion of the SAX pipeline's capacity deprives the pipeline of status as a common carrier. However, the evidence shows that under Illinois law, the SAX pipeline is a common carrier so long as it holds itself out to carry the product of any shipper who requests transport and is willing to pay the FERC-approved tariff for interstate movements. IEPC has satisfied both of those criteria and has already been certified to operate as a common carrier in Docket No. 07-0446. The record shows that two shippers – Marathon and another shipper – have entered into commitments to ship about 210,000 bpd over SAX, about 90,000 bpd short of the pipeline's capacity. That leaves plenty of capacity for other shippers. The fact that Marathon, through an affiliate, owns 35% of the pipeline project does not convert the SAX pipeline into a private line, either as a whole or to the extent of Marathon's ownership. Additionally, the terms and conditions of common carrier traffic for movements of interstate petroleum traffic are governed by the Federal Regulatory Energy Commission ("FERC"). FERC

specifically addressed and approved the Marathon commitment in the order approving the SAX pipeline's tariff framework. As a result, neither Marathon's shipping commitment nor its minority equity stake in IEPC renders SAX a "private line" rather than a common carrier.

The Commission also finds that the Turner Intervenors' accusations that IEPC and Staff engaged in unlawful *ex parte* contacts are unfounded. The Commission's Final Order in Docket No. 07-0446 was issued on July 8, 2009. IEPC's Motion To Reopen And Amend that docket was filed on May 19, 2014, and the Commission ordered the docket reopened on June 26, 2014. The Commission thus finds that all of the alleged *ex parte* communications occurred before the docket was reopened, and thus cannot be *ex parte* communications with regard to Docket No. 07-0446. With respect to Docket No. 13-0446, all of the communications at issue occurred after the issuance of the Final Order in that docket, on April 29, 2014. As for the other two communications, the ALJ had already sent the Proposed Order to the Commission in Docket No. 13-0446 by the time those communications already occurred. Moreover, the evidence shows that those communications were directed toward the change in diameter relevant to Docket No. 07-0446, not Docket No. 13-0446. Additionally, Staff's participation in all of those communications was clearly investigatory and therefore expressly permitted by the Illinois Administrative Code.

Finally, the Intervenors have not produced evidence of "backroom dealing" or "corruption." IEPC followed precedent for the amendment of previously-granted certificates as well as the Commission's specification that the reopened proceedings would have a limited scope. IEPC believed it had inherent authority to make the change in diameter and sought a reopening of Docket No. 07-0446 at Staff's urging. That does not constitute corruption or backroom dealing. The Turner Intervenors argue further that Docket No. 13-0446 is the product

of corruption. However, the Turner Intervenors may not collaterally attack in Docket No. 07-0446 the order in Docket No. 13-0446 and have waived the merits of the eminent domain grant by failing to appeal from the order in that docket.

IEPC has additionally shown that it did not misrepresent or withhold any material fact in Docket No. 13-0446 with regard to its contractual arrangement with Marathon and the decision to change the pipeline from 24 to 36 inches in diameter. The agreement with Marathon went into effect on July 1, 2014, long after the final order was entered in Docket No. 13-0446. The final decision to use 24-inch pipe was not made until March 11, 2014, after the record in Docket No. 13-0446 was marked “heard and taken.” And again, the record shows that until the Staff telephone call to IEPC on April 24, 2014, IEPC believed it had inherent authority to construct a pipeline of up to 36 inches in diameter without going back to the Commission. Those facts also do not support a claim of misrepresentation or withholding of material facts.

In conclusion, IEPC has a valid and lawful certificate for the SAX pipeline and its route based on the July 2009 Order in Docket No. 07-0446. That July 2009 Order was upheld on appeal and has never been stayed. IEPC has shown that an amendment to its Certificate in Good Standing permitting IEPC to build a pipeline with a diameter of 24 inches rather than 36 inches is consistent with the public convenience and necessity. Therefore, IEPC’s Motion to Amend the Certificate in Good Standing allowing it to build a pipeline with a diameter of 24 inches is granted.

## **V. FINDINGS AND ORDERING PARAGRAPHS**

The Commission, having considered the entire record, is of the opinion and finds that:

(1) IEPC is a Delaware Limited Liability Company authorized to conduct business in the State of Illinois;

(2) the Commission has jurisdiction over the parties hereto and the subject matter hereof;

(3) the recitals of fact and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;

(4) this Docket is reopened for the specific “limited purpose” outlined in the Applicant’s “Motion to Reopen and Amend Order Concerning Diameter of the Southern Access Extension Pipeline,” namely, to amend the Certificate for the Southern Access Extension pipeline, also known as the “SAX” pipeline, to authorize IEPC to install a SAX pipeline of 24 inches in diameter rather than 36 inches in diameter, as presently provided;

(5) the proposed amendment to the July 2009 Order does not change the pipeline’s route; the petroleum to be transported includes oil specifically identified in IEPC’s Application in this docket; the pipe’s manufacture, construction, operation, and maintenance will be the same; the safety requirements, policies and practices will be the same; the easements will be the same; and the required permits, license, and agreements identified in the certification proceeding remain the same and need no modification due to pipe size. Only the diameter of the pipeline will change, from 36 inches to 24 inches;

(6) the amendment to the July 2009 Order, authorizing IEPC to construct, operate, and maintain the SAX Pipeline as a pipeline of 24 inches in diameter rather than 36 inches meets the public convenience and necessity;

(7) amendment of the Certificate as described will not require any change in the Order in Docket No. 13-0446 granting eminent domain authority to IEPC for the SAX pipeline;

(8) any objections, motions, or petitions filed in this proceeding that remain unresolved should be deemed disposed of in a manner consistent with the ultimate conclusions contained in this Order.

IT IS THEREFORE ORDERED that the consent and approval of the Illinois Commerce Commission previously granted to Enbridge Pipelines (Illinois) L.L.C. in Docket 07-0446 on July 8, 2009, is modified to authorize Enbridge to construct, operate, and maintain the SAX Pipeline as a pipeline of 24 inches in diameter. As a result of the amendment to the July 2009 Order, the Certificate in Good Standing shall read as follows:

**CERTIFICATE IN GOOD STANDING**

IT IS HEREBY CERTIFIED, subject to the conditions imposed in this order or in the order in this proceeding dated July 8, 2009, that Illinois Extension Pipeline Company, L.L.C. is authorized, pursuant to Section 15-401 of the Common Carrier By Pipeline Law, to construct, operate and maintain the proposed 24-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 approval continues to be granted to Illinois Extension Pipeline Company, L.L.C. to do any and all other things not contrary to law that are necessary and appropriate for the performance of any and all actions authorized herein.

IT IS FURTHER ORDERED that any objections, motions, or petitions filed in this proceeding that remain unresolved are hereby disposed of in a manner consistent with the ultimate conclusions contained in this Order.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Act and 83 Ill. Adm. Code 200.880, this order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this \_\_\_ day of \_\_\_\_\_, 2014.

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

ILLINOIS EXTENSION PIPELINE COMPANY, L.L.C. :

Application pursuant to sections 8-503, 8-509 and	:	07-0446
15-401 of the Public Utilities Act - the Common	:	(on Reopen)
Carrier by Pipeline Law to Construct and Operate a	:	
Petroleum Pipeline and when necessary, to Take	:	
Private Property as Provided by the Law of	:	
Eminent Domain.	:	

**NOTICE OF FILING**

**TO: SEE ATTACHED SERVICE LIST**

**PLEASE TAKE NOTICE** that on this date we have filed with the Clerk of the Illinois Commerce Commission, the PROPOSED ORDER, in the above-captioned matter.

ILLINOIS EXTENSION PIPELINE COMPANY, L.L.C.

By:  /s/ G. Darryl Reed  
One of Its Attorneys

Dated: November 6, 2014

Gerald A. Ambrose  
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**CERTIFICATE OF SERVICE**

I, G. Darryl Reed, an attorney, certify that I caused copies of the PROPOSED ORDER, to be served on each of the parties listed on the service list via electronic or regular mail, this 6th day of November, 2014.

/s/ G. Darryl Reed

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