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 and 123021

IN THE
SUPREME COURT OF ILLINOIS

AMEREN TRANSMISSION COMPANY OF ILLINOIS,

Plaintiff-Appellant,

v.

RICHARD HUTCHINGS, RITA HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC and UNKNOWN OWNERS, et al.,

Defendants-Appellees.

On Direct Appeal from the Circuit Court of 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

BRIEF AND ARGUMENT OF DEFENDANTS-APPELLEES

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ORAL ARGUMENT REQUESTED

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4/20/2018 2:53 PM
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POINTS AND AUTHORITIES

ADDITIONAL STATEMENT OF FACTS

1. General Overview

The Appellees are a group of Edgar County property owners who own land over which a transmission line is to be constructed pursuant to an Order from the Illinois Commerce Commission ("ICC"), entered on August 20, 2013. R. E88-134. The Appellees submitted affidavits attesting that they never received any notice that their property would be directly affected by the route the ICC approved until they received a letter from Ameren Transmission Company of Illinois ("ATXI") dated September 6, 2013, following the Certificate of Public Convenience and Necessity entered on August 20, 2013. R. C897-898; E23 et seq.

ATXI availed itself of the procedures in Section 8-406.1, which became effective on July 28, 2010, to obtain expedited consideration of the Illinois Rivers Project. R. E104. From the initial filing of the Petition by ATXI, the Commission raised questions about the exercise of the discretion to seek expedited review due to the scope of the project. R. E104. It became apparent during the proceedings that the Administrative Law Judges and the ICC noted that shortcomings on ATXI's own routes and analyses were being raised during the evidentiary hearings. R. E106.

When ATXI petitioned ICC for a Certificate of Public Convenience and Necessity, it proposed a primary route and an alternate route. R. E102. Following the Petition filed by ATXI, numerous parties intervened during the ICC proceedings and proposed alternate routes. R. E102.

One of the intervenors to the Kansas-Indiana State Line Section was Stop Coalition,

who proposed two alternative routes. R. E114. Stop Coalition filed its Motion for Leave to File an Alternative Route Proposal on January 17, 2013. Stop Coalition included maps of their proposed routes and the names and mailing addresses of the property owners affected by their routes. R. C68. The ICC did not mail or serve the Appellees with the new proposed routes filed by Stop Coalition. Stip. R. C897-898. Furthermore, ATXI's primary route and alternate route proposals did not list the Appellees as landowners whose property would be affected by the project. R. C713.

After the ICC Order was entered on August 20, 2013, landowners who owned land in Edgar County which would be affected by the approved Stop Coalition Route 2 received a form letter from ATXI. R. C897-898. 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 the new high-voltage transmission line on their property. R. E3. The letter further advised landowners that "This transmission line, which is known as the Illinois Rivers Project, will affect property you own. … A contractor on ATXI's behalf, will contact you sometime … to negotiate … easement rights ATXI is seeking." R. E3.

Following the receipt of the letter, a group of landowners in Edgar County filed a Petition for Leave to Intervene on September 18, 2013 with the ICC. R. E6-9. Those intervenors were Christopher Patrick, Jack and Jill Hoffman, Gary Tresner, Thomas Ogle, Vern See, Ronald Martin, Stephen Eitel, Brent Becker, and Daniel and Lisa Smittkamp ("The Edgar County Citizens Are Entitled to Due Process"). R. E6-8.

On September 19, 2013, landowners/intervenors filed their Due Process Motion to

Strike Proceedings as to the Edgar County Segment and Application for Rehearing. R. E12-18. The landowners/intervenors then filed the Petition to Supplement Due Process Motion to Strike Proceedings as to the Edgar County Segment and Application for Hearing dated September 30, 2013. R. E19-76.

On October 2, 2013, the ICC denied Defendants' Motion for Leave to Intervene. R. E77-78. 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. R. E77-80. The ICC later permitted the landowners to intervene for the purpose of appealing the ICC Orders.

2. ATXI Files Eminent Domain Complaints and the Landowners Filed A Traverse and Motion to Dismiss

ATXI filed 35 Eminent Domain Complaints against landowners in Edgar County beginning in April, 2016. R. C10-17. The landowners filed a Traverse and Motion to Dismiss on or about August 5, 2016. R. C51-59. The landowners alleged that the remedies requested by ATXI, 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 ICC under Section 8-406.1 of the PUA, are unconstitutional in that they allow the taking of property without due process of law. The landowners further alleged that they did not receive notice that they were being deprived of their property. R. C51-59; C897-898.

All Landowners/Appellees signed Affidavits stating the length of time their family had been record holder of the real estate, their address and how long they had been located at their address, and stated that they did not receive any notice from the Illinois Commerce Commission that the real estate they owned was subject to the Certificate of Public

Convenience and Necessity, authorizing the construction, operation, and maintenance of a transmission line on real estate they owned. R. C710, C897-898.

The Appellee-Landowners are Richard and Rita Hutchings, James and Angela Tate, Patricia Jane Martin, Butch and Meghan Creech, Edgar County Bank & Trust Co. Trust No. 455-195 (Ron and Kathy Woodyard), Matthew Garvin, State Bank of Chrisman Trust No. 476 (Steve Brinkerhoff), Scott Henson, Rick Brinkerhoff, Donna Weir, Robert McNabb, Bill Higginbotham, Mike Higginbotham, Terry Higginbotham, Daniel and Lisa Smittkamp, Jack and Jill Hoffman, Steve Eitel, Magers Family, LLC, Becker Family Trust, Michael Tresner, Vern and Karen See, Lanell and Brent Becker, Virginia Kirsch and William Rowse, Richard Bennett, Dorothy Baber, Jane Mangrum, Jill Shrader, Charles and Patricia Schaich, Tom Ogle, Lori Brengle, Tim Martin, Tom Martin, Ron Martin, Edgar County Bank and Trust Co. Trust No. 455-326 (Deborah Allen), and Chris Patrick.

3. Circuit Court Grants Landowners' Motion to Dismiss and ATXI Appeals

The Circuit Court entered an Order granting landowners' Motion to Dismiss, finding that 220 ILCS 5/8-406.1 as it existed at the time of these proceedings was facially unconstitutional. R. C975. (That section has since been amended.) It failed to require personal notice by registered mail or other means which would insure notice to any landowner whose property may be considered for primary or alternate routes proposed throughout the certification process. R. C975. By requiring such notice only to landowners identified in the Application, it deprived landowners whose property was proposed in alternate routes later suggested by the utility or intervenor the same opportunity to participate or object. R. C975. Absent a valid reason to distinguish one group of landowners

from another, due process requires identical notice, which was not provided in this case. R. C976. The method by which the statute was applied also deprived defendants of federally protected constitutional rights. R. C976.

ATXI filed a post-judgment motion challenging the Order's compliance with Illinois Supreme Court Rule 302(c)(2) and Rule 18. R. C977-980.

Judge DeArmond's Order adequately supported its finding that the previously existing version of the statute, 220 ILCS 5/8-406.1(a)(3), was unconstitutional, both on its face and as applied to these Defendants (R. C1049), and the necessary findings required by Supreme Court Rules 18 and 203(c) were supplied.

ARGUMENT

Introduction

It would be difficult to imagine a more unfair and unequal utility routing process than what happened in this case. The defendant/landowner/appellees were never given notice that this power transmission line was to be routed across each of their properties until that route had been approved by the Illinois Commerce Commission. The landowners' first notice of the route occurred when each of them received a letter saying that the ICC had entered an order not only issuing a Certificate of Public Convenience and Necessity to ATXI, but also authorizing ATXI under Section 8-503 to begin construction of this new high voltage transmission line. The letter informed the landowners that the project "will affect property you own," and that they would be contacted by ATXI soon for the purpose of obtaining easements.

One of the many dramatic aspects of this case is that the offending route was proposed by other landowners upon whose land another route had been proposed, thereby shifting the route completely off of their property many miles away to the properties owned by defendants. The ICC Administrative Law Judges recognized that notice to the defendants, whose land would be newly implicated in the proceedings, was essential. Those ALJ's directed the proponents of the alternative route to provide the names and addresses of the newly at-risk landowners, which they did. But, for unknown reasons, neither the ICC nor ATXI gave notice of the slightest kind to the defendants of the important development of this new route.

This unfairness was made even more vivid and consequential when the commissioners of the ICC, in approving the new route across defendants' land, expressly stated that a ground of its decision was the lack of objection from these defendants:

> "[P]erhaps 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. Such acceptance is not mirrored along ATXI's Alternate Route."

ICC Order, October 20, 2013, R. E133.

That mistaken conclusion of the ICC, which was enabled by the failure to send notice to the defendants, could not be further from the truth and reality of the defendants before this Court, who object strenuously to the placement of this line on their land.

This major 375-mile high voltage transmission line project running across Illinois from the Iowa border to the Illinois border was submitted by ATXI under a relatively new

statute, 220 ILCS 5/8-406.1, captioned "Expedited Procedure," which was enacted in 2010. A3. The ATXI petition seeking the CPCN for this project was filed under that then-recently enacted statute on November 7, 2012. R. E98. That statute, true to its caption, sets a stringent, compressed timeframe requiring that the ICC issue its decision within 150 days after the application is filed, which can be extended only one time for an additional 75 days upon good cause shown. § 406.1(i). The August 20, 2013 Order of the Commission ("Order") is replete with frank statements by the Commission about its requests of ATXI to withdraw segments of the project from this expedited procedure so as to increase the quality of the Commission's work, and ATXI was even requested to withdraw this request for expedited treatment and amend its petition to be brought under Section 8-406. As part of its reasoning, the Commission stated:

> "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 emerge if adopted under one of the stipulations." R. E105.

ATXI rejected the requests of the ICC at every turn.

The Order contains an entire section captioned "Propriety of the Petition," in which the ICC expressed grave concern over the appropriateness and integrity of its decision in light of ATXI submitting a massive project of this size through the expedited procedures of Section 406.1. Defendants will not needlessly lengthen this brief by duplicating the entirety of that section of the Order here, but the Court is respectfully referred to the numerous serious concerns expressed there by the ICC. The ICC noted that the adoption of Section 406.1 was made at the urging of Ameren Corporation. R. E104. This project, "if not the largest, is one of the largest transmission line construction projects proposed in

Illinois within the last few decades." R. E104. The Commission "questions ATXI's exercise of its discretion to seek expedited review," and noted troubling concerns expressed by various entities, including the Illinois Farm Bureau. R. E104. The ICC went on to document numerous errors in the initial list of potentially affected landowners and municipalities submitted by ATXI, and documented the delay in the proceedings caused by that problem alone. Then, "two months later, ATXI realized that it neglected to send the complete list of landowners with its initial filing." R. E104.

The Commission related that when confronted with landowners' objections, that the Commission typically provides landowners an opportunity to identify alternative routes. But here, "whereas ATXI has had at least seven years to prepare the massive Illinois Rivers Project and file it at a time of its choosing, the expedited schedule in this proceeding only afforded landowners less than three weeks to identify alternative routes and those that own the impacted land." R. E105. Perhaps foreshadowing what was to come, the Commission stated "[T]he 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." R. E106. The Commission related colloquy among the commissioners attesting to the problems presented by ATXI's actions and the confined time restraints placed upon the Commission. The Commission concluded:

> "[T]he Commission is troubled by the very real possibility that the expedited schedule for considering such a massive project may result in less than optimal outcomes. Alternatives may be overlooked and shortcomings may be missed." R. E107.

The problems inherent within the compressed calendar of Section 406.1, of Ameren's design, in conjunction with its decision to submit this massive project through that troublesome procedure, are not brought before this Court on this appeal as legal issues. They serve, however, as useful backdrop to show, in part, how the dramatic deprivation of defendants' rights to notice came to pass, and to blunt any claim by ATXI that the need for speed should prevail over the injustice worked upon the defendants by the failure to provide them any notice that a route over their land was proposed.

There is another important change in the statutes which bears upon the decision of this case. The Eminent Domain Act was substantially revised in 2007. Among other changes, a new section was added which mandates a rebuttable presumption that the acquisition of an interest in property is primarily for the benefit, use or enjoyment of the public and necessary for a public purpose once a Certificate of Public Convenience and Necessity under certain acts is issued by the Commission. 735 ILCS 30/5-5-5(c). *Enbridge Energy (Illinois) v. Kuerth*, 2016 IL App (4th) 150519, subsequently held that that presumption was a "strong" presumption which could be overcome only by clear and convincing evidence. ¶ 134. As will be developed below, that statutory change which placed a high burden upon landowners once the CPCN was granted, distinguishes case law relied upon by plaintiff here for the proposition that the defendants did not have any right to due process in the ICC proceedings. To the contrary, the expedited procedure of section 406.1, coupled with the fact that that statute mandates the issuance of a Section 8-503 order from the Commission authorizing or directing the approved facilities, respectfully, requires the conclusion that defendants had an interest to be protected under the due process clauses

of the Illinois and United States constitutions. Defendants were not afforded due process, to their patent and dramatic detriment.

I. SECTION 406.1 IS UNCONSTITUTIONAL BOTH FACIALLY AND AS APPLIED BECAUSE THE STATUTE DOES NOT REQUIRE, AND THE ICC DID NOT PROVIDE, NOTICE TO DEFENDANTS OF THE PROPOSED ROUTE ACROSS THEIR LAND, IN VIOLATION OF THE DUE PROCESS CLAUSES OF BOTH THE ILLINOIS AND UNITED STATES CONSTITUTIONS.

The 1970 Constitution of the State of Illinois provides that "no person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." Article 1, § 2. The Constitution of the United States provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law." Amendment XIV, § 1. "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. "Due process principles apply to administrative proceedings." *Lyon v. Dept. of Children and Family Services*, 209 Ill. 2d 264, 272 (2008). "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.*, 399 U.S. 306, 314 (1950). In administrative matters:

> "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.' [Citation] 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, Inc. v. Illinois Liquor Control Comm'n, 2014 IL 116173, ¶ 26.

None of those protections were afforded to defendants before this line was routed across their lands, with an order from the ICC directing construction, granting eminent domain authority, and with an onerous statutory presumption attached to it.

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 in order for ATXI to construct, operate and maintain a new 345 kV electric transmission line and related facilities. The proposed line is to be 375 miles long. R. C152. 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 and directing construction of the project.

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 that the utility or the ICC 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 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 mandates that the chief clerk of the ICC is to then provide notice to these landowners of the initial hearing on the application.

Neither Section 8-406 of the Act nor Section 150(h) explains the procedure for notifying landowners such as defendants 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 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 considering the Project, it was broken down into segments. The ICC 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.

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 intervenors' alternate route proposal, a review of the ALJs' status hearings shows how they determined notice should be handled. The ALJs wanted to ensure the intervenors who proposed alternate routes provided contact information for landowners who would be newly affected by the intervenors' proposals so that affected landowners could be notified.

The ALJs stated:

> "[Y]ou need to identify any other landowners that are going to be affected by it because we don't want to change something on these folks land without giving them notice, just like you wouldn't like it if you got a line put on your property without notice."

A representative of Ameren asked:

> "What information would you expect at a minimum that they would have to provide you so that you would have the necessary information by which to notify perhaps affected landowners?"

The ALJ answered that the Commission would expect to see a map in the same nature as Ameren provided with their petition and that "then you also need to give us the actual addresses, names and addresses of individuals affected by this alternative."

Later, in response to yet another question as to how alternative routes were to be handled, the ALJ stated:

> "We have to let any newly affected property owners have an opportunity to be heard, so I think we have to find out who they are and we have to notify them in the process…."

ICC Docket No. 12-0598, Hearing before ALJ Albers and ALJ Yoder, December 3, 2012, p. 40, 61, 66. https://www.icc.illinois.gov/docket/files.aspx?no=12-0598&docId=191253

Judge Albers explained to the intervenors 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 on January 17, 2013. In order to comply with the ALJs' procedure, 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 an "Order Directing the Clerk to Issue Notice to Certain Affected Landowners."

On that same date the ALJs again addressed the importance of notice to landowners who would be newly affected by alternate routes proposed by intervenors:

> "[Y]ou will identify the route with a map and show all affected property owners by what you are proposing. You have to have their name and their address because they will have to be given notice that you have now suggested that the route go and affect them. Then we'll have to have, like today, another status hearing to give them notice of their process and get them their date to file any testimony."

ICC Docket No. 12-0598, Hearing before ALJ Albers and ALJ Yoder, Jan. 17, 2013, p. 109. https://www.icc.illinois.gov/docket/files.aspx?no=12-0598&docId=193328

On January 24, 2013, the Commission itself met. Chairman Douglas P. Scott stated:

> "Notice is incredibly important. The property owners' rights in this and any similar case are extremely important, and I think to give everyone the same opportunity to move forward, it makes sense both to restart the clock and add the 75 days on."

ICC Docket No. 12-0598, Bench Session, January 24, 2013, p. 18.
https://www.icc.illinois.gov/docket/files.aspx?no=12-0598&docId=193776

The parties to this case stipulated that a) the list of those landowners, the defendants before this Court, was filed with the clerk of the Commission, and b) that 35 the defendants never received any notice from the Commission after that filing concerning the proposed alternate route over their lands. R. C856; A118. In short, there is no evidence that defendants were ever notified of the line to be routed across their land before they received letters from ATXI advising of the Commission's Order, and beginning the process of acquiring rights to their land.

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. Immediately upon receiving the ATXI letters dated September 6, 2013, neighboring landowners began to talk with each other to determine whether they had missed some prior communication from ATXI. The landowners were surprised because those letters 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.

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.

Section 406.1 is facially unconstitutional in that it deprives any person who is identified as a landowner affected by an alternate route proposed after the initial application of due process and equal protection. Owners of land affected by the initial application are required to be given notice; subsequently identified owners, such as defendants here, are not.

That defect in the statute is palpable.

The procedure followed in this case dramatizes the importance of notice. The procedure proposed by the Administrative Law Judges handling this matter, if followed, would have protected the rights of defendants. But, it was not followed. The ALJs required that intervenors who wished to propose an alternate route identify all newly affected owners so that the Commission could give them notice. The intervenors complied with that direction, but the Commission never provided the contemplated notice.

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." ICC Docket No. 12-0598, Hearing before ALJ Albers and ALJ Yoder, Dec. 3, 2012, p. 60. https://www.icc.illinois.gov/docket/files.aspx?no=12-0598&docId=191253 This "we" is not ambiguous: ALJ Albers was placing the responsibility on the ICC as opposed to the intervenors. 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.

While the procedure was obvious and the responsibilities clearly defined, defendants never received any notice of the Stop Coalition proposed route. 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. R. E20, et seq. Had they received the notice according to the procedures implemented by the ALJs, the landowners would have been afforded the due process to which they were entitled.

Due process must be given to an individual prior to deprivation of his or her property rights. Due process means that a person has a right to be heard prior to the government affecting his or her property interests:

> "The federal and Illinois Constitutions protect persons from state governmental deprivations of life, liberty, or property without due process of law. U.S. Const., amend. XIV; Ill. Const. 1970, art. 1, § 2. Procedural due process concerns the constitutional adequacy of the specific procedures employed to deny a person's life, liberty, or property interests. [Citations omitted] Due process entails an orderly proceeding wherein a person is served with notice, and has an opportunity to be heard and to present his or her objections, at a meaningful time and in a meaningful manner, in a hearing appropriate to the nature of the case. [Citations omitted] The purpose of these requirements is to protect persons from mistaken or unjustified deprivations of life, liberty, or property. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972)."

Village of Vernon Hills v. Heelan, 2015 IL 118170, ¶ 31.

The method of the notice can change based on the situation, but it must be sufficient to reliably inform the individuals whose property interests will be affected. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 315 (1950).

Section 8-406.1 of the Act does not contain any provisions that safeguard these defendants' 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 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 do not equal notice that is "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*, 339 U.S. at 314. By the statute's 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 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.

In *Grimm v. Calica*, 2017 IL 120105, ¶ 24, this Court recently referred to *Mathews v. Eldridge*, 424 U.S. 319 (1976), as the "now-traditional balancing test for determining whether a person has received due process," and quoted the test to be applied:

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: 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 requirement would entail. *Id.* at 335, 96 S.Ct. 893."

Adams County Property Owners and Tenant Farmers v. Illinois Commerce Comm'n, 2015 IL App (4th) 130907, which constitutes the core of ATXI's position before this Court, correctly states that "a due process analysis must begin with a determination of whether a protectible interest in life, liberty, or property exists because if one is not present, no process is due." ¶ 46. Defendants acknowledge that *Adams County* held that a protectable interest in property did not exist at the time of the ICC hearing and that therefore the rest of the due process analysis need not be engaged in. ATXI argues strenuously that the same result should obtain here. With respect, *Adams County* and the older cases it relied upon did not take into account either a significant change in the Eminent Domain Act in 2007 or the nature of an expedited proceeding brought under Section 406.1 which carries with it an automatic Section 503 Order directing that the transmission line be constructed.

Adams County, in deciding that it need not engage in a full due process analysis because the ICC order merely approved plans and thus did not implicate any protectable property interest of defendants, relied on a line of cases extending as far back as *Chicago, B. & Q. R. Co. v. Cavanagh*, 278 Ill. 609 (1917). *Cavanagh* held that in a case involving relocation of train tracks, the approval of the commission of the movement of the tracks did not amount to appropriation of any interest in defendant's property because the order did not give the petitioner "any interest in or right to possession of the property." *Id.* at 617.

That reasoning was followed by this Court in *Zurn v. City of Chicago*, 389 Ill. 114, 130 (1945). This Court stated there that "the property rights of the landowners are in nowise affected." *Id.* at 132.

This Court again followed the reasoning of *Cavanagh* in *Egyptian Electric Cooperative Ass'n v. Illinois Commerce Comm'n*, 33 Ill.2d 339 (1965), but there foreshadowed why the outcome in this case should now be different. There, a competing supplier of electricity who had also deliberately purchased land upon a proposed route so as to perhaps gain greater rights, was not permitted to intervene. This Court reached that result "in the absence of facts showing that the proposed order would have a direct and adverse effect upon the appellant's rights." This Court further stated that "any rights it would have as a landowner may be asserted in the condemnation suit." *Id.* at 342, 3. The appellate court, in *Illinois Power Co. v. Lynn*, 50 Ill.App.3d 77 (4th Dist. 1977), followed the reasoning of *Cavanagh* and *Zurn* but in a different procedural context and, once again, in terms which foreshadowed the ability of defendants to assert their rights here. In *Lynn*, the court rejected the utility's argument that because the landowner had participated in the ICC proceedings, that it could not again litigate the question of "public use" and necessity in the eminent domain proceeding then before the court. The court relied upon the *Cavanagh* and *Zurn* reasoning to the effect that the ICC proceedings did not give the utility any rights in the owners' property, saying that those rights "are in jeopardy for the first time in court and are protected there by the motion to dismiss and traverse." *Id.* at 81. The court further said:

> "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 a public use. There is nothing in the Public Utilities Act preempting the rights of the property owners in the condemnation proceedings. The two Acts must be read in harmony if possible." *Id.* at 82.

Subsequent to all of those opinions, the Eminent Domain Act was amended in 2007 to provide for the "strong" rebuttable presumption which now expressly attaches to the Certificate of Public Convenience and Necessity. 735 ILCS 30/5-5-5(c). *Enbridge Energy (Illinois), LLC v. Kuerth*, 2016 IL App (4th) 150519, not only held that the presumption could only be overcome by clear and convincing evidence but made a landowner's task even more difficult by adding:

> "Deeming the Commission's findings worthy of a strong presumption is merely an acknowledgement of that expertise and would serve as a caution to trial courts to not easily disregard the findings of the Commission. Strong public policy favors that the landowners should be required to present clear and convincing evidence before the applicable rebuttable presumptions burst." *Id.* at 140.

Another significant change in the law subsequent to the *Cavanagh* line of cases was the enactment of Section 406.1 in 2010. In providing for that inordinately compressed "expedited" procedure, of Ameren's crafting, the legislature also required that when a certificate is granted under that section, that the Commission "shall include" an order pursuant to Section 8-503 of the Public Utility Act (220 ILCS 5/8-503) directing the construction of the line as specified in the order. Thus, the opportunity of landowners to separately object to a 503 order, which would be the case under the normal Section 406 "standard" proceeding, has been eliminated. 220 ILCS 5/8-406.1(i).

There is more. Section 8-509 of the Public Utilities Act provides for an order granting eminent domain authority to a utility. Historically, it, too, had to be applied for

by a separate petition. However, when the General Assembly enacted Section 8-406.1, it also amended Section 8-509 to provide, in part:

> "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…."

220 ILCS 5/8-509.

The amalgam of these statutory changes presents a far more onerous predicament to a landowner who did not have notice of the administrative proceedings than was presented in *Cavanagh* in 1917. The utility comes to the eminent domain proceeding pre-armed with a strong presumption, a warning from the courts to not lightly ignore the actions of the Commission, with an order directing construction and, of course, eminent domain authority, all of which may have been acquired without notice to landowners situated such as are the defendants before this Court now.

When the statutory scheme which previously existed at the time of the decision of prior cases has changed, then this Court has not hesitated to adapt the case law to conform to the then-extant statutes. *In re R.L.S.*, 218 Ill.2d 428, 447 (2006). Likewise, when ancient case law is found to have repeated prior holdings without contemporary examination, this Court has also been willing to adapt its decisions to modern realities. *Cochran v. Securitas Security Services, USA*, 2017 IL 121200.

In sum, as to the first *Mathews* factor, defendants' private interest is a fundamental right, that being to due process before deprived of property, which is protected under both the Fourteenth Amendment to the United States Constitution and Article 1 of the 1970

Illinois Constitution. Their right to their property has already been burdened without notice as is set out above.

Although this is a *de novo* appeal, defendants nonetheless respectfully urge that the circuit court also analyzed the remaining two *Mathews* factors correctly. R. C92; A26 et seq. "[T]he risk of an erroneous deprivation" of defendants' rights in its property through the procedures used by the Commission is, as Judge DeArmond wrote, "obvious." In any case, the loss of an ability to participate in a hearing due to a lack of notice would be almost an *ipso facto* conclusion because of the complete loss of ability to participate in the proceeding. But here there is dramatic proof that the absence of defendants from the proceedings before the Commission was wrongly, though understandably, taken by the Commission to signify that the defendants did not object to the taking of their land for this power line when in fact they vociferously object, as they do now before this Court. As quoted previously in this brief, the Commission's final order stated that "perhaps the most compelling information in the record is the lack of intervenors from parcels along that part of Stop Coalition's Route 2," and that "the lack of intervenors … indicates to the Commission that the landowners … at least do not object enough to actively oppose a … line in their area." The Commission drove home its point by saying that "such acceptance is not mirrored along ATXI's Alternate Route." ICC Order, Oct. 20, 2013, R. E133. In other words, the Commission not only noted the lack of objection, but took the silence of defendants as positive affirmation and approval of the presence of the line on their land.

The very fabric of the law of due process recognizes both the utility of participation which is enabled by notice and the unconstitutional risk which is presented when notice is not provided:

> "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).

The risk of the erroneous deprivation of the ability to participate became real here. The landowners whom Ameren was required to give notice to at the outset of its application intervened for the most part, and as a result, the route was shifted from the land of owners with notice to that of defendants who had no notice.

Judge DeArmond's rhetorical questions merit repetition here:

> "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." Order, R. C973; A27.

Included within the second *Mathews* factor is an analysis of "the probable value, if any, of additional or substitute procedural safeguards." Here, the value of the additional safeguard, which would have been notice to defendants and inclusion within the statute of a requirement of such notice, is clearly illustrated in the preceding paragraphs. The landowners who had notice were able to take effective action. The defendant landowners who had no notice suffered the imposition of this route upon their lands. The Commission

took the absence of the non-notified defendant landowners to be an expression of assent to the new route.

The General Assembly has spoken plainly to the value of additional procedural safeguards. Section 8-406.1 was amended, effective August 18, 2015, to provide as follows:

> "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).

The final *Mathews* factor is the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. Indicia of the complete acceptability of whatever might be entailed as a burden consequent to a notice requirement are abundant here. As noted immediately above, the General Assembly has already enacted a requirement for future projects that notice by registered mail be given to all owners of affected property for both primary and alternate rights of way. Further, in the ICC proceeding in this case, the ALJs required that intervenors proposing that alternate routes provide the names and addresses of the affected owners to the Commission so that those owners could be notified, in recognition of their vital interest in receiving such notice. Stop Coalition did as it was requested to do. For an unknown reason, the notices were never mailed by the Commission.

The additional burden on the government would be *de minimis*, especially considering that the utilities pay substantial fees to the government so that these hearings may be conducted.

Judge DeArmond concluded that defendants received no notice of the proceedings before the Commission, and he took note of the 35 uncontested affidavits from the landowners to that effect. Order, R. C975; A29.

Defendants were treated in wildly unequal fashion when compared to the initial landowners. The initial and early intervening landowners were not only given notice and the ability to participate, but through the actions of some of them, they categorically succeeded by shifting the route from their property to that of defendants, who were powerless to act because they had no notice of what was occurring. Defendants have not been afforded equal protection. This Court has recognized *sua sponte* that a due process argument can be recognized to be an equal protection argument. *Northern Illinois Homebuilders Ass'n, Inc. v. County of DuPage*, 165 Ill.2d 25, 47 (1995). See also *Stone Street Partners, LLC v. City of Chicago*, 2017 IL App (1st) 133159, ¶ 25.

Even though violations of due process and of equal protection are discussed in different terms, the analysis for each, in some circumstances, is much the same. *People v. Alcozer*, 241 Ill.2d 248, 262 (2011), *People v. Kimbrough*, 163 Ill.2d 231, 242 (1994). Even where the challenge made below was framed only in terms of due process, an appellee may advance both due process and equal protection claims when arguing in favor of affirmance of the court below. *People v. Reed*, 148 Ill.2d 1, 6 (1992).

Defendants now before this Court and the original landowners and intervenors who had notice are both similarly situated with respect to their fundamental interest in the ownership and preservation of their property. Yet, they were treated in starkly unequal fashion because of the failure of the statute to require equal notice and the failure of the Commission to accord the notice which it realized should have been given. Defendants have been denied equal protection of the law.

II. APPELLANT'S FIRST ISSUE AND ARGUMENT CONCERNING THIS COURT'S RULES ARE NOT WELL TAKEN AND HAVE NO CONTINUING IMPORT.

ATXI poses as its first issue whether the circuit court failed to comply with Supreme Court Rule 18 in assertedly not making the findings required by Supreme Court Rule 302(c)(2) in the Final Judgment Order of September 5, 2017 (R. C953; A7) and the Post-Judgment Order of November 6, 2017 (R. C1048; A31). Brief, p. 1. The argument relating to that issue is the first argument advanced by ATXI. Brief, p. 15. To the contrary of those assertions, there has been full compliance with those rules. Judge DeArmond issued his thorough and detailed Final Judgment Order, 24 pages in length, on September 5, 2017. ATXI filed a post-judgment motion. By the time that motion was heard on October 24, 2017, Judge DeArmond, now Justice, had been assigned to the appellate court. Judge Glenn was assigned the future handling of the cases. He entered a comprehensive order on November 6, 2017 addressing ATXI's Rule 18 and Rule 302(c)(2) contentions. In particular, that order both pointed out where the necessary findings had been made originally or supplied them in that post-judgment order. Both rules have been complied with.

ATXI's remaining argument in that section, that the statute could not be found to be facially unconstitutional because it could be constitutionally applied in "certain circumstances," does not withstand any scrutiny. The constitutional defect in Section 8-406.1 is that it does not require notice to landowners situated as these defendants are. ATXI states that "adequate notice could have been given to the landowners," and that therefore the statute is not facially unconstitutional. Brief, p. 17. It is true that any party, in any circumstance, could voluntarily act in such a manner as to not run afoul of the constitution. But the statutory defect remains: the statute did not by its express terms require such notice. And it was not given.

III. NEITHER RES JUDICATA NOR COLLATERAL ESTOPPEL PREMISED UPON ADAMS COUNTY PROPERTY OWNERS V. ILLINOIS COMMERCE COMMISSION SHOULD BE APPLIED HERE TO PRECLUDE THIS COURT'S CONSIDERATION OF DEFENDANTS' DUE PROCESS RIGHTS.

ATXI devotes considerable space to arguing that the circuit court, and by extension this Court, should have precluded defendants from presenting their due process arguments because ostensibly they had been decided by the appellate court in *Adams County Property Owners and Tenant Farmers v. The Illinois Commerce Comm'n*, 2015 IL App (4th) 130907, the appeal on administrative review from the ICC proceedings. Brief, pp. 31-39. ATXI's argument is that because the *Adams County* court found that the Edgar County landowners who participated in that case did not have a protectable property right at that stage of the proceeding, therefore all of the defendants in the eminent domain cases below here should be precluded from asserting their claims to due process.

At the outset, the limited nature of the inquiry by the *Adams County* court into the Edgar County landowners' due process rights should be kept in mind. The bulk of the analysis of due process in Adams County took place with respect to the separate but consolidated appeal of the *Adams County* landowners' claim that the expedited procedure of Section 406.1 itself violated their due process rights. 2015 IL App (4th) 130907, ¶ 44 et seq. When the *Adams County* court turned to the different due process claims advanced by the Edgar County appellants, the court first found that the denial of the Edgar County defendants' petition to intervene was not properly before the court on administrative review. ¶ 74. Nonetheless, the court went on to address the claim of the Edgar County defendants that their due process rights had been violated because of the lack of notice to them. ¶ 76. The court then referred back to its conclusion with respect to the Adams County defendants, saying that the Edgar County appellants did not have a protectable interest because the ICC proceedings had not "deprived landowners of their protected property interests." The *Adams County* court did not proceed to the rest of the *Mathews* due process analysis.

To the extent that the *Adams County* court was of the opinion that the denial of the petition to intervene was not properly before it, then that court's later ruling on the lack of a protectable due process right should be regarded as *dicta* because it was not necessary to the decision of the case. Preclusion doctrines are not applied where the "decision" relied upon was *dicta*. *Wright v. City of Danville*, 267 Ill.App.3d 375, 385 (4th Dist. 1994).

A major fundamental flaw in ATXI's preclusion argument is the absence of any recognition of the fact that both res judicata and collateral estoppel are equitable doctrines

which are to be applied on a discretionary, rather than mechanical, basis. Neither doctrine can be applied in such a way as to promote unfairness. Here, ATXI seeks to use those doctrines not to preclude duplicate litigation of defendants' due process rights, but rather to preclude any court's consideration of defendants' rights. ATXI argued in *Adams County*, and again argues here, that defendants had no due process rights in the ICC hearing. Ameren the argues here that defendants' rights to due process had to have been asserted, and were determined not to exist, in the ICC proceeding and cannot be entertained in this proceeding. In other words, ATXI argues that it was too early to assert defendants' rights in the ICC proceeding and that it is now too late to do so in this eminent domain case.

Collateral estoppel is a branch of res judicata. *Cirro Wrecking Co. v. Roppolo,* 153 Ill.2d 6, 20 (1992). Both collateral estoppel and res judicata are equitable doctrines. Generally stated, neither doctrine is to be applied in a manner which enables an unfair result:

> "[E]ven if the threshold requirements are met, the doctrine should only be applied as fairness and justice require. [Citation] 'Collateral estoppel is an equitable doctrine, so that, even where the threshold elements of the doctrine are satisfied, it will not be applied if an injustice would result.' [Citation] 'Res judicata should only be applied only as fairness and justice require, and only to facts and conditions as they existed at the time judgment was entered.' 'Courts must balance the need to limit litigation against the right to a fair adversarial proceeding in which a party may fully present its case.'"

Yorulmazoglu v. Lake Forrest Hosp., 359 Ill.App.3d 554, 563 (1st Dist. 2005).

It is doubtful that res judicata has any application here. Res judicata applies when a claim has been determined in a prior proceeding. ATXI has not articulated what the "claim" or "cause of action" is which it believes was determined in the *Adams County*

litigation. The Edgar County participants in *Adams County* were not pursuing a "claim." Rather, at most they were advancing the issue that their due process rights had been violated within the larger context of the ICC proceeding. Res judicata has no application here.

But even if it did, the circuit court did not err in refusing to apply it.

The Restatement (Second) of Judgments, § 26, provides in relevant part:

> "(1) When any of the following circumstances exist, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
>
> ….
>
> (d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme…."

Comment e to Section 26 speaks in terms which are highly critical of the type of inflexible result which ATXI argues for in this case:

> "The adjudication of a particular action may in retrospect appear to create such inequities in the context of a statutory scheme as a whole that a second action to correct the inequity may be called for even though it normally would be precluded as arising upon the same claim. … Similar inequities in the implementation of a constitutional scheme may result from inflexible application of the rules of merger and bar…."

Section 26 of the Restatement is followed in Illinois. *Rein v. David A. Noyes and Co.*, 172 Ill.2d 325, 341 (1996). In particular, the aspect of Section 26 set out above has been applied. *People v. Kines*, 2015 IL App (2d) 140518, ¶ 22, ("(Defendant's) claim comes within a well-established exception to the general rule of res judicata: the second action is not barred when 'the judgment in the first action was plainly inconsistent with the equitable implementation of the statutory scheme.'") Here, the Commission's having given notice of the proceeding to certain landowners and intervenors and yet not giving

notice to these defendants constituted a plainly inequitable implementation of both the statutory scheme of the Public Utilities Act and defendants' constitutional rights to due process.

"Equity dictates that the doctrine of res judicata will not be technically applied if to do so would create inequitable and unjust results…. The doctrine should only be applied as fairness and justice require." *Piagentini v. Ford Motor Co.*, 387 Ill.App.3d 887, 890 (1st Dist. 2009). Here, the injustice visited upon these defendants is palpable. The fact that their rights to due process were not recognized in *Adams County* should not serve to preclude this Court's consideration of those due process rights when they are asserted here in the context of these eminent domain proceedings. "The doctrine of res judicata need not be applied in a manner inconsistent with fundamental fairness." *Nowak v. St. Rita High School*, 197 Ill.2d 381, 393 (2001). As stated in *People v. Kines*, 2015 IL App (2d) 140518:

> "Res judicata is first and foremost an equitable doctrine, which 'may be relaxed where justice requires.' [Citation] In other words, the question is not solely whether the doctrine of res judicata applies; we must also ask whether it should be applied." (Emphasis in original.) ¶ 21.

A similar analysis applies to collateral estoppel. Collateral estoppel applies to issue preclusion and not to the larger topic of claim preclusion. Collateral estoppel, being a branch of res judicata, is likewise an equitable doctrine and is subject to similar equitable limitations upon its discretionary use. ATXI's brief is written as if establishing the elements of collateral estoppel is the end of the analysis. It is not. Rather, those "elements" are merely "the minimum threshold requirements for the application of collateral estoppel…." *Talarico v. Dunlap*, 177 Ill.2d 185, 191 (1997). Just as is so with res judicata, collateral estoppel should also not be employed where to do so would result in unfairness:

> "Even where the threshold elements of the doctrine are satisfied and an identical common issue is found to exist between a former and current lawsuit, collateral estoppel must not be applied to preclude parties from presenting their claims or defenses unless it is clear that no unfairness results to the party being estopped."

Talarico v. Dunlap, 177 Ill.2d 185, 191 (1997).

Restatement (Second) of Judgments, § 28, sets out "exceptions to the general rule of issue preclusion," and provides in relevant part as follows:

> "Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> ….
>
> (2) The issue is one of law and … a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the law…."

This section of the Restatement has been recognized to apply in Illinois. *Du Page Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill.2d 71, 79 (2001).

The terms of that exception clearly apply here. The issue of whether defendants have a protectable property right worthy of due process protection is one of law. To the extent that the court might regard the issue as having been decided before, "a new determination is warranted" here in order to take account of both an intervening change in the applicable legal context or to otherwise avoid inequitable administration of the laws with respect to defendants' due process rights. The intervening change in the applicable legal context from the time of *Cavanagh* to the present has been documented in an earlier section of this brief. The dramatic change in the Eminent Domain Act and the mandatory issuance of a Section 503 order in conjunction with the expedited Section 406.1 process

are such intervening changes in the legal context since those earlier cases were decided. In addition, the complete deprivation of a full consideration of defendants' due process rights at this time is necessary to avoid the inequitable result which would obtain if ATXI's argument of preclusion were to prevail. Defendants would never have had a full exploration of their rights to due process.

In sum, similar equitable considerations for both res judicata and collateral estoppel support affirmance of the circuit court's having declined to apply either preclusion doctrine. To do as Ameren asks would only promote unfairness and would be inequitable in the context of this case.

Another fundamental defect with Ameren's preclusion arguments is that the deprivation of due process occurs, and takes effect, in the eminent domain case below. The words of Judge DeArmond below cannot be improved upon:

> "[H]aving 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.

The circuit court below, and this Court here, are confronted with a situation where defendants were plainly deprived of due process and where the effects of that deprivation are now before the court. It is in this proceeding that an order in favor of plaintiff cannot be entered which is reliant upon a proceeding in which due process did not exist.

There is arguably a missing element with respect to ATXI's depiction of the application of res judicata here. ATXI states briefly, in one paragraph, that the case below was tried on stipulated facts and that the stipulation discloses that "the parties agree 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." Brief, p. 35. While it is true that the stipulation states "the defendants – appearing under the title 'Edgar County Citizens are Entitled to Due Process' – filed a motion to strike the entire certificate proceeding ...," the stipulation does not plainly state that the intervenors in the ICC and *Adams County* proceedings are coextensive with the defendants before this Court. R. C858, A120. In fact, ATXI has never regarded the intervenors in the ICC proceedings to be coextensive with the defendants before this Court. For example, in Plaintiff's Memorandum in Support of its Post-Judgment Motion, plaintiff stated that "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." R. C983; A164. The Additional Statement of Facts to this brief lists all of the Edgar County Citizens as well as all of the eminent domain defendants in this case now before the Court. The defendants not named in that Statement of Facts as constituting the Edgar County Citizens did not participate in the *Adams County* appeal.

IV. ATXI'S ARGUMENT THAT "THE CIRCUIT COURT LACKED JURISDICTION" IS NOT IN ACCORD WITH THIS COURT'S HOLDINGS ON SUBJECT MATTER JURISDICTION, THE NATURE OF DEFENDANTS' ARGUMENTS, OR THE CIRCUIT COURT'S ORDER.

ATXI argues that "the circuit court lacked jurisdiction to issue a decision regarding the conduct of ICC proceedings." Brief, p. 39, et seq. Leaving no doubt as to its intent, ATXI writes "the circuit court does not have authority to issue determinations regarding the constitutional conduct of ICC proceedings." Brief, p. 40. That statement is at odds with this Court's modern case law on subject matter jurisdiction, with the circuit court's

reasoning, and with defendants' arguments. Judge DeArmond was sitting as a circuit court with general subject matter jurisdiction. He recognized that the defendants before him were "significantly disadvantaged" with respect to exercising their rights as landowners in condemnation proceedings by the "strong presumption, and shifting of the burden which would not otherwise exist in normal eminent domain proceedings." R. C964, 965; A18, 19. He recognized that defendants "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." R. C965; A19. The court recognized the limited scope of the *Adams County* appeal as was successfully contended for by Ameren:

> "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 process issues were involved since the ICC proceedings did not actually affect the landowners' property rights." R. C970; A24.

The circuit court then stated:

> "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.

Having found that defendants' due process rights were violated, the circuit court granted relief clearly within its jurisdiction – dismissing the eminent domain proceedings. R. C96; A30.

In similar fashion, defendants also only requested dismissal of the eminent domain cases based upon the fact that their property rights had been improperly eroded by the strong presumption which was the direct result of defendants not being afforded notice as is required by the due process clauses.

ATXI is correct in saying that the circuit court was not sitting in administrative review. The circuit court recognized that and no argument is made to the contrary. Rather, the filing of the eminent domain complaints invoked the general subject matter jurisdiction of the circuit court, rather than the special statutory jurisdiction applicable to administrative review. The circuit court's power in this case, its subject matter jurisdiction, was conferred by the Illinois Constitution. *Belleville Toyota, Inc. v. Toyota Motor Sales USA, Inc.*, 199 Ill.2d 325, 334 (2002). "Subject matter jurisdiction refers to the power of a court to hear and determine cases of the general class to which the proceeding in question belongs, and this jurisdiction extends to all justiciable matters." *People v. Castleberry*, 2015 IL 116916, ¶ 15.

If the legislature is to divest circuit courts of that original jurisdiction, it must be through a comprehensive statutory administrative scheme, and it must be done explicitly. *Employers Mut. Companies v. Skilling*, 163 Ill.2d 284, 287 (1994). There is nothing about the Public Utilities Act which purports to divest a circuit court sitting on an eminent domain case of subject matter jurisdiction to hear and decide constitutional arguments concerning deprivation of due process and equal protection. Although a court sitting in administrative review could entertain those claims of violation of constitutional rights, there is nothing about the Act which makes that power exclusive nor which deprives the circuit court in the eminent domain cases of also considering constitutional questions.

It is particularly apt and critical that the circuit court below heard these defendants' constitutional claims, and that this Court affirm that outcome now. The *Adams County* court decided that there were no rights to be protected there. Whether that decision was

right or wrong does not bear upon this case where the defendants are now seen to be laboring in an onerous situation which was caused by the fact that their due process and equal protection rights to notice were not honored.

ATXI cannot be heard to argue, as it does, that because it made it successfully through the ICC proceedings and the *Adams County* appeal without any recognition being made of defendants' due process rights that that inquiry is now over:

> "The United States Supreme Court has made 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."

Lyon v. Dept. of Children and Family Services, 209 Ill.2d 264, 274 (2004).

Judge DeArmond insightfully recognized below that the erosion of defendants' rights as landowners takes place in the eminent domain proceedings as a present consequence of the deprivation of their right to due process in the ICC proceeding, and that "now there are property interests at stake, and now process is due." R. C964, 971; A18, 25.

Regardless of whether *Illinois Power Co. v. Lynn*, 50 Ill.App.3d 77 (4th Dist. 1977), was right or wrong in following the *Cavanagh* and *Zurn* decisions, it was indisputably right in holding that rights of landowners survived the administrative proceedings for later assertion in the eminent domain proceedings:

> "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 a public use. There is nothing in the Public Utilities Act preempting the rights of the property owners in the condemnation proceedings. The two acts must be read in harmony if possible." *Id.* at 82.

ATXI's reliance upon *Enbridge Energy (Illinois), LLC v. Kuerth*, 2016 IL App (4th) 150519, *Town & Country Utilities v. Illinois Pollution Control Board*, 225 Ill.2d 103 (2007), and *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 117 Ill.2d 120 (1987) is misplaced. Brief, p. 44. None of those cases involved due process or any other constitutional claims.

In summary, defendants respectfully ask now, as they did at the outset of this brief, that this Court recognize the fundamental position taken by ATXI, which is that it was too soon for defendants to be heard to assert their right to due process in the ICC proceedings and the *Adams County* appeal, and that it is now too late to assert those claims. That cannot be the law. The circuit court did not err in finding that defendants' constitutional rights had been violated. It is within this Court's plenary power under Supreme Court Rule 366 to affirm that judgment in the context of what has occurred in this case.

V. THE CIRCUIT COURT CORRECTLY DECLINED TO RULE UPON THE TRAVERSE BECAUSE OF THE GRANT OF THE MOTION TO DISMISS.

ATXI's last claim of error is that the circuit court erred "when it failed to deny landowners' traverse based upon the evidence presented." Brief, p. 45. ATXI argues for the denial of the traverse on the merits.

The court granted defendants' motion to dismiss, and then correctly concluded "having granted the motion to dismiss, the court does not need to address the traverse." R. C976; A30. It is self-evident that that action of the circuit court was correct.

CONCLUSION

All defendants, by their attorneys, Asher & Smith, S. Craig Smith of counsel, and Law Offices of Michael T. Reagan, Michael T. Reagan of counsel, respectfully pray that the Circuit Court of Edgar County be affirmed.

Respectfully submitted,

RICHARD HUTCHINGS, RITA HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC and UNKNOWN OWNERS, et al., Defendants-Appellees

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CERTIFICATE OF COMPLIANCE WITH RULE 341

The undersigned hereby certifies that this Brief complies with the form and length requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding the appendix, is 40 pages.

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NOTICE OF FILING / CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on April 20, 2018, the undersigned electronically filed the foregoing BRIEF AND ARGUMENT OF DEFENDANTS-APPELLEES with the Clerk of the Illinois Supreme Court, through the Odyssey eFileIL Case Filing System, which will electronically send notification of such filing to the following attorneys of record at the email addresses indicated:

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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.

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