

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IN THE CIRCUIT COURT FOR THE 23RD JUDICIAL CIRCUIT
DEKALB COUNTY, ILLINOIS

COMMONWEALTH EDISON)
COMPANY, an Illinois)
corporation,)
Plaintiff,) CASE NO. 15 ED 1
vs.) Consolidated with:
ROBERT E. CLAUSEN, as) 15 ED 2-9
Trustee, et al.,)
Defendants.)

REPORT OF PROCEEDINGS of the hearing before
THE HONORABLE JUDGE BRADLEY WALLER, on the 21st of
January, 2016.

APPEARANCES:

MR. PETER GROMETER and
MR. RICHARD BERNET,
for the plaintiff.

MR. MICHAEL RYAN and
MR. WILLIAM RYAN,
for the defendants.

SANDRA FOORD, CSR 084-003025
Official Court Reporter
DeKalb County Courthouse

1 (The following proceedings were had
2 in open court.)

3 (The following is an excerpt of the
4 proceedings.)

5
6 THE COURT: These matters come before the Court
7 on defendants' traverse and motion to dismiss
8 plaintiff's complaint sounding an eminent domain.
9 These matters have been consolidated for the sole
10 and limited purpose of the traverse and motion to
11 dismiss only.

12 Plaintiff has filed a response and defendants
13 have filed a reply. The following documents are
14 part of the record and have been admitted into
15 evidence:

16 1. Illinois Commerce Commission, hereafter
17 referred to as the ICC, order encaptioned
18 Commonwealth Edison Company, Com Ed, application for
19 a certificate of public convenience and necessity
20 pursuant to Section 8-406.1 of the Illinois Public
21 Utilities Act, hereinafter referred to as "Act" or
22 "the Act" and an order pursuant to Section 8-503 of
23 the Act to construct, operate and maintain a new
24 345kV transmission line in Ogle, DeKalb, Kane and

1 DuPage Counties entered under ICC Docket No.
2 13-0657.

3 2. ICC order in the case encaptioned "Verified
4 petition to authorize use of eminent domain under
5 Section 8-509 of the Act" entered under ICC Docket
6 No. 15-0373.

7 3. Copies of the respective petitions in both
8 case numbers 13-0657 and 15-0373.

9 4. Transcript of testimony of Neil F. Kaup,
10 senior overhead transmission engineer, transmission
11 line engineering department for Com Ed which was
12 filed in case 13-0657.

13 5. Transcript of the testimony of Thomas W.
14 Leeming, director of transmission operations and
15 planning department for Com Ed filed in case
16 13-0657.

17 6. Direct testimony of Laurie Oppel, Navigant
18 Consulting, Inc. on behalf of Com Ed filed in case
19 13-0657.

20 7. The initial post-hearing brief of Com Ed,
21 although certainly not filed in this case because
22 they're not filed, the Court has considered every
23 single case that counsel for the defendant has
24 provided to the Court which includes various

1 Appellate and Supreme Court cases.

2 As a result I believe that the Court has
3 considered everything before it including applicable
4 case law.

5 The Court must initially address some procedural
6 matters.

7 First, the Court believes that the defendant has
8 filed a proper pleading attacking the sufficiency of
9 plaintiff's complaint by way of traverse.

10 Second, under prevailing law the burden of proof
11 shifts to Com Ed to make a prima facie proof of the
12 disputed averments.

13 Third, the parties have conceded and agreed that
14 the documents in this matter consist of competent
15 evidence by Com Ed to enable this Court to determine
16 whether Com Ed has met its burden of proof.

17 Fourth, the Court believes that the 2007
18 amendments to the Act allows and permits defendants
19 to challenge the ICC orders by traverse.

20 The disputed allegation in these matters is that
21 Com Ed's complaints exceed the authority granted to
22 it under ICC order 13-0657 by seeking to acquire
23 easement rights/burden rights in excess of the
24 provisions allowed and authorized in case 13-0657.

1 The order in ICC case No. 13-0657 expressly
2 authorized the use of the multi-circuit-ready poles.
3 Article XI paragraph A entitled "Com Ed's position"
4 expressly states, "Com Ed proposes to install
5 multi-circuit-ready poles avoiding the need to
6 purchase and install new poles and acquire new
7 rights-of-way when new lines are required".

8 Article II of the order entitled "Background and
9 description of the project" states in part, "As set
10 forth in its verified petition, Com Ed proposes to
11 construct a 345kV, kilovolt, transmission line
12 routed from Com Ed's existing substation at Byron,
13 Illinois continuing east through Ogle, DeKalb, Kane
14 and DuPage Counties".

15 Article II further provides that in order to
16 allow for future long-term growth, Com Ed proposes
17 to install the line on self-supporting steel poles
18 that are capable of supporting one or two additional
19 circuits without the need to install new poles or
20 acquire new rights-of-way.

21 This Court has reviewed Section 8-509 of the Act
22 which authorizes and empowers the ICC to issue
23 orders of condemnation for the construction of any
24 alterations, additions, extensions or improvements

1 ordered or authorized under Section 8-406.1 and
2 8-503 of the Act.

3 Pursuant to that language it follows that the
4 order in 13-0657 is the enabling authority to which
5 a Section 8-509 order is implemented and attaches,
6 much like the attachment in a security interest and
7 a financing statement for purposes of perfection.

8 The Section 8-509 order entered in this case as
9 ICC order 15-0373 expressly provides that section 6,
10 findings and ordering paragraphs, subparagraph 5
11 that the Commission authorized Com Ed under sections
12 8-406.1 and 8-503 to construct a new 345kV electric
13 transmission line on the route approved in docket
14 No. 13-0657.

15 This Court has not been provided any authority
16 that holds a Section 8-509 order can exceed or
17 modify the authority granted to a utility under
18 sections 8-406.1 and 8-503. This Court concludes
19 that the order entered in 15-0373 exceeds the
20 express authorization and limitations imposed upon
21 Com Ed in case 13-0657.

22 This Court is mindful of the express admission
23 by Com Ed that it would seek the Commission's
24 approval before adding any additional circuits to

1 the multi-circuit poles for post herein. That
2 assurance is found at Article XI subparagraph (a) of
3 the order in 13-0657. This Court will not grant Com
4 Ed more or additional authority than what is
5 authorized in ICC order 13-0657.

6 Courts are to give great deference to the
7 Commission in these matters as a result of the
8 Commission's unique and valued expertise. Com Ed
9 seems to argue that the order in 15-0373 is the
10 additional approval that it assured the Commission
11 it would seek. The 2015 order was entered pursuant
12 to the authority found in Section 8-509 of the Act.
13 That section is limited solely to granting utility
14 the power of condemnation. It does not permit,
15 authorize or allow utility to exceed the limitations
16 of the enabling order entered pursuant to sections
17 8-406.1 and 8-503.

18 From the documents and exhibits filed in these
19 matters the 2013 order has not been vacated,
20 amended, modified or otherwise set aside. Com Ed is
21 confined and limited to the authority granted to it
22 under the order entered in 13-0657.

23 For all the foregoing reasons plaintiff has
24 failed to meet its burden, and defendants' motion to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

dismiss is granted without prejudice.

(End of excerpt.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IN THE CIRCUIT COURT OF THE 23RD JUDICIAL CIRCUIT
DEKALB COUNTY, ILLINOIS

I, Sandra Foord, certify the foregoing to be a true and accurate transcript of the electronic recording of the proceeding of the above-entitled cause, which recording contained the operator's certification as required by Local Rule 1.02(b)(2).

Sandra Foord

Official Court Reporter

License No. 084-003025

Dated this 23rd day
of January, 2016.