

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

DAKOTA ACCESS, LLC)	
)	
)	
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 REPLY BRIEF OF THE 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 Reply Brief in the above-captioned proceeding. The Farm Bureau and SP Group reply to the Initial Briefs filed by the applicant, Dakota Access, LLC ("Dakota Access") and the Commission Staff with respect to Dakota Access' request for eminent domain authority under Public Utilities Act ("PUA") §8-509.

I. Reply to Staff and Dakota Access

Section 8-509 of the PUA 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.

In its Initial Brief, despite its stated position, Staff effectively makes the case for deferral of a §8-509 order:

In order to obtain eminent domain authority under Section 8-509, Dakota Access must first be licensed under Section 15-401 of the Act, 220 ILCS 5/15-401, and must possess a Certificate authorizing it to operate as a common carrier by pipeline. Then, Dakota Access must present evidence sufficient for the Commission to conclude that authorizing Dakota Access ‘to take or damage private property in the manner provided for by the law of eminent domain’ is ‘necessary’ for the construction of the pipeline. 220 ILCS 5/8-509.

Staff IB, p. 20.

Staff acknowledges the sequential order of steps under which a pipeline applicant is to proceed, utilizing terminology (appearing in the above quotation) such as must first, must possess, and Then. Dakota Access does not yet have a license and does not yet possess a Certificate, the key regulatory prerequisites for having a need for a pipeline easement across any Illinois land. Without those authorizations, this Commission is simply not in a position to conclude that further post-license, post-Certificate negotiations, based on a Commission-approved route, would not be fruitful.¹ Dakota Access has provided no evidence otherwise. Landowner witness William Klingele provided testimony consistent with the proposition that Dakota Access will likely encounter greater landowner cooperation if, and after, it has received its license and Certificate, and had a route approved. Klingele Exh. 1.0, pp. 2-3 (Klingele Dir.). It is evident, and logical, that having §8-509 authority gives the pipeline greater negotiating leverage over easement terms and conditions, including but not limited to compensation. Requiring the pipeline to return to the Commission for §8-509 authority later, if needed for particular land parcels, would make pipeline proceedings consistent with the Commission’s policy, as reflected in its order, with electric transmission line dockets.

¹ In the Order Staff cited in the section of its Initial Brief on the §8-509 issue, the Commission listed the five factors applicable to whether an applicant for authority under that section qualifies. Staff IB, p. 21. That Order, issued in an electric transmission line case, stated as factor no. 5, “whether further negotiations will likely prove fruitful.” *Id.*, citing *Ameren Illinois Company*, ICC Docket No. 13-0456, Final Order, p. 3.

In its Initial Brief, Dakota Access summarily states that it requires eminent domain authority as part of the order in this proceeding in order "to meet the commercial in-service date and delivery expectations. Dakota Access must proceed at a fast pace on this Project." Dakota Access IB, p. 51. Dakota Access then makes the following misleading representation:

Further, if a landowner refused to negotiate in good faith for an easement agreement, and Dakota Access did not have eminent domain authority, Dakota Access would have to change the Pipeline route. This would increase the construction time, increase costs, increase impacts on the environment, and potentially impact more landowners than would the optimum route.

Id.

This contention implies that, unless the Commission grants Dakota Access §8-509 authority in this proceeding, it will have to change the pipeline's route when it encounters a landowner who refuses to negotiate in good faith. Such a contention, of course, is false. The correct scenario, and the one the Farm Bureau and SP Group are advocating, would not require pipeline re-routing. Rather, assuming it receives the license and Certificate it is seeking here (which it must possess), in the event Dakota Access is then unable to negotiate an easement with one or more landowners, it may return to this Commission for §8-509 authority as to those landowners; and in doing so it may propose a procedural schedule that would not unduly delay the proceeding.

Furthermore, Dakota Access should not be heard to complain about compliance with its schedule for the pipeline, as it controlled the date of its Application in this proceeding. In addition, the record lacks any evidence as to the status of regulatory approvals for the pipeline in the other states where it is needed. Such a lack of evidence is glaring, and Dakota Access should have provided it if its arguments about its planned in-service date are to be given any credibility. Dakota Access's contention that eminent domain should be granted to enable it to meet its commercial in-service date and delivery expectations lacks merit since none of the states

impacted by Dakota Access's proposed pipeline have approved the project. The North Dakota Public Service Commission held public hearings in May and June of 2015 for this Project and in response to route adjustments proposed by Dakota Access, issued a Notice of Opportunity for Hearing on the proposed reroutes. *See* Case #PU-14-842 at http://psc.nd.gov/database/docket_view_list.php?s_dept=PU&s_year_case=14&s_seq_num=842&s_company_name=Dakota+Access%2C+LLC. Evidentiary hearings in Iowa begin November 16, 2015, and there is no statutory deadline for the Iowa Utility Board to issue a ruling. *See* Case http://psc.nd.gov/database/docket_view_list.php?s_dept=PU&s_year_case=14&s_seq_num=842&s_company_name=Dakota+Access%2C+LLC. The Public Utilities Commission ("PUC") of the State of South Dakota held evidentiary hearings last week and the commission must make a ruling upon Dakota Access's application by December 15, 2015. However, the PUC does not have a role in the eminent domain process. *See* <https://puc.sd.gov/Dockets/HydrocarbonPipeline/2014/hp14-002.aspx>.

The number and nature of Dakota Access land agent and other representative contacts with landowners along the proposed route may show diligence on the part of Dakota Access. But neither that activity nor the substantive terms of the offers are dispositive of the issue whether, as part of this proceeding, it should be granted blanket §8-509 authority over all affected landowners and their lands. Enbridge did not receive §8-509 authority as part of its pipeline approval proceeding in Docket 07-0446, but successfully returned later for eminent domain authority. Electric utilities routinely bifurcate regulatory Certificate approval and eminent domain authority in separate, sequential dockets, applicable to the particular parcels for which eminent domain authority becomes necessary.²

² *See, e.g., Commonwealth Edison Company*, Docket 13-0657 (April 8, 2015 – Order on Rehearing (CPCN granted)), *appeal pending*; *Commonwealth Edison Company*, Docket 15-0373 (July 8, 2015 - §8-509 Order for

In a recent transmission line Certificate case for MidAmerican Energy Company (“MEC”),³ the Applicant requested, and the Commission granted, §8-509 authority as part of the Certificate proceeding. MEC’s 345 kV transmission line is 32 miles long and for the great majority of its length the line will utilize same right of way for the existing 161 kV line which MEC is replacing. MEC witnesses Lane (MEC Ex 5.0) and Albertson (MEC Ex 2.0) testified about routing and right of way acquisition. As of the date of its Petition, MEC had options to Obtain easements from 111 out of 128 landowners needed to construct the line. Lane Dir., MEC Ex. 5.0, p. 5. This is unprecedented for a transmission line or pipeline project. Of the 17 landowners for which MEC didn’t have options at the time it filed its petition, 10 entered easements or options for easements during the pendency of the case before the ICC. Lane Reb., MEC Ex. 12.0, p. 2; Lane Affidavit, MEC Ex. 12.2. Given these factors, the MEC project and proceeding constituted a special situation, and is distinguishable both from other recent electric transmission line dockets and from the instant proceeding. First, MEC witnesses provided extensive and detailed evidence as to the contacts and negotiations with each of the few remaining un-signed landowners.⁴ MEC encountered no opposition: no landowner or other intervenor submitted testimony, conducted cross-examination or otherwise actively participated

project certificated in Docket 13-0657); *Commonwealth Edison Company*, Docket 15-0545 (Application filed Sept. 29, 2015, for §8-509 Order for project certificated in Docket 13-0657- pending); *Ameren Transmission Company of Illinois*, Docket 12-0598 (Feb. 20, 2014 – 2nd Order on Rehearing – CPCN granted), *aff’d on appeal*; *Ameren Transmission Company of Illinois*, Docket 14-0291 (May 20, 2014 - §8-509 Order for project certificated in Docket 12-0598); *Ameren Transmission Company of Illinois*, Docket 14-0380 (June 26, 2014 - §8-509 Order for project certificated in Docket 12-0598), *appeal dismissed*); *Ameren Transmission Company of Illinois*, Docket 14-0438 (Aug. 5, 2014 §8-509 Order for project certificated in Docket 12-0598); *Ameren Transmission Company of Illinois*, Docket 14-0522 (Dec. 10, 2014 – Order on Rehearing - §8-509 Order for project certificated in Docket 12-0598); *Ameren Transmission Company of Illinois*, Docket 14-0551 (Dec. 10, 2014 – Order on Rehearing - §8-509 Order for project certificated in Docket 12-0598); *Ameren Transmission Company of Illinois*, Docket 14-0551 (Dec. 10, 2014 – Order on Rehearing - §8-509 Order for project certificated in Docket 12-0598); *Ameren Transmission Company of Illinois*, Docket 15-0065 (Mar. 11, 2015 – §8-509 Order for project certificated in Docket 12-0598); *Ameren Transmission Company of Illinois*, Docket 15-0237 (May 12, 2015 – §8-509 Order for project certificated in Docket 12-0598); *Ameren Transmission Company of Illinois*, Docket 15-0437 (Sept. 10, 2015 – §8-509 Order for project certificated in Docket 12-0598).

³ *MidAmerican Energy Company*, Docket 14-0494 (Sept. 16, 2015)

⁴ See, e.g., Lane Rebuttal, MEC Ex. 12.0, Docket 14-0494.

in the proceeding. Furthermore, after having scrutinized MEC's right of way acquisition activities, Staff supported MEC's request⁵. Neither the MEC witnesses nor Staff witnesses were subjected to any cross-examination, and all prepared testimony was entered into the record via witness affidavits. No party submitted a brief, with MEC only filing a Draft Order. In the MEC proceeding, the grant of §8-509 authority as part of the same docket as the Certificate issuance, rather than in a subsequent docket, was not challenged in any way or discussed by any party, and was not an issue in the case. In the Commission's Order, furthermore, the §8-509 authority was granted only as to those seven specific parcels of land which had been identified in the evidentiary record and for which MEC had satisfied the "five criteria" standard.⁶ The MEC Docket was clearly an exception to the recent line of electric transmission line dockets which have separated the grant of the Certificate for the proposed project from the grant of eminent domain authority under PUA §8-509; and in that sense was an aberration. Additionally, it is significant that the MEC Order granting §8-509 authority was circumscribed, specifically limited to seven parcels. Here, by contrast, Dakota Access is requesting blanket eminent domain authority over all parcels in the path of the pipeline.

Staff cites an electric transmission line docket (ICC 13-0456) for the established legal authority as to the standard by which the Commission should judge the issuance of a §8-509 order, and no party has offered any reason why transmission line cases and pipeline cases should be treated differently, including the timing of a §8-509 order and the restriction of 8-509 authority to those parcels for which it is specifically "necessary." Nowhere in Dakota Access' evidence or its Initial Brief does it state with any detail what the specific consequences would be

⁵ See Rockrohr Rebuttal, Staff Ex. 3.0, Docket 14-0494.

⁶ *Id.*, pp. 15-17.

if it does not obtain §8-509 authority in this proceeding. No adverse consequences should be inferred.

Staff cites to transmission line docket 13-0456 and the five factors the Commission considers in evaluating whether an applicant should be granted §8-509 authority, yet it does not require Dakota Access to provide sufficient evidence to support a finding that granting eminent domain is appropriate at this time. This Commission requires petitioners in §8-509 dockets to submit detailed evidence of the nature and extent of the utility's negotiations with landowners. The lack of similar evidence in this case is glaring and warrants a denial of Dakota Access's request for eminent domain authority at this time.

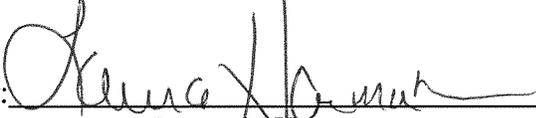
II. Conclusion

For the foregoing reasons, and those contained in their Joint Initial Brief 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 15, 2015

Respectfully submitted,

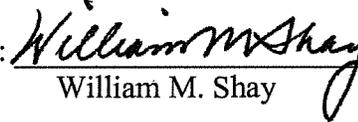
ILLINOIS AGRICULTURAL ASSOCIATION
a/k/a the Illinois Farm Bureau

By: 

Laura A. Harmon
Senior Counsel
Office of the General Counsel

Laura A. Harmon
Senior Counsel
Office of the General Counsel
Illinois Agricultural Association & Affiliated Companies
1701 Towanda Ave, PO Box 2901
Bloomington, IL 61702-2901
lharmon@ilfb.org

SP Group landowners

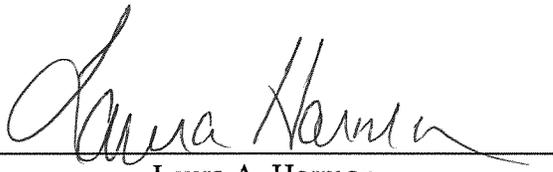
By: 

William M. Shay

Shay Phillips, Ltd.
456 Fulton Street, Suite 255
Peoria, Illinois 61602
309-494-6155
wshay@skplawyers.com

CERTIFICATE OF SERVICE

I, Laura A. Harmon, an attorney, certify that on October 15, 2015, I caused a copy of the foregoing Joint Reply 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.



Laura A. Harmon

SERVICE LIST

Tammy Behymer, Landowner
831 900 E. St.
Mt. Sterling, IL 62353
tbehymmer@adams.net

Terry Behymer, Landowner
831 900 E. St.
Mt. Sterling, IL 62353
tbehymmer@adams.net

Ellen O. Boardman, Atty. for United
Association
O'Donoghue & O'Donoghue LLP
4748 Wisconsin Ave., NW
Washington, DC 20016
[eboardman@odonoghuelaw.com](mailto:boardman@odonoghuelaw.com)

Deborah A. Bone, Atty. for Dakota
Access, LLC
Schiff Hardin LLP
233 S. Wacker Sr., Ste. 6600
Chicago, IL 60606
dbone@schiffhardin.com

Ann Burns Hendrick, Landowner
5560 Basswood Ct.
Petoskey, MI 49770
lfh-abh@charter.net

Colin C. Clark, Atty. for Oelze
Equipment Company, L.L.C.
Black Hedin Ballard McDonald P.C.
PO Box 4007
Mt. Vernon, IL 62864
cclark@illinoisfirm.com

Christine Ericson
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, IL 60601
cericson@icc.illinois.gov

Matthew Flanigan
Black Hedin Ballard McDonald, P.C.
PO Box 4007
108 S. 9th St.
Mt. Vernon, IL 62864
mflanigan@illinoisfirm.com

Paul G. Foran, Atty. for Intervenors
Lueders Robertson & Konzen
1939 Delmar Ave.
Granite City, IL 62040
paulgforan@gmail.com

Donald A. Fry, Landowner
PO Box 34
Stronghurst, IL 61480
[damcfry@hotmail.com](mailto:damecfry@hotmail.com)

Mary C. Fry, Landowner
PO Box 34
Stronghurst, IL 61480
[damcfry@hotmail.com](mailto:damecfry@hotmail.com)

Alison Goncher, Paralegal
Shay Phillips Ltd.
456 Fulton St., Ste. 255
Peoria, IL 61602
agoncher@skplawyers.com

Ryan A. Hagerty, Atty. for
Brotherhood of Teamsters
Asher Gittler & D'Alba, Ltd.
200 W. Jackson Blvd., Ste. 1900
Chicago, IL 60606
rah@ulaw.com

Laura A. Harmon, Asst. General
Counsel
Office of General Counsel
Illinois Agricultural Association
1701 Towanda Ave.
Bloomington, IL 61701
lharmon@iflb.org

Steve Hughart, Business
Manager/Financial Secretary
IBEW Local 702
106 N. Monroe St.
West Frankfort, IL 62896
shughart@ibew702.org

Brian R. Kalb, Atty. for MCPO
Byron Carlson Petri & Kalb LLC
411 St. Louis St.
Edwardsville, IL 62025
brk@bcplaw.com

William J. Klingele, Landowner
21519 W. Chestnut Lane
Plainfield, IL 60554
bill.lnf@comcast.net

Glen Koch, Landowner
618 1290 N. Ave.
Mt. Sterling, IL 62353
gakoch@adams.net

Owen E. MacBride, Atty. for Dakota
Access, LLC
Schiff Hardin LLP
6600 Sears Tower
Chicago, IL 60606
omacbride@schiffhardin.com

Michael T. Manley
Legal Dept.
International Brotherhood of
Teamsters
25 Louisiana, NW
Washington, DC 20001
mmanley@teamster.org

Terrance J. Markert, Landowner
11 Totem Trail
Macomb, IL 61455
markertrentals@comcast.net

Jeff E. Naville, Atty. for LiUNA Local

Alexandra L. Iannessa, Atty. for
Dakota Access, LLC
Schiff Hardin LLP
233 S. Wacker Dr., Ste. 6600
Chicago, IL 60606
aiannessa@schiffhardin.com

Kathleen A. Klingele, Landowner
312 W. Main St.
Mt. Sterling, IL 62353
kklingele@smseagle.org

Alan Koch, Landowner
1319 E. 400 St.
Mt. Sterling, IL 62353
akoch@adams.net

Martha Krohe, for Scott County
Property Owners
Burrus Seed Farms, Inc.
200 Capitol Way
Jacksonville, IL 62650
martha@burrusseed.com

Joseph E. Mallon, Atty. for United
Association
JOHNSON & KROL, LLC
300 S. Wacker Dr., Ste. 1313
Chicago, IL 60606
mallon@johnsonkrol.com

Mark Maple, Case Manager
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701
mmaple@icc.illinois.gov

Dennis R. Minick, Business Manager
IUOE Local 965
3520 E. Cook St.
Springfield, IL 62703
dminick@comcast.net
Jonathan L. Phillips, Atty. for

Unions
Laborers' International Union of North
America
#1 N. Old State Capitol Plz., Ste. 525
Springfield, IL 62701
jnaville@midwestlaborers.org

Keegan Pieper, Associate General
Counsel
Dakota Access, LLC
1300 Main St.
Houston, TX 77002
keegan.pieper@energytransfer.com

Eric Robertson, Atty. for Intervenors
Lueders, Robertson, Konzen
1939 Delmar Ave., P.O. Box 735
Granite City, IL 62040
erobertson@lrklaw.com

William M. Shay, Atty. for
Intervenors
Shay Phillips, Ltd.
456 Fulton St., Ste. 255
Peoria, IL 61602-1220
wshay@skplawyers.com

Gary L. Smith, Atty. for Intervenors
Loewenstein & Smith, P.C.
1204 S. Fourth St.
Springfield, IL 62703-2229
lexsmith@lhoslaw.com

Evelyn Thomas, Landowner
2301 Concordia Village Dr.
Springfield, IL 62711
evelyn.thomas@brandt.co

Stephen T. Veatch, Sr. Director,
Certificates & Reporting
Dakota Access, LLC
1300 Main St.
Houston, TX 77002
stephen.veatch@energytransfer.com

Intervenors
Shay Phillips, Ltd.
456 Fulton St., Ste. 255
Peoria, IL 61602
jphillips@skplawyers.com

Andrew M. Ray, Landowner
1187 980 N. Ave.
Mt. Sterling, IL 62353
oliverplows08@hotmail.com

Ryan Robertson, Atty. for Intervenors
Lueders Robertson & Konzen
1939 Delmar Ave., PO Box 735
Granite City, IL 62040
ryrobertson@lrklaw.com

Rochelle G. Skolnick, Atty. for IBEW
Local 702
Schuchat, Cook & Werner
1221 Locust St., 2nd Flr.
St. Louis, MO 63103
rgs@schuchatew.com

Marilyn S. Teitelbaum, Atty. for
IBEW Local 702
Schuchat Cook & Werner
1221 Locust St., 2nd Fl.
St. Louis, MO 63103
mst@schuchatew.com

Tabitha F. Tripp, Landowner
PO Box 199
Anna, IL 62906
saveilwater@gmail.com

Jane M. Veith, Landowner
R.R. 4, Box 3
Mt. Sterling, IL 62353
jmv1374@adams.net

Janis Von Qualen, Administrative
Law Judge
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701
jvonqual@icc.illinois.gov

Christopher M. Webb, Atty. for
Hancock/Adams County Property
Owners
Schmeideskamp Robertson Neu &
Mitchell LLP
PO Box 1069
525 Jersey
Quincy, IL 62306
cwebb@srm.com