No. 131026 and 131032

IN THE
SUPREME COURT OF ILLINOIS

CONCERNED CITIZENS & PROPERTY OWNERS, et al., *Petitioners-Appellants,* v. ILLINOIS COMMERCE COMMISSION and GRAIN BELT EXPRESS LLC, *Respondents-Appellees.*	On Appeal from the Appellate Court of Illinois, Fifth Judicial District, Appeal No. 5-23-0271, There Heard On Appeal from the Illinois Commerce Commission, ICC Docket No. 22-0499

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10/15/2025 3:08 PM
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ARGUMENT

The Commission correctly interpreted section 8-406.1(f)(3) of the Public Utilities Act and found, upon substantial evidence, that GBX "is capable of financing the proposed construction [of the Project] without significant adverse financial consequences for the utility or its customers." This Court should defer to that factual finding and uphold the Commission's Order.

Appellees' arguments are fundamentally flawed because they hinge on an incorrect interpretation of section 8-406.1(f)(3), specifically rejected by the Commission, that requires financing in place at the time a CPCN is issued. Appellees ask this Court to impermissibly supplant the Commission's decision-making authority by imposing its own interpretation of subsection (f)(3)'s requirements and then re-weighing the evidence before the Commission. Subsection (f)(3) is unambiguous—the Court should enforce its plain meaning and uphold the Commission's Order. To the extent that this Court finds any ambiguity in the statute, the Court should uphold the Commission's reasonable, longstanding interpretation of the "capable of financing" requirement.

Additionally, in order to promote judicial efficiency and avoid piecemeal litigation, the Court should address and dispose of the remaining statutory and constitutional challenges appellees raised below.

I. The Commission correctly applied 8-406.1(f)(3).

The Commission interpreted the "capable of financing" requirement in subsection (f)(3) to not require financing in place at the time it grants a CPCN.

The Commission then found that GBX presented substantial evidence supporting its capability to finance the Project at the appropriate stage of development. This interpretation and finding should be upheld.

A. Appellees' interpretation of section 8-406.1(f)(3) relies on ignoring the plain meaning of "capable".

Appellees argue, "[r]ather than providing evidence to the ICC that it was capable of financing its transmission line project at the time of application, as required by section 8-406.1(f)(3), GBX took the position that all it had to do before the ICC was assert that it will be able to obtain financing at some indeterminate time in the future from entities that are presently unknown." (Response, p. 15) Appellees' argument hinges on their incorrect assertion that subsection (f)(3) required GBX to have financing in place at the time the CPCN was issued. Appellee's assertion, however, was expressly rejected by the Commission.

For example, appellees argue that GBX did not satisfy subsection (f)(3) because, "at the time of CPCN issuance, and still to this day, GBX has no customers for the Project, nor any commitment from any financial institution or the Department of Energy to provide financing for the Project." (Response Br., p. 14). Appellees claim that "assertions about future events are not evidence", and thus, GBX's evidence establishing that it will be able to obtain financing prior to starting construction was not sufficient to satisfy subsection (f)(3). (Response, p. 15).

Under the plain meaning of subsection (f)(3), however, GBX was not required to have customers or commitments from financial institutions or the DOE to finance the Project at the time the CPCN was issued. GBX only had to show that it was "capable of financing" the Project. Pursuant to the Revised Financing Condition, GBX need only have financing secured prior to commencing installation of transmission facilities on easement property—not the entire project.

Appellees try to make much out of DOE's July 23, 2025, announcement that it would terminate its November 2024 loan guaranty program for the Project administered through the DOE's Loan Project Office. But appellees overstate the testimony. They claim Ms. Shine, Invenergy's Vice President of Finance and Capital Markets, "estimated that the financing received from the DOE may range from 65% to 80% of the total Project costs." (Response, p. 14) In fact, Ms. Shine testified before the Commission that 65 to 80 percent of the Project would be financed through debt funded by *either* the DOE, commercial banks, or a combination of the two. (C 1025; R 252-253; R 269-275). She also testified that over the past 20 years, Invenergy has built and financed over 4,000 miles of transmission and collection lines, and completed over $47 Billion in transactions. (C 1025) Invenergy has access to significant amounts of expertise and capital through relationships built over that time with Wells Fargo, MUFG, 107 GE Capital, JP Morgan, Santander, Morgan Stanley, Natixis, Bank of America, and 108 Rabobank. (C 1025)

Accordingly, the DOE loan guaranty was only one of several options for financing the Project. Further, GBX's evidence in support of its capability of financing the Project is more than "assertions about future events" (Response Br. at 15); it is evidence supporting GBX's present attributes or traits indicating that it has the competence to obtain financing at the appropriate stage of Project development. The Commission found that this evidence was sufficient to satisfy subsection (f)(3).

Appellees also argue that GBX waived its ability to set forth the dictionary definition of "capable" in its Brief because GBX did not raise this definition before the Commission. Appellees cite *Carpetland U.S.A., Inc. v. Illinois Dept. of Employment Security*, 201 Ill.2d 351 (2002) and *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200 (2008) for this proposition. However, the waiver rule set forth in *Carpetland* and *Cinkus* does not apply here because those cases involved wholly new issues or claims asserted on appeal, not new arguments made in support of preserved issues.

This Court previously rejected an argument identical to appellees' here. *See 1010 Lake Shore Ass'n v. Deutsche Bank Nat. Trust Co.*, 2015 IL 118372, ¶ 18. In *1010 Lake Shore*, the plaintiff claimed that the defendant forfeited its argument relying on canons of statutory construction because it did not raise that argument below. *Id.* at ¶ 17. The Court explained that "[e]ven if defendant did not make that specific argument in the trial or appellate court, defendant

has consistently disputed the issue of statutory construction" and its "contention based on the canons of statutory construction is merely one argument addressing the issue of the proper construction" of the statute at issue. *Id.* at ¶ 18. The Court observed that parties must "preserve issues or claims for appeal", but need not "limit their arguments in this court to the same ones made in the trial and appellate courts." *Id.*

Here, the issue of whether subsection (f)(3) requires financing in place at the time of CPCN issuance was addressed before the Commission and briefed by all parties before the Fifth District. (ICC Order, pp. 42-49; GBX Appellee Brief, pp. 44-45). Indeed, the Commission specifically disagreed with appellees' interpretation of subsection (f)(3), and the Fifth District subsequently reversed on that ground. The concerns underlying this waiver principle are not present here—the parties built a record before the Commission regarding the interpretation of the "capable of financing" language. GBX did not forfeit any reliance on the dictionary definition of "capable."

B. The Commission's interpretation of section 8-406.1(f)(3) is not a matter of "economic and political significance" that justifies applying the Court's independent judgment rather than deferring to the Commission.

Appellees urge this Court to substitute its own independent judgment for the Commission's interpretation of subsection (f)(3) because such interpretation carries "substantial financial implications." (Response Br., p. 16.) Appellees rely on a United States Supreme Court case holding that

legislative delegation of interpretive authority to an agency must be explicit when the statute at issue implicates matters of deep "economic and political significance." *King v. Burwell*, 576 U.S. 473, 486 (2015). However, appellees' reliance on *King* is misplaced. In attempting to apply *King* here, appellees broaden the scope of the holding in that case and greatly exaggerate the significance of 8-406.1(f)(3) to the larger statutory scheme.

In *King*, the Court reviewed a section of the Internal Revenue Code added by the Affordable Care Act, interpreted by the IRS to authorize tax credits for individuals enrolling in insurance plans through a Federal Exchange. *Id.* at 484–85. The Court determined that, while a statute's ambiguity generally "constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps[,]" in "*extraordinary cases*… there may be reason to hesitate before concluding that Congress has intended such an implicit designation." *Id.* at 485 (quoting *Brown & Williamson*, 529 U.S. at 159) (emphasis added). In holding that *King* was such an extraordinary case, the Court pointed out that the tax credits at issue were one of the Affordable Care Act's key reforms, and that the question of whether those credits are available on Federal Exchanges was "central to this statutory scheme[.]" *Id.* at 486. The Court also noted that "[i]t is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort." *Id.*

Subsection (f)(3) is not a matter of similarly extraordinary "economic and political significance" justifying usurping the Commission's interpretive authority. Unlike in *King*, the interpretation of subsection (f)(3) is not central to CEJA's statutory scheme or a novel question. CEJA is broad legislation aimed at rapidly transitioning Illinois to 100% clean energy. *See* 20 ILCS 3855/1-5(1.5). One component of CEJA was to amend the Public Utilities Act to allow non-incumbent public utilities to obtain CPCNs to "encourage the development of interregional high voltage direct current (HVDC) transmission lines that benefit Illinois." *Id.* § 1-5(10.5); 220 ILCS 5/8-406(b-5). CEJA, however, did not add or change the "capable of financing" requirement.

Notably, the "capable of financing" requirement in section 406.1(f)(3) is identical to the "capable of financing" requirement in section 406(b)—CEJA did not create this requirement; it merely applied this requirement to a new category of applicant. *Compare* 220 ILCS 5/8-406.1(f) *with* 220 ILCS 5/8-406(b). As argued in GBX's Opening Brief, this Court should presume that, in enacting section 406.1(f), the General Assembly was aware of the Commission's longstanding interpretation of the "capable of financing" requirement to allow utilities to satisfy this requirement by showing that they are capable of obtaining financing in the future, including through the "project financing" approach GBX proposed. (Op. Brief, pp. 34–35.)

In their effort to exaggerate the economic significance of section 8-406.1(f)(3), appellees misrepresent the effect of the Commission's finding by

stating that "a CPCN issued under this statutory scheme effectively confers on the applicant the power of eminent domain." (Response, p. 17). According to appellees, "[i]f the agency's interpretation were to be accepted without scrutiny, it would effectively allow a private entity to initiate condemnation proceedings based on a nebulous and inadequately supported showing of financial capability." (Response, p. 17). This reflects a fundamental misunderstanding of the interplay between the issuance of a CPCN and the Eminent Domain Act.

A CPCN alone does not confer eminent domain powers. A public utility may seek approval from the Commission to exercise eminent domain concurrent with or after the issuance of a CPCN. 220 ILCS 5/8-509. Section 8-509 approval is not a mere formality—a utility must show that it "made a reasonable attempt to acquire the property before it will be allowed to exercise eminent domain authority in circuit court." *Ameren Illinois Company*, Docket 13-0456, Order, at 3 (ICC Aug. 29, 2013). Once the Commission approves eminent domain authority pursuant to section 8-509, the public utility must then file an action for condemnation in the circuit court pursuant to the Eminent Domain Act. None of the steps laid out in section 8-509 have been initiated for this Project.

Under section 30/5-5-5(c) of the Eminent Domain Act, the Commission's order granting a CPCN merely "creates a rebuttable presumption that such acquisition… 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. A landowner facing eminent domain "has the undoubted right to contest the petitioner's right to condemn" through a traverse motion seeking dismissal of the action. *Enbridge Pipeline (Illinois), L.L.C. v. Murfin*, 2020 IL App (5th) 160007, ¶ 68. At the traverse hearing, the landowner may present evidence rebutting the presumptions of public use and necessity and refuting the Commission's determination under section 8-509 that the utility engaged in good-faith negotiations with the landowner. *Id.* at ¶ 93. This process is hardly the type of unfettered eminent domain power that appellees suggest.

The Eminent Domain Act's protections aside, appellees also misunderstand the level of deference afforded to agency interpretations on administrative review by suggesting that the Commission's interpretation must be accepted without scrutiny and its fact-findings upheld even if they are "nebulous and inadequately supported." (Response, p. 17). Courts still scrutinize agency interpretations and do not defer to an agency's construction of a statute if they find that it is unreasonable. *Church v. State*, 164 Ill.2d 153, 162 (1995). Additionally, the Court must reverse the Commission's findings if it finds that they are not supported by substantial evidence. 220 ILCS 5/10-201(e)(iv). In sum, the concerns raised by appellees regarding the significance of the Commission's interpretation are largely unfounded and do not justify wholly supplanting the Commission's interpretation with the appellate court's independent judgment.

C. The Commission acted within its statutory authority.

Appellees argue that the Commission exceeded its statutory authority by "permitting [GBX] to comply with section 8-406.1(f)(3)'s capability of financing requirement by means of a Revised Financing Condition." (Response Br., p. 18.) They say that this allows GBX "to satisfy the capability of financing requirement at some indeterminate future time[.]" (Response Br., p. 18). Thus, according to appellees, the Court should apply its independent judgment rather than deferring to the Commission's interpretation. This entire section of appellees' argument can be summarily rejected because it rests on two fundamentally flawed premises: (1) that GBX was required to have financing in place in order to satisfy subsection (f)(3), and (2) that without the Revised Financing Condition, GBX did not prove it is capable of financing the Project.

First, as discussed at length in GBX's Opening Brief and elsewhere herein, the Commission was not required to find that GBX had financing in place in order to find that GBX is "capable of financing" the Project in the future. Second, the Commission did not find that GBX only satisfied the "capable of financing" requirement by agreeing to be bound by the Revised Financing Condition. Instead, consistent with the plain language of subsection (f)(3), the Commission found both that GBX is capable of financing the Project *and* that the Revised Financing Condition protects against adverse financial consequences for the utility or its customers, thus satisfying the entirety of section 8-406.1(f)(3). The Commission found that if GBX is unable to satisfy the Revised Financing Condition, then the only parties that will experience

adverse financial consequences will be GBX's investors. (C 5892). The Revised Financing Condition was not designed to manufacture compliance with the "capable of financing" requirement, as appellees suggest, but to make sure that GBX bears all risk of adverse consequences if financing falls through.

Appellees argue that GBX would not be the only party to suffer adverse financial consequences if financing for the Project falls through because "those landowners whose properties lay along the proposed route suffered a material cloud on the titles to their lands" upon issuance of the CPCN. (Response Br., p. 21). Appellees cite no factual or legal support for this proposition, nor can they. A CPCN does not itself create a lien or encumbrance on the title of properties within the project area. *See Illinois Power Co. v. Lynn*, 50 Ill. App. 3d 77, 81 (4th Dist. 1977) ("[T]he order of the [Commission] did not amount to an appropriation of the owners' property and the making of the order gave the [Commission] no rights in owners' property."). Rather, the CPCN authorizes a utility to proceed with construction and, if necessary, initiate eminent domain proceedings through a process that requires further approval by the Commission and the courts. "The property owners' rights are in jeopardy for the first time in court and are protected there by the motion to dismiss and traverse." *Id.* Accordingly, the speculative potential future impact on landowners' property rights is not an "adverse financial consequence" contemplated in connection with subsection (f)(3), and appellees' baseless contention should be ignored.

Appellees also cite multiple past instances where courts overruled the Commission for taking "extra-legislative action" and attempt to draw parallels between those cases and this one. (Response Br., pp. 25–28). However, the only similarity between the first two cited cases and this case is the applicable standard of review. While the appellate court recited the same standard, the cited cases reversed the Commission's findings based on the specific record in those cases. *See Business & Professional People for Public Interest v. Illinois Commerce Com'n*, 136 Ill. 2d 192 (1989) (concluding that the Commission's order setting a rate increase was not supported by "substantial evidence" in the record because the Commission did not make the requisite finding that the rate increase was "reasonable"); *Illinois Bell Telephone Co. v. Illinois Commerce Com'n*, 352 Ill. App. 3d 630, 641–42 (3d Dist. 2004) (reviewing the Commission's fact findings under the "substantial evidence" standard of review and finding that, although the Commission had the authority to impose a capital spending requirement pursuant to section 13-506.1 of the PUA, there was no evidence in the record to support the amount of that specific requirement). The reversal standard is not impossible to meet; it's simply not met here, where substantial evidence in the record supports the Commission's finding that GBX is capable of financing the Project.

The third case appellees cite, *LifeEnergy, LLC v. Illinois Commerce Com'n*, does not support overturning the Order either. 2021 IL App (2d) 200411. There, the Commission initiated proceedings to investigate whether

LifeEnergy violated agent training and certification requirements. *Id.* at ¶¶ 5–7. The Commission found that LifeEnergy failed to comply with the applicable rules and ordered LifeEnergy to reimburse customers $34,178.20, an amount calculated by LifeEnergy, within 45 days of the order, and submit proof of such refund to the Commission. *Id.* at ¶ 62. However, rather than verifying the amount of the refund required by the order prior to its entry, the Commission required LifeEnergy to file a customer list and proposed refunds within 10 days of the entry of the order, showing how the refund was calculated, and giving any party the opportunity to file an objection identifying any errors in the calculation. *Id.* On appeal, the court found that the requirement to submit proof of refund "was a mere compliance filing," but that requiring a customer list and method of calculation "invited further evidence and proceedings," in violation of 220 ILCS 5/10-103. *Id.* at ¶ 145. The court upheld the reimbursement order, but vacated the separate directive to submit a customer list and method of evidence, and allowed parties to object. *Id.* at ¶ 148.

The Commission's order in *LifeEnergy* bears no resemblance to the Order under review here, where the Commission made a final decision that GBX satisfied section 8-406.1(f)(3) and did not direct further proceedings. Unlike the portion of the *LifeEnergy* order that was reversed, the Order here does not contemplate re-opening evidence to determine whether GBX satisfied subsection (f)(3). The Commission already determined that GBX is capable of financing the Project.

If anything, the Revised Financing Condition is akin to the "mere compliance filing" upheld in *LifeEnergy* because it only requires submission of documents and information confirming that GBX has not installed transmission facilities before obtaining commitments for funds sufficient to finance the Project. As detailed above, appellees' reliance on this case law is based on the flawed premise that the Commission only found that GBX was "capable of financing" the Project because it agreed to the Revised Financing Condition. Since this is not the case, this argument should be rejected.

D. The Commission properly found that GBX met its evidentiary burden of establishing that it is capable of financing the Project.

GBX's Opening Brief contains ample citations to the record before the Commission supporting the Commission's finding that GBX is capable of financing the Project. (Op. Brief, pp. 38–40). The court may only reverse the Commission's finding if it concludes that such a finding is not supported by "substantial evidence based on the entire record of evidence presented to or before the Commission." *Illinois Power Co. v. Illinois Commerce Comm'n*, 382 Ill. App. 3d 195, 201 (3d Dist. 2008). To do this, appellees must offer record evidence showing it is "clearly evident" that GBX *does not* have the capability of financing the Project. *See, e.g.*, *Continental Mobile Telephone Co., Inc. v. Illinois Commerce Com'n*, 2021 IL App (1st) 200366, ¶ 54. They do not do this. Instead, appellees cite to other Commission dockets to argue that GBX's evidence of its financial condition is lacking in comparison. (Response Br., pp. 30-32). None of the decisions suggests a different outcome here.

First, appellees cite to Rock Island Clean Line LLC ("Clean Line"), which proposed using the same project financing approach as GBX. Rock Island Clean Line LLC, ICC Dkt. No 12-0560 (Nov. 25, 2014), Order at 131–32. But that case is like this one and warrants the same outcome. Like GBX, Clean Line's initial capital was provided by Clean Line's equity investors, with project-specific financing arrangements to be entered into with lenders or other investors or partners after long-term transmission contracts are entered. *Id.* at 133. Also, like GBX, Clean Line relied on the experience of key members of its management team in raising capital in the energy industry to establish that it was capable of financing large infrastructure projects. *Id.* at 134. Clean Line agreed to the same Revised Financing Condition as GBX in order to protect against adverse financial consequences for other parties. *Id.* at 134–36.

Next, appellees cite to two cases involving Ameren Illinois Company ("AIC"). In the first (ICC Docket No. 13-0115), AIC provided evidence that the project would be fully supported by its existing lines of credit and demonstrated its access to funds, credit, and borrowing capability. Ameren Illinois Co., ICC Dkt. No. 13-0115 (Sept. 4, 2013), Order at 14–16. In the second (ICC Docket No. 15-0064), AIC introduced evidence that it had access to a short-term credit facility for immediate construction capital requirements and access to parent company funds. Ameren Illinois Co., ICC Dkt. No. 15-0064 (June 16, 2015), Order at 11–12. Like these cases, GBX introduced evidence of its access to initial capital from its parent company, including approximately $60 million to

that date, and its existing relationships with financial institutions that could support the Project's financing. ICC Ord., C5884–85 (A62–63).

In ICC Docket No. 15-0278, ATXI introduced testimony that its parent company, Ameren, was well-capitalized and had adequate financial resources and access to debt capital. Ameren, ICC Dkt. No. 15-0278 (Nov. 12, 2015), Order at 7–8. Similarly, in ICC Docket No. 22-0336, Aqua Illinois provided testimony regarding its day-to-day working capital and available bank lines of credit. Aqua Illinois, Inc., ICC Dkt. No. 22-0336 (Dec. 15, 2022), Order at 6. Likewise, GBX introduced evidence that its parent company, Invenergy Renewables Holdings, is an operating company with billions of dollars in assets, the ability to provide equity to support Project costs initially, and existing relationships with large financial institutions that will provide financing once the Project reaches a stage of development where it can use customer contracts as collateral. ICC Ord., C5884 (A62); R126:18-127:2, 129:18-130:9.

Finally, in ICC Docket No. 16-0412, American Transmission Company LLC provided evidence that it had constructed similar transmission lines in the past. American Transmission Co. LLC, ICC Dkt. No. 16-0412 (December 20, 2016), Order at 5–6. GBX also provided evidence that its management team had significant experience in financing large infrastructure projects. ICC Ord., C5884 (A62). In sum, the evidence in the Commission dockets cited by

appellees does not differ substantially from GBX's evidence and, in fact, compares favorably.

Appellees also urge this court to presume that any financial evidence not provided by GBX would have been unfavorable if produced, citing *Beery v. Breed*, 311 Ill. App. 469 (2d Dist. 1941). However, *Beery* does not support such a presumption. In *Beery*, the court held that "where the plaintiff makes a prima facie case, the failure of the defendant to produce any evidence warrants the inference that the testimony would be unfavorable to him, and may be considered by the jury." *Id.* at 475–76. This construct does not apply in administrative proceedings. Here, GBX is the party with the burden of proof, and it made a sufficient showing that it is capable of financing the Project. There is no inference to be drawn against it for not offering evidence that appellees claim was necessary.

Regardless, GBX did not wholly fail to produce "any evidence." The record contains abundant evidence of GBX's and its parent company's financial condition in the form of testimony on direct and cross examination. Section 8-406.1(f)(3) does not require submission of any specific types of evidence supporting an applicant's capability of financing a project, so GBX's so-called "failure" to produce specific types of evidence now desired by appellees does not support an adverse presumption. In any event, even if the *Beery* presumption applied, it would not compel a conclusion that GBX is not capable of financing the Project. It would merely create a permissible inference that there was

evidence adverse to GBX's position, and the Commission could consider that inference against the ample evidence supporting GBX's position. *See id.* at 476 (nothing that the inference "may be considered by the jury").

Last, appellees rely on *Citizens Valley View Co. v. Illinois Commerce Com'n*, 28 Ill. 2d 294 (1963), arguing it is "substantially similar." (Response Br., pp. 35–37). It is not. In *Citizens Valley*, the Court held that the Commission's finding that the utility was "financially able" to furnish the needed services was not supported by substantial evidence. The finding rested entirely upon the testimony that the utility's major shareholder and his brother were "financially able to build these facilities and if necessary would furnish the money" to the utility. *Id.* at 304. No evidence was offered about "the method" the applicants would use to supply the money, whether by loan or otherwise. *Id.* More evidence "as to the proposed financial structure" of the utility and its method of [obtaining] capital" was needed." *Id.* Here, by contrast, GBX gave detailed testimony, subject to cross examination, regarding the method it proposed utilizing to finance the Project, its proposed financial structure, and its method of obtaining capital.

The Commission's determination that GBX is capable of financing the Project is based on substantial evidence. Appellees have not shown that the opposite conclusion is "clearly evident." Accordingly, appellees have not carried their heavy burden to establish that the Commission improperly concluded that GBX is capable of financing the Project.

E. The Commission's interpretation of section 8-406.1(f)(3) is entitled to substantial deference under Illinois law.

While by no means outcome determinative, as the Commission's decision was based on the unambiguous language of the statute and well-founded in the record before it, the Court should nevertheless address the level of deference afforded to the agency interpretations in Illinois. Appellees rely on *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) to argue that this Court should not apply the *Chevron* deference framework when reviewing the Commission's interpretation of section 8-406.1(f)(3). However, *Loper Bright* does not impact state level matters, and the "*Chevron* deference" approach to review of agency interpretations is still the law of the land in Illinois. *See Church v. State*, 164 Ill. 2d 153, 161 (1995) ("A court will not substitute its own construction of a statutory provision for a reasonable interpretation adopted by the agency charged with the statute's administration.").

This case presents an opportunity for this Court to reaffirm that Illinois administrative agencies such as the Commission are entitled to deference when interpreting and applying the statutes they are charged with administering. Upholding the Fifth District's opinion here would change Illinois law and confirm that courts are better positioned than regulatory bodies to make fact findings and determinations on complex issues that the Illinois legislature has specifically delegated to the regulatory agencies.

Illinois courts defer to the Commission on its resolution of any ambiguities in the statutes it is charged with administering and enforcing. *See*

Illinois Consol. Telephone Co. v. Illinois Commerce Comm'n, 95 Ill. 2d 142, 152 (1983) ("[C]ourts will give substantial weight and deference to an interpretation of an ambiguous statute by the agency charged with the administration and enforcement of the statute.); *see also People ex rel. Madigan v. Illinois Commerce Comm'n*, 2015 IL 116005, ¶ 22 ("Though we are free to disagree with the Commission on what the [Public Utilities Act] means, we remain hesitant to disregard how the Commission applies it. The Commission's interpretation of the Act is accorded deference because administrative agencies enjoy wide latitude in effectuating their statutory functions."); *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 362 Ill. App. 3d 652, 656 (4th Dist. 2005) (Noting that, although courts "generally construe statutes *de novo*", "if the legislature has charged an agency with administering and enforcing a statute, [courts] 'will give substantial weight and deference' to the agency's resolution of any ambiguities in that statute… if the Commission's interpretation is a permissible one, the fact that [the court] might have interpreted the statute differently will not justify reversal."); *People ex rel. Raoul v. Illinois Commerce Comm'n*, 2025 IL App (2d) 230020, ¶ 28 (internal citations omitted): "[C]ourts have consistently afforded 'substantial weight and deference' to the Commission's interpretation of a statute that it is charged with administering and enforcing.").

Additionally, deference is "often applied in the case of factual situations where constructions have been consistently adhered to for a long period of

time." *Illinois Consol. Telephone Co.*, 95 Ill. 2d at 152. "The longer an agency has adhered to an interpretation of the statute, the more weight the interpretation deserves; but consistency and duration are not prerequisites to [the court's] duty of deference." *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 362 Ill. App. 3d at 657. As detailed in GBX's Opening Brief, the Commission has long adhered to its interpretation that the "capable of financing" requirement does not require financing in place at the time of CPCN issuance. (ICC Docket No. 12-0560, Order at 150-151). In Illinois, this interpretation is entitled to substantial deference.

II. Appellees' remaining challenges to the Order are meritless and should be rejected outright.

A. The Order did not need to address section 8-503 of the Public Utilities Act.

Appellees argue that the Commission must make findings that GBX satisfied the criteria under section 8-503 in order to grant authority to construct the Project pursuant to that section. Appellees focus on the mandate in section 8-406(b-5) that "[t]he Commission shall grant the application for a certificate of public convenience and necessity and requests for authority under Section 8-503 if it finds that" that the applicant and proposed project "satisfy the requirements of this subsection and otherwise satisfy the criteria of this Section or Section 8-406.1 and the criteria of Section 8-503…." 220 ILCS 5/8-406(b-5). Appellees suggest that the Commission "cannot read into a statute limitations or exceptions that the legislature itself did not create." (Response Br., p. 41.)

However, the legislature explicitly created such a limitation or exception. Appellees completely ignore the second part of subsection (b-5)'s mandate that explicitly says the Commission only needs to find the criteria of section 8-503 "as applicable to the application and to the extent such criteria are not superseded by the provisions of this subsection." *Id.* § 8-406(b-5). As detailed in GBX's Opening Brief, because GBX applied for a CPCN under section 8-406.1, subsection (b-5)'s mandate above yields to section 8-406.1's mandate to authorize construction under section 8-503.

B. The Commission had the authority to give GBX sixty months to begin construction.

Appellees assert, per section 8-406(f), that the CPCN must be exercised within two years, that this subsection controls, and that the Commission cannot modify it. (Response Br., pp. 41–43.) All of these assertions are incorrect. Appellees rely on section 8-406(f)'s requirement that a CPCN be exercised within a period of two years from the date it is granted and argue that section 8-406.1(i) only allows the Commission to modify that period within that time frame. (Response Br., p. 42.) Basically, appellees argue that section 8-406(f) operates as a limit on the discretion granted to the Commission in section 8-406.1(i) to authorize construction "in the manner and within the time specified" in their order granting a CPCN.

Appellees' interpretation ignores the plain language of section 8-406.1(i), which explicitly provides: "*Notwithstanding any other provisions of this Act*, a decision granting a certificate under this Section shall include an

order… authorizing or directing the construction… in the manner and *within the time specified in said order*." 220 ILCS 5/8-406.1(i) (emphasis added). When a statute begins that way, it means that the statute operates as an exception to all other statutes and controls over any other conflicting section. *Waliczek v. Ret. Bd. of Firemen's Annuity & Ben. Fund of Chicago*, 318 Ill. App. 3d 32, 36 (1st Dist. 2000); *Thomas v. Illinois Dep't of Healthcare & Family Servs.*, 2016 IL App (1st) 143933, ¶ 16 (finding that it was error to apply a generally-applicable statute over an operative statute with a "notwithstanding" clause). Accordingly, the two-year time frame in section 8-406(f) does not limit the Commission's discretion to allow a different, greater time frame for CPCN granted pursuant to section 8-406.1. If there is any conflict between these two sections, then section 8-406.1 prevails.

C. The Cost Allocation Condition does not violate 220 ILCS 5/10-201(e)(iv)(B).

Appellees argue that the Cost Allocation Condition in the Commission's Order violates 22 ILCS 5/10-201(e)(iv)(B) because the Commission does not have subject matter jurisdiction to impose or enforce such a condition. (Response Br., p. 43.) However, as the Commission directly determined in the Order, the Commission's power to enforce the Cost Allocation Condition is derived from its general authority to alter or amend CPCNs pursuant to 220 ILCS 5/10-113(a). The Cost Allocation Condition is merely a stipulation between the parties that binds GBX to its promise to not allocate Project costs to Illinois ratepayers through an RTO transmission tariff without first

engaging the Commission. The federal statute cited by appellees—16 U.S.C. § 824—does not divest, expressly or otherwise, the Commission of jurisdiction to approve the Cost Allocation Condition. Accordingly, although the Project is subject to FERC jurisdiction, the Commission may continue to exercise jurisdiction in the interest of protecting public welfare and in harmony with FERC's concurrent powers. *See Grotemyer v. Lake Shore Petro Corp.*, 235 Ill. App. 3d 314, 316 (1st Dist. 1992) (holding that Congress must affirmatively divest a state agency in order to vest a federal agency with exclusive jurisdiction).

III. The Court should address the constitutional issues raised in the Fifth District here rather than remand.

Section 8-406(b-5) is not unconstitutional. GBX fully adopts and incorporates the Commission's arguments on this issue. This issue has now been fully briefed by the parties. In the interest of judicial economy and avoiding piecemeal rulings, this Court should address the constitutional arguments raised here rather than remanding these issues to the Fifth District for consideration.

CONCLUSION

Despite the appellees' attempts to confuse the issues, this case has nothing to do with so-called "special legislation" or eminent domain proceedings. This is a straightforward administrative review case that involves the Commission's application of a discrete statutory requirement and the level of deference to afford that decision. This Court should uphold the Commission's Order applying the unambiguous language of subsection (f)(3) and granting GBX's CPCN based on substantial evidence in the record. To the extent this Court finds any ambiguity, the Court should defer to the Commission's longstanding interpretation of the "capable of financing" requirement. Additionally, the Court should address all issues raised before the Fifth District below to promote judicial efficiency and avoid piecemeal litigation.

Accordingly, GBX respectfully requests this Court reverse the Fifth District and affirm the Commission's order granting GBX a CPCN.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing 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 5,984 words.

/s/

CERTIFICATE OF FILING AND SERVICE

I, Adam R. Vaught, attorney for appellant GBX, certify that I electronically filed via Odyssey EFile IL the foregoing appellant's reply brief with the Clerk of the Supreme Court on the 15th day of October, 2025.

The undersigned further certifies that on the 15th day of October, 2025, an electronic copy of the foregoing appellant's reply brief is being served through the Court's electronic filing manager to counsel below.

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Under penalties as provided by law pursuant to § 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/