No. 122973
Consolidated With 122985, 122986, 122987, 122988, 122989, 122992, 122993, 122994, 122996, 122997, 122998, 122999, 123000, 123001, 123002, 123003, 123004, 123005, 123006, 123007, 123008, 123009, 123011, 123012, 123013, 123014, 123015, 123016, 123017, 123081, 123019, 123020, 123021

IN THE
SUPREME COURT OF ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)
Plaintiff – Appellant,	)
v.	)
RICHARD L. HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC, and UNKNOWN OWNERS,	)
Defendant-Appellees.	)

On Direct Appeal from the Circuit Court for the
Fifth Judicial Circuit, Edgar County, Illinois

Case Nos. 2016-ED-4, 2016-ED-5, 2016-ED-6, 2016-ED-12, 2016-ED-13, 2016-ED-15, 2016-ED-16, 2016-ED-17, 2016-ED-18, 2016-ED-19, 2016-ED-20, 2016-ED-21, 2016-ED-22, 2016-ED-23, 2016-ED-24, 2016-ED-25, 2016-ED-27, 2016-ED-28, 2016-ED-29, 2016-ED-30, 2016-ED-38, 2016-ED-40, 2016-ED-42, 2016-ED-43, 2016-ED-44, 2016-ED-45, 2016-ED-47, 2016-ED-48, 2016-ED-49, 2016-ED-50, 2016-ED-51, 2016-ED-52, 2016-ED-53, 2016-ED-54, 2016-ED-55

Honorable Craig H. DeArmond and Honorable James R. Glenn, Judges Presiding

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BRIEF OF PLAINTIFF-APPELLANT
AMEREN TRANSMISSION COMPANY OF ILLINOIS

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POINTS AND AUTHORITIES

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NATURE OF THE ACTION

The Eminent Domain Complaint filed by Ameren Transmission Company of Illinois in this matter sought an easement for a state-authorized electric transmission project through Defendant landowners' property and requested a determination of just compensation for the easement interest sought. Ameren Transmission Company of Illinois obtained its authority to acquire easements through the use of eminent domain from the Illinois Commerce Commission in accordance with the Public Utilities Act, specifically from 220 ILCS 5/8-509, following the issuance of a certificate of public convenience and necessity pursuant to 220 ILCS 5/8-406.1. The circuit court dismissed the Eminent Domain Complaint finding that Public Utilities Act Section 220 ILCS 5/8-406.1 was unconstitutional on its face and as applied to landowners by an Order filed on September 5, 2017, as modified by an Order filed November 6, 2017. The question on the pleadings is whether the Eminent Domain Complaint should have been dismissed for the reasons cited.

STATEMENT OF ISSUES

A. Whether the circuit court erred in failing to make the Illinois Supreme Court Rule 18 findings as required by Illinois Supreme Court Rule 302(c)(2) in its Orders filed September 5, 2017 and November 6, 2017 declaring 220 ILCS 5/8-406.1 unconstitutional on its face.

B. Whether the circuit court erred in granting Landowners' Motion to Dismiss based on the unconstitutionality of 220 ILCS 5/8-406.1, and in failing to follow established precedent regarding the inapplicability of due process requirements during Illinois Commerce Commission certificate proceedings.

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C. Whether the circuit court was precluded from finding that 220 ILCS 5/8-406.1 was unconstitutional.

D. Whether the circuit court lacks jurisdiction to review and render an opinion on the validity or constitutionality of Illinois Commerce Commission process and orders.

E. Whether the circuit court erred in failing to deny Landowners' Traverse.

STATEMENT OF JURISDICTION

Jurisdiction is proper pursuant to Illinois Supreme Court Rule 302(a)(1) (West 2017) as this is an appeal of a final judgment from the Circuit Court of the Fifth Judicial Circuit in Edgar County, Illinois where the circuit court invalidated a portion of 220 ILCS 5/8-406.1 (West 2012) by an Order filed September 5, 2017, as modified by an Order filed November 6, 2017.

STATUTE INVOLVED

The statute involved is part of the Public Utilities Act cited as 220 ILCS 5/8-406.1 (West 2012). The full text is found on pages A3-A6 of the Appendix.

STATEMENT OF FACTS

A. General Overview

Ameren Transmission Company of Illinois ("ATXI") is a public utility within the meaning of the Public Utilities Act and is subject to the transmission-siting jurisdiction of the Illinois Commerce Commission ("ICC"). R. C10. In the Order dated August 20, 2013, and in the Order on Rehearing dated February 20, 2014, the ICC issued ATXI a certificate of public convenience and necessity, and authorized ATXI to construct the Illinois Rivers Project, a 345kV electric transmission line intended to enhance reliability and bring low-cost renewable energy to and through central Illinois. R. C10-11; 8/20/13

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ICC Order, R. C138-298; 2/20/14 ICC Order R. C299-439. ATXI attempted to negotiate with Landowners for the easements necessary for the Illinois Rivers Project, but when negotiations were unsuccessful, ATXI sought and received the authority from the ICC to acquire the necessary easements through the use of eminent domain. R. C11, C13; 3/9/16 ICC Order, R. C440-517; 6/7/16 ICC Order, R. C520-705.

ATXI filed 34 eminent domain complaints against landowners in Edgar County beginning in April 2016. R. C10. The Edgar County landowners named as Defendants in the eminent domain complaints are the Appellees and are referred to throughout as "Landowners." Landowners entered their appearance on or around June 6, 2016 and filed a Traverse and Motion to Dismiss on or around August 5, 2016. R. C37, C51-59. Following months of discovery related to the Traverse and Motion to Dismiss, the parties stipulated to certain facts relevant to the Traverse and Motion to Dismiss. Stip., R. C855-873. Landowners' Traverse and Motion to Dismiss was heard on May 2, 2017. R. C7-8; 5/2/17 Trans., R. R46-115.

The circuit court granted Landowners' Motion to Dismiss by Order filed on September 5, 2017, and as modified on November 6, 2017, following hearing on ATXI's Post-Judgment Motion, dismissing all 34 eminent domain cases. The order and modification are collectively referred to hereinafter as "Order". 9/5/17 Order, R. C953-976; 11/6/17 Order, R. C1048-50. The basis for dismissal was that 220 ILCS 5/8-406.1 (West 2012) ("Section 8-406.1") was unconstitutional on its face and as applied to Landowners.

ATXI appealed the dismissals directly to this Court. R. C1081-C1110. With agreement from Landowners' counsel, ATXI requested consolidation of the 34 appeals

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into one appeal as the pleadings, arguments, and record in all 34 cases is the same. R. C1136-140. The motion to consolidate was allowed by this Court. R. C1145.

B. The ICC issued a certificate of public convenience and necessity to ATXI for the Illinois Rivers Project and granted authority to ATXI to acquire easements through the use of eminent domain.

1. The ICC issued a certificate of public convenience and necessity to ATXI.

The Illinois Rivers Project is a 375-mile high voltage electric transmission line running from Missouri to Indiana across south central Illinois through Edgar County, Illinois. R. C10. The project is just one component, albeit a highly important one, of the critical, complex task of maintaining and improving the region's electric infrastructure, and was developed in a process overseen by federal and regional operators. R. C92. The benefits of the project include lower energy costs, the facilitation of renewable energy delivery into the State of Illinois, relief of serious and immediate reliability concerns, and job creation. R. C92.

ATXI derives its authority to construct, operate, and maintain the Illinois Rivers Project from the Public Utilities Act ("PUA") and the ICC. R. C93. In 2012, in accordance with PUA Section 8-406.1 and 220 ILCS 5/8-503, ATXI petitioned the ICC for a certificate of public convenience and necessity to construct the Illinois Rivers Project in ICC Docket No. 12-0598. R. C93. As part of its certificate Petition, ATXI proposed certain routes for the Illinois Rivers Project. R. C93.

As relevant to this appeal, certain property owners not involved in the eminent domain litigation, but affected by one of ATXI's original proposed routes petitioned the ICC and were granted leave to intervene in the certificate proceedings. Stip. R. C856. This intervening group offered evidence challenging the ATXI-proposed routes. Stip. R.

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C856. As part of its evidence, the intervening group proposed its own route through Edgar County, Illinois, that differed from the ATXI-proposed routes. Stip. R. C856. Following ICC directive, the intervening group provided the ICC with the names and addresses of those property owners on the intervenor-proposed route so they could be notified. Stip. R. C856.

The ICC's Clerk filed a written notice of the intervenor-proposed route with a service list that included the names and addresses of Landowners. Stip. R. C856. Landowners conceded that the intervening group complied with the ICC directive and further conceded that ATXI complied with all statutory notice requirements and all ICC notice requirements. Stip. R. C855-56. Landowners further acknowledge that a number of them attended ATXI's pre-filing meetings required by statute, and were made aware of the Illinois Rivers Project at those meetings. R. C69, C80. Landowners claim never to have received the notice sent by the ICC. Stip. R. C856.

The ICC granted ATXI's request for a certificate on August 20, 2013 and, as amended, on February 20, 2014. R. C93. Following the issuance of the August 20, 2013 ICC Order, the Landowners petitioned the ICC to intervene, and were permitted to intervene for the purpose of appealing the ICC Orders. Stip. R. C858. The ICC Orders were admitted without objection into evidence at the evidentiary hearing on Landowners' Traverse and Motion to Dismiss. 5/2/17 Trans. R. R58.

2. On Landowners' appeal pursuant to 220 ILCS 5/10-201, the Illinois Appellate Court for the Fourth District affirmed the validity of the certificate despite Landowners' claims that they were deprived of due process.

There is a procedure in place for challenging the ICC's action in granting a certificate. The legislature, in 220 ILCS 5/10-201 (West 2017) ("Section 10-201"), vested

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direct review of ICC decisions in the appellate court. The relevant portion of Section 10-201, provides that ICC decisions may be appealed to the appellate court of the judicial district in which the subject matter of the hearing is situated. 220 ILCS 5/10-201(a) (West 2017).

The appellate court's duties are also set forth in the statute, and include:

> (e) Powers and Duties of Reviewing Court:
>
> ….
>
> (iv) The court shall reverse a Commission rule, regulation, order or decision, in whole or in part, if it finds that:
>
> A. The findings of the Commission are not supported by substantial evidence based on the entire record of evidence presented to or before the Commission for and against such rule, regulation, order or decision; or
>
> B. The rule, regulation, order or decision is without the jurisdiction of the Commission; or
>
> C. The rule, regulation, order or decision is in violation of the State or federal constitution or laws; or
>
> D. The proceedings or manner by which the Commission considered and decided its rule, regulation, order or decision were in violation of the State or federal constitution or laws, to the prejudice of the appellant.

220 ILCS 5/10-201(e) (West 2017). In accordance with Section 10-201, Landowners appealed the ICC's issuance of the certificate to the Illinois Appellate Court, Fourth District. R. C94, C120.

Landowners raised the following issues in their appeal:

> (1) Did the Illinois Commerce Commission violate the due process rights of [Landowners] when it failed to provide them notice that an intervener [sic] to [the ATXI certificate] proceeding had proposed an alternate route that would directly affect the property rights of the Landowners?
>
> (2) Does the lack of any clear notice requirement in 220 ILCS 5/8-406.1 prior to the ICC issuing a utility a Certificate of Public Convenience and Necessity render the statute unconstitutional?

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R. C71, C78, C95, C132. Other landowner groups raised some of the same challenges and also challenged the route and necessity of the Illinois Rivers Project as set forth in the certificate. R. C95, C117-18. All of these appeals were consolidated for review. R. C117.

Upon consideration of the issues raised by Landowners and other landowner groups, the Fourth District upheld the validity of the ICC's orders and the certificate in its Opinion dated July 25, 2015. *Adams County Property Owners & Tenant Farmers v. Illinois Commerce Comm'n*, 2015 IL App (4th) 130907. In the *Adams County* opinion, the Fourth District specifically rejected the constitutional arguments raised by Landowners:

> Although there is much conflict between the parties on appeal regarding whether notice was actually mailed to [landowners] by the Commission, we find it unnecessary to address this specific argument. As already discussed in relation to ACPO's appeal, relevant case authority—*Lynn*, *Cavanagh*, and *Zurn*—demonstrates that the underlying proceedings before the Commission neither conferred property rights on ATXI nor deprived landowners of their protected property interests. In their reply brief, [landowners ask] this court to "recognize that a proceeding under [s]ection [220 ILCS 5/8-406.1] does implicate landowners' property rights in a significant way." However, they provide no authority upon which we may reject either this court's previous decision in *Lynn* or the supreme court's decisions in *Cavanagh* and *Zurn*. The due process rights of [landowners] were not violated.

Adams County, 2015 IL App (4th) 130907, ¶80; R. C132. Another party filed a petition for leave to appeal the Fourth District's decision, but this Court denied the petition, making the Fourth District decision in *Adams County* final. *Adams County*, 2015 IL App (4th) 130907 (rehearing denied Aug. 21, 2015, cert denied Nov. 25, 2015).

3. The ICC granted ATXI the authority to acquire the necessary easements through the use of eminent domain pursuant to 220 ILCS 5/8-509.

ATXI attempted to negotiate with Landowners to acquire the easement interests necessary for the Illinois Rivers Project, but Landowners generally refused to participate

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in the negotiations. R. C449-452, C455. On January 25, 2016 and April 25, 2016, ATXI filed petitions with the ICC seeking the authority to acquire the necessary easement interests through Landowners' properties using eminent domain pursuant to PUA Section 220 ILCS 5/8-509 ("Section 8-509") as ATXI had been unable to acquire the easements by agreement. R. C441, C521.

Landowners do not dispute they were provided with notice of ATXI's Section 8-509 petitions. Stip. R. C858. Some landowners intervened in the Section 8-509 proceedings, but most entered an appearance and declined to challenge ATXI's Section 8-509 petitions seeking eminent domain authority. Stip. R. C858. The landowners who intervened in the Section 8-509 proceeding did not raise due process claims. R. C449-452, C455.

On March 9, 2016 and June 7, 2016, the ICC entered Orders under Section 8-509 that authorized ATXI to seek, in accordance with the Eminent Domain Act, the necessary land rights (including access and construction easements where necessary) as identified in Appendix A and Appendix B of the ICC's Section 8-509 Orders. 3/9/16 8-509 Order, R. C440-517; 6/7/16 8-509 Order, R. C520-705. Landowners' properties were identified in the Appendices to each Order, which also described the easement interest sought and showed how the easement crossed each of the Landowners' properties. 3/9/16 8-509 Order, R. C458-517; 6/7/16 8-509 Order, R. C533-705. No Landowner appealed the ICC's issuance of the Section 8-509 Orders. The ICC's Section 8-509 Orders were admitted into evidence, without objection, at the hearing on Landowners' Traverse and Motion to Dismiss. 5/2/17 Trans., R. R58; 9/5/17 Order, R. C954.

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C. ATXI filed its Eminent Domain Complaint in compliance with the requirements of the Eminent Domain Act.

In April through July 2016, ATXI initiated condemnation proceedings by filing eminent domain complaints. R. C10. No one has contested that ATXI's eminent domain complaints satisfied all of the elements required by the Eminent Domain Act in that it described: the basis of its authority in the premises; the purpose for which the property was sought to be taken; the property to be taken; the names of all persons with property interests or those unknown; and further included a prayer for compensation and assessment. R. C10-17.

D. Landowners filed a Traverse and Motion to Dismiss the eminent domain complaints.

Landowners responded to the eminent domain complaints by filing a Traverse and Motion to Dismiss. R. C51. In the first four paragraphs of the Traverse and Motion to Dismiss, Landowners raised the following traditional traverse claims:

> 1. The property sought to be acquired in this proceeding is not necessary or convenient for the purpose for which it is sought to be taken.
>
> 2. The amount of property sought to be taken by [ATXI] herein is in excess of [ATXI's] needs.
>
> 3. [ATXI] does not seek to use the property sought to be acquired by this proceeding for public purpose for Citizens of Illinois [sic].
>
> 4. The project for which [ATXI] seeks to acquire the lands of [Landowners] does not constitute a public convenience or necessity.

R. C51-52. Landowners offered no additional facts to support these claims, and the remaining twenty-five paragraphs of the Traverse and Motion to Dismiss were dedicated to Landowners' request that the circuit court dismiss the eminent domain complaints because Landowners allege they were deprived of process purportedly due them in the ICC certificate proceeding. R. C52-58. Likewise, Landowners' Memorandum in Support

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of the Traverse and Motion to Dismiss only addressed issues related to notice in the certificate proceeding, and did not discuss the traverse claims. R. C65-88.

1. ATXI's Motion to Limit the Scope of Traverse and Motion to Dismiss Hearing was denied.

Prior to the hearing on Landowners' Traverse and Motion to Dismiss, Landowners disclosed witnesses and the scope of the testimony they sought to elicit at the hearing on the Traverse and Motion to Dismiss. R. C722-730. Landowners disclosed no opinion witnesses, either retained or independent, to express any opinions on factors such as the necessity of the project, the public use of the project, the adequacy or excessiveness of the easement area sought, nor any of the other issues that may properly be raised by a landowner in a traverse proceeding. R. C722-730. Rather, the entirety of their witness disclosure identified "Notice/Due Process" as the subject matter. R. C722-730. Landowners' witnesses were not intended to address "Notice/Due Process" in the condemnation case, but "Notice/Due Process" in the ICC certificate proceeding, an issue already surviving Landowners' due-process challenge on appeal. R. C722-730. ATXI moved to limit the scope of the hearing to the traverse claims only, and also sought to bar witnesses from testifying as to the issue of notice in the ICC proceeding. R. C734-819. ATXI's motion was denied in the circuit court's February 1, 2017 order. R. C849-854.

2. The parties stipulated to certain facts to be considered on Landowners' Traverse and Motion to Dismiss

Following months of discovery, Landowners and ATXI stipulated to certain relevant facts. R. C855-873. The Stipulation in its entirety is included in the Appendix at A117-135.

3. The parties participated in the Traverse and Motion to Dismiss Hearing.

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a. ATXI met its burdens on Landowners' Traverse, and Landowners failed to introduce any evidence related to their traverse claims.

At the hearing, the circuit court first heard the Landowners' traverse claims. R. R58. Because Landowners raised certain claims related to necessity and public purpose as part of their traverse claims, the burden shifted to ATXI to put on a *prima facie* case as to the elements required in an eminent domain case. R. R58. ATXI introduced the ICC Orders into evidence without objection, and all parties agreed that this evidence shifted the burden to Landowners to offer evidence contradicting the statutory presumptions that the project was necessary and convenient and for a public purpose. R. R58. Landowners offered no evidence related to the necessity or public purpose of the project. R. R57-58, 112. Furthermore, the circuit court and Landowners' counsel specifically acknowledged during the hearing:

> THE COURT [to Mr. Smith]: [T]here is nothing presented on your [Landowners'] traverse, there is nothing presented on that, so they [ATXI] have essentially carried their burden on the traverse. So that issue, I think, has been resolved that if - - if they win the motion to dismiss they have established by the presumptions that they are entitled as a result of the ICC certification that each of the issues you raise in your traverse will be denied.
>
> MR. SMITH: Correct.

R. R112.

b. Landowners offered evidence and argument on their Motion to Dismiss.

Landowners argued that they were not given notice of the intervenor-proposed route in the ICC proceedings on ATXI's petition for a certificate filed pursuant to Section 8-406.1. R. R59-78. Landowners claimed that because they were not provided notice of the intervenor-proposed route during the certificate proceedings, they had been deprived

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of due process in the eminent domain proceedings. R. R65-83. Based on precedent, including but not limited to the decision of the appellate court rejecting these precise claims, ATXI at all times disputed that Landowners were entitled to due process in the ICC certificate proceeding and argued that they were precluded from relitigating the issue. *See* Resp. to Trav., R. C90; Mot. to Limit, R. C734; Bench Brief, R. C874.

4. The circuit court granted Landowners' Motion to Dismiss and ATXI appealed.

The circuit court entered an Order granting Landowners' Motion to Dismiss, concluding that Section 8-406.1 was unconstitutional both on its face and as applied. R. C953-976. ATXI filed a Post-Judgment Motion challenging the Order's compliance with Illinois Supreme Court Rule 302(c)(2) and Rule 18. R. C977-1037. ATXI further argued that the circuit court is unable to comply with Rule 18. R. C977-1037. Finally, ATXI argued that, at a minimum, the Order must be modified to make the findings required by Rule 18. R. C977-1037.

The circuit court granted the Post-Judgment Motion in part modifying the Order and affirming the dismissal of the eminent domain complaints. R. C1048-50. Given the circuit court invalidated an Illinois statute, direct appeal to this Court was permitted under Illinois Supreme Court Rule 302(a)(1), and ATXI filed its notice of appeal. R. C1081-1110.

STANDARD OF REVIEW

A. The issue of whether the circuit court erred in failing to make the required Supreme Court Rule 18 findings as required by Illinois Supreme Court Rule 302(c)(2) in its Orders filed September 5, 2017 and November 6, 2017 may be considered and the Orders summarily vacated by this Court. Review of a circuit court's decision declaring a

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statute unconstitutional is a question of law and review is *de novo*. *In re E.H.*, 224 Ill. 2d 172, 179 (2006); *In re John M.*, 212 Ill. 2d 253, 265-66 (2004).

B. The issue of whether the circuit court erred in failing to follow established precedent regarding due process at the Illinois Commerce Commission, and in granting Landowners' Motion to Dismiss declaring 220 ILCS 5/8-406.1 unconstitutional is a question of law and reviewed *de novo*. *In re John M.*, 212 Ill. 2d 253, 265-66 (2004).

C. The issue of whether the circuit court was precluded from finding that 220 ILCS 5/8-406.1 was unconstitutional is a question of law which is reviewed *de novo*. *Lutkauskas v. Ricker* 2015 IL 117090, ¶ 43.

D. Whether a circuit court lacks jurisdiction to review and render an opinion as to the validity the Illinois Commerce Commission process and orders because such jurisdiction is expressly reserved for the appellate court, is a question of law and is reviewed *de novo*. *People v. Hughes*, 2012 IL 112817, ¶ 19.

E. Because there are no disputed facts related to Landowners' traverse claims, the legal result of those facts is solely a question of law, which is reviewed de novo. *Corral v. Mervis Industries*, 217 Ill. 2d 144, 153 (2005).

ARGUMENT

The circuit court took the extraordinary step of declaring an Illinois statute facially unconstitutional, believing that the Landowners had not been provided sufficient notice of an earlier proceeding. The circuit court did so without offering any analysis that such a conclusion was both necessary and unavoidable, and did so despite the fact that the vital legal conclusion (that there was no set of circumstances in which the law could be constitutionally applied) was impossible to reach. After all, this irredeemable statute

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was applied in the same underlying proceeding to provide notice to dozens and dozens of other persons. The conclusion of facial unconstitutionality was unsupported and clearly incorrect, but the error went much deeper.

The circuit court disregarded nearly a century of Illinois law in dismissing the condemnation proceeding on the grounds that due process had been denied. As long ago as 1917, and a number of times since, this Court and others have addressed this precise issue, and the answer has always been the same: certificate proceedings do not implicate a landowner's property rights, and they are not subject to due-process requirements, *even though they later result in the condemnation of property*. Included in the decades of Illinois law ignored by the circuit court, is a decision of the appellate court upholding the same statute against the same constitutional challenge brought by the same Landowners. *See Adams County Property Owners & Tenant Farmers v. Illinois Commerce Comm'n*, 2015 IL App (4th) 130907.

Even assuming the merits of the constitutional issue were properly before it, the circuit court clearly erred as a matter of law. However, the merits were not properly before the court. To begin with, the constitutional challenge should have been barred. Under the doctrines of both claim preclusion and issue preclusion, the Landowners should not have been permitted to relitigate the same claims and issues already rejected during the *Adams County* appeal. This all presumes the circuit court had jurisdiction to review the ICC's conduct and proceedings, but neither the Eminent Domain Act, nor laws authorizing judicial review of ICC decisions, grant the circuit court such jurisdiction.

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These are all questions of law, and they can and should be settled now by this Court. A remand for any further analysis of the constitutional question would be futile. Moreover, because the Landowners have already passed on the opportunity to present other evidence in support of their traverse, a remand for further proceedings on the traverse claims is not warranted and would be prejudicial to ATXI. A critically important project has been delayed too long already by this condemnation proceeding, and ATXI should not be forced to spend any more time in the starting blocks.

For these reasons, ATXI respectfully asks this Court to reverse and remand to the circuit court with direction to deny the Landowners' Traverse and proceed to a determination of compensation.

A. The circuit court's decision that Section 8-406.1 was facially unconstitutional was incomplete and erroneous.

The circuit court dismissed the condemnation proceedings on the basis that the statute authorizing certificate proceeding, Section 8-406.1, was facially unconstitutional and denied the Landowners due process. The conclusion that the statute is facially unconstitutional was clearly incorrect, but before plunging into the merits of that question, consideration must be given to whether the finding of unconstitutionality was appropriate and necessary under Illinois Supreme Court Rules 302(c)(2) and 18.

The circuit court's Order, in which it took the extraordinary step of determining Section 8-406.1 facially unconstitutional, was conclusory and lacked the requisite analysis and findings required to declare a statute unconstitutional. Declaring a statute unconstitutional is to be a "last resort" and, as such, Rule 302(c)(2) requires a court to make certain findings following the appropriate legal analysis. *Delgado v. Board of*

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Education Commissioners, 224 Ill. 2d 481, 486 (2007). Before invalidating a statute, the court must make and support certain findings including:

(i) that the statute cannot reasonably be construed in a manner that would preserve its validity;

(ii) that a finding of unconstitutionality is necessary to the decision or judgment rendered; and

(iii) that its decision cannot rest upon an alternative ground.

IL. S. Ct. R. 18 (West 2017).

Together, Rule 302(c) and Rule 18 impose a duty on the circuit court to make certain findings and undertake certain analysis before declaring a statute unconstitutional, and failure to undertake such analysis is fatal to a determination of unconstitutionality. *See People v. E.H. (In re E.H.)*, 224 Ill. 2d 172, 178-80 (2006); *In re Parentage of John M.*, 212 Ill. 2d 253 (2004).

In its Order, the circuit court cited Rule 302 and concluded that Section 8-406.1 was "facially unconstitutional," but this statement was made without analysis and is wholly unsupported by the findings within the order. To find a statute unconstitutional on its face, the circuit court must find that no set of circumstances exists under which the statute would be valid. *See, e.g., Lebron v. Gottlieb Mem. Hosp.*, 237 Ill. 2d 217, 228 (2010). Even within the Order itself, the circuit court concedes that Section 8-406.1 *was constitutional under certain circumstances*, i.e., as applied to other landowners who received notice of the initially proposed routes. R. C966-68; A20-22. These internal inconsistencies are telling and dispositive.

Likewise, the circuit court's analysis throughout implied that, regardless of Section 8-406.1's perceived flaws, had the Landowners received notice from the ICC, the

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Landowners themselves would not have been deprived of their purported due process rights. R. C968, C973; A22, A27 In the Order, the circuit court framed the issue as whether "the procedure set forth in Section 8-406.1 or the practice of the ICC in this instance provide[d] [Landowners] with due process." R. C970; A24. This statement proves the point: regardless of the notice requirements appearing on the face of Section 8-406.1 in 2012, adequate notice could have been given to the Landowners through the ICC process.

Because these Landowners could have been provided with notice sufficient to meet the court's claimed need for due process, a finding that Section 8-406.1 was facially unconstitutional was clearly unnecessary. Furthermore, because other landowners were provided with notice under Section 8-406.1, the court's finding of facial unconstitutionality was clearly incorrect. The Order below failed to measure up to Rule 302 and Rule 18, and the "facial" analysis was obviously flawed. That alone constitutes reversible error, but this does not call for a remand to better articulate the findings or to determine whether the statute, as applied, passed constitutional muster. Such a remand would be to no purpose, as the circuit court's error was more fundamental.

B. ICC certificate proceedings do not affect Landowners property rights and, regardless of later condemnation proceedings, due process requirements do not apply.

Under Illinois law, it has been settled for over one hundred years that ICC certificate proceedings do not affect a landowner's property rights, and thus due process requirements simply do not apply at ICC certificate proceedings. This is true even though the certificate may later provide the basis for a condemnor's authority to acquire property rights through the use of eminent domain. In permitting the landowners to present

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evidence on whether they received notice of routing proposals in the certificate proceeding, and then granting their motion to dismiss when it found they did not, the circuit court erred as a matter of law and should be reversed.

1. In holding that the ICC denied due process during the certificate proceeding, the circuit court disregarded a century of binding judicial decisions on this precise issue.

It should go without saying that circuit courts are bound to follow on-point, higher-court authority. Under Illinois' constitutional hierarchy, it is "the absolute duty of the circuit court to follow the decisions of the appellate court." *In re. A.A.*, 181 Ill. 2d 32, 36 (1998) (holding the trial court inexplicably failed to follow an appellate court decision upholding constitutionality of a statute). Until this Court says otherwise, an applicable appellate court decision must be followed by the circuit courts of this state, and a circuit court is obliged to follow the holding of the appellate court whether or not it agrees with that holding. *People v. Carpenter*, 228 Ill. 2d 250, 259–60 (2008). If, in contrast, an inferior court attempted to serve as a reviewing court on questions already resolved, it would inject chaos into the judicial process. *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 347 Ill. App. 3d 828, 836 (1st Dist. 2004).

The issue presented to the circuit court was anything but novel. In various decisions, both this Court and multiple appellate courts have considered the impact of certificate proceedings on landowner property rights and reached the same conclusion: property rights are not implicated by certificate proceedings, and due process protections do not apply even though a condemnation proceeding follows. Here, the circuit court clearly disregarded the path marked by these cases.

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a. The circuit court's analysis inappropriately turned on whether the ICC provided due process during the certificate proceeding.

The Landowners raised the same two arguments before the circuit court that they previously litigated before the appellate court in *Adams County*: first, that their due process rights had been violated because the ICC failed to provide notice that their property would be directly affected by the transmission line; and second, that the statute authorizing the certificate proceeding, Section 8-406.1, is unconstitutional because it allows for a certificate to be granted without providing any notice to affected property owners. R. C71, C78, C95; A56, A63, A74.

The circuit court accepted these questions, clearly believing that its job was to determine whether the ICC provided due process during the certificate proceeding as indicated by the following:

> [T]he question for this Court is, did either the procedure for notice set forth in Section 8-406.1 or the practice of the ICC in this instance, provide the [Landowners] with due process?

R. C970; A24. Answering both queries in the negative, the court concluded that the ICC did not provide due process during the certificate proceeding, and the authorizing statute, Section 8-406.1, was facially unconstitutional. R. C975; A29.

The court's reasoning was neither entirely clear, nor entirely consistent. What certainly was clear was that the circuit court assigned great significance to the fact that the certificate proceeding (which itself did *not* affect protected land rights) had led to condemnation proceedings (which did). The circuit court seemed to reason that because ICC certificate proceedings have the potential to lead to future cases that may implicate a landowner's property rights, they should be subject to due process requirements. On the contrary, this Court and others have long recognized this precise issue, and determined

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that an alleged lack of notice in a certificate proceeding does not somehow invalidate a later condemnation case.

b. This Court confronted and settled this issue over one hundred years ago in *Chicago, Burlington & Quincy R.R. Co. v. Cavanagh*.

This Court took up the question in 1917, facing circumstances more difficult than those here. In *Chicago, Burlington & Quincy R.R. Co. v. Cavanagh*, 278 Ill. 609, 614 (1917), the State Public Utilities Commission (precursor to the ICC) ordered a railroad to relocate its tracks. The order required the railroad to acquire, by purchase or the exercise of the right of eminent domain, whatever property might be necessary for the purpose. *Id*. at 612. During later condemnation proceedings, the affected landowners complained that the relocation order was not served on them, which would have permitted them to appear before the Commission, appeal to the then-appropriate court, and if the order was confirmed, then prosecute a further appeal to this Court. *Id*. at 613. However, because they had not received notice of the order, the *Cavanagh* landowners, unlike the Landowners here, were not even permitted an appeal.

The trial court was persuaded and dismissed the eminent domain petition, but this Court reversed, finding that the order of the Commission did not amount to an appropriation of the defendants' property or any interest in it, which could only be accomplished by the filing of a petition and the ascertainment and payment of compensation for the property. *Id*. at 616. This Court further found that the mere making of the Commission order neither gave the petitioner any interest in, nor right to possession of the property. *Id*. Thus, there was no violation of the due process provision of the Constitution. *Id*.

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c. *Zurn v. City of Chicago* reaffirmed that the later condemnation of property does not impose due process requirements on the earlier certificate proceeding.

Approximately thirty years later, this Court followed *Cavanagh* and reaffirmed that a certificate proceeding does *not* implicate protected property rights, even though the certificate later results in the acquisition of property. *See Zurn v. City of Chicago*, 389 Ill. 114, 115 (1945). *Zurn* involved a neighborhood redevelopment commission, and the owners of affected properties complained that the authorizing statute did not provide for proper notice to property owners of the application for a certificate that would permit the institution of condemnation proceedings. *Id*. at 129. The owners insisted that the failure of the act to provide for actual notice of such hearing to the property owners constituted a denial of due process of law. *Id*.

This Court rejected the due process claim, holding that "it should be kept in mind that this hearing is merely an application for a certificate of convenience and necessity." *Id*. Although the owners argued that the certificate authorizes the corporation to acquire the property located within the development area by eminent domain, it was obvious that no property or property interests were to be taken or interfered with at that hearing. *Id*. On the contrary, the certificate proceeding was simply one of the steps prescribed by the act in the chain of events, that can culminate in the acquisition of property by eminent domain. *Id*. at 132. This *later* impact on property rights did not impose anticipatory due-process requirements on the certificate proceeding. On the contrary, the court found that property owners were not entitled to notice of such hearing before the commission, and the failure of the act to provide for such notice did not constitute a denial of due process. *Id*.

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d. Numerous later cases have confirmed that these principles apply to ICC certificate proceedings.

Following *Zurn* and *Cavanagh*, this Court and multiple appellate courts have applied the same rule to ICC certificate proceedings, concluding that such proceedings do not affect a landowner's property rights. For example, in *Egyptian Electric Co-op Assn. v. Illinois Commerce Comm'n*, 33 Ill. 2d 339, 343 (1965), a competing utility sought to intervene in another utility's certificate proceeding, in part on the basis it owned land subject to what would be a grant of eminent domain authority. When the ICC denied intervention, the competitor appealed, but the court dismissed for lack of standing, finding that allegations that the competing utility was a landowner across whose property the proposed line would have to go, failed to show the required interest in the certificate proceedings. *Id*. The competitor's property rights were "not affected simply by the conferring of a power of eminent domain upon a utility corporation." *Id*.

Illinois appellate courts have likewise recognized that landowners are entitled to assert their property rights, *not* during the certificate proceeding, but in the condemnation case, specifically via the right to file a traverse. For example, in *Illinois Power Co. v. Lynn*, 50 Ill. App. 3d 77, 82 (4th Dist. 1977), the court considered whether the ICC's findings in a certificate proceeding preempted the rights of the property owners in the condemnation proceedings. The answer was no. The certificate proceeding pertained to the legislative decision on the reasonableness of the utility's plans and could not confer property rights. *Id*. at 81. If the plans were approved, the property owners' rights would be in jeopardy for the first time in court, where the landowner is protected from arbitrary taking of private property for nonpublic uses by the right to file a motion to dismiss and traverse, challenging the question of public use and the extent of property to be taken. *Id*.;

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see also Enbridge Energy (Illinois), LLC v. Kuerth, 2016 IL App (4th) 150519, ¶¶ 151 & 164 (holding that although not entitled to litigate anew the ICC's certification decisions at traverse hearing, landowners could not be deprived of exercising the option of presenting relevant evidence to support valid condemnation defenses); *Quantum Pipeline Co. v. Illinois Commerce Comm'n*, 304 Ill. App. 3d 310, 325 (3d Dist. 1999) (Lytton, J., conc.) (stating that long-standing Illinois precedent permits intervening landowners to present evidence challenging the need for the pipeline during the condemnation proceedings, regardless of whether they had participated in the prior certificate process).

e. The same decision was reached in an appeal involving this certificate and these Landowners.

Finally, almost one hundred years after *Cavanagh*, the appellate court confirmed that these principles applied to the very certificate proceeding at issue here. In *Adams County*, 2015 IL App (4th) 130907, the Landowners (now appellees before this Court) appealed the original issuance of the certificate at issue in this case. They alleged they had not received notice of the final route ultimately approved by the ICC, and as a result their due process rights had been violated. *Adams County* ¶ 1.

Among many other notice requirements, ATXI held public meetings in the Landowners' county, after publishing notice of these meetings over three weeks. R. C965; A19. At least some of the Landowners *admit* that they attended these meetings and were aware of the project, but when they saw that the initially proposed routes did not cross their property, they chose not to become involved. R. C69, C80; A54, A65. None of the Landowners claimed to have contacted either ATXI or the ICC to confirm their assumption that the initially proposed routes could not be changed. In their own words, they relied on a "false sense of security." R. C80; A65.

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During the ICC proceeding, an intervenor group proposed a route that crossed the Landowners' property. R. C856; A118. Despite having chosen not to intervene, the Landowners conceded they were identified as affected persons. Landowners do not dispute that the party proposing the new route complied with the ALJ's mandate regarding providing contact information for newly affected landowners. R. C78, C856; A63, A118. They also concede that their names appeared on an ICC service list for the notice of the route that crossed their property. R. C856; A118. Landowners claim, however, that notwithstanding their appearance on the ICC's service list, "the notice they should have received was not actually sent to them by the Chief Clerk of the Commission." R. C78; A63.

In *Adams County*, the Fourth District recognized that a number of Landowners knew about the proceeding, wrongly assumed that it would not affect them, and chose not to intervene. Additionally, as part of the opinion, the Fourth District considered that when a new route was later proposed by a new party, Landowners were identified by the intervening group as affected landowners. The Fourth District acknowledged Landowners claim that the ICC Clerk failed to mail notice to the Landowners, but then bypassed the factual questions intrinsic to Landowners' claim, namely whether Landowners failed to receive the route notice, or whether they simply failed to act on it. *See Adams County*, ¶ 79.

Rather, the Fourth District began with the question preliminary to any due process analysis: whether a protectable interest in life, liberty, or property exists because if one does not, no process is due. *Adams County*, ¶ 46. Following *Cavanagh*, *Zurn*, and *Lynn*, the Fourth District held that the underlying proceedings before the ICC, neither conferred

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property rights on ATXI, nor deprived Landowners of their protected property interests. *Id*. ¶ 80. Therefore, regardless of whether the notice in question was mailed, the Landowners' due process rights were not violated." *Id*.

2. The circuit court disregarded the settled law of Illinois in dismissing the condemnation proceeding on the grounds the ICC had denied Landowners due process.

When the circuit court decided this case, it had nearly a century of case law before it, including a case from its own appellate district resolving the same issues raised by the same landowners about the same ICC proceeding. Notwithstanding the weight of all these on-point, higher-court decisions against it, the circuit court concluded that the Landowners' due process rights had been violated during the certificate proceeding.

How the circuit court satisfied itself with this outcome is not entirely clear. Throughout the Order, the court provided at least three different rationales: first, it held that *Adams County* and the related cases were inapplicable or distinguishable; second, it held *Adams County* did not actually rule on the constitutional issue; and finally, at least in part, it simply disagreed with *Adams County*. None of these positions provided a permissible basis for the circuit court's decision, and it should be reversed.

a. The alleged grounds for distinguishing *Adams County* have been present in virtually every case addressing this issue.

In the November portion of the Order, the circuit court stated that it "was, and is not, required to follow" the appellate court decision of *Adams County* and deemed this case distinguishable. The circuit court further found that in the previous order, the circuit court adequately explained *Adams County*'s inapplicability to the proceedings at bar. R. C1048; A31. That explanation appears to be set forth in the following paragraph of the September portion of the Order:

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> [The appellate court] having concluded there were no property interests at stake, there was no process due. The court in *Adams County* did not have before it the situation before this Court. *Now* there are property interests at stake, and *now* process is due.

R. C971; A25 (emphasis added).

This does not provide a logical basis for distinguishing *Adams County*. If property rights were "now" at stake (*i.e.*, during the eminent domain case), that would lead to a review of the process provided during the *present* eminent domain case, not the *past* certificate proceeding. However, no one contests that Landowners were afforded due process during the eminent domain case. Due process requires notice and an opportunity to be heard, and the Landowners clearly received notice of the eminent domain proceeding, and clearly availed themselves of the opportunity to be heard. The circuit court was correct that property interests were "now" at stake, and that process was "now" due. It was due *before the circuit court*, and the circuit court provided due process in the eminent domain case.

To the extent the court implied that the present case's effect on property rights meant that process *was* (or *should have been*) due in the long-concluded certificate proceeding, then this implication is not a distinction of prior precedent, but a repudiation. *Cavanagh*, *Zurn*, *Adams County*, and many other cases have expressly recognized the fact that certificate proceedings lead to eminent domain proceedings. Indeed, in both *Zurn* and *Cavanagh*, it was *during* the eminent domain proceeding that the due process claims were raised. The *Adams County* court clearly understood that an impact on property rights was likely to follow, noting in the opinion that the certificate proceeding was one of the steps prescribed by the act in the chain of events that could culminate in the acquisition of property by eminent domain. *Adams County*, ¶ 50 (quoting *Zurn*, 389

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Ill. at 129–32). That did not affect the conclusion in these cases that certificate proceedings do not affect property rights, and do not trigger due process requirements.

This case was not then distinguishable from the long line of Illinois cases, but rather exactly like the earlier cases. In each case: the certificate was issued; condemnation proceedings were, or were-to-be, instituted; and due process arguments were raised. The later impact on property rights is not unique to these Landowners, and provided no basis for the circuit court to distinguish *Adams County* or the cases it followed. The only difference here was that the circuit court found a constitutional violation where no other court before had.

b. *Adams County* did not defer ruling on the constitutional issue.

Another of the circuit court's rationales for disregarding *Adams County* was that the appellate court did not actually resolve the constitutional issue. The initial part of the Order stated that:

> [s]ince certification proceedings before the ICC did not actually address property rights or interests of anyone, the court in *Adams County* was reluctant to address the constitutional due process issue.

R. C961; A15. After modification, the Order explicitly stated that "the Appellate Court, in *Adams County*, deferred ruling on the constitutional issue." R. C1048-49; A31-32.

This conclusion is incorrect. *Adams County* cannot even be arguably interpreted as having been reluctant to address or deferring ruling on the constitutional issue. The Fourth District systematically addressed the Landowners' constitutional due process claims in its opinion, and concluded unequivocally that: "[t]he due process rights of [the Landowners] were not violated." *Adams County*, 2015 IL App (4th) 130907, ¶ 80.

It is true that the *Adams County* court did not reach one particular question, whether notice was actually mailed to the Landowners by the ICC. *Id*. ¶ 80. That was a

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factual dispute, pertinent only to a defense raised by ATXI, and not relevant to the constitutional issue itself. It was unnecessary to resolve that factual dispute because the Landowners had no due process rights in the ICC proceedings. *Id*. The Fourth District may have deferred ruling on one of ATXI's due process *defenses*, but the Fourth District did not defer ruling on the constitutional challenge itself.

c. Disagreement is an improper basis for the circuit court's refusal to follow *Adams County*.

Finally, it appears that the circuit court simply disagreed with the appellate court. Disagreement appears implicit throughout the order, but at a key point becomes explicit.

The circuit court considered the appellate court's recognition (in line with many other cases) that the Landowners were not preempted from later exercising their rights as owners of property being taken for a public use. *Adams County*, ¶ 48. The circuit court simply disagreed stating that:

> *[c]ontrary to the court[']s conclusion*, it would appear there is, in fact, something in the [Act] which effectively preempts landowners' rights in the condemnation proceedings, namely the strong presumption, and shifting of the burden which would not otherwise exist in normal eminent domain proceedings.

R. C964-65; A18-19 (emphasis added).

This theory has no merit, but regardless of the merits, the circuit court displayed a serious misunderstanding of its role. If the appellate court concludes something, the circuit court is not entitled to revisit, reject, or reach outcomes contrary to that conclusion even where it disagrees. *See, e.g.*, *People v. Carpenter*, 228 Ill. 2d 250, 259–60 (2008). Again, the conclusion that certificate proceedings do not preempt landowner rights in condemnation proceedings was not novel to the *Adams County* court. Numerous decisions have recognized precisely this point. *See, e.g.*, *Enbridge Energy (Illinois),*

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L.L.C. v. Kuerth, 2016 IL App (4th) 150519, ¶ 151; *Illinois Power Co. v. Lynn*, 50 Ill. App. 3d 77, 82 (4th Dist. 1977).

Despite this fact, the circuit court's repudiation of *Adams County* is direct and explicit. The Fourth District plainly relied on the proposition that Section 8-406.1 did not preempt the rights of property owners in the condemnation proceedings. *Adams County*, ¶ 48. Then just as plainly, the circuit court disagreed, holding that contrary to the court's conclusion, the same statute effectively preempts Landowners' rights in the condemnation proceeding. R. C964-65; A18-19. If the constitutional hierarchy means anything, it means that a circuit court cannot diverge from the appellate court simply because it disagrees.

d. The point on which the circuit court disagreed with the appellate court had no impact on this case.

Given that the appellate court's conclusion was clear and on point, the circuit court was not authorized to reach a different conclusion, even if it believed that the appellate court had gotten some part of the analysis wrong. There was nothing to the circuit court's concern that Landowners' rights had been effectively preempted by the certificate. The statutory presumptions that so concerned the circuit court, far from effectively preempting the Landowners' rights, actually had *no impact* on Landowners or this case.

During an eminent-domain proceeding, there are two criteria on which a certificate-holder, like ATXI, is entitled to a statutory presumption:

- that the project is "primarily for the benefit, use, or enjoyment of the public," and
- that it is "necessary for a public purpose."

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735 ILCS 30/5-5-5(c) (West 2016). The presumption that these criteria have been met is rebuttable, and notably, neither criterion requires landowners to have participated in the certificate proceeding. *Id.*

If there is evidence that a project is not necessary for a public purpose, or is primarily for someone's use or benefit other than the public, it could be discovered by landowners, and admitted and relied upon by a circuit court to grant a traverse dismissing an eminent domain complaint. If such evidence exists, as numerous cases recognize, it can be presented at the condemnation stage, regardless of what occurred during the certificate proceeding. *See, e.g.*, *Enbridge*, 2016 IL App (4th) 150519, ¶ 151 (finding that landowners cannot be deprived of exercising the option of presenting relevant evidence to support valid condemnation defenses). There is no reason, in law or logic, that such evidence would need to first be adduced at the certificate stage, meaning that lack of notice of the certificate proceeding would not prevent a landowner from mounting an argument against these statutory elements.

However, in this case all such discussion of the presumptions is theoretical, for the simple fact that *the presumptions did no work in this case*. Landowners made no attempt to present evidence on any issue related to the statutory elements on which ATXI was entitled to a presumption. Notice in the ICC proceeding was the *only* issue on which the Landowners presented any evidence during the eminent domain proceeding. Although the hearing was plainly the time and place to do so, the Landowners did not put on evidence challenging whether the project was "primarily for the benefit, use, or enjoyment of the public," or was "necessary for a public purpose." The circuit court

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expressly found that Landowners presented no evidence at the hearing in regard to their traverse claims, but instead focused on notice during the ICC proceedings. R. C954; A8.

The circuit court seemed to think the presumptions effectively preempted Landowners from overcoming their burden in a traverse, warranting a new approach, but ignored the fact that Landowners could not have carried *any* burden of proof on these issues below, no matter how light. Landowners made no attempt to overcome the presumptions, and put on *no evidence*, except towards relitigating a notice issue that has been settled since 1917 and specifically decided against them in 2015.

In sum, Illinois law has long made clear that certificate proceedings do not implicate landowner property rights, and thus that due process requirements do not apply, even though condemnation proceedings follow. This settled law ruled out the challenge presented by the Landowners, and the circuit court clearly erred, as a matter of law, both in permitting the Landowners to present evidence attacking the constitutionality of the ICC proceedings and the certificate statute, and in granting their motion to dismiss on the same basis.

C. The circuit court should have precluded Landowners from even presenting arguments that had already been decided by the appellate court.

The foregoing discussion shows that on the merits, a massive weight of precedent dictated the rejection of Landowners' due process arguments. But the circuit court should not have reached the merits. Upon seeing that the same issue, involving the same Landowners, had already been decided on the merits by the appellate court, the circuit court should have ruled that the issue was precluded and gone no further.

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1. Claim preclusion and issue preclusion prohibit successive, repetitive litigation of the same cause of action and issue.

Few rules are more essential or more firmly embedded in our jurisprudence than the doctrine of *res judicata*, or claim preclusion. *Village of Bartonville v. Lopez*, 2017 IL 120643, ¶ 49. Claim preclusion bars a subsequent action between parties or their privies where a final judgment on the merits has been rendered by a court of competent jurisdiction. *Id*. For claim preclusion to apply, there must be: (1) a final judgment on the merits issued by a court of competent jurisdiction; (2) an identity of parties or their privies; and (3) an identity of cause of action. *Id.* ¶ 50. Collateral estoppel, commonly known as issue preclusion, is related but distinct. It operates as a bar to the relitigation of issues that have been resolved in earlier actions. *Du Page Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 77 (2001).

The analysis is similar for issue preclusion. The same first factor applies as in claim preclusion, and (in this case[1]) so does the second. The third factor, however, asks whether the issue decided in the prior proceeding is identical to the one in the current suit. *Gumma v. White*, 216 Ill. 2d 23, 38 (2005). Additionally, for issue preclusion to apply, the issue must also have been actually litigated and determined, and necessary for the judgment in the first proceeding. *Nowak v. St. Rita High School.*, 197 Ill. 2d 381, 390 (2001); *Talarico v. Dunlap*, 177 Ill. 2d 185, 190 (1997).

Properly applied, these defenses conserve judicial resources by preventing repetitive litigation. *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 21. They

[1] For claim preclusion to apply, there must be an identity of parties on *both* sides; for issue preclusion, only the party *to be bound* must be identical. Because in this case ATXI participated in both proceedings, the analyses for both issue and claim preclusion focus on the same question—are the parties to be bound identical?

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protect defendants from the nuisance of relitigating claims or issues that have been previously resolved. *Id*. They foster reliance on judicial action by minimizing inconsistent verdicts. *Montana v. United States*, 440 U.S. 147, 153–54 (1979).

When these factors are present, failure to preclude a claim or an issue is reversible error. *See, e.g.*, *Village of Bartonville v.* Lopez, 2017 IL 120643, ¶ 79 (affirming circuit court and reversing appellate court based on finding that *res judicata* applied); *Richter v. Village of Oak Brook*, 2011 IL App (2d) 100114, ¶ 27 (reversing trial court for incorrectly denying plaintiff's motion for summary judgment based on collateral estoppel).

2. Both claim preclusion and issue preclusion should have barred the relitigation of the due process claim below.

The circuit court below should not have reached the merits of Landowners' claims. Both claim preclusion and issue preclusion prohibited relitigating the question of whether the ICC denied the Landowners due process. ATXI will begin by discussing the two factors common to each defense: whether the prior proceeding reached a final judgment on the merits; and whether the parties are identical or in privity. ATXI will then address the factors unique to each defense.

a. The appellate court rejected Landowners' due process arguments in the first proceeding.

First, there was a prior proceeding reaching a final judgment on the merits, namely the appellate court decision in *Adams County*. A judgment is considered on the merits when it determines the parties' respective rights and liabilities based on the facts before the court. *Ovnik v. Podolskey*, 2017 IL App (1st) 162987, ¶ 24; *Lehman v. Continental Health Care, Ltd.*, 240 Ill. App. 3d 795, 802 (1st Dist. 1992). An appellate court opinion can supply a final judgment on the merits. *See, e.g.*, *Dookeran v. County of*

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Cook, 2013 IL App (1st) 111095, ¶ 27 (finding that an appellate court decision was the final judgment on the merits by a court of competent jurisdiction). Regardless of whether it is correct, a decision on the merits of an issue will be binding in future litigation between the parties or their privies. *See People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 295 (1992) (holding that whether the first court's finding were supported by the evidence is not a proper consideration for preclusion review).

As discussed above, Landowners participated in the ICC proceeding and were permitted to appeal. *See Adams County*, 2015 IL App (4th) 130907, ¶ 17. The appellate court exercised competent jurisdiction over that appeal, in which it clearly had jurisdiction both to review ICC proceedings and to determine their constitutionality. *See* 220 ILCS 5/10-201(e)(iv)(D) (West 2017). Exercising this jurisdiction, it reached the merits of Landowners' due-process arguments and rejected them unequivocally, finding that "[t]he due process rights of [Landowners] were not violated." *Adams County*, 2015 IL App (4th) 130907, ¶ 80. A separate group of landowners then petitioned for leave to appeal to this Court, which was denied. *See* 42 N.E. 3d 369 (Ill. 2015).

The appellate court's judgment was thus final, and its finding that Landowners had no due process right to notice during the certificate proceeding, determined the Landowners' rights and liabilities based on the facts before the court. The proceeding they challenged was upheld, and ATXI was permitted to begin the process of acquiring property rights.

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b. The record shows that the parties to this proceeding are identical to the parties to the *Adams County* appeal.

The second factor, identity of the parties, is also satisfied here. The case below was tried based on stipulated facts. Under the Stipulation, the parties agreed that the same landowners who are "Defendants" in the condemnation proceeding also appeared before the ICC under the title Edgar County Citizens are Entitled to Due Process. R. C858; A120. The Stipulation explains that the ICC permitted the Landowners to intervene only for the purpose of allowing them to seek appellate review. R. C858; A120. Appellate review was then provided in *Adams County*, where the arguments presented by the same group ("Edgar County Citizens are Entitled to Due Process") were considered and rejected. *See Adams County*, 2015 IL App (4th) 130907, ¶¶ 1 & 78–80. In sum, an identity of parties existed in both the appellate proceeding and the eminent domain cases.

c. The cause of action and the issue in each case, are identical, and the issue was actually litigated and necessary to the judgment.

Finally, the third factor for each defense was also satisfied: for claim preclusion, the cause of action was identical; for issue preclusion, the issue in each case was identical.

Claim Preclusion – Identical Cause of Action. Separate claims arise out of the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts. *Hayashi v. Illinois Department of Financial and Professional Regulation* 2014 IL 116023, ¶ 46. The same cause of action gave rise to Landowners' due process claims in both the appeal and in the eminent domain proceedings, and therefore, the latter claims are now barred.

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A cause of action is defined by *the facts* which give rise to a right to relief. *Hayashi*, 2014 IL 116023, ¶ 46. Illinois courts apply the transactional test, under which claims in two separate proceedings are considered identical causes of action if those claims arose from a single group of operative facts. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 309 (1998).

In *River Park*, developers raised federal claims under 42 U.S.C. § 1983 in the Northern District, challenging a city planning commission's alleged refusals to timely process their rezoning petition in violation of their constitutional due-process rights. *Id.* at 297. The District Court dismissed the complaint for failure to state a claim. The developers then raised state-law claims alleging breach of contract and abuse of power in circuit court related to the same commission proceeding. *Id*. at 298. The circuit court ruled the claims precluded, the appellate court reversed, and this Court reversed again. Both the federal and state claims arose from the same set of operative facts: the City's handling of the plaintiffs' zoning applications. *Id*. at 313–14. The court was particularly persuaded by the parallels between the factual allegations of plaintiff's state complaint and their federal complaint. *Id.* at 314. This Court thus reversed the appellate court and barred the developers' claims. *Id*. at 319.

Similar to *River Park*, Landowners' claims, both before the appellate court and circuit court, arise from the same body of operative facts: the ICC's conduct of the certificate proceedings in ICC Docket No. 12-0598. As in *River Park*, a comparison of the Landowners' filings proves the point. Both the issues raised in the *Adams County* appeal, and the issues raised in the motion to dismiss the eminent domain complaints, set forth the same facts and arguments. R. C95; A74. Likewise, a comparison of the pertinent

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sections of the *Adams County* opinion with the circuit court's decisions, also proves the point. Both are devoted entirely to evaluating the ICC's conduct in Docket No. 12-0598, and particularly those facts concerning the provision of notice to these Landowners.

In short, even if any differences existed between the claims raised on appeal and those raised during the condemnation proceeding, both arose from the same group of operative facts. Thus, all three factors necessary for the application of claim preclusion applied, and the circuit court erred by even considering the claims.

Issue Preclusion – Identical issues, Actually Litigated, and Necessary to Judgment. The Landowners raised identical notice issues in both proceedings as well, and the issues were actually litigated and necessary to the judgment. Thus, issue preclusion applies as well as claim preclusion.

That the issues were identical is proven by the Landowners' own pleadings before the appellate court and the circuit court. Landowners' constitutional challenges in each proceeding were predicated on a single issue: whether the ICC, in its conduct of Docket No. 12-0598, failed to provide Landowners with constitutional notice, in particular based on the ICC clerk's alleged failure to mail a notice on January 31, 2013. Indeed, the Landowners' arguments before the circuit court appear to have been largely cut and pasted from their appellate brief in *Adams County*. The "Issues Presented for Review" in Landowners' appellate brief are certainly identical to those raised in their Traverse and Motion to Dismiss before the circuit court. R. C95; A74.

The circuit court clearly considered the issue to be the same as the one raised on appeal. The appellate court described the Landowners' argument as being that their "due process rights were violated because of insufficient notice of the [ICC certificate]

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proceedings." *Adams County*, 2015 IL App. (4th) 130907, ¶ 78. The circuit court analyzed the same question, whether the practice of the ICC in this instance provided the Landowners with due process. R. C970; A24. The context, of course, was different, but the issue (did the ICC satisfy due process requirements in Docket No. 12-0598) was exactly the same.

The issue was also actually litigated and determined in the first proceeding, and necessary for the judgment. *See Nowak*, 197 Ill. 2d at 390; *Talarico*, 177 Ill. 2d at 190. Before the Fourth District, the Landowners, ATXI, and the ICC all argued the notice issue. The appellate court's holding that the certificate proceeding did not implicate the Landowners' property rights, and thus that they did not have a due process right to notice of the proceeding, *was* the central issue raised by the Landowners. Due process was not some peripheral issue that might have escaped Landowners' attention, or on which they lacked incentive to litigate. It was the heart of their case on appeal. Thus, the circuit court should also have barred relitigation of the due process issue.

3. The circuit court provided no reasonable basis for permitting the relitigation of Landowners' due process claims.

In sum, all of the factors necessary to apply both claim preclusion and issue preclusion were present in this case. ATXI raised the preclusion defenses in its Response to Landowners' Traverse and Motion to Dismiss. R. C98-103; A77-82. The circuit court should not have permitted the Landowners to relitigate the claim and issue.

The circuit court provided very little basis for disregarding the *Adams County* opinion and permitting the Landowners to relitigate whether the ICC provided due process. The circuit court seemed to acknowledge ATXI's preclusion arguments, recognizing that ATXI contends the outcome of these proceedings should be dictated by

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the Fourth District's ruling in *Adams County*, but the court provided *no analysis* of either preclusion defense. R. C961; A15. The circuit court concluded that contrary to ATXI's assertions, *Adams County* does not preclude these Landowners from raising their due process issues in the eminent domain proceedings. R. C962; A16. No discussion of the various preclusion factors followed in the Order, even where all the factors were satisfied.

By failing to bar argument on these claims and issues so clearly the same as the claims and issues already resolved in *Adams County*, the circuit court forced ATXI to expend significant resources and, even worse, months of time at the start of eminent domain proceedings. State and federal power regulators determined that the Illinois Rivers Project is sorely needed, both for the sake of the energy grid and the interests of Illinois electric customers. Allowing relitigation of these claims only serves to delay and impede this necessary project. R. C280.

Regardless, this case exemplifies the inefficiency and waste that the doctrines of claim preclusion and issue preclusion are designed to mitigate. The circuit court would not even countenance the defenses, or provide an analysis whether they applied, but simply chose to treat the issue as though a matter for *de novo* review. It clearly erred in doing so and should be reversed.

D. Even if the precise issues raised by the Landowners had not already been settled, the circuit court lacked jurisdiction to issue a decision regarding the conduct of ICC proceedings.

The question of whether due process applied during the ICC proceedings has long been settled. The circuit court erred by failing either to abide by numerous binding precedents or to prohibit Landowners from relitigating these issues, but even if *Adams County* and all the preceding cases had never been decided, this absence would not have

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opened the door for the circuit court to invalidate the process and procedures used in ICC proceedings. The circuit court does not have authority to issue determinations regarding the constitutional conduct of ICC proceedings.

The jurisdictional issue here is somewhat nuanced. The appellate courts, not the circuit courts, have jurisdiction to actually review the ICC's conduct of its proceedings and its decisions on their merits. With that being said, some factors relevant to an ICC certificate proceeding may also be independently relevant to a circuit court eminent domain proceeding, most notably, those concerning the project's public character. Compare 220 ILCS 5/8-406.1(f), which states that the ICC must find that project will promote public convenience and necessity, with 735 ILCS 30/5-5-5(c), which states that the circuit court must find that the acquisition of property is primarily for the benefit, use, or enjoyment of the public. Numerous cases, discussed above, recognize that the circuit court is *not* bound by the ICC's decision on such factors, but entitled to make its own independent findings on that issue. *See, e.g.*, *Lynn*, 50 Ill. App. 3d at 82 (holding that ICC findings in a certificate proceeding do not preempt the rights of the property owners in the condemnation proceedings). In essence, ATXI must secure two independent findings on questions regarding public use, one from the ICC, and one from the circuit court.

However, the circuit court's authority to render findings under the Eminent Domain Act is not the same thing as appellate jurisdiction to review either the decisions of the ICC or the ICC's conduct of its proceedings. That is the irony of this case. The Landowners made no attempt to make a case on the issue over which the circuit court possessed authority (issues pertaining to public use) but instead focused on an issue over

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which it lacked authority (the ICC's conduct of its proceedings). The circuit court, unfortunately, followed the Landowners' lead.

1. Courts only possess authority to review administrative action as provided by law.

Under the Illinois Constitution, circuit courts shall have such power to review administrative action as provided by law. Ill. Const., Art. VI, § 9. Because review of a final administrative decision may only be obtained as provided by statute, a court is said to exercise special statutory jurisdiction when it reviews an administration decision. *Collinsville Community Unit School District No. 10 v. Regional Board*, 218 Ill. 2d 175, 181–82 (2006). Special statutory jurisdiction is limited to the language of the act conferring it and the court has no powers from any other source. *Id*. The Illinois Constitution does not confer any right to judicial review of final administrative decisions. The courts of this state are only empowered to review administrative actions as provided by law. *People ex rel. Madigan v. Illinois Commerce Comm'n*, 2014 IL 116642, ¶ 9; *see also Illini Coach Co. v. Illinois Commerce Comm'n*, 408 Ill. 104, 111 (1951) (finding that the statutory method for reviewing orders of the ICC is exclusive).

The ICC is an administrative agency. *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 148 Ill. 2d 348, 366 (1992). Thus, the circuit court only has such authority to review ICC proceedings as provided by law. *Id.*

2. The authority to review the constitutionality of the ICC proceedings is vested solely in the appellate court.

Section 10-201 of the Public Utilities Act is the law providing courts with authority to review ICC decisions. 220 ILCS 5/10-201 (West 2014); *see Madigan*, 2014 IL 116642, ¶ 12 (finding that Section 10-201 establishes special statutory jurisdiction for judicial review of ICC decisions).

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This section does not provide the circuit court with *any* authority to review the actions of the ICC. Rather, the appellate court is vested with the jurisdiction to review ICC decisions and proceedings. Under Section 10-201(a), any person affected by a rule, regulation, order or decision of the ICC may appeal *to the appellate court* of the judicial district in which the subject matter of the hearing is situated. 220 ILCS 5/10-201(a) (West 2014) (emphasis added). There is no similar delegation of review authority to the circuit court.[2] The circuit court does not have jurisdiction to review a final decision of the ICC. Decisions of the ICC are controlled exclusively by the Public Utilities Act, and are not reviewed by the circuit courts. *Commonwealth Edison Co. v. IBEW, Local Union No. 15*, 961 F. Supp. 1154, 1168 (N.D. Ill. 1996).

Of particular relevance here, Section 10-201 entrusts to the appellate court questions of whether ICC proceedings violated the Constitution. According to Section 10-201(e)(iv)(D), reversal is proper if the proceedings or manner by which the ICC considered and decided its order or decision were in violation of the state or federal constitution or laws, to the prejudice of the appellant. Thus, questions of whether the ICC conducted given proceedings or applied given statutes in accordance with the Constitution are vested solely in the appellate court.

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[2] Prior to 1986, ICC decisions were reviewed in the first instance by the circuit court. *See People ex rel. Hartigan v. Ill. Commerce Comm'n*, 202 Ill. App. 3d 917, 926-27 (1990) (noting that the Public Utilities Act was amended, effective January 1, 1986, to remove review of ICC orders from the circuit court and vest review in the appellate court). Following enactment of Section 10-201, review authority was vested solely in the appellate court. *See id.*; *see also* 220 ILCS 5/10-201(a) (West 2014).

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3. The authority that the circuit court *did* possess under the Eminent Domain Act did *not* authorize review of the certificate proceeding.

What authority the circuit court did have in these cases came from the Eminent Domain Act, but the Eminent Domain Act did not permit the circuit court to review the ICC's orders or the conduct of its proceedings. Such issues are for direct appellate review, as Section 10-201 makes clear.

To be sure, some questions were properly before the circuit court. For example, under the Eminent Domain Act, the utility must demonstrate: (i) its authority in the premises; (ii) the purpose for which the property is sought to be taken; (iii) a description of the property; and (iv) the names of all persons interested in the property. 735 ILCS 30/10-5-10 (West 2016). Certainly some of these issues do bear a relation to issues in the ICC proceeding, specifically the requirements that the circuit court find the acquisition of property is (i) primarily for the benefit, use, or enjoyment of the public, and (ii) necessary for a public purpose. 735 ILCS 30/5-5-5(c) (West 2016).

However, none of the Eminent Domain Act's factors permitted, much less required, any review of the ICC's order or the ICC's conduct of proceedings. As acknowledged above, the circuit court possessed independent authority to render a decision different from the ICC on issues proper to the court's jurisdiction (for example, on public use or necessity). That authority does not flow from some overarching power to review the ICC. Rather, the circuit court possesses its *own* statutory authority to make such findings. *See* 735 ILCS 30/5-5-5(c) (West 2016). This is exactly what *Lynn*, *Adams County*, *Enbridge*, and other decisions have referred to in observing that ICC proceedings do not preempt landowners from presenting condemnation defenses. No evidence on those issues was actually presented, nor were such findings actually made, but that does

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not change the point. The possibility that a circuit court could exercise overlapping jurisdiction *with* the ICC is not the same thing as possessing appellate jurisdiction *over* the ICC.

In a recent case involving an ICC-approved pipeline project, the appellate court confirmed that the proper scope of a traverse hearing is limited to matters appropriate under the Eminent Domain Act and certain other defenses. *Enbridge Energy (Illinois), L.L.C. v. Kuerth*, 2016 IL App (4th) 150519, ¶ 166. What a traverse hearing certainly does *not* encompass is relitigation of the ICC's certification proceeding. In *Enbridge*, the landowners disregarded the limited scope of the traverse hearing by attempting to litigate anew the ICC's certification and Section 8-509 orders, which the appellate court previously affirmed on appeal. *Id.*, ¶ 164. *Enbridge* confirms what is plainly apparent in the Eminent Domain Act, its statutory factors do not give circuit courts authority to review the ICC's conduct of certificate proceedings.

In sum, neither the Public Utilities Act nor the Eminent Domain Act gave the circuit court any authority to review due process issues related to the ICC's conduct of its proceedings. The circuit court erred by permitting evidence on the ICC's conduct of the certificate proceedings, and it erred again by dismissing the eminent domain complaints based on alleged constitutional errors before the ICC. This Court has reversed lower courts where they have taken actions beyond their statutory authority, and should reverse the circuit court here. *See Town & Country Utilities, Inc. v. Ill. Pollution Control Board*, 225 Ill. 2d 103 (2007) (reversing appellate court where it exceeded its statutory authority to review state Pollution Control Board decisions); *People ex rel Hartigan v. Illinois*

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Commerce Comm'n, 117 Ill. 2d 120 (1987) (reversing those parts of circuit court's order that exceeded its authority as prescribed by Public Utilities Act).

E. The circuit court erred when it failed to deny Landowners' Traverse based on the evidence presented.

The circuit court erred in multiple ways in how it resolved this case. Lest it be overlooked in this matter, the Landowners filed a Traverse in addition to their Motion to Dismiss. In its Order, the circuit court stated it did not need to address Landowners' traverse claims. However, the circuit court should have addressed the Landowners' traverse claims, as the pleading had been briefed, evidence had been admitted, and argument presented. The record fully supports that the parties themselves acknowledged a ruling denying the traverse claims would have been appropriate.

Indeed, the circuit court in its Order made and supported the determinative finding. As stated in the Order, the parties:

> agreed at the time of the hearing, that Plaintiff's Exhibits 3, 4 and 6; certified copies of the ICC orders attached to their responses to the Defendants' Traverse, shifted the burden to the Defendant landowners on the traverse issue***Although Defendants refused to concede their claims contained on the Traverse were not supported by the record, they presented no evidence at the hearing in that regard.

C1085. Those findings are sufficient to deny Landowners Traverse, consistent with Illinois law and consistent with the parties' and circuit court's understanding as expressed at the hearing.

With respect to Illinois law, in a traverse proceeding, the burden initially lies with the condemnor to establish those matters necessary for a *prima facie* eminent domain case (for example, authority, necessity, and public use). *Department of Transportation v. First Galesburg Mutual Bank and Trust*, 141 Ill. 2d 462 (1900). Once a condemnor makes its *prima facie* case, the burden of proof shifts to the landowner to rebut it.

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Department of Public Works & Buildings v. Keller, 61 Ill.2d 320 (1975). To do so, landowners must provide clear and convincing evidence contradicting the disputed allegations. See *Homer v. Jones-Bey*, 415 F.3d 748, 752 (7th Cir. 2005); *Village of Wheeling v. Exchange National Bank of Chicago*, 213 Ill. App.3d 325, 334 (1st Dist. 1991). There was no dispute in these cases concerning that manner of proceeding, and the hearing on Landowners' Traverse proceeded in that precise manner.

Landowners' Traverse lacked specific allegations, and therefore, operated as a general traverse, meaning a denial of the material allegations in the eminent domain complaint. *Forest Preserve of DuPage County v. Miller*, 339 Ill. App. 3d 244, 250 (2d Dist. 2003). At no point during the pendency of these cases before the circuit court did the Landowners make any effort to develop or present a record with respect to the traverse issues. Although the parties engaged in discovery as allowed in a traverse, the Landowners identified no witnesses or evidence, and conducted no discovery with respect to the issues like authority, necessity, or public use, focusing instead on ICC due-process issues. R. C722. *See Enbridge Energy (Illinois), L.L.C. v. Kuerth*, 2016 IL App (4th) 150519 ¶¶165-166 (discussing evidence properly part of a traverse). The cases proceeded to a hearing on May 2, 2017 on both Landowners' Traverse and the Motion to Dismiss.

With respect to the parties' and the circuit court's understanding, it is abundantly clear from the record and transcript that all involved, ATXI and Landowners, as well as the circuit court judge, took up the issue of Landowners' Traverse. At the outset of the hearing, ATXI placed into evidence as Exhibits 3, 4 and 6, certified copies of the ICC orders, which were admitted without objection. R. R57-58; A263-64. The admission of

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that evidence satisfied ATXI's burden on the Traverse, a procedure with which the Landowners' counsel was in agreement. R. R58; A264. The Landowners proceeded to present exhibits and argument, all of which addressed only the Motion to Dismiss and its due process claims, rather than the Traverse.

At the conclusion of the hearing, the circuit court recognized that the Landowners presented no evidence or argument with respect to their Traverse. Given that the Motion to Dismiss had not been ruled upon, the circuit court specifically inquired as to the status of the Traverse, and both judge and Landowners' counsel agreed that it had been addressed by the parties and that the court should rule on it. The circuit court and Landowners' counsel specifically acknowledged:

> THE COURT [to Mr. Smith]: [T]here is nothing presented on your [Landowners'] traverse, there is nothing presented on that, so they [ATXI] have essentially carried their burden on the traverse. So that issue, I think, has been resolved that if - - if they win the motion to dismiss they have established by the presumptions that they are entitled as a result of the ICC certification that each of the issues you raise in your traverse will be denied.
>
> MR. SMITH: Correct.

R. R112. Although the circuit court ultimately did not rule on the Traverse in the order, this omission does not change the undisputed fact that no evidence was presented, nor the circuit court's recognition, on the record, that the Traverse should be denied.

Accordingly, based on the pleadings, evidence, and arguments of counsel, and specifically the statements of the circuit court, both at the hearing and as acknowledged in the Order, it is clear that Landowners' traverse claims were considered and resolved on the record, and Landowners' Traverse should have been explicitly denied in the Order.

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CONCLUSION AND RELIEF REQUESTED

The circuit court erred in dismissing ATXI's Eminent Domain Complaint. The circuit court failed to make the findings required when concluding in its Order that Section 8-406.1 was unconstitutional on its face, which alone is sufficient grounds for reversal. However, remand for any further analysis of the constitutional question would be futile as the circuit court as a matter of law is unable to make a determination that Section 406.1 is unconstitutional on its face or as applied to Landowners. The circuit court erred in even considering whether the conduct of ICC proceedings deprived landowners of due process, that issue having already been considered and decided by this Court and multiple appellate courts. The circuit court should not have considered the constitutionality of Section 8-406.1 as it relates to specifically to these Landowners, the constitutionality of Section 8-406.1 as applied having already been considered and upheld by the Fourth District. Furthermore, review of the ICC's conduct of its proceedings, specifically the constitutionality of such process, was reserved for the appellate courts and outside the circuit court's jurisdiction. For each of those reasons, the circuit court's dismissal of ATXI's Eminent Domain Complaint, should be reversed.

Moreover, because the Landowners focused only on the notice issue in the ICC proceedings and failed to present any evidence in support of their traverse claims, a remand for further proceedings on Landowners' Traverse would be to no purpose and prejudicial to ATXI. As the circuit court stated below, Landowners had an opportunity to present such evidence on their Traverse, but declined to do so. They should not be permitted to relitigate the traverse claims.

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For these reasons, ATXI respectfully requests this Court reverse the order granting the Landowners' Motion to Dismiss, and remand with direction to the circuit court to deny the Traverse and proceed to a determination of compensation.

Dated: February 15, 2018

Respectfully submitted,
Ameren Transmission Company of Illinois,

/s/ Lisa A. Petrilli
One of its Attorneys

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CERTIFICATE OF COMPLIANCE

I, Lisa A. Petrilli, Attorney for the Plaintiff-Appellant, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 49 pages.

Dated: February 15, 2018

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IN THE
SUPREME COURT OF ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS, Plaintiff – Appellant, v. RICHARD L. HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC, and UNKNOWN OWNERS, Defendant-Appellees.	))))))))))))))	E-FILED 2/15/2018 4:31 PM Carolyn Taft Grosboll SUPREME COURT CLERK

On Direct Appeal from the Circuit Court for the
Fifth Judicial Circuit, Edgar County, Illinois

Case Nos. 2016-ED-4, 2016-ED-5, 2016-ED-6, 2016-ED-12, 2016-ED-13, 2016-ED-15, 2016-ED-16, 2016-ED-17, 2016-ED-18, 2016-ED-19, 2016-ED-20, 2016-ED-21, 2016-ED-22, 2016-ED-23, 2016-ED-24, 2016-ED-25, 2016-ED-27, 2016-ED-28, 2016-ED-29, 2016-ED-30, 2016-ED-38, 2016-ED-40, 2016-ED-42, 2016-ED-43, 2016-ED-44, 2016-ED-45, 2016-ED-47, 2016-ED-48, 2016-ED-49, 2016-ED-50, 2016-ED-51, 2016-ED-52, 2016-ED-53, 2016-ED-54, 2016-ED-55

Honorable Craig H. DeArmond and Honorable James R. Glenn, Judges Presiding

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APPENDIX TO BRIEF OF PLAINTIFF-APPELLANT
AMEREN TRANSMISSION COMPANY OF ILLINOIS

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ILCS 5/8-406.1. Certificate of public convenience and necessity; expedited procedure

Sec. 8-406.1. Certificate of public convenience and necessity; expedited procedure. (a) A public utility may apply for a certificate of public convenience and necessity pursuant to this Section for the construction of any new high voltage electric service line and related facilities (Project). To facilitate the expedited review process of an application filed pursuant to this Section, an application shall include all of the following:

(1) Information in support of the application that shall include the following:

(A) A detailed description of the Project, including location maps and plot plans to scale showing all major components.

(B) The following engineering data:

(i) a detailed Project description including:

(I) name and destination of the Project;

(II) design voltage rating (kV);

(III) operating voltage rating (kV); and

(IV) normal peak operating current rating;

(ii) a conductor, structures, and substations description including:

(I) conductor size and type;

(II) type of structures;

(III) height of typical structures;

(IV) an explanation why these structures were selected;

(V) dimensional drawings of the typical structures to be used in the Project; and

(VI) a list of the names of all new (and existing if applicable) substations or switching stations that will be associated with the proposed new high voltage electric service line;

(iii) the location of the site and right-of-way including:

(I) miles of right-of-way;

(II) miles of circuit;

(III) width of the right-of-way; and

(IV) a brief description of the area traversed by the proposed high voltage electric service line, including a description of the general land uses in the area and the type of terrain crossed by the proposed line;

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(iv) assumptions, bases, formulae, and methods used in the development and preparation of the diagrams and accompanying data, and a technical description providing the following information:

(I) number of circuits, with identification as to whether the circuit is overhead or underground;

(II) the operating voltage and frequency; and

(III) conductor size and type and number of conductors per phase;

(v) if the proposed interconnection is an overhead line, the following additional information also must be provided:

(I) the wind and ice loading design parameters;

(II) a full description and drawing of a typical supporting structure, including strength specifications;

(III) structure spacing with typical ruling and maximum spans;

(IV) conductor (phase) spacing; and

(V) the designed line-to-ground and conductor-side clearances;

(vi) if an underground or underwater interconnection is proposed, the following additional information also must be provided:

(I) burial depth;

(II) type of cable and a description of any required supporting equipment, such as insulation medium pressurizing or forced cooling;

(III) cathodic protection scheme; and

(IV) type of dielectric fluid and safeguards used to limit potential spills in waterways;

(vii) technical diagrams that provide clarification of any item under this item (1) should be included; and

(viii) applicant shall provide and identify a primary right-of-way and one or more alternate rights-of-way for the Project as part of the filing. To the extent applicable, for each right-of-way, an applicant shall provide the information described in this subsection (a). Upon a showing of good cause in its filing, an applicant may be excused from providing and identifying alternate rights-of-way.

(2) An application fee of $ 100,000, which shall be paid into the Public Utility Fund at the time the Chief Clerk of the Commission deems it complete and accepts the filing.

(3) Information showing that the utility has held a minimum of 3 pre-filing public meetings to receive public comment concerning the Project in each county where the Project is to be located, no earlier than 6 months prior to the filing of the application. Notice of the public meeting shall be published in a newspaper of general circulation within the affected county once a week for 3 consecutive weeks, beginning no earlier than one month prior to the first public meeting. If the Project traverses 2 contiguous counties and where in one county the transmission line mileage and number of landowners over whose property the proposed route traverses is 1/5 or less of the transmission line mileage and number of such landowners of the other county, then the utility may combine the 3 pre-filing meetings in the county with the greater transmission line mileage and affected landowners. All other requirements regarding pre-filing meetings shall apply in both counties. Notice of the public meeting, including a description of the Project, must be provided in writing to the clerk of each county where the Project is to be located. A representative of the Commission shall be invited to each pre-filing public meeting.

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(b) At the first status hearing the administrative law judge shall set a schedule for discovery that shall take into consideration the expedited nature of the proceeding.

(c) Nothing in this Section prohibits a utility from requesting, or the Commission from approving, protection of confidential or proprietary information under applicable law. The public utility may seek confidential protection of any of the information provided pursuant to this Section, subject to Commission approval.

(d) The public utility shall publish notice of its application in the official State newspaper within 10 days following the date of the application's filing.

(e) The public utility shall establish a dedicated website for the Project 3 weeks prior to the first public meeting and maintain the website until construction of the Project is complete. The website address shall be included in all public notices.

(f) The Commission shall, after notice and hearing, grant a certificate of public convenience and necessity filed in accordance with the requirements of this Section if, based upon the application filed with the Commission and the evidentiary record, it finds the Project will promote the public convenience and necessity and that all of the following criteria are satisfied:

(1) That the Project is necessary to provide adequate, reliable, and efficient service to the public utility's customers and is the least-cost means of satisfying the service needs of the public utility's customers or that the Project will promote the development of an effectively competitive electricity market that operates efficiently, is equitable to all customers, and is the least cost means of satisfying those objectives.

(2) That the public utility is capable of efficiently managing and supervising the construction process and has taken sufficient action to ensure adequate and efficient construction and supervision of the construction.

(3) That the public utility is capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers.

(g) The Commission shall issue its decision with findings of fact and conclusions of law granting or denying the application no later than 150 days after the application is filed. The Commission may extend the 150-day deadline upon notice by an additional 75 days if, on or before the 30th day after the filing of the application, the Commission finds that good cause exists to extend the 150-day period.

(h) In the event the Commission grants a public utility's application for a certificate pursuant to this Section, the public utility shall pay a one-time construction fee to each county in which the Project is constructed within 30 days after the completion of construction. The construction fee shall be $ 20,000 per mile of high voltage electric service line constructed in that county, or a proportionate fraction of that fee. The fee shall be in lieu of any permitting fees that otherwise would be imposed by a county. Counties receiving a payment under this subsection (h) may distribute all or portions of the fee to local taxing districts in that county.

(i) Notwithstanding any other provisions of this Act, a decision granting a certificate under this Section shall include an order pursuant to Section 8-503 of this Act [*220 ILCS 5/8-503*] authorizing or directing the construction of the high voltage electric service line and related facilities as approved by the Commission, in the manner and within the time specified in said order.

History

Source:

P.A. 96-1348, § 5.

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ILLINOIS COMPILED STATUTES ANNOTATED
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IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT OF ILLINOIS
EDGAR COUNTY, PARIS, ILLINOIS

FILED
SEP - 5 2017
Angela R Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	
Plaintiffs,	)	
vs.	)	
RICHARD HUTCHINGS, RITA HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC and UNKNOWN OWNERS, *et al.*,	)	CASE NOS. 2016-ED-4, 5, 6, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 23, 24, 25, 27, 28, 29, 30, 38, 40, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55
Defendants,	)	

ORDER

THIS MATTER came before the Court for hearing May 2, 2017 on the Defendants Motions to Dismiss and Traverse filed August 9, 2016. Their Memorandum in support was filed September 12, 2016. Plaintiff filed their response on October 17, 2016 and Defendant's Rebuttal was filed November 4, 2016. A previously filed motion seeking to limit the scope of the hearing and bar certain witnesses was argued and ruled upon. The Plaintiffs then sought a supervisory order from the Supreme Court pursuant to Rule 383, which was denied.

As part of this proceeding, the parties entered into a Stipulation filed April 24, 2017 setting forth certain facts regarding the proceedings

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before the Illinois Commerce Commission (ICC) and actions taken as a result thereof.

The parties further agreed, at the time of the hearing, that Plaintiff's Exhibits 3, 4 and 6; certified copies of the ICC orders attached to their responses to the Defendant's Traverse, shifted the burden to the Defendant landowners on the traverse issue. It was understood the Defendants had the burden of proof on their motion to dismiss from the outset.

The Defendants sought to admit, for purposes of this evidentiary hearing, their Exhibits #1-18. Exhibits #1-14 were previously attached to their Motion to Dismiss and Traverse, Exhibits #15-17 were three separate hearings before the ICC on December 3, 2012, January 17, 2013 and January 24, 2013, and #18 was the Defendants' response to AMEREN's Rule 383 motion before the Supreme Court.

The Plaintiff objected to Ex. #11 which was correspondence between the Edgar County Board and AMEREN, and #18, the response to their 383 motion. Since #11 was already in the record as a part of Defendant's submission to the ICC, the Defendants agreed to withdraw it for purposes of this hearing. The objection to #18 was sustained. The rest were admitted.

Although the Defendants refused to concede their claims contained in the Traverse were not supported by the record, they presented no evidence at the hearing in that regard. The arguments of both sides were focused on "notice" as it related to landowners who may have entered the process after initial application and the proposal of alternate routes.

FACTS

On November 7, 2012 AMEREN petitioned for a certificate of public convenience and necessity with the ICC seeking authority to "construct, operate and maintain" a new electric transmission line through Illinois. The project was designated the Illinois Rivers Project

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and stretched 375 miles across the state from Missouri to Indiana. AMEREN identified a primary and alternate route; each necessitating a permanent 150 wide right-of-way easement.

Section 5/8-406 of the Public Utilities Act (220 ILCS 5/8-406) outlines the requirements for obtaining a certificate of public convenience and necessity. In 2010 the legislature enacted Section 8-406.1 which provided an expedited certification procedure for public utilities where the Commission was required to issue a decision either granting or denying the petition "no later than 150 days after the application is filed."[1] Under this expedited procedure, the Commission could extend the deadline by an additional 75 days if they found good cause to exist; as long as that determination was made within 30 days of the initial filing.[2]

The proceedings, both preceding and subsequent to the Commission's order of August 20, 2013, have been long and circuitous, with at least one trip to the Fourth District Court of Appeals in the process.[3] Various landowners have contended they received no notice of the proceedings before the ICC until receipt of a letter dated September 6, 2013 advising them of the August ICC order. This order authorized the issuance of a certificate to AMEREN to begin construction. The Defendants argue this was, in many instances, the first time they became aware AMEREN intended to exercise a permanent easement over their property.

The parties have stipulated AMEREN "complied with all statutory and regulatory requirements for the filing of its Verified Petition for a Certificate of Public Convenience and Necessity pursuant to Section 8-406.1 and 8-503 of the Public Utilities Act..."[4] The real question before this Court is whether the notice provisions set forth in the expedited procedures permitted under Section 8-406.1 as it existed at the time of

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[1] 220 ILCS 5/8-406.1
[2] 220 ILCS 5/8-406.1(g)
[3] *Adams County Property Owners & Tenant Farmers v. Illinois Commerce Commission*, 2015 IL App(4th) 130907
[4] Stipulation filed April 24, 2017

SUBMITTED - 565006 - Angela McKee - 1/22/2021 8:04:31 AM

these proceedings, deny property owners both procedural and substantive due process rights.

As the Defendants note, it was not until after this matter proceeded through the certification process before the ICC and after the Fourth District rendered its opinion in *Adams County*, the legislature amended Section 8-406.1 to include:

> "For applications filed after the effective date of this amendatory Act of the 99th General Assembly, the Commission shall by registered mail notify each owner of record of the land, as identified in the records of the relevant county tax assessor, included in the primary or alternate rights-of-way identified in the utility's application of the time and place scheduled for the initial hearing upon the public utility's application. The utility shall reimburse the Commission for the cost of the postage and supplies incurred for mailing the notice." 220 ILCS 5/8-406.1 (as amended by P.A. 99-399, August 18, 2015)

The reasons for this amendment are evident in the facts of this case. Prior to the amendment, even the Commission expressed concern for the use of the expedited review process for a project of this scope.[5]

They noted in the August 20, 2013 order some of the problems AMEREN had with getting notice to all affected landowners at the outset of the process.

> "The earliest of ATXI's[6] problems relate to the lists of potentially affected landowners it filed on November 7, 2012. The lists of potentially affected landowners, municipalities,

[5] "Given the scope of this project, the Commission questions ATXI's [AMEREN] exercise of its discretion to seek expedited review...Any projects affecting landowners' rights must be given careful and complete consideration. This is particularly so when the impact can not [sic] be easily reversed, as is the case once a high voltage electric transmission line is constructed." ICC Order dated August 20, 2013, p. 7.

[6] The ICC Order references AMEREN as ATXI, although ATXI is actually an affiliated operating utility within Ameren Services.

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> and nearby utilities contained numerous errors and redundancies which required the Chief Clerk's Office to spend considerable time reviewing the lists to ensure they were accurate and usable. At least two weeks under the expedited schedule were lost before notice of the prehearing conference could be sent. Two months later ATXI realized that it neglected to send a complete list of landowners with its initial filing.... due process required the Commission to extend the deadline to provide the newly notified landowners some semblance of an opportunity to respond." ICC Order dated August 20, 2013, p. 7

The problems with notifying all affected landowners at the very outset of these proceedings resulted in the Commission extending the 150 day deadline by the additional 75 days permitted under the statute.[7] It is also evident throughout the August 20 order the Commission remained concerned about the use of the expedited process for certification of such a massive project and had, on several occasions attempted to provide suggestions to perhaps "reduce the burden of this proceeding" by seeking to get AMEREN (ATXI) to withdraw portions of the plan from the 8-406.1 process. In each instance AMEREN declined to do so.

The Commission noted how, under the expedited schedule, alternative routes had to be identified by intervenors in a period of less than three weeks although AMEREN had taken seven years to prepare theirs. (ICC Order Aug. 20, 2013, p. 8) They clearly expressed their concerns that, in the haste required by 8-406.1, there were many issues which were never fully investigated regarding route selection.

The specific section of the project relating to these proceedings is what was described as the Kansas-Indiana State Line segment. The Commission noted a total of five routes were proposed during the proceedings before the ICC: ATXI's Primary and Alternate routes, a

[7] 220 ILCS 5/8-406.1(g)

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modification to the Primary route by Laura Te Grotenhuis, and two routes proposed by Stop Coalition.

The Defendants contend the Final Approved Route was not described or discussed at any of the three pre-filing public meetings, was located 12 miles north of the Primary route and 6 miles north of the Alternate route, and was not described or included in ATXI's Petition seeking a Certificate of Public Convenience and Necessity filed with the ICC on November 7, 2012.

Issues with failures to notify affected landowners were not exclusive to the Defendants in this case. As the Commission noted in its August 20 order, ATXI's Primary route bisected a federal floodplain easement of which ATXI had been notified, but chose to ignore. Several intervenors brought up the existence of the easement during the proceedings. The Natural Resources Conservation Services (NRCS) had acquired a warranty deed for a floodplain easement in Clark County in March of 2010. (STPL Ex. 1.18)

NRCS had advised ATXI by way of an email sent by NRCS biologist Dave Hiatt on October 17, 2012 "in which he unequivocally told ATXI that the federal floodplain property in Clark County was not available for use by ATXI for the Illinois Rivers Project."[8]

Part of his email was quoted at length in the Order:

> "These easements must be avoided. There is very little to no authority for the NRCS to modify the terms of these conservation easements. The rights acquired under these conservation easements are quite inclusive and will be superior to any rights Ameren might obtain for an overhead power line right-of-way." ICC Order, 8-20-13, p. 106 (quoting from STPL Cross Ex. 8)

Although ATXI's witness acknowledged receipt of the email, and was responsible for selecting routes for the transmission lines, she took

[8] ICC Order, August 20, 2013, p.106

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no action in response. It was further noted in the proceedings ATXI had done nothing to notify the federal government of its intention to construct a transmission line across the federal easement.

Mr. Hiatt made another attempt to put ATXI on notice regarding the non-viability of the Primary route by submitting a public comment on December 5, 2012 noting federal policy prohibited encroaching upon a conservation easement. Again, there was no response by ATXI so a certified letter was sent to one of ATXI's legal counsel on February 27, 2013 by the NCRS State Conservationist which asserted the superior right of the federal conservation easement over any easements ATXI might seek, on which to construct the proposed transmission line.

The letter also noted the Office of General Counsel and National Headquarters had been consulted as well.

All of this occurred without ATXI ever providing notice to the federal government or any relevant federal agency of its intention to cross federal conservation easements which expressly precluded such action.

The Commission's concerns regarding how ATXI addressed route placement were also highlighted in their "Conclusion". Once the issue regarding the federal wetlands easement was made known, ATXI modified the Primary route by means of an "alternative pole placement" of more than one-quarter mile. According to ATXI, this would not constitute an alternate route needing further study, public hearing and discussion, but was simply an internal decision. The Commission questioned how a quarter-mile adjustment in a route could be simply characterized as "alternative pole placement" as opposed to a modification of the existing proposed route. They answered their own question by pointing out to ATXI that "a change of more than one-quarter mile should not be considered a simple adjustment of poles." (ICC Order, 8-20-13, p. 118).

The Commission noted ATXI's late attempt to significantly modify its Primary route and labeling it "alternative pole placement" was

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questionable at least. Their language seemed to indicate they considered ATXI's explanation disingenuous.

As the Commission worked through their decision in the Order, several times they referenced the "lack of intervenors from parcels along a part of Stop Coalition's Route 2". They concluded the lack of intervenors along this route indicated those affected landowners did not object enough to actively oppose a second transmission line in their area.

The Defendants contend it was the lack of notice of this alternative which resulted in any failure to object. Regardless, the Commission concluded the Stop Coalition's Route 2 was the appropriate route for this segment of the Illinois Rivers Project.[9]

Pursuant to the certification, AMEREN began mailing letters to affected landowners informing them of the certification and AMEREN's desire to purchase an easement across their property.

According to the Defendants, this is the first notice they received regarding an approved route which would affect their property.

On September 5, 2013, the Commission received the first of seven applications for rehearing pursuant to the Illinois Administrative Code. This application, which does not relate to the portion of the project in question here, was allowed on September 18, after which the Commission then received six more applications, including one by some of the Defendants here, which was denied. A First Order on Rehearing was entered on February 5, 2014 relating only to the individual property owners in the first application.

The Second Order on Rehearing, entered on February 20, 2014, related to applications of property owners not involved in these proceedings.

The Final Order entered on March 9, 2016 involved the verified petition of ATXI filed with the ICC pursuant to Section 8-509 of the Public Utilities Act (220 ILCS 5/1-101 *et seq.*). This petition requested authorization to use eminent domain to acquire rights-of-way across 26

[9] ICC Order of Aug. 20, 2013, p. 121

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parcels of land in a portion of the route previously approved by the Commission. The Order affected some of the defendants in this case and addressed efforts to negotiate the purchase of rights-of-way from them.

ATXI was granted the authority to seek their easement by way of eminent domain pursuant to the Order entered March 9, 2016.

On April 4, 2016 AMEREN filed complaints in Edgar County Circuit Court seeking the exercise of eminent domain over the property of the Defendants. On April 25, 2016 AMEREN filed their second petition with the ICC pursuant to Section 8-509, seeking authorization to pursue eminent domain to acquire right-of-way easements across 62 parcels of land. Counsel for the Defendants appeared as counsel for 38 landowners who owned 53 of the parcels involved in the petition. Some of those same landowners are parties in this matter. The order authorizing the use of eminent domain regarding these parcels was entered June 7, 2016.

ANALYSIS

AMEREN contends the outcome of these proceedings should be dictated by the Fourth District's ruling in *Adams County v. Ill. Commerce Comm'n*, 2015 IL App (4th) 130907. However, as this Court noted in its previous order, the appellate court:

> "when discussing due process, referenced the fact that the proceedings before the ICC did not confer property rights on AMEREN or deprive the landowners of protected property interests." Order of February 1, 2017.

Since certification proceedings before the ICC did not actually address property rights or interests of anyone, the court in *Adams County* was reluctant to address the constitutional due process issue. The court pointed out in its analysis of *Illinois Power Co. v. Lynn*, 50 Ill.App.3d 77 (4th Dist. 9177), how proceedings such as these before the

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Commission could not confer property rights, but instead dealt only with the reasonableness of the utility's plan.

The *Lynn* court also noted how:

> "The appearance of the owners before the ... Commission to give input into the plans, or object thereto, could not bar them from later exercising their rights as owners of property being taken for a public use. There is nothing in the ... Utilities Act pre-empting the rights of the property owners in the condemnation proceedings." *Adams*, at P48; citing *Lynn*, 50 Ill.App.3d at 81-82.

Contrary to the assertions of AMEREN, the Defendants in these eminent domain proceedings, *even if they had been given some form of notice and actively participated* are not precluded from raising their due process issues here according to *Adams County*. If the notice provided by statute at the time failed to meet the constitutional requirements for due process, it was not somehow either litigated away or waived by the proceedings before the ICC.

Relying on *Lynn, Chicago, Burlington & Quincy R.R. Co. v. Cavanagh*, 278 Ill.609(1917) and *Zurn v. City of Chicago*, 389 Ill. 114 (1945), the court in *Adams County* concluded due process did not require the notice one would expect if property rights were at risk. However, as this Court already noted in the February Order, it is the decision of the ICC authorizing the construction of the transmission line as necessary for the public good which leads to the eminent domain proceedings before this Court for all those who refuse to accept AMEREN's offer to purchase an easement.

The proceedings before the ICC are a necessary condition precedent to AMEREN's Section 8-509 application for approval to proceed by eminent domain to acquire rights-of-way from the same landowners who claim they were never given the opportunity to fully participate before the Commission in the first proceeding.

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Once certification has been provided by the ICC, AMEREN enjoys certain statutory presumptions relating to authority, necessity and public purpose under 735 ILCS 30/5-5-5(c). Subsection (c) provides, in relevant part:

> " Evidence that the Illinois Commerce Commission has granted a certificate or otherwise made a finding of public convenience and necessity for an acquisition of property ... for private ownership or control (including, without limitation, an acquisition for which the use of eminent domain is authorized under the Public Utilities Act [220 ILCS 5/1-101et seq.], ...) to be used for utility purposes creates a rebuttable presumption that such acquisition of that property (or right interest in property) is (i) primarily for the benefit, use, or enjoyment of the public and (ii) necessary for a public purpose."

The statutory presumptions created by this section as well as those of the Public Utilities Act provide AMEREN with a *prima facie* case for the exercise of eminent domain. The presumption provided by the Act is not just any presumption, either. Most rebuttable presumptions found in the civil law require the opposing party to present *some* evidence sufficient to rebut the presumption. As the Fourth District noted in *Enbridge Energy (Illinois) L.L.C. v. Kuerth*, 2016 IL App (4th) 150519), this type of "Thayer's bursting bubble" presumption may require the presentation of "sufficient evidence to support a finding of the nonexistence of the presumed fact." *Enbridge* at P133; citing *R.J. Management Co. v. SLRB Development Corp.*, 346 Ill.App.3d 957 (2nd Dist. 2004).

However, the *Enbridge* court found the sort of presumption created by the PUA to be a "strong presumption" which can only be rebutted by "clear and convincing evidence". *Enbridge* at P138. As they pointed out, the clear and convincing standard of proof requires more

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than a preponderance but less than the criminal standard of proof beyond a reasonable doubt; citing *Altenheim German Home v. Bank of America, N.A.,* 376 Ill.App.3d 26 (2nd Dist. 2007).

The court concluded:

> "Strong public policy favors that the landowners should be required to present clear and convincing evidence before the applicable rebuttable presumption bursts." P140.

AMEREN either fails to recognize or chooses to ignore the distinct disadvantage landowners face if not properly notified of proceedings before the ICC and contends instead their property rights are not affected by the Commissions actions.

As AMEREN noted in their Response to Traverse and Motion to Dismiss, normally when landowners raise a claim of traverse, the burden shifts to the contemnor (the public utility in this case) to make the *prima facie* showing for eminent domain. *Department of Transportation v. First Galesburg National Bank & Trust Co.,* 141 Ill.2d 462 (1990). Here, however, because AMEREN enjoys the strong presumption found to exist because of the ICC proceedings and certification, there already exist strong presumptions of authority, necessity and public purpose.

The courts are to give great deference to the expertise of the ICC when reviewing its decisions. See *People ex rel. Madigan v. Illinois Commerce Commission,* 2015 IL 116005. So, it would appear when affected landowners fail to receive proper notice, they are significantly disadvantaged "from later exercising their rights as owners of property being taken for a public purpose" as the court stated in *Adams County* at P48.

Contrary to the courts conclusion, it would appear there is, in fact, something in the PUA which effectively preempts landowners' rights in the condemnation proceedings; namely the strong presumption, and

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shifting of the burden which would not otherwise exist in normal eminent domain proceedings.

Landowners who were never properly apprised of the proceedings before the ICC are now required to present, by clear and convincing evidence" some reason to prevent the utility from taking an interest in their property by eminent domain.

Because of this, "it only seems reasonable to conclude the necessary notice required for due process would be at least as much as that required for the ICC to determine which routes are best." Order, 2-1-17, pp. 2-3.

At the time of the filing of the petitions in this case, Section 8-406.1 required a minimum of three public meetings held no earlier than 6 months before filing. Notice of these meetings was by publication in a newspaper of general circulation within the affected county once a week for 3 consecutive weeks, beginning no earlier than one month prior to the first public meeting. 220 ILCS 5/8-406.1(a)(3). Notice of the public meetings was to be provided to the County Clerk's Office of the counties in which meetings were to be held.

AMEREN held three pre-filing public meetings in Kansas, Illinois[10] on May 30, 2012, July 26, 2012 and October 4, 2012 wherein they disclosed their Primary and Alternate routes. Issues surrounding the notification of affected landowners have already been mentioned, but suffice it to say the Commission was sufficiently concerned about the lack of notice they extended the 150 day deadline by the statutorily permitted 75 additional days in order to provide affected landowners "some semblance of an opportunity to respond." ICC Order of August 20, 2013, p.7.

Section 8-406.1 at the time of these proceedings did not specify the method by which affected landowners were to be apprised of alternate routes proposed after the utility's filing of their petition. Personal notice by mail was considered necessary for those along the Primary and

[10] The Defendants claim some disadvantage to the location of the public meetings being held in a "far north-western" portion of the county, far from their affected lands. The statute only requires the meetings to be in the county, and the Kansas substation happens to be the starting point for the section in issue.

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Alternate Routes proposed by AMEREN. In addition, AMEREN was required to provide a complete list of all affected landowners to the Commission.[11]

Sections 200.150(g) and (h) of the Illinois Administrative Code set forth the procedure the Commission was to follow in order to get notice to the affected landowners when an application under 8-406 was filed, but was silent with regard to the expedited process of 8-406.1.

Section (g) provided:

> "(g) The Commission shall serve the notice provided by subsection (f) by personal delivery or by mailing the notice in the United States mail in a sealed envelope with postage prepaid. The Commission may also serve, by electronic means, the notice provided for in subsection (f), provided that the subject line of the electronic message states "OFFICIAL COMMISSION NOTICE OF CASE OR PROCEEDING". Notice of any additional hearings or other notices mailed by the Commission shall be by regular United States mail or as otherwise provided by the Hearing Examiner." 83 Ill. Adm. Code Section 200.150(g)

Section (f) required the party filing for a Certificate of Public Convenience and Necessity to provide the list of names and addresses of all affected landowners to the Commission. The Commission would then "notify the owners of record of the time and place scheduled for the initial hearing upon the application." 83.200.150(f). Neither section however, addressed the situation here where persons not originally affected were later brought into the case as the result of intervenors filing suggested alternate routes.

The Commission sought to deal with this by requiring intervenors to provide essentially the same information as the original petitioner. The Administrative Law Judges (ALJs) required intervenors to provide

[11] Which proved not to be the case.

SUBMITTED - 963006 - Angela McKee - 1/22/2021 8:04:31 AM

a map of the proposed alternate routes similar to that provided by AMEREN, which outlined any changes to the routes proposed by AMEREN. ICC Docket No. 12-0598, Dec. 3, 2012, pp. 61-62. They also required intervenors to provide the names and addresses of the owners of each parcel of land affected by their alternate route proposal. Their expressed reason for doing so: "because we don't want to change something on these folks [sic] land without giving them notice, just like you wouldn't like if you got a line put on your property without notice." Id. at p.40.

The ALJs wanted the information so that "we can notify the landowners that would be affected by that new alternative." Id.at p.60. The obvious implication was, the ALJs recognized there were no clear notice requirements set forth in the expedited application process, so they sought to mirror that required of the original petitioner in the normal application process found in 8-406.

This would only make sense since the end result of the application proceedings could well result in landowners being forced to allow rights-of-way across their property they did not otherwise want.

It becomes equally apparent from the record notification became a very cumbersome process as additional intervenors came forward and additional alternate routes were proposed. As the ICC Order of August 20, 2013 indicated, the Chief Clerk of the Commission sent notices of proceedings to approximately 8,436 potentially affected landowners and 80 different individuals or entities petitioned to intervene. ICC Order, Aug. 20, 2013, p.2.

A Notice of Prehearing Conference dated November 21, 2012 reveals how the Commission began dealing with the list of landowners. Marked Ex. #6 to Plaintiff's Response, the Notice provides:

> "Notice is also given by the Administrative Law Judges that a list of all affected landowners is available electronically on the Commission's e-Docket system under Docket No. 12-0598..."

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At the time of the above notice, even if mailed to the Defendants, it did not include proposed routes directly affecting them.

"Stop Coalition" filed their Motion for Leave to File an Alternate Route Proposal Instanter on January 17, 2013. They complied with the requirements set forth by the ALJs and sought an Order Directing the Clerk to Issue Notice to Certain Affected Landowners.

The Stipulation by the parties in these proceedings includes an agreement that the Stop Coalition's proposed alternate routes included properties which were not crossed by AMEREN's proposed Primary or Alternate Route. (Stipulation filed April 24, 2017, para. 4.)

Exhibit 1 attached to the Stipulation is the Notice and Notice of Continuance of Hearing entered by the Commission as a result of the Intervention of Stop Coalition. This Notice would appear to be the first time the Defendants became aware there were alternate routes proposed which might directly affect their property. Although AMEREN contends otherwise, they do not dispute the representation of the defendants in their Traverse and Motion to Dismiss that the Final Approved Route (which turned out to be one of the alternates proposed by Stop Coalition) was not described or discussed at the three pre-filing public meetings, was not included in their Petition, and was located more than 12 miles north of the Primary Route and 6 miles north of the Alternate Route.

AMEREN's argument in their Response to the Traverse and Motion to Dismiss is disingenuous when it says certain named Defendants had notice since they received notice of the Primary and Alternate Routes. Notice of those routes would not have put them on notice of the route ultimately chosen which did, in fact, directly affect them.

What is significant about the Notice is the last paragraph:

> "Notice is further given by the Administrative Law Judges that due to the length of the list of entities to receive notice

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> of this proceeding, the Chief Clerk's Office *need not include with this notice the list of potentially affected landowners and entities.* [emphasis added] The list is available electronically on the Commission's e-Docket system under Docket No. 12-0598. The web address for the e-Docket system is: http://www.icc.illinois.gov/e-docket/. Those unable to access the list electronically may request that the Commission's Chief Clerk mail a hardcopy to them by calling (217) 782-7434." Stipulation filed April 24, 2017, Ex. #1.

AMEREN refers to this same document as Exhibit #8 in their Response as follows: "The ICC certified that it mailed notice to those people on the STPL [Stop Coalition] routes on January 31, 2013. A copy of the Certification is attached as **Exhibit 8**; certified Copy of the January 31, 2013 Notice filed in ICC Docket 12-0598". However, neither the Notice nor the attached certification says it was ever mailed to the alternate landowners. Instead, the Chief Clerk certifies it was filed on January 31, 2013.

There are no other references in the record to a certificate of mailing and the Court has been unable to find such a certificate in the substantial number of documents filed in this case.

Against the inference AMEREN seeks to raise regarding this particular notice, the Court is confronted with 35 landowners, including both local and out-of-state individuals as well as several bank trust departments who all swear under oath they received no such notice.

It is also significant, as the Commission noted in their order:

> "... perhaps the most compelling information on the record is the lack of intervenors from parcels along that part of Stop Coalition's Route 2 that does not overlap ATXI's Alternate Route. The lack of intervenors from this area indicates to the Commission that the landowners affected by Stop Coalition's Route 2 at least do not object enough to actively oppose a

SUBMITTED - 563006 - Angie Barnett - 1/22/2018 10:13 AM

> second transmission line in their area." Order of Aug.20, 2012, p.120

This is after 80 individuals or entities petitioned to intervene along AMEREN's proposed routes. There were five alternate routes proposed for this segment alone. The record indicates there were intervenors all along the way; except for this particular section whose only notice is reflected in the notice of January 31, 2013.

So, the question for this Court is, did either the procedure for notice set forth in Section 8-406.1 or the practice of the ICC in this instance, provide the Defendants with due process?

The U.S. Supreme Court described procedural due process in *Fuentes v. Shevin*, 407 U.S. 67 (1972) as:

> "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." 407 U.S. at 80.

They found it equally fundamental that the right to notice and an opportunity for hearing had to be granted at a meaningful time and in a meaningful manner. Here, the affidavits of the Defendants all say their first actual notice was upon receipt of the August 20, 2013 Order from the Commission by certified mail after September 6, 2013. By this time the routes have been chosen and the Certification process is over.

AMEREN contends their recourse was to appeal. Section 10-201 says the Commission's decisions are appealable to the appellate court of the judicial district in which the subject matter of the hearing is situated. 220 ILCS 5/10-201(a). However, as was seen here, although Defendants were not permitted to intervene for purposes of addressing the lack of due process before the ICC, they were permitted to intervene for the limited purpose of appealing the decision. An appeal of the Commission's Order would only be a review of the proposed plan and the extent of property sought. The Court in *Adams County* found no due

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process issues were involved since the ICC proceedings did not actually affect the landowners' property rights.[12]

The Fourth District also noted:

> "The core of due process is the right to notice and a meaningful opportunity to be heard; no person may be deprived of a protected interest by an administrative adjudication of rights unless these safeguards are provided." 2015 IL App (4th) 130907, P45; citing *World Painting v. Costigan*, 2012 IL App (4th) 110869, P14.

However, having concluded there were no property interests at stake, there was no process due. The court in *Adams County* did not have before it the situation before this Court. Now there are property interests at stake, and now process is due.

Due process principles apply to administrative proceedings and procedural due process claims question the constitutionality of the procedures used to affect a person's property interests. See: *Lyon v. Dept. of Children & Family Services*, 209 Ill.2d 264.

The Supreme Court in *Lyon* also held:

> "The United States Supreme Court has made it clear that due process is a matter of federal constitutional law, so compliance or noncompliance with state procedural requirements is not determinative of whether minimum procedural due process standards have been met." 209 Ill.2d at 274.

Lyon dealt with due process as it related to the standard of proof required at early stages of DCFS's administrative process and the delays involved in processing appeals therefrom. However, they

[12] Which they parenthetically concluded could be raised later during eminent domain proceedings as they have here.

SUBMITTED - 563006 - Angie Brooks - 1/22/2021 8:41:31 AM

discussed the factors courts are to consider when evaluating procedural due process claims:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." 209 Ill.2d at 277; citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)

In this case, the private interest is a fundamental right, protected by both the U.S. and Illinois Constitutions, to due process before being deprived of property. U.S. Const. amend. XIV, Sec. 1; Ill. Const. art. I. Sec. 2. The landowners before this Court will have suffered the loss of property taken by eminent domain for a right-of-way granted by the state's administrative process of which they were not a party.

The risk of an erroneous deprivation of their property interests through the procedures used is obvious. Without notice and an opportunity to be heard, their absence was taken by the Commission as a tacit acceptance of Stop Coalitions Alternate Route 2. As indicated above, the ICC Order of August 20, 2013 specifically mentioned the absence of objection or intervention by the landowners along that particular route as "perhaps the most compelling information on the record." Order, p. 120.

> " An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

SUBMITTED - 563006 - Angela McKee - 1/22/2018 10:13 AM

> *Mullane v. Central Hanover Bank Trust Co.*, 339 U.S. 306, 314 (1950)

Here, the apparent failure to personally notify the 35 landowners just as AMEREN was required to do at the outset of their application process, deprived them of the opportunity to be heard before the Commission. Why would subsequently identified landowners, who risk the same result as those originally identified in any application, not be entitled to the same due process? Why would those, whose property is later nominated for use as an alternate route by some third party, not be entitled to the same personal notice by certified mail the original landowners received? They suffer the risk of their property being taken by eminent domain just as the original landowners do.[13]

The "value of additional or substitute safeguards" is clearly reflected in the subsequent amendment to Section 8-406.1 effective August 18, 2015:

> "For applications filed after the effective date of this amendatory Act of the 99th General Assembly [P.A. 99-399], the Commission shall by registered mail notify each owner of record of the land, as identified in the records of the relevant county tax assessor, included in the primary or alternate rights-of-way identified in the utility's application of the time and place scheduled for the initial hearing upon the public utility's application. The utility shall reimburse the Commission for the cost of the postage and supplies incurred for mailing the notice. 220 ILCS 5/8-406.1(a)(3)

As a result of the amendment, it was made clear landowners affected by primary <u>or</u> alternate rights of way were entitled to notice by registered mail. It is reasonable to conclude, since the ALJs in this case followed the then-existing procedure for all subsequent alternate routes

[13] As this case clearly points out since the ultimate route chosen for this segment of the project was Stop Coalition's Route 2; which was nowhere near the original route proposed by AMEREN.

SUBMITTED - 963006 - Angie Barnett - 1/22/2021 8:04:31 AM

proposed by intervenors, they would be inclined to do so now; thereby entitling any newly identified landowners to registered mail notification.

This requirement also prevents the possible abuse of the certification process by an intervenor. Obviously, if a person or group seeks to intervene in the application process, they do so for one reason; to keep the transmission line from crossing their property. Unless they are required to provide an accurate list of all landholders affected by their alternate route proposal, the risk exists there might be no objections or efforts to intervene by those whose property is ultimately taken, because they would have no notice of any such risk.

The final *Mathews* factor; "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail", seem obvious. Actual notice to all affected landowners provides everyone the opportunity to participate in the less expensive, less formal administrative process; preventing the need for litigation such as this. In addition, the process is already in place and notice to all affected landowners is already provided; with cost reimbursed by the utility, so there would be no increased fiscal or administrative burden.

AMEREN chose to utilize an expedited process even the Commission considered fraught with danger in light of the size of the project. The Commission attempted several times to get AMEREN to compartmentalize or reduce the size of the affected properties in the application process in order to allow them adequate time to fully investigate the matter. They even noted in their August 20 Order their concerns all the various ramifications of proposed routes were not fully investigated, but since they were up against a statutorily mandated timeline, they did the best they could.

It is clear from the record the list of potentially affected landowners became administratively burdensome to the point where the Commission stopped sending the list and made it available electronically. Exhibits 1 and 6 mentioned above do nothing to alleviate

SUBMITTED - 963076 - Angie Barnett - 1/22/2021 8:04:31 AM

the concerns regarding lack of notice and the Court is confronted with 35 affidavits from landowners swearing under oath they received no notice. Coupled with the fact that a segment of the project which appeared to be devoid of objection or intervention also happened to be the same landowners, the Court must conclude they did not receive the notice to which they were entitled.

> "Due process of law is served where there is a right to present evidence and arguments on one's own behalf, a right to cross-examine adverse witnesses and impartiality in rulings upon the evidence which is offered." *Lakeland Construction Co. v. Department of Revenue*, 62 Ill. App. 3d 1036 (1st Dist. 1996)

The Defendants here were provided none of these. From the evidence before this Court, their first actual notice of the possible use of their land for a utility right-of-way came with AMEREN's letter dated September 6, 2013 advising them of the ICC order entered August 20, 2013 issuing a Certificate of Public Convenience and Necessity.

Conclusion

For the reasons set forth above, the Defendant's Motion to Dismiss the Eminent Domain Complaints filed in their respective cases is granted. 220 ILCS 5/8-406.1 as it existed at the time of these proceedings was facially unconstitutional. It failed to require personal notice by registered mail or other means which would ensure notice to any landowner whose property may be considered for primary or alternate routes proposed throughout the certification process.

By requiring such notice only to landowners identified in the application and at public hearing, it deprived landowners whose property was proposed in alternate routes later suggested by the utility or any intervenor, of the same opportunity to participate or object.

SUBMITTED - 565076 - Angie McKee - 1/22/2021 8:41:31 AM

Although well-intentioned, the Commission's ALJs were left to fashion a method of notification for all subsequently proposed routes; which method did not provide the same due process to those landowners later identified.

There was no good or constitutionally permissible reason to distinguish initially affected landowners from those later identified since the potential for loss of property rights were the same.

Absent a valid reason to distinguish one group of landowners from the other, due process requires identical notice; which was not provided in this case.

The method by which the statute was applied also deprived Defendants of federally protected constitutional rights.

Having granted the Motion to Dismiss, the Court does not need to address the Traverse.

Based upon the Court's ruling, a Supreme Court Rule 302(a) finding is entered.

ENTER: 8-30-17

JUDGE

SUBMITTED - 563076 - Angie Barnett - 1/22/2018 10:31 AM

FILED
NOV - 6 2017
Angela R Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT OF ILLINOIS
EDGAR COUNTY PARIS, ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	Nos. 2016-ED-4, 2016-ED-5, 2016-ED-6,
	)	2016-ED-12, 2016-ED-13, 2016-ED-15,
Plaintiff,	)	2016-ED16, 2016-ED-17, 2016-ED18,
	)	2016-ED-19, 2016-ED-20, 2016-ED-21,
vs.	)	2016-ED-22, 2016-ED-23, 2016-ED-24
	)	2016-ED-25, 2016-ED-27, 2016-ED-28
RICHARD L. HUTCHINGS, RITA M.	)	2016-ED-29, 2016-ED-30, 2016-ED-38
HUTCHINGS, FARM CREDIT SERVICES	)	2016-ED-40, 2016-ED-42, 2016-ED-43
OF ILLINOIS, FLCA, DONICA CREEK,	)	2016-ED-44, 2016-ED-45, 2016-ED-47
LLC and UNKNOWN OWNERS,	)	2016-ED-48, 2016-ED-49, 2016-ED-50
et al.,	)	2016-ED-51, 2016-ED-52, 2016-ED-53
Defendants.	)	2016-ED-54, 2016-ED-55

ORDER

This matter came before the Court for hearing October 24, 2017, on Plaintiff's 735 ILCS 5/2-1203 Post-Judgment Motion and Memorandum in Support filed September 27, 2017. Defendants filed their Response and Memorandum in Support on October 19, 2017.

Judge DeArmond, who entered the Order of August 30, 2017, has since been assigned to the Appellate Court, and is not able to hear Plaintiff's Post-Judgment Motion. Judge James R. Glenn was assigned these cases. The Court has carefully reviewed the Order, along with the Motions, Responses, Memoranda, and Briefs related thereto, including the ones filed prior to the entry of the Order, itself, and those filed subsequent thereto. The Court finds and rules as follows:

The Court was, and is not, required to follow the Appellate Court decision of *Adams County Property Owners and Tenant Farmers v. The Illinois Commerce Commission.* It is distinguishable. And the Court, through Judge DeArmond's opinion, adequately explained its inapplicability to the proceedings at bar. The Court finds that the Appellate Court, in *Adams*

SUBMITTED - 563076 - Angela Mckee - 12/20/2018 10:13 AM

County, deferred ruling on the constitutional issue.

This Court finds that the Court, through Judge DeArmond, adequately supported in its Order that the previously existing form of the statute, 220 ILCS 5/8-406.1(a)(3), was unconstitutional, both on its face and as applied to these Defendants. The issues were framed on both Pages 3 and 18 of the Order.

The inadequacy of the notice provisions to all of the landowners, not just the Defendants that are here in this case, but to all of them, was discussed by Judge DeArmond on Pages 13 through 15 of the Order, when he talked about the problems the Commission was having making sure that all of the landowners that were before the Commission at that time had notice. And the steps that were taken to try to make sure that everybody had adequate notice. That was described on Pages 13 through 15 of the Order, and summarized on Page 23. The Court's analysis and conclusions set forth and summarized the deficiencies of the statute and support the Court's eventual determination in that Order.

The Court also finds that Supreme Court Rule 18 has either been complied with or can be complied with. Contrary to the assertions of the Plaintiff, the Order does clearly identify the portion of the statute held unconstitutional. That would be the notice provision found in Section 8-406.1(a)(3). The Court finds that the contents of the Order itself and the records support findings under Supreme Court 18(c), Paragraphs 3, 4, and 5. The Court finds that it is necessary to clarify and provide more specific findings, and the Court will modify the Order to make those specific findings as follows:

1. The previously existing form of 220 ILCS 5/8-406.1(a)(3) cannot reasonably be construed in a manner that would preserve its validity.

2. The finding of unconstitutionality is necessary to the decision or judgment rendered,

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and such decision or judgment cannot rest upon an alternative ground.

3. Notice required by Supreme Court Rule 19 has been served. It was served on November 22, 2016, to the Illinois Attorney General's Office. Said notice was not specifically referred to in the Order, but is specifically referred to now in this Order. Those served with such notice have been given adequate time and opportunity under the circumstances to defend the challenged statute.

Therefore, for those reasons, Plaintiff's Section 2-1203 Post-Judgment Motion is allowed in part.

The request to reconsider the Order, vacate it in its entirety, or vacate the findings that the statute is unconstitutional on its face are denied.

The request that the Order be modified with Supreme Court Rule 18 findings is allowed, and the Court makes those three specific findings.

The remainder of the Order stands, and that would include the Supreme Court Rule 302(a) finding.

ENTER: 11/3/17

Judge

SUBMITTED - 565006 - Angela McKee - 1/22/2018 10:01 AM

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
EDGAR COUNTY, ILLINOIS

FILED
APR - 4 2016
Sandra K. Willett
Circuit Clerk, 5th Judicial Circuit Edgar County

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	
Plaintiff,	)	
v.	)	Case No.: 16-ED-4
RICHARD L. HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC, and UNKNOWN OWNERS,	)	
Defendants.	)	

EMINENT DOMAIN COMPLAINT

NOW COMES Plaintiff, AMEREN TRANSMISSION COMPANY OF ILLINOIS, by and through its attorneys, Sorling Northrup, Gary A. Brown, David A. Rolf, and Lisa A. Petrilli, of Counsel, and for its Eminent Domain Complaint pursuant to 735 ILCS 30/1-1-1, et seq. states as follows:

1. Ameren Transmission Company of Illinois ("ATXI") is a public utility within the meaning of Section 3-105 of the Public Utilities Act (hereinafter referred to as the "PUA") and is engaged in the construction, operation, and maintenance of a 345kV electric transmission line in Edgar County. As such, ATXI is subject to the jurisdiction of the Illinois Commerce Commission (hereinafter referred to as the "Commission").

2. ATXI is seeking to take private property for public use to construct the 345kV electric transmission line in Edgar County. On August 20, 2013 and February 20, 2014, in Docket No. 12-0598, the Commission granted a Certificate of Public Convenience and Necessity (collectively hereinafter referred to as the "Certificate") to ATXI certifying that the public convenience and necessity require construction, operation, and maintenance of a 345kV electric

SUBMITTED - 963006 - Angie McKee - 12/12/2018 10:13:01 AM

transmission line through the state of Illinois, including Edgar County, Illinois (hereinafter referred to as the "Illinois Rivers Transmission Line").

3. The route through Edgar County is specified and approved in the Appendix to the August 20, 2013 Order and Certificate, and the February 20, 2014 Second Order on Rehearing and Certificate. The Certificate was issued pursuant to Section 8-406.1 of the PUA.

4. ATXI is authorized to construct the Illinois Rivers Transmission Line. On August 20, 2013, in Docket No. 12-0598, the Commission issued an Order authorizing ATXI to construct the Illinois Rivers Transmission Line pursuant to Section 8-503 of the PUA. On February 20, 2014, in Docket No. 12-0598, the Commission issued the Second Order on Rehearing which affirmed ATXI's authorization to construct the Illinois Rivers Transmission Line pursuant to Section 8-503 of the PUA.

5. ATXI is authorized to acquire property by eminent domain to construct the Illinois Rivers Transmission Line. On or about March 9, 2016, in Docket No. 16-0040, the Commission entered an Order authorizing ATXI, pursuant to Section 8-509 of the PUA and in accordance with the Illinois Eminent Domain Act, to seek the necessary land rights, including construction easements where necessary in Edgar County, along the Illinois Rivers Transmission Line.

6. ATXI now seeks to acquire, pursuant to the Eminent Domain Act, for the uses and purposes described above, a permanent easement across the certain real property situated in Edgar County, Illinois as described herein.

7. The owners of record of real property situated in Edgar County, Illinois (referred to hereinafter as "Property") along the Illinois Rivers Transmission Line are Richard L. Hutchings and Rita M. Hutchings (referred to hereinafter as the "Hutchings"). To identify the

SUBMITTED - 565006 - Angie McKee - 1/22/2021 10:41:31 AM

Property through which the easement is sought, the Property is legally described in **Exhibit 1** attached.

8. ATXI seeks to acquire for the uses and purposes described above, a permanent easement across the Property. A Certified Plat of the easement on the Property containing a legal description of the permanent easement sought is attached as **Exhibit 2** and made a part hereof ("Permanent Easement").

9. The Permanent Easement sought is situated along the Illinois Rivers Transmission Line as approved by the Commission and authorized in Sections 8-503 and 8-509 of the PUA.

10. It is necessary for ATXI to have and acquire for public purposes the Permanent Easement to construct, operate, and maintain the 345kV Illinois Rivers Transmission Line.

11. The land rights, or other property described is private property, and the parties mentioned in connection with the Property are, as far as appears of record, and as far as ATXI has been able to learn, the persons who own or are otherwise interested in the Property, or claim to have some interest therein.

12. Farm Credit Services of Illinois, FLCA has an interest as it has recorded a Mortgage against the Property.

13. Donica Creek, LLC has an interest as it has recorded a Memorandum of Lease against the Property.

14. ATXI is not aware of any other individuals or entities whose interest in the Property is affected by these proceedings.

15. In addition to the parties named herein, there are or may be other persons who are interested in this action and who may have or claim some right, title, interest of lien in, to, or on the Property, including but not limited to beneficiaries of trusts, and the name of each of those

SUBMITTED - 963008 - Angie McKee - 1/22/2018 10:13 AM

other persons is unknown, and all such persons are, therefore, made party Defendants to this action by the name and description of Unknown Owners.

16. In addition to persons designated by name herein, there are or may be other persons occupying or in possession of a portion of the Property, and the name of each of those other persons is unknown, and all such persons are, therefore, made party Defendants to this action by the name and description of Unknown Owners.

17. ATXI seeks a determination of the compensation to be paid by ATXI for the Permanent Easement because ATXI and the Hutchings have been unable to agree to the amount of compensation and/or the terms of the interests sought, although ATXI has attempted in good faith to effect such an agreement.

WHEREFORE, Plaintiff, AMEREN TRANSMISSION COMPANY OF ILLINOIS, asks for relief as follows:

A. That the usual process of summons be issued against each and all of the above-described Defendants according to law, commanding them to be and appear before this Court on the return day of the summons, and that due notice according to the law may be given to the owners of and parties interested in and to the Unknown Owners of the real property described in Exhibit 1;

B. That ATXI be granted a Permanent Easement for the construction, operation, and maintenance of a 345kV electric transmission line as described in Exhibit 2;

C. That the Court take such proceedings and enter such Orders as necessary, ordering that ATXI may enter on the Permanent Easement and use it for the aforementioned purposes upon payment of full compensation to the parties entitled thereto, or to the County Treasurer, within such reasonable time as is fixed by the Court;

SUBMITTED - 963006 - Angie McKee - 12/20/2018 10:13 AM

D. That the Court cause compensation to be ascertained and determined according to the Eminent Domain Act for the Permanent Easement sought to be acquired;

E. That the Court retain jurisdiction of this cause to enter such further Orders as may be necessary, including such Orders as may be necessary to put ATXI into possession of the Permanent Easement; and

F. For any other relief that this Court deems just.

PLAINTIFF DEMANDS TRIAL BY JURY OF SIX.

AMEREN TRANSMISSION COMPANY OF ILLINOIS,
Plaintiff,

By: _____
One of Its Attorneys

Sorling Northrup
Gary A. Brown, of Counsel (ARDC #313548)
David A. Rolf, of Counsel (ARDC #6196030)
Lisa A. Petrilli, of Counsel (ARDC #6280865)
One North Old State Capitol, Suite 200
Post Office Box 5131
Springfield, IL 62705-5131
Telephone: (217)544-1144
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E-Mail: darolf@sorlinglaw.com
E-Mail: lapetrilli@sorlinglaw.com

SUBMITTED - 565006 - Angie McKee - 1/22/2018 10:31 AM

Richard L. Hutchings and Rita M. Hutchings

That certain tract of land situated in the NW1/4 SE1/4 of S26, T13N, R14W Edgar County, Illinois, more particularly described in Trustee's Deed dated July 1, 2003 from State Bank of Chrisman, under the provisions of a trust agreement dated February 21, 2001, known as Trust No. 460 to Richard L. Hutchings and Rita M. Hutchings, recorded under County Clerk's File No. 03-0002621, Deed of Records, Edgar County, Illinois, less and except any conveyances heretofore made.

Tax ID: 08-16-26-400-001

42Q4941 3/15/2016

EXHIBIT
1
C 15

SUBMITTED - 565076 - Angie Barnett - 1/22/2021 10:41:31 AM

AMEREN TRANSMISSION
ILLINOIS RIVERS PROJECT
SUGAR CREEK TO KANSAS
345 KV TRANSMISSION LINE

EXHIBIT "A"

A 4.605 ACRE TRACT OF LAND SITUATED IN THE NORTHWEST 1/4 OF THE SOUTHEAST 1/4 OF SECTION 26, TOWNSHIP 13 NORTH, RANGE 14 WEST OF THE 2ND PRINCIPAL MERIDIAN, EDGAR COUNTY, ILLINOIS AND BEING PART OF A TRACT OF LAND DESCRIBED AS TRACT I IN DEED TO RICHARD L. HUTCHINGS AND RITA M. HUTCHINGS, RECORDED IN DOCUMENT NO. 03-0002621 OF THE DEED RECORDS OF EDGAR COUNTY, ILLINOIS AND BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT IN THE WEST LINE OF SAID NORTHWEST 1/4, FROM WHICH A 5/8-INCH IRON ROD WITH A RED CAP STAMPED "RICHARD KNIGHT PLS 2845" FOUND AT THE SOUTHWEST CORNER OF SAID NORTHWEST 1/4 BEARS SOUTH 01 DEGREES 49 MINUTES 16 SECONDS EAST, A DISTANCE OF 697.93 FEET, SAID POINT OF BEGINNING HAVING GRID COORDINATES OF N:1048596.30, E:1096718.08;

THENCE NORTH 01 DEGREES 49 MINUTES 16 SECONDS WEST, ALONG SAID WEST LINE, A DISTANCE OF 150.02 FEET TO A POINT FOR CORNER;

THENCE NORTH 89 DEGREES 06 MINUTES 21 SECONDS EAST, LEAVING SAID WEST LINE, A DISTANCE OF 1,304.50 FEET TO A POINT FOR CORNER;

THENCE NORTH 75 DEGREES 50 MINUTES 49 SECONDS EAST, A DISTANCE OF 33.10 FEET TO A POINT FOR CORNER IN THE EAST LINE OF SAID NORTHWEST 1/4;

THENCE SOUTH 01 DEGREES 43 MINUTES 58 SECONDS EAST, ALONG SAID EAST LINE, A DISTANCE OF 153.59 FEET TO A POINT FOR CORNER, FROM WHICH A 3/4-INCH BENT IRON PIPE FOUND AT THE SOUTHEAST CORNER OF SAID SOUTHEAST 1/4 BEARS SOUTH 34 DEGREES 49 MINUTES 50 SECONDS EAST, A DISTANCE OF 2,449.84 FEET;

THENCE SOUTH 75 DEGREES 50 MINUTES 49 SECONDS WEST, LEAVING SAID EAST LINE, A DISTANCE OF 17.50 FEET TO A POINT FOR CORNER;

THENCE SOUTH 89 DEGREES 06 MINUTES 21 SECONDS WEST, A DISTANCE OF 1,319.51 FEET TO THE **POINT OF BEGINNING** AND CONTAINING 200,596 SQUARE FEET OR 4.605 ACRES OF LAND, MORE OR LESS.

BEARING BASIS: ALL BEARINGS AND COORDINATES SHOWN HEREON ARE BASED ON THE ILLINOIS STATE PLANE COORDINATE SYSTEM, NAD 83(2011), EAST ZONE. ALL DISTANCES SHOWN HEREON ARE SURFACE DISTANCES.

MICHAEL W. GERBERICK
PROFESSIONAL LAND SURVEYOR
REGISTRATION NO. 035-002683
STATE OF ILLINOIS PROFESSIONAL
DESIGN FIRM LICENSE NO. 184.006475

DATE: 07/28/2015

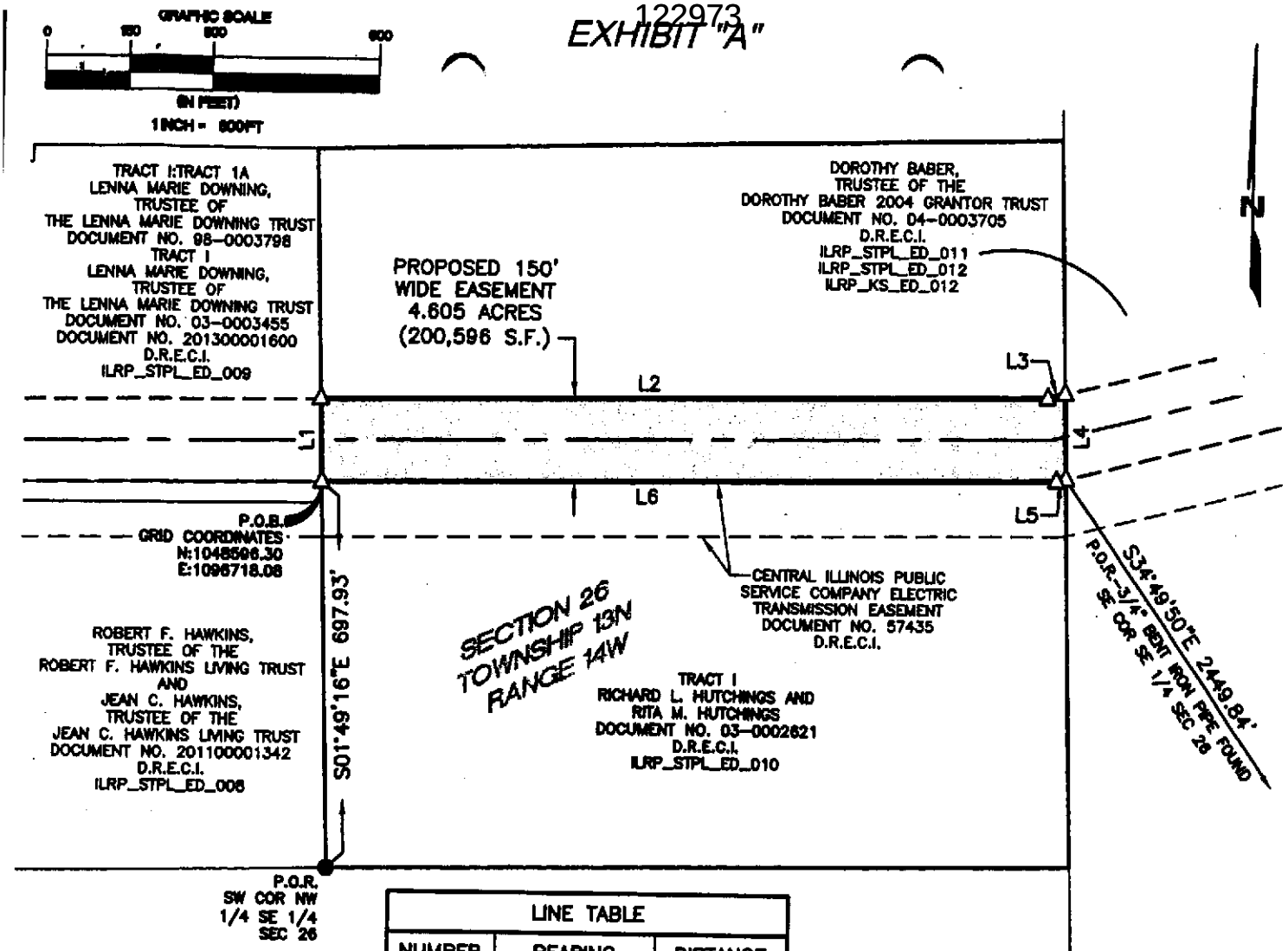
PROFESSIONAL LAND SURVEYOR
MICHAEL W.
GERBERICK
035-002683
FREEPORT, ILLINOIS
STATE OF ILLINOIS

EXHIBIT
2
Blumberg No. 5118

P:\Ameren\32359 Illinois Rivers Project\Documents\Legal Descriptions\Final\LS08R2-Kansas to Sugar Creek STPL Route\D_1923_ILRP_STPL_ED_010.docx

SUBMITTED - 565106 - Angie Barnett - 1/22/2018 10:13:01 AM

EXHIBIT "A"



LINE TABLE		
NUMBER	BEARING	DISTANCE
L1	N01°49'16"W	150.02'
L2	N89°06'21"E	1304.50'
L3	N75°50'49"E	33.10'
L4	S01°43'58"E	153.59'
L5	S75°50'49"W	17.50'
L6	S89°06'21"W	1319.51'

LEGEND

D.R.E.C.I.	DEED RECORDS EDGAR COUNTY, ILLINOIS
P.O.B.	POINT OF BEGINNING
P.O.R.	POINT OF REFERENCE
△	CALCULATED POINT
●	5/8" IRON ROD WITH A RED CAP STAMPED "RICHARD KNIGHT PLS 2845" FOUND
— — —	SECTION LINE
———	SUBJECT PROPERTY LINE
———	PROPERTY LINE
— — —	PROPOSED EASEMENT CENTERLINE
— — —	PROPOSED EASEMENT

PROFESSIONAL LAND SURVEYOR
MICHAEL W. GERBERICK
035-002683
FREEPORT, ILLINOIS
STATE OF ILLINOIS

MICHAEL W. GERBERICK
PROFESSIONAL LAND SURVEYOR
NO. 035-002683 - STATE OF ILLINOIS
PROFESSIONAL DESIGN FIRM
LICENSE NO. 184.006475 - STATE OF ILLINOIS

NOTES:

1. *THIS EXHIBIT DOES NOT REFLECT ANY UNDERGROUND UTILITIES, EASEMENT OF RECORD OR OTHER ENCUMBRANCES THAT MAY AFFECT THE SUBJECT TRACT.*
2. *REFERENCE IS MADE TO THE DESCRIPTION OF EVEN DATE ACCOMPANYING THIS SKETCH.*

SHEET 02 OF 02

PROJECT: ILLINOIS RIVERS
JB NUMBER: 32359
DATE: 07/28/2015
SCALE: 1"=300'
TRACT ID: ILRP_STPL_ED_010
DRAWN BY: KAS
FN: D_1923

Ameren TRANSMISSION

SAM SURVEYING · AERIAL MAPPING · ENGINEERING
826 Cheshire Court #1, Freeport, IL 61032
Ph: (214) 631-7886 Fax: (214) 631-7103
EMAIL: SAM@SAM.BIZ

150' TRANSMISSION
LINE EASEMENT
SUGAR CREEK TO KANSAS
SECTION 26, TOWNSHIP 13 NORTH, RANGE 14 WEST
OF THE 2ND PRINCIPAL MERIDIAN
EDGAR COUNTY, ILLINOIS

C 17

ILRP_STPL_ED_010.DWG

SUBMITTED - 563006 - Angie Barnett - 12/28/2018 10:13:01 AM

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT OF ILLINOIS
EDGAR COUNTY PARIS, ILLINOIS

FILED
AUG - 5 2016
Circuit Clerk, 5th Judicial Circuit Edgar County

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	
Plaintiff,	)	
vs.	)	No. 2016-ED-4
RICHARD L. HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC and UNKNOWN OWNERS,	)	
Defendants.	)	

TRAVERSE AND MOTION TO DISMISS

Now come Defendants, RICHARD L. HUTCHINGS and RITA M. HUTCHINGS, by and through their Attorney, S. Craig Smith of Asher & Smith, and for their Traverse and Motion to Dismiss, respectfully state as follows:

1. The property sought to be acquired in this proceeding is not necessary or convenient for the purpose for which it is sought to be taken.

2. The amount of property sought to be taken by Plaintiff herein is in excess of Plaintiff's needs.

3. The Plaintiff does not seek to use property sought to be acquired by this proceeding for public purpose for Citizens of Illinois.

4. The project for which Plaintiff seeks to acquire the lands of Defendants does not

SUBMITTED - 963076 - Angela McKee - 1/22/2018 10:13 AM

constitute a public convenience or necessity.

5. The remedies requested by Plaintiff though predicated upon the Public Utilities Act ("PUA"), 220 ILCS 5/1-101, *et. seq.*, and a Certificate of Public Convenience and Necessity issued by the Illinois Commerce Commission ("ICC") under Section 8-406.1 of the PUA, are unconstitutional in that they allow the taking of property without due process of law, in violation of the Constitution of the State of Illinois, Article 1, Section 2. The Defendants did not receive notice that they were being deprived of their property. (See attached Exhibit 1, Affidavit of Richard Hutchings and Rita Hutchings.)

6. The Illinois Commerce Commission issued the Certificate of Public Convenience and Necessity in Docket No. 12-0598 on August 20, 2013. The Defendants did not receive notice of the Illinois Commerce Commission's issue of the Certificate of Public Convenience and Necessity in Docket No. 12-0598 by certified mail until after September 6, 2013. (See attached Exhibit 2.)

7. Prior to the Illinois Commerce Commission mailing of said Notice, Plaintiff and the Illinois Commerce Commission had not informed Defendants that Plaintiff intended to construct, operate, and maintain a 345 kilovolt ("kV") electric transmission line along and upon their property.

8. On September 18, 2013, Edgar County Landowners filed a Petition for Leave to Intervene with the Illinois Commerce Commission. (See attached Petition, marked as Exhibit 3.)

9. On September 19, 2013, Edgar County Landowners filed a Due Process Motion to Strike Proceedings As To The Edgar County Segment And Application For Rehearing. (See attached Exhibit 4.)

SUBMITTED - 563006 - Angela McKee - 1/22/2018 10:31 AM

10. On October 1, 2013, Edgar County Landowners filed a Petition to Supplement Due Process Motion To Strike Proceedings As To The Edgar County Segment And Application For Rehearing, attaching an additional thirteen Affidavits to the original Due Process Motion To Strike and their Response to Plaintiff's Opposition to Petition for Interventions and Motion for Rehearing. (See attached Exhibits 5 and 6.)

11. On October 2, 2013, the Illinois Commerce Commission denied the Due Process Motion To Strike Proceedings As To The Edgar County Segment And Application For Rehearing, and denied the Defendants' Petition to Intervene. (See attached Exhibit 7.)

12. The Plaintiff held three pre-filing public meetings in Kansas, Illinois, on May 30, 2012, July 26, 2012, and October 4, 2012, and disclosed their Primary Route and Alternate Route. (See attached Exhibit 8.)

13. The Final Approved Route was not described or discussed at the three pre-filing public meetings. (See attached Exhibit 9.)

14. The Final Approved Route is located more than 12 miles North of the Primary Route and 6 miles North of the Alternate Route.

15. The Final Approved Route was not described or included in Plaintiff's Petition seeking a Certificate of Public Convenience and Necessity, which was filed with the Illinois Commerce Commission on November 7, 2012.

16. Prior to the Final Order entered by the Illinois Commerce Commission on August 20, 2013, the Defendants did not receive any notice from the Plaintiff or Illinois Commerce Commission which described the location of the Final Approved Right-of-Way, or that the Illinois Commerce Commission was considering any route other than Plaintiff's Primary and

SUBMITTED - 565006 - Angela McKee - 1/22/2021 8:04:31 AM

Alternate Routes.

17. The Final Approved Route is located on real estate owned by Defendants. (See attached Exhibit 10.)

18. As a result of the failure to give proper notice to Defendants of the proceeding, Defendants have been denied due process and have been denied the right to participate in the proceeding in the manner in which they were entitled.

19. Section 10-25(a) of the Administrative Procedure Act states, "[i]n a contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice." *People ex rel. Illinois Commerce Commission v. Operator Communication, Inc.*, 281 Ill.App.3d 297, 300 (1st Dist. 1996), quoting 5 ILCS 100/10-25(a). "The statutory requirements of notice and opportunity to be heard are also necessary under principles of procedural due process....Administrative proceedings must conform to the requirements of due process of law... A decision in a contested case which does not comply with the provisions of the Administrative Procedure Act is void." *Id.* at 302-03.

20. Defendants' valid address is on file with Edgar County Treasurer's Office and the Edgar County Supervisor of Assessments Office, and tax bills are sent to that address. Plaintiff and the Illinois Commerce Commission clearly were able to locate Defendants' address for purposes of notification and due process. Defendants have a large tract of farmland and residential property which could not have escaped Plaintiff's attention.

21. Defendants had a due process right to propose an alternate route, present direct and rebuttal testimony, and fully participate in Commission proceedings prior to the entry of any order affecting his property, which was denied by Plaintiff and the Illinois Commerce

SUBMITTED - 963006 - Angela McKee - 1/22/2021 8:04:31 AM

Commission.

22. The Edgar County Board unanimously passed a Resolution objecting to the transmission line being constructed in Edgar County, due to the failure of the Illinois Commerce Commission and Ameren to notify residents of Edgar County of the final location of the proposed transmission line prior to the Order being entered by the Illinois Commerce Commission. (See attached Exhibit 11.)

23. Under Section 4, Proprietary of the Petition, the Commission makes the following statements:

A. "The Illinois Rivers Project. . . spans 375 miles, and has affected at least 8,436 landowners." (See attached Exhibit 12, Illinois Commerce Commission Order, p. 7.)

B. "Given the scope of this project, the Commission questions ATXI's exercise of its discretion to seek expedited review. . ." The Farm Bureau in particular is troubled by the schedule of this matter and questions to what extent due process has been provided. Any projects affecting landowners' rights must be given careful and complete consideration. This is particularly so when the impact can not be easily reversed, as is the case once a high voltage electric transmission line is constructed." (See attached Exhibit 12, Illinois Commerce Commission Order, p. 7.)

C. "Given that the alternative routes proposed by intervenors were identified in a matter of weeks, the Commission has no assurance that as of yet unidentified shortcomings in these hastily developed routes will not later

SUBMITTED - 563006 - Angela McKee - 1/22/2021 8:41:31 AM

emerge if adopted under one of the stipulations. . . . The fact that the routes ATXI developed for this proceeding on its own schedule appear to have shortcomings does not provide the Commission with any confidence in the decision to expedite the Illinois Rivers Project." (See attached Exhibit 12, Illinois Commerce Commission Order, pp. 8-9.)

24. ATXI witnesses testified at the hearing before the Illinois Commerce Commission that in some areas of the ATXI primary and alternate routes only aerial surveillance was done, and that assumptions were made as to whether there were occupants and/or residences involved. Because of the number of occupied residences along the various proposed routes is a factor in determining the suitability of each route, aerial surveillance can lead to errors in choosing a route. (See attached Exhibit 12, Illinois Commerce Commission Order, p. 9 and p. 119.)

25. Illinois Commerce Commission witnesses also stated that the schedule set up for the proceedings did not allow for the development of a complete and thorough record upon which the Commission could base its decision. Due to the length of the proposed project and the number of intervenors submitting proposals, some information about potential routes will not be thoroughly addressed in the record. More time for discovery and development of alternative route proposals would lead to different proposals and conclusions that are not included in the record of evidence. (See attached Exhibit 12, Illinois Commerce Commission Order, p. 9.)

26. The Illinois Commerce Commission staff questions the logic of expanding the existing Kansas Substation, and maintained that ATXI could terminate its proposed 345kV line at the existing substation (Kansas). (See attached Exhibit 12, Illinois Commerce Commission Order, p. 118.)

SUBMITTED - 565006 - Angela McKee - 1/22/2021 8:41:31 AM

27. The Illinois Commerce Commission Order further stated that the number of occupied homes near each route is a topic on which the Commission wishes it had more information. ATXI's witness testified that it did not make a ground-level assessment of structures along the routes and based its decision on assumptions made from its aerial survey, and the Commission was hesitant to accept ATXI's numbers of residences involved. (See attached Exhibit 12, Illinois Commerce Commission Order, p. 119.)

28. The Illinois Commerce Commission Order further stated that it simply lacks reliable information concerning the criterion concerning occupied homes. Perhaps had more time existed, this void in the record would not exist. The record being what it is, the Commission can not say with confidence which route is preferable under this criterion. (See attached Exhibit 12, Illinois Commerce Commission Order, p. 119.)

29. The Illinois Commerce Commission Order commented that the criterion, community acceptance, was considered, noting "perhaps the most compelling information in the record is the lack of intervenors from parcels along that part of Stop Coalition's Route 2 . . . The lack of intervenors from this area indicates to the Commission that the landowners affect by Stop Coalition's Route 2 at least do not object enough to actively oppose a second transmission line in their area. (See attached Exhibit 12, Illinois Commerce Commission Order, p. 120.)

30. The lack of intervenors on Stop Coalition's Route 2 route is due to the fact that the landowners were not given notice of Stop Coalition's Route 2, prior to August 20, 2013, when the Illinois Commerce Commission issued a Certificate of Public Convenience and Necessity.

SUBMITTED - 565006 - Angie Barnett - 1/22/2021 8:04:31 AM

WHEREFORE, DEFENDANTS, RICHARD L. HUTCHINGS and RITA M. HUTCHINGS, REQUEST this Court grant their Traverse and Motion to Dismiss.

RICHARD L. HUTCHINGS and RITA M.
HUTCHINGS, Defendants,
By Asher & Smith, their Attorneys

By: _____
S. Craig Smith, Attorney

S. Craig Smith
Asher & Smith
1119 N. Main Street
P. O. Box 340
Paris, IL 61944
Telephone: 217/465-6444
Fax: 217/463-2486

SUBMITTED - 567076 - Angie Barnett - 1/22/2021 8:41:31 AM

FILED
SEP 12 2016
Sandra K. Willett
Circuit Clerk, 5th Judicial Circuit Edgar County

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT OF ILLINOIS
EDGAR COUNTY PARIS, ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	Nos. 2016-ED-4, 2016-ED-5, 2016-ED-6,
	)	2016-ED-12, 2016-ED-13, 2016-ED-15,
Plaintiff,	)	2016-ED16, 2016-ED-17, 2016-ED18,
	)	2016-ED-19, 2016-ED-20, 2016-ED-21,
vs.	)	2016-ED-22, 2016-ED-23, 2016-ED-24
	)	2016-ED-25, 2016-ED-27, 2016-ED-28
RICHARD L. HUTCHINGS, RITA M.	)	2016-ED-29, 2016-ED-30, 2016-ED-38
HUTCHINGS, FARM CREDIT SERVICES	)	2016-ED-40, 2016-ED-42, 2016-ED-43
OF ILLINOIS, FLCA, DONICA CREEK,	)	2016-ED-44, 2016-ED-45, 2016-ED-47
LLC and UNKNOWN OWNERS,	)	2016-ED-48, 2016-ED-49, 2016-ED-50
et al.,	)	2016-ED-51, 2016-ED-52, 2016-ED-53
Defendants.	)	2016-ED-54, 2016-ED-55

MEMORANDUM IN SUPPORT OF
TRAVERSE AND MOTION TO DISMISS

NOW COME the Defendants in these Eminent Domain Actions filed by AMEREN, by and through their Attorney, S. Craig Smith of Asher & Smith, and respectfully offer the following Memorandum in Support of Traverse and Motion to Dismiss filed in each of these cases:

The Defendants are a group of Edgar County property owners, who own land over and upon which a transmission line is to be constructed, pursuant to an Order from the Illinois Commerce Commission ("ICC") entered on August 20, 2013. The Defendants (Farmers, Trust Officers of Local Bank, Out-of-State Residents, Fourth-Generation Landowners, Livestock Farmers, Investors, Airfield Owners, Families with Small Children, Retirees, and Environmentalist) swear that they never received the requisite notice that their lands would be directly affected by the route the ICC approved until they received a letter from Ameren Transmission Company of Illinois ("ATXI"), following the Certificate of Public Convenience and

SUBMITTED - 963006 - Angela McKee - 1/22/2018 10:13 AM

Necessity entered on August 20, 2013.

On November 7, 2012, ATXI filed a Verified Petition with the ICC under Section 8-406.1 of the Illinois Public Utilities Act ("Act"). The Petition requested that the ICC issue to ATXI a Certificate of Public Convenience and Necessity ("certificate") in order for ATXI to construct, operate, and maintain a new 345 kV electric transmission line and related facilities, such as new or expanded substations. The project for which ATXI sought a Certificate is known as the Illinois Rivers Project ("Project"), and it is really a combination of four separate projects identified by Midwest Independent Transmission System Operator, Inc. ("MISO") that will comply with Federal Energy Regulatory Commission mandates. In addition to petitioning for a Certificate, ATXI also, pursuant to Sections 8-406.1 and 8-503 of the Act, petitioned for an Order from the ICC authorizing construction of the project.

Section 8-406.1 of the Act is entitled "Certificate of public convenience and necessity; expedited procedure." 220 ILCS 5/8-406.1. Under this procedure, the ICC must enter an order granting or denying a petition for a Certificate within 150 days of its filing. 220 ILCS 5/8-406.1(g). In order for a utility to qualify for expedited review of its petition, there are certain requirements that the utility must have already completed and included in its petition. 220 ILCS 5/8-406.1(a). Two requirements of the statute germane to this appeal are that the utility, prior to filing its petition for a Certificate, must have identified a primary and at least one alternate route for its project and, in an effort to elicit public comment on the project, must have held at least three public meetings in each county affected by the proposed project.

Section 8-406.1 of the Act does not require the utility or the ICC to mail individual notice to owners of property who would be directly affected by the approval of either the utility's primary or alternate routes for a project. That statute does say that the ICC shall grant a Certificate if the

SUBMITTED - 963006 - Angela McKee - 1/22/2021 10:41:31 AM

utility has met the requisite criteria "after notice and hearing," but it does not explain anything regarding the notice required. 220 ILCS 5/8-406.1(f).

The Illinois Administrative Code requires persons filing applications under Section 8-406 or Section 8-503 of the Act to include in the application the names and addresses of landowners affected by the proposed project. 83 Ill. Admin. Code §200.150(h). This section then mandates that the Chief Clerk of the ICC is to provide notice to these landowners of the initial hearing on the application.

Neither Section 8-406.1 of the Act nor Section 83.200.150(h) of the Illinois Administrative Code explains the procedure for notifying landowners whose property would be directly affected when, while the utility's petition for a certificate is pending, an intervening party proposes an alternate route for the project.

ATXI's initial filing for a certificate omitted 130 landowners from its landowner lists, so the Administrative Law Judges ("ALJs") determined that ATXI's petition for a certificate was completed on January 7, 2013, instead of on November 7, 2012, the date ATXI initially filed its Verified Petition. ATXI petitioned for interlocutory review of this decision, which the ICC denied. At the same time it denied ATXI's Petition for Interlocutory Review, the ICC granted a 75-day extension of the deadline for the ICC to grant or deny the petition for a Certificate. In light of these actions, August 20, 2013, became the deadline for the ICC to render a decision.

For purposes of analyzing and considering the Project, it was broken down into segments. The ICC has designated the segment of the Project affecting the Defendants as "Kansas – Indiana State Line." While, several different parties intervened regarding this segment of the line, only Stop the Power Lines Coalition ("Stop Coalition") and Laura Te Grotenhuis proposed alternate routes that the ICC considered.

SUBMITTED - 963006 - Angela McKee - 1/22/2021 10:41:31 AM

While Section 8-406.1 of the Act and 83.200.150(h) of the Illinois Administrative Code are silent regarding the notice required to landowners whose property would be affected by an intervener's alternate route proposal, a review of the ALJs' status hearings shows how the judges determined the procedure should be handled. The ALJs wanted to ensure the interveners who proposed alternate routes provided contact information for landowners who would be affected by the interveners' proposals so that affected landowners could be notified. ICC Docket No. 12-0598, Hearing Before ALJ Albers and ALJ Yoder, Dec. 3, 2012, p. 40.

Judge Albers explained that the judges would expect to see a map similar to what ATXI initially provided when it filed for a certificate, outlining the changes to the ATXI proposed route(s) and clearly indicating the path the transmission line would follow. Id. at 61-62. In addition, Judge Albers told the landowners that they needed to submit with their proposal the names and address of landowners along a proposed alternate route. Id. at 61. Judge Albers had explained to the interveners that the landowner contact information needed to be included so that "we can notify the landowners that would be affected by that new alternative." Id. at 60 (emphasis added).

"Stop Coalition" filed its Motion for Leave to File an Alternate Route Proposal Instanter on January 17, 2013. In order to comply with the ALJs' procedure, in its Motion, Stop Coalition included maps of their proposed routes and the names and mailing addresses for the property owners affected by their routes. Stop Coalition also requested in its Motion an "Order Directing the Clerk to Issue Notice to Certain Affected Landowners."

Ultimately, on August 20, 2013, the ICC entered an Order granting ATXI a Certificate and authorizing it to begin construction of the Project. The ICC selected Stop Coalition's Route 2 for the Kansas- Indiana State Line segment of the project. In the Order, the ICC admitted, "the record

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lacks a count of occupied homes near Stop Coalition's Route 2." The ICC also indicated a major consideration was the lack of interveners along Stop Coalition's Route 2. The ICC's Order said:

> "But perhaps the most compelling information in the record is the lack of intervenors from parcels along that part of Stop Coalition's Route 2 that does not overlap ATXI's Alternate Route. The lack of intervenors from this area indicates to the Commission that the landowners affected by Stop Coalition's Route 2 at least do not object enough to actively oppose a second transmission line in their area."

After the ICC Order was entered, Defendants who owned land in Edgar County that would be affected by the approved Stop Coalition Route 2 received a form letter from ATXI. This letter, dated September 6, 2013, advised landowners that the ICC had entered an Order on August 20, 2013, that issued a certificate to ATXI and authorized it to begin constructing a new high voltage transmission line. The letter to the landowners said: "[t]his transmission line, which is known as the Illinois Rivers Project, will affect property you own." The letter also informed the landowners that ATXI would be contacting them in the near future to discuss obtaining easements.

Immediately upon receiving these letters, neighboring landowners began to talk with each other to determine whether they had missed some form of prior communication from ATXI. The landowners were surprised because this September 6, 2013, letter telling them that their property *would* directly be affected by the Project was the first notice they had ever received explaining that their property even *could* directly be affected by one of the proposed routes for the Project. ATXI's primary route and alternate route proposals did not list the Defendants as landowners whose property would be affected by the project.

Some of the Defendants attended the pre-filing public meetings ATXI held in order to confirm their properties were not affected. Because Defendants' properties were not affected by ATXI's initial primary route or alternate route, this group of landowners never received notice from the ICC of the initial hearing. Additionally, the Defendants never received notice from the

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ICC of any subsequent hearings, despite the fact that other landowners from other segments of the project whose property would be affected by alternate route proposals were given notice of these alternate routes and attended status hearings. Defendants never received notice of Stop Coalition's alternate route proposals.

Defendants quickly sought legal counsel and filed a Petition for Leave to Intervene on September 18, 2013. On September 19, 2013, Defendants filed their Due Process Motion to Strike Proceedings as to the Edgar County Segment and Application for Rehearing. The group then filed a Petition to Supplement Due Process Motion to Strike Proceedings as to the Edgar County Segment and Application for Rehearing, dated September 30, 2013.

On October 2, 2013, the ICC denied Defendants' Petition for Leave to Intervene. The next day, October 3, 2013, the ICC denied Defendants' Due Process Motion to Strike Proceedings as to the Edgar County Segment and Application for Rehearing.

STATUTES INVOLVED

U.S. Const. amend. XIV, §1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ill. Const. art. I, §2.

> No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

220 ILCS 5/8-406.1 (See Attached)

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83 Ill. Admin. Code §200.150(h)

> A person filing an application under Section 8-406 of the Public Utilities Act for a Certificate of Public Convenience and Necessity to construct facilities upon or across privately owned tracts of land, or filing under Section 8-503 of that Act [220 ILCS 5/8-503], shall include with the application when filed with the Commission a list containing the name and address of each owner of record of the land as disclosed by the records of the tax collector of the county in which the land is located, as of not more than 30 days prior to the filing of the application. The Commission shall notify the owners of record of the time and place scheduled for the initial hearing upon the application. The foregoing provisions for notice to owners of record shall not be deemed jurisdictional and the omission of the name and address of an owner of record from the list or lack of notice shall in no way invalidate a subsequent order of the Commission relating to the application.

5 ILCS 100/10-25 (The Administrative Procedure Act) (See Attached)

ARGUMENT

The Defendants are a group of individuals whose due process rights have been violated. They have been violated because the Illinois Commerce Commission ("ICC") failed to provide notice to Defendants that their property would be directly affected by the construction of a new 345 kV transmission line (the "Project") that the ICC authorized Ameren Transmission Company of Illinois ("ATXI") to build when it granted it a Certificate of Public Convenience and Necessity ("Certificate").

Because Defendants' constitutional due process rights have been violated, this Court, should dismiss Plaintiff's Eminent Domain Petition.

I. The Due Process Rights Of Defendants Were Violated When the ICC Failed To Provide Them Notice Of An Alternate Route Proposal and When It Denied Their Application for Rehearing.

Both the Fourteenth Amendment to the United States Constitution and Article One, Section Two of the Illinois State Constitution guarantee Illinois citizens the right to due process. The ICC violated the due process rights of landowners in Edgar County, Illinois, when it failed to

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provide them notice of the hearing before the ICC regarding ATXI's petition for a Certificate. They should have been given this notice because an intervening group submitted a route proposal that would directly affect land owned by Defendants. This lack of notice deprived these individuals of the opportunity to meaningfully participate in the hearing process, the outcome of which was directly adverse to their property rights.

As the United States Supreme Court said: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank Trust Co., 339 U.S. 306, 314 (1950). Also, the Illinois Supreme Court has said that "[d]ue process principles apply to administrative proceedings." Lyon v. Dept. of Children and Family Services, 807 N.E.2d 423, 431 (Ill., 2004). However, in this administrative proceeding, landowners of property in Edgar County were not provided with notice that amounts to the "elementary and fundamental requirement of due process."

Pursuant to the United States and Illinois Constitutions, no person may be deprived of life, liberty, or property without due process of law. U.S. Const., amend. XIV; see also Ill. Const. 1970, art.I, § 2. "'The core of due process is the right to notice and a meaningful opportunity to be heard'; no person may be deprived of a protected interest by an administrative adjudication of rights unless these safeguards are provided." World Painting Co. v. Costigan, 2012 IL App (4th) 110869, ¶ 14, 967 N.E.2d 485 (quoting Lachance v. Erickson, 522 U.S. 262, 266 (1998)). Further, in the context of an administrative proceeding, "due process is satisfied when the party concerned has the 'opportunity to be heard in an orderly proceeding which is adapted to the nature and circumstances of the dispute.'" WISAM 1, Inc. v. Illinois Liquor Control Comm'n, 2014 IL

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116173, ¶ 26, 18 N.E.3d 1 (quoting Obasi v. Department of Professional Regulations, 266 Ill. App. 3d 693, 702, 639 N.E.2d 1318, 1325 (1994)). "A fair hearing includes the right to be heard, the right to cross-examine adverse witnesses, and impartiality in ruling on the evidence." WISAM 1, 2014 IL 116173, ¶ 26, 18 N.E.3d 1; Adams County Property Owners & Tenant Farmers v. Illinois Commerce Comm'n, 2015 Ill App (4th) 130907 (Ill. App. 2015), at p. 11.

Prior to analyzing a claim that due process rights have been violated, a court must first determine whether a liberty or property interest existed that would require procedural due process be afforded to the individual who is allegedly being deprived. Quantum Pipeline Co. v. Illinois Commerce Commission, 709 N.E.2d 950, 953 (Ill. App. 3d Dist. 1990). The Defendants had interests that merited due process protection because they were landowners of private land upon or across which ATXI sought to construct a high voltage power line. In other words, their property interests in this case was their ownership interests in their land.

Next, a court must decide what process is due. Id. In making this determination, courts should analyze two factors: "(1) the risk of an erroneous deprivation of the property interest caused by the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (2) the fiscal and administrative burdens placed on the Commission due to any necessary additional or substitute procedural requirements." Id. As the United States Supreme Court has acknowledged time after time, the fundamental meaning of due process is the right for individuals to be heard, and that right requires notification. Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

Defendants are entitled to give input into the plans approved by the Commission, as well as objecting to the approved Certificate, as owners of property being taken for a public use at the time of filing their Traverse and Motion to Dismiss. In a prior action, Illinois Power Company brought

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an action to acquire certain tracts of land by eminent domain pursuant to authority granted to it by the Commission in a certificate of convenience and necessity and an enabling order, Illinois Power Co. v. Lynn, 50 Ill. App. 3d 77, 365 N.E. 2d 264, 265 (1977). The landowners filed a motion to dismiss and traverse, which the trial court denied. Lynn, 50 Ill. App. 3d at 78, 365 N.E.2d at 265.

Courts are not preempted from inquiring into the same subject matters as the Commission during certification proceedings and should allow landowners' motion to dismiss and traverse to proceed. Lynn, 50 Ill. App. 3d at 82, 365 N.E.2d at 268. The Lynn decision held as follow:

> "The hearing [before the Commission] was on the reasonableness of the utility's *plans* and could not confer property rights. Appeal of the order of the *** Commission to the courts as provided by statute would only have been a review of the proposed plan for development of the project and the extent of the property to be sought. The appearance of the owners before the *** Commission to give input into the plans, or object thereto, could not bar them from later exercising their rights as owners of property being taken for a public use. There is nothing in the *** Utilities Act preempting the rights of the property owners in the condemnation proceedings." (Emphasis in original.) Lynn, 50 Ill. App. 3d at 81-82, 365 N.E.2d at 267.

The Administrative Procedure Act requires that all parties in a contested case be given notice and an opportunity for a hearing. "The statutory requirements of notice and opportunity to be heard are also necessary under principals of procedural due process. 'Due process of law is

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served where there is a right to present evidence and argument in one's own behalf, a right to cross-examine adverse witnesses, and impartiality in rulings upon the evidence which is offered.' Administrative proceedings must conform to the requirements of due process of law." People ex rel. Illinois Commerce Com'n v. Operator Communication, Inc., 666 N.E.2d 830, 833, 834, 281 Ill. App. 3d 297, 217 Ill. Dec. 161 (Ill. App. 1 Dist. 1996).

A. The ICC's failure to follow the ALJs' procedure for notifying landowners who would be directly affected by an intervener's proposed route violated the due process rights of the Defendants.

The ALJs handling ATXI's petition for a Certificate for this Project had a clear procedure in place for how landowners should be notified if their property was going to be affected by an intervener's proposed route. The ALJs recognized how important to landowners this notice was, and, presumably, recognized that Section 8-406.1 of the Act and Section 83.200.150(h) of the Illinois Administrative Code are silent regarding this matter. Examining the minutes of the status hearings the ALJs held helps to see what this procedure was. Had the ICC followed this procedure and provided Defendants the requisite notice, their property interests would have been protected because they would have been afforded due process.

In the status hearing on December 3, 2012, ALJ Albers explained the general process interveners should follow when they propose an alternate route. He said a landowner who proposes an alternate route should, "identify any other landowners that are going to be affected by it because we don't want to change something on these folks[sic] land without giving them notice, just like you wouldn't like if you got a line put on your property without notice." ICC Docket No. 12-0598, Hearing Before ALJ Albers and ALJ Yoder, Dec. 3, 2012, p. 40. More specifically,

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ALJs mandated that they would expect interveners to provide a map similar to what ATXI had provided, which would distinctly exhibit the proposed route line and exactly how it deviated from ATXI's routes. Id. at 61-62. Along with the proposed route, the intervener proposing it would need to provide the names and addresses of the owners of each parcel affected by the alternate route proposal. Id. at 62.

As for who should provide the notice to the landowners, ALJ Albers said, "we can notify the landowners that would be affected by that new alternative." Id. at 60. This "we" is not ambiguous: ALJ Albers was placing the responsibility on the ICC as opposed to the interveners. This makes sense, as it is the ICC Chief Clerk's responsibility to provide the initial notice to affected landowners under Section 83.200.150(h) of the Code. However, further evidence to support this proposition can be seen in one of the intervener's alternate route proposals. In the request to file the proposal, the party also requested an order that would direct the Clerk to issue notice to the landowners affected by its route proposal. This demonstrates that intervening parties understood what the procedure was and who was to provide the notice.

In light of this review of the status hearing minutes, it is clear that the procedure for notifying landowners who would be directly affected an intervener's proposed route was as follows: 1) the intervener proposes a route and that proposal includes a detailed map of the route and the names and addresses of all landowners affected by this route; and 2) the Clerk of the Commission was to send notice to the newly affected landowners.

Apparently, this procedure of notifying newly affected landowners was followed in most instances because some newly affected landowners, after receiving notice of the alternate route proposals, attended a subsequent status hearing before the ALJs in January 2013. ICC Docket No. 12-0598, Hearing Before ALJ Albers and ALJ Yoder, Jan. 17, 2013, p. 100. Again, at this

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hearing, the ALJs explained the general procedure for how the petition for a certificate would be handled. They reminded individuals that if they planned to propose alternate routes they needed to have the names and addresses of the newly affected landowners "because they will have to be given notice that you have now suggested that the route go an affect them." Id. at 109. Those newly affected landowners would then have an opportunity to attend a status hearing to have the administrative process explained to them and a date issued to them by which they would need to file any testimony they might wish to provide. Id.

All the rhetoric and reminders regarding the procedure and the constant mention of notice highlights the fact that the ALJs were squarely focused on the importance of providing notice to landowners who were going to be directly affected by any proposed alternate routes. In fact, the judges explained that even the slightest deviation in a route merited notice to property owners. Id. at 112-113. In other words, even if a property owner had previously been provided notice that the route would affect one portion of his or her property, and even if he or she had not intervened, if someone proposed an alternate route that modified its location such that it would affect a different side for that same landowner's property, he or she needed to be provided notice. Id. The basis for this determination was that even though the landowner was amenable to where the route was currently planned to affect his or her property, he or she might not be so accepting if the route were to change and affect a different portion of his or her property. Id.

While the procedure was obvious and the responsibilities clearly defined, the Defendants never received the notice. The Defendants have filed Affidavits, which are attached to Defendants' Motion to Dismiss and Traverse, swearing that the first time they received notice of the ICC proceedings was when ATXI sent them letters after the Order had been entered. Had they received the notice according to the procedures implemented by ALJs, the landowners would have

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been afforded the due process to which they were entitled.

Defendants have had an opportunity to review the record, the group does not dispute that Stop Coalition complied with the ALJs' mandates regarding providing contact information for newly affected landowners of an alternate route. They do remain fervent that *the notice they should have received was not actually sent to them by the Chief Clerk of the Commission.*

Due process represents this country's commitment to ensuring our government engages in a fair decision-making process prior to affecting citizens' property. Fuentes, 407 U.S. at 80-81. This time-honored tradition was offended in this case because Defendants did not receive notice of the ICC proceedings. The Defendants had a right to be notified that an administrative proceeding had been initiated that could result in the ICC granting ATXI a certificate giving it the authority to build a high voltage transmission line on or across their private property. Due process is in place to protect "a person's right to enjoy what is his, free of governmental interference." Id. at 81. Notification would have accomplished this goal because it would have allowed the Defendants to intervene in the matter earlier and to more effectively enter testimony to protect their property rights.

II. Section 406.1 Of The Illinois Public Utilities Act Is Unconstitutional Because It Does Not Provide Due Process To Landowners Prior To The ICC Granting A Utility A Certificate Of Public Convenience And Necessity.

ATXI filed its Petition for a Certificate under the relatively newly enacted Section 8-406.1 of the Illinois Public Utilities Act ("Act"). This appears to be a case of first impression regarding this specific statute and the due process that should be afforded to individuals when a utility seeks a Certificate pursuant to it. The statute does not contain language that ensures landowners who will be affected by proposed projects receive the due process they deserve prior to the ICC granting a certificate to a utility. Therefore, this Court should determine that Section 8-406.1 of

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the Act is unconstitutional because it violates citizens' rights to due process.

Due process must be given to an individual prior a deprivation of his or her property rights. U.S. Const. amend XIV, §1. Due process means that a person has a right to be heard prior to the government affecting his or her property interests. Fuentes, 407 U.S. at 80. With the right to be heard comes the right to be given notice of the hearing; these ideas are part and parcel. Id. The method of the notice can change based on the situation, but it must be sufficient to inform the individuals whose property interests will be affected. Mullane, 339 U.S. at 315.

Although it does contain some requirements that utilities must satisfy prior to the ICC granting certificates, Section 8-406.1 of the Act does not contain any provisions that safeguard individuals' due process rights. Section 8-406.1(a)(3) requires the utility that intends to apply for a certificate under the expedited process to hold at least three public meetings about the proposed project for which a certificate is sought. 220 ILCS 5/8-406.1(a)(3). These meetings are to be held in each county affected by the project and they need to be held prior to the utility filing its petition for a certificate. Id. Prior to each of meeting, notice of the meeting is to be published once a week for three consecutive weeks in a paper of general circulation in the county affected by the proposed project. Id. In addition, notice of the public meeting along with a description of the project is to be given to the County Clerk for the county in which the project is to be located. Id.

The public meetings a utility is required to hold before it can file its petition for a certificate does not equal notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendendcy of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 314. By the statute's own express language, the purpose of these pre-filing, public meetings is "to receive public comment concerning the project," not to provide citizens with notice to ensure they receive due process. Id. Even looking beyond the

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purpose of the statutory provision, the effect still does not protect due process rights: landowners attending these public meetings who would be affected by the proposed utility's routes still would not be apprised of the time and place for a hearing because the utility would not yet have even filed a petition for a certificate.

The United States Supreme Court has said that, "[t]he reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." Id. at 315. ATXI cannot defend the meetings under any such grounds. And while under no circumstances do these public meetings satisfy due process requirements, ATXI particularly cannot claim they were sufficient as to the members of ECCDP.

Some Defendants attended these pre-filing meetings. When they attended, they saw ATXI's proposed routes. They also saw that the proposed routes for the project did not affect their property. However, neither of these routes were the route the ICC chose. As such, claiming that the Defendants who attended the public meetings had notice sufficient to comply with due process is ludicrous. When the facts are broken down, at best, the Defendants who attended had notice that some project involving the construction of a high-voltage power line was potentially passing through their county along a route that may or, as the case would be, may not be the route for the proposed project. Under the circumstance, this really is the best statement that can be made regarding what definitive information was conveyed at these meetings.

If anything, attending these pre-filing meetings gave the Defendants a false sense of security because they were under the impression that the proposed routes would not affect their land. The Defendants certainly did not have notice of the route that was selected. And the notice they did have of the possibility of a transmission line being built in their county does not even

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begin to approach the threshold of what due process requires.

The Defendants are not claiming ATXI did not comply with Section 8-406.1(a)(3). The group fully acknowledges that it did. What the Defendants contend, however, is that this compliance did nothing to protect the group's due process rights. Further, the Defendants assert, as demonstrated by the provision's purpose and its effect, Section 8-406.1(a)(3) does not save Section 8-406.1 from failing to comply with constitutional due process requirements. As such, the statute is unconstitutional.

In Section 8-406.1(f) of the Act, the Commission is told that it shall issue a certificate to a utility satisfies the criteria included in that particular provision. The language of the statute provides for "notice and a hearing" prior to the ICC issuing the certificate. 220 ILCS 5/8-406.1(f). Although the statutory provision mentions "notice," this fact does nothing to bring the statute into compliance with due process requirements.

In fact, the statute remains silent as to who is to be notified or in what manner notification is to happen. Nothing in the context of the statute indicates that the notice is to be provided to landowners whose property rights would be directly and adversely affected if the ICC grants a utility's petition for a Certificate. It is entirely unclear what this phrase "after notice and a hearing" means in the context used. Id. Most like this is referring to the fact that there is to be a hearing to determine whether the utility applying for a certificate has met the criteria established in that statutory provision.

Regardless, Section 406.1 of the Act allow for a utility to be granted authority to directly affect a citizen's property interest without that citizen even being guaranteed any semblance of due process.

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CONCLUSION

Defendants only request what the constitutions of this state and this country promise them: due process. From the beginning, the progression toward the ICC granting ATXI a certificate has been a convoluted process, mainly because Section 8-406.1 is unconstitutional. It is void of any procedural safeguards for landowners who are in jeopardy of having the ICC enter an order that would be directly adverse to their rights as property owners. This lack of due process has created confusion and is the root the chaotic procedural and factual background of this case. Despite the ALJs' best efforts to supplement a statute that is sorely lacking with a procedure designed to protect individuals' due process rights, the Defendants still failed to receive the notice they deserved.

Defendants ask this Court to see through the muddled record and to analyze the facts. If the Court does this, it will see that the ICC violated the due process rights of the Defendants when it failed to send them notice. The Defendants received no direct notice when ATXI's Verified Petition was filed because they were not landowners whose land was directly affected by the proposed routes. Then, when their lands were directly affected as a result of an alternate route proposed by an intervener, they still never received notice. In between the initial filing and the ICC Order, there was no reasonable way the Defendants would have known to intervene in this proceeding other than had they been provided the notice the ICC should have sent them.

Because the Defendants never received notice, they did not have the opportunity that every other landowner whose property was affected by proposed routes for the Project had: the meaningful opportunity to be heard, to present testimony to the ICC, and to propose an alternate route for the Project.

This Court should Dismiss the Eminent Domain Complaint because the Defendants were

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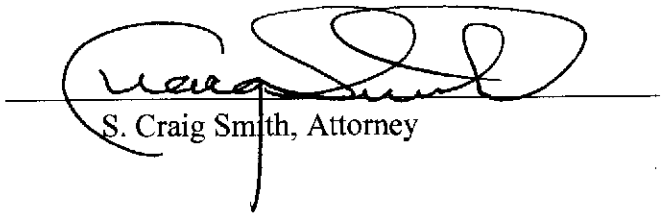
not provided the notice that due process demands. Additionally, this Court should Dismiss the Eminent Domain Complaint on the grounds that Section 8-406.1 of the Act is unconstitutional because it allows for a certificate to be granted without providing any notice to the property owners who would be affected.

WHEREFORE, DEFENDANTS IN THE EMINENT DOMAIN ACTIONS FILED BY AMEREN, REQUEST this Court grant their Traverse and Motion to Dismiss.

Respectfully Submitted,

Defendants in the Eminent Domain Actions Filed
By Ameren
By: Asher & Smith, their Attorneys



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Sandra K. Willett
Circuit Clerk, 5th Judicial Circuit Edgar County

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
EDGAR COUNTY, ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	Case Nos.: 2016-ED-4, 2016-ED-5, 2016-ED-6, 2016-ED-12, 2016-ED-13, 2016-ED-15, 2016-ED-16, 2016-ED-17, 2016-ED-18, 2016-ED-19, 2016-ED-20, 2016-ED-21, 2016-ED-22, 2016-ED-23, 2016-ED-24, 2016-ED-25, 2016-ED-27, 2016-ED-28, 2016-ED-29, 2016-ED-30, 2016-ED-38, 2016-ED-40, 2016-ED-42, 2016-ED-43, 2016-ED-44, 2016-ED-45, 2016-ED-47, 2016-ED-48, 2016-ED-49, 2016-ED-50, 2016-ED-51, 2016-ED-52, 2016-ED-53, 2016-ED-54, 2016-ED-55
Plaintiff,	)	
v.	)	
RICHARD L. HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC, and UNKNOWN OWNERS, *et al.*,	)	
Defendants.	)	

RESPONSE TO TRAVERSE AND MOTION TO DISMISS

NOW COMES, Plaintiff, AMEREN TRANSMISSION COMPANY OF ILLINOIS ("ATXI"), by and through its attorneys, Sorling Northrup, Gary A. Brown, David A. Rolf, and Lisa A. Petrilli, of counsel, and for its Response to the Traverse and Motion to Dismiss ("Traverse") filed in each of the above referenced cases states as follows:

I. INTRODUCTION

The Landowners' Traverse focuses entirely on a pair of alleged constitutional errors arising in a *different* proceeding—namely, the 2012 proceeding in which the Illinois Commerce Commission ("ICC") approved, and the Fourth District Appellate Court upheld, the route and certificate necessary to construct the Illinois Rivers Project. The Landowners, however, omit to inform the Court of a critical piece of information: their precise arguments have already been presented to the Fourth District Appellate Court—by the same counsel and a number of the same parties—where they were conclusively rejected. A copy of the decision in *Adams County Property Owners and Tenant Farmers v. The Illinois Commerce Commission,* 2015 IL App (4th) 130907, is attached to this Response and incorporated herein as **Exhibit 1**.

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Why Landowners failed to bring this adverse decision to the Court's attention—even describing the issues raised as ones "of first impression" is unclear. (Memorandum in Support of Traverse, p. 14). Regardless, the appellate decision is not only directly relevant to these proceedings, but it compels the rejection of Landowners' Traverse. Landowners' constitutional arguments are barred by the doctrines of *res judicata* and issue preclusion and must also be rejected under the binding authority of the Appellate Court sitting over this Circuit.

As a holder of a certificate granted by the ICC, ATXI enjoys a rebuttable presumption that its acquisition of the property is for a public benefit and purpose, and it has provided evidence satisfying the other requirements of the Eminent Domain Act. *See* 735 ILCS 30/10-5-10(a). The presumption and evidence in favor of condemnation stand unrebutted. The cases should, therefore, proceed to hearing on the issue of compensation for the easement interest sought.

II. SCOPE OF THE TRAVERSE

Before addressing the arguments raised in the Traverse, ATXI will first clarify the scope of the present pleadings. ATXI filed eminent domain complaints in Edgar County. Craig Smith entered his appearance in most of the Edgar County cases. In certain cases, Mr. Smith filed a Traverse. Each Traverse filed by Mr. Smith is identical with the exception of a landowner Affidavit attached to each as Exhibit 2 and the Certified Plat of the easement sought (Comp. Ex. 2) attached as Exhibit 10. To assist in the hearing on this matter, **Exhibit 2** to this Response contains a list of ATXI Edgar County eminent domain cases in which Mr. Smith entered his appearance, sorted by case number, and including information as to whether the landowner filed a Traverse.

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Attorney Smith and counsel for ATXI appeared before this Court for a status hearing on August 29, 2016 in Case Nos. 16-ED-4 (Hutchings), 16-ED-5 (Trust 455-195), 16-ED-12 (Tate Living Trust), and 16-ED-13 (Tate). At that hearing the parties agreed to a briefing schedule in what ATXI believed were the four cases set for status hearing. The briefing schedule provided that Mr. Smith would file a Memorandum in Support of his Traverse on or before September 12, 2016; ATXI would respond on or before October 14, 2016; and Mr. Smith would reply on or before November 4, 2016. ATXI understood that hearing on the Traverse in the four above-referenced cases was set for November 17, 2016 at 9:00 a.m.

On or about September 12, 2016 Mr. Smith filed a Memorandum in Support of the Traverse ("Memorandum"), and referenced not 4, but 35 separate cases in the caption. This Response is intended to respond to each Traverse and the Memorandum filed by Mr. Smith, as each raises the same argument without distinction. ATXI's present pleading responds to the legal issues raised in the pleadings. Should factual issues specific to each landowner become an issue, ATXI requests additional hearing time as it is impossible to address specific facts related notices to 35 sets of landowners in a half-day hearing.

III. BACKGROUND

A. Illinois Commerce Commission Petition and Certificate Proceedings

The Illinois Rivers Project is a 375-mile high voltage electric transmission running from Missouri to Indiana across south central Illinois. The project is just one component—albeit a highly important one—of the critical, complex task of maintaining and improving the region's electric infrastructure. These benefits of the project include lower energy costs, the facilitation of renewable energy delivery into the State of Illinois, relief of serious and immediate reliability concerns, and job creation.

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ATXI derives its authority to construct, operate, and maintain the Illinois Rivers Project from the Public Utilities Act ("PUA") and the ICC. In 2012, in accordance with PUA Sections 220 ILCS 5/8-503 and 220 ILCS 5/8-406.1, ATXI petitioned the ICC for a Certificate of Public Convenience and Necessity to construct the Illinois Rivers Project in ICC Docket No. 12-0598. The ICC granted ATXI's request for a Certificate of Public Convenience and Necessity on August 20, 2013 and, as amended, on February 20, 2014. These Orders are attached and incorporated herein as **Exhibit 3** and are collectively referred to hereinafter as the "Certificate".

B. Multiple Notices of the Certificate Proceeding were Provided to Affected Landowners.

The proceedings before the Commission were not uncontested, however. Numerous parties intervened and otherwise participated in the case, including a number of the Landowners and their counsel. The Landowners' Traverse is almost entirely dedicated to issues of notice in the certificate proceeding; as ATXI will demonstrate below, such issues are not germane to this case. Nevertheless, given Landowners' extensive focus on that topic, it is worth noting that ATXI complied with all statutory notice requirements, as well as all additional ICC required notices.

Explained further, the applicable statute, PUA Section 8-406.1, requires certain notice to affected landowners. The Landowners concede that ATXI complied with statutory notice requirements. (Memorandum, p. 17). They concede that a number of Landowners attended pre-filing meetings and had actual notice of the project. (Memorandum, p. 16). They concede that statutory notice procedures were generally followed. (Memorandum, p. 12). The parties further agree that, although not mandated by the PUA, the ICC required all intervening parties to identify the landowners affected by proposed alternate line routes and requested the ICC send notice to those landowners. Landowners generally acknowledge that the party proposing the

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route affecting Landowners' properties complied with this additional ICC requirement. *Adams County*, 2015 IL App (4th) 130907, ¶79.

The Landowners' Traverse again describes the notices in the ICC proceeding as it did in its appellate brief in considerable detail. Their chronology, however, suddenly comes to an end at the point of the ICC's decision. (Memorandum, p. 6) (procedural background ends with ICC decision on October 3, 2013). The proceeding did not end with the ICC's decision, however.

C. Landowners' Appeal of the Certificate and ICC Order is Rejected

Several groups of landowners, including the Edgar County Citizens are Entitled to Due Process ("ECCDP"), the group referenced in Landowners' pleadings herein, appealed the ICC's issuance of the Certificate to the Fourth District of the Illinois Appellate Court.[1] Other landowner groups raised the same challenges and also challenged the route and necessity of the Illinois Rivers Project as set forth in the Certificate. All of these appeals were consolidated for review.

Although the Landowners describe the issues raised in their Motion as being "of first impression," that is not correct. The same constitutional arguments were expressly presented to the Fourth District on appeal. The following table demonstrates that the issues there and here are identical:

[1] While it is unclear from reading the pleadings filed by attorney Smith, not all of landowners in these eminent domain cases appeared at the ICC and appealed the ICC's order and Certificate. The Landowners appearing at the ICC and who appealed the ICC's order and Certificate are noted on **Exhibit 2** and referred to hereinafter as "ECCDP".

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Issues "Presented for Review" in ECCDP Appellate Brief	Landowners' Motion to Dismiss
"Did the Illinois Commerce Commission violate the due process rights of [ECCDP] when it failed to provide them notice that an intervener to [the ATXI certificate] proceeding . . . had proposed an alternate route that would directly affect the property rights of the landowners?" Ex. 3, ECCDP Appellate Br. at 4–5.	"The Defendants are a group of individuals whose due process rights . . . have been violated because the Illinois Commerce Commission . . . failed to provide notice to Defendants that their property would be directly affected by the construction of a new . . . transmission line . . . ." Mot. to Dismiss at 7.
"Does the lack of any clear notice requirement in 220 ILCS 5/8-406.I prior to the ICC issuing a utility a Certificate of Public Convenience and Necessity render the statute unconstitutional?" *Id.*	"Section 8-406.1 is unconstitutional because it allows for a certificate to be granted without providing any notice to the property owners who would be affected." Mot. to Dismiss at 19.

Upon consideration of the issues raised by ECCDP and the other landowner groups, the Fourth District Appellate Court upheld the validity of the ICC's orders and the Certificate in its Opinion dated July 25, 2015. *Adams County*, 2015 IL App (4th) 130907. In that Order, the Court specifically rejected the constitutional arguments raised by Landowners: "the underlying proceedings before the Commission neither conferred property rights on ATXI nor deprived landowners of their protected property interests." *Id.* ¶ 80. Thus, ECCDP had no due-process rights at stake in the Certificate proceeding. The lack of any protected property interest meant that, regardless of whether notice was or was not received, "[t]he due process rights of ECCDP's members were not violated." *Id.*

Another party filed a petition for leave to appeal the Fourth District's decision, but the Supreme Court of Illinois denied the petition, making the Fourth District Appellate Court's decision final. *Adams County*, 2015 IL App (4th) 130907 (rehearing denied Aug. 21, 2015, cert denied Nov. 25, 2015).

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D. Section 8-509 Authority

As the appellate process was reaching its conclusion, ATXI began acquiring the parcels necessary to build the line. Most of the affected property owners had negotiated easements over their affected parcels, but some parties (including the Landowners) essentially refused to negotiate. Because of the upcoming in-service dates, ATXI could not afford to wait indefinitely to acquire the needed property rights. Accordingly, ATXI turned to the ICC for authority to initiate condemnation proceedings.

1. The March 9, 2016 8-509 Order

On January 25, 2016, ATXI filed its petition seeking eminent domain authority from the ICC pursuant to PUA Section 220 ILCS 5/8-509 to proceed against certain landowners (ICC Docket No. 16-0040). The Landowners included in ICC Docket No. 16-0040 are noted on Exhibit 2. All Landowners named in Docket 16-0040 were given notice and all Landowners named intervened in the ICC proceedings. (ICC Docket No. 16-0040). On March 9, 2016, the ICC entered an Order under PUA Section 8-509 that authorized ATXI to seek, in accordance with the Eminent Domain Act, the necessary land rights (including access and construction easements where necessary) as identified in Appendix A and Appendix B of the Commission's Order. Landowners Properties are identified on Exhibit A, and the Certified Plats in Appendix B show the easement interest sought through each of the Properties. A copy of the ICC's March 9, 2016 Certified Order in Docket No. 16-0040 and its Appendices is attached and incorporated herein as **Exhibit 4** (hereinafter referred to as "3/9/16 8-509 Order").

2. The June 7, 2016 8-509 Order

The remaining landowners represented by Mr. Smith were part of ATXI's petition for PUA Section 8-509 authority filed on April 25, 2016 in ICC Docket No. 16-0274. Those

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landowners received notice of the ICC proceedings, but declined to participate in the ICC proceedings. See letter from Mr. Smith dated April 18, 2016 attached and incorporated herein as **Exhibit 5**. On June 7, 2016, the ICC entered an Order under PUA Section 8-509 that authorized ATXI to seek, in accordance with the Eminent Domain Act, the necessary land rights (including access and construction easements where necessary) as identified in Appendix A and Appendix B of the Commission's Order. Landowners Properties are identified on Exhibit A, and the Certified Plats in Appendix B show the easement interest sought through each of the Properties. A copy of the ICC's June 6, 2016 Certified Order in Docket No. 16-0274 and its Appendices is attached and incorporated herein as **Exhibit 6** (hereinafter referred to as "7/6/16 8-509 Order").

The 3/9/16 8-509 Order and the 7/6/16 8-509 Order are hereinafter collectively referred to as the "8-509 Orders". These 8-509 Orders authorized ATXI to initiate condemnation proceeding in circuit court and ATXI filed its Complaints in this Court.

IV. ARGUMENT

ATXI's Complaint before this Court satisfies all of the elements required under the Eminent Domain Act. ATXI described the basis of its authority in the premises; the purpose for which the property was sought to be taken; the property to be taken; the names of all persons with property interests or those unknown; and it included a prayer for compensation and assessment. *See* 735 ILCS 30/10-5-10(a). The Landowners each responded by filing a Traverse. However, the specific issues raised in those pleadings do *not*, by their terms, respond to the facts alleged in ATXI's Complaint or even pertain to this case. Rather, the Landowners seek to raise legal issues with past proceedings *before the ICC*. Indeed, if not for the caption and title of Landowners' Traverse and Memorandum, one would think it was an appellate brief from an ICC decision.

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Ironically, although counsel for the Landowners treats this proceeding *as though* it were an appeal, counsel fails to mention that there has *already* been an appeal. And in that appeal, the precise issues raised regarding the validity of the ICC proceedings were conclusively resolved by the Fourth District Appellate Court against the Landowners. The Landowners' constitutional arguments are thus barred on two independent grounds: either under a doctrine of preclusion or under the binding authority of the Appellate Court in which this Court sits. Given that ATXI has presented sufficient evidence to satisfy its burden under the Eminent Domain Act, the Traverse should be rejected and the case should proceed to a determination of compensation for the easement interest sought.

A. *Res judicata* and issue preclusion bar Landowners from re-litigating Landowners' due process and unconstitutionality claims related to notice at the ICC, as both issues were raised and already decided by the Fourth District Appellate Court.

1. *Res judicata* and issue preclusion generally

Illinois distinguishes *res judicata*, also known as claim preclusion, and issue preclusion. *Redfern v. Sullivan*, 111 Ill.App.3d 372, 375 (4th Dist. 1983); *Morris v. Union Oil Co.*, 96 Ill.App.3d 148, 153–54 (5th Dist. 1981); see also *People v. Bone*, 82 Ill.2d 282 (1980), *cert. denied*, 454 U.S. 839 (1981). *Res judicata* involves the same parties or their privies and "operates as an absolute bar to a subsequent action where a prior judgment rests on the merits, 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' " *Bone*, 82 Ill.2d at 287 (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877)). Issue preclusion does not necessarily involve the same parties and "concludes only 'those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' " *Bone*, 82 Ill.2d at 287 (quoting *Cromwell*, 94 U.S. at 353).

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"The determination of a question directly involved in one action is conclusive as to that question in a second suit." *Cromwell v. County of Sac,* 94 U.S. 351, 354, 24 L.Ed. 195 (1877). Issues decided by the court are settled thereby "protect[ing]" against "the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent verdicts." *Montana v. United States,* 440 U.S. 147, 153–154, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979).

2. The Fourth District Appellate Court considered whether Landowners' were deprived of due process at the ICC and decided that Landowners were not entitled to due process in the proceeding because there was no taking or other deprivation of rights.

All claims raised by ECCDP Landowners, as well as all those issues the ECCDP Landowners could have raised in the appeal regarding the validity of the Certificate and the ICC's authority, are barred by *res judicata.* For those Landowners who did not participate in the appeal, issue preclusion bars re-litigation of all matters raised and decided in the appeal filed by their neighbors.

Although the Landowners assert that "[t]his appears to be a case of first impression regarding this specific statute and the due process that should be afforded," this is not correct—Landowners are simply repeating their prior appellate argument challenging notice at the ICC. (Memorandum, p. 14). They again allege a lack of notice related to a proposed route in the ICC proceedings, and again claim the alleged lack of notice violated their due process rights. All specific arguments set forth in the Landowners' Traverse relate only to the notice and opportunity to be heard in the ICC proceedings, an issue that was raised by ECCDP and decided by the Fourth District Appellate Court. Indeed, Landowners' argument in the Memorandum in this matter for the most part appears to have been cut and pasted from ECCDP's brief submitted

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to the Fourth District Appellate Court. The "Issues Presented for Review" in ECCDP's Appellate Brief are certainly identical to those raised in the Traverse and Memorandum at issue.

As discussed above, upon consideration of ECCDP's appeal, the Fourth District Appellate Court held "the underlying proceedings before the [ICC] neither conferred property rights on ATXI, nor deprived landowners of their protected property interests. As a result, landowners were not entitled to due process during those proceedings and cannot assert a due process violation" based on alleged lack of notice at the ICC. *Adams County*, 2015 IL App (4th) 130907, ¶ 51, 80. While landowners may petition the ICC to intervene in its proceedings to give input as to the necessity, public purpose, and route of a project, such ability to intervene and offer input is not a protectable property right. *Id.* ¶ 48; *see also Illinois Power Company v. Lynn*, 50 Ill.App.3d 77, 81 (4th Dist. 1977).

Res judicata bars re-litigation of ECCDP's claims that the alleged lack of notice at the ICC resulted in a deprivation of due process. The Fourth District Appellate Court considered and entered an order on the very same issue ECCDP now raises before this Court. Since there was a decision on the merits of ECCDP's claims, ECCDP is barred from re-litigating those claims and any claims related to the validity of the Certificate that could have been raised in ECCDP's appeal.

Likewise, issue preclusion bars re-litigation of this issue by all remaining Landowners who chose not to appeal. While certain Landowners decided not to petition to intervene in the ICC and appeal the Certificate, those Landowners are bound by the decision on the issues decided by the Fourth District Appellate Court, including the issue of whether lack of notice at the ICC violated Landowners' right to due process. As set forth by the Fourth District Appellate Court, Landowners were not entitled to due process at the ICC.

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The appropriate due process inquiry in this matter is whether the landowners have notice and an opportunity to be heard in the eminent domain matter - in *this* proceeding - where the result may be the taking of easement interests through Landowners' properties. And here, it is undisputed that notices of the eminent domain matters have been provided to Landowners as counsel has entered his appearance on Landowners' behalf in each case. Landowners, through counsel, are in fact actively participating in the eminent domain litigation. If landowners wish to contest issues in eminent domain litigation, they may file a traverse, a counterclaim, or challenge the amount of just compensation for the taking. Landowners in this matter filed a traverse, but did not raise a specific issue other than the one related to notice at the ICC, an issue already decided by the Fourth District Appellate Court.

3. The constitutionality of PUA Section 8-406.1 has already been upheld in the face of the precise claims raised herein.

The constitutionality of PUA Section 406.1 was one of the main issues decided by the Fourth District Appellate Court in the above referenced appeals. *Adams County*, 2015 IL App (4th) 130907, ¶44, 80. It was raised by ECCDP, as well as, other landowner groups. As set forth above, *res judicata* bars ECCDP from re-litigating the constitutionality of PUA Section 406.1. Given that the constitutionality of PUA Section 406.1 was specifically considered, and the Fourth District Appellate Court refused to declare the Section unconstitutional, issue preclusion bars re-litigation of that same issue by Landowners in these eminent domain matters. *Id.* at ¶36-51.

Additionally, in order to challenge the constitutionality of a statute, Landowners must give notice to the Illinois Attorney General. Ill. S. Ct. R. 19. Landowners failed to give the requisite notice. Thus, even if it were not barred, this particular claim would be inappropriate to consider.

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4. The *Lynn* case, relied heavily upon by Landowners, supports rejection of Landowners' claims.

Landowners' attempt to argue that the validity of the underlying ICC proceeding violated Landowners' due process rights is based nearly entirely on *Lynn*, despite the Fourth District Appellate Court's reliance on *Lynn* as the basis for rejecting those same claims. *Lynn* was an eminent domain case filed by a public utility following issuance of a certificate and 8-509 order. In response to the utility company's eminent domain complaint, landowner filed a traverse challenging, among other things, the utility company's authority to proceed in eminent domain. *Lynn*, 50 Ill.App.3d at 78. The trial court held it was preempted from considering such authority and dismissed the traverse without hearing. The Fourth District Appellate Court reversed the dismissal of the traverse finding that landowners have the right to challenge ICC orders. *Id.* at 81.

The right to challenge the validity of an ICC order is not an issue in this matter, as many of the Landowners are aware, having already challenged the validity of the ICC orders and Certificate by appeal to the Fourth District Appellate Court. Landowners seem to take the position already rejected by the Fourth District Appellate Court that *Lynn* permits a due process challenge to notice at the ICC as long as the challenge is raised in the eminent domain matter. However, the timing of such challenge is not the issue as shown in *Lynn* or in *Adams County* (the Fourth District challenge).

Lynn and *Adams County* both held that landowners were not entitled to due process at the ICC, not that such challenge to notice at the ICC must be raised in the eminent domain action. Indeed with regard to notice at the ICC, the court in *Lynn* held: "the property owners…were not 'parties to the proceedings' in the sense of parties to a litigation. The hearing was on the reasonableness of the utility's plans and could not confer property rights." *Lynn*, 50 Ill.App.3d at

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81. While *Lynn* and *Adams County* both support the ability to challenge the ICC orders, as ECCDP did, Landowners are now left with the binding *Adams County* decision rejecting the very claims they raise in this matter.

B. The Eminent Domain Act provides for burdens and presumptions in a traverse proceeding. Other than precluded claims, Landowners have not raised any specific challenge to ATXI's complaint allegations.

In short, as ATXI has shown above, the issues raised by the Landowners provide no defense and must be rejected by the Court. The only remaining question is whether ATXI has carried its burden of setting forth a *prima facie* eminent domain case. It has.

1. ATXI has carried its burden under the Eminent Domain Act

The Eminent Domain Act requires a Complaint for Eminent Domain to contain facts supporting the following allegations: (i) the condemnor's authority in the premises; (ii) the purpose for which the property is sought to be taken or damaged; (iii) a description of the property; and (iv) the names of all persons interested in the property as owners or otherwise, as appearing of record, if known, or if not known stating that fact. 735 ILCS 30/10-5-10 (2014). The complaint shall pray the court to cause the compensation to be paid to the owner be assessed. *Id.*

Landowners raise claim of traverse, but their claim fails to allege any specific facts disputed. Because of the lack of specific allegations, Landowners' claim operates as a general traverse, meaning a denial of the material allegations in the Complaint. *Forest Preserve District of DuPage County v. Miller*, Ill.App.3d 244, 250 (2d Dist. 2003). Generally speaking, once a landowner asserts a claim of traverse, the burden shifts to the condemnor to set forth a *prima facie* eminent domain case. *Department of Transportation v. First Galesburg National Bank and Trust Co.*, 141 Ill.2d 462 (1990). However, the Eminent Domain Act affords ATXI certain

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statutory presumptions related to authority, necessity, and public purpose. 735 ILCS 30/5-5-5(c) (2016). ATXI's Complaint clearly contains the facts required by the Eminent Domain Act sufficient to overcome the Traverse. Those facts are supported by the Fourth District Appellate Court's opinion, the Certificate and 8-509 Orders, and the Affidavit of Rick Trelz attached and incorporated herein as **Exhibit 7**.

a. ATXI has the authority to proceed to acquire the easement sought through the use of eminent domain.

The first element that ATXI must show is that it possesses authority to acquire the easement. To the extent Landowners raise the issue of the validity of the ICC's order and the Certificate, the Fourth District Appellate Court has already considered the ICC's issuance of the Certificate and found the Certificate to be valid.

The ICC issued a valid Certificate authorizing the construction, operation, and maintenance of ATXI's project pursuant to PUA Section 8-406.1, and specifically, authorizing ATXI's construction of the line pursuant to PUA Section 8-503. (Ex. 3, 8/20/13 Order, pp. 133-34 & 2/20/14 Order, pp. 83-84). ATXI plead the basis for its authority to condemn certain property rights and the certified ICC Orders attached hereto as Exhibit 2 and Fourth District Appellate Court's opinion attached hereto as Exhibit 1 support ATXI's pleadings.

With regard to the authority and necessity to acquire the property interests through the use of eminent domain, the Section 8-509 Orders both state:

> The Commission authorized ATXI under Sections 8-406.1 and 8-502 of the [Public Utilities] Act to construct a new 345 kV electric transmission line along the route approved in Docket No. 12-0598;
>
> ATXI [has] acted reasonably in its efforts to obtain the easements at issue in this proceeding;
>
> IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Ameren Transmission Company of Illinois is authorized under Section 8-509 of

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> the Public Utilities Act to seek, in accordance with the Eminent Domain Act, the necessary land rights (including access and construction easements where necessary) on the properties identified in Appendix A and Appendix B hereto.

(Ex. 4, p. 12; Ex. 6, pp. 16-17). The easement interests for which ATXI sought authority from the ICC are the same as those easement interests sought in each eminent domain case as shown on Exhibit 2 to each Complaint and Appendix B to each 8-509 Order. ATXI complied with the PUA and obtained all necessary authority from the ICC to proceed in these eminent domain cases.

As already discussed, the Landowners' challenge to this element is the attempted re-litigation of legal arguments already considered and rejected by the Fourth District Appellate Court. Regardless, what must be pleaded and shown in the eminent domain complaint is not the ICC's authority, but *ATXI's authority* to condemn property for public use. Such authority is determined by the legislature and set forth by statute. As a public utility, ATXI derives its authority from the ICC pursuant to PUA Sections 8-406, 8-406.1, 8-503, and 8-509 and from the Eminent Domain Act. ATXI's authority in the premises is set forth in Complaint Paragraphs 2 through 5 and further supported by the Certificate and the Section 8-509 Orders.

There is no question that ATXI has authority to acquire the easement, and thus the first element of the statute is met.

b. The easement sought is primarily for the benefit, use, or enjoyment of the public and is necessary for a public purpose.

The second element ATXI must satisfy is to describe the purpose for which the property is sought to be taken. Generally, this requirement has been interpreted by the courts to mean that the condemnor must allege that the taking of the property interest must be primarily for the benefit, use, or enjoyment of the public and necessary for a public purpose. *See Kruetzer v.*

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Illinois Commerce Com'n, 404 Ill.App.3d 791 (2d Dist. 2010). The PUA requires the ICC make certain findings of necessity prior to the issuance of a Certificate and 8-509 Order.

In order for the ICC to issue a Certificate, there must be a showing of the necessity of the project. *Id.* at 812; *see* 220 ILCS 5/8-406.1. In this matter, the project is "necessary to provide adequate, reliable, and efficient service to the public utility's customers and is the least cost means of satisfying the service needs of the public utility's customers..." (Ex. 3, 8/20/13 Order, p. 133 & 2/20/14 Order, p. 83). For the ICC to authorize construction of the project, PUA Section 8-503 requires a showing of necessity for the additions and improvements to implement the more reliable service. *Kruetzer*, 404 Ill.App.3d at 812. The Certificate authorized the construction of the necessary high voltage electric service line, the new and expanded substations, and related facilities. (Ex. 3, 8/20/13 Order, p. 133 & 2/20/14 Order, p. 83). PUA Section 8-509 requires a showing that obtaining the easements is necessary for the additions and improvements. *Kruetzer*, 404 Ill.App.3d at 812. In the Section 8-509 Orders, the ICC found ATXI acted reasonably in attempting to obtain easements by agreement and recognized the use of the eminent domain act was necessary to acquire such easements. ((Ex. 4, p. 12; Ex. 6, pp. 16-17).

Moreover, upon a showing that the ICC granted the Certificate and Section 8-509 Orders, ATXI enjoys the benefit of a presumption that the easements are for the benefit of a public purpose and are necessary. Where the condemnor is a public utility whose authority is derived from the ICC, the Eminent Domain Act provides:

> Evidence that the Illinois Commerce Commission has granted a certificate or otherwise made a finding of public convenience and necessity for an acquisition of property (or any right or interest in property) for private ownership or control (including, without limitation, an acquisition for which the use of eminent domain is authorized under the Public Utilities Act...) to be used for utility purposes ***creates a rebuttable presumption that such acquisition of that property (or right***

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> ***or interest in property) is (i) primarily for the benefit, use, or enjoyment of the public and (ii) necessary for a public purpose.***

735 ILCS 30/5-5-5(c). Such presumption is sufficient to make a *prima facie* showing that the easements sought are primarily for the benefit, use, or enjoyment of the public and are necessary for a public purpose. The Landowners raise no challenge to ATXI's satisfaction of this element.

c. The easement interest sought is specifically described in a Certified Plat attached to each Complaint as Exhibit 2.

The third statutory element under Section 10-5-10 is that the property interests sought must be described with reasonable certainty. *Kruetzer*, 404 Ill.App.3d at 812. This element is also satisfied. The interests sought in this matter are easements as shown on the Certified Plats prepared by a surveyor licensed in the State of Illinois and as found in each Complaint Paragraph 8, each Exhibit 2 to the Complaint, and in the Section 8-509 Orders. (Comp. ¶8 and Ex. 2; Ex. 4, Appx B; Ex. 6, Appx. B). Rick Trelz is the Project Manager for the Illinois Rivers Project and in his Affidavit Mr. Trelz confirms the Certified Plat attached to each Complaint describes the easement interest sought and is the same Certified Plat approved by the ICC in the 8-509 Orders.

d. All owners of record have been named and appear in this matter and all unknown owners have been joined in accordance with 735 ILCS 5/2-206.

The fourth element requires all parties interested in the property to be named in the eminent domain matter. ATXI satisfies this prong as well. Mr. Trelz affirms that the landowner named in each Complaint is the owner of record as determined by a title search. (Ex. 7). Unknown owners are named and joined in each Complaint in accordance with 735 ILCS 5/2-206. An Affidavit of Service by Publication certifying publication in each case once per week for three consecutive weeks was filed in each case. Again, the Landowners raise no challenge to whether the owners of record have been sufficiently identified.

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e. The prayer for relief requests the Court to cause the compensation to be paid to the owner be assessed.

Finally, the statute requires the condemnor to request in its prayer for relief the compensation to be paid to the owner be assessed. The prayer for relief in each Complaint prays the following:

> B. That ATXI be granted Permanent Easements for the construction, operation, and maintenance of a 345kV electric transmission line as described in Exhibit 2;
>
> C. That the Court take such proceedings and enter such Orders as necessary, ordering that ATXI may enter on the Permanent Easements and use it for the aforementioned purposes upon payment of full compensation to the parties entitled thereto, or to the County Treasurer, within such reasonable time as is fixed by the Court;
>
> D. That the Court cause compensation to be ascertained and determined according to the Eminent Domain Act for the Permanent Easement sought to be acquired;
>
> E. That the Court retain jurisdiction of this cause to enter such further Orders as may be necessary, including such Orders as may be necessary to put ATXI into possession of the Permanent Easements…

Such prayer for relief is consistent with the requirements of 735 ILCS 30/10-5-10.

2. Landowners have not provided any evidence contradicting ATXI's *prima facie* case.

Once a condemnor makes a *prima facie* case on each of the disputed allegations, the burden of proof shifts to the landowner. *Dept. of Public Works & Bldgs. v. Keller*, 61 Ill.2d 320, 335 N.E.2d 443 (1975). To overcome the *prima facie* case shown by ATXI, Landowners must provide clear and convincing evidence contradicting the disputed allegations. *See Homer v. Jones-Bey*, 415 F.3d 748, 752 (7th Cir. 2005); *Vill. of Wheeling v. Exch. Nat. Bank of Chicago*, 213 Ill.App.3d 325, 334, 572 N.E.2d 966, 972 (1st Dist. 1991). As discussed above, Landowners

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have alleged no facts in their Traverse sufficient to overcome the presumptions and meet the burden created upon ATXI's showing of a *prima facie* case.

V. CONCLUSION

WHEREFORE, Plaintiff, AMEREN TRANSMISSION COMPANY OF ILLINOIS, requests this Court deny Landowners' Traverse and permit each eminent domain case to proceed and for any other relief that this Court deems just.

AMEREN TRANSMISSION COMPANY OF ILLINOIS,
Plaintiff,

By: _____
One of Its Attorneys

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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served by placing same in a sealed envelope addressed:

Mr. Craig Smith
Asher & Smith
1119 North Main Street
Post Office Box 340
Paris, IL 61944

and by depositing same in the United States mail in Springfield, Illinois, on the 14 day of October, 2016, with postage fully prepaid.

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FILED
NOV - 4 2016
Sandra K. Willett
Circuit Clerk, 5th Judicial Circuit Edgar County

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT OF ILLINOIS
EDGAR COUNTY PARIS, ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	
	)	Nos. 2016-ED-4, 2016-ED-5, 2016-ED-6,
	)	2016-ED-12, 2016-ED-13, 2016-ED-15,
Plaintiff,	)	2016-ED16, 2016-ED-17, 2016-ED18,
	)	2016-ED-19, 2016-ED-20, 2016-ED-21,
vs.	)	2016-ED-22, 2016-ED-23, 2016-ED-24
	)	2016-ED-25, 2016-ED-27, 2016-ED-28
RICHARD L. HUTCHINGS, RITA M.	)	2016-ED-29, 2016-ED-30, 2016-ED-38
HUTCHINGS, FARM CREDIT SERVICES	)	2016-ED-40, 2016-ED-42, 2016-ED-43
OF ILLINOIS, FLCA, DONICA CREEK,	)	2016-ED-44, 2016-ED-45, 2016-ED-47
LLC and UNKNOWN OWNERS,	)	2016-ED-48, 2016-ED-49, 2016-ED-50
et al.,	)	2016-ED-51, 2016-ED-52, 2016-ED-53
Defendants.	)	2016-ED-54, 2016-ED-55

REBUTTAL REPLY

NOW COME the Defendants in these Eminent Domain Actions filed by AMEREN, by and through their Attorney, S. Craig Smith of Asher & Smith, and respectfully offer the following Rebuttal Reply filed in each of these cases:

I. Landowners Are Not Barred from Raising Due Process and Constitutional Claims Because the Fourth District Appellate Court Did Not Find that Their Protected Property Interests Were At Risk.

The issue raised by ECCPD in the *Adams County* case, that the Illinois Commerce Commission violated their due process rights, was not answered by the Court, in that the Court found that there was no protected property interests. *Adams County Property Owners and Tenant Farmers v. Illinois Commerce Commission, et al.*. 2015 Ill. App. (4th) 130907, 36 N.E.3d 1019, 394 Ill. Dec. 728 (2015). Therefore, there is no notice required. The *Adam County*

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decision held that the only issue before the ICC was ATXI's Petition for a Certificate of Necessity, which only allowed ATXI the right to proceed with the project some time in the future. The landowners at this stage are not barred to seek their constitutional protections because *res judicata* and issue preclusion (as to the *Adams County* decision) have no bearing on this case since the landowners' constitutional due process rights were not addressed in the *Adams County* case. ATXI is correct that the *Adams County* decision did find that the landowners were not entitled to due process during the certificate hearing because the Court felt that there was no taking or deprivation of property rights. However, in this case, before this Court, the landowners' protected property rights are being deprived, and their rights to due process have been denied..

Thirty-five separate Defendants have attached Affidavits to their Traverse and Motion to Dismiss, stating that they did not receive notice that their land was being considered for the transmission line being considered by the ICC for the Illinois Rivers Project Certificate. (See Group Exhibit 14.) The Court can see that the Affidavits are from local landowners, out-of-state landowners, and bank trust departments. The fact that thirty-five separate landowners and trust departments did not receive notice of the proceedings before the ICC should not be overlooked by the Court in this cause of action. It would be a statistical anomaly to find that the ICC did provide the landowners with notice of the new interventors' third route when ATXI cannot show any landowner from Kansas, Illinois, to Oliver, Illinois, received notice of the intervenors' new proposed line.

The *Adams County* decision is not *res judicata* as to the argument before this Court,

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which involves protected property rights which ATXI is attempting to acquire through eminent domain. It is the position of the landowners that their property rights are at risk, and that they will be deprived of those property rights without due process of law because they received no notice that their land was subject to a taking without allowing them an opportunity to be heard. "Although there is much conflict between the parties on appeal regarding whether notice was actually mailed to ECCDP's members by the Commission, we find it unnecessary to address this specific argument. . . . The underlying proceeding before the Commission neither conferred property rights on ATXI nor deprived landowners of their protected property interests. . . . The due process of ECCDP's members were not violated." *Adams* at 36 N.E.3d 1041, 394 Ill. Dec. 750.

The United States and Illinois Constitutions provide for fundamental fairness. That fairness is that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV; see also, Ill. Const. 1970, Art. I §2. "'The core of due process is the right to notice and a meaningful opportunity to be heard;' no person may be deprived of a protected interest by an administrative adjudication of rights unless these safeguards are provided." *Adams* at 36 N.E.3d 1033, 394 Ill. Dec. 742. In the *Adams County* decision, the Court found that "a due process analysis must begin with a determination of whether a protectable interest in life, liberty, or property interest exists. If one is not present, no process is due." *Adams* at 36 N.E.3d 1033, 394 Ill. Dec. 742. In its analysis, the Court felt that there was no property interest involved in the hearing before the ICC, it was merely an Application for a Certificate of Convenience and Necessity. Therefore, there was no protected property interests

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that would be taken as a result of the hearing and the eventual decision made by the ICC. The Court went on to state that it was simply one of the steps in a chain of events which would proceed with the development and the eventual acquisition of property by voluntary conveyance or by eminent domain. *Adams* at 36 N.E.3d 1035, 394 Ill. Dec. 744. Therefore, the Appellate Court did not feel that there was any constitutional issue since this was merely an approval of a route to be potentially developed in the future, "this hearing is merely an application for certificate of convenience and necessity." *Adams* at 36 N.E.3d 1035, 394 Ill. Dec. 744..

If the landowners' property rights are at risk, then pursuant to the United States and Illinois Constitutions, the landowners are entitled to due process of law, have a right to notice, and have a right to be heard. Defendant Landowners are now allowed to present the issue of whether they are entitled to due process before ATXI starts depriving them of their property interest.

"Courts are not preempted from inquiring into the same subject matter as the Commission during certification proceedings." *Illinois Power Company, v. Chester D. Lynn, et al.*, 50 Ill. App. 3d 77, 82, 8 Ill. Dec. 26, 365 N.E.2d 264, 268. The Court further held: "The hearing (before the Commission) was on the reasonableness of the utility's plans and could not confer property rights . . . . The appearance of the owners before the Commerce Commission to give input into the plans or object thereto, could not bar them from later exercising their rights as owners of property being taken for public use. There is nothing in . . . Utilities Act preempting the rights of the property owners in the condemnation proceedings." *Lynn* at 50 Ill. App. 3d 81-82, 8 Ill. Dec. 26, 365 N.E.2d 267.

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The *Lynn* decision further defined the role of the Commerce Commission when it stated: "The Commerce Commission is an extension of the legislative branch. It considers the plans of the utility, endorses them with a certificate of convenience and necessity, and authorizes the utility to proceed with an enabling order." *Lynn* at 50 Ill. App. 3d 81. The Commerce Commission's Order "did not amount to an appropriation of owner's property and the making of the order gave the [Commerce Commission] no rights in owners' property. The property owners' rights are in jeopardy for the first time in court and are protected there by the motion to dismiss and traverse." *Lynn* at 50 Ill. App. 3d 81. "In essence then, the property owners . . ., were not 'parties to the proceeding' in the sense of parties to a litigation. . . . There is nothing in the Public Utilities Act preempting the rights of the property owners in the condemnation proceedings." *Lynn* at 50 Ill App. 3d 82.

ATXI did hold three public hearings to discuss the Illinois Rivers Project, and part of their hearing showed ATXI's primary and secondary lines. The primary line is located more than 10 miles south of the final transmission line approved by the ICC (the third route proposed by an intervenor). The secondary proposed transmission line is located more than 4.5 miles south of the final approved transmission line. (See Exhibit 13.) Your landowners were never told nor did they receive any notice that a third route was proposed by an intervenor, and that their property would be in play. This was merely a shell game the ICC allowed by not giving notice to the Edgar County Landowners that a third route had been proposed.

Lynn and *Adams County* relied on two Supreme Court decision, *Zurn* and *Cavanagh*, that held that proceedings before the Commission neither conferred property right on ATXI, nor

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deprived landowners of their protected property interests. *Adams* at 36 NE 3d at 1035, 394 Ill Dec. 744. Therefore, those decisions only held that landowners cannot assert due process violation before the ICC. None of those decisions are *res judicata* as to the issue of when a landowner can assert due process rights. The question before this Court is when can property owners assert their due process rights, if not now?

II. The Eminent Domain Act Does Not Provide Any Constitutional Safeguards for Landowners Who Have Not Been Given Any Due Process to Notice and Meaningful Opportunity To Be Heard.

While it is true that the *Adams County* decision discussed United States and Illinois Constitutions, it did not render any decision concerning landowners' due process rights under the Constitutions. Instead, the Court stated that their analysis must begin with the determination of whether there was a protected interest in life, liberty or property, because if protected property interests are not involved, then the Court found that no process is due. So, the decision was merely lip service, stating no person can be deprived of their protected interests by administrative hearings, and that a party should have a right to a fair hearing, including the right to be heard, the right to cross-examine adverse witness, and the right to present evidence, but then found that the Edgar County Landowners were not entitled any of those protections because the Court found that they did not have a protected property interest at risk during the ICC hearing. The *Adams County* decision did not render any decision on the constitutionality of the Public Utilities Act, §8-406.1 because the Court felt that the Landowners' property rights were not affected by the ICC decision granting the certificate of necessity.

ATXI argues that they have carried their burden of setting forth a *prima facia* eminent

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domain case. They list the elements under the Eminent Domain Act, *i.e.*, they have the authority to proceed; the easement is for the benefit, use, or enjoyment of the public; easement is correctly described and certified plat; all owners of record have been named; and that their prayer of relief asks the Court to set the compensation to be paid for said easement. However, they fail to recognize that before a party should be able to get to a Petition for Eminent Domain, that the landowner is entitled to due process under both the United States and the Illinois Constitutions, which provide that the landowner is entitled to notice that his protected property interest is at risk. "Pursuant to the United States and Illinois Constitutions, no person may be deprived of life, liberty, or property without due process of laws." U.S. Const. amend. XIV; see also, Ill. Const. 1970, Art. I §2.

> "'The core of due process is the right to notice and a meaningful opportunity to be heard;' no person may be deprived of a protected interest by an administrative adjudication of rights unless these safeguards are provided." *Adams* at 394 Ill. Dec. 742.

In other words, ATXI should not be allowed to show up at an Edgar County Landowner's front porch announcing that they have come to take his land, without first allowing the landowner the right to prior notice and the right to be heard in an administrative hearing.

The Affidavits of thirty-five separate Landowners and the Resolution passed by the Edgar County Board establish that no notice was given to our Landowners that would satisfy their constitutional rights of due process. (See Exhibit 11, Resolution, attached to Motion to Dismiss.) The Edgar County Landowners, whose property ATXI wants to build a transmission line upon or across, did not participate in the Commission's proceedings due to the fact that they never received notice. The notice they failed to receive was notice that, apparently, every

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similarly situated property owner across the State received.

While it is true that the *Adams County* decision held that proceedings under §8-406.1 do not implicate landowners' property rights in a significant way. However, after the §8-406.1 proceedings were completed, ATXI's certificate gave it the right to construct a transmission line along a certain route, and property owners no longer had an opportunity to have any meaningful chance to object to the path of the transmission line. Therefore, realistically, after the ICC's Order was entered, it became a mere foregone conclusion that the Landowners' property rights would be deprived and at risk in the future. In effect, after the Order was granted, the only thing that remains is the negotiation process for acquiring property. All constitutional safeguards for property rights have vanished. The §8-406.1 Order did have a significant impact on landowners' property rights. It became a mere foregone conclusion that they will lose their land to ATXI. In effect, after the Order was granted, the only thing that remains is the negotiation process for acquiring their property. Edgar County Landowners' right to be heard is now.

III. CONCLUSION

The Edgar County Landowners request this Court to determine that they have protected property interests that demand due process protection, and the failure of the Landowners to be notified of the alternate route change amounted to a violation of their due process rights. Moreover, this Court should determine that the notice provided to the Edgar County Landowners as a result of the minimal amount of notice laid out in §8-406.1 was not enough to comport with the constitutional demands of due process. As such, the failure to notify of the alternate route change resulted in a constitutional violation of the Edgar County Landowners due process rights.

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The Edgar County Landowners respectfully request that this Court dismiss the Petitions for Eminent Domain and for any other relief that this Court deems just.

Respectfully Submitted,

Defendants in the Eminent Domain Actions Filed
By Ameren
By: Asher & Smith, their Attorneys

S. Craig Smith, Attorney

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FILED
DEC 23 2016
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IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
EDGAR COUNTY, ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	Case Nos.: 2016-ED-4, 2016-ED-5, 2016-ED-6, 2016-ED-12, 2016-ED-13, 2016-ED-15, 2016-ED-16, 2016-ED-17, 2016-ED-18, 2016-ED-19, 2016-ED-20, 2016-ED-21, 2016-ED-22, 2016-ED-23, 2016-ED-24, 2016-ED-25, 2016-ED-27, 2016-ED-28, 2016-ED-29, 2016-ED-30, 2016-ED-38, 2016-ED-40, 2016-ED-42, 2016-ED-43, 2016-ED-44, 2016-ED-45, 2016-ED-47, 2016-ED-48, 2016-ED-49, 2016-ED-50, 2016-ED-51, 2016-ED-52, 2016-ED-53, 2016-ED-54, 2016-ED-55
Plaintiff,	)	
v.	)	
RICHARD L. HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC, and UNKNOWN OWNERS, *et al.*,	)	
Defendants.	)	

MOTION TO LIMIT SCOPE OF HEARING AND BAR WITNESSES

NOW COMES Plaintiff, AMEREN TRANSMISSION COMPANY OF ILLINOIS (hereinafter "ATXI"), by and through its attorneys, David A. Rolf, Lisa A. Petrilli, and Gary A. Brown, of Counsel, and moves this Court prior to hearing in this matter to limit the scope of the hearing to issues of traverse and to bar Defendants' witnesses, thereby denying the Motion to Dismiss which rests entirely on the issue of notice and due process before the Illinois Commerce Commission. In support of this relief, ATXI states as follows:

I. A condemnation proceeding is not the proper place to challenge the legality of a Commission decision or proceeding; those functions are vested in another court under another process.

As Mr. Smith stated at the prior hearing, the landowners "think that all subject matters that were before the Commission are now before this court..." (Transcript, Pg. 13), referencing the Lynn decision. Given this Court's stated willingness to learn, and having the opportunity to educate all involved, (Transcript, Pg. 19), the starting point in evaluating the proper scope of Plaintiffs' traverse motion should be a review of the statutory procedure for challenging an Illinois Commerce Commission decision and proceeding. On this point, and as described below,

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the Fourth District Appellate Court has very recently explained what is and is not appropriate for the circuit court to review in an eminent domain case.

There is a procedure in place for challenging the Illinois Commerce Commission's action in granting the Certificate, a procedure of which many of these landowners availed themselves. The legislature has vested direct review of Illinois Commerce Commission decisions in the appellate court. 220 ILCS 5/10-201. The relevant portion of the Illinois Public Utilities Act (PUA), Section 10-201, provides the Commission decisions may be appealed "...to the appellate court of the judicial district in which the subject matter of the hearing is situated..." 220 ILCS 5/10-201(a).

The appellate court's duties are also set forth in the statute, and include:

(e) Powers and Duties of Reviewing Court:

....

(iv) The court shall reverse a Commission rule, regulation, order or decision, in whole or in part, if it finds that:

A. The findings of the Commission are not supported by substantial evidence based on the entire record of evidence presented to or before the Commission for and against such rule, regulation, order or decision; or

B. The rule, regulation, order or decision is without the jurisdiction of the Commission; or

C. The rule, regulation, order or decision is in violation of the State or federal constitution or laws; or

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D. The proceedings or manner by which the Commission considered and decided its rule, regulation, order or decision were in violation of the State or federal constitution or laws, to the prejudice of the appellant.

People v. Illinois Com. Com., 2014 IL 116642 (2014) (appeal of proceeding under PUA governed by terms of the PUA); Lakehead Pipeline Co. v. Illinois Com. Com., 296 Ill.App.3d 942, 696 N.E.2d 345 (3rd Dist. 1948) (on appeal from Commission, appellate court's review includes whether state or federal constitutional rights have been infringed.)

The fundamental problem with the due process challenge raised in landowners' Motion to Dismiss is that it is a challenge to process they allege was due them in the Illinois Commerce Commission Certificate proceeding. That is to be distinguished from a due process challenge, alleging they were denied due process in the eminent domain proceeding pending in *this* Court. There is no due process challenge with respect to this eminent domain proceeding, as the landowners were served with the Complaint, have appeared by and through counsel, and can fully participate in a trial on the merits for a determination of compensation due them for the easement being sought.

Through a perceived misconstruction of the Fourth District Appellate Court Opinion in Adams County Property Owners and Tenant Farmers v. The Illinois Commerce Commission, the landowners here seek to have this Court determine whether their due process rights in the Certificate proceeding before the Illinois Commerce Commission were deprived. The Fourth District – under the proper Section 10-201 mechanism referenced above - squarely addressed this issue. The Fourth District Appellate Court in the Adams County decision clearly stated that "the underlying proceedings before the Commission neither conferred property rights on ATXI, nor deprived owners of their protected property interests." It concludes that same paragraph by

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holding "[t]he due process rights of ECCDP's members were not violated." By asking this Court to entertain the landowners' argument with respect to notice and due process before the Illinois Commerce Commission at this stage in the proceeding, the landowners are asking this Court to invade the jurisdiction of the Illinois Commerce Commission and impose upon it obligations that the Appellate Court, performing a duly-authorized review under Section 10-201, has already found do not exist. This Court must recognize that in entertaining this argument, it is ignoring the appropriate statutory review process and sanctioning what amounts to an end-around on the mechanisms that must be used to challenge the legality of a Commission proceeding.

The Fourth District Appellate Court, in a decision just this past week in the continuing challenges to the Enbridge Energy LLC pipeline, provided further guidance of the scope of a traverse filing and hearing. (Copy attached). Addressing Lynn, the court noted that landowners are permitted "to present relevant evidence to rebut the public-use and public necessity presumptions [ATXI] enjoyed by virtue of the Commission's Certificate and eminent domain determinations. In addition, landowners [are] also entitled to challenge the Commission's determination that [ATXI] had engaged in good-faith negotiations when the Commission granted [ATXI] eminent-domain authority." See Paragraph 161.[1]

Of particular import here is what the Appellate Court noted are *not* proper subjects of a traverse hearing and, therefore, what the trial court should decline to consider:

> We note, however, that in their July 2014 traverse motions, landowners disregarded the limited scope of the traverse hearing by attempting to litigate anew the Commission's certification and eminent-domain decisions, which this court affirmed on appeal. In this regard, landowners claim that (1) IEPC is "not properly vested with authority to acquire: their tracts of land, (2) the SAX project did not "constitute a common carrier because of restrictions on access to the proposed pipeline," (3) the Commission's grant of eminent-domain authority did not apply to the current SAX pipeline project, and (4) IEPC did not possess the

[1] As will be noted following, landowners have disclosed no witnesses to testify as to any of these permitted issues.

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legal authority to construct the SAX pipeline project. Such issues are not the proper subjects of a traverse hearing, and on remand, the trial court should decline to consider them.

It is clear, therefore, that a proper challenge to the decision made by the Commission in the Certificate proceeding must be made to the Appellate Court and only to the Appellate Court. It is clear that the Appellate Court's duties include constitutional review of the Commission process. It is clear that the constitutionality of the Commission process is not an appropriate subject for the trial court to consider in a traverse proceeding. If there was any confusion in this regard, the Enbridge decision has now clarified this point. It is not within the jurisdiction of this Court to invalidate the Commission's Certificate, nor ignore that the Appellate Court has already performed its review. This Court should decline to consider the due process issue.

II. Landowners' witness disclosure demonstrates they are only attacking the due process components of the Illinois Commerce Commission hearing.

At the previous hearing before this Court on the Motion to Continue, the Court set forth a Scheduling Order requiring that the landowners disclose their witnesses pursuant to the standards of Illinois Supreme Court Rule 213(f). The landowners have now done so and a copy of that disclosure is attached hereto as **Exhibits A and A1**[2]. It is clear from this disclosure that the landowners intend to pursue, and to only pursue, the notice and due process argument raised in their Traverse and Motion to Dismiss. Landowners have disclosed no opinion witnesses, either retained or independent, to express any opinions on the subject matter of the necessity of the project, the public use of the project, the adequacy or excessiveness of the easement area sought, nor any of the other issues that may properly be raised by a landowner in a traverse proceeding. Rather, the entirety of their witness disclosure identifies "Notice/Due Process" as the subject

[2] The landowners' initial disclosure (Exhibit A) lacked the information required by Supreme Court Rule 213(f)(2), providing only the subject matter of the testimony. Upon request of ATXI, the disclosure was supplemented by Exhibit A1.

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matter. Their list consists of (1) the landowners themselves, stating only they will testify as to notice; (2) two Illinois Commerce Commission Commissioners, tendered to testify on Illinois Commerce Commission notice requirements and who voted to allow a rehearing on the issuance of Certificate [thus the minority votes of the Commissioners deciding that issue]; (3) the two Administrative Law Judges from the Commission proceeding one of which is no longer employed by the Commission, and (4) eight Illinois legislators to testify about notice under Section 8-406.1 of the Public Utilities Act – presumably including an amendment to that statute that was passed *after* the proceeding at issue.

It is clear that all the witnesses are offered on the issue of notice. Further, all of the witnesses are offered on the issue of notice at the Commission, in the Commission Certificate proceeding. It cannot be any clearer, now that the landowners have made their witness disclosure, that notice at the Commission is the only issue they are going forward on at the hearing.

The extent of the testimony landowners have identified clearly indicates that their argument far exceeds the roll of this Court in an eminent domain case. Attached hereto as **Exhibit B** is the copy of the bill status for Senate Bill 1726, which amended Section 8-406.1 of the Public Utilities Act, the Section under which this project has proceeded for approval through the Illinois Commerce Commission. The Court will note in the landowners' disclosure the August 18, 2015 date referenced in the subject matter of the legislator witnesses' testimony as the effective date of an amendment to 8-406.1. That is *two years* after the Illinois Commerce Commission decision on which the landowners are seeking to present evidence of notice and due process before this Court. The eight legislators disclosed are the sponsoring Senator and the seven co-sponsoring Representatives. Clearly, those witnesses can provide no factual

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information with regard to the notice received by these landowners. Equally clear is that a change in the law after the fact has no bearing on its propriety at the time in question. The landowners are simply seeking to re-contest the constitutionality of 8-406.1, a challenge which they have already made to the Fourth District Appellate Court and on which the Fourth District Appellate Court has already ruled, upholding its constitutionality. Query whether if there was a dissenting justice to the Adams County Fourth District Opinion that justice would also be on the landowners' disclosure.

The fact that the landowners have disclosed sponsors of the legislation amending 8-406.1 in reality supports that their due process rights were not violated. While the landowners may not like the procedure that was in place, it is clearly the Legislature's responsibility to change it, and not that of the judiciary. That there may have been legislative changes to 8-406.1 two years after the Certificate was issued on this project affirms that what the landowners may want in terms of notice procedure is a legislative issue to resolve and not a constitutional issue of due process for this Court. Accordingly, going down this path of entertaining the landowners' due process challenge is again an instance of this Court being asked to step out of its proper role and into the jurisdiction of the legislature.

III. The Fourth District has ruled on landowners' precise issue.

The Fourth District Appellate Court decision in Adams County clearly decided the landowners' due process rights despite their argument that the question was not answered. They misconstrue the Court's statement that the landowners had no property rights at issue, the basis for the Court's finding that their due process rights were not violated. The focus at the prior hearing was on Paragraph 80 of the Adams County decision, perhaps giving too much emphasis to the Court's statement that it finds it unnecessary to address the specific argument. The Court

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goes on to immediately explain why it was unnecessary: "As already discussed...," meaning the due process issue was addressed earlier in the Opinion when dealing with the Adams County landowners. Paragraphs 45 through 51 is the discussion that concludes, as does Paragraph 80, with the holding that the landowners "...were not entitled to due process during those proceedings and cannot assert a due process violation." In the face of that analysis and holding, the landowners here are asking this Court to act in direct contradiction to its reviewing body, the Fourth District Appellate Court, and create due process rights in the Commission Certificate proceeding. These "rights" did not exist. If the landowners had no property rights at issue in the Commission's Certificate proceeding, it is impossible for the filing of an eminent domain action to retroactively create property rights in that proceeding.

IV. The disclosed testimony from landowners' independent expert witnesses is irrelevant and should be barred on such grounds.

As further support for the Motion to Bar Witnesses, the disclosed testimony expected to be elicited from all of landowners' independent expert witnesses is irrelevant. A review of that proposed testimony makes it clear that it has no bearing on the issue of what notice the landowners received.

A. Commissioners

Landowners disclosed that they expect to elicit from two Illinois Commerce Commission Commissioners what Illinois Commerce Commission notice requirements were to landowners on the proposed route, as well as their vote to allow rehearing and the reason therefore. There is no dispute as to what the Illinois Commerce Commission notice requirements were to the landowners, and those requirements were not even in dispute before the Fourth District Appellate Court in the Adams County matter. The Appellate Court noted that "ATXI complied with the notice requirements of Section 8-406.1..." @ Paragraph 78. Therefore, whether either

SUBMITTED - 563008 - Angie Barnett - 1/22/2018 10:13:01 AM

Commissioner knows what those requirements were or not is irrelevant, and adds nothing to assist this Court in deciding the notice/due process issue (or for that matter, a proper traverse). Likewise, that the two Commissioners identified voted, obviously in the minority of the Commissioners to vote, to allow the Edgar County landowners a rehearing is irrelevant, as much as is their reason. The votes of these Commissioners are of record, and as stated above, obviously in the minority since the rehearing request was denied. The reason for any particular member of tribunal deciding an issue is irrelevant to this Court's review of the landowners' due process issue.

This Court is not being asked to review the decision of the Commission on whether to grant or deny the landowners a rehearing. It is, however, particularly telling that again the crux of the landowners' argument in this Court is focusing on a review of the Illinois Commerce Commission proceeding in granting the Certificate, a procedure already appropriately reviewed by the Fourth District Appellate Court. Indeed, based on the review of the facts as set forth in Paragraphs 75 and 76 of the Adams County decision, it is clear that the Edgar County landowners' Application for Rehearing was not a valid filing, the landowners having not been granted leave to intervene, and thus not being a party before the Commission. This Court should avoid being drawn into review of matters not appropriately before it.

B. Administrative Law Judges

The disclosure for the Administrative Law Judges again, as with the Commissioners, suggests that they will be asked to speak to the notice requirements established by the Administrative Law Judges and Illinois Commerce Commission to landowners. There is no dispute as to the existence of these requirements, and such requirements need no testimony. Likewise, an Administrative Law Judges' opinion as to the purpose of requiring that notice, or

SUBMITTED - 963006 - Angela McKee - 12/20/2018 10:13 AM

comments made during different status calls is irrelevant and adds nothing to the factual issues for which the evidentiary hearing is scheduled to take place before this Court. The Certificates attached to the pleadings already before the Court reflect comments of both Administrative Law Judges, whose role is to make recommendations to the Illinois Commerce Commission. As such, their opinion as to any issue in the Illinois Commerce Commission proceeding is irrelevant to the legal issue of due process. Therefore, the testimony should be barred.

C. Illinois Legislators

The eight Legislators, the sponsor and co-sponsors of the amendment to 8-406.1, which amendment took place two years after the Certificate was issued, add nothing of value to the Court's determination on the due process issue. Paragraphs A and B for each disclosed witness merely suggests landowners will elicit from each Legislator their knowledge of the notice requirements in the statute both before and after the amendment. There can be no possible relevance to those eight Legislators' knowledge, nor the knowledge of any other Legislator as to the requirements of 8-406.1. Likewise, the fact that these Legislators were co-sponsors of the amendment and the purpose of that amendment is irrelevant to the issue of whether the landowners' due process rights were violated two years previously.

The last disclosure is the suggestion that these Legislators will opine that due process should be required to landowners prior to the Order of Certificate of Public Convenience and Necessity. It appears, therefore, that the Legislators would have a difference of opinion with the Fourth District Appellate Court. In any event, presumably the Legislators thought they solved that problem through legislative action by the amendment, again noting that ATXI followed all of the notice as requirements even in the amended provision. Thus, the list of independent

SUBMITTED - 565008 - Angie Brooks - 1/22/2018 10:13:01 AM

experts and the purported testimony landowners expect to elicit from them is clearly irrelevant and should be barred.

Conclusion

ATXI respectfully requests this Court to enter an Order limiting the hearing to issues appropriately raised in a traverse proceeding, and thereby deny the Motion to Dismiss on the issue of due process at the Illinois Commerce Commission, or in the alternative, bar the witnesses and testimony of all of the disclosed Independent Expert witnesses.

AMEREN TRANSMISSION COMPANY OF ILLINOIS,
Plaintiff,

By: _____
One of Its Attorneys

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SUBMITTED - 565106 - Angie Barnett - 1/22/2018 10:13:01 AM

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served via email and by placing same in a sealed envelope addressed:

Mr. Craig Smith
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1119 North Main Street
Post Office Box 340
Paris, IL 61944

and by depositing same in the United States mail in Springfield, Illinois, on the 20th day of December, 2016, with postage fully prepaid.

SUBMITTED - 573078 - Angie Barnett - 1/22/2018 10:31 AM

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT OF ILLINOIS
EDGAR COUNTY, PARIS, ILLINOIS

FILED
FEB 01 2017
Angela R Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

AMEREN TRANSMISSION COMPANY OF ILLINOIS, Plaintiff,	),)))	
vs.	)	CASE Nos: 2016-ED-4,5,6,12,13 15-25,27-30,38,40,42-45,47-55
RICHARD L. HUTCHINGS, RITA HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, *et al.*, Defendants,	)))))	

ORDER

THIS MATTER comes before the Court on the Defendants' Traverse and Motion to Dismiss filed August 9, 2016, along with a Memorandum in Support filed September 12, 2016. Plaintiff filed their Response thereto on October 17, 2016 and Defendants' Rebuttal Reply was filed November 4, 2016.

Plaintiff has filed a Motion to Limit Scope of Hearing and Bar Witnesses on or about December 20, 2016 and that matter was heard this 30th of January, 2017.

ANALYSIS

This is a proceeding in eminent domain filed by Ameren as the result of a Certificate of Public Convenience and Necessity issued by the Illinois Commerce Commission (ICC) on August 20, 2013 and February 20, 2014. Ameren chose to proceed by means of the "expedited

SUBMITTED - 563006 - Angela McKee - 1/22/2018 10:31 AM

procedure" set forth in the Public Utilities Act (220 ILCS 5/8-406.1) in order to construct what has been referred to as the Illinois Rivers Project (ICC Docket No. 12-0598)

Defendants contend they received no notice of the proceedings before the ICC, or no notice that the proposed or considered routes of the project directly affected land they owned, until after the Certificate was issued. They contend they have been denied procedural due process as a result of that failure and will suffer substantive due process by the taking of their land for easements.

It would appear that at the time of the proceedings before the ICC there was no clear mechanism for how and when notice was to be provided. Plaintiffs contend that since notice was given at the outset of the proceedings that was sufficient; regardless of the fact that the proposed routes changed and ultimately, a route was chosen that was never included in the original application.

Although the Commission outlined a procedure for notice to any landowners involved in alternate routes, there was apparently no requirement that notice be provided as it was to landowners affected by the route proposed in the original application.

Plaintiffs contend *Adams County Property Owners and Tenant Farmers v. Illinois Commerce Commission*, 2015 IL App (4th) 130907 is dispositive of the issues raised by Defendants in their Traverse and Motion because the Appellate Court addressed the same issues with the same parties and rejected their constitutional due process argument.

In reality, the Appellate Court in *Adams County*, when discussing due process, referenced the fact that the proceedings before the ICC did not confer property rights on Ameren or deprive the landowners of protected property interests. That is true as far as it goes.

However, it is the decision of the ICC setting the routes which ultimately led to the eminent domain proceedings before this Court for those who did not choose to accept the offer of Ameren for a permanent easement over their property. As such, it is reasonable to conclude the

SUBMITTED - 563006 - Angie McKee - 1/22/2018 10:31 AM

necessary notice required for due process would be at least as much as that required for the ICC to determine which routes are best.

Section 8-406.1 as it existed at the time of the proceedings before the ICC did not elaborate on the nature of the notice required other than to provide for "notice and hearing".

The Illinois Administrative Code provides, however, that when persons file applications under 8-406 or 8-503 of the Act, they must include in the application, the names and addresses of landowners affected by the proposed project. 83 Ill. Admin. Code Section 200.105(h) the Chief Clerk of the ICC is then required to provide notice to those named landowners of the initial hearing on the application.

Neither Section 8-406.1 of the Act nor Section 83.200.150(h) of the Illinois Administrative Code explained the procedure for notifying landowners whose property could be directly affected when, while a petition was pending, an intervening party proposed an alternate route.

Here, the Administrative Law Judges decided that due process required any intervenor proposing alternate routes should be required to include contact information for landowners who would be affected by those routes.

It is alleged that for many Defendants here, their first notice of any intention by Ameren to seek to exercise a permanent easement over their property was a letter dated September 6, 2013 advising them of the ICC Order entered August 30, 2013 issuing the Certificate to Ameren to begin construction.

The logic of requiring notice to all affected landowners at the time of the initial application is obvious. The failure of the statute providing for an expedited certification proceeding to address notice similarly is troubling; especially as it relates to intervenors who may be proposing completely different routes.

If Due Process requires individual notice to those affected by the initial application, it is difficult to ascertain a constitutionally adequate reason for disposing with this requirement for all subsequently identified classes of persons; namely, landowners of property affected by

SUBMITTED - 563076 - Angela McKee - 1/22/2018 10:13 AM

proposed alternate routes (whether identified by intervenors or the original parties themselves).

Lyon v. Department of Children and Family Services, 309 Ill.2d 264 (2004) says due process is a matter of federal constitutional law so compliance or non-compliance with State procedural requirements is not determinative of whether minimum procedural due process standards have been met.

Due process principles apply to administrative proceedings and procedural due process claims are focused on the procedures used to deny a person's property interest.

Although AMEREN disagrees, what appear to be a matter of first impression is the interpretation of "notice and hearing" as referred to in the expedited certification procedure of Section 8-406.1 vis-à-vis the notice required in Section 8-406.

The Court recognizes the ruling in *Adams*, however the procedural due process claims of the Defendants were not addressed because the Court found there were no substantive due process rights affected by the proceedings before the ICC.

What seems to be ignored are the presumptions which flow to AMEREN upon receipt of the certification which directly affects the property rights of those who become defendants in eminent domain proceedings.

Although *Adams* said property owners were free to litigate the same subject matter addressed by the Commission, 735 ILCS 30/5-5-5(c) gives AMEREN certain statutory presumptions relating to authority, necessity, and public purpose which deprive landowners of the opportunity to do so.

The statutory presumptions created by the PUA and Eminent Domain statutes provide AMEREN a prima facie case for eminent domain. This shifts the burden to the property owners. In effect, landowners were precluded from asserting lack of notice as a due process violation before the ICC. The Appellate Court's finding that no property interests were being affected by proceedings before the ICC,

SUBMITTED - 563006 - Angie McKee - 1/22/2021 8:01:31 AM

resulted in the landowners being deprived of the opportunity to litigate the same issues raised before the Commission in court because now certain matters are taken as rebuttable presumptions and a *prima facie* case for eminent domain has already been made. Lack of notice is arguably no longer an issue to be raised in the trial court.

As a result it becomes their burden to seek to protect their due process rights inherent in the constitution from being taken by a public utility, rather than the public utility being required to show adequate protection of their rights to procedural due process.

Courts are not pre-empted from inquiring into the same subject matter as the Commission during the certification process. *Illinois Power v. Lynn*, 50 Ill.App.3d 77 (1977). The hearing before the Commission was on the reasonableness of the utility's plan and could not confer property rights. An appeal of the order of the Commission, as noted by Defendants, would only be a review of the proposed plan for development of the project and the extent of the property sought. There is nothing in the PUA preempting the rights of the property owners in the condemnation proceedings.

Contrary to the assertions of AMEREN in their Response *Adams* did not address the constitutionality of Section 8-406.1. The Appellate Court merely found the Defendant's constitutional claims were defeated by the fact that no due process rights were affected by ICC proceedings.

The constitutionality of Section 8-406.1 is still an open question. The rules of statutory construction require the trial court to presume the statute constitutional unless it is conclusively established to be otherwise; either in its interpretation or implementation.

Defendants are not seeking to re-litigate the certification process. They are instead seeking to point out the deprivation of a constitutional right to due process that arises from the implementation of the procedure used to notify landowners in this case. Defendants here have alleged they never received the "notice and hearing" to which they are entitled by Section 8-406.1. This was not something which the Appellate Court was willing to consider on appeal, and now, it is arguable they

SUBMITTED - 963006 - Angie Barnett - 12/30/2021 10:01 AM

would otherwise be precluded from doing so in the eminent domain cases before this Court. This results in effectively denying Defendants the right to ever contest their lack of notice and hearing to which they were entitled and facing instead the now imminent taking of a property interest in their land through easements favoring the Plaintiff.

Such a result could not have been contemplated when the expedited proceedings were enacted. To allow the taking of property without ever receiving notice of the proceedings which would set that result in motion cannot amount to the procedural due process the Constitution requires.

For these reasons, the Plaintiff's Motion to Limit the Scope of Hearing is denied.

ENTER: 1-30-17

JUDGE

SUBMITTED - 563078 - Angie McKee - 1/27/2017 8:01:31 AM

FILED
APR 24 2017
Angela R Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
EDGAR COUNTY, ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	Case Nos.: 2016-ED-4, 2016-ED-5, 2016-ED-6, 2016-ED-12, 2016-ED-13, 2016-ED-15, 2016-ED-16, 2016-ED-17, 2016-ED-18, 2016-ED-19, 2016-ED-20, 2016-ED-21, 2016-ED-22, 2016-ED-23, 2016-ED-24, 2016-ED-25, 2016-ED-27, 2016-ED-28, 2016-ED-29, 2016-ED-30, 2016-ED-38, 2016-ED-40, 2016-ED-42, 2016-ED-43, 2016-ED-44, 2016-ED-45, 2016-ED-47, 2016-ED-48, 2016-ED-49, 2016-ED-50, 2016-ED-51, 2016-ED-52, 2016-ED-53, 2016-ED-54, 2016-ED-55
Plaintiff,	)	
v.	)	
RICHARD L. HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC, and UNKNOWN OWNERS, *et al.*,	)	
Defendants.	)	

STIPULATION

The parties hereto, by and through their attorneys who represent that they have authority to enter into this binding Stipulation for and on behalf of each of their clients in the above referenced cases stipulate as follows:

1. Ameren Transmission Company of Illinois ("ATXI") complied with all statutory and regulatory requirements for the filing of its Verified Petition for a Certificate of Public Convenience and Necessity pursuant to Section 8-406.1 of the Illinois Public Utilities Act and for an Order pursuant to Sections 8-406.1 and 8-503 of the Public Utilities Act, in the Illinois Commerce Commission proceeding docketed as Docket No. 12-0598, including the requirements of Section 8-406.1 of the Public Utilities Act and 83 Ill. Adm. Code Section 200.150.

2. In Exhibit C to its Verified Petition, ATXI provided the Illinois Commerce Commission with a list of landowners who owned property on ATXI's proposed primary and alternate electric transmission line routes, including those landowners who owned property on ATXI's proposed primary and alternate routes through Edgar County, Illinois.

SUBMITTED - 963006 - Angela McKee 1/22/2021 10:13 AM

3. On or about November 21, 2012, the Illinois Commerce Commission mailed notice to the landowners listed on ATXI's Verified Petition Exhibit C.

4. In December 2012 a group calling themselves the Stop the Power Line Coalition ("STPL"), which included landowners in Edgar County, Illinois, successfully petitioned the Illinois Commerce Commission to intervene in Docket No. 12-0598. In January 2013 STPL proposed alternate electric transmission line routes across property not crossed by ATXI's proposed primary and alternate routes.

5. Defendants own property on one or more of STPL's proposed transmission line routes.

6. The Administrative Law Judge in Docket No. 12-0598 instructed STPL to provide the Illinois Commerce Commission with a list of the names and addresses of the landowners on STPL's proposed transmission line routes.

7. STPL provided the list of landowners and addresses to the Illinois Commerce Commission. Defendants were on this list.

8. On January 31, 2013, a document entitled Notice and Notice of Continuance of Hearing with attached Service List, and accompany document entitled Alternate Landowner List, were filed in Docket No. 12-0598 by Chief Clerk of the Illinois Commerce Commission, and a copy of this document is attached hereto as **Exhibit 1**.

9. The following named Defendants would testify to the matters contained in the Affidavits attached to their respective Traverse and Motion to Dismiss and, additionally, that they did not receive any notice from the Illinois Commerce Commission on or after January 30, 2013, concerning proposed alternate route made by Intervenors, Stop Coalition Line:

1. Richard L. Hutchings and Rita M. Hutchings
2. The Edgar County Bank and Trust Co. Trust No. 455-195

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3. Butch L. Creech and Meghan M. Creech
4. The Laura C. Tate Living Trust
5. James H. Tate and Angela K. Tate
6. Matthew L. Garvin
7. State Bank of Chrisman Trust No. 476
8. Scott Henson
9. Donald E. Brinkerhoff, Dorothy H. Brinkerhoff, and Donna Weir
10. Donald E. Brinkerhoff, Dorothy H. Brinkerhoff, Richard J. Brinkerhoff, and Betty Brinkerhoff
11. Robert D. McNabb
12. Billy D. Higginbotham, Mike Higginbotham, and Terry Higginbotham
13. Daniel D. Smittkamp and Lisa R. Smittkamp
14. Jack Dwain Hoffman and Jill D. Hoffman
15. Stephen W. Eitel – State Bank of Chrisman, as Custodian
16. Marywill Holdings, LLC
17. Becker Family Living Trust
18. Michael Tresner
19. The Edgar County Bank and Trust Co. Trust No. 455-421
20. Karen See and L. Vern See
21. Lanell L. Becker Living Trust
22. Virginia R. Kirsch and William R. Rowse, Jr.
23. Richard A. Bennett Revocable Trust
24. Dorothy Baber 2004 Grantor Trust
25. Jane Nicholson Mangrum
26. Amanda Jill Shrader and Jeff D. Shrader
27. Patricia A. Schaich and Charles Schaich
28. Tom Ogle
29. Lori Ann Brengle
30. Ronald L. Martin, Thomas R. Martin, and Timothy J. Martin
31. Patricia Jane Martin
32. The Edgar County Bank and Trust Co. Trust No. 455-327
33. Thomas R. Martin and Timothy J. Martin, and The Edgar County Bank and Trust Co. Trust No. 455-410
34. Chris J. Patrick
35. L. Vern See

10. The final route chosen by the ICC through Edgar County was a combination of ATXI's proposed alternate route from Oliver, Illinois, to the east and STPL's proposed route that was located 4.5 miles north of ATXI's proposed alternate route.

SUBMITTED - 565006 - Angela McKee - 1/22/2018 10:13:01 AM

11. In September 2013, Defendants received a letter from ATXI dated September 6, 2013, notifying them that a certificate had been issued and that property they owned would be affected by the transmission line.

12. The Defendants—appearing under the title "Edgar County Citizens are Entitled to Due Process"—filed a motion to strike the entire certificate proceeding, and an application for rehearing at the Illinois Commerce Commission on September 19, 2013. The Illinois Commerce Commission denied the motion to strike the proceeding, and permitted the landowners to intervene only for the purpose of allowing them to seek appellate review.

13. Defendants received notice by mail from the Illinois Commerce Commission of ATXI's Petition for eminent domain authority pursuant to Illinois Public Utilities Act Section 8-509 proceeding in, as applicable, Docket No. 16-0040 on or about January 25, 2016 or Docket No. 16-0274 on or about April 29, 2016.

14. In Docket No. 16-0274, the Defendants in that case filed a letter with the Commission stating that the landowners would not object to the Company's Section 8-509 request for authority to condemn their property. In Docket 16-0040, the following Defendants petitioned the Illinois Commerce Commission and were granted leave to intervene: Scott D. Henson, Butch Creech and Meghan Creech, Richard Hutchings and Rita Hutchings, James H. Tate and Patricia J. Martin as Co-Trustees of Laura C. Tate Living Trust, James H. Tate and Angela Tate, and the Edgar County Bank & Trust Co. as Trustee of Trust No. 455-195 dated March 30, 1987 and Ron Woodyard.

This Stipulation is entered into by counsel for the parties without prejudice to any party's position as to the appropriateness of this Court's consideration of Defendants' due process challenge as raised in its Traverse and Motion to Dismiss.

SUBMITTED - 963006 - Angela McKee - 1/22/2021 10:41:31 AM

SUBMITTED - 563076 - Angie Barnett - 1/22/2021 10:41:31 AM

Respectfully submitted,

AMEREN TRANSMISSION COMPANY OF ILLINOIS,
Plaintiff,

By: _____
One of Its Attorneys
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Respectfully submitted,

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By: _____
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SUBMITTED - 565006 - Angie Barnett - 1/22/2018 10:13 AM

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

January 31, 2013

Ameren Transmission Company of Illinois Petition for a Certificate of Public Convenience and Necessity, pursuant to Section 8-406.1 of the Illinois Public Utilities Act, and an Order pursuant to Section 8-503 of the Public Utilities Act, to Construct, Operate and Maintain a New High Voltage Electric Service Line and Related Facilities in the Counties of Adams, Brown, Cass, Champaign, Christian, Clark, Coles, Edgar, Fulton, Macon, Montgomery, Morgan, Moultrie, Pike, Sangamon, Schuyler, Scott and Shelby, Illinois.	:	12-0598

NOTICE
AND
NOTICE OF CONTINUANCE OF HEARING

TO ALL PARTIES OF INTEREST:

Notice is hereby given by the Administrative Law Judges that on November 7, 2012, Ameren Transmission Company of Illinois ("ATXI") filed with the Illinois Commerce Commission ("Commission") a petition initiating Docket No. 12-0598. In its petition, ATXI requests the Commission's permission to build a 345 kilovolt electric transmission line from approximately Quincy, Illinois to Terre Haute, Indiana. ATXI proposed a preferred route and an alternative route for the transmission line in its petition. Other parties to this docket, however, have recently proposed alternative routes. You are receiving this notice because the Commission has been informed that you have an interest in property affected by one or more of the intervenors' alternative routes. As a potentially affected property owner, you may participate in this docket, which may ultimately determine the location of the transmission line that ATXI wishes to build. Additional information on this docket may be found on the Commission's e-Docket website. The address for the Commission's e-Docket website is: www.icc.illinois.gov/e-Docket/. You will need the docket number of this proceeding (12-0598) to access the relevant information.

Notice is also given by the Administrative Law Judges that the hearing in the above entitled matter has been continued to March 1, 2013, at the offices of the Commission, Springfield, Illinois, Leland Building, 527 East Capitol Avenue, at the hour of 10:30 A.M., for status. Those intervenors interested in participating may do so via telephone with the permission of the Administrative Law Judges.

SUBMITTED - 565006 - Angela McKee - 1/22/2013 10:41:31 AM

Notice is further given that the Administrative Law Judges have granted the January 25, 2013 "Motion to Withdraw Petition for Interlocutory Review of Stop the Power Lines Coalition."

Notice is further given by the Administrative Law Judges that due to the length of the list of entities to receive notice of this proceeding, the Chief Clerk's Office need not include with this notice the list of potentially affected landowners and entities. The list is available electronically on the Commission's e-Docket system under Docket No. 12-0598. The web address for the e-Docket system is: http://www.icc.illinois.gov/e-docket/. Those unable to access the list electronically may request that the Commission's Chief Clerk mail a hardcopy to them by calling (217) 782-7434.

Sincerely,

Elizabeth A. Rolando
Chief Clerk

EAR:lkb
Administrative Law Judges Albers & Yoder

cc: Policy
Mr. Kennedy
Mr. Brightwell
Mr. Rismiller
Mr. Zuraski
Mr. Rearden

SUBMITTED - 565106 - Angela McKee - 1/22/2018 10:13:01 AM

Service List 12-0598
Plus list of alternate landowners

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C 863

* Active Parties

Service List 12-0598
Plus list of alternate landowners

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& Timothy J. Tighe Jr.
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* Active Parties

SUBMITTED - 565006 - Angela McKee - 1/22/2018 10:31 AM

Service List 12-0598
Plus list of alternate landowners

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C 865

* Active Parties

Service List 12-0598
Plus list of alternate landowners

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C 866

* Active Parties

SUBMITTED - 963006 - Angela McKee - 1/22/2021 8:04:31 AM

Service List 12-0598
Plus list of alternate landowners

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* Active Parties

SUBMITTED - 963006 - Angela McKee - 1/22/2013 10:41:31 AM

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Lana M. Downing
PO Box 400
Paris, IL 61944

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Glen Mills, PA 19342

D. Wright
5236 N. 125th St.
Paris, IL 61933

Richard Hutchins
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Paris, IL 61933

Dorothy Baber
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Omaha, NE 68154

Hickory Grove Farms
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Dennison, IL 62423

Elizabeth Barett
404 W. Madison
Paris, IL 61944

Jason Stanfield
404 W. Madison
Paris, IL 61944

David & Evelyn Stanfield Trust
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Kansas, IL 61933

Edgar County Bank & Trust
PO Box 167
Chrisman, IL 61924

Laura Stanfield Prichard
231 Bingham Rd.
Carlisle, MA 01741

Helen Jane Mangrum
5121 N. 625th St.
Paris, IL 61944

James H. & Angela Tate
5637 E. 500th Rd.
Kansas, IL 61933

Oliver K. & Barbara S. Francis
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Paris, IL 61944

Bruce Cottle
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Kansas, IL 61933

Jeff & Amanda Shrader
2307 N. County Rd. 2200 E.
Charleston, IL 61920

Patricia Martin
529 McCord Dr.
Paris, IL 61944

Marilyn I. Gough Trust
5250 E. 250th Rd.
Kansas, IL 61933

Laura Tate
6209 E. 517th Rd.
Paris, IL 61944

Mary A. Hillyard Trust
715 6th St.
Charleston, IL 61920

Nelson & Lila Hawkins
7214 Anglin Rd.
Paris, IL 61944

State Bank of Chrisman
Trust 476
5871 N. 925th St.
Paris, IL 61944

Matthew L. Garvin
4 Pinto Dr.
Leroy, IL 61752

Donald E. & Dorothy H. Brinkerhott
5461 N. 800th St.
Paris, IL 61944

Heirs of T.A. Foley
308 Columbine
Clarendon Hills, IL 60514

Thomas J. & Vickie D. Titus
8752 E. 550th Rd.
Paris, IL 61944

Kyle Mooneyham
5486 N. 925th St.
Paris, IL 61944

SUBMITTED - 363006 - Angie McKee - 1/22/2021 8:41:31 AM

Alternate Landowner List

John H. See
20184 N. 825th St.
Metcalf, IL 61940

Harold & Bonnie Franz
5574 N. 1000th St.
Paris, IL 61944

Tom Ogle
5150 N. 1000th St.
Paris, IL 61944

Larry Maynard
3395 Grove Pkwy.
Columbus, IN 47203

Charles & Jo Anne Setzer
10403 E. 550th Rd.
Paris, IL 61944

Phylip Griffin
5392 N. 1050th St.
Paris, IL 61944

Scott Henson
5401 N. 1100th St.
Paris, IL 61944

Bartlett A. Krebs Trust
1663 53rd St.
Moline, IL 61265

Ronald & Thomas S. Martin
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Paris, IL 61944

Edgar County Bank Trust
455-410
5704 N. 1175th St.
Paris, IL 61944

Chris & Paige Patrick
PO Box 547
Paris, IL 61944

David Patrick
10501 IL Hwy 133
Paris, IL 61944

Vern & Karen See
5293 Public Well St.
Paris, IL 61944

Daniel & Lisa Smittkimp
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c/o Stephen Eitel, IRA
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Paris, IL 61944

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Paris, IL 61944

Duane & Connie Hess
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Paris, IL 61944

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Bernie Tompkins
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Paris, IL 61944

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Norma & Frances Becker
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Paris, IL 61944

Lanell Becker Living Trust
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Paris, IL 61944

SUBMITTED - 363006 - Angela McKee - 1/22/2021 8:41:31 AM

Alternate Landowner List

First Bank & Trust 893-048
16450 Hill Rd.
Paris, IL 61944

Mary R. Strow
16536 Hill Rd.
Paris, IL 61944

Gary Tresner
16923 Hill Rd.
Paris, IL 61944

Brent Becker Living Trust
3809 IL Hwy 1
Paris, IL 61944

John & Mary Thomlinson
4524 IL Hwy 1
Paris, IL 61944

Deborah Dougherty
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Paris, IL 61944

Harry Hissem
16156 Hill Rd.
Paris, IL 61944

Darrin & Christopher Gher
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Paris, IL 61944

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16320 Hill Rd.
Paris, IL 61944

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Paris, IL 61944

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James & Rhonda Williamson
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Paris, IL 61944

Matthew Fitzpatrick
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Paris, IL 61944

Brandley & Margo Weargin
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Paris, IL 61944

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Paris, IL 61944

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Paris, IL 61944

Justin Rhoads
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Brook Garrett Dahlin
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Paris, IL 61944

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455-523
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Paris, IL 61944

William & Joel Redburn
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Cody Starr
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Paris, IL 61944

Alternate Landowner List

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Paris, IL 61944

Jeffrey & Sandra Leibe
19234 E. 400th Rd.
Paris, IL 61944

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Michael McConkey
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Paris, IL 61944

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Alternate Landowner List

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SUBMITTED - 565106 - Angie McKee - 1/22/2021 8:04:31 AM

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

CERTIFICATE

Re: 12-0598

I, ELIZABETH A. ROLANDO, do hereby certify that I am Chief Clerk of the Illinois Commerce Commission of the State of Illinois and keeper of the records and seal of said Commission with respect to all matters except those governed by Chapters 18a and 18c of The Illinois Vehicle Code.

I further certify that the foregoing is a true, correct and complete copy of the Notice and Notice of Continuance of Hearing & Alternate Landowner List filed January 31, 2013.

Given under my hand and seal of said Illinois Commerce Commission at Springfield, Illinois, on March 27, 2017.

Elizabeth A. Rolando
Chief Clerk

SUBMITTED - 565006 - Angie Barnett - 1/22/2018 10:13:01 AM

FILED
APR 28 2017
Angela R Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
EDGAR COUNTY, ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	Case Nos.: 2016-ED-4, 2016-ED-5, 2016-ED-6, 2016-ED-12, 2016-ED-13, 2016-ED-15, 2016-ED-16, 2016-ED-17, 2016-ED-18, 2016-ED-19, 2016-ED-20, 2016-ED-21, 2016-ED-22, 2016-ED-23, 2016-ED-24, 2016-ED-25, 2016-ED-27, 2016-ED-28, 2016-ED-29, 2016-ED-30, 2016-ED-38, 2016-ED-40, 2016-ED-42, 2016-ED-43, 2016-ED-44, 2016-ED-45, 2016-ED-47, 2016-ED-48, 2016-ED-49, 2016-ED-50, 2016-ED-51, 2016-ED-52, 2016-ED-53, 2016-ED-54, 2016-ED-55
Plaintiff,	)	
v.	)	
RICHARD L. HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC, and UNKNOWN OWNERS, *et al.*,	)	
Defendants.	)	

PLAINTIFF'S BENCH BRIEF IN SUPPORT OF DENIAL OF DEFENDANTS' TRAVERSE AND MOTION TO DISMISS

NOW COMES Plaintiff, AMEREN TRANSMISSION COMPANY OF ILLINOIS ("ATXI"), by and through its attorneys, Sorling Northrup, David A. Rolf and Lisa A. Petrilli, of Counsel, and for its Bench Brief in Support of Denial of Defendants' Traverse and Motion to Dismiss filed by Defendants, states as follows:

Overview

Defendants' Traverse and Motion to Dismiss is divided into two parts. The first part is Defendants' Motion to Dismiss, which is based upon an alleged lack of due process in the Illinois Commerce Commission ("ICC") proceedings. The second part is Defendants' traverse claim. Defendants' Motion to Dismiss must fail in that the Appellate Court has already ruled that the Defendants were not entitled to any notice during the ICC proceedings. Even if they were, Defendants received whatever notice they were arguably entitled. Defendants' traverse must also fail as Defendants offered no evidence and made no attempt to overcome the presumptions

SUBMITTED - 965008 - Angela McKee - 1/22/2018 10:01 AM

created by the issuance of the ICC's Orders in Docket Nos. 12-0598, 16-0040, and 16-0274. The evidence presented pertains solely to their notice arguments.

All parties stipulated to certain facts as shown on the Stipulation filed in these matters in April 2017 and attached hereto as **Exhibit A**. In addition to the facts set forth in the Stipulation, this Court may take judicial notice of the docket and public documents which are included in the ICC Docket Nos. 12-0598, 16-0040, and 16-0274.[1] There is ample support for judicial notice of documents filed in other courts and administrative tribunals, including the ICC. Such documents from other courts and administrative tribunals, including the ICC, fall within the category of readily verifiable facts which are capable of "instant and unquestionable demonstration." *May Dept. Stores Co. v. Teamsters Union Local No. 743*, 64 Ill.2d 153, 159 (1976).

I. Undisputed Material Facts.

ATXI complied with all statutory notice requirements for the filing of its Verified Petition for a Certificate of Public Convenience and Necessity pursuant to Section 8-406.1 of the Illinois Public Utilities Act, in the ICC proceeding docketed as Docket No. 12-0598, including the requirements of Section 8-406.1 of the Public Utilities Act ("PUA") and 83 Ill. Admin. Code Section 200.150. (Stipulation ¶1). Those requirements are herein described in detail.

A. ATXI's Verified Petition and Notice to Landowners in Edgar County of ICC Proceedings.

On November 7, 2012, in accordance with PUA Sections 220 ILCS 5/8-503 and 220 ILCS 5/8-406.1, ATXI petitioned the ICC for a Certificate of Public Convenience and Necessity to construct the Project in ICC Docket No. 12-0598 ("Verified Petition"). (ICC Docket No. 12-0598, Verified Petition filed on November 12, 2012).

[1] Each docket may be accessed online at https://www.icc.illinois.gov/ and entering the applicable docket number as indicated on the right side of the page. Once the docket number is entered, this Court may access the docket sheet set forth in reverse chronological order and the documents referenced in each Docket entry using the menu on the right.

SUBMITTED - 963006 - Angela McKee - 1/22/2021 10:01:31 AM

In conjunction with its Verified Petition, ATXI provided all notice required by Section 8-406.1 of the PUA and the Commission's rules, including:

- Holding three public meetings about the Project in Edgar County;
- Publication of newspaper notice in Edgar County;
- Delivery of meeting notices to Edgar County Clerk;
- Publication of newspaper notice in the state newspaper;
- Establishing a project website; and
- Providing the Commission a list of all landowners whose property is crossed by ATXI's proposed routes, to which the ICC mailed notice.

The following are the specifics of these notices.

At the time of filing the Verified Petition, Section 8-406.1(a)(3) required, and ATXI and the ICC complied with the following notice requirements[2]:

- A minimum of 3 pre-filing public meetings to receive public comment concerning the Project in each county where the Project is to be located, no earlier than 6 months prior to the filing of the application.
    - Edgar County meetings were held May 30, 2012, July 26, 2012 and October 4, 2012 in Kansas, Illinois. (ICC Docket No. 12-0598, Ex. 4.1 to ATXI's Verified Petition filed on November 12, 2012).
- Notice of the public meeting shall be published in a newspaper of general circulation within the affected county once a week for 3 consecutive weeks, beginning no earlier than one month prior to the first public meeting. If the Project traverses 2 contiguous counties and where in one county the transmission line mileage and number of landowners over whose property the proposed route traverses is 1/5 or less of the transmission line mileage and number of such landowners of the other county, then the utility may combine the 3 pre-filing meetings in the county with the greater transmission

[2] 220 ILCS 5/8-406.1 was amended in 2015 to add the following effective August 18, 2015:
For applications filed after the effective date of this amendatory Act of the 99th General Assembly, the Commission shall by registered mail notify each owner of record of the land, as identified in the records of the relevant county tax assessor, included in the primary or alternate rights-of-way identified in the utility's application of the time and place scheduled for the initial hearing upon the public utility's application. The utility shall reimburse the Commission for the cost of the postage and supplies incurred for mailing the notice.

SUBMITTED - 963008 - Angela McKee - 1/22/2018 10:31 AM

line mileage and affected landowners. All other requirements regarding pre-filing meetings shall apply in both counties.

- Edgar County notice was published in the Paris Beacon on May 9, 16 and 23, 2012. (ICC Docket No. 12-0598, Ex. 4.8 to ATXI's Verified Petition filed on November 12, 2012).

- Notice of the public meeting, including a description of the Project, must be provided in writing to the clerk of each county where the Project is to be located.

  - ATXI sent notices to Edgar County Clerk August Griffin on April 24, 2012, June 29, 2012, and September 7, 2012. (ICC Docket No. 12-0598, Ex. 4.7 to ATXI's Verified Petition filed on November 12, 2012).

ATXI complied with additional notice requirements in Section 406.1(d) and (e) which provided:

- The public utility shall publish notice of its application in the official State newspaper within 10 days following the date of the application's filing.

  - ATXI published notice in the Breeze Courier on November 14 and 21, 2012. (ICC Docket No. 12-0598, ATXI's Ex. 1.0, p. 11 filed on December 11, 2012).

- The public utility shall establish a dedicated website for the Project 3 weeks prior to the first public meeting and maintain the website until construction of the Project is complete. The website address shall be included in all public notices.

  - On April 23, 2012, ATXI established www.ilriverstransmission.com and it remains active. (ICC Docket No. 12-0598, ATXI's Ex. 4.0, p. 22 to Maureen A. Borkowski Testimony filed on November 7, 2012).

Further notice requirements are found in Article 83 of the Illinois Administrative Code.

Section 200.150(h) regarding service requires that:

> A person filing an application under Section 8-406 of the Public Utilities Act for a Certificate of Public Convenience and Necessity to construct facilities upon or across privately owned tracts of land, or filing under Section 8-503 of that Act [220 ILCS 5/8-503], shall include with the application when filed with the Commission a list containing the name and address of each owner of record of the land as disclosed by the records of the tax collector of the county in which the land is located, as of not more than 30 days prior to the filing of the application. ***The Commission shall notify the owners of record of the time and place scheduled for the initial hearing upon the application. The foregoing provisions for notice to owners of record shall not be deemed jurisdictional and the omission of the name and address of an owner of record from the list or***

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> ***lack of notice shall in no way invalidate a subsequent order of the Commission relating to the application.*** (emphasis added).

Section 200.150(c) provides that service is accomplished by:

> Delivering in person or by depositing in the United States mail, properly addressed with first class postage prepaid, or by depositing with a private express courier service, properly addressed with charges prepaid or payment arrangements made, one copy to each person entitled thereto. ***Service by mail is effective upon mailing;*** service by a private express courier service is effective upon delivery to the private express courier service. (emphasis added).

Pursuant to 83 Ill. Admin. Code § 200.150(c) and (h) and in accordance with past ICC directives, lists containing the names and addresses of each owner of record of privately owned tracts of land, upon or across which ATXI's proposed Primary and Alternate Routes of the Project as disclosed by the records of the tax collectors of the pertinent counties, was included with ATXI's Verified Petition in Exhibit C as well as certain other persons or entities potentially impacted by the Project or by connections to the Project. (Stipulation ¶2).

On or about November 21, 2012, the ICC mailed notice to the landowners listed on ATXI's Verified Petition Exhibit C. (Stipulation ¶3). The docket entry for the November 21, 2012 Notice, a copy of which is attached as **Exhibit B**, states:

> Set for Prehearing Conference by the Administrative Law Judge on December 3, 2012, in Springfield at 10:30 A.M. Notice also given by the Administrative Law Judges that a list of all affected landowners is available electronically on the Commission's e-Docket system under Docket No. 12-0598. The web address for the e-Docket system is: http://www.icc.illinois.gov/e-docket/. Those unable to access the list of affected landowners electronically may request that the Commission's Chief Clerk mail a hardcopy to them by calling 217-782-7434. Be advised that the list of affected landowners contains over 4,500 entries. **Notice mailed to parties.** (emphasis added).

The corresponding Notice mailed by the ICC is also attached as part of **Exhibit B** and attached to that Notice document is the list of landowners to which the Notice was mailed, which includes

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the landowners listed in ATXI's Exhibit C. (ICC Docket No. 12-0598, Notice filed on November 21, 2012).

Further notice was given to specific stakeholders, such as local officials of potentially affected units of local government, agencies, school districts, irrigation and drainage districts, levee districts and economic development organizations. All were directly invited to participate in various community representative forum meetings. In Edgar County, such notice was sent to the following:

- Edgar County Flat Branch Township Drainage District No. 22
- Edgar County Community Unit District 6 Flat Branch Township Highway Department
- Edgar County Farm Bureau - Flint Township
- Edgar County Highway Department Four E's Trees
- Edgar County Highway Department – Edgar Township
- Edgar County Highway Department – Kansas Township
- Edgar County Highway Department – Stratton Township
- Edgar County Highway Department- Elbridge Township
- Edgar County Highway Department- Grandview Township
- Edgar County- Paris Township Friends Creek Drainage Distriet No. 1
- Edgar County Soil and Water Conservation District

(ICC Docket No. 12-0598, Ex. 4.3 - Exhibit B to ATXI's Verified Petition filed on November 12, 2012).

B. STPL and Notice to Defendants.

Following these notices, multiple landowners or interested parties petitioned for and were granted leave to intervene in the ICC proceedings. In December 2012, a group calling themselves the Stop the Power Line Coalition ("STPL"), which included landowners in Edgar County, Illinois, successfully petitioned the Illinois Commerce Commission to intervene in Docket No. 12-0598. In January 2013, STPL proposed alternate electric transmission line routes across property not crossed by ATXI's proposed primary and alternate routes. (Stipulation ¶4).

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While not required by the Public Utilities Act, upon direction from Administrative Law Judge Albers, STPL provided the ICC with the names and address of the owners of record according to the owners listed on the tax bill in the Recorder of Deeds in Edgar County on STPL's proposed routes. (Stipulation ¶6, 7). The list was provided to the ICC by STPL on January 17, 2013. Defendants were on this list. (Stipulation ¶7).

On January 31, 2013, the ICC Clerk filed two documents on e-docket: a Notice with service list and a list of Alternate Landowners to which the Notice was mailed. Defendants are on the list of Alternate Landowners accompanying the Notice mailed by the ICC on January 31, 2013. (Stipulation 7, 8 and Exhibit 1; ICC Docket No. 12-0598, Docket entry and Notice filed on January 31, 2013). The ICC Docket entry for January 31, 2013, attached hereto as **Exhibit C,** states as follows:

> Notice given by the Administrative Law Judges that on November 7, 2012, Ameren Transmission Company of Illinois ("ATXI") filed with the Illinois Commerce Commission ("Commission") a petition initiating Docket No. 12-0598. In its petition, ATXI requests the Commission's permission to build a 345 kilovolt electric transmission line from approximately Quincy, Illinois to Terre Haute, Indiana. ATXI proposed a preferred route and an alternative route for the transmission line in its petition. Other parties to this docket, however, have recently proposed alternative routes. You are receiving this notice because the Commission has been informed that you have an interest in property affected by one or more of the intervenors' alternative routes. As a potentially affected property owner, you may participate in this docket, which may ultimately determine the location of the transmission line that ATXI wishes to build. Additional information on this docket may be found on the Commission's e-Docket website. The address for the Commission's e-Docket website is: www.icc.illinois.gov/e-Docket/. You will need the docket number of this proceeding (12-0598) to access the relevant information. Notice also given by the Administrative Law Judges that the hearing has been continued to March 1, 2013, in Springfield at 10:30 A.M., for status. Those intervenors interested in participating may do so via telephone with the permission of the Administrative Law Judges.
>
> ***

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> Notice further given by the Administrative Law Judges that due to the length of the list of entities to receive notice of this proceeding, the Chief Clerk's Office need not include with this notice the list of potentially affected landowners and entities. The list is available electronically on the Commission's e-Docket system under Docket No. 12-0598. The web address for the e-Docket system is: http://www.icc.illinois.gov/e-docket/. Those unable to access the list electronically may request that the Commission's Chief Clerk mail a hardcopy to them by calling (217) 782-7434. Notice mailed to parties. **(Notice also mailed to Alternate Landowner List.)** (emphasis added).

The corresponding Notice document mailed to parties and those on the Alternate Landowner List is attached as Exhibit 1 to the Stipulation and as part of **Exhibit C**.

Following the ICC's January 31, 2013 mailing, a group of Edgar County landowners on the STPL route who were listed on the Alternate Landowner List attached as Exhibit 1 to the Stipulation, petitioned the ICC to intervene. Included in that group calling themselves the "Edgar County Intervenors" was one of the named Defendants in 2016-ED-53, Edgar County Bank and Trust as Trustee for Trust No. 455-410, represented at the time by Meyer Capel. (**Exhibit D**; ICC Docket No. 12-0598, Petition for Leave to Intervene filed on April 12, 2013).

C. ICC Orders in 12-0598.

The ICC granted ATXI's request for a Certificate of Public Convenience and Necessity on August 20, 2013 and, as amended, on February 5 and 20, 2014 in its Orders on Rehearing. These Orders are collectively referred to hereinafter as the "Certificate". The route through Edgar County approved by the ICC in the Certificate was STPL's "Route 2", which was a hybrid route that combined part of an ATXI Alternate Route and a new STPL route. (Stipulation ¶10). The parties at issue in this matter are all on STPL's approved route. (Stipulation ¶7).

D. ATXI's Petitions for Eminent Domain Authority Pursuant to 220 ILCS 5/8-509.

ATXI attempted to negotiate with the Defendants for a voluntary easement, but Defendants refused to negotiate. ATXI then petitioned the ICC for authority to acquire an

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easement interest through the Defendants' properties pursuant to PUA Section 8-509 in two separate proceedings. Section 8-509 states:

> When necessary for the construction of any alterations, additions, extensions or improvements ordered or authorized under Section 8-406.1, 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. If a public utility seeks relief under this Section in the same proceeding in which it seeks a certificate of public convenience and necessity under Section 8-406.1 of this Act, the Commission shall enter its order under this Section either as part of the Section 8-406.1 order or at the same time it enters the Section 8-406.1 order. If a public utility seeks relief under this Section after the Commission enters its order in the Section 8-406.1 proceeding, the Commission shall issue its order under this Section within 45 days after the utility files its petition under this Section.

735 ILCS 5/8-509 (2016).

On or about January 25, 2016 in ICC Docket No. 16-0040, and on or about April 25, 2016, in ICC Docket No. 16-0274, ATXI filed its petitions with the ICC for authority to acquire the necessary easements across the Defendants' properties through the use of eminent domain. As with the initial Verified Petition, ATXI provided the ICC with a list of affected landowners as an exhibit to ATXI's Verified Petitions for an Order Pursuant to Section 8-509 of the PUA, and on January 29, 2016 in Docket No. 16-0040, and on April 29, 2016 in Docket No. 16-0274. The ICC mailed notice to the landowners as noted in each docket entry. Docket 16-0040 states:

> Set for Prehearing Conference by the Administrative Law Judge for February 8, 2016, in Springfield at 9:00 A.M. Notice served electronically to parties. **(Notice also mailed to Landowners from Exhibit A to the Petition).** (emphasis added).

Docket No. 16-0274 states:

> Set for Prehearing Conference by the Administrative Law Judge for May 9, 2016, in Springfield at 9:00 A.M. Notice served electronically or by mail to parties. **(Notice also served by mail to Landowners from Exhibit A to the Petition, Parts 1 & 2).** (emphasis added).

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Defendants' names and addresses are found in the lists attached as Exhibit A to each Section 8-509 Petition. All Defendants admittedly received the mailed notice from the ICC. (Stipulation ¶13).

In Docket 16-0040, the following Defendants petitioned the Illinois Commerce Commission and were granted leave to intervene: Scott D. Henson, Butch Creech and Meghan Creech, Richard Hutchings and Rita Hutchings, James H. Tate and Patricia J. Martin as Co-Trustees of Laura C. Tate Living Trust, James H. Tate and Angela Tate, and the Edgar County Bank & Trust Co. as Trustee of Trust No. 455-195 dated March 30, 1987 and Ron Woodyard. Defendants made no mention of any due process claims in the Petitions to Intervene filed on February 11, 2016. Neither Defendants' Opening Brief filed on February 23, 2016, nor Defendants' Brief on Exceptions filed on March 1, 2016 mentions claims of due process, despite acknowledging that the issue being consider in the proceeding was ATXI's authority to proceed to acquire the easements through eminent domain. (ICC Docket No. 16-0040, Opening Brief filed on February 23, 2016, Brief on Exceptions filed on March 1, 2016). The ICC entered an Order on March 9, 2016 granting ATXI the authority to use eminent domain to acquire the easement rights needed for the Project across the Defendants' properties. (ICC Docket No. 16-0040, Order dated March 9, 2016).

The remaining Defendants not included in Docket No. 16-0040 were named in Docket No. 16-0274. Attorney Smith entered his appearance for the Defendants in Docket No. 16-0274, but did not petition to intervene or offer argument or testimony challenging ATXI's rights to acquire the easement through eminent domain based on due process or lack of notice. Instead, he filed a letter with the ICC stating that the landowners would not object to the Company's Section 8-509 request for authority to condemn their property. (ICC Docket No. 16-0274, Entry

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of Appearance filed on May 6, 2016). The ICC entered an Order on June 7, 2016 granting ATXI the authority to use eminent domain to acquire the easement rights needed for the Project across the remaining Defendants' properties.

E. Procedural History of ATXI's Eminent Domain Complaint.

ATXI filed Eminent Domain Complaints against the Defendants in which it is seeking an easement through the property described in Exhibit 2 to each Eminent Domain Complaint. This easement in Exhibit 2 is the same as the easement approved by the ICC on March 9, 2016 in Docket No. 16-0040 and on June 7, 2016 in Docket 16-0274.

II. Defendants are unable to meet their burden and the Motion to Dismiss based upon lack of due process should be denied.

In the Motion to Dismiss, Defendants' seem to claim that the process leading up to filing the eminent domain complaints was deficient and deprived Defendants of due process. The claim is based upon notice to which the Defendants believe they were entitled from the ICC. As discussed in detail herein, the ICC process leading up to the filing of the eminent domain complaint consists of two parts. The first part is the issuance of the Certificate of Public Convenience and Orders pursuant to 220 ILCS 5/8-406.1 and 8-503 in Docket No. 12-0598. The second part of the ICC process is the Order authorizing ATXI to file the eminent domain complaints in Docket Nos. 16-0040 and 16-0274. The Defendants' due process arguments must fail for two reasons: First, the Appellate Court has already ruled, on these precise facts, that Defendants were not entitled to any notice under the due process clause; and second, even if they were arguably entitled to any notice, they received whatever notice could have been due.

A. The Appellate Court has already resolved the due process issue against the Defendants.

On several occasions, ATXI has pointed out that the Appellate Court has already resolved the issue of whether the ICC provided due process during the Certificate proceeding, and that on

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several bases, this resolution compels rejection of the Defendants' arguments. ATXI reincorporates those arguments by reference here and continues to urge the Court not to consider the issues that have already been resolved by the Appellate Court.

In incorporating these arguments, ATXI recognizes that the Court has thus far rejected them. For that reason, in the following section, it will (for the sake of argument) discuss the notice issues as though the Appellate Court had not already ruled that notice was **not** required before the ICC. ATXI does so in the hope the Court will reach an independent basis for rejecting the Defendants' argument. But ATXI would make clear that in so doing, it does not waive or forfeit its position that the Appellate Court decision controls in this case and compels rejection of the Defendants' notice claims.

B. The evidence shows that whatever form of notice could arguably have been required was provided.

Even if the Appellate Court had not already settled these issues, the Defendants still cannot prevail on their due process claims. The evidence shows that any form of notice that arguably could have been due (constructive or actual) was provided to them.

Procedural due process claims concern the constitutionality of the specific procedures employed to deny a person's life, liberty, or property interest. *East St. Louis Federation of Teachers, Local 1220 v. East St. Louis School District No. 189 Financial Oversight Panel*, 178 Ill.2d 399, 415 (1997). The requirement of due process is met by having an orderly proceeding wherein a person is served with notice, *actual or constructive*, and has an opportunity to be heard and to enforce and protect his rights. *People ex rel. Devine v. $30,700.00 United States Currency*, 199 Ill.2d 142, 156 (2002). The fundamental requirement of due process in any proceeding is whether notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

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objections." *Devine*, 199 Ill.2d 142 at 156 (2002), quoting *Stratton v. Wenona Community Unit District No. 1*, 133 Ill.2d 413, 432 (1990). Indeed, in zoning and other similar types of cases involving real property, "courts generally hold that due process does not require personal notice to landowners or adjacent property owners, but that notice by publication, that is usually required by statute is sufficient to satisfy the 'reasonably calculated to apprise' due process standard for notice." *Passalino v. City of Zion*, 237 Ill.2d 118, 148 (2010); citing Mullane, 339 U.S. 306, 315 1950). Due process does not guarantee against erroneous or seemingly unjust actions by courts or administrative agencies. See *Reyes v. Court of Claims*, 299 Ill.App.3d 1097, 1104–05 (1998).

While not necessarily entitled to notice as property rights are not affected in the ICC proceedings, Defendants were notified by the ICC by mail that their property was potentially affected by the Project on January 31, 2013. That notice, combined with the extensive notice to the residents in Edgar County in the form of public meetings, publications, notices to public officials and units of local governments, is sufficient notice to survive Defendants' due process challenge. The notice provided to the Defendants is the same notice required by statute and the same notice provided to all other landowners whose property was potentially affected. Some of those landowners, including at least one of the named Defendants, chose to participate in the ICC proceedings, and other landowners, including the remaining named Defendants chose not to participate. The ICC did nothing to prevent the Defendants from being heard in the ICC proceedings. But Defendants' inaction does not change the fact that they received constructive notice of the fact the proceedings would potentially affect their property.

Moreover, even if actual notice was required (and it was not), the record before the Court supports a finding that it was provided. The ICC Docket shows that on January 31, 2013, notice of the Project as potentially affecting Defendants' properties was mailed to Defendants.

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Defendants also admit that a similar notice on November 21, 2012 was mailed to the landowners, and further admit that Defendants received other similarly mailed notices from the ICC at the same addresses.

Defendants argue that the admitted presence of their names on the Alternate Landowner List - filed by the ICC Clerk as part of the service list for the January 31, 2013 Notice - does not mean the notice was actually mailed. But there has long been a common law presumption that the proper mailing of a letter raises a presumption that the letter was received by the addressee. *Tabor and Company v. Gorenz*, 43 Ill.App.3d 124, 356 N.E.2d 1150 (2nd Dist. 1976). That presumption has in some instance been codified, including in the Public Utility Act with respect to service of commission orders. See 220 ILCS 5/10-112.

There is also a presumption of law that a public officer, including the clerk of the ICC, does her duty and that her official required acts are regularly performed, until the contrary appears. *See Compton v. School Directors of Dist.*, 8 Ill.App.2d 243, 251 (2d Dist. 1955). Further, in this case there are additional circumstances that support these presumptions, primary of which is that the ICC Docket shows that on January 31, 2013, notice of the Project as potentially affecting Defendants' properties was mailed to Defendants. Defendants also admit that a similar notice on November 21, 2012 was mailed to the landowners on those service lists, and further admit that Defendants received other similarly mailed notices from the ICC at the same addresses.

Here, it is only the statements of the clearly interested landowner denying receipt which serves to rebut the presumptions afforded by law. ATXI submits that such statements of the interested Defendants' alone do not provide the type of substantial evidence to demonstrate that Defendants did not receive the mailing. See also, *In Re Chicago Partnership Board, Inc.*, 236

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B.R. 249 (N.D. Illinois 1999) where mailing of notice and publication notice and compliance with statutory requirement satisfied due process, not requiring actual knowledge or receipt of the notice.

Furthermore, to the extent that the ICC procedure is a continuing process, the Defendants admittedly received notice and participated in the later, Section 8-509 part of the ICC process, yet did not raise any due process claims. In addition to the mailed notice on January 31, 2013, Defendants received notice of and participated in the Section 8-509 proceedings, yet failed to raise any due process claims. Since Defendants' due process challenge is to ATXI's authority to proceed in the eminent domain matters, such claims could have been made in the Section 8-509 proceedings as those are the very proceedings from which ATXI would obtain its authority to file the eminent domain complaints. Defendants failed to raise such claims or appeal the issuance of the ICC's Section 8-509 Orders.

Against this evidence and these presumptions in favor of ATXI, the Defendants have only the fact they did not intervene until a route was actually selected, supported solely by the self-interested claim that they did not receive notice. In fact, the Defendants' entire case boils down to the allegation that, contrary to the entries in the ICC docket, the Chief Clerk of the ICC failed to mail the Defendants' notice that the STPL route was being considered. These statements are uncorroborated, and the presumptions of regularity discussed above defeat them. So does common sense. The Chief Clerk successfully mailed notices to hundreds of other persons who intervened, including numerous residents of Edgar County who intervened in April 2013. (See Docket 12-0598 Orders dated August 20, 2013, February 5, 2014, February 20, 2014 for lists of interventions; *see* Stipulation ¶4). The Chief Clerk also successfully mailed every other required notice to the Defendants, including of the 8-509 proceedings. The most likely

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explanation for the Defendants' failure to intervene earlier was *not* a one-time, one-off failure by the Clerk to do her job, but the fact that the Defendants sat on their rights and *chose* not to intervene. After all, the STPL notice was only that a route on Defendants' properties was being *considered*; once such a route was actually *selected*, the Defendants' promptly acted. That transition—from mere consideration to affirmative selection—is the most likely explanation for the timing of Defendants' actions before the ICC, a scenario made even more evident when considering that other landowners on the very STPL notice Defendants claim was never sent successfully petitioned the ICC to intervene in April 2013.

In sum, Defendants are not entitled to actual notice at the ICC, nor are they entitled to personal service at the ICC, and ATXI is not required to show proof of such notice. Defendants received notice by mail and had constructive notice that the Project could potentially affect their properties, yet they failed to actively participate in the first part of the ICC process. Defendants admittedly had additional notice and participated in later ICC proceedings where ATXI's authority to file the eminent domain complaints was at issue, yet failed to raise any claim of deprivation of due process in the ICC proceedings. Defendants self serving statements are the only evidence offered by Defendants and are insufficient to sustain a dismissal based on lack of due process. As such Defendants' Motion to Dismiss must be denied.

III. ATXI has presented a prima facie case and the Defendants are unable to overcome the presumption created by the ICC Certificate and Section 8-509 Orders, and as such their Traverse should be denied.

Defendants raise various claims in their traverse, in so far as they technically state the claims in their filing. But other than the due process notice issue, Defendants do not develop any of their traverse claims or adduce evidence in support of them. ATXI enjoys rebuttable presumptions that it has authority to condemn, that the project is for the public benefit and is

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necessary for a public purpose, and that it engaged in good faith negotiations. Defendants offer nothing to overcome these presumptions. Thus, Defendants fail to meet their burden on their traverse and it must be denied.

A. ATXI's Burden.

Generally speaking, once a landowner asserts a claim of traverse, the burden shifts to the condemnor to set forth a prima facie eminent domain case. *Department of Transportation v. First Galesburg National Bank and Trust Co.*, 141 Ill.2d 462 (1990). However, the Eminent Domain Act affords ATXI certain statutory presumptions related to authority, necessity, and public purpose. Where the condemnor is a public utility whose authority is derived from the ICC, the Eminent Domain Act provides:

> Evidence that the Illinois Commerce Commission has granted a certificate or otherwise made a finding of public convenience and necessity for an acquisition of property (or any right or interest in property) for private ownership or control (including, without limitation, an acquisition for which the use of eminent domain is authorized under the Public Utilities Act...) to be used for utility purposes ***creates a rebuttable presumption that such acquisition of that property (or right or interest in property) is (i) primarily for the benefit, use, or enjoyment of the public and (ii) necessary for a public purpose.***

735 ILCS 30/5-5-5(c) (2016). Additionally, the Court in *Enbridge Energy (Illinois), L.L.C. v. Kuerth,* found that when the ICC issues an order pursuant to Section 8-509 finding that the public utility engaged in good-faith negotiations with landowners, that order creates a rebuttable presumption of those good-faith negotiations. 2016 IL App (4th) 150519, para 148. These burdens may only be overcome by landowners' presentation of clear and convincing evidence to the contrary. *Id.* para 140.

ATXI has presented the facts required by the Eminent Domain Act sufficient to create the presumptions found in Section 5-5-5(c) and *Enbridge.* Defendants have presented no facts sufficient to overcome the burden created by those presumptions.

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1. ATXI has the authority to proceed to acquire the easement sought through the use of eminent domain.

The ICC issued a valid Certificate in two Orders dated August 20, 2013 and February 20, 2014, authorizing the construction, operation, and maintenance of ATXI's project pursuant to PUA Section 406.1, and specifically, authorizing ATXI's construction of the line pursuant to PUA Section 503. Additionally, the ICC issued two separate Orders on March 9, 2016 in Docket No. 16-0040 and on June 7, 2016 in Docket No. 16-0274 pursuant to PUA Section 509. The easement interests for which ATXI sought authority from the ICC, are the same as those easement interests sought in each eminent domain cases as shown on Exhibit 2 and also in Appendix B of each Section 8-509 Order. ATXI complied with the PUA and obtained all necessary authority from the ICC to proceed in this matter.

2. The easement sought is primarily for the benefit, use, or enjoyment of the public and is necessary for a public purpose.

In order for the ICC to issue a Certificate, there must be a showing of the necessity of the project in general pursuant to PUA Sections 8-406 and 406.1. In this matter, the project is "necessary to provide adequate, reliable, and efficient service to the public utility's customers and is the least cost means of satisfying the service needs of the public utility's customers..." (ICC Docket No. 12-0598 8/20/13 Order, p. 133; 2/20/14 Order, p. 83). For the ICC to authorize construction of the project, PUA Section 8-503 requires a showing of necessity for the additions and improvements to implement the more reliable service. *Kruetzer*, 404 Ill.App.3d at 812. The Certificate authorized the construction of the necessary high voltage electric service line, the new and expanded substations, and related facilities. (ICC Docket No. 12-0598 8/20/13 Order, p. 133; 2/20/14 Order, p. 83). PUA Section 8-509 requires a showing that obtaining the easements is necessary for the additions and improvements. *Kruetzer*, 404 Ill.App.3d at 812. In each

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Section 509 Order, the ICC found ATXI acted reasonably in attempting to obtain easements by agreement and recognized the use of the eminent domain act was necessary to acquire such easements. (ICC Docket No. 16-0040 Order dated March 9, 2016 and 16-0274 dated June 7, 2016).

Upon a showing that the ICC granted the Certificate and 509 Order, ATXI enjoys the benefit of a presumption that the easements are for the benefit of a public purpose and are necessary. Additionally, upon the issuance of the Section 8-509 Order, ATXI enjoys a presumption that it negotiated in good-faith with the Defendants. Such presumptions are sufficient to make a prima facie showing that the easements sought are primarily for the benefit, use, or enjoyment of the public and are necessary for a public purpose.

3. The easement interest sought is specifically described in a Certified Plat attached to the Complaint as Exhibit 2.

The property interests sought must described with reasonable certainty. *Kruetzer*, 404 Ill.App.3d at 812. The interests sought in this matter are easements as shown on the Certified Plats prepared by a surveyor licensed in the State of Illinois and found in Exhibit 2 to each Eminent Domain Complaint, and in the 509 Orders.

4. All owners of record have been named and appear in this matter and all unknown owners have been joined in accordance with 735 ILCS 5/2-206.

Defendants are the owners of record of the properties referenced in each Complaint.

5. The prayer for relief requests the Court to cause the compensation to be paid to the owner be assessed.

The prayer for relief prays the following:

B. That ATXI be granted Permanent Easements for the construction, operation, and maintenance of a 345kV electric transmission line as described in Exhibit 2;

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C. That the Court take such proceedings and enter such Orders as necessary, ordering that ATXI may enter on the Permanent Easements and use it for the aforementioned purposes upon payment of full compensation to the parties entitled thereto, or to the County Treasurer, within such reasonable time as is fixed by the Court;

D. That the Court cause compensation to be ascertained and determined according to the Eminent Domain Act for the Permanent Easement sought to be acquired;

E. That the Court retain jurisdiction of this cause to enter such further Orders as may be necessary, including such Orders as may be necessary to put ATXI into possession of the Permanent Easements…

Such prayer for relief is consistent with the requirements of 735 ILCS 30/10-5-10.

B. The Defendants' Burden.

Once a condemnor makes a prima facie case on each of the disputed allegations, the burden of proof shifts to the landowner to overcome those burdens. *Dept. of Public Works & Bldgs. v. Keller*, 61 Ill.2d 320, 335 N.E.2d 443 (1975); *Enbridge*, para 140. To overcome the prima facie case shown by ATXI, the Defendants must provide clear and convincing evidence contradicting the disputed allegations. *See Homer v. Jones-Bey*, 415 F.3d 748, 752 (7th Cir. 2005); *Vill. of Wheeling v. Exch. Nat. Bank of Chicago*, 213 Ill.App.3d 325, 334, 572 N.E.2d 966, 972 (1st Dist. 1991); *Enbridge*, para 140.

Defendants have presented no evidence and made no attempt to overcome the presumptions created by the ICC Orders and the Stipulation contains no facts in support of the Defendants traverse claims. They certainly have not identified, nor can they present the amount of evidence sufficient to rise to the level of the clear and convincing evidence required to overcome the presumptions and meet the burden created upon ATXI's showing of a prima facie case. The only argument even developed in their evidence goes to whether they received notice

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at the ICC, and those arguments (as discussed above and elsewhere) must be rejected as a matter of law. As such, Defendants traverse must be denied.

WHEREFORE, Plaintiff, AMEREN TRANSMISSION COMPANY OF ILLINOIS, respectfully requests this Court deny Defendants' Traverse and Motion to Dismiss and for any other relief that this Court deems just.

AMEREN TRANSMISSION COMPANY
OF ILLINOIS,
Plaintiff,

By: _____
One of Its Attorneys

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SUBMITTED - 963006 - Angela McKee - 1/22/2018 10:13:01 AM

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Mr. S. Craig Smith
Asher & Smith
1119 North Main Street
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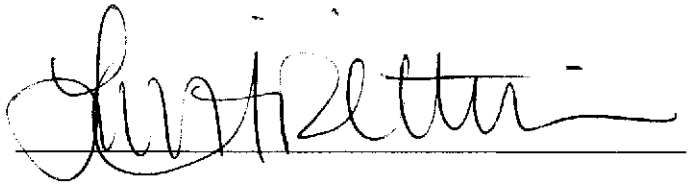
Paris, IL 61944

and by depositing same in the United States mail in Springfield, Illinois, on the 26th day of April, 2017, with postage fully prepaid.



SUBMITTED - 963006 - Angie McKee - 1/22/2018 10:13 AM

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
EDGAR COUNTY, ILLINOIS

FILED
SEP 27 2017
Angela R Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

AMEREN TRANSMISSION COMPANY OF ILLINOIS, Plaintiff, v. RICHARD L. HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC, and UNKNOWN OWNERS, Defendants.	)	Case No.: 2016-ED-4

PLAINTIFF'S 735 ILCS 5/2-1203 POST-JUDGMENT MOTION

NOW COMES Plaintiff, AMEREN TRANSMISSION COMPANY OF ILLINOIS ("ATXI"), by and through its attorneys, Sorling Northrup, David A. Rolf and Lisa A. Petrilli, of Counsel, and for its Post-Judgment Motion pursuant to 735 ILCS 5/2-1203, states as follows:

1. On or about August 30, 2017, the Court entered an Order dismissing the Eminent Domain Complaints filed by Plaintiff in the above referenced case ("Order").

2. The basis for the dismissal is that 220 ILCS 5/8-406.1, as it existed during the timeframe relevant to this dispute ("Section 406.1"), was "facially unconstitutional" and was unconstitutional as applied to Defendants.

3. The Order further states that a "Supreme Court Rule 302(a) finding is entered."

4. The Order fails to comply with Supreme Court Rule 302(a) in that the Order does not contain the requisite findings under Supreme Court Rule 18.

5. Where the circuit court can decide a case without reaching the constitutionality of a statute, it is required to do so. *People v. E.H.*, 224 Ill.2d 172 (2006).

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6. The Court should have decided Defendants' Motion to Dismiss without determining that Section 406.1 was invalid on its face *or* as applied, but instead the Court ignored the precedent set in *Adams County Property Owners and Tenant Famers v. Illinois Commerce Commission*, 2015 IL App (4th) 130907.

7. Consideration of the precedent in *Adams County* and its application to this matter requires the Order be vacated in full.

8. In the alternative, while the Order declares the former version of Section 406.1 unconstitutional on its face, the entire Order is devoted to an "as applied" analysis and lacks any specific grounds for a finding that the statute is unconstitutional on its face. (S. Ct. R. 18(c)(2).

9. Because the Order declares Section 406.1 is unconstitutional on its face without making the findings required per Rule 18, such declaration in the Order must be vacated.

10. It is incumbent that the Court make all the required Rule 18 findings in a written order when declaring a statute unconstitutional. *In Re Parentage of John M.*, 212 Ill.2d 253 (2004).

11. Failure to make specific Rule 18 findings must result in the order being vacated. *Delgado v. Bd. Of Election Comm'rs*, 224 Ill.2d 481, 486 (2007).

12. Specifically, the Order:

a. Fails to clearly identify the portion of the statute being found unconstitutional (S. Ct. R. 18(b));

b. Fails to find that the statute cannot reasonably be construed in a manner that would preserve its validity (S. Ct. R. 18(c)(3));

SUBMITTED - 563006 - Angie Barnett - 1/22/2021 8:04:31 AM

c. Fails to find that the determination of unconstitutionality is necessary to the decision or judgment render and that the judgment cannot rest upon an alternative ground (S. Ct. R. 18(c)(4)); and

d. Fails to state that the notice required by Rule 19 has been served and that those served had adequate time and opportunity to defend the statute (S. Ct. R. 18(c)(5)).

13. If the Court is not willing to vacate the Order in its entirety or the "on its face" conclusion, said Order must, at the very least, be modified to comply with Rule 18. To find that Section 406.1 is unconstitutional on its face, the Court must make the requisite Rule 18 findings and modify the Order to reflect such findings.

14. In further support of this Motion, ATXI files a Memorandum in Support which it incorporates herein.

WHEREFORE, Plaintiff, AMEREN TRANSMISSION COMPANY OF ILLINOIS, requests this court reconsider the Order and either vacate the Order in its entirety, vacate the finding that Section 406.1 is unconstitutional on its face, or make the required Rule 18 findings and modify the Order. Additionally, Plaintiff requests any other relief that this Court deems just.

AMEREN TRANSMISSION COMPANY
OF ILLINOIS,
Plaintiff,

By: _____
One of Its Attorneys

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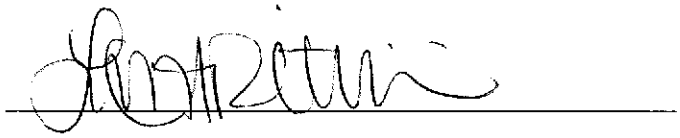

SUBMITTED - 363106 - Angela McKee - 1/22/2018 10:13 AM

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
EDGAR COUNTY, ILLINOIS

FILED
SEP 27 2017
Angela R Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	
Plaintiff,	)	
v.	)	Case No.: 2016-ED-4
RICHARD L. HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC, and UNKNOWN OWNERS,	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS 735 ILCS 5/2-1203 POST-JUDGMENT MOTION

NOW COMES Plaintiff, AMEREN TRANSMISSION COMPANY OF ILLINOIS ("ATXI"), by and through its attorneys, Sorling Northrup, David A. Rolf and Lisa A. Petrilli, of Counsel, and for its Memorandum in Support of Its Post-Judgment Motion pursuant to 735 ILCS 5/2-1203, states as follows:

On or about August 30, 2017, the Court entered an Order dismissing the Plaintiff's Eminent Domain Complaint against the Defendants ("Order"). A copy of the Order is attached and incorporated as **Exhibit A**. The basis for the dismissal is that 220 ILCS 5/8-406.1, as it existed during the timeframe relevant to this dispute ("Section 406.1")[1], is "facially unconstitutional" and unconstitutional as applied to Defendants. The Order further states that a "Supreme Court Rule 302(a) finding is entered."

ATXI disagrees with the Order in its entirety. However, for the purposes of this Post-Judgment Motion, and without waiving its right to further appeal, ATXI seeks reconsideration of

[1] As set forth in the Order, Section 406.1 was amended in August 2015. All parties agree that the amended Section 406.1 is not applicable in this matter. All reference to Section 406.1 in this Motion and Memorandum is to un-amended Section 406.1.

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the Order's finding of unconstitutionality. While the Order purports to declare the statute unconstitutional, referencing Supreme Court Rule 302(a), the Order lacks the requisite findings under Supreme Court Rule 18 for such a declaration. Furthermore, the Circuit Court is unable to make the findings necessary under Supreme Court Rule 18 for a Supreme Court Rule 302 order because such a finding is contrary to the recent Fourth District Appellate in *Adams County* and the Circuit Court only conducted an "as applied " analysis of the statute.

ATXI requests this Court reconsider the Order and either:

(1) Vacate the Order in its entirety as it is contrary to established precedent in *Adams County;* or

(2) Vacate the finding that Section 406.1 is unconstitutional on its face; or

(3) Make the findings required by Rule 302 and Rule 18 and modify the Order to include those findings.

I. Introduction and Background

ATXI applied for and was granted a Certificate of Public Convenience and Necessity by the Illinois Commerce Commission ("ICC" or "Commission") to construct, operate and maintain a 345kV electric transmission line called the Illinois Rivers Project (the "Project") under several sections of the Illinois Public Utilities Act, 220 ILCS 5/8-406.1 and 8-503. The Certificate was granted in Orders dated August 20, 2013 and February 5 and 20, 2014 (collectively "Certificate"). Once the Project is complete, it will provide benefits to Illinois and the regional electric grid, including lower energy costs, delivery of renewable energy into Illinois from the west, relief of serious and immediate reliability concerns, and job creation. *Ameren Transmission Co. of Ill.*, ICC Docket 12-0598, Order at 10, 14.

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The Commission weighed multiple proposed routes for the Project against a dozen environmental, social, and economic factors, and selected the route it deemed "least-cost." The Certificate ordered the Company to construct the Project on Commission-approved route. See generally Ameren Transmission Co. of Ill., ICC Docket 12-0598, Order [R-00085]; see also Second Order on Reh'g. The route through Edgar County ultimately approved by the ICC was not proposed by ATXI, but instead was proposed by an intervenor group called "Stop the Power Lines" or "STPL". Defendants were not members of this group, but own property on the ICC approved STPL route through Edgar County.

Following the issuance of the Certificate by the ICC, which approved the STPL route on Defendants' property, certain landowners appealed the ICC's decision to the Fourth District Appellate Court claiming that the Section 406.1 and the ICC process failed to provide Defendants with due process. The landowners called themselves "Edgar County Citizens Entitled to Due Process" and their appeal was combined with other landowners challenging the ICC's certificate.[2] The case is captioned *Adams County Property Owners and Tenant Famers v. Illinois Commerce Commission*, 2015 IL App(4th) 130907, a copy of which is attached and incorporated herein as **Exhibit B**. In *Adams County*, the Fourth District addressed the issue of the constitutionality of the ICC process and Section 406.1 as raised by Defendants, and held that Section 406.1 did not deprive Defendants of their due process rights. 2015 IL App (4th) 130907, ¶80. Specifically, the Court found "the proceedings before the Commission neither conferred property rights on ATXI nor deprived landowners of their protected property interests." *Id.*

[2] While not all landowners included as Defendants in the Order were part of the group appealing in *Adams County*, all are similarly situated and have at all times been considered part of the "Edgar County Citizens Entitled to Due Process". As such for purposes of this Motion and Memorandum, Defendants are considered part of the group that appealed in *Adams County*.

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During the pendency of the appeal and following the Fourth District's decision in *Adams County*, ATXI attempted to negotiate with the Defendants for a voluntary easement, but Defendants refused to negotiate. ATXI then petitioned the ICC for authority to initiate condemnation proceedings in circuit court. ATXI was granted authority by the ICC to proceed to acquire the property interest through eminent domain. ATXI filed its Eminent Domain Complaint against the Defendants seeking an easement through the Defendants' property. Shortly thereafter, Defendants filed a Motion to Dismiss the Eminent Domain Complaint claiming that their right to due process had been violated.

On or about August 30, 2017, the Court entered an Order dismissing the Eminent Domain Complaint. The basis for the dismissal is that 220 ILCS 5/8-406.1, as it existed during the timeframe relevant to this dispute, was "facially unconstitutional" and was unconstitutional as applied to Defendants. The Order further states that a "Supreme Court Rule 302(a) finding is entered", yet the Order lacks the requisite findings under Supreme Court Rule 18 to support a Supreme Court Rule 302(a) finding of unconstitutionality.

II. Requirements for Rule 302(a) Order

Rule 302(a) provides that appeals from final judgments of circuit courts shall be taken to the Supreme Court in cases in which a statute of the United States or of this state has been held invalid. IL. S. Ct. R. 302(a) (2107). Rule 302(c)(2) further provides that the Supreme Court, on its own motion or upon the motion of a party, before or after any brief has been filed or oral argument held, may summarily vacate and remand a judgment of the circuit court for noncompliance with Rule 18. IL. S. Ct. R. 302(c)(2) (2017). Rule 18 states:

> A court shall not find unconstitutional a statute, ordinance, regulation or other law, unless:
> (a) the court makes the finding in a written order or opinion, or in an oral statement on the record that is transcribed;

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(b) such order or opinion clearly identifies what portion(s) of the statute, ordinance, regulation or other law is being held unconstitutional;
(c) such order or opinion clearly sets forth the specific ground(s) for the finding of unconstitutionality, including:
(1) the constitutional provision(s) upon which the finding of unconstitutionality is based;
(2) whether the statute, ordinance, regulation or other law is being found unconstitutional on its face, as applied to the case *sub judice*, or both;
(3) that the statute, ordinance, regulation or other law being held unconstitutional cannot reasonably be construed in a manner that would preserve its validity;
(4) that the finding of unconstitutionality is necessary to the decision or judgment rendered, and that such decision or judgment cannot rest upon an alternative ground; and
(5) that the notice required by Rule 19 has been served, and that those served with such notice have been given adequate time and opportunity under the circumstances to defend the statute, ordinance, regulation or other law challenged.

IL S. Ct. R. 18 (2017). The purpose of Rule 302(c) and Rule 18 is to impose a duty on the circuit court to make certain findings and undertake certain analysis before declaring a statute unconstitutional, and failure to undertake such analysis is fatal to a circuit court's determination of unconstitutionality. *See People v. E.H. (In re E.H.)*, 224 Ill.2d 172 (2006); *In Re Parentage of John M.*, 212 Ill.2d 253 2004).

III. The Court is unable to make the required Rule 18 findings regarding the unconstitutionality of Section 406.1, and the Order must be vacated either in full for failure to comply with the precedent in *Adams County*, or in part because it is unable to find Section 406.1 unconstitutional on its face.

Where the circuit court can decide a case without reaching the constitutionality of a statute, it is required to do so. *People v. E.H.*, 224 Ill.2d at 172 (2006). The Court could have made a decision on Defendants' Motion to Dismiss without finding that Section 406.1 was unconstitutional on its face. It could, and should, have denied the Motion outright. The only way that the Court could find that Section 406.1 is unconstitutional, either on its face or as applied to Defendants, was to impermissibly ignore the precedent set by the Fourth District in *Adams*

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County. Furthermore, a finding that Section 406.1 is unconstitutional on its face is unsupported by the findings contained in the Order. Because the case could have been decided without finding that Section 406.1 was unconstitutional, the Order must be vacated either in full for failure to follow the precedent set in *Adams County*, or in part because it is unable to find Section 406.1 unconstitutional on its face.

A. The Order improperly contradicts the Fourth District Appellate Court's precedential decision that Section 8-406.1 did not deprive landowners of due process and must be vacated in full.

The Order's determination that Section 406.1 unconstitutionally deprived Defendants of their due process can only made by improperly rejecting the precedential decision of the Fourth District in *Adams County*. *See Delgado v. Bd. Of Election Comm'rs,* 224 Ill.2d 481, 487 (2007). The Supreme Court in *Delgado* found that a circuit court is not permitted to reject the precedent of an appellate court's decision regarding the constitutionality of a statute. *Id.* at 486. The Supreme Court then vacated the circuit court's decision further finding that the decision to declare a statute unconstitutional after the appellate court already upheld the statute's validity to be "fatally infirm". *Id.*

The issue of whether the Order is contrary to the precedent set forth in *Adams County* is a legal issue that does not invite nor require a reconsideration of the underlying facts. This Court need only consider the Order and the *Adams County* decision, both of which address the constitutionality of Section 406.1 and both of which are attached hereto. The Fourth District in *Adams County* held that Section 406.1 did not deprive Defendants of their constitutional right to due process, and the Order finds Section 406.1 did deprive Defendants of those same rights. Because the Order is contrary to *Adams County*, it too is "fatally infirm" and must be vacated.

In *Adams County,* Defendants claimed:

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> ...[their] due process rights were violated ***because they failed to receive notice*** from the Commission that Stop Coalition, an intervening party in the underlying proceedings, proposed an alternate route for the transmission line which would directly affect the property rights of [Defendants]. [Defendants] ***also contend[s] that the lack of a clear notice requirement in section 8-406.1 of the Utilities Act renders the statute unconstitutional.***

Adams County 2015 IL App 130907 ¶69 (emphasis added). The Fourth District specifically considered and rejected Defendants claims, upholding the constitutionality of Section 406.1, both facially and as applied to these Defendants. In response to Defendants' claims that Section 406.1 deprived Defendants of their right to due process, the Fourth District held:

> Although there is much conflict between the parties on appeal regarding whether notice was actually mailed to [Defendants] by the Commission, we find it unnecessary to address this specific argument. As already discussed...relevant case authority...demonstrates that the underlying proceedings before the Commission neither conferred property rights on ATXI nor deprived landowners of their protected property interests. In their reply brief, [Defendants ask] this court to "recognize that a proceeding under [s]ection 8-406.1 does implicate landowners' property rights in a significant way." However, they provide no authority upon which we may reject either this court's previous decision in *Lynn* or the supreme court's decisions in *Cavanagh* and *Zurn*. ***The due process rights of [Defendants] were not violated.***

Adams County 2015 IL App 130907 ¶80 (emphasis added).

The Court's rejection of Fourth District precedent in this matter is even more egregious than in *Delgado* as *Adams County* addressed not only the same issue, i.e. constitutionality of Section 406.1, but the same issue as raised by the same Defendants. The Court cannot make findings "contrary to the [Fourth District's] conclusion" as it did in this matter. See Order pp. 12, 23-24. Because the Court is bound by the Fourth District's decision in *Adams County*, it is unable to make a finding that Defendants due process rights were violated by Section 406.1, either on its face or as applied. As the Court is unable to make those findings, the Order must be vacated in full and Defendant's Motion to Dismiss denied.

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B. The Court only conducted an "as applied" analysis, and is unable to make a finding that Section 8-406.1 was unconstitutional on its face. The finding that Section 406.1 is unconstitutional and invalid on its face must be vacated.

The Court's conclusory statement that 220 ILCS 5/8-406.1 was "facially unconstitutional" is wholly unsupported by any findings in the Order. To find a statute unconstitutional on its face, the circuit court must find that no set of circumstances exists under which the statute would be valid. *Lebron v. Gottlieb Mem. Hosp.*, 237 Ill.2d 217, 228 (2010) citing *Napleton v. Village of Hinsdale*, 229 Ill.2d 296, 306 (2008). The Court did not undertake that analysis. Instead, it focused on the notice-related facts applied to the 35 Defendants as a stand-alone group. Order, p. 17.

Even within the Order itself, the Court concedes that Section 406.1 is constitutional under certain circumstances, i.e. where applied to those landowners on a utility proposed route[3]. Order, p. 13-15. Furthermore, the Court also implies that had Defendants received notice from the ICC, despite no requirement under Section 406.1, the Defendants would not have been deprived of their purported due process rights. Order, pp. 21-22.

In the Order, the Court framed the issue as whether "either the procedure set forth in Section 406.1 or the practice of the ICC in this instance provide Defendants with due process". Order, p. 12. Such statement evidences the presumption that even where Section 406.1 did not require notice, adequate notice could have been given to the Defendants though the ICC process. Because these Defendants could have been provided with notice sufficient to meet the Court's claimed need for due process, a finding of unconstitutionality of Section 406.1 on its face is unnecessary.

The Court could have come to its decision under another analysis, i.e. finding that Defendants due process rights were violated by the ICC process as it was applied to Defendants.

[3] As opposed to a route proposed by an intervenor group, like the one here.

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Where the Court could have reached a decision that would have upheld the constitutionality of Section 406.1, it is required to do so. *Delgado*, 224 Ill.2d at 486. Despite such requirement, the Court simply concluded that Section 406.1 was unconstitutional on its face and also as applied to Defendants. Because the determination that Section 406.1 is unconstitutional on its face is contrary to specific findings in the Order, the portion of the Order declaring Section 406.1 invalid and unconstitutional on its face must be vacated.

IV. The Order lacks the requisite Rule 18 findings and if the Court is going to uphold the validity of the Order, the Court is required to make such findings and modify the Order.

The Order is deficient in that it:

a. Fails to clearly identify the portion of the statute being found unconstitutional (S. Ct. R. 18(b));

b. Fails to find that the statute cannot reasonably be construed in a manner that would preserve its validity (S. Ct. R. 18(c)(3));

c. Fails to find that the determination of unconstitutionality is necessary to the decision or judgment render and that the judgment cannot rest upon an alternative ground (S. Ct. R. 18(c)(4)); and

d. Fails to state that the notice required by Rule 19 has been served and that those served had adequate time and opportunity to defend the statute (S. Ct. R. 18(c)(5)).

Despite being required, each of the above findings is absent from the Order. The Order declares that Section 406.1 in its entirety is unconstitutional on its face, yet fails to clearly identify the portion of Section 406.1 being found unconstitutional. Additionally, as set forth in detail above, while the Order declares Section 406.1 unconstitutional on its face, the entire Order is devoted to an "as applied" analysis and lacks any specific grounds for a finding that the statute

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is unconstitutional on its face. (S. Ct. R. 18(c)(2)). The "as applied" analysis contradicts with the finding that Section 406.1 was unconstitutional on its face as set forth in the Order's Conclusion.

It is incumbent on the circuit court to specifically make all the required Rule 18 findings in a written order when declaring a statute unconstitutional. *In Re Parentage of John M.*, 212 Ill.2d at 253. Failure to make such specific findings must result in the order being vacated. *Delgado v. Bd. Of Election Comm'rs*, 224 Ill.2d 481, 486 (2007). Because the Court failed to make the requisite findings under Rule 302 and Rule 18, the Court must either: vacate the Order in full because such findings are unable to be made; vacate the Order in part because the finding the Section 406.1 is unconstitutional on its face is unsupported; or make the required Rule 18 findings and modify the Order.

V. Conclusion

In its Order, the Court failed to undertake the necessary analysis under Rule 302 and Rule 18 when declaring Section 406.1 unconstitutional. The Court is unable to make the findings required by Rule 18 without rejecting the precedent set in *Adams County*. Even if the Court ignores the decision in *Adams County*, the finding that Section 406.1 is unconstitutional on its face is unnecessary and must be vacated since the Court could have reached its decision without finding Section 406.1 was invalid. Furthermore, the Court found that Section 406.1 is unconstitutional, yet the Order fails to make specific findings required by Rule 18. To find that Section 406.1 was unconstitutional on its face, the Court is required to make the Rule 18 findings and modify the Order to include such findings.

WHEREFORE, Plaintiff, AMEREN TRANSMISSION COMPANY OF ILLINOIS, requests this court reconsider the Order and either vacate the Order in its entirety, vacate the

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finding that Section 406.1 is unconstitutional on its face, or make the required Rule 18 findings and modify the Order. Additionally, Plaintiff requests any other relief that this Court deems just.

AMEREN TRANSMISSION COMPANY
OF ILLINOIS,
Plaintiff,

By: _____
One of Its Attorneys

Sorling Northrup
David A. Rolf, of Counsel (ARDC #6196030)
Lisa A. Petrilli, of Counsel (ARDC #6280865)
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E-Mail: lapetrilli@sorlinglaw.com

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Paris, IL 61944

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_____

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FILED
OCT 19 2017
Angela R Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT OF ILLINOIS
EDGAR COUNTY PARIS, ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	
	)	Nos. 2016-ED-4, 2016-ED-5, 2016-ED-6,
	)	2016-ED-12, 2016-ED-13, 2016-ED-15,
Plaintiff,	)	2016-ED16, 2016-ED-17, 2016-ED18,
	)	2016-ED-19, 2016-ED-20, 2016-ED-21,
vs.	)	2016-ED-22, 2016-ED-23, 2016-ED-24
	)	2016-ED-25, 2016-ED-27, 2016-ED-28
RICHARD L. HUTCHINGS, RITA M.	)	2016-ED-29, 2016-ED-30, 2016-ED-38
HUTCHINGS, FARM CREDIT SERVICES	)	2016-ED-40, 2016-ED-42, 2016-ED-43
OF ILLINOIS, FLCA, DONICA CREEK,	)	2016-ED-44, 2016-ED-45, 2016-ED-47
LLC and UNKNOWN OWNERS,	)	2016-ED-48, 2016-ED-49, 2016-ED-50
et al.,	)	2016-ED-51, 2016-ED-52, 2016-ED-53
Defendants.	)	2016-ED-54, 2016-ED-55

DEFENDANTS' RESPONSE TO PLAINTIFF'S
735 ILCS 5/2-1203 POST-JUDGMENT MOTION

NOW COMES the Defendants, RICHARD L. HUTCHINGS, *et al.,* by S. Craig Smith of Asher & Smith, their Attorney, in response to Plaintiff's Post-Judgment Motion, state as follows:

1. The Order dismissing the Eminent Domain Complaints does comply with Supreme Court Rule 302(a) in that the Order does contain the requisite findings under Supreme Court Rule 18:

A. The Court made the Supreme Court Rule 302(a) finding in its written Order.

B. The Order clearly identified the portion of the Statute (220 ILCS 5/8-406.1) that is being held unconstitutional. (See page 23 of said Order.)

C The Order clearly set forth the specific grounds for the finding of unconstitutionality:

(i) The Constitution provisions upon which the finding of unconstitutionality is due process under U.S. and Illinois State Constitutions. (See Order, page 20.)

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(ii) The Statute 220 ILCS 5/8-406.1 was found unconstitutional on its face as applied to the case *sub judice*. (See Order, page 23.)

(iii) The Notice required by Rule 19 has been served, and those served with such notice have been given adequate time and opportunity under the circumstances to defend the statute.

2. In further support of this Response, Defendants file a Memorandum in Support, which is incorporated herein.

WHEREFORE, DEFENDANTS REQUEST this Court to deny Plaintiff's Post-Judgment Motion. Additionally, Defendants request any other relief that this Court deems just.

RICHARD L. HUTCHINGS, *et al.*, Defendants
By ASHER & SMITH, their Attorneys

By: _____
S. Craig Smith, Attorney

S. Craig Smith
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Angela R Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT OF ILLINOIS
EDGAR COUNTY PARIS, ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	Nos. 2016-ED-4, 2016-ED-5, 2016-ED-6,
	)	2016-ED-12, 2016-ED-13, 2016-ED-15,
Plaintiff,	)	2016-ED16, 2016-ED-17, 2016-ED18,
	)	2016-ED-19, 2016-ED-20, 2016-ED-21,
vs.	)	2016-ED-22, 2016-ED-23, 2016-ED-24
	)	2016-ED-25, 2016-ED-27, 2016-ED-28
RICHARD L. HUTCHINGS, RITA M.	)	2016-ED-29, 2016-ED-30, 2016-ED-38
HUTCHINGS, FARM CREDIT SERVICES	)	2016-ED-40, 2016-ED-42, 2016-ED-43
OF ILLINOIS, FLCA, DONICA CREEK,	)	2016-ED-44, 2016-ED-45, 2016-ED-47
LLC and UNKNOWN OWNERS,	)	2016-ED-48, 2016-ED-49, 2016-ED-50
et al.,	)	2016-ED-51, 2016-ED-52, 2016-ED-53
Defendants.	)	2016-ED-54, 2016-ED-55

DEFENDANTS' MEMORANDUM IN SUPPORT OF ITS RESPONSE TO POST-JUDGMENT MOTION

NOW COME Defendants, RICHARD L. HUTCHINGS, *et al.*, by S. Craig Smith of Asher & Smith, their Attorney, for their Memorandum in Support of its Response to Post-Judgment Motion, states as follows:

On or about August 30, 2017, the Court entered an Order dismissing Plaintiff's Eminent Domain Complaint against the Defendants ("Order"). The Order declared 220 ILCS 5/8-406.1 as unconstitutional, and it specifically referenced Supreme Court Rule 302(a). The Order contains requisite findings under Supreme Court Rule 18. The findings in the Order are not contrary to the recent Fourth District Appellate Decision in *Adams County*, in that the Fourth District did not make a decision on whether or not Section 8-406.1 deprived landowners of due process.

The Defendants request this Court to deny the Post-Judgment Motion.

I. The requirements for Rule 302(a) Order were contained in the Circuit Court Order.

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The Court made a Supreme Court Rule 302(a) Order finding in its written Order. The Court clearly identified the portion of the statute (220 ILCS 5/8-406.1) that is being held unconstitutional at page 23 of the Order.

The Circuit Court Order clearly set forth the specific grounds for the finding of unconstitutionality, specifically, on page 20, noting that the constitutional provisions upon which the finding of unconstitutionality is based is due process under the U.S. and Illinois State Constitutions. It went on to state that the statute (220 ILCS 5/8-406.1) was found unconstitutional on its face. "It failed to require personal notice by registered mail or other means which would ensure notice to any landowner whose property may be considered for primary or alternate routes proposed throughout the certification process." Furthermore, notice required by Rule 19 has been served, and those served with such notice have been given adequate time and opportunity under the circumstances to defend the statute. The Attorney General's Office was also provided notice and was given adequate time and opportunity to defend the statute, but elected not to.

II. The Court was able to make the required Rule 18 findings, and its Order does not improperly contradict the Fourth District Appellate Court's Decision in *Adams County*.

The Plaintiff claims that the Court ignored precedence set by the Fourth District in *Adams County*. However, the Court noted that *Adams County* found no due process issues were involved since the ICC proceedings did not actually affect property owners' property rights. On page 19 of the Order, the Court stated: "However, having concluded there were no property interests at stake, there was no process due. The Court in *Adams County* did not have before it the situation before this Court. Now there are property interests at stake, and now process is

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due."

The Post-Judgment Motion points to Supreme Court Rule 18(c)(3) and states that the Order "[f]ails to find that the statue cannot reasonably be construed in a manner that would preserve its validity . . ." However, the language in Rule 18 indicates that this prong of Rule 18 is not required as long as the statute is found unconstitutional on its face, as applied to the case *sub judice*.

The Order contains necessary analysis under Rule 302 and Rule 18 to declare Section 406.1 unconstitutional. The Court analyzed the following due process cases, which were contained in its 302 Order: *Fuentes v. Shevin*, 407 U.S. 67 (1972); *World Painting v. Costigan*, 2012 IL App (4th) 110869, P.14; *Lyon v. Dept. of Children & Family Services*, 209 Ill.2d 264; *Mathews v. Eldridge*, 424 U.S.319, 335 (1976); *Mullane v. Central Hanover Bank Trust Co.*, 339 U.S. 306, 314 (1950); and *Lakeland Construction Co. v. Department of Revenue*, 62 Ill.App.3d 1036 (1st Dist. 1996). The Court also analyzed why the *Adams County* case was not precedential to the case before the Court.

III. Conclusion.

In its Order, the Court undertook the necessary analysis under Rule 302 and Rule 18 in declaring Section 406.1 unconstitutional. The Court Order makes the specific findings which were required by Rule 18. Its findings should be confirmed, and Plaintiff's Post-Judgment Motion should be denied.

RICHARD L. HUTCHINGS, *et al.*, Defendants
By ASHER & SMITH, their Attorneys

By: _____
S. Craig Smith, Attorney

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FILED
NOV 22 2017
Angela R Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

REPORT OF PROCEEDINGS -
MOTION TO COMPEL
MOTION FOR CONTINUANCE

Transcript of the hearing held November 17, 2016, before CRAIG H. DeARMOND, Circuit Judge.

PRESENT:

MR. DAVID A. ROLF
MS. LISA A. PETRILLI
Attorneys at Law
for Plaintiff

MR. S. CRAIG SMITH
MR. DREW GRIFFIN
Attorneys at Law
for Defendants

BARBARA CASH, CSR, RDR, CRR
Official Court Reporter
Edgar County Courthouse
Paris, IL 61944
CSR No. 84-1491

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(Hearing commenced at 8:52 a.m.)

THE COURT: I have 16 ED 4, 5, 12, and 13. We have pleadings filed in 16 ED 4 through 6, 12, 13, 15 through 25, 28, 29, 38, 40, 42 through 45, 47 through 55.

I have a traverse and motion to dismiss filed August 9th of 2016. The defendants -- I have a response to the traverse and motion to dismiss. I don't have a file-marked copy in front of me, so I don't remember exactly what date that was filed.

MR. SMITH: What was that motion?

THE COURT: The response? Mr. Rolf?

MR. ROLF: October 22nd of 2016. In addition, Judge, the defendants filed a memorandum in support of their motion on September 12th.

THE COURT: I got that. I got the response. I have a motion to compel filed November 6th and a motion to continue filed yesterday. Is that everything that I should have?

MR. SMITH: I think it is.

MR. ROLF: Did you mention a reply?

MR. SMITH: There was a reply filed --

MR. ROLF: -- November 4th.

THE COURT: I don't believe I've gotten the reply. I have to admit I haven't seen the reply.

MR. SMITH: That's all right.

THE COURT: Was a hard copy sent up to Danville? Do you

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1 know?

2 MR. SMITH: I don't know.

3 THE COURT: Okay. By the way, for future reference, you can

4 e-mail me any documents that you want.

5 So I assume, if I understood correctly -- we should put on

6 the record we had a telephone conversation yesterday. And let's

7 back up a minute.

8 We have Mr. Rolf and Ms. --

9 MS. PETRILLI: Petrilli.

10 THE COURT: -- Petrilli --

11 MS. PETRILLI: P-e-t-r-i-l-l-i.

12 THE COURT: -- for the plaintiff, Mr. Smith for the

13 defendants.

14 MR. SMITH: And Mr. Griffin.

15 THE COURT: And Mr. Griffin.

16 The matter comes on for hearing pursuant to notice. We did

17 have a telephone conversation yesterday. It is my understanding

18 from that conversation that the motion to compel has been

19 resolved. Is that true?

20 MR. SMITH: We are not objecting to their motion, just need

21 a date certain. We're working on answers. I would remind the

22 Court we have quite a few out-of-state people.

23 THE COURT: As I recall, there were two components to it.

24 One was some responsive pleadings. Another was some access for

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1 inspections.
2 MR. SMITH: Right.
3 THE COURT: Those have all been agreed, or at least you're
4 not objecting to those.
5 MR. SMITH: Correct.
6 THE COURT: Okay. Ms. Petrilli.
7 MS. PETRILLI: I suppose just to clarify, we'd like a date
8 certain for the discovery responses. And in terms of access on
9 the properties for which we've requested, we filed motions to
10 compel on 16 ED 26, 31, 32, 33, 35, 36, and 41.
11 THE COURT: All right. So you're asking for both documents
12 and access in those files.
13 MS. PETRILLI: Right. And we'd like access as set forth in
14 our motion, which set aside the week of December 12th through
15 the 16th for such access.
16 MR. SMITH: And my understanding, access is for an updated
17 appraisal.
18 MS. PETRILLI: That's correct. It will be for appraisers to
19 perform an inspection of the properties.
20 THE COURT: Mr. Smith?
21 MR. SMITH: No objection to that.
22 THE COURT: All right. There's no objection, so the motion
23 to compel is granted as to the access to properties that have
24 been listed. And that would be provided between December 12th

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1 and December 16th of 2016.
2 Now, as to the date for the response to the discovery
3 requests.
4 MR. SMITH: I would say 30 days from now, Judge.
5 THE COURT: Thirty days. Ms. Petrilli or Mr. Rolf?
6 MS. PETRILLI: That's fine.
7 THE COURT: All right. So 30 days for defendants to
8 respond.
9 Does that take care of all of the matters with regard to
10 the motion to compel?
11 MS. PETRILLI: It does.
12 THE COURT: Okay. I think the next matter would be the
13 motion for continuance. Mr. Smith.
14 MR. SMITH: Judge, we filed a motion to continue, just to
15 add additional testimony, whether it be live testimony or by
16 evidence deposition, of certain witnesses that I have advised
17 counsel for Ameren would be the two law judges, two of the
18 commissioners, three people who testified before the commission:
19 Greg Rockrohr, Donell Murphy, and Mr. Trelz who's here today. I
20 believe that we're entitled to present additional evidence
21 during one of these motions, and the traverse.
22 I do, however, not -- I don't believe that this is a
23 do-or-die, in that I think both parties have put in evidence or
24 documentation from the ICC. And I don't believe that Ameren is

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1 objecting to testimony given at the ICC. If that's the case,
2 much of the testimony that we would be getting by way of
3 depositions or live testimony is already in the record and has
4 already been provided to you.
5 However, the law judges, their instructions as to how to
6 proceed, that's also been provided to you. And I believe that
7 if the parties stipulate that those witnesses would testify as
8 they have in the prior hearing before the ICC, it may not be an
9 issue. If it's going to be that we can't stipulate that they
10 would be testifying as they did before the ICC, then I would
11 like to have an opportunity to have them come here and testify.
12 THE COURT: Are there any matters that relate to the
13 commissioners or the ALJs that are not in the record, that you
14 believe are essential to your motion?
15 MR. SMITH: Well, on the commissioners, we have no idea,
16 because their comments are not in the record. Their vote is in
17 the record. The ALJs' comments about setting up procedure is in
18 the record. But why they set those procedures up, of course, is
19 not in the record. And I would be asking questions dealing with
20 why certain procedures were established during status hearings.
21 THE COURT: Relating to notice?
22 MR. SMITH: Yes, sir.
23 THE COURT: Mr. Rolf?
24 MR. ROLF: Well, that's my initial reaction to the

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1 suggestion that he's going to have administrative law judges and
2 commissioners subpoenaed to testify, is that that simply goes to
3 the notice and due process argument, which I think is a legal
4 question that may be disposed of today based on the pleadings
5 that are here.
6 I don't know that the entire ICC record is before the
7 Court. But certainly the orders that were entered, the
8 certificates and the orders of the commissioners, were
9 submitted. And we don't have any objection to those. And we
10 plan to submit those, you know, to establish our prima facie
11 case. Then the burden would shift to the landowners, based on
12 our submission of those orders. And they obviously say what
13 they say and present issues that were considered and such.
14 But if he's soliciting all these witnesses and testimony
15 just for the issue of procedure and notice -- I think that's the
16 due process issue they've raised -- I think, one, that that's an
17 argument that would be disposed of and denied. We're not going
18 to have evidentiary hearings on the notice and due process
19 issue. It's been resolved by the Fourth District already.
20 MR. SMITH: Well, that's why we're here. We have a
21 disagreement on that.
22 THE COURT: I understand.
23 MR. SMITH: But what I would also say, Judge, I think that
24 the administrative law judges and the commissioners will deal

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1 with notice. I think that the ICC staffers Rockrohr -- I'm
2 probably terrible with his name -- Donell Murphy who was
3 presented by Ameren, and Mr. Trelz by Ameren, would go not only
4 to notice but propriety of the petition, subject matters that
5 were brought up before the Commission, which we believe the
6 Adams court specifically says all subject matter is up for game
7 at this hearing.
8 THE COURT: I guess I'm sort of just thinking out loud. We
9 have a couple of different things going on here at the same
10 time. The procedure and the results that came out of the ICC
11 have to do with the propriety of the plan. They don't relate to
12 eminent domain.
13 I'm not so sure that the issues of notice and due process,
14 as they related to the ICC proceedings, is a resolved matter for
15 us here today. Because the issue before us today is a
16 constitutional property deprivation due process issue that
17 wasn't before either the ICC or Adams. That had to do with the
18 review of the propriety of the process as it related to the
19 approval of the plan.
20 Now we've moved to -- from simply the propriety of the plan
21 for Ameren to the process of depriving people of their property
22 interests. I'm not so sure that -- and I think, really, if I
23 remember, the court in Adams specifically held that they weren't
24 addressing the property interests.

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1 Now, that having been said, there are portions of their
2 motion that I think have been resolved by both the ICC and by
3 the Adams decision. I'm going to be hard-pressed to be
4 convinced that we go back and relitigate is it the least
5 expensive; is it -- whether the property's necessary or
6 convenient for the purpose sought; whether the amount of
7 property is excessive; whether it's for a public use; whether
8 it's a public convenience or necessity.
9 That's a bigger rock to push uphill, to convince me that
10 that can be relitigated. I really think the issue here narrows
11 down to the due process question of notice as it relates to the
12 claim, as I read it, if I'm reading it correctly -- and I've
13 tried to get through all of the ICC orders and all the documents
14 that have been provided to me -- that there were alternative
15 plans submitted; that although the initial notice may have been
16 to everybody that was affected, subsequent plans included
17 properties which did not -- which the claim is they did not get
18 notice.
19 So the question that we've got before us, I do think, may
20 very well be one of first impression. I understand Ameren's
21 position that, "Well, no, it's not first impression because
22 Adams has already addressed it." I don't think they addressed
23 it from the context that we're having to look at it here.
24 If the issue is, Were there property owners who never did

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1 get notice properly, that's a claimed due process violation, a
2 property interest violation, a constitutional issue that wasn't
3 addressed and wouldn't have been addressed by either the Adams
4 court or the ICC.
5 There have been findings, however, with regard to these
6 other matters that are also part of their motion to dismiss that
7 it's going to be a lot harder to convince me they are entitled
8 to relitigate those matters. I think those matters may very
9 well be resolved. But that's not really the issue here. The
10 issue here is -- in my opinion, really narrows down to the
11 notice and due process question. I may be wrong. Of course,
12 that's why they've got appellate courts too. But that's kind of
13 where I think we are.
14 So that gets me to my question. If the testimony that
15 you're wanting, if the evidence that you're wanting, is relating
16 to that issue, I'm inclined to give you time to get it, because
17 I think that is the crux of what we've got in front of us.
18 MR. SMITH: Well, I agree with your narrowing of the issue.
19 It is -- and as you can tell by my memos, it's all going to
20 notice and due process. And I do think that the -- especially
21 the two law judges, or even just one potentially, to explain
22 issues on notice, would be who we would be calling.
23 THE COURT: The reference in Adams I was referring to would
24 have been paragraph 80 of the copy that was provided to me as

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1 Exhibit 1, where they found it unnecessary to address some
2 specific arguments because they've determined that the
3 underlying proceedings before the Commission neither confer
4 property rights on ATXI nor deprive landowners of their
5 protected property interests. They're not addressing that
6 issue.
7 Well, that's the issue we're addressing, because now we're
8 in the eminent domain part of the process. So I don't think
9 it's been -- I am inclined to believe, although I'm willing to
10 listen to argument, and I learn something new every day, and it
11 wouldn't be the first time I've had to turn around and say, "You
12 know what? I was wrong." But I'm inclined to believe that the
13 issue before us really has not been addressed by Adams.
14 That being said, if what they're asking a continuance for
15 is to flesh out more evidence with regard to the notice issue
16 -- to me, that's the crux of the case. And if that's what
17 they're asking time for, I'm inclined to give them time to do
18 that, because I really think this case boils down to, Did those
19 particular landowners get adequate notice?
20 I don't think we're in a position to relitigate how the ICC
21 came to their decision, whether they decided -- whether that
22 plan was the best plan, whether it was in fact the most
23 convenient or necessary. I think those issues have been
24 decided. And I don't believe -- although you may convince me

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1 otherwise, I don't believe those issues really are subject to
2 being relitigated. And I think that Ameren's position in that
3 regard is accurate. Those matters have already been addressed.
4 That's the part of the -- that's the part of the ICC
5 process which they did have authority and jurisdiction over and
6 they did specifically rule on. What they've said in Adams is
7 they're not addressing the due process property right question,
8 because that's not really before them.
9 They agreed that they -- they said that they had -- that
10 the due process rights of the members were not violated as it
11 relates to the determination of the propriety of the plan.
12 We're beyond that now. Now we're to the effect of the plan on
13 the property interests of the parties.
14 MR. SMITH: I believe you're correct. They went on even to
15 say, in oral arguments, "Show us what is your property interests
16 now." And there's no case law on what it is, as they appear
17 before the ICC.
18 I would comment, though, that I think that all subject
19 matters that were before the Commission are now before this
20 court, because of their paragraph 48 comment where they were
21 discussing the Lynn case. And the Lynn case, the trial court
22 had dismissed the motion for dismissal and traverse, and they
23 said, "No."
24 And then the Adams court, which was the same Fourth

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1 District, said, "Ultimately, we determine courts were not
2 preempted from inquiring into the same subject matters as the
3 Commission during the certification procedure."
4 So I believe that everything may be in play now. I'm not
5 saying that it's not a tough burden. But I also agree with the
6 Court that they punted on paragraph 80. They said, "We're not
7 going to discuss the Constitution. We're not going to discuss
8 due process, because quite frankly you don't have a property
9 right. You're not being deprived of your property. So come
10 back to us when you have a property right."
11 Well, we're here.
12 THE COURT: And I -- I agree with you, sort of. Yes,
13 everything -- I suppose, from a technical standpoint, yes,
14 everything's fair game. But I'm supposed to give deference to
15 the proceedings that have already been held. And it's going to
16 be your burden to show me that those things somehow either
17 weren't done properly or they were just completely wrong.
18 So, yeah, I mean, from a technical standpoint, yes,
19 everything's in play. But, realistically, and based upon the
20 extent of the evidence that was presented, it's going to be a
21 pretty tough row to hoe to overturn what's been done as far as
22 these other findings.
23 But, yeah, technically, I mean, it's all subject to circuit
24 court review because it's an administrative proceeding, and now

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1 we're in circuit court. And, yeah, I've got authority to review
2 administrative proceedings to make sure that they were done
3 properly and that all the rules and procedures were properly
4 followed. To make a factual determination that the ALJs were
5 factually wrong, that's a pretty tough burden.
6 Mr. Rolf.
7 MR. ROLF: Judge, I'm going to respectfully disagree with
8 your analysis of this, and I know you appreciate that's part of
9 this process.
10 THE COURT: Absolutely.
11 MR. ROLF: The due process issue was squarely addressed by
12 the Fourth District in Adams County. And if you -- they didn't
13 punt on it. By saying there's no property rights at issue in
14 this hearing, they didn't say, "Therefore, we don't have to
15 address it." They said there's no property rights; therefore,
16 the due process rights -- I mean, this is the last sentence of
17 paragraph 80. I mean, I think when the landowners characterized
18 that they didn't address the issue, I don't know how they could
19 address it other than saying the due process rights of the Edgar
20 County members were not violated.
21 They didn't say that, "So we don't have to reach that
22 issue." I know you've read a lot of appellate court decisions.
23 And if an appellate court says, you know, "Based on what's
24 before us, we don't have to reach that issue," they say, "We're

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1 not making that ruling today. We're not reaching that issue."
2 What they said was: The due process of the Edgar County
3 members were not violated. Okay? That's on the notice issue.
4 In addition, on the second grounds -- that Section 8-406.1 is
5 unconstitutional because it didn't have a notice provision --
6 they squarely said that's not true. It was upheld as
7 constitutional.
8 So there were no due process rights that were violated at
9 the ICC. And where that plays into where we're at now, and the
10 Court's suggestion that when you have property rights, you are
11 afforded due process -- that's true. And they're afforded due
12 process in this eminent domain case, which is where their
13 property rights are at issue. And they were afforded due
14 process because the complaint was filed. Their counsel accepted
15 service of summons. Their counsel has appeared beforehand.
16 They're entitled to participate in this proceeding.
17 And I agree with Mr. Smith and the Lynn decision and what
18 you just said, as the Lynn decision said, is that they're not
19 barred from requiring the utility to prove use and need for
20 acquiring the land. Now, based on the Eminent Domain Act that
21 was amended shortly after the Lynn case, we can meet that burden
22 by submitting the certificates and the order. And that's our
23 prima facie case. It shifts the burden to them. They have to
24 prove that the decision was wrong, that there's no basis for

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1 holding up, abuse of discretion. They have their due process
2 rights. They're afforded due process in this hearing in that
3 manner. Okay?
4 But if you look at the conclusion in their memorandum in
5 support of their traverse and motion to dismiss, you're going to
6 see what they're asking you to do. And it's to rule that the
7 Illinois Commerce Commission violated the due process rights of
8 the defendants when it failed to send them notice.
9 They're suggesting that the filing, by Ameren, of an
10 eminent domain case suddenly gives rise to property rights at
11 the ICC and gives rise to due process rights at the ICC. And
12 that's not at all what the law is and not what Adams County
13 said.
14 Adams County said we can't come in and file an eminent
15 domain and deprive you from participating in that, or not serve
16 summons on you and go to court and say, "Here's the compensation
17 that's owed; we're taking your property." They're entitled to
18 participate in this. And they all are. You've got 35 cases or
19 whatever is on file.
20 But the filing of this doesn't go back and somehow create
21 due process rights in front of the Illinois Commerce Commission
22 on the certificate proceeding, when the Appellate Court
23 specifically said the due process rights were not violated. And
24 this court can't go back and create due process rights that

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1 weren't there.

2 And the Court did not punt on it. It didn't pass on it.

3 It said, "There's no due process rights here. You're not

4 entitled to due process. Therefore, your due process was not

5 violated, either by failure to get notice or by the expedited

6 proceedings at the ICC."

7 Adams County landowners raised the same issues, and -- in

8 that appeal that was consolidated, and the same conclusion was

9 reached as to them. There's no due process violations of any of

10 those. The proceeding with eminent domain doesn't go back and

11 create those.

12 Otherwise, they could just, you know -- well, I mean, it

13 just -- they're asking this court to say we're going to create

14 due process rights in an Illinois Commerce Commission

15 proceeding, when the Appellate Court has said there are none

16 there and they weren't violated.

17 If we create them here, it's going to go up. And the

18 Appellate Court's going to say, "We told you once. There's no

19 due process rights at the certificate proceeding. There's no

20 due process violation for lack of notice or for expedited

21 proceeding at the Commerce Commission proceeding. Why are you,

22 in Edgar County court, telling us that there are? We've told

23 you there aren't."

24 Now, you have due process rights here. They've got them.

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1 They can come in and challenge the things under the traverse.
2 Is 150 feet too much or not -- you know. They can do that.
3 They've got the burden, you know, a stiff burden, but that's
4 where they're afforded the protections.
5 And they know that. Because in their reply, which you
6 didn't see, they tried to say, "Well, while the Appellate Court
7 said we don't have property interests at stake" -- which was the
8 basis for their saying there's no due process violation -- they
9 said that, "in essence, it's a done deal, foregone conclusion,
10 so we really did have property rights at stake. We did have an
11 interest at stake in front of the Commerce Commission. And
12 therefore, the Commerce Commission and the Appellate Court is
13 wrong, and now's the time for us to say that."
14 They wouldn't have to make that argument. They're still
15 going back to saying, "We needed due process at the Commerce
16 Commission." And the Appellate Court has said, "No, you don't."
17 Fair and square. They didn't kick the can down the road. They
18 didn't say, "We'll let the trial judge deal with it." They got
19 due process. It's right here, sitting right there.
20 THE COURT: And I appreciate what you're saying, Mr. Rolf.
21 And like I said, I'm willing to learn. And I'm going to give
22 you the opportunity to educate me. I've also never been
23 offended by an appellate court telling me I was wrong.
24 MR. ROLF: And I'm aware of that, Judge.

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1 THE COURT: Because I understand that I'm not going to be
2 right a hundred percent of the time.
3 The question that I have in my mind, in analyzing this, is
4 we've set -- there's been a mechanism set up by statute to
5 address a process by which the utility can seek to obtain rights
6 to form a -- this plan. That's a creature of statute.
7 Everything that was done at the ICC, and was reviewed by Adams,
8 has to do with that statutory creation and due process as it
9 applies to that statutory creation.
10 We're here, however, in a different vein. We're here in a
11 constitutional due process property deprivation issue, not a
12 creature of statute but of a basic constitutional right. I can
13 understand where Adams says, "We find it unnecessary to address
14 the specific argument that related to the notice, whether it got
15 actually mailed or didn't get mailed, because," they say, "the
16 underlying proceedings before the Commission neither confer
17 property rights on ATXI nor deprive landowners of their
18 protected property interests."
19 They recognize the limits of this statutory process. But
20 that's not where we are today, because now we're at the next
21 phase, where, as a result of the process that you've gone
22 through with ICC, now you're going to be seeking to actually
23 affect property rights and protected property interests.
24 If -- and this is just hypothetical. If the evidence came

SUBMITTED - 5[illegible] - [illegible] - 1/22/2018 10:41:31 AM

1 out that the properties involved here never got any notice of
2 any kind whatsoever until after the decision was made, it would
3 be difficult to envision why we'd even be allowed to have a
4 circuit court review an administrative procedure, if, without
5 notice, they can go ahead and do what they do.
6 If it's established at the circuit court level that
7 something was defective -- I kind of think that's why they let
8 us review them, is so that if that happens, then, yes, it can be
9 sent back. And they have to do whatever they're supposed to do
10 in a proper method.
11 I do think there's a distinction, although, like I said,
12 I'm willing to let you educate me. And the farther we go down
13 this road, I'm sure I'm going to learn a lot more. The question
14 I had before me, though, today, just without getting into --
15 I've got into some of the substance of it, simply to explain why
16 I think it's relevant that if in fact Mr. Smith is saying, "I
17 want some additional time to bring in additional testimony as it
18 relates to this one issue," I'm inclined to give it.
19 Now, if he said, "I want to bring in these people to
20 basically go back and retry everything that was in front of
21 ICC" -- no. No. You're going to have to convince me that
22 you're entitled to do that. You're going to have to show me
23 that there was some defect, other than the notice issue, before
24 you get to do that. But if it's as to the notice, it seems to

SUBMITTED - 5653008 - Angie Barnett - 1/22/2021 8:41:31 AM

1 me there's enough in the record to at least create the question
2 that I have to find out whether in fact there was proper notice
3 given and what constitutes proper notice under the
4 circumstances.
5 It would seem that when I went through the ICC findings,
6 they've anticipated the fact that when people submit alternate
7 routes, that the original notice that existed isn't going to be
8 enough, obviously, because now you're affecting other property
9 interests. And so they require that if you're going to submit
10 an alternate route, you have to list all the property owners
11 along that route. Well, why else would they list it, if they
12 didn't intend on everybody getting notice?
13 And if the question we've got in front of us is they're
14 saying, "Wait a minute, Judge. There's a bunch of us here that
15 never got the notice; we're on that second or third iteration of
16 routes and we didn't get the notice that was given to the first
17 group or the second group," that's a legitimate question of fact
18 that they should be allowed to support with evidence.
19 If it were simply a question of law, I would agree with
20 you. But I do think there is a question of fact that entitles
21 them to present evidence. And if that's what they're asking,
22 I'm inclined to give them the time to present that information.
23 MR. SMITH: That's what we're asking, and specifically
24 dealing with the ALJs' status hearings that they had, that I

SUBMITTED - 5630108 - Angie Barnett - 1/22/2021 8:41:31 AM

1 think that you probably read, where they explained the
2 procedures and what they were going to do and how they were
3 concerned that folks like these might not get notice. He says
4 it, and he establishes a procedure. "Why did you do it?" And
5 then the question is, to him --
6 THE COURT: Was the procedure followed.
7 MR. SMITH: -- was it followed? And if it wasn't, what's
8 the remedy?
9 I make exception to Mr. Rolf on his argument that eminent
10 domain, we have plenty of due process rights in eminent domain.
11 Well, you know, the chicken's already out of the hen house by
12 then. They already got it. It's just a matter -- their due
13 process, what they're talking about the due process that we're
14 entitled to today is, How much money? What are my damages?
15 My due process I'm talking about is what they set up about
16 240 years ago, east of here, when a bunch of landowners got
17 together and set up a thing called the Fourteenth Amendment, an
18 Article of the Constitution, saying, "You can't take my property
19 without giving me some kind of notice." It's called due
20 process. They did punt due process.
21 "No property or property rights of landowners are taken, so
22 there's no reason to discuss due process." They didn't have due
23 process. It goes to notice, Judge, and that's what my witnesses
24 are talking about.

SUBMITTED - 563006 - Angie Barnett - 1/22/2021 8:41:31 AM

1 THE COURT: Well, they had due process as far as it went for
2 purposes of that administrative proceeding.
3 MR. SMITH: Well, I would --
4 THE COURT: But not addressing the property rights or the
5 property interests of the parties, because they specifically
6 said those weren't at issue.
7 MR. SMITH: At issue, right.
8 THE COURT: That's where I think we have our disagreement
9 between Mr. Rolf and I. But like I said, I'm willing to be
10 educated.
11 MR. ROLF: Well, Judge, I mean, if we look at the Commerce
12 Commission vs. Operator Communication case -- that's cited in
13 support of due process. It talks about due process in an
14 administrative proceeding and the Administrative Procedure Act.
15 There's due process required when it's a contested case, when
16 rights are being determined. That's consistent with the Lynn
17 decision, the two Supreme Court cases, the Adams County case.
18 They say that if it's a -- under the Public Utility Act, if
19 it's a contested case, Section 1-30, if there's legal rights,
20 duties, or privileges determined. And the Appellate Court said
21 there aren't in this ICC proceeding for this, putting together
22 this plan. And then the same thing would be under the
23 Administrative Procedure Act if there's legal rights, duties, or
24 privileges determined.

SUBMITTED - 563076 - Angela McKee - 1/22/2021 8:01:31 AM

1 The Public Utility Act is where there's complaint cases,
2 investigative proceedings, or rate-making cases. Then there's a
3 contested case. Rights are determined. Therefore, there is
4 notice requirements and due process issues.
5 In this case -- I mean, this is the very issue they raised
6 in the Appellate Court. And again, they're asking -- suggesting
7 that the Illinois Commerce Commission violated the due process
8 rights of the defendant. The Illinois Commerce Commission isn't
9 even a party to this case. They're -- you know, this is the
10 issue --
11 THE COURT: But for the Illinois Commerce Commission, we
12 wouldn't be here. No, they're not a party, but they are the
13 precipitating cause for the dispute. They don't have to be a
14 party. This is -- this is essentially -- what's requested is a
15 review of their process.
16 MR. ROLF: Which was made already in Adams County, very
17 specifically.
18 THE COURT: Which, in my opinion, does not address the exact
19 issue that we have in front of us here.
20 The other problem that I've got is, I take the idea -- you
21 know, lawyers argue all the time, "Judge, you should find this
22 unconstitutional." Yeah, yeah, right. I'm a trial court.
23 Okay? That's not my job, to find things unconstitutional.
24 That's the people that get paid more than me and sit in bigger

SUBMITTED - 563076 - Angela McKee - 1/22/2021 8:01:31 AM

1 chairs.

2 But there are occasionally circumstances where the

3 potential unconstitutionality of a procedure requires the trial

4 court to make that finding and then leave it up to the courts of

5 review to decide whether that's true or not.

6 I think there are issues with the vagueness of how notice

7 is described within the ICC and exactly who it is that's

8 supposed to provide the notice and under what circumstances.

9 And that's why I think it is relevant, the information that he's

10 wanting from the ALJs, because I may have to make a

11 determination on the constitutionality of the statute, which I

12 am extremely reluctant to do -- and most trial courts are

13 extremely reluctant, for good reason, to do.

14 And if I'm going to have to do that, then I want as full a

15 record as possible. That's why I write long opinions, so that

16 the Appellate Court either understands how I got to where I got

17 or they can see why I was so wrong.

18 Mr. Rolf.

19 MR. ROLF: I just want to clarify. They've raised the due

20 process constitutional issue on two grounds. One is that they

21 didn't receive notice, this ALJ's suggestion that they send out

22 these notices and they didn't. They've also raised that 8-406.1

23 is unconstitutional on its face because it doesn't provide a

24 notice provision.

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1 And you just mentioned in your comments that they're
2 challenging the constitutionality of the statute, as opposed to
3 the implementation of that statute and due process. If they're
4 challenging the constitutionality of the statute -- and we
5 raised this in our response -- they're required to give notice
6 to the Illinois Attorney General of a challenge of the statute
7 on its face, as opposed to the application of that statute and
8 whether its alleged failed implementation violates due process.
9 That's two different issues.
10 THE COURT: And I'm not trying to speak for Mr. Smith.
11 Mr. Smith will tell us what it is he's --
12 MR. SMITH: And as Mr. Rolf knows, if you read that
13 section, there are time elements when you can advise the
14 Attorney General. One is when he filed. Two is when I make my
15 answer or my counterclaim. There's still time in this to let
16 the AG know about it. So that's not an issue today, whether the
17 AG is here or not.
18 The issue, again, is, yes, we've talked about what the
19 Constitution says, in our motion, and what I believe the
20 Constitution stands for, not only the U. S. Constitution but our
21 state Constitution. But we've also raised in our motion that
22 they didn't follow their own procedures. And therefore, there
23 is an issue that this trial court can look at and say, "Well, if
24 you didn't do it, and you didn't follow your own procedures, and

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1 why didn't you follow the" -- I'm glad Mr. Rolf brought it
2 up -- "the Administrative Procedure Act?"
3 They ought to be read together. The Administrative
4 Procedure Act is very specific. It says if you have an
5 administrative hearing and it's contested -- boy, this is
6 contested -- then you have to, you shall, give everybody notice
7 of the hearing by registered or certified mail. That goes back
8 to my argument. Why did the ALJs talk about this? Why did they
9 set up an extra safeguard? I think we know why they did.
10 THE COURT: Let me flip hats for a minute. If you felt the
11 the procedure wasn't properly followed, then don't you have
12 administrative remedies available to you? And did you or did
13 you not pursue those?
14 MR. SMITH: We pursued the fact that we felt that there was
15 a due process right at the time that they should have it. We're
16 not denied the right to indicate that it was also raised but the
17 Appellate Court didn't even touch it, didn't talk about it, the
18 Administrative Law Act. Nor did they talk about this extra
19 safeguarded procedure that the ALJ brought up that we want to
20 bring into the record here.
21 THE COURT: Okay. Mr. Rolf, anything else on this point?
22 MR. ROLF: Well, I think the Fourth District Appellate
23 opinion belies what was just represented, in that they didn't
24 address it or speak to it. It's referred to in there, and they

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1 said there's no property rights.
2 Another interesting thing is he keeps saying, "they,"
3 "they," "they" -- "they" being the ICC. But he again is asking
4 to go back and revisit, relitigate, retake the issue of whether
5 the ICC violated their due process rights in the Fourth
6 District. And the single sentence couldn't be any clearer, that
7 their due process rights were not violated.
8 THE COURT: I've even got it underlined myself. But I've
9 also got underlined that sentence before it where they're
10 talking about these proceedings aren't conferring property
11 rights.
12 MR. ROLF: That's the basis for their reaching the decision
13 that they weren't violated.
14 THE COURT: I understand that. But that's kind of the
15 dilemma that I have, is that they're deciding due process absent
16 the deprivation of a property right. Now we're deciding due
17 process specifically as it relates to property rights, which
18 they have expressly excluded from their analysis.
19 MR. ROLF: The only other thing I would say, with regard
20 with notifying the Attorney General. In an eminent domain case,
21 the landowners, one, don't file an answer. Two, they're not
22 required to file a counterclaim until after their traverse or
23 motion to dismiss has been heard.
24 The purpose of giving the Attorney General notice is so

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1 they can weigh in on the constitutionality of this. So if the
2 landowners think they can wait until after they -- until they
3 file a counterclaim, the issue will long be resolved before
4 then.
5 THE COURT: Well, and if you think they're procedurally in
6 error, then you can file the proper motion, and I'll be glad to
7 hear it.
8 MR. ROLF: Fair enough.
9 THE COURT: All right. So here's where I believe we are.
10 I've kind of fleshed out at least some of my thought process.
11 It's not definitive. I've tried to make it clear that I could
12 very well, after hearing all of the evidence, agree entirely
13 with Mr. Rolf and Ms. Petrillo. I don't know yet.
14 But I do think that there is at least enough raised in the
15 motion to allow Mr. Smith additional time to subpoena the
16 witnesses that he believes are necessary to present evidence in
17 support of a fact question as it relates to notice. I'm willing
18 to hear whatever evidence you are in a position to present this
19 morning, if you're in a position to present evidence, or
20 continue the matter to give you time to present more.
21 It's their motion to dismiss. Mr. Rolf, if it were your
22 motion to dismiss, and you decided you needed additional time,
23 I'd give you that time. I'm one who fully believes that both
24 sides should have a full and fair opportunity to present all of

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1 the evidence they believe is necessary for their record before I
2 rule.
3 MR. SMITH: We would want -- we would have -- our druthers
4 would be to do it at one time, have one hearing. I guess then
5 it comes down to the question -- as you can see, there are
6 separate eminent domain petitions filed. We have filed the
7 motion as to, I believe, 35 right now.
8 THE COURT: Looks like.
9 MR. SMITH: Are we consolidating this for evidence as to
10 all 35, or are we pursuing this one at a time? I'm perfectly --
11 THE COURT: My intention would be to consolidate it for
12 hearing purposes. We don't necessarily have to consolidate the
13 cases.
14 MR. SMITH: No, I'm talking about for hearing purposes and
15 testimony.
16 THE COURT: Mr. Rolf?
17 MR. ROLF: Well, the issue that's going to come up, Judge,
18 if we're going to go down this path of notice, there's 35
19 landowners. Some of them got notice that others didn't get.
20 Some of them were at certain meetings. As you know, some of
21 them petitioned to intervene. Some of them, in their petition
22 to intervene, said, "We accept the record as it stands and the
23 procedural posture as it stands." So they're not going to all
24 be the same, if we're going to go down to -- if the issue is

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1 what specific notice each individual landowner may have gotten
2 or didn't get or what they knew or didn't know.
3 THE COURT: It would sound to me, though, that you have
4 knowledge of who got notice and who didn't, just as Mr. Smith
5 does.
6 MR. ROLF: Well --
7 THE COURT: If that's the question, if that's true, then why
8 can't we reach certain stipulations as to those facts that you
9 both understand to be true?
10 MR. SMITH: Well, that's why I also, in my motion,
11 requested a case management order where we -- we're going to
12 also send discovery documents to them, to find out who they
13 believe did get notice and how they got notice. So we're going
14 to -- we've got the motion -- or the discovery ready to file.
15 So, again, first, if you're going to grant the motion for
16 me to present more evidence, at that point we will go forward
17 with discovery. We're answering their discovery. They'll
18 answer ours.
19 THE COURT: Well, I do intend on granting your motion to
20 continue.
21 MR. SMITH: Thank you.
22 MR. ROLF: Judge, just so I have this on the record.
23 THE COURT: Mr. Rolf.
24 MR. ROLF: We were here August 29th and set the schedule

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1 and set this hearing date. And, you know, when we did, the
2 suggestion by counsel was that we set aside an hour for this.
3 We said, "Well, no, a traverse can be an evidentiary hearing.
4 Let's make it three hours." So we set aside the half day. And
5 then on the eve of the hearing, less than 24 hours before that,
6 we get -- a motion to continue is filed. So I want to object on
7 the record to that.
8 Not only that, now he's suggesting that they get to serve
9 discovery to find certain things out, when we're also here on a
10 motion to compel and they've had discovery that's been
11 unresponded to for three or four months.
12 So, you know, two and a half months go by, nothing happens.
13 The purpose of this is for delay. I think we're going to
14 continue to see it. And it's to the landowners' advantage, and
15 the perceived disadvantage of Ameren, that this thing get drug
16 on.
17 It's their motion, their traverse. They would have known
18 what witnesses they needed, particularly if they're raising this
19 due process issue. That wasn't new to them. It was in their
20 pleading. So if they intended to have people here on notice,
21 they could have said on the 29th -- or sometime in the last two
22 and a half months sent out subpoenas saying, "Hey, we've got an
23 evidentiary hearing on the 29th. We need Mr. Albers, the
24 administrative law judge here," do it and subpoenaed him. But

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1 instead, we're on the eve.

2 So I want on the record a general objection to this motion

3 to continue. And it's untimely under the Fifth Circuit rules.

4 It's no good cause shown.

5 That said, you know -- discovery on all this? I don't know

6 what he has in mind, or who, because we just found out yesterday

7 that there's these witnesses. They raised all the notice issues

8 in the Commerce Commission. I mean, the opinion even says that:

9 that it was disputed, it was contested. They had the whole ICC

10 record there. And the Court said there's no due process rights

11 violated. So, you know. . .

12 THE COURT: I don't disagree with the fact that the motion

13 was untimely. I don't disagree with the fact that this should

14 have been done sooner. As it turns out, it hasn't. I can

15 chastise Mr. Smith for that, but I'm not going to penalize his

16 clients for that.

17 It looks like what we might have thought wasn't quite so

18 complicated may be more complicated than we think. Maybe that's

19 my fault. Maybe I'm just making it too complicated. Maybe it's

20 because I'm just a simple guy from Iowa who doesn't get all

21 this. But I think it's rather complex. And I think it does

22 raise some fairly unique issues that we don't normally find, if

23 we are talking about the adequacy of notice as it relates to the

24 ultimate taking of property interests.

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1 I fully understand your frustration, Mr. Rolf. But if I'm
2 going to err, I'm going to err on the side of caution, because
3 we are in fact ultimately talking about the permanent
4 deprivation of property interests. That's a pretty significant
5 issue. And I don't think any court should be taking that
6 lightly.
7 I understand it's all for a public good. I understand it's
8 all for improvement of persons and properties and communities.
9 It all has a perfectly legitimate use and purpose. But we're
10 talking about permanently depriving property interests -- which
11 I get it. People are going to be understandably disturbed,
12 upset, unhappy. So before we get to that point, I want to make
13 sure that we've covered everything that needs to be covered.
14 I think they at least have a legitimate argument. Whether
15 they're able to win that argument, that's a whole other issue.
16 Like I said, by the time we hear everything, I may very well
17 wind up agreeing with Ameren's position and deny the motion.
18 And then we move on. But I think there's at least enough raised
19 by the motion to allow them the opportunity to present the
20 evidence that they ask to present.
21 If an appellate court later finds that that was
22 unnecessary, then so be it. But I just think that in order to
23 make sure that everybody's -- just as I would if the request
24 were being made on the side of Ameren. I want to make sure

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1 everybody has the opportunity to present everything they believe
2 is necessary for this court to make a finding.
3 Mr. Rolf.
4 MR. ROLF: Fair enough. I derailed the question, I think.
5 So what was your question before I --
6 THE COURT: I don't even remember.
7 MR. SMITH: I think I was asking about consolidation.
8 THE COURT: Oh, consolidation.
9 MR. ROLF: Yeah.
10 THE COURT: My intention would be to consolidate it for the
11 hearing purposes. If you don't want to consolidate the cases, I
12 understand that. But I'm not going to require witnesses to come
13 35 times.
14 MR. ROLF: Well, I guess, Judge, I'm somewhat perplexed as
15 to what the witnesses will be.
16 THE COURT: Well, I think this is why we need the case
17 management. Okay? Because I've done -- this isn't my first
18 rodeo with complex litigation. Okay? We probably need to sit
19 down, just the attorneys -- sit down for a case management
20 conference.
21 Let's figure out -- I'm sure that these various groups of
22 landowners fall within different classes. You're going to have
23 a class of people who were all notified. You're going to have a
24 class of people who claim they were never notified. You're

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1 going to have a class of people who may not have been initially
2 notified but became part of the proceedings at some point in
3 time in front of the ICC.
4 Why don't we sit down and figure out what our categories of
5 landowners are and where they fall in this notice continuum, so
6 that Mr. Rolf and his side can figure out who they need to
7 prepare for and what they need to prepare. I agree with the
8 point he was going to make, and that was, to just have you pull
9 in 35 landowners and have them testifying to all different kinds
10 of things is going to be extremely difficult for them to be
11 prepared to cross-examine or present evidence of their own.
12 So let's figure out the categories of the landowners as
13 they relate to notice, because that's really the issue, the
14 primary issue we're giving you an opportunity to present
15 evidence on. We can do that in a case management conference
16 with just us.
17 Once we do that, then figure out, okay, to whom do your
18 witnesses relate? Does it relate to this group? Does it relate
19 to this group? Does it relate to this group? And then we
20 figure out, scheduling-wise, how we're going to present the
21 testimony. So that they know that, say, for example, on this
22 day, these are the only group of witnesses that are going to
23 testify, and that's the only group of people that you need to be
24 prepared to cross-examine. On this day, these people are going

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1 to testify, and this is the issue that they're relating to, so
2 that we break it down by these classes of landowners.
3 And if you come up with a different method of classifying
4 them or categorizing them, that's fine too. I'm not saying it
5 has to be the different levels of notice, you know. But let's
6 put it into a manageable form that both sides then can clearly
7 know, okay, this is the issue we're addressing; these are the
8 people we're going to be having testify; and this is the issue
9 that they're going to be testifying about -- rather than this
10 hodgepodge of just calling everybody one after the other, and,
11 okay, this person never got notice. This person got notice.
12 This person never appeared. This person was part of the
13 petition to intervene. Because I understand that there's all
14 different levels here. Does that make any sense at all?
15 MR. SMITH: Yes, sir.
16 THE COURT: Mr. Rolf? I'm trying to narrow it down so that
17 you aren't just given this deluge of witnesses and have no idea
18 who they're going to be and testify about.
19 MR. ROLF: I don't disagree with that's a way to maybe
20 categorize as to the landowners.
21 THE COURT: And if you come up with a different class of
22 categorization, that's fine with me too.
23 MR. ROLF: Another suggestion, I mean, because I think
24 we're going to -- if we're going down this path, I think we're

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1 going to have to hear from each of them. But the other
2 witnesses --
3 THE COURT: Or stipulate.
4 MR. ROLF: Yeah.
5 THE COURT: Are you telling me that you can't stipulate --
6 MR. ROLF: No, I'm suggesting that the landowners won't --
7 MS. PETRILLO: There's a dispute as to whether they actually
8 got notice. They've got affidavits that say, "We didn't get
9 it," and we -- our evidence is that they --
10 MR. ROLF: -- were sent.
11 THE COURT: Sure. Yeah. No, I'm not -- obviously I'm not
12 asking you to stipulate to those.
13 MS. PETRILLO: Well, that's everybody, though.
14 THE COURT: There isn't any group of people that you guys
15 agree, "Yes, they got notice," and they agree, "Yes, we got
16 notice"?
17 MS. PETRILLO: I think with regard to certain types of
18 notice of certain proceedings, I think that, yes, there are some
19 things that they would certainly agree that they got notice of,
20 because of the way that the proceedings and the ICC work. But
21 in terms of -- I guess -- I mean, our position is that everybody
22 got -- everybody had the same notice and they're not entitled to
23 any additional notice.
24 THE COURT: Because I'm not asking you to waive any claim or

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1 issue that you might have, by way of stipulation. I just
2 thought that if in this group there were certain numbers that
3 you might be able to agree on, we could take care of those by
4 stipulation. If we can't, we can't.
5 MR. ROLF: Are there certain witnesses -- if he can answer
6 this -- whose testimony is going to be needed for all classes of
7 landowners?
8 MR. SMITH: Well, that would be the ALJs.
9 MR. ROLF: That's what I mean. One suggestion I was going
10 to make, Judge, is that if we could have a 213(f)(1), (2), and
11 (3) disclosure by the landowners with respect to the issues on
12 the traverse and motion to dismiss -- not necessarily with
13 respect to the eminent domain case. Discovery will continue in
14 that, and that's where our discovery has been served on them,
15 and if they want to serve discovery on that.
16 But I think that tells us, for purposes of the hearing
17 we're going to try and set, who their witnesses are, what
18 subject matter is that they expect them to testify to. And then
19 we can decide, one, whether we need any discovery or
20 depositions. Or, you know, we can say, "We'll stipulate to
21 this" or "That's in the record. Here's twenty pages of the two
22 million that are in front of the Commerce Commission that you
23 can read." But I think that would be helpful, apart from what
24 we decide to do with the landowners.

SUBMITTED - 563076 - Angie Barnett - 1/22/2021 8:04:31 AM

1 THE COURT: I think that's fair.
2 MR. SMITH: I don't see anything wrong with that.
3 THE COURT: So how much time would you need to provide that?
4 MR. SMITH: Well, I can provide him with disclosures within
5 14 days, of the ALJs and the Commissioners.
6 Now, since they're independent experts -- I haven't hired
7 them. I have no idea, other than what they've read and what
8 I've read. I can provide them with that, and I can provide them
9 with their names and provide them what the subject matter will
10 be. So I think they're entitled to that.
11 THE COURT: Sure.
12 MR. ROLF: Yeah. I mean, (f)(2), "Independent Experts,"
13 addresses the subject matter. And they dealt with, obviously,
14 many subject matters over and over.
15 MR. SMITH: Correct.
16 THE COURT: So you'd like -- you want them to narrow it down
17 to "What is it that you're going to call them for?"
18 MR. ROLF: Right. I would suggest that that would apply to
19 any witnesses they intend to call at this hearing, perhaps apart
20 from the landowners. And then the landowners, we can try to get
21 together and say -- if it's three groups or categories or
22 something like that, we can deal with that. But anybody who's
23 not a landowner -- you know, he's said the CEO of Ameren.
24 MR. SMITH: Well, that's what I said yesterday.

SUBMITTED - 5[illegible] - [illegible] - 1/[illegible] [illegible] AM

1 THE COURT: I didn't hear that today.
2 MR. ROLF: No. What I don't want to hear is, if we're back
3 here on December 12th at a hearing, that, you know, "This is the
4 guy I need or want to hear from." I mean, just tell -- and I
5 don't doubt that he's ready, willing, and able to do that. I
6 just would like to have him pinned down to 14 days, so we know
7 what we're talking about.
8 MR. SMITH: I can do it.
9 THE COURT: Fourteen days. All right. And that's a fair
10 request. What else can we do?
11 MR. SMITH: I think we just need to get together with the
12 Court and set up a case management order.
13 THE COURT: You guys want to come up to Danville to do that?
14 MR. SMITH: Sure we do.
15 THE COURT: Since it's just us.
16 MR. ROLF: And case management order to address from where
17 we are today through the hearing on the motion to dismiss and
18 traverse?
19 THE COURT: Right. How much time everybody needs to do
20 whatever discovery they're going to do, get depositions done if
21 they're going to be doing evidence deps.
22 MR. SMITH: Final pretrial and trial.
23 THE COURT: I mean, honestly, we could do that by phone if
24 you want. Attorneys wouldn't need to make a trip.

SUBMITTED - 563006 - Angie Barnett - 12/20/2018 10:11 AM

MR. SMITH: That's fine with me.

THE COURT: Because we're not going to be doing anything of substance. We're just doing scheduling really. And as far as the deadlines go, I normally leave up that to the attorneys. You know your cases much better than I do. The only dates I even care about are the final pretrial and the final hearing date. The various other deadlines are whatever you guys agree on. And if you can't agree, then get me on the phone and I'll flip the coin of justice and set a date.

MR. ROLF: I think the ball might finally be in your court to say when are you available for this phone conference.

THE COURT: For that, I need Alex. He's the one with all the answers.

MR. ROLF: And he's not waiting in the car.

THE COURT: Yeah, he's not waiting. Tell you what, though. We can probably do it in what? Half an hour?

MR. SMITH: You want to do it today?

THE COURT: I mean, I'm willing to sit -- I'm willing to wait. Once we get done with the hearing, we can just do it now. And I'll get him on the phone and come up with a date.

MR. ROLF: We can do that.

MR. SMITH: Why don't we do that while we're here. We can go in the jury room.

THE COURT: Sure. So what else do we have to do out here?

SUBMITTED - 565006 - Angie Barnett - 1/22/2021 8:41:31 AM

1 Anything?
2 MR. SMITH: No, sir.
3 THE COURT: Mr. Rolf? Ms. Petrillo?
4 MR. ROLF: There is, Judge, just to prove that we can
5 stipulate to certain things. There's been a change of ownership
6 of land in two of the cases.
7 THE COURT: Okay.
8 MR. ROLF: And we've got stipulated substitutions and
9 consolidations. One of the cases is a substitution.
10 THE COURT: Substitution of parties?
11 MR. ROLF: Yeah, where the land was sold to a different
12 owner. And this is now the different ownership of the adjoining
13 parcel, so those cases would be consolidated.
14 THE COURT: Okay. So we've got 16 ED 20, there's a
15 stipulated consolidation order that's entered this date.
16 And in 16 ED 25, the stipulated order for substitution of
17 parties, which is entered this date.
18 All right. Anything else, then, other than us figuring out
19 dates?
20 MR. SMITH: No.
21 THE COURT: Okay.
22 MR. SMITH: Thank you.
23 THE COURT: Thank you.
24 (Hearing adjourned at 10:02 a.m.)

SUBMITTED - 563006 - Angie Barnett - 1/22/2021 8:04:31 AM

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT

EDGAR COUNTY PARIS, ILLINOIS

I, Barbara Cash, CSR, RDR, CRR, Official Court Reporter, do hereby certify that the foregoing is a true and complete report of the proceedings had in said cause on November 17, 2016, before Craig H. DeArmond, Circuit Judge.

Dated this 22nd day of November, 2016.

Barbara Cash

CSR No. 84-1491

SUBMITTED - 567006 - Angie McKee - 1/22/2018 10:13 AM

FILED
FEB 02 2018
Angela R. Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

IN THE CIRCUIT COURT

FOR THE FIFTH JUDICIAL CIRCUIT

EDGAR COUNTY, PARIS, ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS, Plaintiff,	)	
-vs-	)	NO.s 16 ED 4, 5 6, 12, 13, 15-25, 27-30, 38, 40 42-45, 47-55
RICHARD L. HUTCHINGS, RITA HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, et al., Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, and CERTIFIED, that on to wit: The 30th day of January, 2017, the following proceedings were held in the aforesaid cause before The Honorable CRAIG H. DEARMOND, Circuit Judge.

APPEARANCES: PLF-ATTY
Assistant State's Attorney
On behalf of the Plaintiff

DEF-ATTY
Assistant Public Defender
On behalf of the Defendants

MOTION TO LIMIT SCOPE OF HEARING

Jamie S. Atkinson, CSR
Official Court Reporter
Vermilion County Courthouse

SUP R 4

SUBMITTED - 5[illegible] - [illegible] 2/[illegible]/2018 [illegible] AM

1 (Monday, January 30, 2017, at 12:58 p.m.)
2 WHEREUPON, THE FOLLOWING PARTIAL PROCEEDINGS WERE HELD
3 IN OPEN COURT:
4 THE COURT: All right. This is 16 ED 2,
5 4, 5, 6, 12, 13, 15 through 27, 30, 38, 40, 42 through
6 45, 47 through 55, 26, 31, 32, 33, 35, 36 and 41.
7 Ameren versus Hutchings, et al.
8 Mr. Rolf and Ms. Petrilli -- and is Mr. Brown
9 also present?
10 MR. ROLF: No.
11 THE COURT: Okay. -- are present on
12 behalf of the Plaintiff.
13 Mr. Smith and --
14 MR. SMITH: Mr. Griffin.
15 THE COURT: Griffin are present on
16 behalf of the Defendants.
17 It looks like we have one file, 16 ED 2,
18 Kimpan, where there's been no appearance by any
19 attorney.
20 MR. SMITH: That's correct.
21 THE COURT: Is Kimpan present? They're
22 not present.
23 Looks like we've got a Motion to Limit the
24 Scope of the Hearing and Bar Witnesses filed by the

SUBMITTED - 5[illegible] - [illegible] - 2/[illegible]/2018 10:31 AM

1 Plaintiffs December 23rd. We have a Defendant's
2 Motion to Compel filed January 25th, and we have a
3 Petition for Rule to Show Cause filed by the
4 Plaintiffs December 27 of '16. There's also as to
5 that 16 ED 2 the Motion to Compel Compliance with
6 Written Discovery.
7 How would you like to proceed?
8 MR. ROLF: Judge, I think we probably
9 prefer to start just with the Motion to Limit the
10 Scope of the Hearing.
11 THE COURT: All right.
12 MR. ROLF: Address that issue.
13 THE COURT: Mr. Rolf.
14 MR. ROLF: Okay. Thank you, Judge.
15 We filed that Motion to Limit the Scope of
16 the Hearing as well as Bar Witnesses. The barring of
17 the witnesses I think goes away if we -- if the scope
18 of the hearing is limited.
19 In dealing with this motion it necessarily
20 requires us to go back and visit the Motion to Dismiss
21 and the Response that was filed by Ameren earlier that
22 we were here on the last hearing. And in that
23 Response Ameren had pointed out that the landowners
24 had already raised the due process challenges to the

SUBMITTED - 5[illegible] - Angie McKee 2/[illegible]

1 ICC Certificate proceeding and their appeal to the
2 Fourth District Appellate Court which was as
3 appropriate pursuant to the Public Utility Act Statute
4 saying that the process before the ICC is appealed
5 directly to the Appellate Court and the Fourth
6 District Court and the Adams County decision
7 appropriately considered those issues and ruled upon
8 them.
9 So at the last hearing, looking back at the
10 transcripts, it was noted that there was a process
11 that the ICC, it's a statutory process that there was
12 a creation of the Public Utility Act and there's a
13 statutory review tribunal, the Appellate Court
14 pursuant to that Public Utility Act, and that process
15 that we're looking at there was the commission process
16 under Section 8-503 which is, in essence, enabling
17 legislation. The Certificate issues, it approves the
18 public utility -- the plan and authorizes the public
19 utility to proceed with that plan. The same way
20 statutory legislation enables IDOT to plan for roads
21 and then proceed with eminent domain. That process in
22 front of the commission under the Public Utility Act
23 was reviewed by the Fourth District Appellate Court,
24 and as stated in our motion here, the Public Utility

SUBMITTED - 5[illegible] - Angie McKee 2/23/2018 10:31 AM

1 Act provides that that process is appealed directly, a
2 commission rule, regulation, or the decision, no one
3 of the party's appealed, to the Appellate Court
4 directly including the list of four things to review
5 that that proceeding or manner in which the commission
6 considered in deciding its rule, regulation, or the
7 decision and whether they were in violation of the
8 State or Federal constitutions. So it's appropriate
9 that it went to the Appellate Court. It's appropriate
10 that the landowners which are here today took that
11 appeal from the commission proceeding to the Appellate
12 Court on the due process grounds and it was
13 appropriate that the Appellate Court in Adams County
14 ruled on that issue.
15 The statute, the enabling legislation giving
16 the authority to the Public Utility Act who approved
17 that plan is not a taking and therefore due process
18 rights don't arise at that proceeding, and as a result
19 of that the Fourth District in Adams County said they
20 had complied with the notice requirements as provided.
21 Even if there was no notice it would be sufficient
22 cause there's no due process rights involved.
23 And the fundamental problem we have here,
24 Judge, with the Landowners' Motion to Dismiss is that

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1 it goes beyond the Traverse and raises a due process
2 challenge and that challenge is again to the process
3 that took place before the Illinois Commerce
4 Commission. And we spoke about that last time, when
5 you look at their Motion to Dismiss the conclusion is
6 is that they're asking this Court to find that the
7 Illinois Commerce Commission violated the due process
8 right to the Defendants when it failed to send them
9 notice. So they're challenging the conduct of the
10 Illinois Commerce Commission which they've already
11 done and it's -- the ruling was that it's not -- or
12 what they're doing here is not a due process challenge
13 to the suits -- the eminent domain lawsuits that have
14 been filed by Ameren. They -- they're entitled to due
15 process of these. They received it by having service
16 of the complaint. They appeared here with counsel
17 Mr. Smith. They've -- can fully participate in this
18 proceeding going forward and their due process rights,
19 they are protected. If they're challenging, however,
20 the process that approved the commission plan, that's
21 to be done at the Appellate Court and was, in fact,
22 done.
23 Since our last hearing, Judge, the Fourth
24 District Appellate Court has issued another -- heard

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1 another appeal in the Enbridge Project, the long
2 running pipeline dispute, running through Central
3 Illinois as well. We attached a copy of that most
4 recent Fourth District opinion in the Enbridge case to
5 our motion, and the Fourth District recognizing a
6 multiplicity of issues in that case and eminent domain
7 proceedings took the opportunity to lay it out for the
8 lower courts who actually deal with the eminent domain
9 complaints. And that decision, Judge, goes through
10 and says here's what's appropriate to consider on the
11 Traverse in an eminent domain case, and they also went
12 forward and said here's what's not appropriate to
13 consider in a Traverse and eminent domain case. They
14 clarified the Lynn decision in its application. They
15 clarified the presumptions afforded the ICC
16 Certificates, both the 8 503 and the 8 509
17 Certificates recognizing that while a landowner may
18 rebut those -- that those give rise to presumptions
19 and the landowners may rebut those but for purposes of
20 this Motion to Limit the Scope of the Hearing based on
21 the landowner's pleading the Appellate Court noted
22 that landowners attempts to litigate anew the
23 commission's certification and eminent domain
24 decisions are not proper subjects for the trial court

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1 to consider. That's from the Enbridge decision. So
2 the Fourth District in Enbridge is saying and it noted
3 that it had already afforded the Commission
4 Certificate in appeal, and that's exactly where we
5 find ourselves here in this case, Judge, in these
6 Edgar County landowners. The landowners have already
7 litigated the Commission Certificate. The Appellate
8 Court has already affirmed that on appeal in the Adams
9 County decision, and at this point in time it's time
10 for us to move to the Traverse issues and legitimate
11 issues that can be addressed to this Court under a
12 Traverse as filed.
13 Therefore, we're asking the Court today to
14 limit the scope of the hearing. We'd be eliminating
15 the Motion to Dismiss the Complaints based on the due
16 process challenges raised -- based on the due process
17 challenges in the commission proceeding and proceed on
18 the legitimate Traverse issues which were described in
19 Enbridge and of which the -- Ameren is entitled to a
20 presumption based on the 503 and 509 Certificate and
21 we can go forward from there.
22 Thank you.
23 THE COURT: Thank you, Mr. Rolf.
24 Mr. Smith.

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1 MR. SMITH: May it please the Court.
2 Mr. Rolf. Ms. Petrilli.
3 Let -- let me go from the back of David's
4 argument going backwards on the Enbridge case.
5 The Enbridge case again brings up the Lynn
6 case and the Lynn case keeps coming before this Court
7 and we just have a disagreement with what the Lynn
8 case, what the Adams case and now the Enbridge case
9 stands for.
10 The Enbridge case again goes and -- and
11 specifically talks about Lynn. And in it specifically
12 states that when the trial court denied the Traverse
13 they then appealed that and the Appellate Court said
14 they were wrong in denying going forward and
15 specifically found -- the court found that the
16 question of public need for this tract has been
17 resolved before the hearing in the commission in which
18 the defendants actively participated at as parties.
19 What the Appellate Court said -- and in Lynn they
20 did -- they were at the commission and then they
21 brought the Traverse. On appeal the Appellate Court
22 in Lynn and also in the Adams case identified the
23 question in front of it and the question was are you,
24 this court today, pre-empted from inquiring into the

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1 same subject matters that where the -- the property
2 owners were fully participants and the party at the
3 commission, are you pre-empted from going into all of
4 that information all over again and reviewing that.
5 And the Appellate Court in Enbridge, in Adams, and in
6 Lynn said no you're not. It said the trial courts are
7 not pre-empted from inquiring into the same subject
8 matter as the commission during the -- the
9 certification proceedings. Now, that's what we -- we
10 keep saying over and over again and none of these
11 decisions say that that's wrong. In fact, they keep
12 quoting and stating that the trial courts are not
13 pre-empted from going into the subject matter of the
14 certification proceedings.
15 Now, what our position has always been an
16 interpretation of the -- what -- what we can do today
17 and in a couple weeks is that we've always argued due
18 process, Judge, and in the Adam's case we were up
19 there arguing due process and the court said what.
20 Well, you're not really entitled to due process. And
21 why not. Because you don't have a property interest.
22 So really the only thing that we were doing -- or the
23 commission was doing was certifying this line.
24 Nothing more. Nothing less. You don't get due

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1 process because we're not coming after your land.
2 What interesting thing in that Enbridge case
3 is that they even mentioned that that certification
4 phase was just the first process, step one of an
5 ongoing process, and that's been our position the
6 entire time, even before the court in the Adams case.
7 The Adams case said we were wrong about due process.
8 Sorry. Come back later when you have a property
9 interest. Well, that's why we're here. We're back
10 later and we have a property interest.
11 We believe that the Court -- this Court, you,
12 Judge, are left with the issue and it's basically
13 this:
14 If there's no due process rights at the ICC
15 level because we don't have a property interest but
16 that property rights are used in an eminent domain
17 case and if the Certificate or the certification
18 granted by the ICC at their level is prima facie case
19 for the eminent domain case then due process is an
20 argument we can raise at this point. All of them go
21 hand in hand, Judge. Eventually some court and it's
22 this court gets to look at due process no matter what
23 the Act says. The Act talks about some notices but it
24 doesn't talk about specific notice and it doesn't talk

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1 about a taking of the land. The taking of the land is
2 this part. So at this point we should be able to
3 attack the ICC proceedings in the eminent domain case
4 which we're here before under our due process theory
5 because the ICC proceedings cannot be entirely
6 divorced from the eminent domain proceedings. Since
7 the only reason that they have eminent domain hearing
8 today is because they got the Certificate. In other
9 words, it all goes in a circle, Judge, and it all has
10 to come back to us and to you today. They have
11 eminent domain because they got the Certificate. They
12 got the Certificate under our theory because they
13 didn't give us -- and that goes to a question of
14 necessity also. They didn't give us a chance to
15 present any evidence or to be heard or do anything.
16 They just showed up and sent us a letter and said, by
17 the way, we now have the right to come and construct
18 on your land. So we believe that it is a full circle.
19 It was step one and step two.
20 We do not read the cases the same way that
21 Mr. Rolf understands and interprets the cases. We do
22 not see anything in those cases, Adams or Enbridge
23 that stops this Court from considering the entire
24 process and to take in our argument on due process and

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1 whether due process was granted and should be granted,
2 and we think that due process should be at least
3 presented as to whether that was something that should
4 have been done and should be done at this point.
5 THE COURT: Thank you, Mr. Smith.
6 MR. SMITH: Thank you.
7 THE COURT: Are you in on this?
8 SPECTATOR: No, I'm not.
9 THE COURT: Okay. All right. Mr. Rolf.
10 MR. ROLF: Yeah, Judge, a couple of
11 things. One, I mean, the Lynn decision, this is
12 reading straight from it, the question is are they now
13 barred from requiring the utility to prove use and
14 need for acquiring the defendant's land by filing a
15 Motion to Dismiss and Traverse in the eminent domain
16 proceeding. To prove use and need. That's consistent
17 with what Adams County interpreted Lynn. That's
18 consistent what the Enbridge case just laid out. The
19 Certificates are a presumption that the landowners can
20 challenge use and need. That's an appropriate thing
21 to raise in a Traverse and it's appropriate and that's
22 what the Lynn case said that the trial court can
23 consider. If you look at what the trial court can't
24 consider and you look at the Enbridge decision it says

SUBMITTED - 5[illegible] - Angie Barnett - 2/[illegible]/2018 10:[illegible] AM

1 right there that the -- they are -- the landowners are
2 attempting to litigate anew the commission
3 certification and eminent domain decisions which this
4 court affirmed on appeal. Then it goes down and says
5 such issues are not the proper subject of the Traverse
6 hearing on remand and the trial court should decline
7 to consider them. It can't be any more clearer than
8 that. The trial court should decline to consider
9 them.
10 So the Lynn case dealt with a very specific
11 issue and the Enbridge Court and Adams County laid
12 that out. The Appellate Court in the Adams County
13 case never said come back later. It dealt with the
14 due process issue as is appropriate because the Public
15 Utility Act under Section 10 201 which confers and
16 directs that the appeal from the commission process go
17 to the Appellate Court includes in their list of
18 things to consider whether or not the Federal and
19 State constitutions were complied with. They dealt
20 with the issue. The statutory framework for dealing
21 with that issue is under the Public Utility Act from
22 the commission to the Appellate Court. That's what
23 they mean when they say in the Enbridge case they're
24 attempting to litigate into the commission's

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1 certification and eminent domain proceedings, the 503
2 and the 509 Certificates. Those are appropriate
3 before the Appellate Court and the Appellate Court did
4 decide those. But, I mean, there is no disagreement
5 that that's what's provided for in the Public Utility
6 Act and the appeal directly to the Appellate Court and
7 that's how these very landowners took advantage of
8 that and raised the issue there. If that wasn't
9 suppose to be the case they wouldn't have done it, but
10 that's what the -- the setup is.
11 The other thing is -- one thing that's never
12 explained by landowners is how the filing of this
13 eminent domain proceeding somehow retroactively vest
14 landowners with property rights before the Illinois
15 Commerce Commission in the 503 proceeding which
16 property rights heretofore never existed. How can the
17 filing of the eminent domain proceeding two and a half
18 years later somehow give rise to property rights and
19 due process rights two and a half years previously in
20 a proceeding where the Appellate Court has already
21 said their -- the due process was not violated in that
22 proceeding.
23 So we -- I -- I don't think there is any
24 confusion. I think the Enbridge case, the Fourth

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1 District Appellate Court did a good job in saying
2 look, for whatever confusion there may be out here let
3 me just lay it out for you. These things are
4 appropriate to consider, these things are not, and
5 into the things that not is the relitigation of the
6 Certificate process. They can reraise public use need
7 to try to rebut the presumption, but the fact that
8 there's a presumption doesn't give rise to
9 rechallenging a due process right. And the Enbridge
10 case makes it very clear. You can't relitigate that.
11 It's already been ruled on. It's been ruled on in
12 Enbridge in the Appellate Court, it was ruled on by
13 Adams County in this case.
14 THE COURT: Thank you, Mr. Rolf.
15 MR. Smith.
16 MR. SMITH: Judge, we're not
17 rechallenging something we were never given. You can
18 rechallenge something, I understand that, if they told
19 us we had due process right, they told us we didn't in
20 Adams County.
21 This case is very different than Adams
22 County, Lynn, and Enbridge, because in this case your
23 defendants are alleging absolutely no notice given.
24 That their land was going to be taken. In all other

SUBMITTED - 5[illegible] - Angela McKee 2/23/2023 10:23:14 AM

1 cases everybody participated in the commission level,
2 in all of them. The Enbridge case, they've been going
3 on in litigation for over seven years. They've been
4 up and back, in the commission, out of the commission.
5 In Lynn they even appeared before. In Adams County
6 for the Edgar County appellants they had never
7 appeared before the commission, and I -- I -- David
8 and I read certain sections from this decision but
9 they quote Lynn and say, in essence, then the property
10 owners there as here were not parties to the
11 proceeding in the sense of parties to the litigation.
12 The hearing it was on the reasonableness of the
13 utility's plans not -- and could not confer property
14 rights. The only thing -- but then on review -- or
15 that they could review to the Appellate Court said in
16 Enbridge and also in Lynn and Adams was the proposed
17 plan of development, just the extent of the project,
18 not whether there was due process. So we're
19 challenging due process now cause we weren't given it
20 before.
21 Also Enbridge it's interesting at the very
22 end that utility -- the pipeline argued that the trial
23 court should not consider the landowners claims
24 because they'd already been resolved by the commission

SUBMITTED - 5[illegible] - Angie McKee 2/[illegible]

1 and affirmed by appeal. Sounds like the argument of
2 Amerens just now. And in Enbridge they said for the
3 reasons given by this court their position is not
4 correct. They can raise issues and they can raise the
5 full circle of what's been going on in the commission.
6 For that reason, I believe that we should be
7 able to present that type of evidence. We should not
8 be limited to present the evidence at least to you for
9 you to consider.
10 Thank you.
11 THE COURT: Thank you, Mr. Smith.
12 It is your motion so you get the last shot,
13 Mr. Rolf.
14 MR. ROLF: Judge, you know, he says they
15 didn't get notice that their land would be taken. The
16 503 proceeding is not a taking of land. In fact, the
17 step 2 is the 8 509 where they request eminent domain
18 to authority. So that would be the first that the
19 commission would be determining whether or not they
20 would even have the right to eminent domain. The 503
21 is to approve the plan. They're not parties to that.
22 They -- if -- if they got notice and chose to
23 participate they would be intervenors, not parties.
24 So just the incorrect use of the term that they're

SUBMITTED - 505076 - Angie Barnett - 2/23/2018 10:31 AM

1 not -- action's not being taken as to their property.
2 It's a plan that's being approved and the process for
3 challenging that plan is in the Appellate Court.
4 And then if you look at the Enbridge decision
5 the landowners, it says, argue the trial court erred
6 in denying their Traverse motions for numerous
7 reasons. One is they had raised the issues concerning
8 the proprietary of the commission certification
9 process for the project. That's one of the nine
10 things they raise and that's one of the things that
11 the Appellate Court said is not appropriate for the
12 trial court to hear. Whether or not the -- Enbridge
13 was properly vested with authority to acquire their
14 tracts of land was the certification process that was
15 appropriately challenged to the Appellate Court and
16 ruled on there. So they raised nine points in
17 Enbridge. The court said one, seven, eight, nine the
18 trial court doesn't deal with, those are challenges to
19 the ICC process. Two through six deal with Public
20 necessity, public use, good faith negotiations, those
21 are appropriately covered and the trial court can
22 consider those in a Traverse proceeding if raised. So
23 I think the Enbridge case very clearly delineates it
24 and this due process argument to be raised at this

SUBMITTED - 5[illegible] - [illegible] - 2/[illegible]/2018 10:31 AM

1 point in time, the due process argument, what happened
2 at the 503 certification process is simply off limits
3 and -- and should not be something this trial court
4 takes under consideration on a Motion to Dismiss.
5 THE COURT: All right. Well, I've
6 already taken a lot of time going through all this
7 material and I appreciate how much work has been done
8 by both sides just to get us to this point.
9 This is a proceeding in eminent domain filed
10 by Ameren as a result of Certificate of Public
11 Convenience and Necessity issued by the Illinois
12 Commerce Commission on August 20th of 2013 and
13 February 20th of 2014. Ameren chose to proceed by
14 means of the expedited procedure set forth in Public
15 Utilities Act -- in the Public Utilities Act which is
16 220 ILCS 5/8-406.1 in order to construct what has been
17 referred as the Illinois Rivers Project ICC Docket
18 Number 12-0598.
19 Defendants contend they received no notice of
20 the proceedings before the ICC, or no notice that the
21 proposed or considered routes of the project directly
22 affected land that they owned, until after the
23 Certificate was issued. They contend they have been
24 denied procedural due process as a result of that

SUBMITTED - 505076 - Angela McKee - 2/23/2018 10:31 AM

1 failure and will suffer substantive due process by the
2 taking of their land for easements.
3 It would appear at the time of the
4 proceedings before the ICC there was no clear
5 mechanism for how and when notice was to be provided.
6 Plaintiffs contend that since notice was given at the
7 outset of the proceedings that was sufficient;
8 regardless of the fact that the proposed routes
9 changed and ultimately, a route was chosen that was
10 never included in the original application.
11 Although the Commission outlined a procedure
12 for notice to any landowners involved in an alternate
13 route, there was apparently no requirement that notice
14 be provided as it was to landowners affected by the
15 route proposed in the original application.
16 Plaintiffs contend that Adams County Property
17 Owners and Tenant Farmers versus Illinois Commerce
18 Commission, 2015 IL App 4th 130907 is dispositive of
19 the issues raised by the Defendants in their Traverse
20 and Motion because the Appellate Court addressed the
21 same issues with the same parties and rejected their
22 constitutional due process argument.
23 In reality, the Appellate Court in Adams
24 County, when discussing due process, referenced the

SUBMITTED - 5[illegible] - [illegible] 2/[illegible] 10:[illegible] AM

1 fact that the proceedings before the ICC do not confer
2 property rights on Ameren or deprive the landowners of
3 protected property interests. That is true as far as
4 it goes.
5 However, it is the decision of the ICC
6 setting the routes which ultimately led to the eminent
7 domain proceedings before this Court for those who do
8 not choose to accept the offer of Ameren for a
9 permanent easement over their property. As such, it
10 is reasonable to conclude the necessary notice
11 required for due process would be at least as much as
12 that required for the I- -- for the ICC to determine
13 which routes are best.
14 Section 8-406.1 as it existed at the time of
15 the proceedings before the ICC did not elaborate on
16 the nature of the notice required other than to
17 provide for quote, notice and hearing, end quote.
18 The Illinois Administrative Code provides,
19 however, that when persons file applications under
20 8-406 or 8-503 of the Act, they must include in the
21 application, the names and addresses of landowners
22 affected by the proposed project. That's found at 83
23 Illinois Administrative Code Section 200.105(h). Then
24 require the Chief -- they then require the Chief Clerk

SUBMITTED - 5[illegible] - [illegible] - 2/[illegible]/2018 10:[illegible] AM

1 of the ICC to provide notice to those named landowners
2 of the initial hearing on the application.
3 Neither Section 8-406.1 of the Act nor
4 Section 83- -- or 83.200.150(h) of the Illinois
5 Administrative Code explained the procedure for
6 notifying landowners whose property could be directly
7 affected when, while a petition was pending, an
8 intervening party proposed an alternate route.
9 Here, the Administrative Law Judges decided
10 the due process required any intervenor proposing
11 alternate routes to include contact information for
12 landowners who would be affected by any such proposed
13 routes.
14 It is alleged that for many Defendants here,
15 their first notice of any intention by Ameren to seek
16 to exercise a permanent easement over their property
17 was a letter dated September 6 of 2013 advising them
18 of the ICC Order entered August 30 of 2013 issuing the
19 Certificate to Ameren to begin construction.
20 The logic of requiring notice to all affected
21 landowners at the time of the initial application is
22 obvious. The failure of the statute providing for
23 expedited certification proceedings to address notice
24 similarly is troubling; especially as it relates to

SUBMITTED - 5[illegible] - [illegible] - 2/[illegible]/2018 10:31 AM

1 intervenors who may be proposing completely different
2 routes.
3 If Due Process requires individual notice to
4 those affected by the initial application, it is
5 difficult to ascertain a constitutionally adequate
6 reason for disposing with this requirement for all
7 subsequently identified classes of persons; namely,
8 landowners of property affected by proposed alternate
9 routes (whether identified by intervenors or by the
10 original parties themselves).
11 Lynn versus Department of Children and Family
12 Services at 309 Illinois Second 264 says due process
13 is a matter of federal constitutional law so
14 compliance or non-compliance with State procedural
15 requirements is not determinative of whether minimum
16 procedural due process standards have been met.
17 Due process principles apply to
18 administrative proceedings and procedural due process
19 claims are focused on the procedures used to deny a
20 person's property interest.
21 Although Ameren disagrees, what does appear
22 to be a matter of first impression is the
23 interpretation of notice and hearing as referred to in
24 the expedited certification procedure of Section

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1 8-406.1 vis-à-vis the notice required in Section
2 8-406.
3 The Court recognizes the ruling in Adams,
4 however the procedural due process claims of the
5 Defendants were not addressed because the Court found
6 there were no substantive due process rights affected
7 by the proceedings before the ICC.
8 What seems to be ignored are the presumptions
9 which flow to Ameren upon receipt of the certification
10 which directly affect the property rights of those who
11 become defendants in eminent domain proceedings.
12 Although Adams noted that property owners
13 were free to litigate the same subject matter
14 addressed by the Commission, 735 ILCS 30/5-5-5
15 subparagraph c gives Ameren certain statutory
16 presumptions relating to authority, necessity, and
17 public purpose which deprive landowners of the
18 opportunity to do so.
19 The statutory presumptions created by the
20 Public Utilities Act and Eminent Domain statues
21 provide Ameren a prima facie case for eminent domain.
22 This shifts the burden to the property owners. In
23 effect, landowners were precluded from asserting lack
24 of notice as a due process violation before the ICC.

SUBMITTED - 5[illegible] - [illegible] 2/[illegible]

1 This coupled with the Appellate Court's finding that
2 no property interests were being affected by the
3 proceedings before the ICC, resulted in the landowners
4 being deprived of the opportunity to litigate the same
5 issues raised before the Commission in court.
6 Instead, it becomes their burden to seek to
7 protect their due process rights inherent in the
8 constitution from being taken by a public utility,
9 rather than the public utility being required to show
10 adequate protection of their rights to procedural due
11 process.
12 Courts are not pre-empted from inquiring into
13 the same subject matter as the Commission during the
14 certification process. Illinois Power versus Lynn
15 says so. The hearing before the Commission was on the
16 reasonableness of the utility's plan and could not
17 confer property rights. An appeal of the order of the
18 Commission, as noted by the Defendants, would only be
19 a review of the proposed plan for development of the
20 project and the extent of the property sought. There
21 is nothing in the Public Utilities Act preempting the
22 rights of the property owners in the condemnation
23 proceedings.
24 Contrary to the assertions of Ameren in their

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1 Response Adams did not address the constitutionality
2 of Section 8-406.1, they merely found that the
3 Defendant's constitutional claims were defeated by the
4 fact that no due process rights were affected by ICC
5 proceedings.
6 The constitutionality of Section 8-406.1 is
7 still an open question. The rules of statutory
8 construction require the trial court to presume the
9 statute constitutional unless it is conclusively
10 established to be otherwise; either in its
11 interpretation or implementation.
12 Although found constitutional in its
13 interpretation, the question remaining before this
14 Court is whether its implementation effectively denied
15 procedural due process to the Defendants and therefore
16 was unconstitutional.
17 The Defendants are not seeking a relitigation
18 of the certification process. They are instead
19 seeking to point out the deprivation of a
20 constitutional right to due process that arises from
21 the implementation of the process as was done in this
22 case. Defendants here are alleging that they never
23 had the notice and hearing to which they are entitled
24 by Section 8-406.1.

SUBMITTED - 5[illegible] - [illegible] - 2/[illegible]/2018 10:[illegible] AM

1 It's for those reasons, that the Motion to
2 Limit the Scope of Hearing and Bar Witnesses is
3 denied.
4 What would you like to do next?
5 MR. ROLF: Well, Judge, I think the next
6 order of business from our point of view would be that
7 we would ask to -- from the Court to move to continue
8 the hearing on the 8th and 9th, February 8th and 9th.
9 It would be the intention of Ameren to proceed with a
10 petition under Supreme Court Rule 383 for a
11 supervisory order from the Supreme Court to address
12 this issue. That procedure, file a petition, it
13 allows yourself, Respondent seven days to respond to
14 that, so that can't be accomplished prior to the 9th
15 and 10th. So I would make a motion to continue that
16 hearing to allow that process to go forward.
17 THE COURT: Any objection?
18 MR. SMITH: I think he's entitled to
19 that.
20 THE COURT: I agree.
21 MR. SMITH: Yes.
22 (Cause adjourned.)
23 WHICH WERE ALL THE PROCEEDINGS MADE OF RECORD IN THIS
24 CAUSE ON SAID DAY.

SUBMITTED - 5[illegible] - [illegible] - 2/[illegible]

C E R T I F I C A T E

I, Jamie S. Atkinson, Official Court Reporter in and for the County of Vermilion, State of Illinois, do hereby certify that the foregoing to be a true and accurate transcript of the proceedings had in the before-entitled cause on said day.

Dated this 2nd day of February, 2018.

Jamie S. Atkinson, CSR
Official Court Reporter
License No. 084-004156

SUBMITTED - 5[illegible] - [illegible] - 2/[illegible]/2018 [illegible] AM

FILED
NOV 28 2017
Angela R. Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

IN THE CIRCUIT COURT FOR THE
FIFTH JUDICIAL CIRCUIT
EDGAR COUNTY, ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)
Plaintiff,	) Nos. 2016-ED-4, 5, 6, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 38, 40, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55
VS.	)
RICHARD HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC, and UNKNOWN OWNERS, et al.,	)
Defendants.	)

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED and CERTIFIED that on, to wit: May 2, 2017, the following proceedings were held in the aforesaid cause before The Honorable Craig H. DeArmond, Circuit Judge.

MOTION TO DISMISS/TRAVERSE

APPEARANCES:

Mr. David A. Rolf
Ms. Lisa A. Petrilli
SORLING NORTHRUP
On Behalf of the Plaintiff

Mr. S. Craig Smith
Mr. Griffin
ASHER & SMITH
On Behalf of the Defendants

Proceedings reported and transcribed by-
Ms. Amy Buhr, CSR
Official Court Reporter
Fifth Judicial Circuit of Illinois

SUBMITTED - 563006 - Angela McKee - 1/22/2018 10:13:14 AM

1 THE COURT: Show this is 16-ED-4, et al.,
2 Ameren vs. Hutchings, et al. We have Mr. Rolf and
3 Miss Petrilli for the plaintiff. Mr. Smith and
4 Mr. Griffin for the defendants. Matter comes on for
5 hearing pursuant to notice. We've got pending case
6 management conference, as I understand. And also,
7 Mr. Smith, I have a proposed case management order
8 that I think you sent up some time ago and have not
9 gotten signed yet. I am assuming, Mr. Rolf and
10 Miss Petrilli, you are already in agreement with
11 this order and I can just go ahead and sign it and
12 enter it?
13 MR. ROLF: That's correct.
14 MS. PETRILLI: Yes.
15 THE COURT: Show the case management order
16 enters this date. Mr. Smith, I am going to let you
17 hang on to this so I don't lose it in all of the
18 rest of this, and if you can file that after the
19 hearing.
20 MR. SMITH: Thanks.
21 THE COURT: Thanks. As to 16-ED-37 and
22 2 -- first as to 16-ED-37, there is apparently an
23 agreement to continue the matter. Is that true?
24 MR. ROLF: Yes, Judge, that's true. We

SUBMITTED - 5[illegible] - [illegible] - [illegible]

had set it for case management conference today and the matter has been resolved, so we would ask that to be continued, anticipating we would be filing a motion for dismissal with the order that was agreed to.

THE COURT: We have settlement documents coming?

MR. ROLF: Right.

THE COURT: As to 16-ED-2, Kempen (phonetic), a motion for summary judgment.

MS. PETRILLI: Yes, Your Honor. On that one we were contacted recently by an attorney, Kramer, who I believe sent yesterday an entry of appearance, likely has not made it into the file yet, but we have agreed to continue the hearing on the motion for summary judgment.

THE COURT: Okay. And we didn't get a date for that yet?

MS. PETRILLI: No. I went ahead and told him we would contact your clerk's office to schedule that if needed.

THE COURT: Okay. Then there is a motion to compel on 16-ED-34, proceedings against the William McCulley Trust.

SUBMITTED - 5630108 - Angie Barnett - 1/22/2021 8:04:31 AM

1 MR. SMITH: That case, Judge, we have been
2 working with attorney Leonard, who represents the
3 other half of the trust. He prepared answers and
4 filed them within the last day or two. We are
5 adopting those answers as answers to the
6 William McCulley trust. The two trusts own the same
7 properties, so it wouldn't be necessary to have two.
8 MS. PETRILLI: As a housekeeping issue on
9 that, too, I don't believe Mr. Smith ever entered
10 his appearance on behalf of the William McCulley --
11 MR. SMITH: I'll do that.
12 MS. PETRILLI: That was one of the issues.
13 We did receive the responses from the Doris McCulley
14 Trust, and Attorney Leonard, but we don't yet have
15 the responses on the William McCulley or the entry
16 of appearance for Mr. Smith and his firm.
17 THE COURT: So what do you want to show on
18 that? Just that we are awaiting the responses and
19 entry of appearance?
20 MS. PETRILLI: If we could continue out
21 the motion to compel. If we could just continue out
22 the motion to compel, assuming that he enters his
23 appearance and then adopts those, obviously we won't
24 proceed on that.

SUBMITTED - 5653006 - Angie Barnett - 1/22/2021 8:04:31 AM

1 THE COURT: Is this a motion like the
2 previous motions to compel for access or --
3 MS. PETRILLI: No. This is just for
4 documents. We don't have a response to the
5 discovery requests.
6 THE COURT: Okay. So I'll just wait for
7 you to set that for something.
8 MS. PETRILLI: Okay.
9 MR. SMITH: Thank you.
10 MS. PETRILLI: Thank you.
11 THE COURT: Then we have the defendants'
12 motions to dismiss and traverse for hearing; we
13 have -- I have plaintiff's motion to limit the scope
14 of the traverse hearing; I have plaintiff's brief in
15 support of their denial of the defendants' traverse
16 and motion to dismiss; I have the stipulation that's
17 previously been entered into between the attorneys;
18 and I have a motion for sanctions. And then there
19 was a reference in a note I received yesterday that,
20 Mr. Smith, were you intending on filing a motion for
21 leave to amend the traverse and motion to dismiss in
22 a number of these cases?
23 MR. SMITH: Yes, sir. We filed that on
24 April the 28th asking leave to file an amended

SUBMITTED - 963006 - Angela McKee - 12/30/2021 10:41:31 AM

1 traverse and motion to dismiss and amended
2 affidavits.
3 THE COURT: Mr. Rolf or Miss Petrilli,
4 have you --
5 MR. ROLF: We received the motion for
6 leave to file the amended traverse and motion to
7 dismiss, with copies of those, but this is the first
8 we have heard of an amendment to any affidavits, and
9 we certainly haven't received any affidavits. We
10 just received merely the amended pleading.
11 MR. SMITH: Affidavits are being prepared
12 now, Judge. They will be filed.
13 THE COURT: So I assume we are going to
14 reserve this issue for now? Does that affect our
15 hearing today?
16 MR. SMITH: It does not.
17 THE COURT: Miss Petrilli?
18 MS. PETRILLI: Well, just to clarify,
19 there was two sets of cases that are proceeding in
20 16-ED-4, et al. I think we are prepared to proceed
21 on that particular -- on the motions to dismiss with
22 regard to those cases. We are ready to proceed on
23 the other cases. We received the pleadings, the
24 amended pleadings, and don't believe that changes

SUBMITTED - 5653108 - Angela McKee - 12/30/2021 8:04:31 AM

1 the positions of the parties at all with respect to
2 the motions to dismiss and traverse on the other --
3 well, there were seven motions to traverse filed,
4 but there's only six that were amended. I'm not
5 sure why. But our position is that those amended
6 pleadings, as we have seen them, have no effect on
7 the motion and we are ready to proceed.
8 MR. SMITH: We are not ready to proceed --
9 THE COURT: All right.
10 MR. SMITH: -- on those. We are ready to
11 proceed on the ones that we had set for many months
12 prior.
13 THE COURT: Do we have the number of
14 those?
15 MR. SMITH: Yes, sir. Numbers are
16 16-ED-26, 31 --
17 THE COURT: Okay. So that's 26, 31, 32,
18 33, 35, 36 and 41?
19 MR. SMITH: Yes, sir.
20 THE COURT: Okay.
21 MR. SMITH: They are not -- they were
22 never set for the May 2 argument date prior to
23 counsel setting them about a week ago. We are not
24 prepared to go forward on those at this point. We

SUBMITTED - 5653078 - Angie McKee - 12/20/2018 10:13:01 AM

1 would be prepared to go off the May 22 hearing,
2 which the Court is reserving.
3 THE COURT: Miss Petrilli or Mr. Rolf, do
4 you want to be heard any further on those?
5 MS. PETRILLI: Again, we would object to
6 any continuance. It was set longer than a week ago
7 and we believe that -- we are ready to proceed. I
8 mean, it would be us that would be prejudiced by
9 their amendments anyway and we don't believe that we
10 are.
11 THE COURT: Well, I am assuming that
12 there's something about the amended affidavits that
13 the defendants believe is relevant. Are those
14 affected by the motion for sanctions?
15 MR. SMITH: They would be.
16 THE COURT: Okay. All right. Because
17 that's the same cases.
18 MR. SMITH: Yes, sir.
19 MS. PETRILLI: Yes.
20 THE COURT: Well, I'm going to give them
21 time to file the amended -- they already filed the
22 amended pleadings. What they need to file are the
23 amended affidavits, correct?
24 MR. SMITH: I have an order, Your Honor,

SUBMITTED - 5631076 - Angie Barnett - 1/22/2021 8:04:31 AM

for the amended --

MS. PETRILLI: If I may, to clarify, unless that pleading changed, that doesn't include all of the ones you had filed on. One of them is missing.

MR. SMITH: Well, I will have to find that.

MS. PETRILLI: I can tell you which one it is if you want to add it in.

MR. SMITH: Which one?

MS. PETRILLI: It's ED-31. Rhoads was missing off of the documents that you had sent to us.

THE COURT: That's missing off of this proposed order. Do you want me to include that by interlineation?

MR. SMITH: Yes, sir.

THE COURT: This is just as to an order granting leave to file the amended traverse and motions to dismiss, which I am assuming you don't have objection to.

MS. PETRILLI: No.

THE COURT: Your objection is to not proceeding today.

SUBMITTED - 567006 - Angie Barnett - 1/22/2021 8:41:31 AM

1 MS. PETRILLI: Yes.
2 THE COURT: Not to their filing?
3 MS. PETRILLI: That's correct.
4 THE COURT: Okay. So if we add 16-ED-31,
5 Rhoads, that order is entered this date. There is
6 an objection by the plaintiff to allowing the
7 defendants additional time to file amended
8 affidavits. Since it appears the amended affidavits
9 may impact or be impacted by the motion for
10 sanctions, which I received sometime after
11 April 25th, I'm going to give the defendants leave
12 or additional time to file the amended affidavits,
13 see what effect that may have. This order is only
14 as to the filing of the pleadings themselves, not
15 the affidavits.
16 MS. PETRILLI: Then, Your Honor, if you
17 have that on your schedule still for May 22nd, we
18 would like, and it seems as though Mr. Smith is
19 agreeable, to allow them only to continue up until
20 that date and request that the hearing be on
21 May 22nd.
22 THE COURT: I'm pretty sure it's in here.
23 I've got May 22nd and May 23rd blocked out for this.
24 MR. SMITH: Fine with me.

SUBMITTED - 5653078 - Angie Barnett - 1/22/2018 10:41:31 AM

THE COURT: Any problem with that?

MR. SMITH: No.

THE COURT: So we are going to include for hearing 26, 31, 32, 33, 35, 36 and 41 on that May 22nd hearing date by agreement of the parties. Is that true?

MR. SMITH: Yes.

MR. ROLF: Yes.

MS. PETRILLI: Yes. If we may, Your Honor, we would like a date certain when Mr. Smith has to have those affidavits filed so that we can prepare for that.

THE COURT: I think that's reasonable. Mr. Smith.

MR. SMITH: Within seven days.

THE COURT: Seven days from today's date. Give me just a minute to include these. I guess, Mr. Rolf, by implication then, your motion for sanctions, I'm going to hold off until we get those affidavits.

MR. ROLF: Correct.

THE COURT: I will show that over your objection.

MR. ROLF: (Nods head.)

SUBMITTED - 563006 - Angela McKee - 1/22/2021 8:01:31 AM

1 THE COURT: All right. Where does that
2 put us?
3 MR. SMITH: Time to argue, Judge.
4 THE COURT: Mr. Rolf, I am correct, am I
5 not, that the motions to limit the scope of the
6 traverse hearings that I received most recently,
7 those all apply to these seven cases that we are
8 going to be addressing later?
9 MR. ROLF: That is correct, Your Honor.
10 We have argued that motion in the ED-4, Hutchinson
11 [sic], et al. cases earlier and have your rulings.
12 So those are directed to each of those seven cases
13 which are now set for May 22nd.
14 THE COURT: So now we are back to the
15 defendants' -- defendants' traverse and motions to
16 dismiss. Mr. Smith.
17 MR. SMITH: Yes.
18 THE COURT: How would you like to proceed?
19 MR. SMITH: I think it's probably my turn,
20 unless you think you should go first.
21 MR. ROLF: No, Judge. I mean, it's an
22 issue where the burdens lie on the traverse, we bear
23 that, and we think we -- we talked about this
24 earlier is that with the Exhibits 3, 4 and 6,

SUBMITTED - 5653076 - Angie Barnett - 1/22/2021 8:04:31 AM

1 certified copies of the ICC orders attached to our
2 response, that that satisfies our burden and shifts
3 it to then the landowners on the traverse issue.
4 The motion to dismiss issue would be the landowners'
5 burden from the get-go.
6 So I don't know whether you want to start
7 with the traverse. I would certainly make a motion
8 to the Court to admit into evidence Exhibits 3, 4
9 and 6, which are certified copies of those ICC
10 orders in this hearing, and I think that satisfies
11 our burden on the traverse side of the equation.
12 THE COURT: Do you have any objection to
13 that admission?
14 MR. SMITH: I do not.
15 THE COURT: Those are admitted. Having
16 admitted those documents, do you disagree with
17 Mr. Rolf's analysis --
18 MR. SMITH: No, I don't.
19 THE COURT: -- as to the traverse?
20 MR. SMITH: No.
21 THE COURT: All right.
22 MR. SMITH: From a standpoint, Judge, of
23 housekeeping, we would admit into evidence --
24 THE COURT: I was hoping I would get more

SUBMITTED - 563006 - Angela McKee - 1/22/2021 8:01:31 AM

paper today.

MR. SMITH: There's more documents. I'm sorry about that. These are documents that have been supplied in our pleadings when we filed, but I just want to make sure that they are admitted into evidence. The documents are the 12. 1 through 14 are all part of our motion and traverse; 14 is the group exhibit that we have all stipulated that can come in instead of having evidentiary hearing.

My 15, 16 and 17 are the -- you could call it either a bench session or a status hearing that the ICC had on three separate dates of December the 3rd, 2012; January the 17th, 2013; and January the 24th, 2013.

And then finally, 18 is our response to Ameren's Rule 383 motion to the Supreme Court, which was filed during the Supreme Court's consideration of limiting testimony. So we would move those.

THE COURT: There is a motion by the defendants to admit 1 through 18. Any objection, Mr. Rolf?

MR. ROLF: Yeah, Judge. I -- what did he say 1 through 10 were?

THE COURT: These were part of a group of

SUBMITTED - 567006 - Angela McKee - 1/22/2021 8:04:31 AM

14 exhibits, 1 through 14, actually, were all part of exhibits that were attached to the original traverse and motions to dismiss. True?

MR. SMITH: That's true. They have been in the court file since we filed our motion.

THE COURT: So those we have had for quite a while.

MR. SMITH: The only thing that we did, the only slight change is 13, a small picture of this (indicating) which shows the commission-approved route versus the alternate and primary route. Exhibit 14 again, what I said was the group exhibit which we have stipulated to.

THE COURT: Those are all the affidavits.

MR. SMITH: Right. And the other three are part of the ICC record. And then our response to the Supreme Court, which they've had.

MR. ROLF: Judge, I mean, we -- we don't have an objection to the extent some of these are ICC -- appear in the ICC docket. We talked about that before, we referenced the docket, and those things we think you can take judicial notice of ICC pleadings and dockets.

You know, No. 11, Edgar County Board

SUBMITTED - 5653076 - Angela McKee - 1/22/2021 8:04:31 AM

1 correspondence to Ameren, I think that's hearsay.
2 We object to that being admitted in an evidentiary
3 hearing. The response to Ameren Rule 383 motion, I
4 don't know what -- you know, we filed a pleading
5 with the Supreme Court for review, they filed a
6 response. I don't think that's appropriate to be --
7 I think it's irrelevant as an exhibit in this case
8 and we would object to that being admitted as an
9 exhibit on this argument.
10 I think that's -- that would be the sum of
11 ours.
12 THE COURT: Mr. Smith, there is an
13 objection to 11 and to 18.
14 MR. SMITH: I think the 11 goes to an
15 issue of notice and I think it is an exception to
16 the hearsay rule, merely a letter from the Edgar
17 County Board to Ameren Company mentioning lack of
18 notice. And as far as I think their objection is
19 that our submission to the Supreme Court was their
20 petition of 383, it was our response, and then the
21 Supreme Court denied their petition. I think that
22 we can at least present to the Court our argument.
23 THE COURT: What's the relevance to 18 as
24 far as this hearing?

SUBMITTED - 5653108 - Angela McKee - 12/30/2021 8:04:31 AM

1 MR. SMITH: Not much, Judge, other than
2 the fact that it places in the Court's hand what the
3 arguments were presented to the Supreme Court since
4 they did not give us an oral argument, they only
5 allowed us to submit documents and that was our
6 response.
7 MR. ROLF: Judge, in response to that, I
8 mean, you're familiar with how the 383 process
9 works. Their denial is just we're not going to
10 entertain this.
11 THE COURT: Not going to hear it.
12 MR. ROLF: So it says nothing. And I
13 think the pleadings of either side are irrelevant in
14 terms of evidence in this, an evidentiary hearing.
15 THE COURT: And I tend to agree. I guess
16 my question is for -- to be admitted for purposes of
17 the record, perhaps, I could understand why they may
18 want it in there; but as far as weight that I could
19 give it, I don't really think I can give it any
20 weight. So I'd be inclined to let them admit it,
21 but it's not something that has evidentiary value
22 here. If they want to say "and look at our argument
23 there, ditto," that's what we say again, you know,
24 it doesn't have any evidentiary value, but maybe

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1 purposes of argument. If they want to include it as
2 part of the record, I suppose I can understand that,
3 but I wouldn't accept their arguments as evidence in
4 this case.
5 MR. SMITH: That's the only purpose then,
6 Judge.
7 THE COURT: Okay. What about 11, that
8 correspondence, the notice?
9 MR. ROLF: Judge, that's hearsay. I mean,
10 if he's offering that as evidence as to who may or
11 may not have received notice, we have entered into
12 stipulations, we've allowed affidavits from
13 landowners. This is not an affidavit. This is a
14 letter from county board member that was sent, it's
15 not notarized. It's hearsay and there is no
16 exception to it.
17 MR. SMITH: I'll cut short on that.
18 That's a part of the ICC record, which they have
19 already stipulate is going up, so it's in the
20 record.
21 THE COURT: So it's already in the record,
22 so you'll withdraw --
23 MR. SMITH: It was part of our initial
24 pleadings with the ICC.

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1 THE COURT: So you'll withdraw 11 for this
2 proceeding?
3 MR. SMITH: Sure.
4 THE COURT: And the objection to 18 is
5 sustained.
6 All right. Mr. Smith.
7 MR. SMITH: Judge, just so we -- we
8 started, stopped, started, stopped. So just from
9 historical background, just so everybody knows where
10 we are, Ameren filed their -- they filed their
11 eminent domain sometime in the fall, late spring or
12 late summer of 2016. We filed our traverse and
13 motion to dismiss on August the 5th of '16. We
14 filed a memo in support where we cited numerous
15 cases, both Illinois cases, U.S. Supreme Court
16 cases, for our position. We filed a rebuttal reply
17 on 11-4-16. The Court, you gave us a preliminary
18 order on January the 30th. Ameren filed its rule
19 for a 383 petition with the Illinois Supreme Court,
20 which they denied, and therefore we are here today.
21 THE COURT: They didn't really deny it.
22 MR. SMITH: They denied the right to --
23 THE COURT: They just said that they
24 weren't going to hear it.

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1 MR. SMITH: Yes, sir. And there was an
2 alternative asking for a writ of mandamus, which was
3 denied.
4 From a background of our Constitution and
5 the statutes involved, we believe that the
6 Fourteenth Amendment to the United States
7 Constitution has great bearing on this case. Passed
8 by Congress in 1866, ratified in 1878 or '68, so
9 it's been around for about 150 years, basically says
10 that they are going to stop any state from taking
11 anybody's property without due process.
12 Then we get Illinois legislature involved
13 in the Act, and on July the 28th, 2010, they amend
14 the Public Utility Act, specifically 406.1. They
15 establish something they refer to in the act as
16 expedited procedure. And boy, is it ever. It's an
17 expedited procedure that basically states that
18 within 150 days after an application is filed by a
19 company like Ameren, the ICC has to come up with an
20 order. Historically, before that was passed by our
21 legislature, it would take years for one of these
22 things to go through and establishing transmission
23 lines. But not in 2010.
24 What is interesting about the order, the

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statute in 2010 is that they failed to set up any kind of procedure for notice for newly-proposed alternate routes. At most, they just talked about having some pre -- pre-filing public meetings, put it in a newspaper, and then have an alternate route and have a primary route. And right here on Exhibit 13, which is blown up, you can see, Judge, that their primary route when they would have made this was this kind of green line that, interestingly enough, when they called it the Clark County route, Ameren did -- and you can see why. I mean, it starts right there and then it runs all the way down to Clark County.

And then the alternate route was also defined as Clark County and they had these public hearings. Interestingly enough, the public hearing for Edgar County was way over in the northwest side of the county, about as far away as you can get from some of the folks that are on this line.

Another interesting thing is that since 1975, we've had the Administrative Hearings Act, which is 5 ILCS 100/10-25, which sets up what you are supposed to do at contested hearings. And I submit to the Court that if this isn't a contested

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1 hearing, I don't know what would be if you are
2 taking somebody's property. And it says that all
3 parties are afforded an opportunity for hearing
4 after reasonable notice, served personally certified
5 or registered. Then, to bring matters to a full
6 circle, as we know, the legislature has now amended
7 again 406.1, but that has nothing to do with our
8 landowners today here.
9 Judge, in our memorandum in support, we
10 cited numerous cases from the United States Supreme
11 Court, and I would just like to quote from a couple
12 of them since we are doing this historical
13 background. In 1983, the Fuentes Corp stated that,
14 I am quoting, "For more than a century, the central
15 meaning of procedural due process has been clear:
16 'Parties whose rights are to be affected are
17 entitled to be heard; and in order that they may
18 enjoy that right, they must first be notified.'"
19 The Court went on to state that, "The
20 constitutional right to be heard is a basic aspect
21 of the duty of government to follow a fair process
22 of decision-making when it acts to deprive a person
23 of his possessions. The purpose of this requirement
24 is not only to ensure abstract fair play to the

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1 individual, its purpose, more particularly, is to
2 protect his use and possession of property from
3 arbitrary encroachment -- to minimize substantive,
4 unfair or mistaken deprivations of property, a
5 danger that is especially great when the State
6 seizes goods simply upon the application of and for
7 the benefit of a private party. So viewed, the
8 prohibition against the deprivation of property
9 without due process of law reflects the high value,
10 embedded in our constitutional and political
11 history, that we place on a person's right to enjoy
12 what is his, free from government interference."
13 In the Mullane case that we cited, also
14 Supreme Court, this was back in 1950, the Court
15 stated, "An elementary and fundamental requirement
16 of due process in many proceedings which is to be
17 accorded finality is notice reasonably calculated,
18 under all the circumstances, to apprise interested
19 parties of the pendency of the action and afford
20 them an opportunity to present their objections."
21 The Court went on to state that, "The
22 reasonableness, and hence the constitutional
23 validity of, any chosen method may be defended on
24 the ground that it is, in itself, reasonably certain

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1 to inform those affected."
2 And this is where the Court kind of got to
3 the crux of it, Judge. "Notice must be such as is
4 reasonably calculated to reach interested parties.
5 Where the names and post office addresses of those
6 affected by a proceeding are at hand, the reasons
7 disappear for resort to means less likely than the
8 mails to apprise them of its pendency."
9 That's kind of what Ameren had been
10 arguing most of the time that we've had numerous
11 arguments before the Court, that, well, there's some
12 notice and it's going to be okay. The Mullane court
13 went on and stated, "Publication may be
14 theoretically available to all the world," they are
15 talking about publication here, sort of sounds like
16 our act, "but it is too much, in our day, to suppose
17 that each or any individual beneficiary does or
18 could examine all that's published to see if
19 something may be tucked away in it that affects his
20 property interests."
21 The issue constitutionally, and we have
22 continued to argue this, Judge, is that the statute
23 deprives landowners such as the landowners I
24 represent. The affidavits attached and stipulated

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1 by the parties include 44 landowners. It also
2 includes two bank trust departments, two separate
3 banks. All of them have filed affidavits that they
4 didn't get notice of this red dotted line that's
5 located 4.5 miles north of the alternate line and
6 10 miles north of the primary route.
7 The statute is -- is short when it comes
8 to constitutional safeguards in that it doesn't talk
9 about what you are supposed to do with landowners
10 who are then brought in after the original petition
11 is filed. Ameren and the ICC cannot take the
12 position that they didn't know that this was going
13 to happen because we have indicated or shown in our
14 exhibits the bench sessions/status hearings that
15 they had. They had them early on, they had them in
16 December, they had two in January. And what does
17 the administrative law judge say at every one of
18 them? "Notice is important. We need to set up some
19 sort of a protocol, even though the statute is
20 totally void of any language of what to do, that
21 when people come in and intervene, as Stop Coalition
22 did in this case, that they've got to give us all of
23 these names and addresses, but that we, the ICC,
24 need to make sure that they get notice of it."

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1 Now, Ameren is going to argue that, well,
2 gee, look at the certified notice that went out.
3 But if you look closely at that notice, they start
4 short-changing everybody. They say, well, we are
5 going to mail it out, we may have mailed it out, but
6 we are not going to list all the people because
7 there are just too darn many people to list them
8 all. That smacks in the face of the affidavits that
9 have been filed. How in the world can they argue,
10 other than their argument that they have already
11 made about all these folks, it's their self-interest
12 that they are saying this, they just don't want the
13 line, how do they get past the fact that we have two
14 banks, two trust officers, who signed affidavits the
15 same, that they didn't get it. They don't have a
16 dog in this fight. They have a fiduciary
17 relationship with their trustee, with their
18 landowners.
19 That's where their argument fails to
20 recognize that these 44 people, and the two banks
21 and the two trust officers, signed affidavits
22 indicating that the ICC did not in fact do what they
23 should have done. Notice was not mailed to these
24 folks and they were not told about what their

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1 property was being involved and what they should do
2 about it.
3 We have cited some cases dealing with the
4 Administrative Procedure Act, Judge, the ICC vs.
5 Operator Communication case that we cited in our
6 memorandum. The Administrative Procedure Act
7 requires that all parties in contested case be given
8 notice, opportunity for hearing. Administrative
9 proceedings must conform to the requirements of due
10 process.
11 We cited the Lyon case, versus DCFS, which
12 is a Supreme Court case, and in that case, and I am
13 quoting directly from our Supreme Court about the
14 United States Supreme Court, where they stated, "The
15 United States Supreme Court has made it clear that
16 due process is a matter of federal constitutional
17 law. So compliance or noncompliance with state
18 procedural requirements," i.e. 406.1, "is not
19 determinative of whether minimal procedural due
20 process standards have been met."
21 We have -- Mr. Rolf and I have had many
22 discussions concerning this and before the Court on
23 what the next two cases mean. We disagree with what
24 they mean and it's only fair to bring them back up

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1 because they are very important to this case.
2 Adams County. That's the case that we took up with
3 some other landowners and our case went up
4 specifically on due process argument, indicating to
5 the Court we did not -- our folks did not get notice
6 of this alternate line, this hybrid. As a matter of
7 fact, what's interesting is, if our people had even
8 gone to those first three meetings and had listened
9 to the Ameren proposal, they would have left knowing
10 that Ameren's primary route was going here
11 (indicating) and that their alternate route was
12 going here (indicating), but my folks live on the
13 red-dotted line, four and a half miles north. My
14 folks would have gone home and said, "Not about me.
15 I don't have to go in there anymore." The only way
16 they would have known, Judge, if they were being
17 involved was if the ICC had in fact sent, mailed
18 their notices, which the affidavits indicate they
19 did not.
20 So we took the Adams case up, we've raised
21 due process, even though I think Ameren's brief says
22 we didn't. In the ICC, if you look at our -- our
23 exhibits, you can see that the first thing we filed
24 was due process, on our petition to intervene was

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1 No. 3. No. 4 was our due process motion to strike.
2 No. 5 was our petition to supplement the due process
3 motion. I don't know how it can be any brighter.
4 It was in big bold print, due process motion. Of
5 course, we know what happened to us on that one.
6 They just summarily denied our right to, one --
7 first, they denied us the right to intervene.
8 Didn't even give us the right to intervene. And
9 then finally, they said, well, we are going to let
10 you intervene so you can appeal it. So we appealed
11 it.
12 But what did Adams County really say on
13 the due process? They said they found that there
14 were no property interests involved, neither
15 conferred property interests on ATXI, nor deprived
16 landowners of property interest. Once they made
17 that decision, they punted the ball. No violation
18 of due process because they don't have any.
19 But they didn't stop there. Adams did not
20 stop there. They went on to say, when they were
21 describing their decision in the Lynn case,
22 "Ultimately, we determined courts were not preempted
23 from inquiring into the same subject matters as the
24 Commission during the certification proceedings and

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1 found the trial court erred in dismissing the
2 landowners' motion to dismiss and traverse."
3 Lynn, the landowners, even appeared before
4 the commission, but the Fourth District held that
5 they could not be barred from later exercising their
6 rights as owners of property that were being taken
7 by public use. That's what Adams said. This was
8 not decided on constitutional question. It was
9 decided on anything but constitution because they
10 found out there is no constitutional safeguard here.
11 You don't have a property right so why should -- why
12 are you entitled to be heard?
13 If you look at it just from that
14 standpoint only, I can understand how 406.1 can
15 somehow be looked at as it's only a way to get a
16 certificate and an order. But as the Court
17 indicated in your preliminary order, it starts --
18 the river starts flowing down and the water is
19 flowing, and where is it flowing from? It's flowing
20 from this certificate order. What does it give them
21 the right to? It gives them the right to do what
22 they are doing today, eminent domain, to be in this
23 courtroom, trying to take my clients' properties
24 away from them.

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1 The Lynn case was decided by the Court
2 well before the Adams case, in 1977. And in the
3 Lynn case, the Court said, "The property owners'
4 rights are in jeopardy for the first time in
5 court" -- not at the ICC. In court, here today --
6 "and are protected by their motion to dismiss and
7 traverse."
8 The Court went on in Lynn, stating,
9 "Appeal of the order of the Commerce Commission to
10 the courts as provided by statute would only have
11 been a review of the proposed plan for development
12 of the project and the extent of the property to be
13 sought."
14 And it went on to say that landowners
15 could not be barred from later exercising their
16 rights of owners of property being taken for public
17 use. There's nothing -- the Court said this, "There
18 is nothing in the Public Utilities Act preempting
19 the rights of the property owners in the
20 condemnation proceedings. The two acts should be
21 read in harmony, if possible."
22 I believe that Adams is not any kind of
23 precedent to this Court today, and I believe that
24 it's not because of what we have indicated to you in

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1 our argument and in the case law that we have cited
2 to you and in our memorandum which we gave the Court
3 many months ago. I also believe that the Lynn case
4 establishes what can be done in a traverse and a
5 motion to dismiss, which is exactly what we are
6 doing today.
7 And at the end of the day -- I always
8 carry this around with me, Judge, because it's just
9 a little thing, it's just called the Constitution,
10 but it's amazing how small it is compared to the
11 statutes that Illinois has and what our legislature
12 has done as far as writing acts that are not meant
13 necessarily beneficial to everybody.
14 I believe that the United States
15 Constitution has been around for over 150 years and
16 that there was a good reason that they came up with
17 that amendment and it was ratified by all the
18 states, and that is that you can't have a situation
19 like we have here. You can't have a big company
20 asking the State to do their bidding. You can't ask
21 them to do it without telling people they're coming
22 to getcha. You can't do it and let them knock on
23 the door after the order is already entered, which
24 it was done in this case on August the 20th, 2013,

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1 and these fine folks in this room got notice on
2 September the 6th, by letter, of '13. That's the
3 first time they knew their property was being taken.
4 How do I know that? Because I've got 44 affidavits
5 of people and I have two bank officers and not one
6 of them got notice. If they didn't get notice, then
7 this Act has no constitutional backing at all.
8 We've got an Act that's basically says,
9 well, tough with the Constitution. But I think the
10 Constitution stands for a lot more. And I think
11 with the Fuentes case that we cited, the Mullane
12 case that we cited, the Lynn case that we cited, and
13 the Adams County decision, does not preclude us from
14 raising the objection today and does not preclude
15 this Court from dismissing the eminent domain cases
16 against these individual landowners due to lack of
17 constitutional due process. They have to be given
18 an opportunity to know what's going on, Judge. And
19 they were not provided with that.
20 We ask after you have consideration of all
21 the pleadings, the case law, and the stipulations,
22 that you dismiss the eminent domain as to our
23 landowners in Edgar County. And thank you for your
24 time.

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THE COURT: Thank you, Mr. Smith.

Mr. Rolf. Mr. Rolf, before you start, let me ask Mr. Smith a question. You can stay right there. You have asked for dismissal. Would the Court have authority, if it agreed with your position, to send the matter back to the ICC as opposed to dismissal, outright dismissal?

MR. SMITH: I'm not sure about that, Judge, to be honest with you. I'm not -- and I'm not indicating that the Court could not so state in the order. I'm not sure that this has ever been an issue that's come up due to a constitutional issue, but I think you can include it in the order.

What the ICC and Ameren does at that point really is up to them, whether they want to go back and revisit this piece of the line. It doesn't stop the other line from going. But I still think that you could make such --

THE COURT: You would agree that I can't redo the ICC's work.

MR. SMITH: No, you cannot. I agree with that.

THE COURT: All right. Mr. Rolf, go ahead.

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1 MR. ROLF: Let me tack on to the end of
2 that, I think here is the rub is that if you dismiss
3 this case, you are essentially invalidating the
4 ICC's order where they issued the Certificate of
5 Public Convenience and Necessity. And there is a
6 specific procedure under the Public Utility Act to
7 challenge those, which these landowners participated
8 in, and it went up to the Fourth District and that's
9 all taken place.
10 THE COURT: That gets us back to the
11 interpretation of Adams, right?
12 MR. ROLF: Well, to some extent. But I
13 mean, that's what you're -- that's the problem here
14 is that we're revisiting a due process argument of
15 whether the landowners got actual notice during the
16 ICC process that their land was on a proposed route.
17 And that's -- that's not what Adams County says,
18 that's not what Lynn says, that's not the other --
19 the other Supreme Court case cited in those is the
20 Chicago B & Q Railway vs. Cavanaugh where they
21 changed the railroad crossing. And there, the
22 Supreme Court said under the Public Utilities Act
23 it's not necessary in the proceeding requiring the
24 railroad to relocate its road that the property

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1 owners of the new right-of-way have a copy of the
2 order to satisfy due process.
3 And then it went on to say -- this is
4 consistent with Lynn and what is appropriate in a
5 traverse proceeding, it went on to say that they
6 can -- "The General Assembly has unlimited power to
7 take private property, upon making compensation,
8 reserving to the property owner the right to contest
9 the question whether the proposed use is public or
10 private, and whether the power is to be exercised
11 for the purpose for which it was conferred."
12 In other words, appropriate under a
13 traverse is -- is the route that the Commerce
14 Commission approved. I mean, they chose a route.
15 That's not a contested case or anything else. They
16 can come in and say that's -- the landowner can
17 still on a traverse say that's not for public
18 purpose, that's a private purpose. They can come in
19 and say it's not being used for the purpose for
20 which the ICC approved it. That's why we submit the
21 order. That gives us a presumption that those
22 findings have been made and they can rebut those.
23 That's proper on a traverse.
24 So that's what Lynn is saying, look, we

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1 are not saying because you participate in the ICC
2 process where they were deciding whether there was a
3 public purpose or such precludes you from later,
4 when they are taking your property in a condemnation
5 case, from contesting that. It's not res judicata,
6 it's not issue precluding the Commerce Commission
7 because you can raise those issues that are
8 traverse.
9 THE COURT: Let me back up just for a
10 second though. In light of what he's arguing,
11 Mr. Smith, do I take it from your argument that you
12 are conceding that the property sought to be
13 acquired is necessary for the purposes for which
14 it's sought, is not in excess of the plaintiff's
15 needs, does not seek to use the property for
16 purposes other than for public purpose? Essentially
17 the basic initial criteria of your traverse, are you
18 conceding those and relying solely on the motion to
19 dismiss?
20 MR. SMITH: On my motion to traverse?
21 THE COURT: Right.
22 MR. SMITH: I'm not necessarily conceding
23 those at this point. However, I am arguing that
24 the -- that the due process is the issue that

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1 constitutionally is wrong here, that you can't -- I
2 understand what he is saying. Yeah, you are
3 invalidating the order as to these landowners, not
4 to the other 150 to 200, I don't know how many, but
5 no, I'm not --
6 THE COURT: Okay. I just wanted to make
7 sure.
8 MR. ROLF: Judge, at the end of this
9 hearing today, we are going to ask you to rule on
10 the traverse.
11 THE COURT: Right.
12 MR. ROLF: And there is no evidence coming
13 from them to rebut the presumption which the Court
14 has already found exists by the submission of those
15 orders. So they can say they didn't concede it, but
16 there is going to be no evidence here today
17 contesting any of those things and we would expect
18 at the end of this hearing that an order would be
19 issued that denies the traverse in so much as the
20 traverse issues are in play today.
21 THE COURT: I understand.
22 MR. ROLF: So if we are looking then to
23 the due process, and there was a lot of time spent
24 today, Judge, here arguing what essentially probably

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1 the Appellate argument in the Adams case that we
2 think has already been ruled on and where they are
3 challenging the constitutionality of 8-406.1 on its
4 face and I think it's clear the Adams case clearly
5 said it was constitutional.
6 As to whether these folks got notice and
7 it's constitutional as applied to them is a
8 different issue, but I think that the constitutional
9 challenge to the statute itself has been upheld.
10 And what we are doing here today, I guess, is
11 suggesting that due process, as Mr. Smith said,
12 requires notice reasonably calculated to give the
13 people an opportunity to participate. And our view
14 is the statute and the proceedings, and specifically
15 in this case, were designed that very way. They
16 don't always, as the judge knows, statutes don't
17 always require actual service like in a lawsuit
18 where we are taking their property in condemnation.
19 So it's not a -- they seem to indicate
20 that these landowners were entitled, we would have
21 to prove they had actual notice that their specific
22 property was on this proposed route when the
23 Commerce Commission entered its original certificate
24 in 2013 approving the route. And if we accept

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1 that's what we are talking about here is whether
2 during the Commerce Commission proceeding, that's
3 what is being litigated, we think there were plenty
4 of steps that were reasonable steps to impart notice
5 on these folks and that they in fact had sufficient
6 notice to satisfy the due process requirements as
7 applied to these landowners, Judge. The overall
8 constitutionality of the statute not being an issue.
9 Ameren started this process in the ICC,
10 and when they did, they complied with all that the
11 statute required, and regulations. There is no
12 dispute about that. In fact, the first paragraph of
13 the stipulation entered into between the parties
14 says that, that all -- Ameren complied in filing
15 their petition with all the statutes and
16 regulations: County-wide notices, publications,
17 provided project information. The brief, our bench
18 brief, Your Honor, sets forth all of these steps,
19 and they are designed to give what is effective
20 notice, we believe is effective notice, in and of
21 itself because it's what's reasonably calculated and
22 you can't put a burden on somebody to notify every
23 landowner in Edgar County. They took reasonable
24 steps to notify the landowners on the proposed

SUBMITTED - 5653008 - Angela McKee - 1/22/2021 8:04:31 AM

1 routes and the neighboring land of those proposed
2 routes and they provided county-wide publication and
3 notice and informational meetings.
4 And the purpose of that is not so -- it's
5 to let everyone know this project is coming through.
6 And it's at the landowners' own peril should they
7 decide to look at that and say, well, it doesn't
8 involve me so I can ignore it. Because as they
9 know, just like they wanted to intervene, there were
10 people whose land was affected. What did they think
11 those people might do? I mean, they may come in and
12 say, well, we are going to challenge this route
13 because it goes through our property.
14 THE COURT: Using that logic then,
15 everybody in the county should appear because no one
16 knows at what stage the route may change and where
17 the route may go. So basically you are saying that
18 there should be notice to everybody in the county
19 and everybody in the county should appear.
20 MR. ROLF: What I am saying, Judge, is the
21 statute and the publication notices cover that issue
22 of giving notice countywide and that the cases will
23 say you can't -- that due process, to reasonably
24 give people notice can't require a burden such as to

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1 send every single landowner in the county, based on
2 the tax rolls of the real estate, a mailed notice.
3 So that's why they have publication notice.
4 THE COURT: How about the landowners of
5 the property that a route is being proposed for?
6 MR. ROLF: They got notice. Ameren
7 provided that list to the Commerce Commission. The
8 Commerce Commission sent those people notice. They
9 received that notice. That's been admitted. It's
10 been admitted by these landowners that the parties,
11 their route and the alternative routes proposed by
12 Ameren in the initial petition received notice.
13 THE COURT: That the 44 people who have
14 signed affidavits, they all got notice?
15 MR. ROLF: Judge, I am talking about the
16 original petition.
17 THE COURT: That's my question though.
18 The 44 people, did they ever get notice that there
19 was a proposed route that was going to cross their
20 property?
21 MR. ROLF: Well, Judge, I -- I am prepared
22 to argue that they did, okay?
23 THE COURT: Okay.
24 MR. ROLF: There is multiple steps in

SUBMITTED - 5653078 - Angie Barnett - 1/22/2021 8:04:31 AM

1 that, okay? And part of that -- I mean, what due
2 process requires is reasonably calculated to give
3 notice. So this publication notice is part of that.
4 Is that a reasonable step when at that point in time
5 their land may or may not be affected? It's
6 reasonable to put everybody on notice that they need
7 to pay attention, participate, check back in, not
8 just ignore it.
9 So what happens then? That notice goes
10 and then Exhibit C to that verified petition lists
11 the landowners. There is no dispute again that was
12 given. Paragraph 3 of our stipulation admit that
13 those landowners received that notice from the
14 Commerce Commission. And then if you look at the
15 ICC docket, Judge, and we have set forth the docket
16 entries, not just the notices, in our bench brief,
17 and the docket entry for that is on page 5 of our
18 brief and it says the attached notice was filed,
19 then the docket entry -- and we think this is
20 important -- says, "notice mailed to the parties."
21 And that's to the parties that are on Exhibit C to
22 the petition on the proposed routes by Ameren. And
23 the docket was accurate. No one disputes that that
24 notice was mailed just as the docket said.

SUBMITTED - 563006 - Angela McKee - 1/22/2021 8:01:31 AM

1 So what happened after that? Well, we had
2 some of those landowners, as you have heard, Stop
3 the Power Lines Coalition petitioned to intervene
4 and they did so and they proposed yet another route
5 or two, and that's in the stipulation, paragraph 4
6 of our stipulation. There is no dispute that
7 landowners that got the original notice that their
8 land was being affected, came in, were granted to
9 intervene, proposed other routes. Then they
10 complied, those landowners.
11 The administrative law judge suggested
12 that they provide a list of the landowners based on
13 the tax rolls for who might be affected by their
14 proposed routes. And they did that. The Stop the
15 Power Lines Coalition provided that list, the
16 ultimate landowner list as referred to. Paragraph 7
17 of the stipulation between the parties admits that
18 that was filed and given to the ICC. It also admits
19 that all of these 44 landowners were on that list.
20 So what did the ICC do? They filed a
21 notice. And again, if you look at the docket entry
22 in our brief, that says that the docket entry says,
23 "Notice mailed to parties. Notice also mailed to
24 alternate landowner list." So again, we have the

SUBMITTED - 563006 - Angela McKee - 1/22/2021 8:01:31 AM

1 docket entry showing that those notices did go out
2 to the landowners on that list.
3 And in addition to that, what happened
4 next then, Judge, after that went out, well, you
5 have some of those very landowners intervening.
6 Landowners that were not on the first list, the list
7 that went with -- that accompanied Ameren's
8 petition, but landowners on the alternate landowner
9 list that was provided by the Stop the Power Lines
10 Coalition to the ICC, that the ICC said the notice
11 was mailed out to them, petition to intervene, and
12 that's Exhibit D to our bench brief. Petition for
13 leave to intervene on behalf of Edgar County
14 interveners.
15 And Judge, we have heard a lot today about
16 how these landowners have bank trust officers
17 providing affidavits. Well, you will see here that
18 there is Edgar County Bank & Trust as trustee for
19 five different trusts listed there intervening, and
20 this is in April of 2013. And the -- specifically,
21 Edgar County Bank Trust No. 455-410 is a defendant
22 landowner in one of these cases, 16-ED-53, a named
23 defendant, along with Thomas and Tim Martin. That
24 trust, 45 -- 455-410 is a defendant and yet they

SUBMITTED - 5630108 - Angela McKee - 1/22/2018 10:41:31 AM

1 filed today. Mr. Smith has filed them on behalf of
2 the traverse and motion to dismiss, when they
3 intervened in April of 2013.
4 So where is the affidavit from the trust
5 officer there, Judge? That motion of traverse and
6 motion to dismiss contains the affidavits of Martin
7 but not the Edgar County Bank trust officer, who is
8 a named landowner, who they have appeared on behalf
9 of and who previously intervened in the ICC.
10 So what does that suggest, Judge? That
11 suggests that that -- the Commerce Commission did
12 its job, sent out those petitions. So when you ask
13 if there is some evidence that these 44 landowners
14 got notice, we think that's some indication that
15 that notice was mailed out.
16 Next, for ICC filing purposes, Judge,
17 there were two 509 petitions by Ameren.
18 THE COURT: Can I ask a question? In the
19 docket entry you reference on page 5, it talks about
20 notice being made available electronically on the
21 commission's e-Docket system. Is that the notice
22 you are talking about?
23 MR. ROLF: No. They had it -- the
24 notice -- copy of the notices attached as Exhibit B

SUBMITTED - 563006 - Angela McKee - 1/22/2021 8:01:31 AM

1 and what's set forth there is the docket entry and
2 the last line says, "Notice mailed to the parties."
3 The actual notice went out to the parties.
4 THE COURT: All right.
5 MR. ROLF: It is also available there.
6 And --
7 THE COURT: That's the Exhibit B that you
8 reference?
9 MR. ROLF: Right.
10 THE COURT: Go ahead. I'm sorry.
11 MR. ROLF: So the next step is the two
12 509 petitions by Ameren and those are actually the
13 petitions where Ameren is granted -- is seeking and
14 granted authority to proceed in eminent domain. The
15 certificate doesn't give them the authority to do
16 that. That just picks a route. So if you look
17 again at the ICC docket entries, and these entries
18 are page 8 and on page 9 of the bench brief, the
19 statement is again made in the docket entry by the
20 clerk at the commission that the notice was mailed
21 to landowners in each docket.
22 Now, some of the defendant landowners,
23 some of the 44 were in one docket and some of them
24 were in the other docket; but in any event, the ICC

SUBMITTED - 5653076 - Angie Brockett - 12/20/2018 10:31 AM

1 sent notice to all the landowners in both of those
2 dockets, and they all received it and it's
3 undisputed, Judge, because the intervene --
4 Mr. Smith intervened on behalf of some of them in
5 the ICC proceeding and the rest in the second 509
6 proceeding. He entered his appearance for them and
7 then filed a letter with the ICC stating that he
8 would -- they would not object to the 509 authority.
9 So again, at that stage they didn't
10 challenge due process, and that's where Mr. Smith
11 stood up up here and said they did file and he's
12 referring to these exhibits and due process. Those
13 were his petitions to intervene at the time the
14 certificate was issued. Here in the 509 proceeding,
15 in 2016, when Ameren is asking for the authority to
16 eminent domain, there is no issue raised as to due
17 process. So if you are going down this road that
18 the ICC proceeding is a process, this would have
19 been the time then, if that's when they are asking
20 for the authority to do a taking, that they might
21 have raised the due process issue.
22 So it's against this background, Judge,
23 and the other mailing that went out was in
24 September, and all the affidavits reference this,

SUBMITTED - 5630708 - Angela McKee - 12/30/2021 8:01:31 AM

that in September Ameren sent a letter to the landowners informing them that they had received the Certificate of Public Need and Necessity that was granted in August of 2013. So if you count that mailing, there was five different mailings, notices, that went out to the landowners and against the background where these landowners are only challenging that there was one mailing out of those five that they didn't get.

So we've got the starting process in terms of did they get notice is we've got a presumption that it was done. We've got the ICC docket entries in each instance saying that notice was mailed. And the Compton case we cite stands for the proposition that there is a presumption that a public official performs the acts which they are required to perform.

And then there is a second case we cite, the Tabor case, that says that there is a presumption that mail that is mailed has been received. They don't require people to come in and prove actual receipt in instances like that.

So then the burden goes over onto the landowners to overcome those presumptions by

SUBMITTED - 5630108 - Angie Barnett - 12/20/2018 10:13:01 AM

1 substantial evidence, and then again to what is the
2 evidence of whether or not those notices went and
3 were received? Well, we have the evidence, a
4 history of Ameren complying with all the statutory
5 and regulatory notices required of it under the Act
6 and regulations. We have a history of the ICC
7 mailing to the landowners in November of 2012, at
8 the time of the original petition, and an admission
9 that these landowners received that notice. We have
10 a history of Ameren sending a letter in September of
11 the approved route to the addresses of these
12 landowners, and they received, as some actually
13 tried to intervene at that time and they all in
14 their affidavits say they got that letter.
15 Then we have a history of --
16 THE COURT: The previous notice of the
17 approved route, when did that go out prior to
18 September?
19 MR. ROLF: The notice of the approved
20 route was the September letter from Ameren. Is that
21 right?
22 MS. PETRILLI: The STPL route, that notice
23 went out in January to those landowners that are
24 involved in this hearing.

SUBMITTED - 563006 - Angela McKee - 1/22/2021 8:01:31 AM

1 THE COURT: Is the STPL route the
2 ultimately-approved route?
3 MS. PETRILLI: Part of it.
4 MR. ROLF: Part of it is. That notice
5 went out -- yes. I understood your question to be
6 when did the notice go out that the route was
7 approved.
8 THE COURT: Well, no.
9 MR. ROLF: As opposed to when did the
10 notice go out of the route that was --
11 THE COURT: You are saying the record will
12 show that all 44 of these people and the trusts got
13 notice of the ultimate route prior to its approval
14 by ICC?
15 MR. ROLF: Right. That notice would have
16 gone out in January of 2013. The ICC docket entry
17 says it was mailed to the parties, as well as the
18 alternate landowner list. Paragraph, I think, 4 of
19 the stipulation indicates that all of these 44
20 landowners were on that list, and we have evidence
21 that at least some of those landowners received it
22 because they appeared in the Commerce Commission
23 proceeding in April of 2013, including one of the
24 defendants in this case.

SUBMITTED - 563006 - Angie McKee - 1/22/2021 8:01:31 AM

1 THE COURT: Okay. Go ahead.
2 MR. ROLF: And we have evidence that all
3 of these landowners received the ICC notice that was
4 mailed in the 8-509 proceedings in 2016 that went
5 out on two different occasions.
6 So against that, we have the affidavit of
7 the defendant landowners saying they never received
8 the January 2013 notice. We've got a November 12
9 note, ICC doing their job, mailing their notice. We
10 have January 2013, ICC doing their job, mailing the
11 notice. We have a September letter from Ameren,
12 mailed to these people and received by these people.
13 We have a January 2016 and an April 2016 notices by
14 the ICC that were received by these people, versus
15 then just the single affidavit of the interested
16 landowners saying they never received it.
17 So the case law speaks to due process and
18 you look at the statute and they did all that was
19 required there, Ameren did. We look at the
20 landowners' claim regarding the ALJ's direction. He
21 required a list be provided based on the tax records
22 and that it be mailed out and there is evidence that
23 that was done.
24 So we think there is sufficient evidence,

SUBMITTED - 5630108 - Angela McKee - 1/22/2021 8:04:31 AM

1 Judge, based on the presumptions afforded the docket
2 entries by the ICC that notice was mailed, the fact
3 that these landowners received other notices sent to
4 those very same addresses, the fact that at least
5 one of the defendants intervened in the case after
6 the January notice went out and before the route was
7 approved in August of 2013. So we think that that
8 is sufficient evidence that proves receipt by these
9 defendants and they have not shown substantial
10 evidence to overcome the presumptions that they were
11 afforded.
12 Did they get -- did they just not get this
13 one piece of mail, although they got every other
14 mail, piece of mail that went? The Tabor case talks
15 to that very issue where there is admission of
16 receipt by the defendant of other mailings done
17 pursuant to the same practice, but they disputed the
18 one that they wanted to dispute. And that's why
19 they have these presumptions because things take
20 place. And for us to prove they have receipt when
21 it's not required by the statute, the mailings went,
22 they received all the others, we think it's fair
23 that reasonably calculated -- to undertake that
24 process by mailing reasonably calculated to give

SUBMITTED - 563006 - Angela McKee - 1/22/2018 10:13:31 AM

1 them notice and an opportunity to participate.
2 Certainly at least one of the defendants found the
3 opportunity to participate and intervene back in
4 April of 2013.
5 So, you know, is there another explanation
6 for that? You know, the other explanation, Judge,
7 would be that perhaps these landowners were just
8 waiting for the final route to be approved to
9 determine whether or not they needed to get in to
10 object, and that's -- there's some reasonable
11 support for that because if you look at their
12 affidavits, the fourth paragraph in each of their
13 affidavits says, "I did not receive any notice that
14 the real estate I owned was subject to a certificate
15 of public convenience and necessity authorizing the
16 construction, operation and maintenance of the line
17 in Edgar County prior to August 20th, 2013," the
18 date the commission issued the certificate.
19 So they are saying I didn't receive notice
20 of the certificate until after the certificate was
21 issued. Well, nobody received notice of the
22 certificate until after it was issued. But that
23 tells you they were waiting to see where is this
24 going to end up? Because if it ends up on my land,

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1 then I want to fight it. I think that's a plausible
2 explanation for why they sat back and then
3 intervened right away after they got notice that the
4 route had been chosen, Judge.
5 And I think that is more plausible than
6 the idea that for some reason they didn't get the
7 one mailing out of the five that they are claiming
8 they didn't get when we know in fact one of them
9 intervened. And actually, there were two -- two
10 landowners on that alternate list that intervened.
11 Only one of them is a defendant in these cases. But
12 certainly Edgar County Bank & Trust, based on that
13 petition, was representing four or five trusts and
14 intervened.
15 So we would ask that the motion to dismiss
16 on due process grounds be denied, Judge, and we also
17 would ask that the traverse be denied.
18 THE COURT: Thank you, Mr. Rolf.
19 Mr. Smith.
20 MR. SMITH: Judge, working backwards to
21 forwards, the fact that the bank may have become as
22 a trustee and intervener later doesn't tell you
23 anything. It doesn't tell you how they got notice.
24 There is nothing in there to state whether they got

SUBMITTED - 565006 - Angela McKee - 1/22/2021 8:41:31 AM

1 an affidavit that they received notice. Nothing.
2 So that doesn't show anything after the Stop
3 Coalition's line was posted.
4 I don't think Mr. Rolf read the affidavits
5 correctly. What the affidavits said, "I did not" --
6 all 44 -- "I did not receive any notice from the
7 Illinois Commerce Commission or Ameren that the real
8 estate I own was subject to a certificate" -- was
9 subject to certificate -- "authorizing the
10 construction, operation, maintenance of the
11 transmission line in Edgar County prior to
12 August the 20th, 2013," the date that the
13 certificate was entered. "The first notice I
14 received that the real estate I owned was involved
15 in the Illinois Rivers Transmission Line was
16 September 2013."
17 The next paragraph in all the
18 affidavits, "I was not given prior notice nor
19 allowed to present any evidence before the ICC."
20 We have -- we have 44 affidavits, Judge,
21 that are not, in my opinion, trumped by any of the
22 docket entries by the ICC. The ICC kind of takes a
23 shortcut even when they want to say that they are
24 going to mail them out, then they say the list is

SUBMITTED - 567006 - Angela McKee - 1/22/2018 10:11 AM

too long to let these folks know individually. But I guess it wasn't too long. And this is, I think, where you had indicated in one of your earlier orders is why don't they have the same requirement in this Act for an intervener new line as they do for the primary and the alternate line? Because the Act provides that everybody on this primary and alternate line gets notice.

They don't get a little notice in the -- by the way, you can download it electronically if you want to, and since there is so many of you, we're not going to list them, because if you've got a list like that and you've got a little two-page notice like that, that list, you are going to see your neighbors are going to be on there. There is a reason the Act says that they were supposed to send this by mail and they didn't do it. They didn't do it to these folks because I've got 44 affidavits. I've got trust officers who signed affidavits saying they did not get it for that specific -- for that trust that they represented in our pleadings.

I think Mr. Rolf indicated reasonably calculated to give notice; you can't expect us to notify every landowner. But in fact, Judge, if you

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1 went to that first three meetings and you are right
2 there in that school building or wherever they had
3 it at the northeast -- northwest corner of the
4 county and you lived on this red-dotted line and you
5 did your due diligence by showing up because they
6 put a little blurb in the paper, you would have only
7 seen green and yellow lines, and those are in our
8 exhibits. Find my sheet. I think it's Exhibit
9 No. 8, the Ameren Transmission Illinois Rivers
10 Project Proposed Routes. Doesn't even say Edgar
11 County. Clark County. The next ones, proposed
12 routes, Clark County. And then the third, proposed
13 routes from Kansas to Sugar Creek.
14 All three of those were prepared by Ameren
15 and all three of those show that everybody on that
16 line got notice. Not one of the people that are in
17 this courtroom today live anywhere near those lines.
18 They are four and a half miles north of one and ten
19 miles north of the other.
20 So we are asking that the Court find that
21 there is more notice requirement than just doing
22 what the statute says. And what do the cases say?
23 Just because you follow a defective statute and you
24 do everything that defective statute states, if it's

SUBMITTED - 5630108 - Angela McKee - 1/22/2021 8:04:31 AM

1 deficient when it comes to due process, that's not
2 sufficient to show people were given proper notice.
3 And that's what it all comes back to, that's the
4 crux of our argument. Even if they did everything
5 they were supposed to, there was a serious neglect,
6 Judge. The neglect was when they dropped the
7 ball -- and Ameren didn't do it, the ICC did it --
8 they didn't do it. As a matter of fact, Ameren
9 didn't even -- they did a stipulation that this line
10 wouldn't even -- wouldn't count. But it was the
11 ICC. It's the government again coming in and doing
12 the bidding for a private party, just like they
13 talked about in Fuentes and in the Mullane case,
14 United States Supreme Court cases.
15 There is a sufficient -- there is a very
16 deficient -- deficiency in this case when it comes
17 to notice, Judge, and these folks are entitled to,
18 yes, an invalidating of the order as it comes to
19 this, right from here to here (indicating). And
20 why? Because the Constitution stands for something
21 more than a faulty statutory provision that doesn't
22 tell it what to do with the secondary lines that
23 are -- that were presented and for some unknown
24 reason didn't get to these folks in this county.

SUBMITTED - 5670108 - Angela McKee - 1/22/2018 10:31 AM

1 It should be dismissed, Judge.
2 THE COURT: Thank you, Mr. Smith.
3 Mr. Rolf?
4 MR. ROLF: I want to address the idea that
5 the commission left people off the list. What the
6 docket entry or the notice says is, "Due to the
7 length of the list of entities to receive notice of
8 this proceeding, the chief clerk's office need not
9 include with the forthcoming notice of the
10 prehearing conference the list of potentially
11 affected landowner municipalities."
12 In other words, all of the landowners got
13 the notice, they just weren't required to get the
14 list of everybody that the notice went to. So
15 that's -- that's no defense that they shortchanged
16 and didn't send them the notice. They all got the
17 notice.
18 So I just want to make sure that that's
19 clear, that that's not suggesting that they didn't
20 send the notice to everybody or that it was
21 available online, it's just that the notice didn't
22 include a list of 200 names or whatever it is.
23 Lastly, I have to go back to the
24 2016-ED-53, which is one of the cases in this group

SUBMITTED - 5653006 - Angela Mckee - 1/22/2021 8:41:31 AM

of 30 or 40, Judge, and it's the -- now comes defendant, Thomas Martin, Tim Martin and Trust No. 455-410, the Edgar County Bank & Trust Company, by and through their Attorney, Craig Smith, of Asher & Smith, filed a motion to traverse and dismiss. There is no affidavit from the bank or trust officer attached to that, just the affidavits of the Martins, who are named defendants and are co-owners of the property. But the other co-owner of the property, a defendant, already had intervened in April of 2013 in this proceeding.

So if nothing else, Judge, you know, if you decide to dismiss these cases, I think 2016-ED-53 maybe stands alone and isn't dismissed because they are a defendant in that case, participated and intervened at a time when this alternate stop the power line track was an issue. And that's what their petition to intervene says, we have property interests that are affected. Well, they weren't until the Edgar -- stop the power line one, so that's evidence they got notice in January of a stop the power line route. They filed a petition to intervene saying now our property is affected.

SUBMITTED - 565006 - Angela McKee - 1/22/2021 8:41:31 AM

1 So if you dismiss the others, I suggest
2 you could not dismiss 16-ED-53.
3 THE COURT: Mr. Smith, anything else?
4 MR. SMITH: Judge, I don't have ED-53 in
5 front of me. I'm not sure if it was the one that
6 was signed by -- as far as the trust, with the
7 trust, whether it entered its name as a trustee but
8 not the individual owners. But as to the other 44
9 individuals, there's -- there's no argument that
10 they did not receive notice.
11 THE COURT: Well, if you go back to my
12 order previously entered, it's obvious what my
13 concerns have been about this from the outset.
14 There was a specific notification procedure set out.
15 However, for the expedited procedure, there wasn't.
16 And as I went through the ICC pleadings and their
17 reports, there were continuous issues and questions
18 raised about notice and who was going to provide
19 notice, how it was going to be provided. And I
20 guess where I'm at is, and I'm -- I'd like -- I know
21 it's in your brief, but I still have a question as
22 to whether the 44 people on the ultimate route ever
23 received notice that was the route.
24 I get the impression that Ameren is

SUBMITTED - 567006 - Angie Barnett - 1/22/2021 8:41:31 AM

1 arguing, well, they got notice that it was among the
2 routes that were being discussed, but not that this
3 was the route that was going to be pursued. I'm not
4 sure they got notice that it was among the routes to
5 be discussed.
6 And so here's what I'm asking both sides
7 to do. Mr. Smith already says he's got the
8 affidavits, which I have to take to be true.
9 Mr. Rolf, you are saying we can show specifically
10 each of the docket entries and each of the notices
11 that went out that include those 44 people and I
12 need you to point those out to me.
13 MS. PETRILLI: Exhibit C.
14 THE COURT: Exhibit C to which one?
15 MR. ROLF: Exhibit C to our bench brief,
16 Your Honor. The docket entry is on the first page.
17 THE COURT: I got that.
18 MR. ROLF: Then the notice was stipulated
19 to that that is the notice that went.
20 THE COURT: And this notice, Exhibit C, is
21 the one that you are saying includes the 44 people?
22 MR. ROLF: Right. The notice as attached
23 to it, the service list, plus the list of alternate
24 landowners, and it says that at the top of that

SUBMITTED - 5[illegible] - [illegible] - 1/[illegible] [illegible] AM

1 list, "alternate landowner list". Those are pages
2 following the actual notice. And it was stipulated
3 to, I think, in our stipulation, paragraph 7, that
4 that -- that that list was submitted and that the
5 defendants are on that list. And then it was
6 stipulated in paragraph 8 that the ICC notice is as
7 provided here in Exhibit C, and then you have the
8 ICC docket entry that ends with the notice also
9 mailed to alternate landowner list.
10 MR. SMITH: Judge, if I may, the only
11 comment I would make on what Mr. Rolf has said so
12 far on notice is the stipulation doesn't really say
13 that that notice was mailed. It says that the Stop
14 Coalition folks provided a list of landowners and
15 that the defendants were on the list.
16 THE COURT: Right.
17 MR. SMITH: We didn't argue with that. It
18 says that on January 31st, a document entitled
19 Notice and Notice of Continuance Hearing with
20 attached service list and accompanied document were
21 filed. It doesn't indicate that it was mailed.
22 Now, they have -- in their brief, they have included
23 a docket that indicates that there may have been a
24 mailing, but that's not part of the stipulation.

SUBMITTED - 5630108 - Angie Brooks - 1/22/2018 10:31 AM

1 MR. ROLF: Judge, I will tell you I have
2 never represented that the stipulation said that
3 they stipulated it was mailed. It was exactly as he
4 just described it. And I think that it's fairly
5 clear that I was pointing the Court to the docket
6 entry that says "notice mailed". And the point
7 being, just like it said "notice mailed" four other
8 times, it was this time, and that's a fair inference
9 that the Court can draw from this and the history of
10 all these notice and that's why I went through all
11 of that.
12 If you look at the alternate landowner
13 list, the fifth name down, Richard Hutchings, we
14 have referred to this case as 16-ED-4, Hutchings,
15 et al., and the et al.'s are all on there, too, and
16 that is stipulated to in paragraph 7. Go a little
17 further down that same column, third from the
18 bottom, Edgar County Bank & Trust, not just a
19 specific trust, but just the Bank & Trust. Go to
20 the next page is when you get to the Edgar County
21 Bank & Trust, 455-410. That's the one that
22 intervened in the commission in April and now here
23 has a traverse and motion to dismiss pending,
24 indicating they had no idea.

SUBMITTED - 5653006 - Angie Barnett - 12/20/2018 10:13:01 AM

1 THE COURT: Well, I need to take this
2 under advisement because I can't -- I don't have all
3 of those ICC documents with me, I didn't drag them
4 all down here with me, and I do need to go back and
5 take a look at those in relation to what you have
6 just argued because that's -- obviously that's
7 significant. My whole concern with this has been
8 whether there is evidence of sufficient notice to
9 the parties, to these 44 people that were on this
10 ultimate list. If the record clearly reflects that
11 there is adequate notice, then they got notice. But
12 if it doesn't, they didn't, and that's been my
13 concern from the outset of the case. So I'm going
14 to go back and look at the ICC reports that I've got
15 that you all provided me with --
16 MR. ROLF: Judge, just to -- as we just
17 heard, there is a notice of docket, that's the
18 notice that went, and then there is the docket entry
19 and it's the docket entry that indicates mailed,
20 just so that we don't overlook both.
21 THE COURT: Oh, no, I'm looking at them
22 both. On the traverse issue, I'm trying to think of
23 what happens in each case. If I find that the
24 motion to dismiss is proper, then does the traverse

SUBMITTED - 5670108 - Angie Barnett - 1/22/2018 10:31 AM

1 really matter?
2 MR. ROLF: Judge, I would ask, thought
3 about this, I would ask you to still enter a ruling
4 on that. Because if you enter that the motion to
5 dismiss is proper and it goes up on appeal, the
6 appellate court doesn't need to remand it here to go
7 forward on a traverse. If you are going to rule on
8 the traverse --
9 THE COURT: That's true. I tend to agree
10 with that.
11 MR. SMITH: I agree with that.
12 THE COURT: Mr. Smith, you too? Because
13 there is nothing presented on your traverse, there
14 is nothing presented on that, so they have
15 essentially carried their burden on the traverse.
16 So that issue, I think, has been resolved, that
17 if -- if they win the motion to dismiss, they have
18 established by the presumptions that they are
19 entitled as a result of the ICC certification that
20 each of the issues you raise in your traverse would
21 be denied.
22 MR. SMITH: Correct.
23 THE COURT: Okay. So the only issue we
24 have standing then is the propriety of the motion to

SUBMITTED - 5630108 - Angela McKee - 1/22/2018 10:11:31 AM

1 dismiss. And to decide that I need to go back and
2 look at these ICC reports again in relation to what
3 was happening at the time these notices went out and
4 the dockets were referenced. So I will get you a
5 written order just as soon as I can, all right?
6 MR. SMITH: Thank you, Judge.
7 MR. ROLF: Thank you.
8 MS. PETRILLI: Thank you.
9 THE COURT: We are set then for the 22nd
10 on those others, right?
11 MS. PETRILLI: I do have one housekeeping
12 issue. On the response to the traverse and motions
13 to dismiss in the cases that start with 16-ED-26, so
14 not the ones that were just heard, we filed an
15 affidavit as Exhibit 13 of Rick Trelz. It was an
16 unsigned affidavit. And what I just have is a
17 motion to substitute that for the signed --
18 MR. SMITH: That's fine.
19 MS. PETRILLI: -- affidavit instanter.
20 THE COURT: That's allowed without
21 objection.
22 MS. PETRILLI: Thank you.
23 THE COURT: Anything else then for now?
24 MR. ROLF: I don't think so, Judge.

SUBMITTED - 5670108 - Angie Barnett - 1/22/2018 10:13:01 AM

MR. SMITH: No, sir. Thank you.

THE COURT: Thank you, gentlemen, ladies.

WHICH WERE ALL THE PROCEEDINGS MADE

OF RECORD IN THIS CAUSE ON SAID DAY.

Amy Buhr, CSR

SUBMITTED - 5[illegible] - [illegible] 1/22/2018 10:41:31 AM

STATE OF ILLINOIS)
) SS
COUNTY OF VERMILION)

I, AMY BUHR, the Certified Shorthand Reporter who reported the proceedings had on said day in this cause, do hereby certify that the foregoing Report of Proceedings is a true, complete, and correct of the proceedings had on said day as reported by this reporter in this cause as herein contained.

Dated this 28th day of November, 2017.

Amy Buhr

AMY BUHR, CSR
IL CSR NO. 084-003275

SUBMITTED - 565106 - Angela McKee - 1/22/2018 10:31 AM

1 IN THE CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT
2 EDGAR COUNTY, ILLINOIS
3
4 AMEREN TRANSMISSION COMPANY)
5 OF ILLINOIS,)
6 Plaintiff)
7 v.) No. 16 ED 4, et al
8 RICHARD L. HUTCHINGS, et al,)
9 Defendants.)
10
11
12 REPORT OF PROCEEDINGS of the hearing on the 24th
13 day of October, 2017, before the Honorable JAMES R. GLENN,
14 Circuit Judge.
15
16
17 THE FOLLOWING PROCEEDINGS WERE HAD AND ENTERED OF
18 RECORD IN THIS CAUSE:
19 PETE SHANKS
20 OFFICIAL COURT REPORTER
21 651 JACKSON, 2ND FLOOR
22 COURT ADMINISTRATION
23 CHARLESTON, IL 61920
24 CSR # 084-002002

FILED
NOV 22 2017
Angela R Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

SUBMITTED - 563106 - Angela McKee - 11/22/2017 10:41 AM

1

2 APPEARANCES:

3

4 LISA A. PETRILLI

5 DAVID A. ROLF

6 Sorling Northrup

7 Springfield, Illinois

8 on behalf of the Plaintiff.

9

10 S. CRAIG SMITH.

11 Asher & Smith

12 Paris, Illinois.

13 on behalf of the Defendants.

14

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SUBMITTED - 5673076 - Angie Barnett - 1/22/2021 8:04:31 AM

1 THE COURT: Good afternoon. We like to take up the
2 thirty-five, or the batch of thirty-five cases first. And
3 this is Ameren Transmission Company v. Hutchings, et al.
4 And do we have Mr. Rolf and Ms. Petrilli for the Plaintiffs?
5 MS. PETRILLI: Yes, Your Honor.
6 THE COURT: And we have Mr. Smith and --
7 MR. SMITH: This is Mr. Morris.
8 THE COURT: Mr. Morris. All right. We will show
9 Mr. Morris is with Mr. Smith for the Defendants.
10 As I indicated, we are going to deal with the post
11 judgment motion first. And this involves thirty-five cases.
12 I do want to state them on the record. It is 16 ED 4, 5, 6,
13 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28,
14 29, 30, 38, 40, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53,
15 54, 55.
16 I am Judge Glenn. I've been assigned these cases. And
17 I am going to take up in those cases Plaintiff's 735 ILCS
18 5/2 -- 1203 post judgment motion that was filed in all of
19 these cases.
20 I am familiar with the motion, responses, the
21 memoranda. I have studied the order, and the motions that
22 were filed prior to that order. So, I do believe I
23 understand the issues. Perhaps you will be able to educate
24 me even more, but I am prepared to hear the oral arguments

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1 at this time.

2 Before we start, are there any housekeeping matters,

3 Ms. Petrilli, Mr. Rolf?

4 MS. PETRILLI: The only issue in reading off these

5 cases, expand a little bit on clearing some of them. Case

6 16 ED 29 was actually consolidated in 16 ED 20 sometime ago.

7 Although prior to the entry of the order. So, it is just a

8 housekeeping matter. I believe there are thirty-four cases

9 pending as opposed to the thirty-five.

10 THE COURT: Right. And I did see that order where

11 those cases consolidated.

12 Any housekeeping matters, Mr. Smith or Mr. Morris?

13 MR. SMITH: No, sir.

14 THE COURT: All right. Thank you. Then I will hear

15 the Plaintiff's argument on the post judgment motion.

16 MS. PETRILLI: Thank you, Your Honor.

17 Because of this motion, as well as the Motion for Stay

18 that's pending, a little bit of background I thought might

19 be helpful to understand the two sets of cases that we are

20 dealing with here.

21 Ameren filed with the Illinois Commerce Commission for

22 a Petition to Construct, Operate and Maintain a transmission

23 line that spans from the Missouri border all the way through

24 Illinois to the Indiana border. And that project is made up

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1 of nine segments. At this time, seven of the segments have
2 been built, and five of them are actually in service, with
3 two more scheduled to go in service at the end of this year.
4 It leaves two segments that are not in service. One of
5 them, they are beginning construction on soon; and then this
6 segment that includes cases pending in Edgar and Clark
7 Counties.
8 And those -- that particular segment is divided up into
9 two subparts. And the reason why there are two subparts is
10 that Ameren, as part of its Petition to the Commerce
11 Commission, proposed a route and an alternate route.
12 The -- as part of those proceedings, a group called the
13 Stop the Power Lines Route, or STPL as it is referred to
14 throughout the pleadings, petitions the ICC, the Commerce
15 Commission, to intervene. The Commission permitted the
16 landowners to intervene, and they proposed an intervening
17 route. The route that the Commerce Commission eventually
18 approved was a combination of part of that STPL route which
19 is -- we refer to in some of our pleadings as Sub Part One,
20 and then part of Ameren's alternate route, which is Sub Part
21 Two. And if I may approach?
22 THE COURT: Yes.
23 MS. PETRILLI: I have a map that shows -- that
24 designates those two subparts, with the first subpart going

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1 from Point A to Point B, and that being highlighted in
2 yellow. All of the landowners that are part Ameren's post
3 judgment motion and were part of the previous August 30
4 Order of this Court are on that subpart of the route, from A
5 to B.
6 The group from B to C is the second subpart. And in
7 this case, or in the Motion to Stay, the landowners on that
8 route, from B to C, that second subpart, who are part and
9 who filed the Motion to Stay.
10 And so, the Illinois Commerce Commission, as I stated,
11 initially or eventually approved this route that you see on
12 the map. And a group of landowners on that first subpart,
13 including many of the Defendants in these cases, filed an
14 appeal to the Fourth District, which is the Adams County
15 case which is included in -- and attached to our memorandum,
16 and referred to throughout our pleadings.
17 The -- eventually, the cases went through the Illinois
18 Commerce Commission. Ameren received authority from the ICC
19 to proceed in eminent domain, and then the eminent domain
20 cases were filed.
21 As you can see from the record, there were various
22 pleadings. Ultimately, the Order that was entered on August
23 30 dismissed thirty-four of those cases. Again, those being
24 all landowners on the first subpart that goes from A to B.

SUBMITTED - 5[illegible] - [illegible] 1/2[illegible]

1 The problem with the order that was entered is that the
2 order found that Section 406.1 was unconstitutional, both on
3 its face and as applied to the Defendants in this case. And
4 if I may approach again?
5 THE COURT: Yes.
6 MS. PETRILLI: Here is -- for reference, this is a copy
7 of the entire Section 406.1.
8 This very section, the constitutionality of this
9 section, particularly the notice section as applied to the
10 Defendants, was an issue that was already heard and decided
11 by the Appellate Court in Adams County. And if the Court
12 refers to the case that we cited, Delgado v. Board of
13 Election Commissioners, the Supreme Court in Delgado found
14 that a Circuit Court is not permitted to reject the
15 precedent of an Appellate Court's decision regarding the
16 constitutionality of a statute.
17 So, what we have here is an Appellate Court decision
18 that considered the constitutionality of Section 406.1, and
19 found that Section 406.1 was not unconstitutional. It found
20 that Section 406.1 was valid.
21 Contrast that with Judge DeArmond's order which
22 rejected the Fourth District's opinion and found that
23 Section 406.1 was unconstitutional; not only as applied to
24 these land owneders, but also on its face. Which is clearly

SUBMITTED - 5653006 - Angie Brooks - 1/22/2021 8:04:31 AM

1 contrary to the Fourth District opinion that involved not
2 only the same issue -- that being the constitutionality of
3 406.1 -- but involved the very same parties.
4 So, the issues were identical. And those issues were,
5 according to the order, whether the Defendants in this case
6 and the ICC were deprived of their due process because they
7 failed to receive notice; not here, but at the ICC. Which
8 was the very issue that the Appellate Court considered in
9 the Adams County case.
10 And so, the Court's complete rejection of the Fourth
11 District precedent in this matter is even more egregious
12 than in Delgado because it didn't involve just the same
13 issue -- that being the constitutionality of a statute --
14 but it involved the same issue, the same parties, the same
15 facts, as were considered prior to Judge DeArmond entering
16 his order.
17 And because the Fourth District is actually bound by
18 the decision in Adams County, it is Ameren's position that
19 the orders should be vacated in full, and the Motion to
20 Dismiss should be denied.
21 Now, should the Court find that Adams County isn't
22 precedent in this matter, then we return to the issue of the
23 constitutionality of 406.1. And the problem within the
24 order is that the order spends -- pretty much the bulk of

SUBMITTED - 565006 - Angela McKee - 1/22/2021 8:04:31 AM

1 the order is devoted to an as applied analysis, finding that
2 the Illinois Commerce Commission process, as applied to this
3 particular group of defendants, deprives them of their due
4 process rights.
5 In the end, in a sentence only, the Court concludes
6 that Section 406.1 is unconstitutional, both on its face and
7 as applied. And the problem with that finding with striking
8 down all of 406.1 is that in order to find a statute
9 facially unconstitutional, there has to be no set of
10 circumstances that would exist where that statute could be
11 valid.
12 Even within the order, itself, the Court concedes that
13 there are facts under which Section 406.1 was applied
14 constitutionally to everyone else on this project, including
15 the defendants that are at issue in the Motion to Stay.
16 And not only that, there was language in there, and if
17 you look at the previous pleadings, that indicated that had
18 these defendants in these cases received some sort of actual
19 notice from the ICC, even if it wasn't in Section 406.1,
20 that they wouldn't have been deprived of their due process
21 rights.
22 And so, the issue isn't one of 406.1 being
23 unconstitutional on its face. At most, it is an issue of
24 406.1 or the process of the ICC unconstitutional as applied

SUBMITTED - 5653006 - Angie Brooks - 1/22/2021 8:04:31 AM

1 to the particular set of defendants under this set of facts.
2 And so, if that is the case, then we ask that the
3 portion of the order that finds that Section 406.1 is
4 unconstitutional on its face be vacated.
5 And then finally, if you turn to and if you look at
6 what is required by Supreme Court Rule 18, when a court
7 enters an order that declares a statute unconstitutional on
8 its face under Rule 302, the Supreme Court has put in place
9 Supreme Court Rule 18. And the reason for that is so that a
10 court can't just conclude that a statute is unconstitutional
11 on its face. There has to be an analysis that the Court
12 goes through, and then the analysis has to be in a written
13 order.
14 Now, there is no dispute that there was a written order
15 and that some of the things that are required by Rule 18 are
16 in the order. The problem is is that there are certain
17 things that Rule 18 requires that aren't part of the order.
18 And because of that alone, the order is likely to be
19 rejected if it goes up on appeal to the Supreme Court, as
20 intended apparently in the order.
21 And specifically, the order is deficient in that it
22 fails to identify the portion of the statute that's being
23 found unconstitutional.
24 I provided you with a full copy of Section 406.1, which

SUBMITTED - 5[illegible] - [illegible] - 1/[illegible]

1 is what Judge DeArmond found to be unconstitutional. But if
2 you look at 406.1, the notice portion of it is in Section A
3 3 only. And the rest of it is not even addressed in any
4 part of Judge DeArmond's order.
5 So, it was entirely inappropriate to strike down all of
6 Section 406.1, for an issue that he had which appears to be
7 just that one section. Again, it is not even stated within
8 the order which portion of that he was finding
9 unconstitutional. That's the first issue with the lack of
10 findings.
11 The second is that there is no finding that the statute
12 cannot be reasonably construed in a manner that would
13 preserve its validity. And that is what I had just
14 discussed previously. That even within the order itself,
15 there are scenarios which contemplate that Section 406.1
16 could have and was constitutional as applied to different
17 groups of people, and could have even been constitutional
18 and applied to these people had they received some sort of
19 actual notice in the ICC process.
20 That finding is not going to be able to be made just
21 based on what is in the order. And that being the other
22 scenarios that contemplate that 406.1 could have been
23 constitutional as applied to other parties than these
24 parties.

SUBMITTED - 563076 - Angela McKee - 12/20/2018 10:13:14 AM

1 Third issue is that it fails to determine that -- or I
2 am sorry, that there is no finding that the determination of
3 unconstitutionality is necessary to the decision, and that
4 the judgment cannot rest on an alternative ground. Which
5 again, there are alternate grounds that even if the Court
6 finds that these landowners were deprived of their due
7 process, that can be done without striking down Section
8 406.1. And because that can be done, then you can't -- the
9 Court is unable to make that finding in Rule 18(c)(4).
10 And then finally, the order itself fails to state that
11 notice was provided in accordance with Rule 19.
12 Now, Mr. Smith's motion -- or I am sorry, his response
13 indicates that such notice was given. It is not attached to
14 the response. I don't know whether or not it is in the
15 record. It certainly isn't in the order, which is a
16 requirement of the Rule 18.
17 So, even had that notice been given, it isn't anywhere
18 within that particular order.
19 And so, despite each of those findings being
20 required -- and by findings, the Court means more than
21 just -- or needs more than just those sentences. There need
22 to be findings that support those particular items that the
23 Supreme Court found necessary for an order that determines
24 that a statute is unconstitutional.

SUBMITTED - 563076 - Angie Barnett - 1/22/2021 8:01:31 AM

1 And so, for those reasons, Ameren is asking first that
2 the Court vacate the order in its entirety for its failure
3 to recognize binding precedent in Adams County.
4 In the alternative, Ameren is asking that the Court
5 vacate the findings that Section 406.1 is unconstitutional
6 on its face.
7 And a third alternative is that we are asking that the
8 Court then make the findings that are required by Rule 18,
9 and modify the order as required by the Supreme Court Rules.
10 Thank you.
11 THE COURT: Thank you, Ms. Petrilli.
12 Mr. Smith, do you have a response?
13 MR. SMITH: Yes, sir. Thank you, Judge.
14 We believe that the Court should dismiss or deny the
15 motion, post trial motion, in that we have always felt that
16 we have had a disagreement between counsel as to what Adams
17 County stood for and what it didn't stand for. We made that
18 argument with Judge DeArmond. And Judge DeArmond agreed
19 with our position in that Adams County punted that issue.
20 They did not decide the constitutionality of that issue.
21 And he specifically says so in his order on Page 18.
22 He says the Court in Adams County found no due process
23 issues were involved since the ICC proceeding did not
24 actually affect the landowners' property rights.

SUBMITTED - 5653008 - Angela McKee - 12/20/2018 10:13:01 AM

1 Then he went on to say that, it concluded that the
2 Adams County did not have before it the situation before
3 this Court. Now that there are property interests at stake,
4 it is now a due process issue and a constitutionality
5 question comes forward and full face at this time, at this
6 court. And that's what his order indicated.
7 Adams County is not any kind of precedent to this case
8 because they did not decide the constitutionality of 406.1
9 as to my clients, the landowners.
10 We also believe, Judge, that his order has plenty of
11 analysis as to what sections are in violation and what part
12 of the constitutions are involved.
13 As specifically noted on Page 20, he cites the sections
14 of the federal and state Constitution that have been
15 violated or have not been followed.
16 He says that it is -- that 406.1 is factually
17 unconstitutional. There are no set of circumstances, and
18 applied to his order, that would provide any due process to
19 these landowners, no matter what. They can't unwind the
20 fact that they didn't get notice. They can't unwind the
21 fact that they didn't get a seat at the table. They can't
22 unwind the fact that their property is now being taken
23 because they didn't get notice. There are no set of
24 circumstances that can make that any better for them.

SUBMITTED - 563076 - Angie Barnett - 1/22/2021 8:01:31 AM

1 So, his order is explicit in that, describing the lack
2 of notice and why this can't be fixed.
3 We believe that his order, also on Rule 18, is
4 sufficient in that we read it to be that one and two and
5 five, but not necessarily that you need one, two, three,
6 four and five. Because it talks about in the findings of
7 unconstitutionality, the constitutional provisions upon
8 which the finding of unconstitutionality is based, he did
9 that. And two, whether the statute or ordinance,
10 regulation, to be found as unconstitutional on its face, he
11 stated that, or both.
12 And then, there is in the record that the AG was put on
13 notice in November. Notice was sent, that the
14 constitutionality was being questioned. The AG elected not
15 to intervene. All parties were seen. The order itself does
16 not necessarily need to have three and four, the way we read
17 Number 18, Rule 18. But even if it did, there is sufficient
18 findings in the order to satisfy three and four.
19 He specifically talks about the statute. He talks
20 about how 406 -- how 406.1 is deficient constitutionally
21 because of the notice, Judge.
22 We think his order is sufficient. It is a 302. It can
23 go up. 18 has been complied with. This should go straight
24 to the Supreme Court.

SUBMITTED - 567006 - Angie Barnett - 1/22/2021 8:41:31 AM

1 THE COURT: Thank you, Mr. Smith.
2 Any rebuttal argument, Ms. Petrilli?
3 MS. PETRILLI: Briefly.
4 Regarding the claim that the Adams County decision
5 isn't precedent and that Judge DeArmond didn't find contrary
6 to the Fourth District opinion.
7 On the bottom of Page 12 when Judge DeArmond starts to
8 issue his order, it says Contrary to the Court's conclusion,
9 it appears that the landowners' due process rights may have
10 been impacted.
11 So, the decision that Judge DeArmond was entering, he
12 is aware that it was contrary to the Adams County decision.
13 Regarding Rule 18, I am not sure how it can be
14 interpreted that only certain parts of Rule 18 are required
15 and not others, when 18(c) says that such order or opinion
16 clearly sets forth specific grounds for the finding of
17 unconstitutionality including -- it goes on through a list
18 that is joined with the word and, which seems to indicate
19 that all of those things have to be within the -- within the
20 written order from the Court.
21 And it seems from argument that counsel is almost
22 admitting that three and four aren't in it, and certainly
23 hasn't pointed to any part within the order where the
24 findings that would comply with three, four, or five are in

SUBMITTED - 5653006 - Angie Barnett - 1/22/2021 8:04:31 AM

1 the Court's order. Thank you.
2 THE COURT: Thank you, Ms. Petrilli.
3 This is a unique situation. As you know, the judge who
4 entered the order of August 30, 2017 has since been assigned
5 to the Appellate Court, and is not able to hear the
6 Plaintiff's post judgment motion. On his order. The order
7 that he entered.
8 Nevertheless, this judge has carefully reviewed that
9 order, along with the motions, responses, memoranda, and
10 briefs related thereto. Including the ones filed prior to
11 the entry of the order, itself, and those filed subsequent
12 thereto. And the Court finds and rules as follows:
13 The Court was and is not required to follow the
14 Appellate Court decision of Adams County Property Owners and
15 Tenant Farmers v. the Illinois Commerce Commission. It is
16 distinguishable. And the Court, through the Judge
17 DeArmond's opinion, adequately explained its inapplicability
18 to the proceedings at bar.
19 I do believe that it deferred ruling on the
20 constitutional issue. It didn't rule on it. It punted, as
21 Mr. Smith indicates.
22 Also, this Court finds that the Court, through Judge
23 DeArmond, adequately supported in its order that the
24 previously existing form of the statute, 220 ILCS

SUBMITTED - 563076 - Angela McKee - 1/22/2018 10:13 AM

1 5/8--406.1(a)(3), was unconstitutional, both on its face and
2 as applied to these defendants. The issues were framed on
3 both Pages 3 and 18 of the order.
4 The inadequacy of the notice provisions to all of the
5 landowners, not just the defendants that are here in this
6 case, but to all of them, was discussed by Judge DeArmond on
7 Pages 13 through 15 of the order when he talked about the
8 problems the Commission was having making sure that all of
9 the landowners that were before the Commission at that time
10 had notice. And the steps that were taken to try to make
11 sure that everybody had adequate notice.
12 So, that was described on Pages 13 through 15 of the
13 order, and summarized on Page 23.
14 The Court's analysis and conclusions set forth and
15 summarized the deficiencies of the statute and support the
16 Court's eventual determination in that order.
17 The Court also finds today that Supreme Court Rule 18
18 has either been complied with or can be complied with.
19 Contrary to the assertions of the Plaintiff, the order does
20 clearly identify the portion of the statute held
21 unconstitutional. And that would be the notice provision,
22 and Ms. Petrilli herself identified it. It is the one
23 regarding the application, Section 8-406.1(a)(3).
24 The Plaintiff goes on to claim that the order fails to

SUBMITTED - 5630108 - Angela McKee - 1/22/2018 10:13 AM

1 clearly set forth the grounds listed in Supreme Court Rule
2 18(c), Paragraphs 3, 4 and 5.
3 The Court finds that the contents of the order itself
4 and the record support findings under each of those
5 subparagraphs.
6 However, I do agree with the necessity of clarifying it
7 and providing more specific findings, and this Court will
8 modify the order to make those specific findings. There
9 would be three of them. And the Court does find that they
10 are supported by the Court's rationale and the record.
11 The first is that the previously existing form of 220
12 ILCS 5/8 -- 406.1(a)(3) cannot reasonably be construed in a
13 manner that would preserve its validity.
14 Two, the finding of unconstitutionality is necessary to
15 the decision or judgment rendered, and such decision or
16 judgment cannot rest upon an alternative ground.
17 And three, notice required by Supreme Court Rule 19 has
18 been served. I think we all know it was served on November
19 22, 2016, but I don't think it made its way into the order.
20 So, the notice required by Supreme Court Rule 19 has been
21 served.
22 Those served with such notice have been given adequate
23 time and opportunity under the circumstances to defend the
24 challenge statute.

SUBMITTED - 565006 - Angie Brooks - 1/22/2018 10:13:01 AM

1 So, for those reasons, the Plaintiff's Section 2 --
2 1203 post judgment motion is allowed in part.
3 The request to reconsider the order, vacate it in its
4 entirety or vacate the findings that the statute is
5 unconstitutional on its face are denied.
6 The request that the order be modified with Supreme
7 Court Rule 18 findings is allowed. And the Court makes
8 those three specific findings as I just stated moments ago.
9 The remainder of the order stands, and that would
10 include the Supreme Court Rule 302(a) finding.
11 Are there any questions or clarifications of the
12 ruling, Ms. Petrilli?
13 MS. PETRILLI: No, Your Honor.
14 THE COURT: Mr. Smith?
15 MR. SMITH: No, sir.
16 THE COURT: That would conclude at this time the
17 proceedings regarding those thirty-five cases. Thirty-four,
18 really, based on the consolidation.
19 That would then take us to the other seven cases. And
20 those would be 16 ED 26, 31, 32, 33, 35, 36 and 41.
21 Before I hear arguments, I do have some procedural
22 questions. As I went through the files, and I didn't read
23 the transcripts of the hearings, but I have read the docket
24 entries and the pleadings. And I just need some

SUBMITTED - 5653006 - Angie Brooks - 1/22/2021 8:04:31 AM

1 clarification.

2 I note that these Defendants filed a Traverse and

3 Motion to Dismiss on January 27, 2017. I know that there

4 was a Motion to Amend. And it appears from the docket entry

5 that the Court allowed that, with some restrictions on

6 affidavits. But my question is, is that January 27, 2017

7 motion still pending, or has it been superceded by an

8 amended motion?

9 MR. SMITH: No, it is not pending. We withdrew the

10 Motion for Traverse and Motion to Dismiss as to the seven

11 remaining cases that are on the Motion to Stay. Well --

12 THE COURT: Well, I know there is a pending Motion to

13 Dismiss the Amend -- But was that Amended Traverse and

14 Motion to Dismiss ever filed?

15 MR. SMITH: No, sir.

16 THE COURT: So, wouldn't that original Motion to

17 Dismiss or Traverse and Motion to Dismiss still be pending,

18 maybe unintentionally?

19 MR. SMITH: Well, unintentionally I guess, yes.

20 THE COURT: It is your intention -- Mr. Smith, it was

21 your intention to amend it. And it is now your intention to

22 withdraw that amendment?

23 MR. SMITH: Yes, sir.

24 THE COURT: Ms. Petrilli, do you have any light to shed

SUBMITTED - 565006 - Angela McKee - 1/22/2018 10:11 AM

1 on that?

2 MS. PETRILLI: No. I mean, we filed a response to the

3 initial Motion to Dismiss and Traverse. And then we were

4 over before the Court -- that was supposed to be on hearing

5 for that, but at that hearing he asked to -- Mr. Smith asked

6 to amend. The Court granted leave. And I had thought that,

7 on a call with Judge DeArmond, that he had actually said

8 that he was going to enter an order that dismissed the

9 Motions to Dismiss and Traverse.

10 I wasn't aware of -- that there was a distinction made

11 in the motion. And it could have been I just didn't catch

12 it that the motion -- or the Motion to Withdraw was made on

13 the Amended Motion as opposed to the initial. And only one

14 that ended up being filed.

15 THE COURT: It didn't make its way to the docket entry,

16 and I have -- I notice in the file a blank Order Granting

17 Motion to Dismiss Amended Traverse and Motion to Dismiss.

18 It would seem to me, that's still something you want --

19 I know there is a Motion for Sanctions that had been filed

20 before that.

21 You still are seeking, Mr. Smith, whether this happened

22 or not, to dismiss that Amended Traverse and Motion to

23 Dismiss?

24 MR. SMITH: Yes, sir.

SUBMITTED - 563076 - Angie Barnett - 1/22/2021 8:01:31 AM

1 THE COURT: It would seem to me that by doing so,
2 really, you are withdrawing whatever you have filed. The
3 Traverse and Motion to Dismiss and the Amended Traverse and
4 Motion to Dismiss. You are withdrawings all of that?
5 MR. SMITH: Yes, sir.
6 THE COURT: That's your understanding, as well, Ms.
7 Petrilli?
8 MS. PETRILLI: Yes.
9 THE COURT: I am going to enter that order, but
10 possibly clarify it. Give me a moment, please.
11 I will add a sentence to the proposed order, indicating
12 that the Traverse and Motion to Dismiss filed on January 27,
13 2017 and any amendments thereto are withdrawn.
14 MR. SMITH: Yes, sir.
15 THE COURT: Give me a minute, please.
16 The written order that I just signed has the title
17 Order Granting Motion to Dismiss Amended Traverse and Motion
18 to Dismiss. And it says now, This cause being heard on
19 Motion of Defendants to Dismiss Amended Traverse and Motion
20 to Dismiss, and the Court having been fully advised of the
21 premises, it is ordered that Defendant's Amended Traverse
22 and Motion to Dismiss be dismissed without prejudice.
23 The Traverse and Motion to Dismiss filed on January 27,
24 2017 and any amendments thereto are withdrawn. Entered this

SUBMITTED - 565106 - Angie Barnett - 1/22/2018 10:13:01 AM

1 date. So, that is now the Court's order.
2 I had just a couple other questions. On December 27,
3 2016, the Plaintiff filed a Petition for Rule to Show Cause.
4 I know there is also a Motion to Compel that was addressed
5 in the docket entries.
6 Is that Petition for Rule to Show Cause now moot?
7 MS. PETRILLI: Yes, it is.
8 THE COURT: Do you agree?
9 MR. SMITH: Yes, I do.
10 THE COURT: The Court then finds that the Petition for
11 Rule to Show Cause filed in these cases on December 27, 2016
12 is now deemed moot.
13 I do have a question about 16 ED 34, which isn't up
14 today, but perhaps we can discuss that afterwards.
15 There is a Case Management Order that we have that
16 pertains to these seven cases as well as that other cases.
17 Really, I am wondering if that case, 34, is still set for
18 trial, but we can deal with that a little bit later today.
19 Why don't we then go forward then on the Motion to Stay
20 that's been filed by the Defendants. And I have reviewed
21 the motion along with the Plaintiff's Response to that
22 Motion to Stay.
23 Mr. Smith, do you have argument you wish to make?
24 MR. SMITH: Yes, sir.

SUBMITTED - 5653076 - Angie Barnett - 1/22/2018 10:41:01 AM

1 Judge, based upon the order being entered by first
2 Judge DeArmond and now yourself, we have seven cases that
3 are different than the prior cases.
4 These cases are ones that deal with what we would call
5 Oliver, and we have got it attached to our Motion to Stay.
6 Yesterday with Judge Resch, we weren't sure that it was
7 showing color on his copy. If I may approach? This is
8 Exhibit B that's attached to our Motion for Stay, or to
9 Stay.
10 THE COURT: Thank you.
11 MR. SMITH: And we have a larger picture over here on
12 the easel.
13 What we have got is the dotted red line. This is all
14 of the cases that the people that live along here, on the
15 prior cases that the Court just made a ruling on. And the
16 people that we are here now on the Motion to Stay are all
17 from Oliver, east.
18 We are not taking the position, nor have we, that they
19 were not on this alternate line.
20 What we are saying and why we are asking for a stay is
21 that we do not think that there is anything that Ameren can
22 do at this point to construct their line until this matter
23 has really been litigated, probably in the Supreme Court.
24 That leaves us with approximately twenty some miles

25

SUBMITTED - 563076 - Angela McKee - 12/20/2018 10:13:14 AM

1 where there can be no connection. Right here at the
2 proposed substation -- that is not proposed, it is the
3 substation. And this is a better positioning.
4 Our first client, Bennett, is right here. All of these
5 boxes are part of the thirty-four to thirty-five landowners.
6 And if you see, they are along all of the line until you get
7 over to Oliver. There is no physical or construction that
8 can be -- physical way you can connect here to here. If
9 that's the case, this construction job can't go forward in
10 the current state that it is in this courtroom. And
11 potentially, in the Supreme Court.
12 Therefore, we are asking that any of the people that
13 are over here, that are not involved, that we get a stay
14 until we know whether this project is actually going to go;
15 or if another project is going to go, it may not even be
16 impacting their land in the first place. It's one of
17 judicial and economic policy, judicial economy, in that
18 there may not be a reason to have any of these cases go to
19 eminent domain. And economically, it is not fair to the
20 Defendants to have to defend and hire experts, appraisers,
21 be ready for trial, do discovery, until this underlying case
22 of the thirty-five is decided.
23 So, we are asking, until this picture is more complete,
24 that these folks be able to wait until we see what happens

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1 with the Supreme Court.

2 And therefore, we are asking that this Court stay those
3 seven cases from going forward on an eminent domain that has
4 absolutely at this point no reason to go forward. There is
5 no reason to think that any pole would be constructed twenty
6 some miles away from the substation if there is no way to
7 connect it. Thank you.

8 THE COURT: Thank you, Mr. Smith. Ms. Petrilli?

9 MS. PETRILLI: Thank you.

10 While Mr. Smith's Motion to Stay is based entirely on
11 speculation by himself and his landowners as to what Ameren
12 is going to do on a project that, as we had discussed
13 earlier, goes across the entire State of Illinois, and is
14 already fully constructed on seven of the nine segments.

15 The issue in this is that -- is involved in the post
16 judgment motion, isn't whether this project will be
17 constructed. It is whether eventually -- I mean, worst case
18 scenario for Ameren, it would have to go back to the ICC,
19 and the ICC would have to again re-think the route from A to
20 B.

21 The route from B to C isn't an issue. It is never
22 going back before the ICC because it isn't an issue. The
23 order that the ICC issued granting Ameren the right to
24 construct, operate and maintain a line is still valid as

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1 applied to the portion from B to C.
2 Now, the other problem with this Motion to Stay is that
3 what Mr. Smith is asking for is an injunction, because these
4 landowners are under the mistaken impression that there is a
5 chance that this line isn't going to cross their property.
6 And that isn't the case. Because the route from A to B,
7 which does involve those landowners that were part of the
8 post judgment motion and the order entered earlier today,
9 does not apply to those landowners that filed the Motion for
10 Stay. Those on the portion from B to C. That isn't ever
11 going to change.
12 And the fact that these landowners might have to spend
13 money to defend an eminent domain case also doesn't change
14 based on the outcome of the cases involving the STPL
15 landowners or those that were subject to the Court's
16 previous order today. Those landowners are going to have to
17 spend that money if they want to defend the eminent domain
18 case. Because what is happening in those cases is that
19 Ameren has submitted its opinion of value. And if those
20 landowners don't agree with that, then they have every right
21 to get an appraiser and put forth their own opinion as to
22 the value of the easement interest that Ameren is seeking on
23 their property. That also doesn't change. It is the same
24 issue now as it will be once there is a decision that

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1 involves the other subpart of landowners.
2 And so, there is nothing in these cases that is in any
3 way dependant on the outcome of the post judgment motion and
4 order today, and that subpart, except for that these people
5 just don't want to defend the eminent domain case right now.
6 And as Mr. Smith stated today, it is because they are under
7 this mistaken impression that somehow, their property might
8 not be affected, when there is no issue that they received
9 notice, there is no issue that the route is going to go from
10 B to C, and it is going to affect those landowners'
11 properties.
12 And so, in -- what hasn't been shown in this case and
13 what is unable to be shown is that the outcome of the other
14 subgroup of cases has any effect on these cases. And if it
15 has no effect on it, and all we are talking about is the
16 issue of compensation, these people are going to have to
17 spend money now or later if they choose to defend the
18 eminent domain case and choose to put forth their own
19 opinions of value. That also isn't going to change.
20 There is no reason for the delay other than they just
21 want the delay right now because their neighbors don't have
22 to proceed because they are part of the other group. And as
23 we have established, they are two separate groups. Two
24 separate issues. One is not dependant on the other.

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1 And so, for that reason, the Motion to Stay we believe
2 should be denied.
3 THE COURT: Ms. Petrilli, is compensation the only
4 issue that is determined in the eminent domain?
5 MS. PETRILLI: It is. After -- normally, what would
6 happen is, if a landowner had an issue with the findings of
7 public convenience and necessity, they would file a Traverse
8 and Motion to Dismiss, which was filed in this case. When
9 faced with our Response and the Motion for Sanctions, that
10 motion was withdrawn. And has not been refiled.
11 These cases have been proceeding. And you will see in
12 there that, the Case Management Order, that sets a trial
13 date in all of these cases. So, these cases have been
14 proceeding, according to that schedule. And actually, were
15 set for -- all the landowners were set to be deposed this
16 very week. Which did not happen because of the motion in
17 this matter.
18 And so, they are separate, and there isn't anything in
19 these cases, as of now, that is left to be determined other
20 than the amount of just compensation that's due the
21 landowners for the interest that Ameren is seeking in their
22 property.
23 THE COURT: Well, I am aware that there is a
24 presumption that exists in favor of the -- of your client

SUBMITTED - 5653006 - Angela McKee - 1/22/2021 8:41:31 AM

1 based on the Illinois Commerce Commission ruling, and that
2 there must be a showing that it is primarily for the
3 benefit, use or enjoyment of the public and necessary for
4 public purpose. So, that is outside the hands of the Court
5 now?
6 MS. PETRILLI: Well, that, in order to be an issue in
7 an eminent domain case, it has to be raised by the other
8 party, and the mechanism to do that is the Traverse. And
9 then the Motion to Dismiss that can be joined. But those
10 claims are dealt with in the Traverse.
11 So, as long as the landowner isn't raising those issues
12 in Traverse, the issue for the Court in eminent domain is
13 just compensation. And that's the issue that the jury
14 decides.
15 THE COURT: Right. Thank you, Ms. Petrilli.
16 Do you have any argument in rebuttal, Mr. Smith?
17 MR. SMITH: Just a bit, Judge.
18 I am not sure that we can take a leap of faith that
19 Ameren is going to stick with B and C. I don't know that.
20 Once she goes back to the ICC, as everybody knows, all this
21 comes back up to play.
22 And Ameren initially proposed this, this was their
23 primary route, the green thing. I don't know that they are
24 not going to go back to that, if they have to go back. I

SUBMITTED - 563076 - Angela McKee - 1/22/2021 8:01:31 AM

1 don't know that they won't abandon this B to C that you were
2 shown this afternoon.
3 What we do know is that right now, they can't do A to
4 B. They can't -- they can't build it from here to here.
5 And if they can't do that, now that we have an order -- we
6 didn't have an order until just recently when Judge DeArmond
7 did his order, and now that you have affirmed it. Maybe
8 there is a question about whether there is necessity now.
9 Without being able to connect it here, is this truly a
10 necessity? I don't know. But that's not before the Court
11 now. But no more is the assumption by counsel that they are
12 going to -- they are never going to abandon B to C,
13 that's -- that's nuts. We don't know. That's really up to
14 the ICC as to what they are going to approve.
15 And it is also up to the people who finally get notice
16 and are able to present something. There may be something
17 shown by the new people that show up that would never
18 connect A to B. In any way. We just don't know. And
19 that's why there is too much -- there is too much question,
20 and people shouldn't have to spend money about something
21 that none of us know what Corporate is going to decide or
22 what the ICC is going to decide and what the Supreme Court
23 is going to decide.
24 We just think it is fair for these folks that they not

SUBMITTED - 563076 - Angela McKee - 12/20/2018 10:13:14 AM

1 have to spend money to go through an eminent domain at this
2 stage of the litigation. Once its fully litigated, then
3 yes.
4 THE COURT: Thank you. With regard to the Motion to
5 Stay itself, which is what's being argued here, I believe
6 that I am required by law to look at the standards for a
7 preliminary injunction as Ms. Petrilli indicated.
8 And whereas I see a clearly ascertained right and need
9 of protection, and also could see irreparable injury in the
10 absence of an injunction, in the event that we just have
11 towers or whatever is being built that connects nowhere, I
12 can't say that I see no adequate remedy at law, because I do
13 see some possible remedies for the Defendants at law.
14 So, I don't feel that the Defendants meet the -- can
15 show that the elements have been met for an injunction, and
16 therefore -- and I do equate that with a Motion to Stay.
17 So, I am prepared to deny the Motion to Stay.
18 We do have -- we do have to consider a little bit more
19 scheduling because the scheduling was set before Judge
20 DeArmond, but why I am a little troubled by it is I am kind
21 of wondering if perhaps the Motion to Stay actually benefits
22 the Plaintiff more than the Defendants who requested it.
23 Procedurally, I am looking at the Case Management
24 Conference Order, first of all. And I see where Motions to

SUBMITTED - 565076 - Angie Barnett - 1/22/2021 8:04:31 AM

1 Amend Pleadings, not applicable, but dispositive motions
2 except for summary judgment shall be filed and heard by
3 January 31, 2018, which is months away. And summary
4 judgment motions shall be filed not later than forty-two
5 days prior to the commencement of trial.
6 I am wondering if the arguments that Mr. Smith puts
7 forward on behalf of Defendants could be structured in
8 another Motion to Dismiss which could still be filed, and
9 possibly resolved by a Motion for Summary Judgment that
10 could be adverse to Ameren.
11 The reason I say that is because if we don't know for
12 certain if that other segment is going to follow the same
13 route, it is going to depend on how the Supreme Court
14 interprets the order that Judge DeArmond and myself have
15 entered. But let's just assume that it is affirmed. And I
16 realize it could be reversed, as well. But if it is
17 affirmed, I think we go through the same process again. And
18 perhaps with notice, that same route is approved. But what
19 if it is not? And what if there isn't -- what if that lapse
20 in the transmission lines still exists? It's still pending
21 at this time, and it is going to be pending up to the time
22 of the March trial.
23 What's to keep the Defendants from filing a Motion to
24 Dismiss, not attacking constitutional issues, subjecting it

SUBMITTED - 563076 - Angela McKee - 1/22/2018 10:13:31 AM

1 to sanctions, but on another basis such as what Mr. Smith
2 stated before; and then at a summary judgment, show that,
3 based on the facts, the presumption can be rebutted by clear
4 and convincing evidence? Because without a connecting line
5 to this segment, how can -- how can it be shown that it is
6 for the benefit, use or enjoyment of the public, or even
7 necessary for public purpose if, in fact, it is a line to
8 nowhere?
9 So, I guess what I am saying is, with these deadlines,
10 that have not been expired yet, I still see where the
11 Defendants might be able to file another Motion to Dismiss,
12 and seek summary judgment and probably take care of their
13 concerns that way. So, they have an adequate remedy at law,
14 which is why I am prepared to deny the Motion to Stay, but I
15 guess I am just asking you, Ms. Petrilli, are you sure you
16 want that? And if you want time to think about it or talk
17 about it, that's fine. I am just posing that question.
18 I am happy to confirm the trial settings if that's what
19 everybody wants.
20 MS. PETRILLI: I think, Your Honor, we would propose
21 that the order be entered but stayed for twenty-one days, to
22 give Ameren the opportunity to determine whether or not it
23 would withdraw its objection to the Motion to Stay.
24 THE COURT: Perhaps we can set a phone conference or

SUBMITTED - 563076 - Angela McKee - 1/22/2021 8:01:31 AM

1 something to confer about that. Would you agree with that
2 procedure, Mr. Smith?
3 MR. SMITH: Yes.
4 THE COURT: All right. You want me to go ahead,
5 though, and rule that the Motion to Stay is denied? Or stay
6 my ruling on it?
7 MS. PETRILLI: We'd ask that you stay the ruling on it.
8 THE COURT: Maybe I shouldn't use the word stay, but
9 reserve my ruling.
10 MS. PETRILLI: Reserve your ruling.
11 THE COURT: Okay. We will show that the Court has
12 considered the arguments that have been presented. And by
13 agreement, the Court reserves ruling on the Motion to Stay.
14 We can set a phone conference in approximately
15 twenty-one days to determine where to go from here. I mean
16 we do have some other logistical matters.
17 First of all, going back for a moment to the other
18 thirty-four, thirty-five cases, do you believe, Mr. Smith,
19 that you want a written order showing that modification?
20 MR. SMITH: Yes, sir.
21 THE COURT: I said it verbally. I am going to direct
22 you to prepare that written modification order.
23 Ms. Petrilli, I would prefer to have him send that to
24 you for approval as to form. Whether you agree with the

SUBMITTED - 565076 - Angie Barnett - 1/22/2021 8:04:31 AM

1 content, or not, just if the form is consistent with the
2 Court's ruling.
3 So, I will direct Mr. Smith to prepare the written
4 order on my ruling on the post judgment motion, send it to
5 Ms. Petrili for approval as to form. Then I will enter
6 that.
7 And now that I have entered the Order Granting the
8 Withdrawal of the Motions to Dismiss, there isn't an Answer
9 or Response on file. Do you want any time to file anything,
10 Mr. Smith?
11 MR. SMITH: I'd say -- they are waiting twenty-one
12 days. Thirty days?
13 THE COURT: Any --
14 MS. PETRILLI: If I may. I don't believe that an
15 Answer is required or actually proper in an eminent domain
16 case where the parties have filed --
17 MR. SMITH: I think that's true.
18 MS. PETRILLI: The Entry of Appearance by counsel is a
19 general denial of the -- obviously, we can't agree on the
20 compensation issue, and that's why it is pending.
21 THE COURT: So, it is not really necessary to do any of
22 that.
23 MR. SMITH: No, I think we talked about that early on.
24 The entry was all I needed to do.

SUBMITTED - 565108 - Angie McKee - 1/22/2018 10:31 AM

1 THE COURT: Okay. So, twenty-one days from now, can
2 anybody tell me what date that is?
3 MS. PETRILLI: It would be the week of Monday, November
4 13.
5 THE COURT: I really don't have my schedule with me,
6 but if it is a phone conference, I think we can work around
7 everything, especially if we do it in the afternoon. Would
8 a phone conference on November 14 at let's say 3:00 work for
9 everyone?
10 MR. SMITH: What time?
11 THE COURT: 3:00?
12 MR. SMITH: That's fine.
13 THE COURT: And I am just guessing that I don't have
14 anything at that time. And who would be willing to initiate
15 the call?
16 MR. SMITH: I will do it.
17 THE COURT: All right. And Mr. Smith, I will announce
18 to the whole public here, my private line is Area Code 217,
19 348-0544.
20 MR. SMITH: Okay.
21 THE COURT: I am going to summarize what we have done
22 today in a moment. But are there other matters we need to
23 address at this time, Ms. Petrilli?
24 MS. PETRILLI: Only 16 ED 34 if the Court would like to

SUBMITTED - 565108 - Angie McKee - 11/22/2018 10:31 AM

1 address that issue.
2 THE COURT: Oh. I don't think we need to address it
3 yet. Really my question was, is that still set for trial
4 with the other cases?
5 MS. PETRILLI: It is separate. I don't believe
6 Mr. Smith has entered his appearance in 16 ED 34.
7 THE COURT: It is a different attorney.
8 MS. PETRILLI: Well, there is two Defendants in that
9 case. The other attorney has entered his appearance.
10 Mr. Koester has entered his appearance for the Doris McAuley
11 Trust, but there is no Entry of Appearance in that case
12 for the William McAuley Trust. And so, that's how it has
13 been pending.
14 MR. SMITH: I will enter my appearance in the William
15 McAuley.
16 MS. PETRILLI: Can we get a deadline, because you have
17 been saying that I think since November.
18 MR. SMITH: It slipped my mind.
19 THE COURT: Okay. In 16 ED 34, how much time do you
20 need to enter any appearance?
21 MR. SMITH: I will do it by the end of the week.
22 THE COURT: We will show then by close of business
23 October 27, 2017.
24 MR. SMITH: Remind me.

SUBMITTED - 565006 - Angie Barnett - 11/22/2018 10:31 AM

1 THE COURT: And the only other thing I was going to
2 tell you about is if we keep our trial dates, the final case
3 management conference was set on February 19, which is a
4 state holiday. So, we would have to change the date of the
5 final case management conference.
6 As for the jury trial, if you want to keep that March
7 5th setting, it will have to be second on call. I do have
8 another jury trial that's set that week. It is a civil
9 call. As you might expect, most of those cases settle or go
10 away somehow. So, I can't tell you for sure about that one.
11 But if you want to keep that date, it would have to stay
12 second on call. If you want to reschedule it, I do have
13 trials back to back several weeks after that. I think there
14 is a date in April and a date in May that I might be free.
15 We can discuss that more at our phone conference, but I just
16 want you to be aware. We need a new final case management
17 date. And just so that you are aware, if we keep the March
18 5th trial date, you would be second on call to a Coles
19 County case.
20 Were there other matters that we need to address before
21 I summarize, Ms. Petrilli?
22 MS. PETRILLI: No, I don't believe there are, Your
23 Honor.
24 THE COURT: Mr. Smith?

SUBMITTED - 5[illegible]06 - Angie McKee - 1/22/2018 10:13:01 AM

1 MR. SMITH: No, sir.

2 THE COURT: While show the matter came on for hearing
3 on the first thirty-four, thirty-five cases, two of which
4 are consolidated, on Plaintiff's 735 ILCS 5/2 -- 1203 Post
5 Judgment Motion. Arguments were heard. That motion is
6 allowed in part.

7 The request to reconsider the order, vacate it in its
8 entirety or vacate the finding that the statute is
9 unconstitutional on its face are denied.

10 The request that the order be modified with Supreme
11 Court Rule findings is allowed, and the Court makes those
12 three specific findings.

13 The remainder of the order stands including the Supreme
14 Court Rule 302(a) finding.

15 Mr. Smith is directed to prepare a written order,
16 submit it to Ms. Petrilli for approval as to form, before
17 the Court enters it.

18 The Court also clarified the proceedings regarding the
19 Defendant's original Traverse and Motion to Dismiss and any
20 Amended Traverse and Motion to Dismiss.

21 Without objection, the Defendants' Motion to Dismiss
22 Amended Traverse and Motion to Dismiss is allowed. And the
23 Court enters an Order Granting Motion to Dismiss, Amended
24 Traverse and Motion to Dismiss, which in effect shows that

SUBMITTED - 5673076 - Angie Brooks - 1/22/2018 10:41 AM

1 the original Traverse and Motion to Dismiss and any
2 amendments thereto are withdrawn. And this pertains to
3 cases 16 ED 26, 31, 32, 33, 35, 36 and -- excuse me, 36 and
4 41.
5 With regard to 16 ED 34, Mr. Smith is granted time to
6 enter his appearance on or before the close of business
7 October 27, 2017.
8 The motion came on for hearing on the Motion to Stay.
9 Arguments were heard. Ruling is deferred until further
10 notice.
11 The matter is set for further case management
12 conference by telephone. And that will be on these seven
13 cases that I just -- to which I just referred. And that
14 will be with the phone call placed to my office in Coles
15 County on November 14, 2017 at 3:00 p.m. Mr. Smith to place
16 that call. If we need to discuss some matters in the other
17 cases, certainly we can do so during that phone conference,
18 as well, but specifically, it is directed to these seven
19 cases.
20 If -- you gave me some exhibits, demonstrating your
21 arguments. Do you want me to file those or just keep those
22 with my notes? Ms. Petrilli?
23 MS. PETRILLI: You can just keep those with your notes.
24 THE COURT: Mr. Smith?

SUBMITTED - 565006 - Angela McKee - 11/22/2018 10:13:01 AM

1 MR. SMITH: Same.
2 THE COURT: They are helpful, so I appreciate it.
3 That will conclude our proceedings today. Thank you.
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SUBMITTED - 957076 - Angie Barnett - 1/22/2021 8:04:31 AM

1 IN THE CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT
2
3 COLES COUNTY, CHARLESTON, ILLINOIS
4
5
6 I, Pete Shanks, an Official Court Reporter for the
7 Circuit Court of Coles County, Fifth Judicial Circuit of
8 Illinois, do hereby certify that I reported in shorthand the
9 proceedings had on the hearing in the above entitled cause;
10 that I thereafter caused the foregoing to be transcribed
11 into typewriting, which I hereby certify to be a true and
12 accurate transcript of the proceedings had before the
13 Honorable JAMES R. GLENN, Judge of said court.
14
15
16
17
18
19
20 Official Court Reporter
21
22 Dated this 27TH day
23 of October, 2017.
24

SUBMITTED - 565006 - Angela McKee - 1/22/2018 10:11 AM

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT

EDGAR COUNTY PARIS, ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS, Plaintiff, vs. RICHARD L. HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK LLC, and UNKNOWN OWNERS, Defendants.	)	No. 16-ED-4
AMEREN TRANSMISSION COMPANY OF ILLINOIS, Plaintiff, vs. TRUST NO. 455-195 - THE EDGAR COUNTY BANK AND TRUST CO., FARM CREDIT SERVICES OF ILLINOIS, FLCA, and UNKNOWN OWNERS, Defendants.	)	No. 16-ED-5
AMEREN TRANSMISSION COMPANY OF ILLINOIS, Plaintiff, vs. LAURA C. TATE LIVING TRUST, DONICA CREEK, LLC, and UNKNOWN OWNERS, Defendants.	)	No. 16-ED-12
AMEREN TRANSMISSION COMPANY OF ILLINOIS, Plaintiff, vs. JAMES H. TATE, ANGELA K. TATE, FARM CREDIT SERVICES OF ILLIONIS, FLCA, and UNKNOWN OWNERS, Defendants.	)	No. 16-ED-13

BARBARA CASH, CSR, RDR, CRR
Official Court Reporter
Edgar County Courthouse
Paris, IL 61944
CSR No. 84-1491

SUBMITTED - 5[illegible] - [illegible] - 1/22/2018 10:41 AM

APPEAL TO THE ILLINOIS SUPREME COURT FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT EDGAR COUNTY, ILLINOIS

FILED
NOV 16 2017
Angela R Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	
Plaintiff/Appellant,	)	
v.	)	Case No.: 2016-ED-4
RICHARD L. HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC, and UNKNOWN OWNERS,	)	
Defendants/Appellees.	)	

AMENDED NOTICE OF APPEAL

Plaintiff/Appellant, AMEREN TRANSMISSION COMPANY OF ILLINOIS, by and through its attorneys, Sorling Northrup, David A. Rolf and Lisa A. Petrilli, of Counsel, appeal to the Illinois Supreme Court pursuant to Illinois Supreme Court Rule 302(a)(1), from the Order granting Defendants/Appellees' Motion to Dismiss dated August 30, 2017 as modified by the Order on November 3, 2017. The Illinois Supreme Court Rule 18 Order dated August 30, 2017 as modified by the November 3, 2017 Order are attached hereto as **Exhibit 1**.

Plaintiff/Appellant requests the Circuit Court provide the appropriate notice to the Illinois Supreme Court including the Illinois Supreme Court Rule 18 Order (dated August 30, 2017 as modified by Order dated November 3, 2017).

By this appeal, Plaintiff/Appellant seeks reversal of the Order granting Defendants/ Appellees' Motion to Dismiss, and such other relief as Plaintiff/Appellant may be entitled on appeal.

SUBMITTED - 563076 - Angela Mckee - 12/20/2018 10:13 AM

Respectfully submitted,

AMEREN TRANSMISSION COMPANY OF ILLINOIS, Plaintiff/Appellant,

By: _____
One of Its Attorneys

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SUBMITTED - 5730108 - Angie Barnett - 11/22/2018 10:31 AM

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was served by placing same in a sealed envelope addressed:

Mr. S. Craig Smith
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1119 North Main Street
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Honorable James R. Glenn
Coles County Courthouse
651 Jackson Avenue
Charleston, IL 61920

and by depositing same in the United States mail in Springfield, Illinois, on the 16th day of November, 2017, with postage fully prepaid.

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IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT OF ILLINOIS
EDGAR COUNTY, PARIS, ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	
Plaintiffs,	)	
vs.	)	
RICHARD HUTCHINGS, RITA HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC and UNKNOWN OWNERS, *et al.*,	)	CASE NOS. 2016-ED-4, 5, 6, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 23, 24, 25, 27, 28, 29, 30, 38, 40, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55
Defendants,	)	

FILED
SEP - 5 2017
Angela R Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

ORDER

THIS MATTER came before the Court for hearing May 2, 2017 on the Defendants Motions to Dismiss and Traverse filed August 9, 2016. Their Memorandum in support was filed September 12, 2016. Plaintiff filed their response on October 17, 2016 and Defendant's Rebuttal was filed November 4, 2016. A previously filed motion seeking to limit the scope of the hearing and bar certain witnesses was argued and ruled upon. The Plaintiffs then sought a supervisory order from the Supreme Court pursuant to Rule 383, which was denied.

As part of this proceeding, the parties entered into a Stipulation filed April 24, 2017 setting forth certain facts regarding the proceedings

EXHIBIT
1

SUBMITTED - 563076 - Angela McKee - 1/22/2018 10:01 AM

before the Illinois Commerce Commission (ICC) and actions taken as a result thereof.

The parties further agreed, at the time of the hearing, that Plaintiff's Exhibits 3, 4 and 6; certified copies of the ICC orders attached to their responses to the Defendant's Traverse, shifted the burden to the Defendant landowners on the traverse issue. It was understood the Defendants had the burden of proof on their motion to dismiss from the outset.

The Defendants sought to admit, for purposes of this evidentiary hearing, their Exhibits #1-18. Exhibits #1-14 were previously attached to their Motion to Dismiss and Traverse, Exhibits #15-17 were three separate hearings before the ICC on December 3, 2012, January 17, 2013 and January 24, 2013, and #18 was the Defendants' response to AMEREN's Rule 383 motion before the Supreme Court.

The Plaintiff objected to Ex. #11 which was correspondence between the Edgar County Board and AMEREN, and #18, the response to their 383 motion. Since #11 was already in the record as a part of Defendant's submission to the ICC, the Defendants agreed to withdraw it for purposes of this hearing. The objection to #18 was sustained. The rest were admitted.

Although the Defendants refused to concede their claims contained in the Traverse were not supported by the record, they presented no evidence at the hearing in that regard. The arguments of both sides were focused on "notice" as it related to landowners who may have entered the process after initial application and the proposal of alternate routes.

FACTS

On November 7, 2012 AMEREN petitioned for a certificate of public convenience and necessity with the ICC seeking authority to "construct, operate and maintain" a new electric transmission line through Illinois. The project was designated the Illinois Rivers Project

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and stretched 375 miles across the state from Missouri to Indiana. AMEREN identified a primary and alternate route; each necessitating a permanent 150 wide right-of-way easement.

Section 5/8-406 of the Public Utilities Act (220 ILCS 5/8-406) outlines the requirements for obtaining a certificate of public convenience and necessity. In 2010 the legislature enacted Section 8-406.1 which provided an expedited certification procedure for public utilities where the Commission was required to issue a decision either granting or denying the petition "no later than 150 days after the application is filed."[1] Under this expedited procedure, the Commission could extend the deadline by an additional 75 days if they found good cause to exist; as long as that determination was made within 30 days of the initial filing.[2]

The proceedings, both preceding and subsequent to the Commission's order of August 20, 2013, have been long and circuitous, with at least one trip to the Fourth District Court of Appeals in the process.[3] Various landowners have contended they received no notice of the proceedings before the ICC until receipt of a letter dated September 6, 2013 advising them of the August ICC order. This order authorized the issuance of a certificate to AMEREN to begin construction. The Defendants argue this was, in many instances, the first time they became aware AMEREN intended to exercise a permanent easement over their property.

The parties have stipulated AMEREN "complied with all statutory and regulatory requirements for the filing of its Verified Petition for a Certificate of Public Convenience and Necessity pursuant to Section 8-406.1 and 8-503 of the Public Utilities Act..."[4] The real question before this Court is whether the notice provisions set forth in the expedited procedures permitted under Section 8-406.1 as it existed at the time of

[1] 220 ILCS 5/8-406.1
[2] 220 ILCS 5/8-406.1(g)
[3] *Adams County Property Owners & Tenant Farmers v. Illinois Commerce Commission*, 2015 IL App(4th) 130907
[4] Stipulation filed April 24, 2017

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these proceedings, deny property owners both procedural and substantive due process rights.

As the Defendants note, it was not until after this matter proceeded through the certification process before the ICC and after the Fourth District rendered its opinion in *Adams County*, the legislature amended Section 8-406.1 to include:

> "For applications filed after the effective date of this amendatory Act of the 99th General Assembly, the Commission shall by registered mail notify each owner of record of the land, as identified in the records of the relevant county tax assessor, included in the primary or alternate rights-of-way identified in the utility's application of the time and place scheduled for the initial hearing upon the public utility's application. The utility shall reimburse the Commission for the cost of the postage and supplies incurred for mailing the notice." 220 ILCS 5/8-406.1 (as amended by P.A. 99-399, August 18, 2015)

The reasons for this amendment are evident in the facts of this case. Prior to the amendment, even the Commission expressed concern for the use of the expedited review process for a project of this scope.[5]

They noted in the August 20, 2013 order some of the problems AMEREN had with getting notice to all affected landowners at the outset of the process.

> "The earliest of ATXI's[6] problems relate to the lists of potentially affected landowners it filed on November 7, 2012. The lists of potentially affected landowners, municipalities,

[5] "Given the scope of this project, the Commission questions ATXI's [AMEREN] exercise of its discretion to seek expedited review...Any projects affecting landowners' rights must be given careful and complete consideration. This is particularly so when the impact can not [sic] be easily reversed, as is the case once a high voltage electric transmission line is constructed." ICC Order dated August 20, 2013, p. 7.

[6] The ICC Order references AMEREN as ATXI, although ATXI is actually an affiliated operating utility within Ameren Services.

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> and nearby utilities contained numerous errors and redundancies which required the Chief Clerk's Office to spend considerable time reviewing the lists to ensure they were accurate and usable. At least two weeks under the expedited schedule were lost before notice of the prehearing conference could be sent. Two months later ATXI realized that it neglected to send a complete list of landowners with its initial filing.... due process required the Commission to extend the deadline to provide the newly notified landowners some semblance of an opportunity to respond." ICC Order dated August 20, 2013, p. 7

The problems with notifying all affected landowners at the very outset of these proceedings resulted in the Commission extending the 150 day deadline by the additional 75 days permitted under the statute.[7] It is also evident throughout the August 20 order the Commission remained concerned about the use of the expedited process for certification of such a massive project and had, on several occasions attempted to provide suggestions to perhaps "reduce the burden of this proceeding" by seeking to get AMEREN (ATXI) to withdraw portions of the plan from the 8-406.1 process. In each instance AMEREN declined to do so.

The Commission noted how, under the expedited schedule, alternative routes had to be identified by intervenors in a period of less than three weeks although AMEREN had taken seven years to prepare theirs. (ICC Order Aug. 20, 2013, p. 8) They clearly expressed their concerns that, in the haste required by 8-406.1, there were many issues which were never fully investigated regarding route selection.

The specific section of the project relating to these proceedings is what was described as the Kansas-Indiana State Line segment. The Commission noted a total of five routes were proposed during the proceedings before the ICC: ATXI's Primary and Alternate routes, a

[7] 220 ILCS 5/8-406.1(g)

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modification to the Primary route by Laura Te Grotenhuis, and two routes proposed by Stop Coalition.

The Defendants contend the Final Approved Route was not described or discussed at any of the three pre-filing public meetings, was located 12 miles north of the Primary route and 6 miles north of the Alternate route, and was not described or included in ATXI's Petition seeking a Certificate of Public Convenience and Necessity filed with the ICC on November 7, 2012.

Issues with failures to notify affected landowners were not exclusive to the Defendants in this case. As the Commission noted in its August 20 order, ATXI's Primary route bisected a federal floodplain easement of which ATXI had been notified, but chose to ignore. Several intervenors brought up the existence of the easement during the proceedings. The Natural Resources Conservation Services (NRCS) had acquired a warranty deed for a floodplain easement in Clark County in March of 2010. (STPL Ex. 1.18)

NRCS had advised ATXI by way of an email sent by NRCS biologist Dave Hiatt on October 17, 2012 "in which he unequivocally told ATXI that the federal floodplain property in Clark County was not available for use by ATXI for the Illinois Rivers Project."[8]

Part of his email was quoted at length in the Order:

> "These easements must be avoided. There is very little to no authority for the NRCS to modify the terms of these conservation easements. The rights acquired under these conservation easements are quite inclusive and will be superior to any rights Ameren might obtain for an overhead power line right-of-way." ICC Order, 8-20-13, p. 106 (quoting from STPL Cross Ex. 8)

Although ATXI's witness acknowledged receipt of the email, and was responsible for selecting routes for the transmission lines, she took

[8] ICC Order, August 20, 2013, p.106

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no action in response. It was further noted in the proceedings ATXI had done nothing to notify the federal government of its intention to construct a transmission line across the federal easement.

Mr. Hiatt made another attempt to put ATXI on notice regarding the non-viability of the Primary route by submitting a public comment on December 5, 2012 noting federal policy prohibited encroaching upon a conservation easement. Again, there was no response by ATXI so a certified letter was sent to one of ATXI's legal counsel on February 27, 2013 by the NCRS State Conservationist which asserted the superior right of the federal conservation easement over any easements ATXI might seek, on which to construct the proposed transmission line.

The letter also noted the Office of General Counsel and National Headquarters had been consulted as well.

All of this occurred without ATXI ever providing notice to the federal government or any relevant federal agency of its intention to cross federal conservation easements which expressly precluded such action.

The Commission's concerns regarding how ATXI addressed route placement were also highlighted in their "Conclusion". Once the issue regarding the federal wetlands easement was made known, ATXI modified the Primary route by means of an "alternative pole placement" of more than one-quarter mile. According to ATXI, this would not constitute an alternate route needing further study, public hearing and discussion, but was simply an internal decision. The Commission questioned how a quarter-mile adjustment in a route could be simply characterized as "alternative pole placement" as opposed to a modification of the existing proposed route. They answered their own question by pointing out to ATXI that "a change of more than one-quarter mile should not be considered a simple adjustment of poles." (ICC Order, 8-20-13, p. 118).

The Commission noted ATXI's late attempt to significantly modify its Primary route and labeling it "alternative pole placement" was

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questionable at least. Their language seemed to indicate they considered ATXI's explanation disingenuous.

As the Commission worked through their decision in the Order, several times they referenced the "lack of intervenors from parcels along a part of Stop Coalition's Route 2". They concluded the lack of intervenors along this route indicated those affected landowners did not object enough to actively oppose a second transmission line in their area.

The Defendants contend it was the lack of notice of this alternative which resulted in any failure to object. Regardless, the Commission concluded the Stop Coalition's Route 2 was the appropriate route for this segment of the Illinois Rivers Project.[9]

Pursuant to the certification, AMEREN began mailing letters to affected landowners informing them of the certification and AMEREN's desire to purchase an easement across their property.

According to the Defendants, this is the first notice they received regarding an approved route which would affect their property.

On September 5, 2013, the Commission received the first of seven applications for rehearing pursuant to the Illinois Administrative Code. This application, which does not relate to the portion of the project in question here, was allowed on September 18, after which the Commission then received six more applications, including one by some of the Defendants here, which was denied. A First Order on Rehearing was entered on February 5, 2014 relating only to the individual property owners in the first application.

The Second Order on Rehearing, entered on February 20, 2014, related to applications of property owners not involved in these proceedings.

The Final Order entered on March 9, 2016 involved the verified petition of ATXI filed with the ICC pursuant to Section 8-509 of the Public Utilities Act (220 ILCS 5/1-101 *et seq.*). This petition requested authorization to use eminent domain to acquire rights-of-way across 26

[9] ICC Order of Aug. 20, 2013, p. 121

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parcels of land in a portion of the route previously approved by the Commission. The Order affected some of the defendants in this case and addressed efforts to negotiate the purchase of rights-of-way from them.

ATXI was granted the authority to seek their easement by way of eminent domain pursuant to the Order entered March 9, 2016.

On April 4, 2016 AMEREN filed complaints in Edgar County Circuit Court seeking the exercise of eminent domain over the property of the Defendants. On April 25, 2016 AMEREN filed their second petition with the ICC pursuant to Section 8-509, seeking authorization to pursue eminent domain to acquire right-of-way easements across 62 parcels of land. Counsel for the Defendants appeared as counsel for 38 landowners who owned 53 of the parcels involved in the petition. Some of those same landowners are parties in this matter. The order authorizing the use of eminent domain regarding these parcels was entered June 7, 2016.

ANALYSIS

AMEREN contends the outcome of these proceedings should be dictated by the Fourth District's ruling in *Adams County v. Ill. Commerce Comm'n*, 2015 IL App (4th) 130907. However, as this Court noted in its previous order, the appellate court:

> "when discussing due process, referenced the fact that the proceedings before the ICC did not confer property rights on AMEREN or deprive the landowners of protected property interests." Order of February 1, 2017.

Since certification proceedings before the ICC did not actually address property rights or interests of anyone, the court in *Adams County* was reluctant to address the constitutional due process issue. The court pointed out in its analysis of *Illinois Power Co. v. Lynn*, 50 Ill.App.3d 77 (4th Dist. 9177), how proceedings such as these before the

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Commission could not confer property rights, but instead dealt only with the reasonableness of the utility's plan.

The *Lynn* court also noted how:

> "The appearance of the owners before the ... Commission to give input into the plans, or object thereto, could not bar them from later exercising their rights as owners of property being taken for a public use. There is nothing in the ... Utilities Act pre-empting the rights of the property owners in the condemnation proceedings." *Adams*, at P48; citing *Lynn*, 50 Ill.App.3d at 81-82.

Contrary to the assertions of AMEREN, the Defendants in these eminent domain proceedings, *even if they had been given some form of notice and actively participated* are not precluded from raising their due process issues here according to *Adams County*. If the notice provided by statute at the time failed to meet the constitutional requirements for due process, it was not somehow either litigated away or waived by the proceedings before the ICC.

Relying on *Lynn, Chicago, Burlington & Quincy R.R. Co. v. Cavanagh*, 278 Ill.609(1917) and *Zurn v. City of Chicago*, 389 Ill. 114 (1945), the court in *Adams County* concluded due process did not require the notice one would expect if property rights were at risk. However, as this Court already noted in the February Order, it is the decision of the ICC authorizing the construction of the transmission line as necessary for the public good which leads to the eminent domain proceedings before this Court for all those who refuse to accept AMEREN's offer to purchase an easement.

The proceedings before the ICC are a necessary condition precedent to AMEREN's Section 8-509 application for approval to proceed by eminent domain to acquire rights-of-way from the same landowners who claim they were never given the opportunity to fully participate before the Commission in the first proceeding.

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Once certification has been provided by the ICC, AMEREN enjoys certain statutory presumptions relating to authority, necessity and public purpose under 735 ILCS 30/5-5-5(c). Subsection (c) provides, in relevant part:

> " Evidence that the Illinois Commerce Commission has granted a certificate or otherwise made a finding of public convenience and necessity for an acquisition of property ... for private ownership or control (including, without limitation, an acquisition for which the use of eminent domain is authorized under the Public Utilities Act [220 ILCS 5/1-101et seq.], ...) to be used for utility purposes creates a rebuttable presumption that such acquisition of that property (or right interest in property) is (i) primarily for the benefit, use, or enjoyment of the public and (ii) necessary for a public purpose."

The statutory presumptions created by this section as well as those of the Public Utilities Act provide AMEREN with a *prima facie* case for the exercise of eminent domain. The presumption provided by the Act is not just any presumption, either. Most rebuttable presumptions found in the civil law require the opposing party to present *some* evidence sufficient to rebut the presumption. As the Fourth District noted in *Enbridge Energy (Illinois) L.L.C. v. Kuerth*, 2016 IL App (4th) 150519), this type of "Thayer's bursting bubble" presumption may require the presentation of "sufficient evidence to support a finding of the nonexistence of the presumed fact." *Enbridge* at P133; citing *R.J. Management Co. v. SLRB Development Corp.*, 346 Ill.App.3d 957 (2nd Dist. 2004).

However, the *Enbridge* court found the sort of presumption created by the PUA to be a "strong presumption" which can only be rebutted by "clear and convincing evidence". *Enbridge* at P138. As they pointed out, the clear and convincing standard of proof requires more

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than a preponderance but less than the criminal standard of proof beyond a reasonable doubt; citing *Altenheim German Home v. Bank of America, N.A.,* 376 Ill.App.3d 26 (2nd Dist. 2007).

The court concluded:

> "Strong public policy favors that the landowners should be required to present clear and convincing evidence before the applicable rebuttable presumption bursts." P140.

AMEREN either fails to recognize or chooses to ignore the distinct disadvantage landowners face if not properly notified of proceedings before the ICC and contends instead their property rights are not affected by the Commissions actions.

As AMEREN noted in their Response to Traverse and Motion to Dismiss, normally when landowners raise a claim of traverse, the burden shifts to the contemnor (the public utility in this case) to make the *prima facie* showing for eminent domain. *Department of Transportation v. First Galesburg National Bank & Trust Co.,* 141 Ill.2d 462 (1990). Here, however, because AMEREN enjoys the strong presumption found to exist because of the ICC proceedings and certification, there already exist strong presumptions of authority, necessity and public purpose.

The courts are to give great deference to the expertise of the ICC when reviewing its decisions. See *People ex rel. Madigan v. Illinois Commerce Commission,* 2015 IL 116005. So, it would appear when affected landowners fail to receive proper notice, they are significantly disadvantaged "from later exercising their rights as owners of property being taken for a public purpose" as the court stated in *Adams County* at P48.

Contrary to the courts conclusion, it would appear there is, in fact, something in the PUA which effectively preempts landowners' rights in the condemnation proceedings; namely the strong presumption, and

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shifting of the burden which would not otherwise exist in normal eminent domain proceedings.

Landowners who were never properly apprised of the proceedings before the ICC are now required to present, by clear and convincing evidence" some reason to prevent the utility from taking an interest in their property by eminent domain.

Because of this, "it only seems reasonable to conclude the necessary notice required for due process would be at least as much as that required for the ICC to determine which routes are best." Order, 2-1-17, pp. 2-3.

At the time of the filing of the petitions in this case, Section 8-406.1 required a minimum of three public meetings held no earlier than 6 months before filing. Notice of these meetings was by publication in a newspaper of general circulation within the affected county once a week for 3 consecutive weeks, beginning no earlier than one month prior to the first public meeting. 220 ILCS 5/8-406.1(a)(3). Notice of the public meetings was to be provided to the County Clerk's Office of the counties in which meetings were to be held.

AMEREN held three pre-filing public meetings in Kansas, Illinois[10] on May 30, 2012, July 26, 2012 and October 4, 2012 wherein they disclosed their Primary and Alternate routes. Issues surrounding the notification of affected landowners have already been mentioned, but suffice it to say the Commission was sufficiently concerned about the lack of notice they extended the 150 day deadline by the statutorily permitted 75 additional days in order to provide affected landowners "some semblance of an opportunity to respond." ICC Order of August 20, 2013, p.7.

Section 8-406.1 at the time of these proceedings did not specify the method by which affected landowners were to be apprised of alternate routes proposed after the utility's filing of their petition. Personal notice by mail was considered necessary for those along the Primary and

[10] The Defendants claim some disadvantage to the location of the public meetings being held in a "far north-western" portion of the county, far from their affected lands. The statute only requires the meetings to be in the county, and the Kansas substation happens to be the starting point for the section in issue.

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Alternate Routes proposed by AMEREN. In addition, AMEREN was required to provide a complete list of all affected landowners to the Commission.[11]

Sections 200.150(g) and (h) of the Illinois Administrative Code set forth the procedure the Commission was to follow in order to get notice to the affected landowners when an application under 8-406 was filed, but was silent with regard to the expedited process of 8-406.1.

Section (g) provided:

> "(g) The Commission shall serve the notice provided by subsection (f) by personal delivery or by mailing the notice in the United States mail in a sealed envelope with postage prepaid. The Commission may also serve, by electronic means, the notice provided for in subsection (f), provided that the subject line of the electronic message states "OFFICIAL COMMISSION NOTICE OF CASE OR PROCEEDING". Notice of any additional hearings or other notices mailed by the Commission shall be by regular United States mail or as otherwise provided by the Hearing Examiner." 83 Ill. Adm. Code Section 200.150(g)

Section (f) required the party filing for a Certificate of Public Convenience and Necessity to provide the list of names and addresses of all affected landowners to the Commission. The Commission would then "notify the owners of record of the time and place scheduled for the initial hearing upon the application." 83.200.150(f). Neither section however, addressed the situation here where persons not originally affected were later brought into the case as the result of intervenors filing suggested alternate routes.

The Commission sought to deal with this by requiring intervenors to provide essentially the same information as the original petitioner. The Administrative Law Judges (ALJs) required intervenors to provide

[11] Which proved not to be the case.

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a map of the proposed alternate routes similar to that provided by AMEREN, which outlined any changes to the routes proposed by AMEREN. ICC Docket No. 12-0598, Dec. 3, 2012, pp. 61-62. They also required intervenors to provide the names and addresses of the owners of each parcel of land affected by their alternate route proposal. Their expressed reason for doing so: "because we don't want to change something on these folks [sic] land without giving them notice, just like you wouldn't like if you got a line put on your property without notice." Id. at p.40.

The ALJs wanted the information so that "we can notify the landowners that would be affected by that new alternative." Id.at p.60. The obvious implication was, the ALJs recognized there were no clear notice requirements set forth in the expedited application process, so they sought to mirror that required of the original petitioner in the normal application process found in 8-406.

This would only make sense since the end result of the application proceedings could well result in landowners being forced to allow rights-of-way across their property they did not otherwise want.

It becomes equally apparent from the record notification became a very cumbersome process as additional intervenors came forward and additional alternate routes were proposed. As the ICC Order of August 20, 2013 indicated, the Chief Clerk of the Commission sent notices of proceedings to approximately 8,436 potentially affected landowners and 80 different individuals or entities petitioned to intervene. ICC Order, Aug. 20, 2013, p.2.

A Notice of Prehearing Conference dated November 21, 2012 reveals how the Commission began dealing with the list of landowners. Marked Ex. #6 to Plaintiff's Response, the Notice provides:

> "Notice is also given by the Administrative Law Judges that a list of all affected landowners is available electronically on the Commission's e-Docket system under Docket No. 12-0598..."

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At the time of the above notice, even if mailed to the Defendants, it did not include proposed routes directly affecting them.

"Stop Coalition" filed their Motion for Leave to File an Alternate Route Proposal Instanter on January 17, 2013. They complied with the requirements set forth by the ALJs and sought an Order Directing the Clerk to Issue Notice to Certain Affected Landowners.

The Stipulation by the parties in these proceedings includes an agreement that the Stop Coalition's proposed alternate routes included properties which were not crossed by AMEREN's proposed Primary or Alternate Route. (Stipulation filed April 24, 2017, para. 4.)

Exhibit 1 attached to the Stipulation is the Notice and Notice of Continuance of Hearing entered by the Commission as a result of the Intervention of Stop Coalition. This Notice would appear to be the first time the Defendants became aware there were alternate routes proposed which might directly affect their property. Although AMEREN contends otherwise, they do not dispute the representation of the defendants in their Traverse and Motion to Dismiss that the Final Approved Route (which turned out to be one of the alternates proposed by Stop Coalition) was not described or discussed at the three pre-filing public meetings, was not included in their Petition, and was located more than 12 miles north of the Primary Route and 6 miles north of the Alternate Route.

AMEREN's argument in their Response to the Traverse and Motion to Dismiss is disingenuous when it says certain named Defendants had notice since they received notice of the Primary and Alternate Routes. Notice of those routes would not have put them on notice of the route ultimately chosen which did, in fact, directly affect them.

What is significant about the Notice is the last paragraph:

> "Notice is further given by the Administrative Law Judges that due to the length of the list of entities to receive notice

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> of this proceeding, the Chief Clerk's Office *need not include with this notice the list of potentially affected landowners and entities.* [emphasis added] The list is available electronically on the Commission's e-Docket system under Docket No. 12-0598. The web address for the e-Docket system is: http://www.icc.illinois.gov/e-docket/. Those unable to access the list electronically may request that the Commission's Chief Clerk mail a hardcopy to them by calling (217) 782-7434." Stipulation filed April 24, 2017, Ex. #1.

AMEREN refers to this same document as Exhibit #8 in their Response as follows: "The ICC certified that it mailed notice to those people on the STPL [Stop Coalition] routes on January 31, 2013. A copy of the Certification is attached as **Exhibit 8**; certified Copy of the January 31, 2013 Notice filed in ICC Docket 12-0598". However, neither the Notice nor the attached certification says it was ever mailed to the alternate landowners. Instead, the Chief Clerk certifies it was filed on January 31, 2013.

There are no other references in the record to a certificate of mailing and the Court has been unable to find such a certificate in the substantial number of documents filed in this case.

Against the inference AMEREN seeks to raise regarding this particular notice, the Court is confronted with 35 landowners, including both local and out-of-state individuals as well as several bank trust departments who all swear under oath they received no such notice.

It is also significant, as the Commission noted in their order:

> "... perhaps the most compelling information on the record is the lack of intervenors from parcels along that part of Stop Coalition's Route 2 that does not overlap ATXI's Alternate Route. The lack of intervenors from this area indicates to the Commission that the landowners affected by Stop Coalition's Route 2 at least do not object enough to actively oppose a

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> second transmission line in their area." Order of Aug.20, 2012, p.120

This is after 80 individuals or entities petitioned to intervene along AMEREN's proposed routes. There were five alternate routes proposed for this segment alone. The record indicates there were intervenors all along the way; except for this particular section whose only notice is reflected in the notice of January 31, 2013.

So, the question for this Court is, did either the procedure for notice set forth in Section 8-406.1 or the practice of the ICC in this instance, provide the Defendants with due process?

The U.S. Supreme Court described procedural due process in *Fuentes v. Shevin*, 407 U.S. 67 (1972) as:

> "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." 407 U.S. at 80.

They found it equally fundamental that the right to notice and an opportunity for hearing had to be granted at a meaningful time and in a meaningful manner. Here, the affidavits of the Defendants all say their first actual notice was upon receipt of the August 20, 2013 Order from the Commission by certified mail after September 6, 2013. By this time the routes have been chosen and the Certification process is over.

AMEREN contends their recourse was to appeal. Section 10-201 says the Commission's decisions are appealable to the appellate court of the judicial district in which the subject matter of the hearing is situated. 220 ILCS 5/10-201(a). However, as was seen here, although Defendants were not permitted to intervene for purposes of addressing the lack of due process before the ICC, they were permitted to intervene for the limited purpose of appealing the decision. An appeal of the Commission's Order would only be a review of the proposed plan and the extent of property sought. The Court in *Adams County* found no due

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process issues were involved since the ICC proceedings did not actually affect the landowners' property rights.[12]

The Fourth District also noted:

> "The core of due process is the right to notice and a meaningful opportunity to be heard; no person may be deprived of a protected interest by an administrative adjudication of rights unless these safeguards are provided." 2015 IL App (4th) 130907, P45; citing *World Painting v. Costigan*, 2012 IL App (4th) 110869, P14.

However, having concluded there were no property interests at stake, there was no process due. The court in *Adams County* did not have before it the situation before this Court. Now there are property interests at stake, and now process is due.

Due process principles apply to administrative proceedings and procedural due process claims question the constitutionality of the procedures used to affect a person's property interests. See: *Lyon v. Dept. of Children & Family Services*, 209 Ill.2d 264.

The Supreme Court in *Lyon* also held:

> "The United States Supreme Court has made it clear that due process is a matter of federal constitutional law, so compliance or noncompliance with state procedural requirements is not determinative of whether minimum procedural due process standards have been met." 209 Ill.2d at 274.

Lyon dealt with due process as it related to the standard of proof required at early stages of DCFS's administrative process and the delays involved in processing appeals therefrom. However, they

[12] Which they parenthetically concluded could be raised later during eminent domain proceedings as they have here.

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discussed the factors courts are to consider when evaluating procedural due process claims:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." 209 Ill.2d at 277; citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)

In this case, the private interest is a fundamental right, protected by both the U.S. and Illinois Constitutions, to due process before being deprived of property. U.S. Const. amend. XIV, Sec. 1; Ill. Const. art. I. Sec. 2. The landowners before this Court will have suffered the loss of property taken by eminent domain for a right-of-way granted by the state's administrative process of which they were not a party.

The risk of an erroneous deprivation of their property interests through the procedures used is obvious. Without notice and an opportunity to be heard, their absence was taken by the Commission as a tacit acceptance of Stop Coalitions Alternate Route 2. As indicated above, the ICC Order of August 20, 2013 specifically mentioned the absence of objection or intervention by the landowners along that particular route as "perhaps the most compelling information on the record." Order, p. 120.

> " An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

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Mullane v. Central Hanover Bank Trust Co., 339 U.S. 306, 314 (1950)

Here, the apparent failure to personally notify the 35 landowners just as AMEREN was required to do at the outset of their application process, deprived them of the opportunity to be heard before the Commission. Why would subsequently identified landowners, who risk the same result as those originally identified in any application, not be entitled to the same due process? Why would those, whose property is later nominated for use as an alternate route by some third party, not be entitled to the same personal notice by certified mail the original landowners received? They suffer the risk of their property being taken by eminent domain just as the original landowners do.[13]

The "value of additional or substitute safeguards" is clearly reflected in the subsequent amendment to Section 8-406.1 effective August 18, 2015:

> "For applications filed after the effective date of this amendatory Act of the 99th General Assembly [P.A. 99-399], the Commission shall by registered mail notify each owner of record of the land, as identified in the records of the relevant county tax assessor, included in the primary or alternate rights-of-way identified in the utility's application of the time and place scheduled for the initial hearing upon the public utility's application. The utility shall reimburse the Commission for the cost of the postage and supplies incurred for mailing the notice. 220 ILCS 5/8-406.1(a)(3)

As a result of the amendment, it was made clear landowners affected by primary <u>or</u> alternate rights of way were entitled to notice by registered mail. It is reasonable to conclude, since the ALJs in this case followed the then-existing procedure for all subsequent alternate routes

[13] As this case clearly points out since the ultimate route chosen for this segment of the project was Stop Coalition's Route 2; which was nowhere near the original route proposed by AMEREN.

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proposed by intervenors, they would be inclined to do so now; thereby entitling any newly identified landowners to registered mail notification.

This requirement also prevents the possible abuse of the certification process by an intervenor. Obviously, if a person or group seeks to intervene in the application process, they do so for one reason; to keep the transmission line from crossing their property. Unless they are required to provide an accurate list of all landholders affected by their alternate route proposal, the risk exists there might be no objections or efforts to intervene by those whose property is ultimately taken, because they would have no notice of any such risk.

The final *Mathews* factor; "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail", seem obvious. Actual notice to all affected landowners provides everyone the opportunity to participate in the less expensive, less formal administrative process; preventing the need for litigation such as this. In addition, the process is already in place and notice to all affected landowners is already provided; with cost reimbursed by the utility, so there would be no increased fiscal or administrative burden.

AMEREN chose to utilize an expedited process even the Commission considered fraught with danger in light of the size of the project. The Commission attempted several times to get AMEREN to compartmentalize or reduce the size of the affected properties in the application process in order to allow them adequate time to fully investigate the matter. They even noted in their August 20 Order their concerns all the various ramifications of proposed routes were not fully investigated, but since they were up against a statutorily mandated timeline, they did the best they could.

It is clear from the record the list of potentially affected landowners became administratively burdensome to the point where the Commission stopped sending the list and made it available electronically. Exhibits 1 and 6 mentioned above do nothing to alleviate

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the concerns regarding lack of notice and the Court is confronted with 35 affidavits from landowners swearing under oath they received no notice. Coupled with the fact that a segment of the project which appeared to be devoid of objection or intervention also happened to be the same landowners, the Court must conclude they did not receive the notice to which they were entitled.

> "Due process of law is served where there is a right to present evidence and arguments on one's own behalf, a right to cross-examine adverse witnesses and impartiality in rulings upon the evidence which is offered." *Lakeland Construction Co. v. Department of Revenue*, 62 Ill. App. 3d 1036 (1st Dist. 1996)

The Defendants here were provided none of these. From the evidence before this Court, their first actual notice of the possible use of their land for a utility right-of-way came with AMEREN's letter dated September 6, 2013 advising them of the ICC order entered August 20, 2013 issuing a Certificate of Public Convenience and Necessity.

Conclusion

For the reasons set forth above, the Defendant's Motion to Dismiss the Eminent Domain Complaints filed in their respective cases is granted. 220 ILCS 5/8-406.1 as it existed at the time of these proceedings was facially unconstitutional. It failed to require personal notice by registered mail or other means which would ensure notice to any landowner whose property may be considered for primary or alternate routes proposed throughout the certification process.

By requiring such notice only to landowners identified in the application and at public hearing, it deprived landowners whose property was proposed in alternate routes later suggested by the utility or any intervenor, of the same opportunity to participate or object.

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Although well-intentioned, the Commission's ALJs were left to fashion a method of notification for all subsequently proposed routes; which method did not provide the same due process to those landowners later identified.

There was no good or constitutionally permissible reason to distinguish initially affected landowners from those later identified since the potential for loss of property rights were the same.

Absent a valid reason to distinguish one group of landowners from the other, due process requires identical notice; which was not provided in this case.

The method by which the statute was applied also deprived Defendants of federally protected constitutional rights.

Having granted the Motion to Dismiss, the Court does not need to address the Traverse.

Based upon the Court's ruling, a Supreme Court Rule 302(a) finding is entered.

ENTER: 8-30-17

JUDGE

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FILED
NOV - 6 2017
Angela R. Barrett
Circuit Clerk, 5th Judicial Circuit Edgar County

IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT OF ILLINOIS
EDGAR COUNTY PARIS, ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS,	)	Nos. 2016-ED-4, 2016-ED-5, 2016-ED-6,
	)	2016-ED-12, 2016-ED-13, 2016-ED-15,
Plaintiff,	)	2016-ED16, 2016-ED-17, 2016-ED18,
	)	2016-ED-19, 2016-ED-20, 2016-ED-21,
vs.	)	2016-ED-22, 2016-ED-23, 2016-ED-24
	)	2016-ED-25, 2016-ED-27, 2016-ED-28
RICHARD L. HUTCHINGS, RITA M.	)	2016-ED-29, 2016-ED-30, 2016-ED-38
HUTCHINGS, FARM CREDIT SERVICES	)	2016-ED-40, 2016-ED-42, 2016-ED-43
OF ILLINOIS, FLCA, DONICA CREEK,	)	2016-ED-44, 2016-ED-45, 2016-ED-47
LLC and UNKNOWN OWNERS,	)	2016-ED-48, 2016-ED-49, 2016-ED-50
et al.,	)	2016-ED-51, 2016-ED-52, 2016-ED-53
Defendants.	)	2016-ED-54, 2016-ED-55

ORDER

This matter came before the Court for hearing October 24, 2017, on Plaintiff's 735 ILCS 5/2-1203 Post-Judgment Motion and Memorandum in Support filed September 27, 2017. Defendants filed their Response and Memorandum in Support on October 19, 2017.

Judge DeArmond, who entered the Order of August 30, 2017, has since been assigned to the Appellate Court, and is not able to hear Plaintiff's Post-Judgment Motion. Judge James R. Glenn was assigned these cases. The Court has carefully reviewed the Order, along with the Motions, Responses, Memoranda, and Briefs related thereto, including the ones filed prior to the entry of the Order, itself, and those filed subsequent thereto. The Court finds and rules as follows:

The Court was, and is not, required to follow the Appellate Court decision of *Adams County Property Owners and Tenant Farmers v. The Illinois Commerce Commission*. It is distinguishable. And the Court, through Judge DeArmond's opinion, adequately explained its inapplicability to the proceedings at bar. The Court finds that the Appellate Court, in *Adams*

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County, deferred ruling on the constitutional issue.

This Court finds that the Court, through Judge DeArmond, adequately supported in its Order that the previously existing form of the statute, 220 ILCS 5/8-406.1(a)(3), was unconstitutional, both on its face and as applied to these Defendants. The issues were framed on both Pages 3 and 18 of the Order.

The inadequacy of the notice provisions to all of the landowners, not just the Defendants that are here in this case, but to all of them, was discussed by Judge DeArmond on Pages 13 through 15 of the Order, when he talked about the problems the Commission was having making sure that all of the landowners that were before the Commission at that time had notice. And the steps that were taken to try to make sure that everybody had adequate notice. That was described on Pages 13 through 15 of the Order, and summarized on Page 23. The Court's analysis and conclusions set forth and summarized the deficiencies of the statute and support the Court's eventual determination in that Order.

The Court also finds that Supreme Court Rule 18 has either been complied with or can be complied with. Contrary to the assertions of the Plaintiff, the Order does clearly identify the portion of the statute held unconstitutional. That would be the notice provision found in Section 8-406.1(a)(3). The Court finds that the contents of the Order itself and the records support findings under Supreme Court 18(c), Paragraphs 3, 4, and 5. The Court finds that it is necessary to clarify and provide more specific findings, and the Court will modify the Order to make those specific findings as follows:

1. The previously existing form of 220 ILCS 5/8-406.1(a)(3) cannot reasonably be construed in a manner that would preserve its validity.

2. The finding of unconstitutionality is necessary to the decision or judgment rendered,

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and such decision or judgment cannot rest upon an alternative ground.

3. Notice required by Supreme Court Rule 19 has been served. It was served on November 22, 2016, to the Illinois Attorney General's Office. Said notice was not specifically referred to in the Order, but is specifically referred to now in this Order. Those served with such notice have been given adequate time and opportunity under the circumstances to defend the challenged statute.

Therefore, for those reasons, Plaintiff's Section 2-1203 Post-Judgment Motion is allowed in part.

The request to reconsider the Order, vacate it in its entirety, or vacate the findings that the statute is unconstitutional on its face are denied.

The request that the Order be modified with Supreme Court Rule 18 findings is allowed, and the Court makes those three specific findings.

The remainder of the Order stands, and that would include the Supreme Court Rule 302(a) finding.

ENTER: 11/3/17

Judge

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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2018, I electronically filed the foregoing with the Clerk of the Court using the Odyssey eFile IL System which will send notification of such filing to the following:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ Lisa A. Petrilli

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Carolyn Taft Grosboll
SUPREME COURT CLERK

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