

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

DAKOTA ACCESS, LLC)	
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)	
Application Pursuant to Section 15-401 of the)	Docket No. 14-0754
Common Carrier by Pipeline Law and)	
Sections 8-503 and 8-509 of the Public Utilities)	
Act and for a Certificate of Good Standing and)	
Related Authority to Construct and Operate a)	
Petroleum Pipeline as a Common Carrier)	
Pipeline and When Necessary to Take Private)	
Property as Provided by the Law of Eminent)	
Domain)	

**JOINT INITIAL BRIEF OF ILLINOIS AGRICULTURAL ASSOCIATION
and THE SP GROUP**

Pursuant to Section 200.800 of the Rules Practice of the Illinois Commerce Commission ("Commission"), 83 ILL. ADM. CODE 200.800, and the procedural schedule established for this proceeding, the ILLINOIS AGRICULTURAL ASSOCIATION a/k/a the Illinois Farm Bureau ("Farm Bureau"), by and through its attorney, Laura A. Harmon, and landowner intervenors represented by Shay Phillips, Ltd. (together the "SP Group") hereby file their Joint Initial Brief in the above-captioned proceeding. The landowner intervenors comprising the SP Group are O.L. Behymer, Wilma Behymer, Tamara Behymer, Terry Behymer, Donald A. and Mary C. Fry, Ann Burns Hendrick, William J. Klingele, Kathleen A. Klingele, Mary E. Klingele-Ahmed, Glen Koch, Alan Koch, Robert E. Koch, Terrance J. Markert, Andrew M. Ray, Julie J. Radel, Carole A. Salrin, Evelyn Thomas, Jane M. Veith, Julia A. Veith, and Elizabeth J. Veith.

I. Introduction and Procedural History

On December 22, 2014, Dakota Access, LLC ("Dakota Access") filed its Application for Certificate in Good Standing and Other Relief ("Application") seeking authority to construct and operate a petroleum pipeline as a common carrier pipeline and to take private property through

eminent domain pursuant to Section 15-401(a) of the Common Carrier by Pipeline Law (220 ILCS 5/15-401(a) and pursuant to Sections 8-503 (220 ILCS 5/8-503) and 8-509 (220 ILCS 5/8-509) of the Illinois Public Utilities Act (“PUA”). Several parties, including Farm Bureau and SP Group intervened¹ and testimony was presented by Dakota Access, ICC Staff, SP Group and other intervenors. An evidentiary hearing was held on September 1, 2015, and at the conclusion of the hearing the matter was not marked HEARD and TAKEN.

II. Description of Project and Relief Requested

The Dakota Access project originates in North Dakota, passes through South Dakota, Iowa and Illinois and terminates in Patoka, Illinois. Dakota Access is proposing to construct a 30-inch diameter crude oil pipeline approximately 180 miles in length in Illinois through the counties of Adams, Bond, Brown, Fayette, Hancock, Macoupin, Marion, Montgomery, Morgan, Pike, Schuyler, and Scott. When Dakota Access filed its Application, it submitted a preliminary proposed route, requested approval of a 500 foot project width around the final approved route and notified landowners within a general .75 mile wide corridor on the preliminary proposed route. (Application, ¶ 4, p. 3, and Dakota Access Exh. 2.0, p. 6) In its Application, Dakota Access stated that it planned to start construction in the 4th Quarter of 2015, and place the pipeline in service in the 4th Quarter of 2016. (Application, ¶ 34) On March 6, 2015, Dakota Access submitted additional testimony identifying ten minor realignments and re-routes (Exh. 2.16) and on August 31, 2015, Dakota filed supplemental testimony identifying 28 realignments and re-routes for the proposed project. (Exh. 2.22). On June 8, 2015 Dakota Access entered into an Agricultural Impact Mitigation Agreement (“AIMA”) with the Illinois Department of Agriculture for the project. (Dakota Access Exh. 2.19)

¹ SP Group members filed separate Petitions for Leave to Intervene as reflected by their ownership of affected properties.

III. Statutory Provisions

Requests for a Certificate in Good Standing authorizing a company to operate as a common carrier by pipeline are governed by Section 15-401 of the PUA, which provides, in part:

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

(b) Requirements for issuance. The Commission, after a hearing, shall grant an application for a certificate authorizing operations as a common carrier by pipeline, in whole or in part, to the extent that it finds that the application was properly filed; a public need for the service exists; the applicant is fit, willing, and able to provide the service in compliance with this Act, Commission regulations, and orders; and the public convenience and necessity requires issuance of the certificate. In its determination of public convenience and necessity for a proposed pipeline or facility designed or intended to transport crude oil and any alternate locations for such proposed pipeline or facility, the Commission shall consider, but not be limited to, the following:

- (1) any evidence presented by the Illinois Environmental Protection Agency regarding the environmental impact of the proposed pipeline or other facility;
- (2) any evidence presented by the Illinois Department of Transportation regarding the impact of the proposed pipeline or facility on traffic safety, road construction, or other transportation issues;
- (3) any evidence presented by the Department of Natural Resources regarding the impact of the proposed pipeline or facility on any conservation areas, forest preserves, wildlife preserves, wetlands, or any other natural resource;
- (4) any evidence of the effect of the pipeline upon the economy, infrastructure, and public safety presented by local governmental units that will be affected by the proposed pipeline or facility;
- (5) any evidence of the effect of the pipeline upon property values presented by property owners who will be affected by the proposed pipeline or facility;
- (6) any evidence presented by the Department of Commerce and Economic Opportunity regarding the current and future economic effect of the proposed pipeline or facility including, but not limited

- to, property values, employment rates, and residential and business development; and
- (7) any evidence presented by any other State agency that participates in the proceeding.

In its written order, the Commission shall address all of the evidence presented, and if the order is contrary to any of the evidence, the Commission shall state the reasons for its determination with regard to that evidence. The provisions of this amendatory Act of 1996 apply to any certificate granted or denied after the effective date of this amendatory Act of 1996.

Section 8-503 of the PUA, provides, in 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 or of any 2 or more public utilities are necessary and ought reasonably to be made or that a new structure or structures is or are necessary and should be erected, to promote the security or convenience of its employees or 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 ...

Section 8-509 states, in part:

When necessary for the construction of any alterations, additions, extensions or improvements ordered or authorized under Section 8-503 or 12-218 of this Act, any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain.

IV. Section 8-503 of the Public Utilities Act

The Farm Bureau and the SP Group take no direct position on whether the Commission should grant a certificate to Dakota Access under Sections 15-401 and 8-503 of the PUA, but if the Commission grants such relief then Dakota Access should be held to the terms of the Agricultural Impact Mitigation Agreement and condition the certificate upon compliance with the AIMA. (*See Rock Island Clean Line LLC*, Docket No. 12-0560 (Order, Nov. 25 2014), 201-205 requiring compliance with the AIMA).

V. Section 8-509 of the Public Utilities Act-Eminent Domain

The Common Carrier by Pipeline Law does not contain provisions regarding the authority to use eminent domain. Section 8-509 of the PUA provides that when necessary for the construction of any project authorized under Section 8-503 a public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain. The Commission has found that under Section 8-509, a utility must show that it made a reasonable attempt to acquire the easements necessary to construct the project.

Although Dakota Access filed its Application on December 22, 2015, it did not file direct testimony supporting its Application until January 21, 2015. According to its Application, Dakota Access began easement negotiations with landowners in October 2014. (Application, ¶ 73) Dakota Access Witness Bryon McGregor is the project Right-of-Way Manager-IL employed by Contract Land Staff, the land service company with whom Dakota Access contracted to assist with acquiring easements. Mr. McGregor testified that as of January 16, 2015, it had obtained easement agreements with nine landowners and had an appraiser conduct a market study in the Counties through which the pipeline would traverse to “assist Dakota Access in making good-faith offers for easements for the proposed Project.” (Dakota Access Exh. 5.0, pp 9, 11)

ICC Staff Witness Mark Maple filed direct testimony on May 20, 2015. Mr. Maple is the Staff Senior Gas Engineer in the Energy Engineering Program of the Safety & Reliability Division. Among other things, Mr. Maple testified that Dakota Access met the requirements for obtaining eminent domain authority. (ICC Staff Exh. 1.0, p 25) In his testimony Staff Witness Maple noted the factors the Commission considers in evaluating whether an applicant has met the required showing for eminent domain:

- (1) the number and extent of contacts with landowners;
- (2) whether the utility has explained its offer of compensation;
- (3) whether the offers of compensation are comparable to offers

made to similarly situated landowners; (4) whether the utility has made an effort to address landowner concerns; and (5) whether further negotiations will likely prove fruitful in reaching negotiated settlements. (See, Ameren Illinois Company, Docket No. 13-0456 at 3, 9-10 (September 10, 2013).) (ICC Staff Exh. 1.0, pp. 20-21)

Mr. Maple relied upon Dakota Access Witness McGregor's testimony and Dakota Access's response to Staff data request ENG 1.21 and concluded that Dakota Access made the required showing on the number and extent of contacts with landowners because: Dakota Access had contacted 100% of the landowners at least once; Dakota Access testified that it had acquired 267 easements of 887 easements needed; made offers to 87% of the landowners; and that Dakota Access contacted almost every landowner multiple times. (ICC Staff Exh 1.0, p 21).

Mr. Maple testified that Dakota Access adequately explained its offer of compensation to landowners based upon Dakota Access Witness McGregor's testimony on valuing easements, crop damage payments and that offers are comparable to offers made to similarly situated landowners because the market study was used as a basis for making specific offers for each property on the route. (ICC Staff Exh. 1.0, pp 21-22). Mr. Maple testified further that Dakota Access met the required showing on addressing landowner concerns by modifying the routing due to landowner concerns, and working with the Illinois Department of Agriculture to develop an AIMA. In response to whether further negotiations would likely prove fruitful in reaching negotiated settlements, Mr. Maple testified:

I do not know with certainty, but I do believe it is very likely in the short term that Dakota Access will continue to obtain additional easements along the route. At the time, McGregor filed his direct testimony on January 21, 2015, the Company had only finalized 9 easements, and had only recently begun making offers, as about 12% of landowners had been presented an offer. (Dakota Access Exhibit 5.0 at 11) More recently, in its April 30 update to Staff data request ENG 1.21, attached hereto as Attachment B, Dakota Access had signed 267 easements. However, I do believe that it is very possible that Dakota Access will encounter a stalemate in negotiations with certain landowners prior to obtaining 100% of the easements. In that same date request response, Dakota Access noted that there are 27 landowners that are unwilling to negotiate, 36 landowners that Dakota Access

has been unable to contact, and 3 landowners that have refused to meet. (ICC Staff Exh. 1.0, pp 23-24)

Prior to the evidentiary hearing on September 1, 2015, Dakota Access Witness McGregor filed Surrebuttal Testimony to reflect that the company has obtained easements for 522 parcels of a total 858 parcels that will be impacted by the pipeline, or 60.0% of the easements needed for this Project. According to McGregor, Dakota Access has met in-person with all of the landowners, except for 38 parcels, but was successful in negotiating easements for 13 of the 38 parcels without an in-person meeting. (Dakota Access Exh. 5.9, p. 2, and Exh. 5.10). Dakota Access updated its response to Staff data request ENG 1.21 on August 27, 2015 to reflect that it had obtained 560 easements of 856 needed, is engaged in ongoing negotiations with 289 landowners, has not made offers on 3 parcels, no landowners have refused to meet with Dakota Access and it believes that 4 landowners are unwilling to negotiate in good faith for an easement agreement on reasonable terms.

Landowner intervenor William Klingele, an SP Group member, testified that Dakota Access's request for eminent domain authority is premature and assuming the Commission grants a certificate and approves a route, then it would be timely and appropriate for the affected landowner to negotiate an easement. (Klingele Exh. 1.0, pp 2-3) "I am not interested in spending time and money, including paying an attorney, to deal with negotiating an easement for the pipeline, when we do not know if the Commission is going to approve it at all, and if it does, what the route will be." (*Id.*, p.2.) Mr. Klingele explained that he would feel obligated to negotiate if and when Dakota Access obtains approval for the pipeline and the route by the Commission, and consult an attorney to determine if the easement terms are fair and reasonable. Under this approach, which electric transmission public utilities use, if a landowner is unable to reach an

easement agreement with Dakota Access, despite reasonable efforts, then Dakota Access could seek eminent domain authority from the Commission. Utilities normally seek and obtain approval for the project and the route, and if the utility cannot negotiate an easement with all of the landowners, it returns to the commission to request eminent domain authority. (*Id.*, pp 3-4) Mr. Klingele disagreed with Dakota Access' characterization of "the monopoly power of a 'holdout' landowner. (*Id.*, p.4, *quoting* Application, ¶ 71) In his opinion, without § 8-509 authority initially, both the pipeline and the landowner would feel pressure to negotiate and attempt to agree and the terms of an easement. (*Id.*, p.4) Mr. Klingele stated that he would not relish the idea of intervening in a subsequent ¶ 8-509 proceeding, and then having to defend himself in a civil condemnation lawsuit. (*Id.*) In his rebuttal testimony, Mr. Klingele stated that he did not understand on what basis the grant of eminent domain authority in this proceeding is "necessary" which is a requirement to be shown under § 8-509. As a landowner, Mr. Klingele believes some landowners would not want to negotiate with Dakota Access unless Dakota Access gains regulatory approval. (Klingele Exh. 2.0, p. 2) No witness countered Mr. Klingele in prepared testimony on this point, and he was not cross-examined.

During the evidentiary hearing on September 1, 2015, on cross examination Staff Witness Maple clarified that according to Dakota Access four landowners are refusing to negotiate in good faith and in his opinion the company will be unable to reach easements with all landowners. (Evidentiary Hearing Transcript, pp 105-06, 128) Maple acknowledged that landowners are entering into voluntary easements even though the Commission hasn't approved the project and the company can come back to the Commission at any time and request eminent domain authority if the Commission does not grant eminent domain in this proceeding. (Transcript p. 106, 111-12) Mr. Maple acknowledged that, based on his understanding of the PUA, the Commission is not

required to grant § 8-509 authority in the same proceeding in which the pipeline is seeking project approval. (*Id.*, pp. 11-112). Mr. Maple further acknowledged on cross that he was aware of an Enbridge pipeline case (Docket 07-0446) in which the Commission declined to grant § 8-509 authority, instead requiring Enbridge to return at a later point in time, if necessary, to seek a § 8-509 order (which it did in Docket 13-0446) (pp. 112-114) Mr. Maple quoted his testimony in the Enbridge § 8-509 proceeding (Docket 13-0446) where he expressed concern about the possibility of negotiating leverage on the part of the pipeline over the landowner if it has been granted § 8-509 authority. (*Id.*, pp 116-119) As to any particular time pressures, Dakota Access was facing in its Project, Mr. Maple could not recall any deadline. (*Id.*, pp 120-121)

In Section 8-509 proceedings, the Commission has relied upon five factors which Staff Witness Maple references in his testimony, yet the evidence relied upon by Mr. Maple does not support granting eminent domain in this proceeding. Maple relied upon testimony submitted by Dakota Access and monthly updates on the status of easement negotiations and has no direct knowledge as to what is transpiring between landowners and Dakota Access during the easement acquisition process. For example, to support the number and extent of contacts with landowner; explanation of compensation offers McGregor provides information on how many easements have been obtained, how many offers have been made, how many and with whom Dakota Access is negotiating easements, and how many landowners Dakota Access asserts may not be willing to negotiate in good faith. Mr. Maple was not aware of the substance of communications between Dakota Access and any landowner that would lead one to conclude that further negotiations would likely not be fruitful. (*Id.*, pp 126-127)

The monthly update to Staff Eng data requests 1.21 and 1.38 prepared by Dakota Access identifies the parcel, property owner, number and type of contacts with the landowner and the dates

of those contacts but does not contain information about the substance of those contacts or meetings with landowners. In his Rebuttal Testimony, McGregor responds to the direct testimony of the Hapo landowner intervenors and provides a status of the easement negotiations with those landowners. Status updates on easement negotiations is insufficient to support a finding that eminent domain should be granted. There's no narrative summary or substantive testimony to inform the Commission that Dakota Access met with the landowners(s).

Based upon the evidence in the record we know that Dakota Access sent survey notifications, ICC Landowner packets, has a form easement, conducted a market study, eventually signed the AIMA on June 8th and provided these materials to landowners. We don't know if the land agents explained the proposed easement dimensions, or terms of the easement document. We don't know how many times the land agents met with the landowner to actually discuss easement terms. We don't know if landowners were provided with an appraisal. We don't know if the landowners made counter offers or if the company responded to those counteroffers. We don't know if landowners have raised concerns and whether the company has responded to those concerns. There is insufficient evidence in the record to support a finding that Dakota Access has explained its offer of compensation, whether the offers of compensation are comparable to offers made to similarly situated landowners and whether Dakota Access has made an effort to address landowner concerns as part of the easement negotiation process.

Dakota Access's request for eminent domain in this case is premature and the in this record clearly supports a finding that further negotiations will be useful. While Dakota Access has represented that it plans to start construction in time to place the pipeline in service in the 4th Quarter of 2016, it did not provide any further information about the desired in-service date, or the consequences if it did not meet such a schedule. It was incumbent on the Application in this

proceeding to demonstrate the need for an Order by a certain date, and for the pipeline, if approved along with a route, to be constructed and in service. Similarly, Dakota Access provided no evidence about the regulatory approvals it needs from other states, and the status of those proceedings.

In January, the company had negotiated 9 easements and by May it had acquired 267 easements for this project. According to the most recent easement acquisition update, Dakota Access has acquired 604 easements of the 859 required for the entire project. Negotiations are ongoing with 249 landowners and Dakota Access has not made an offer to 1 landowner. According to Dakota Access, 5 landowners' response to easement offers indicates they are unwilling to negotiate in good faith for an easement agreement on reasonable terms. (DAPL Response to Staff ENG 1.21 9/29/15). There's no evidence to support Dakota Access's assertion that 5 landowners are not negotiating in good faith, or whether any reluctance to negotiate is due to the fact that Dakota Access possess neither regulatory approval to construct the pipeline nor an approved route. The record clearly does not support a finding that further negotiations would be pointless.

The landowners are negotiating and should be allowed to continue to negotiate with Dakota Access and not be forced to agree to an easement where Dakota Access has a certificate and eminent domain authority under § 8-509. More importantly, it's unreasonable to require landowners to enter into easements for a project that hasn't been approved by this Commission. As this Commission noted in Dockets 06-0706, 07-0532 and 07-0446 seeking eminent domain authority after a certificate is granted and route is approved may better serve the landowners in the easement negotiation process. If Dakota Access is unsuccessful in obtaining the remaining easement rights through post-certification negotiations, then it can seek authorization to exercise eminent domain in later petition filed at any time under Section 8-509. Until then, however, the Commission should withhold § 8-509 authority and help foster a more level playing field between

Dakota Access and the landowners. This outcome would be consistent with all recent Commission orders in electric utility transmission line dockets, and nothing in the record shows that Dakota Access would be unduly prejudiced as a result.

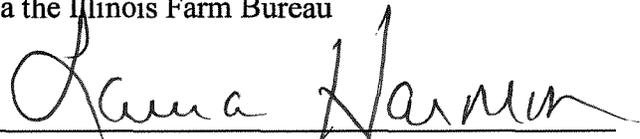
VI. Conclusion

For the foregoing reasons, the Farm Bureau and SP Group request that, if the Commission decides to grant authority to Dakota Access to construct the proposed pipeline, that it withhold granting eminent domain authority under § 8-509 that withholding such authority presently be without prejudice to Dakota Access to return later for such additional authority applicable to the specific properties for which it requires eminent domain authority, based on making the showings this Commission traditionally requires in § 8-509 proceedings.

October 1, 2015

Respectfully submitted,

ILLINOIS AGRICULTURAL ASSOCIATION
a/k/a the Illinois Farm Bureau

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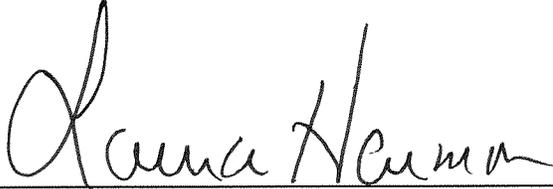
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CERTIFICATE OF SERVICE

I, Laura A. Harmon, an attorney, certify that on Oct 1, 2015, I caused a copy of the foregoing Joint Initial Brief of Illinois Agricultural Association and SP Group to be filed with the Commission and served by electronic mail to the individuals on the Commission's Service List for Docket 14-0754.



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