No. 18-___

IN THE

Supreme Court of the United States

RICHARD HUTCHINGS, *et al.*,

Petitioners,

v.

AMEREN TRANSMISSION COMPANY OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A then-new provision of the Illinois Public Utilities Act for providing expedited hearings to site electrical transmission lines effectively required that notice be given to landowners on proposed routes, but not to landowners subsequently put at risk by a new route proposed by the first landowners.

The questions presented are:

I. Where an evidentiary hearing to evaluate specified criteria under a power line siting statute results in orders approving a specific route for a line, directing its construction, and granting eminent domain authority to a privately owned utility, and also gives rise to a strong statutory presumption of public use and necessity for eminent domain litigation purposes, does the Due Process Clause of the Fourteenth Amendment require that affected landowners be given notice of those proceedings so that they may participate?

II. In those circumstances, where the siting statute requires that landowners affected by the route first proposed by the utility be given notice, does the Due Process Clause of the Fourteenth Amendment require that other landowners to whose lands the first owners propose to shift the route be given notice so that they, too, may participate?

III. Are courts required to provide a forum at some stage in which landowners affected by this quasi-judicial administrative decision which resulted in approval of a detailed route may present their claim that they have been deprived of their right to notice under the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS

Petitioners in this Court, who were appellees in the Illinois Supreme Court and defendants the Circuit Court of Edgar County, Illinois, 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.

Respondent, Ameren Transmission Company of Illinois, was the appellant in the Illinois Supreme Court and plaintiff in the Circuit Court of Edgar County, Illinois.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Richard Hutchings, et al., respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 2018 IL 122973, _ N.E.3d _ (2018). (App. 1a-23a) The order of the Circuit Court of Edgar County, Illinois, from which the appeal to the Supreme Court of Illinois was taken, entered on August 30, 2017, filed with the Circuit Clerk of Edgar County on September 5, 2017, is not reported. (App. 24a-51a)

JURISDICTION

The opinion of the Supreme Court of Illinois, with its two additional opinions, was filed on October 18, 2018. Petitioners timely filed their Petition for Rehearing on November 8, 2018. That Petition for Rehearing was denied on November 26, 2018. (App. 104a) On December 18, 2018, the Supreme Court of Illinois granted petitioners' motion to stay the mandate of that court pending the disposition of this Petition for a Writ of Certiorari. (App. 108a)

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

The order of the Circuit Court of Edgar County from which appeal was taken to the Supreme Court of Illinois declared a section of the Illinois Public Utilities Act to be unconstitutional both on its face and as applied. The Attorney General of Illinois was formally notified of the claim of unconstitutionality and the finding of that circuit court at every relevant stage, including the opinion of the Supreme Court of Illinois. The Attorney General of Illinois did not participate in

any aspect below. 28 U.S.C. § 2403(b) may apply, and this Petition for Certiorari will be served upon the Attorney General of Illinois.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, Section 1

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

220 ILCS 5/8-406.1 – Appendix H (Certificate of Public Convenience and Necessity; expedited procedure) (110a)

220 ILCS 5/8-503 – Appendix I (Authorization to Construct) (116a)

220 ILCS 5/8-509 – Appendix J (Grant of eminent domain) (118a)

735 ILCS 30/5-5-5 – Appendix K (119a)

> … Evidence that the Illinois Commerce Commission has granted a certificate or otherwise made a finding of public convenience and necessity for an acquisition of property (or any right or interest in property) for private ownership or control (including, without limitation, an acquisition for which

> the use of eminent domain is authorized under the Public Utilities Act, the Telephone Company Act, or the Electric Supplier Act) to be used for utility purposes creates a rebuttable presumption that such acquisition of that property (or right or interest in property) is (i) primarily for the benefit, use, or enjoyment of the public and (ii) necessary for a public purpose.

83 Ill. Adm. Code 200.150(h) – Appendix L (127a)

STATEMENT OF THE CASE

A. The Factual and Statutory Background.

Ameren Transmission Company of Illinois ("ATXI") is a public utility within the meaning of the Illinois Public Utilities Act and is subject to the transmission-siting jurisdiction of the Illinois Commerce Commission. In 2012, ATXI filed a petition for "expedited"' review by the ICC pursuant to section 8-406.1 of the Illinois Public Utility Act. (220 ILCS 5/8-406.1) ATXI sought a Certificate of Public Convenience and Necessity to construct and operate a new 375-mile-long transmission line, to run in an east-west direction across south central Illinois from the Iowa to Indiana borders. Then-new section 8-406.1, which was enacted in part at the urging of ATXI (R. E104), placed compressed tight time restrictions on every aspect of the siting process, and including an inflexible deadline by which the ICC must decide upon the petition.

The eventual order of the ICC contained frank statements by the Commission noting its unsuccessful requests of ATXI to withdraw segments of the project from that expedited procedure so as to increase the quality of the Commission's work. ATXI rejected each of those requests.

When ATXI filed its petition, it proposed both a primary route and an alternate route, as was required by statute.

The Commission is to decide upon the petition for a CPCN "after notice and hearing," and is to determine whether "all of the (specified) criteria are satisfied." (§ 406.1(f)) (App. 114a) The statute provides for discovery, intervention, and evidence, under the supervision of administrative law judges. Section 10-110 of the Public Utilities Act provides that notice of the hearings were to be given to "such other interested persons as the Commission shall deem necessary." (220 ILCS 5-10-110) Under the statute providing for the normal timetable for siting, the Commission's Rules of Practice require that the Commission provide notice of the "initial hearing" under that section to each owner of record of the land upon which the utility proposes to construct facilities or cross. (83 Ill. Adm. Code 200.150(h).)

Although that rule does not reference the expedited proceedings under section 8-406.1, nonetheless any proceeding under section 8-406.1 "shall include an order pursuant to section 8-503 of this Act authorizing or directing the construction" of the line approved by the Commission. (§ 8-406.1(i)) (App 115a) The Commission is charged by the Administrative Code with notifying the landowners of record of the time and place of the initial hearing on the application. (83 Ill. Adm. Code 200.150(h)) (App. 127a) Consequently, the landowners of record for both the primary and alternate routes proposed by ATXI received specific, formal notice of the routes proposed to be placed upon their lands.

Some affected landowners intervened, both individually, and under the aegis of organizations. The

section of the line relevant to this case is described as the Kansas-Indiana state line section. (Kansas is a small Illinois town, with a population of less than 1,000.) One of the organizations formed to intervene with respect to that segment was Stop Coalition. Stop Coalition both offered evidence challenging the routes proposed by ATXI and also proposed two alternative routes through Edgar County.

The administrative law judges administering this proceeding and the chairman of the ICC all expressed the importance of notice being given to landowners who would be affected by these subsequently proposed alternate routes. While sections 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 of 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.

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 the date that Stop Coalition sought leave to file its routes, 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 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 stipulated that the list of those landowners who would be affected by an alternate route proposed by Stop Coalition, and their addresses, was filed with the clerk of the ICC. However, the trial judge below found that no notice was ever mailed by the ICC to those landowners.

The ICC, after evidentiary hearings, decided to place the Kansas-Indiana state line segment on one

of the routes proposed by Stop Coalition, thereby removing it from the property of those intervenors who had notice of the proceedings.

Mr. and Mrs. Hutchings and the remaining 34 petitioners seeking certiorari are the owners of the land upon which the ICC placed the line as proposed by Stop Coalition. Each of the petitioners filed affidavits attesting that they had never been notified of the line to be routed across their land until they received letters from ATXI after the ICC's decision seeking to begin the process of acquiring rights to their land. (R. C856; C897-898; E23 et seq.)

Less than two weeks after being notified of the ICC's order and ATXI's initial attempt to gain their property, petitioners filed their due process Motion to Strike Proceedings and Application for Rehearing with respect to the Edgar County segment. (R. E12-18) The ICC denied petitioners' motion for leave to intervene, and on the following day, denied petitioners' due process Motion to Strike Proceedings and Application for Rehearing. (R. E77-80) The ICC later permitted the landowners narrowly limited intervention only for the purpose of participating in the appeal which was taken by various parties as to the ICC orders.

B. The Prior Appeal in *Adams County Property Owners & Tenant Farmers v. Illinois Commerce Commission* in an Illinois Intermediate Court.

Following the final order of the ICC which approved the specific route of the line, granted the Certificate of Public Convenience and Necessity, and directed the construction of the line, a large number of parties appealed to the intermediate Illinois appellate court.

Such an appeal from that administrative action is authorized by the Public Utility Act. (220 ILCS 5/10-201(a))

Among the many issues raised in that consolidated appeal was the claim by landowners in Adams County that the expedited procedure in this newly enacted statute violated their due process rights because, even though they had express notice of the proceedings, the extraordinarily compressed schedule set by statute violated their due process rights because they were unable to meaningfully participate in the administrative proceedings.

The court began its analysis by inquiring "whether a protectible interest in life, liberty, or property exists because if one is not present, no process is due." (2015 IL App (4th) 130907, ¶ 46) (App. 79a) The court held that the "property rights of (the Adams County owners) were not affected by the proceedings at issue and, thus, there was no process to which they were due in the certification proceedings." The authority relied upon stemmed from a 1917 Illinois opinion grounded upon Illinois, rather than federal, law. In discussing other Illinois authority in that line, the court noted that participation by the landowners before the ICC "could not bar them from later exercising their rights as owners of property being taken for public use." (App. 81a, ¶ 48) The court concluded its analysis by saying that the Adams County owners "were not entitled to due process during those proceedings and cannot assert a due process violation." (2015 IL App (4th), ¶ 51) (App. 83a)

The court then turned to the appeal brought by landowners from Edgar County, some of whom are also petitioners to this Court. Those Edgar County landowners asserted that their rights to due process

were violated because they had not been notified of the proceedings before the Commission which affected their land. The appellate court referred to the discussion summarized above which disposed of the Adams County owners' claim of due process and repeated that holding that "the underlying proceedings before the Commission neither conferred property rights on ATXI nor deprived landowners of their protected property interests." (App. 96a, ¶ 80) The court concluded that because the Edgar County landowners had no due process rights, that none were violated. (¶ 80)

C. The Trial Court Proceedings in the Eminent Domain Cases Below.

Petitioners here, upon receiving first notice of the routing of the line across their property by a form letter from Ameren after it had obtained the certificate from the Commission, declined to voluntarily sell or grant easements to ATXI. ATXI then filed the thirty-five eminent domain complaints which constitute the trial court proceedings here. Petitioners filed a Traverse and Motion to Dismiss which asserted that those eminent domain proceedings, and the section of the Illinois Public Utilities Act upon which they were grounded, were unconstitutional in that they permitted the taking of petitioners' property without due process. The petitioners alleged that they had never received notice of the routing of the line across their properties while all other landowners had, including the other landowners who proposed the route across petitioners' property which was approved by the Commission. (C-51; C-897)

The circuit court granted that motion to dismiss, finding that the expedited procedure section of the Public Utility Act as it existed at the time of these

proceedings was unconstitutional, both facially and as applied to the petitioners:

> "220 ILCS 5/8.406.1 as it existed at the time of these proceedings was facially unconstitutional. It failed to require personal service by registered mail or other means which would ensure notice to any landowner whose property may be considered for primary or alternate routes proposed throughout the certification process.
>
> By requiring such notice only to landowners identified in the application and at public hearing, it deprived landowners whose property was proposed in alternate routes later suggested by the utility or any intervenor, of the same opportunity to participate or object. …
>
> There was no good or constitutionally permissible reason to distinguish initially affected landowners from those later identified since the potential for loss of property rights were the same.
>
> That's an invalid reason to distinguish one group of landowners from the other, due process requires identical notice; which was not provided in this case.
>
> The method by which the statute was applied also deprived defendants of federally protected constitutional rights."

(App. 50-51a; C-976)

The circuit court fully recognized and acted in accordance with the outcome of the Adams County administrative appeal in which that court said that

the petitioners had not yet sustained a deprivation of rights. However, the circuit court concluded that petitioners' rights were now being affected:

> "[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."

(App. 45a; C-971)

The court also analyzed at length the adverse effect upon the petitioners in these eminent domain cases of the "strong" statutory presumption which arose under the eminent domain statute as a result of the grant of the certificate of public convenience and necessity. 735 ILCS 30/5-5-5(c) creates a "rebuttable presumption that such acquisition of that property … is (i) primarily for the benefit, use, or enjoyment of the public and (ii) necessary for a public purpose." (App. 121a) That presumption has been judicially interpreted to be a "strong" presumption. *Enbridge Energy (Illinois) L.L.C. v. Kuerth*, 2016 IL App(4th) 150519. The trial court stated that as a result of that presumption, operating for the first time in the eminent domain cases, that the affected landowners who failed to receive notice are significantly disadvantaged in exercising their rights. (App. 35-37a)

D. The Opinion of the Supreme Court of Illinois Below.

ATXI appealed directly to the Supreme Court of Illinois, properly bypassing the intermediate appellate court because a statute had been found unconstitutional. The Supreme Court, with divided opinions, held that the eminent domain circuit court did not

have subject matter jurisdiction to entertain petitioners' due process claims, ruling that such claims could only be heard in the prior Adams County appeal from the ICC proceeding. Petitioners had argued in the Illinois Supreme Court that they had been completely deprived of due process in the ICC proceedings, that the Adams County appeal had not passed upon that deprivation of due process because of its conclusion that petitioners' property rights were not yet at risk, and that there was an additional concrete consequence of the deprivation of due process because of the "strong" statutorily created presumption of public use and necessity created by the grant of the Certificate of Public Convenience and Necessity and the unconstitutional proceedings. (App. 159a)

Two of the seven justices of the Supreme Court filed separate opinions. (App. 9a, 21a) Both justices were in agreement in strongly differing from the majority's conclusion that the trial court was without subject matter jurisdiction to entertain the constitutional argument. Both of those justices agreed that "the majority's flawed analysis raises significant threats to individual rights." Both justices were of the further opinion that petitioners' having unsuccessfully participated in the ICC appeal presented issue preclusion impediments, either partially, or completely, to the presentation of their due process claims in this case. One of those justices dissented from the judgment, recognizing that not all of the petitioners had been parties to the Adams County ICC appeal and concluding that it would be yet an additional abuse of due process and fundamentally unfair to apply the doctrine of *res judicata* to those petitioners. (App. 21a, 22a)

The Supreme Court denied petitioners' request for a rehearing on November 26, 2018 (App. 104a), but granted petitioners a stay of the mandate pending the outcome of this petition for certiorari (App. 108a).

E. Rule 14.1.(g)(i) Facts.

Petitioners' first pleading in the eminent domain cases below was their Traverse and Motion to Dismiss, together with their Memorandum in Support thereof. (App. 128a) The entirety of that motion was devoted to petitioners' argument that their rights under the due process clauses of both the United States Constitution and the Illinois Constitution had been violated. The caption to Argument "I" in the memorandum was "the due process rights of defendants were violated when the ICC failed to provide them notice of an alternate route proposal and when it denied their application for a rehearing." The first sentence of the argument was that "both the Fourteenth Amendment to the United States Constitution and Article One, Section Two, of the Illinois State Constitution guarantee Illinois citizens the right to due process." (App. 136a) The fully developed argument cited *inter alia Mullane v. Central Hanover Bank Trust Co.*, 339 U.S. 306 (1950) and *Fuentes v. Shevin*, 407 U.S. 67 (1972).

As set out above, the circuit court granted that motion to dismiss, after a full analysis of *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Mullane*, among many other authorities. The court stated that "the private interest is a fundamental right, protected by both the U.S. and Illinois Constitutions, to due process before being deprived of property." (App. 136a)

In reliance upon that analysis, the court concluded that the statute was "facially unconstitutional," and further that "the method by which the statute was

applied also deprived defendants of federally protected constitutional rights." (App. 50a, 51a)

When ATXI appealed to the Supreme Court of Illinois, petitioners, as appellees, presented as their Argument "I" the same deprivation of due process claims which they had successfully maintained in the circuit court. The caption to that argument is "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." (App. 161a) (The entirety of that section of petitioners' brief as appellee is at 161a.)

The Supreme Court of Illinois did not reach petitioners' due process argument, as explained above.

ARGUMENT

Introduction

Future years will see ever-increasing pressure for the construction and siting of new electric power transmission lines. Much of the pressure with respect to additional transmission capacity will come from plans to distribute power generated from renewable sources, such as wind and solar. Those transmission lines will often traverse new ground from remote regions. *Survey of Transmission Siting Practices in the Midwest*, Edison Electric Institute and Organization of MISO States, https://pubs.naruc.org/pub.cfm?id=538D82DD-2354-D714-5157-244A2AA66041; Matthew Wald, *Ideas to Bolster Power Grid Run Up Against the System's Many Owners.* N.Y. Times, July 12, 2013, https://www.nytimes.com/2013/07/13/us/ideas-to-bolster-power-grid-run-up-against-the-systems-many-owners.html. The increasing prevalence of new

power line construction, often across private, virgin land requires clear guidance from this Court as to the due process rights of the many affected landowners. The existing guidance is insufficient.

While the fundamental principles of due process have been exquisitely expressed by this Court, it is uncertain as to how those hallowed principles have to be applied in specific instances of quasi-judicial administrative hearings in which evidence is taken and decisions are made to place a final route across private land, and to bestow upon private entities the government's immense power of eminent domain.

In a Yale Law Journal note examining a slightly different facet of the intersection between due process and eminent domain, the following was offered as introduction:

> "Despite the fact that the Constitution clearly states that property cannot be taken without due process, neither federal nor state case law uniformly recognizes the necessity of applying basic procedural protections in the eminent domain context. This fact has led many state courts to arrive at a conclusion seemingly contrary to the plain text of the Constitution and counterintuitive to modern conceptions of property and procedural rights: due process does not apply to state eminent domain actions. …
>
> The Supreme Court has never fully defined the due process rights of a property owner faced with an eminent domain action undertaken by a government – local, state, or federal. …"

D. Zachary Hudson, Note, *Eminent Domain Due Process*, 119 Yale L.J. 1280, 1283, 1286 (2010).

It would be difficult to imagine a more arbitrary and unfair treatment of landowners, or a more stark deprivation of due process caused by a complete absence of notice, than what has been suffered by petitioners. Under this relatively new Illinois statute for expedited decision making with respect to the grant of a certificate for the construction of a new line, the owners of land which would be potentially subject to the primary and alternate routes proposed by the utility are required to be provided with individualized written notice of the initiation of the proceedings. Here, they were. Those landowners intervened and exercised their right to propose other alternate routes, which they did. As requested by the Commission, that first set of owners provided the Commission with the names and addresses of the soon-to-be-affected owners of the land on the new route, because "notice is important."

But, the statute did not mandate that notice be served on those new owners, the petitioners here, and notice was never provided. The hearings took place without them, the Commission noted the absence of objection from the "new" landowners (petitioners, who had neither reason nor opportunity to object), routed the line across petitioners' lands, directed construction of the line, and granted ATXI eminent domain power. As but one instance of the injustice which has resulted, one of the petitioners, Christopher J. Patrick, is the owner of farm ground which has been in his family for five generations. He grew up in one house on the property, and lived there for 50 years. Six years ago, he moved into a new home he constructed on the same premises, 650 feet from the first home. His daughter,

her husband, and their four children now live in the older home. The ATXI line is to run between the two residences and over his barns, and the 150-foot right-of-way which ATXI seeks to acquire passes through the kitchen of his new residence. (Affidavit of Christopher J. Patrick, Ex. B to petitioners' Motion to Stay Issuance of Mandate filed with the Illinois Supreme Court.) The Illinois Supreme Court granted that stay pending the outcome of this Petition for Certiorari. (App. 108a)

The intermediate Illinois appellate court decided, based on a thin line of cases which are factually inapposite, that petitioners had no property rights at risk in the Commission siting proceedings, and therefore they were not entitled to notice or any other aspect of due process in that proceeding, despite the fact that the outcome was that the line was ordered to be situated on their property. The Supreme Court of Illinois below, with two justices in disagreement, held that the trial judge sitting in the eminent domain cases did not have subject matter jurisdiction to entertain, in any manner, petitioners' argument that they did not receive due process. As a result of those two rulings, petitioners have never been afforded an appellate forum to review the substance of their due process claims. The trial court, sitting in eminent domain, squarely decided in favor of petitioners that under the Fourteenth Amendment petitioners have been completely deprived of due process by the complete lack of notice:

> "Now there are property interests at stake, and now process is due.…
>
> [T]he private interest is a fundamental right, protected by both the U.S. and Illinois Constitutions to due process before being

> deprived of property. … the landowners before this Court will have suffered the loss of property taken by eminent domain for a right-of-way granted by the State's administrative process of which they were not a party….
>
> There was no good or constitutionally permissible reason to distinguish initially affected landowners from those later identified since the potential for loss of property rights were the same." (App. 45a, 46a, 50a)

There are no mitigating circumstances or explanations which can justify this complete lack of notice and process. The appeal from the ICC proceeding held that it was too soon for petitioners to have due process rights to protect; the Supreme Court below held that it was now too late. Petitioners have never been heard, except by the trial court, who agreed with them.

I. THE FOURTEENTH AMENDMENT REQUIRED THAT THESE PETITIONERS BE GIVEN NOTICE OF THE COMMISSION PROCEEDINGS WHICH, AFTER AN EVIDENTIARY HEARING, FINALLY SITED A SPECIFIC ROUTE, WITH THE GRANT OF EMINENT DOMAIN AUTHORITY, ON THEIR LANDS.

States employ different utility siting regimes. A number of states use a multi-stage process by which policy considerations concerning an application are first considered on a macro basis, then followed by the determination of specific routes with individualized notice at later stages in the process after initial approvals, e.g., *Power Line Coalition, Inc. v. New York State Public Service Comm'n,* 244 A.D.2d 98 (App. Div. 1998), *No Power Line, Inc. v. Minnesota*

Environmental Quality Counsel, 262 N.W.2d 312 (Minn. 1977). The Illinois procedure under the new section of the Public Utility Act providing for an expedited procedure permitted ATXI to obtain a certificate for public convenience and necessity, an order directing construction of the line, and eminent domain authority all as the result of a single hearing process. 220 ILCS 5/8-406.1, 8-503, 8-509. (App. 110a, 118a) The Commission is directed to construct an "evidentiary record" "after notice and hearing" and thereby determine whether it finds that the project promotes the public convenience and necessity, and that all of the specified "criteria are satisfied." Section 8-406.1(f). (App. 114a) The findings required to be made by the Commission under each of the above sections require both "an adequate evidentiary basis" and "distinct showings of necessity." *Kreutzer v. Illinois Commerce Comm'n*, 404 Ill.App.3d 791, 812, 936 N.E.2d 147, 164 (2010).

Among the "criteria" which must be "satisfied" as the result of "the evidentiary record," is the following requirement:

> "That the Project is necessary to provide adequate, reliable, and efficient service to the public utility's customers and is the least-cost means of satisfying the service needs … ."

8-406.1(f)(1). (App. 114a)

The determination of "least-cost means" is a factual determination which is subject to manifest weight review. The Commission has historically employed twelve criteria to evaluate proposed routes. Among those twelve are considerations of environmental impacts, impacts on historical resources, social and land use impacts, number of affected landowners and

other stakeholders, proximity to homes and other structures, proximity to existing and planned development, community acceptance, and visual impact. *Adams County Property Owners & Tenant Farmers v. Illinois Commerce Comm'n*, 2015 IL App.(4th) 130907, ¶¶ 53-55, 36 N.E.3d 1019 (4th Dist. 2015). (App. 84a, 85a)

For determining whether the Illinois electrical siting regime must afford due process, and the nature of the process due, those hearings must be regarded as a quasi-judicial proceeding. It is an insufficient and incomplete mode of analysis to merely say, as ATXI has, that the determination by the Commission involved eminent domain and that *ipso facto* no due process is to be afforded. Rather, the nature of the proceeding must be examined to determine whether it is of a type for which due process should be afforded. Similarly, to say that the decision of the Commission was the "mere approval of plans" as some Illinois courts have said, is equally wrong when the details of this multi-part proceeding leading to a specific route are examined. In other contexts, it has been said that to say that an administrative proceeding is "a general inquiry, is futile":

> "It has regard to the mere form of the proceedings and ignores realities. … The proceeding had all the essential elements of contested litigation…."

Morgan v. U.S., 304 U.S. 1, 20 (1938).

The proceeding below had all of the characteristics of an adjudication: discovery, expert disclosure, expert testimony, cross-examination, the submission of briefs, a required written decision, a rehearing process, and appellate review.

"[V]arious discrete functions of government, legislative, judicial, and executive, may be and frequently are combined in the same agency." 3 Sutherland Statutory Construction, §65:4 (7th Ed.)

Horn v. County of Ventura, 24 Cal.3d 605, 596 P.2d 1134 (1979) involved land use decisions. The Supreme Court of California examined the differences between legislative and adjudicatory proceedings, partly in reliance upon this Court's precedents, concluding that parties there should have been given notice as a requirement of due process. The court, pointing to *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950), acknowledged that legislative action is not subject to due process principles, but those governmental decisions which are adjudicative in nature are. *Horn*, at 612. The court stated that land use decisions less extensive than a general rezoning "could not be insulated from notice and hearing requirements by application of the 'legislative act' doctrine." At 613.

Much like the Commission below, the *Horn* court recognized that citizen input is important:

> "Resolution of these issues involves the exercise of judgment, and the careful balancing of conflicting interests, the hallmark of the adjudicative process. Expressed opinions of the affected landowners might very well be persuasive to those public officials who make the decisions…."

Horn, at 615.

The court concluded that "the due process requirements discussed herein are not rooted in statute but are compelled by the stronger force of constitutional principle." At 616.

In *Douglas County Board of Commissioners v. Public Utilities Commission,* 829 P.2d 1303 (Col. 1992), in the context of a power line case, the Supreme Court of Colorado confronted the question of whether the Public Utilities Commission hearing was quasi-legislative or quasi-judicial, concluding that it was the latter. The court noted that it was a "fact-intensive analysis … to determine whether an administrative agency proceeding was quasi-legislative or quasi-judicial." Further:

> "Agency proceedings which affect a specific party and resolve particular issues of disputed facts by applying previously determined rules or policies to the circumstances of the case are deemed adjudicatory proceedings."

Douglas County, at 1307.

The court also stated that the fact that the statute itself called for certain due process elements, a public hearing and notice to the community, was itself indicative of a quasi-judicial action." At 1308.

The Supreme Court of New Jersey, in *Handlon v. Town of Belleville*, 4 N.J. 99, 71 A.2d 624 (1950), with express reference to this Court's cases, emphasized that the reality of the proceeding must be examined to determine its nature:

> "Whether the proceeding in essence is legislative or judicial is determined by the nature of the final act and the character of the process and operation rather than by the general character of the authority itself. *Morgan v. U.S.,* 298 U.S. 468 (1936)."

Handlon, at 104.

The employment of due process principles by an agency not only protects citizens but redounds to the benefit of the government itself:

> "The maintenance of proper standards on the part of administrative agencies and the performance of their quasijudicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. … [T]hey must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

Morgan v. U.S., 304 U.S. 1, 22 (1938).

The fundamental requirements of the Due Process Clause of the Fourteenth Amendment are clear:

> "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. … [I]t is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner."

Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Mathews v. Eldridge, 424 U.S. 319 (1976), is recognized to be an important formulation of the modern

test for consideration of the factors to be evaluated in determining the specific mandates of due process. The trial judge below, in concluding that petitioners' rights had been grossly violated, performed a detailed *Mathews* analysis. (App. 45a-50a) That analysis will not be duplicated here. In short summary, the petitioners' private interests in the ownership and use of their land is obvious, the risk to them is patent and extant, the value of the simple expedient of notice is incontestable, and there is no additional burden upon the government in the common sense requirement of merely, but importantly, giving additional notice to a few more people other than those already entitled to notice by statute.

The requirement of due process does not exist in a vacuum devoid of purpose. Rather, the express purposes underlying the Due Process Clause of the Fourteenth Amendment graphically apply to what happened to petitioners:

> "The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property…."

Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

Fuentes goes on to state all that petitioners pray for here. The opportunity to be heard does not serve as a barrier to a person's property being taken, "but the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property." *Fuentes*, at 81.

Lingle v. Chevron USA, Inc., 544 U.S. 528 (2005) speaks plainly to the role of due process in preventing arbitrary governmental action. An action "that fails to serve any legitimate governmental objective may be so arbitrary or irrational that runs afoul of the Due Process Clause." *Lingle*, at 542. *Morgan v. U.S.,* 304 U.S. 1 (1938), as noted above, speaks to the "cherished judicial tradition embodying the basic concepts of fair play."

The trial judge, in finding this statute and its application to be unconstitutional, wrote:

> "[F]ailure to personally notify the thirty-five landowners just as Ameren was required to do at the outset of their application process, deprived them of the opportunity to be heard before the Commission. Why would subsequently identified landowners, who risk the same result as those originally identified in any application, not be entitled to the same due process? Why would those, whose property is later nominated for use as an alternate route by some third party, not be entitled to the same personal notice by certified mail the original landowners received? …
>
> There was no good or constitutionally permissible reason to distinguish initially affected landowners from those later identified…."

(App. 47a, 50a)

Here, petitioners, who were not given notice of the proceedings despite both the administrative law judges and the Commission itself noting that their names should be garnered and that due process and notice are "important," are victims of arbitrary action which is a graphic antithesis of fair play.

II. THIS UNCONSTITUTUIONAL STATUTE AND ITS APPLICATION TO THESE PETITIONERS HAS PRESENT CONSEQUENCES IN THE EMINENT DOMAIN CASES NOW BEFORE THIS COURT.

The trial judge granted petitioners' Traverse and Motion to Dismiss which was grounded upon the deprivation of petitioners' rights to due process under the Fourteenth Amendment in the siting proceeding. He recognized that the intermediate appellate court in the appeal from the Commission proceeding had held that petitioners had no property interest at stake there, and that therefore there was no process due there. But the trial judge expressly stated that the situation was now different before him, and that "now there are property interests at stake, and now process is due." (App. 45a) It is an untenable and illogical fiction to extrapolate from a few different, early, cases to conclude that in the detailed quasi-judicial evidentiary proceeding outlined above that petitioners would not have had any property rights at risk. But, as the trial judge found, such rights are now starkly at risk in the eminent domain proceedings.

In addition to the fundamental fact that the line had been sited upon their property and eminent domain authority had been granted in the Commission proceeding, there is an additional legal consequence which stemmed directly from the deprivation of due process but which comes into being only in the eminent domain cases. 735 ILCS 30/5-5-5(c) provides that the grant by the Commission of a certificate of public convenience and necessity gives rise to a rebuttable presumption in the eminent domain case "that such acquisition of that property … is (i) primarily for the benefit, use, or enjoyment of the

public and (ii) necessary for public purpose." (App. 121a) The trial judge recognized that that presumption completely flipped the burden of proof adversely to petitioners here. Further, because the presumption has been interpreted to be a "strong" presumption, then it can be overcome only by clear and convincing evidence. *Enbridge Energy (Illinois) LLC v. Kuerth*, 2016 IL App (4th) 150519. For that reason alone, petitioners were substantially prejudiced in the defense of the eminent domain cases by the unconstitutional deprivation of their due process rights.

Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) provides a useful analogy where, when there has been an unconstitutional deprivation of notice for due process purposes in an early stage of a series of proceedings, a remedy should be fashioned at a later stage. Mennonite Board held a mortgage on property. The mortgagor defaulted and the real estate taxes were sold. Mennonite Board was not given effective notice of the tax sale. The tax sale was completed without any participation by Mennonite Board because of its lack of knowledge. The mortgagee was held to be entitled to notice of the tax sale even though its interest in the property was not actually lost until the redemption period expired. So too, here, the landowners may technically not lose interest in their properties until after the Commission issues its certificate and after the condemnation proceedings are filed. But, as in *Mennonite*, there is much at stake for the landowners prior to the filing of the condemnation actions. In *Mennonite*, if the mortgagee had received notice before the tax sale it would have had a number of options to protect its interest, which it could not pursue. Here, the petitioners, if they had received notice of the Commission proceedings, would have had

the right to fully participate as the other landowners did.

Justice Garman wrote an extensive separate opinion in the Supreme Court of Illinois below. (App. 9a) Although she ultimately concurred in the reversal of the trial judge's order, as will be taken up below, she strongly disagreed with the reasoning of the majority. As will be discussed below, she was of the strong opinion that the trial judge had subject matter jurisdiction to review the constitutionality of the Public Utilities Act, stemming from the plenary grant of jurisdiction to the court by the Illinois Constitution. (App. 9a, ¶¶23, 27, 32) But pertinent to this section of this petition, Justice Garman stated that the majority failed to offer any reason why the trial judge "should continue to apply the Commission certificate even after the [trial] court invalidated the underlying statute." "It is not self-evident that the circuit court should acknowledge the Commission certificate after finding that the statute that created it was unconstitutional." (App. 16a, ¶37) Justice Garman also then recognized the pernicious effect of applying the presumption created by section 5-5-5(c) of the Eminent Domain Act. (¶37)

III. COURTS MUST PROVIDE A FORUM IN WHICH A CLAIM OF DEPRIVATION OF DUE PROCESS MAY BE HEARD. NONE WAS PROVIED HERE.

Even as the progress of justice refines the details of providing procedural due process to more fairly align the constitutional guaranty with modern understandings, the bedrock fundamental must always be kept in mind. The entire framework of due process is to assure that there is some forum in which the citizen can be listened to:

> "For more than a century the central meaning of procedural due process has been clear. 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *Baldwin v. Hale*, 1 Wall. 223, 233."

Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

This Court carefully calibrates when that opportunity to be heard is to be provided, such as before, or after, a particular deprivation of some aspect of a right. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). But the fundamental is that at some point due process requires an opportunity to be heard.

Although the intermediate appellate court in the appeal from the ICC decision acknowledged that some of these petitioners were claiming a deprivation of due process because they had never been heard, that court held that the Commission proceedings had not "deprived landowners of their protected property interests," and that therefore they "were not entitled to due process during those proceedings and cannot assert a due process violation." *Adams County Property Owners & Tenant Farmers*, 2015 IL App (4th) 130907, ¶¶ 51, 80. The Supreme Court of Illinois denied discretionary leave to appeal in that case. ("Unfortunately," per Justice Kilbride, ¶ 50, App. 212).

The trial judge perceived the intense necessity for him to deal with the due process claim within the context of the eminent domain cases before him, as has been fully documented in this petition already. But, the Illinois Supreme Court held that any claim of deprivation of due process, including the unconstitutionality of the Public Utility Act, could be heard only in the appeal from the ICC proceeding. As a result, petition-

ers have been stripped of any opportunity to have a meaningful assessment of their lack of notice.

Two members of the Illinois Supreme Court strongly disagreed with the majority's conclusion that the unconstitutionality of the statute, which deprived petitioners of due process, could not be heard by the trial judge sitting in the eminent domain cases:

> "I disagree with the majority's interpretation, which dramatically expands the General Assembly's power to reduce circuit courts' jurisdiction. No Illinois court has ever considered reviewing the constitutionality of a statute to be 'review of administrative action' simply because that statute implicates an agency's procedural rules. The majority cites only a few cases in its short analysis….
>
> Nor does ATXI cite any precedent that deprives the circuit court of jurisdiction to conduct judicial review of the constitutionality of the statute."

Ameren, 2018 IL 122973, ¶¶ 30-31. (App. 12a-13a)

Justice Garman could not see how the trial judge could be confined to applying a statute which he regarded to be unconstitutional, especially where the invocation of the presumption of public necessity arose for the first time in the eminent domain case. ¶ 37. Justice Garman concluded that "the majority's flawed analysis raises significant threats to individual rights." ¶ 38. Justice Kilbride, concurring in part and dissenting in part, expressly agreed with all aspects of those statements by Justice Garman. ¶ 49, App. 212.

In contrast, the essence of ATXI's position below is that compensation under the Takings Clause is sufficient alone. It is not. In the event of government

action which "is so arbitrary as to violate due process … [n]o amount of compensation can authorize such action." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 543 (2005).

The ownership of real estate has always been recognized to be unique. Further, "the sanctity of a citizen's possession of property is a cherished constitutional right, the arbitrary deprivation of which is quite significant on both a legal and personal level." D. Zachary Hudson, Note, *Eminent Domain Due Process*, 119 Yale L.J. 1280, 1307 (2010). Patrick's affidavit renders vivid testimony as to but one instance of how the lack of citizen input has resulted in manifest injustice.

In the event that petitioners succeed on this appeal, ATXI would have an easy remedy. They may file another application for the 25-mile segment of the line involved here, have the Commission provide notice to all affected landowners, and then have a hearing fair to all concerned. ATXI has already filed second applications on other segments.

IV. ISSUE PRECLUSION DOCTRINES SHOULD NOT BAR CONSIDERATION OF THIS VITAL ISSUE.

ATXI argued below that because the *Adams County* intermediate appellate court refused to recognize that some of these petitioners had any due process rights to protect, that the entirety of petitioners' claim of due process is barred by collateral estoppel, and for that additional reason could not be heard by the eminent domain court below. The majority of the Illinois Supreme Court never reached that issue. Justice Garman did, and stated that she would have applied collateral estoppel to not only those petitioners which

actually participated in the *Adams County* appeal but also all remaining petitioners who had agreed, among many other stipulations, to be treated as if they were parties to the prior appeal. *Ameren*, Garman, J., ¶¶ 40-47.

Justice Kilbride, concurring in part and dissenting in part, also took up the issue preclusion argument. Dissenting, and relying upon precedent from this Court, and further recognizing that "it is undisputed that many of the landowners in this eminent domain action were not parties in the *Adams County* appeal," stated that "applying the doctrine of res judicata to them results in a denial of due process." Kilbride, J., App. 21a-23a, ¶¶ 50-52.

Petitioners established in depth at pages 28-35 of their brief in the supreme court that both res judicata and collateral estoppel are equitable doctrines which are to be applied on a discretionary, rather than a mechanical, basis. (App. 180a) Here, ATXI seeks to use those doctrines not to preclude duplicate litigation of petitioners' due process rights, but rather to preclude any court's consideration of defendants' rights.

The law of Illinois is in alignment with the majority rule expressed in the Restatement (Second) of Judgments which recognizes the equitable nature of issue preclusion. Section 26(1)(d) states that the general rule of preclusion should not be applied where "the judgment in the first action was plainly inconsistent with a fair and equitable implementation of a statutory or constitutional scheme…." Comment e to that section confirms that the doctrines should not be applied where, "in retrospect (the adjudications) 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. … Similar inequities in the implementation of a constitutional scheme may result from inflexible application of the rules of merger and bar…."

Section 28, setting out "exceptions to the general rule of issue preclusion," provides in relevant part that even though an issue may have been actually litigated, raising the issue in subsequent action is "not precluded" where:

> "The issue was 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…."

Both of those provisions are followed in Illinois. *Rein v. David A. Noyes & Co.*, 172 Ill.2d 325, 341 (1996) (§ 26); *DuPage Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill.2d 71, 79 (2001) (§ 28).

The equities of this case strongly merit permitting petitioners' due process claims to be heard.

V. THESE ISSUES ARE IMPORTANT AND EVERY UTILITY SITING PROCEEDING WILL BENEFIT FROM THIS COURT'S DIRECTION.

It is beyond argument that there will be ever-increasing pressure to construct additional transmission capacity, stemming from changes in the composition of the country's sources of power. In particular, the ascendant generative capacity from wind and solar sources will uniquely give rise to attempts to create new transmission lines. By the nature of those sources, their supply lines will often cross new routes, in rural areas, and from remote regions of the country.

Siting statutes most often require the type of detailed evidentiary presentation called for by the Illinois statute, and the rendition of a decision based upon granular statutory and case law criteria.

The structure of the law generally is becoming more attuned to the needs of citizens in the protection of their personal positions relative to the impositions of government. It is an insufficient and antiquated answer to merely say that eminent domain is a legislative function without examining the actual nature of the proceedings involved.

This case presents a prime opportunity to address the due process issues presented by this case because of the stark deprivation here of any opportunity for the petitioners to participate, and the indisputable reality that the line was sited on their property at the behest of other property owners, with the Commission noting that a prime factor in its decision was the absence of objection from the petitioners – who were not parties and who had no idea that the proceeding was underway.

A decision by this Court would provide flexible guidance on a national basis.

CONCLUSION

It is respectfully requested that this Petition be granted.

Respectfully submitted,

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February 22, 2019

APPENDIX

APPENDIX A

SUPREME COURT OF ILLINOIS

Docket Nos. 122973, 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, 123018, 123019, 123020, 123021 cons.

AMEREN TRANSMISSION COMPANY OF ILLINOIS,

Appellant,

v.

RICHARD L. HUTCHINGS, *et al*.,

Appellees.

Opinion filed October 18, 2018

OPINION

JUSTICE THOMAS delivered the judgment of the court, with opinion.

¶ 1 To facilitate the construction of a high-voltage transmission line, Ameren Transmission Company of Illinois (ATXI) filed eminent domain complaints against several landowners located in Edgar County, Illinoi (Landowners). The Landowners filed a traverse and motion to dismiss, and the circuit court dismissed every complaint on the grounds that section 8-406.1 of the Public Utilities Act (220 ILCS 5/8-406.1 (West 2016)), as it existed at the time, is unconstitutional

both on its face an as applied to the Landowners. This direct appeal followed. Ill. S. Ct. R. 302(a) (eff. Oct. 4, 2011).

¶ 2 BACKGROUND

¶ 3 The Public Utilities Act (Act) (220 ILCS 5/1-101 *et seq.* (West 2010)) requires a public utility to obtain a certificate of public convenience and necessity from the Illinois Commerce Commission (Commission) before transacting business or beginning new construction within Illinois Section 8-406 of the Act sets forth the requirements for obtaining a certificate. *Id.* § 8-406. Effective July 28, 2010, the legislature enacted section 8-406.1 of the Act (*id.* § 8-406.1), which permits a public utility to apply for a certificate using an expedited procedure when seeking to construct a new high-voltage electric service line and related facilities.

¶ 4 On November 7, 2012, ATXI petitioned the Commission for a certificate of public convenience and necessity that would authorize ATXI "to construct, operate and maintain a new 345 kV electric transmission line * * * and related facilities, including certain new or expanded substations, within * * * Illinois." ATXI's proposed plan was designated the Illinois Rivers Project (Project), and portions of the Project were to be located within several Illinois counties, spanning 375 miles across the state. ATXI elected to file its petition pursuant to the expedited process set forth in section 8-406.1.

¶ 5 ATXI's proposal included both a primary route and an alternate route, and the Commission sent notice of the impending proceedings to several thousand potentially impacted landowners. After the notices went out, certain interested and affected parties sought

and were granted leave to intervene. Some of these intervenors then proposed alternative routes of their own for certain segments of the Project. One such alternative was proposed by an intervening group named Stop Coalition, and it involved the "Kansas-Indiana State Line" segment of the Project. In the end, the Commission approved the Project and granted ATXI a certificate of public convenience and necessity, based on a route that included Stop Coalition's alternative proposal for the Kansas-Indiana State Line segment.

¶ 6 Shortly thereafter, several landowners from the Kansas-Indiana State Line segment of the Project filed a petition to intervene. The petition alleged that, although these landowners owned property that was either on or directly adjacent to the alternative route proposed by Stop Coalition, they did not receive notice of that fact until after the Commission had entered its decision approving the Project. Accordingly, along with their petition to intervene, these landowners filed both a motion to strike the Commission's proceedings relating to the Kansas-Indiana State Line segment of the Project and an application for rehearing. The Commission denied both the motion to strike and the application for rehearing, but it then granted the petition to intervene for the limited purpose of accommodating appellate review.

¶ 7 A direct appeal to the appellate court followed (see 220 ILCS 5/10-201(a) (West 2016)), and the landowners impacted by the Kansas-Indiana State Line segment of the Project were among the parties to that appeal. *Adams County Property Owners & Tenant Farmers v. Illinois Commerce Comm'n*, 2015 IL App (4th) 130907, 394 Ill.Dec. 728, 36 N.E.3d 1019. In a lengthy opinion, the appellate court affirmed the

Commission's decision approving the Project and granting the certificate of public convenience and necessity. *Id.* ¶ 102. In the course of doing so, the appellate court considered and rejected the affected landowners' argument that their due process rights were violated because they never received notice of Stop Coalition's alternative route proposal. *Id.* ¶¶ 78-80.

¶ 8 Following disposition of the direct administrative appeal, ATXI attempted unsuccessfully to negotiate easement rights with the Landowners. Consequently, in early 2016, ATXI sought and secured from the Commission authority to obtain the necessary easements by eminent domain. Thereafter, ATXI filed a total of 35 eminent domain complaints against the Landowners. The Landowners, in turn, filed a traverse and motion to dismiss. Although the Landowners asserted traditional traverse claims, they ultimately did not develop or defend those claims in the subsequent proceedings.[1] Instead, the Landowners focused on their motion to dismiss, which argued that ATXI's eminent domain complaints must be dismissed because the Landowners' due process rights were violated

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[1] At the hearing on the Landowners' traverse and motion to dismiss, counsel for the Landowners conceded that ATXI had established a *prima facie* case for the propriety of the taking, that the Landowners had made no attempt to rebut that presumption, and that consequently, if the Landowners' motion to dismiss were denied, their traverse would also have to be denied. Likewise, in its order granting the Landowners' motion to dismiss, the circuit court stated that, "[a]lthough the [Landowners] refused to concede their claims contained in the Traverse were not supported by the record, they presented no evidence at the hearing in that regard." That being said, the trial court's order concludes by stating, "[h]aving granted the Motion to Dismiss, the Court does not need to address the Traverse."

during the proceeding in which the Commission granted the certificate of public convenience and necessity. More specifically, the Landowners argued that their due process rights were violated because they were never notified that their property would be affected by the route that the Commission ultimately approved.

¶ 9 On September 25, 2017, the circuit court of Edgar County entered a 24-page written order granting the Landowners' motion to dismiss on the grounds that the applicable version[2] of section 8-406.1 was unconstitutional both on its face and as applied to the Landowners. In support of its conclusion that section 8-406.1 was unconstitutional on its face, the circuit court explained:

> "220 ILCS 5/8-406.1 as it existed at the time of these proceedings was facially unconstitutional. It failed to require personal notice by registered mail or other means which would ensure notice to any landowner whose property may be considered for primary or alternate routes proposed throughout the certification process.
>
> By requiring such notice only to landowners identified in the application and at public hearing, it deprived landowners whose property was proposed in alternate routes later suggested by the utility or any intervenor, of the same opportunity to participate or object."

Accordingly, the circuit court dismissed all 35 of ATXI's eminent domain complaints.

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[2] Section 8-406.1 has since been amended. See Pub. Act 99-399 (eff. Aug. 18, 2015) (amending 220 ILCS 5/8-406.1).

¶ 10 ATXI appealed the circuit court's decision directly to this court. Ill. S. Ct. R. 302(a) (eff. Oct. 4, 2011).

¶ 11 ANALYSIS

¶ 12 We need not reach the merits of the circuit court's due process analysis, as the circuit court clearly lacked the necessary jurisdiction to review the legality and constitutionality of the Commission's administrative proceedings.

¶ 13 Illinois courts courts of general jurisdiction and enjoy a presumption of subject-matter jurisdiction. *Illinois State Treasurer v. Illinois Workers' Compensation Comm'n*, 2015 IL 117418, ¶ 14, 391 Ill.Dec. 18, 30 N.E.3d 288. That presumption is inapplicable, however, where administrative proceedings are involved. *Id.* Illinois courts are empowered to review administrative actions only "as provided by law." Ill. Const. 1970, art. VI, § 6 (appellate court), § 9 (circuit court). When the legislature has, through law, prescribed procedures for obtaining judicial review of an administrative decision, a court is said to exercise "special statutory jurisdiction" when it reviews an administrative decision pursuant to that statutory scheme. *People ex rel. Madigan v. Illinois Commerce Comm'n*, 2014 IL 116642, ¶ 10, 386 Ill.Dec. 655, 21 N.E.3d 418. Special statutory jurisdiction is limited by the language of the act conferring it. *Id.* A court has no powers from any other source. *Id.* A party seeking to invoke a court's special statutory jurisdiction must therefore comply strictly with the procedures prescribed by the statute. *Id.* If the mode of procedure set forth in the statute is not strictly pursued, no jurisdiction is conferred on the court. *Id.*

¶ 14 This court has held that "[r]eview of final decisions of the Commission * * * involves the exercise of

special statutory jurisdiction and is constrained by the provisions of the Public Utilities Act." *Illinois Landowners Alliance, NFP v. Illinois Commerce Comm'n*, 2017 IL 121302, ¶ 29, 418 Ill.Dec. 290, 90 N.E.3d 448; see also *People ex rel. Madigan v. Illinois Commerce Comm'n*, 231 Ill. 2d 370, 387, 326 Ill.Dec. 10, 899 N.E.2d 227 (2008). The relevant provision of the Act is section 10-201, and it states that a party affected by a rule, regulation, order, or decision of the Commission has 35 days to "appeal to the appellate court of the judicial district in which the subject matter of the hearing is situated * * * for the purpose of having the reasonableness or lawfulness of the rule, regulation, order or decision inquired into and determined." 220 ILCS 5/10-201(a) (West 2016). Section 10-201 goes on to state that, in such cases, the appellate court "shall reverse a Commission rule, regulation, order or decision, in whole or in part, if it finds that * * * [t]he proceedings or manner by which the Commission considered and decided its rule, regulation, order or decision were in violation of the State or federal constitution or laws, to the prejudice of the appellant." *Id.* § 10-201(e)(iv)(D). Thus, under the plain language of the Act, the power to review a final decision of the Commission, including whether "[t]he proceedings or manner by which the Commission considered and decided its rule, regulation, order or decision were in violation of the State or federal constitution or laws," is a power conferred on the appellate court by the special statutory jurisdiction established in section 10-201. Absent such jurisdiction, a court has no power to review the legality or constitutionality of Commission proceedings.

¶ 15 The problem here is that the circuit court below was not exercising the special statutory jurisdiction conferred by section 10-201 when it determined that

the Commission's proceedings in relation to the Project were in violation of due process. Rather, it was sitting as a court of general jurisdiction charged with adjudicating the merits of ATXI's eminent domain complaints. As such, the circuit court below had no authority whatsoever to review either the Commission's decision itself or whether the proceedings leading up to that decision "were in violation of the State or federal constitution or laws." Section 10-201 specifically reserves such questions for the appellate court exercising its statutory power of direct administrative review, which is exactly what the *Adams County* court was doing back in 2015 when it considered and rejected the very same due process challenge at issue here. *Adams County*, 2015 IL App (4th) 130907, ¶¶ 78-80, 394 Ill.Dec. 728, 36 N.E.3d 1019. In other words, there is an explicit statutory scheme in place for reviewing the legality and constitutionality of the Commission's administrative proceedings, and the subsequent eminent domain litigation forms no part of it.

¶ 16 Given this, we agree with ATXI that the circuit court's decision granting the Landowners' motion to dismiss must be reversed. As discussed above, the circuit court's sole rationale for granting those motions was its conclusion that the Commission's proceedings were in violation of due process. As the legality and constitutionality of the Commission's proceedings was a question beyond the circuit court's power to decide, its answer to that question cannot form the basis for dismissing the complaints in this case. Accordingly, the judgment of the circuit court is hereby reversed.

¶ 17 CONCLUSION

¶ 18 For the foregoing reasons, the judgment of the circuit court of Edgar County is reversed, and we remand the cause for further proceedings.

¶ 19 Reversed and remanded.

Chief Justice Karmeier and Justices Burke, Theis, and Neville concurred in the judgment and opinion.

Justice Garman specially concurred, with opinion.

Justice Kilbride concurred in part and dissented in part, with opinion.

¶ 20 JUSTICE GARMAN, specially concurring:

¶ 21 Defendants are a group of landowners who claim that the Public Utilities Act instructed the Illinois Commerce Commission and the circuit court to transfer their property rights to plaintiff Ameren Transmission Company of Illinois (ATXI) without affording them due process of law. The majority does not address the substance of defendants' complaint but instead finds that the circuit court could not consider their argument because it lacked jurisdiction. I disagree with this reasoning, but I agree with the conclusion to reverse the circuit court's order.

¶ 22 A. The Circuit Court's Jurisdiction

¶ 23 The Illinois Constitution of 1970 grants circuit courts general subject-matter jurisdiction over "all justiciable matters." Ill. Const., art. VI, § 9. One such justiciable matter is eminent domain (735 ILCS 30/10-5-10(a) (West 2010)). ATXI cannot plausibly claim that the circuit court lacked jurisdiction over these proceedings; after all, ATXI is the plaintiff. In the course of those eminent domain proceedings, the circuit court found that section 8-406.1 of the Public

Utilities Act (220 ILCS 5/8-406.1 (West 2012)) and the Commission proceedings under that statute violated the due process clauses of the United States and Illinois Constitutions. Section 8-406.1 established the Commission expedited procedure for granting certificates of public necessity, which in turn created the "rebuttable presumption" that ATXI relied on in its eminent domain petition. *Id.*; 735 ILCS 30/5-5-5(c) (West 2014).

¶ 24 The majority finds that the circuit court lacked jurisdiction to find that section 8-406.1 of the Public Utilities Act and the Commission proceedings violated the due process clause. The majority certainly is correct that the circuit court lacked jurisdiction to review a challenge to the Commission's certificate of public necessity. The Illinois Constitution states that Illinois's circuit courts and appellate court have jurisdiction to review administrative action only "as provided by law." Ill. Const. 1970, art. VI, §§ 6, 9. Section 10-201(e)(iv)(D) of the Public Utilities Act grants the appellate court jurisdiction to reverse a "Commission rule, regulation, order or decision, in whole or in part, if it finds that * * * [t]he proceedings or manner by which the Commission considered and decided its rule, regulation, order or decision were in violation of the State or federal constitution or laws, to the prejudice of the appellant." 220 ILCS 5/10-201(e)(iv)(D) (West 2016). No comparable provision grants the circuit court jurisdiction to review a Commission rule, regulation, order, or decision. If the circuit court had held merely that the Commission failed to follow the Public Utilities Act, this would have been "review of [an] administrative action," which only the appellate court could exercise.

¶ 25 However, the circuit court did not conclude that only the Commission's *decision* was unconstitutional. It also held that section 8-406.1 of the Public Utilities Act was unconstitutional.

¶ 26 The majority finds either that section 10-201(e)(iv)(D) instructs the appellate court to consider the constitutionality of the Public Utilities Act in addition to the Commission certificate or that this distinction between the Act and the Commission decision is irrelevant. The majority's analysis is brief and does not elaborate on its reasoning.

¶ 27 If the majority finds that the appellate court's authority to review the Commission certificate of public necessity included the authority to review the Public Utilities Act, it is mistaken for two reasons. First, section 10-201(e)(iv)(D) does not state this. Section 10-201 directs the appellate court to reverse a "Commission rule, regulation, order or decision, in whole or in part, if it finds that * * * [t]he proceedings or manner by which the Commission considered and decided its rule, regulation, order or decision were in violation of the State or federal constitution or laws, to the prejudice of the appellant." *Id.* Nothing in the plain language of this statute strips the circuit court of jurisdiction to consider the constitutionality of the Public Utilities Act, which is not a "Commission rule, regulation, order or decision" but a General Assembly statute.

¶28 Second, if section 10-201(e)(iv)(D) was intended to deprive the circuit courts of jurisdiction to review the constitutionality of the Public Utilities Act and give jurisdiction exclusively to the appellate court, then section 10-201(e)(iv)(D) would be unconstitutional. The Illinois Constitution does not allow the General Assembly to remove matters from circuit

courts' general jurisdiction. Circuit courts' jurisdiction derives from the Illinois Constitution, and the General Assembly may not extend or reduce it. *McCormick v. Robertson*, 2015 IL 118230, ¶ 23, 390 Ill.Dec. 142, 28 N.E.3d 795.

¶ 29 One exception to circuit courts' constitutional general jurisdiction is that "Circuit Courts shall have such power to review administrative action as provided by law." Ill. Const. 1970, art. VI, § 9. Similarly, the appellate court has jurisdiction to review administrative action as provided by law. Ill. Const. 1970, art. VI, § 6. Under these provisions, review of administrative action is considered "special statutory jurisdiction" that exists only through a grant from the General Assembly. *People ex rel. Madigan v. Illinois Commerce Comm'n*, 2014 IL 116642, ¶ 10, 386 Ill.Dec. 655, 21 N.E.3d 418. If the General Assembly has not provided the circuit court with jurisdiction to review a certain administrative action, the circuit court lacks jurisdiction to review that action. The majority claims that this exception allows the Public Utilities Act to grant the appellate court, not the circuit court, the power to review the constitutionality of the Public Utilities Act.

¶ 30 I disagree with the majority's interpretation, which dramatically expands the General Assembly's power to reduce circuit courts' jurisdiction. No Illinois court has ever considered reviewing the constitutionality of a statute to be "review [of] administrative action" simply because that statute implicates an agency's procedural rules. The majority cites only a few cases in its short analysis. In *Illinois State Treasurer v. Illinois Workers' Compensation Comm'n*, 2015 IL 117418, 391 Ill.Dec. 18, 30 N.E.3d 288, the court concluded that the statutory requirements for appealing

a decision of the Workers' Compensation Commission had not been met. That case was a direct appeal of a decision of an administrative agency. Unlike this case, there was no challenge to the constitutionality of a statute. *People ex rel. Madigan v. Illinois Commerce Comm'n*, 231 Ill. 2d 370, 326 Ill.Dec. 10, 899 N.E.2d 227 (2008), and *People ex rel. Madigan*, 2014 IL 116642, 386 Ill.Dec. 655, 21 N.E.3d 418, also involved direct review of Commission orders and questions about the statutory requirements for jurisdiction. *Illinois Landowners Alliance, NFP v. Illinois Commerce Comm'n*, 2017 IL 121302, 418 Ill.Dec. 290, 90 N.E.3d 448, was a direct appeal of a Commission order granting a certificate of public necessity. The court concluded that the Commission had applied the Public Utilities Act incorrectly. None of these cases involve a court lacking jurisdiction to review the constitutionality of a statute.

¶ 31 Nor does ATXI cite any precedent that deprives the circuit court of jurisdiction to conduct judicial review of the constitutionality of a statute. ATXI relies on *Fredman Brothers Furniture Co. v. Department of Revenue*, in which the court considered whether a 35-day filing period to appeal an administrative order created a jurisdictional bar. 109 Ill. 2d 202, 209, 93 Ill.Dec. 360, 486 N.E.2d 893 (1985). There is no indication that any party in *Fredman Brothers* challenged the constitutionality of the Retailers' Occupation Tax Act or the Administrative Review Act, which created the administrative framework for the litigation. The question was whether the plaintiff's failure to follow the statutory requirements deprived the circuit court of jurisdiction over an appeal of the agency's decision. ATXI also relies on *Collinsville Community Unit District No. 10 v. Regional Board of School Trustees*, 218 Ill. 2d 175, 300 Ill.Dec. 15, 843 N.E.2d 273 (2006);

People ex rel. Madigan v. Illinois Commerce Comm'n, 2014 IL 116642, 386 Ill.Dec. 655, 21 N.E.3d 418; *Illini Coach Co. v. Illinois Commerce Comm'n*, 408 Ill. 104, 96 N.E.2d 518 (1951); *Commonwealth Edison Co. v. International Brotherhood of Electrical Workers, Local Union No. 15*, 961 F.Supp. 1154 (N.D. Ill. 1996). None of these cases deny circuit courts' jurisdiction in constitutional challenges to state statutes.

¶ 32 The majority's error results from its misunderstanding of what claims the General Assembly may constitutionally assign to the appellate court. Only appeals challenging an agency's final determination itself are reserved for appellate courts. For example, in *ESG Watts, Inc. v. Pollution Control Board*, 286 Ill. App. 3d 325, 221 Ill.Dec. 778, 676 N.E.2d 299 (1997) a landowner applied for permits to operate a landfill, but the Illinois Pollution Control Board denied his application. On his direct appeal to the Third District, the landowner argued that the board's decision was against the manifest weight of the evidence. *Id.* at 330, 336, 221 Ill.Dec. 778, 676 N.E.2d 299. This is the sort of challenge that section 5/10-201(e)(iv)(D) directs to appellate courts. 220 ILCS 5/10-201(e)(iv)(D) (West 2016). Once the case reached the appellate court, that court could consider the landowner's constitutional challenge to the statute. *ESG Watts, Inc.*, 286 Ill. App. 3d at 334, 221 Ill.Dec. 778, 676 N.E.2d 299.

¶ 33 Although not squarely on point, this court's decision in *Board of Education of Peoria School District No. 150 v. Peoria Federation of Support Staff, Security/ Policeman's Benevolent & Protective Ass'n Unit No. 114*, 2013 IL 114853, 375 Ill.Dec. 744, 998 N.E.2d 36 supports my conclusion that "review of administrative action" does not include assessing the constitutionality of a General Assembly statute. In

that case a statute removed jurisdiction over certain labor disputes from one administrative agency and placed those disputes under the authority of a different agency. The plaintiffs filed a declaratory judgment action arguing that this statute was unconstitutional special legislation. This court found that the circuit court had jurisdiction to consider the constitutional challenge. We explained that "the parties cite no case with comparable facts, *i.e.*, a constitutional challenge to a statute that would potentially divest one labor board (the IELRB) of jurisdiction, with specified dispute resolution procedures, and confer it upon another (the ILRB), with different procedures. Disposition of the constitutional issue dictates which of the two boards has jurisdiction of this matter. That decision is properly one for the courts, and, in the first instance, the circuit court." *Id.* ¶ 37.

¶ 34 Admittedly *Board of Education of Peoria* concerned whether the courts or an administrative agency had jurisdiction, not which level of state court had jurisdiction. However, if reviewing the constitutionality of a statute constitutes "review [of] administrative action," as the majority concludes, then administrative agencies themselves would be capable of considering this question. For example, if reviewing the constitutionality of the Public Utilities Act is review of "administrative action" under article VI, section 9, then the Commission's administrative law judge should be capable of considering the constitutional challenge. But this court in *Board of Education of Peoria* expressly disavowed this conclusion, stating that "administrative agencies have no authority to declare statutes unconstitutional or even to question their validity." *Id.* ¶ 38. Instead, the courts, and specifically the circuit courts, have jurisdiction over such questions. *Id.* ¶ 37.

¶ 35 In its brief opinion, the majority justifies this expansion of the General Assembly's power simply by citing article VI, section 9, but that text does not support the majority's claim. Article VI, section 9 states only that "Circuit Courts shall have such power to review administrative action as provided by law." Ill. Const. 1970, art. VI, § 9. It is not obvious why the phrase "administrative action" should include a statute passed by the General Assembly simply because that statute governs an administrative agency's procedures, and the majority provides no justification for this strained interpretation.

¶ 36 One might argue that, regardless of the circuit court's jurisdiction to consider the constitutionality of the Public Utilities Act, my distinction between the Public Utilities Act and the Commission order is irrelevant. Even if the circuit court could strike down the Public Utilities Act as unconstitutional, the objection might say, the court would still need to consider the Commission's order itself. But the circuit court lacked jurisdiction to review this order.

¶ 37 Because the majority disregards the distinction between the Public Utilities Act and the Commission certificate of public necessity, it fails to explain why the circuit court should continue to apply the Commission certificate even after the court invalidated the underlying statute. It is not self-evident that the circuit court should acknowledge the Commission certificate after finding that the statute that created it was unconstitutional. Moreover, even if the Commission's certificate of public necessity survives the invalidation of the statute that produced it, that invalidation could still have effects in the eminent domain proceeding based on that certificate. The circuit court was required, under section 5-5-5(c) of the Eminent

Domain Act, to afford a rebuttable presumption of public necessity to a Commission certificate of public necessity. 735 ILCS 30/5-5-5(c) (West 2014). The circuit court reasonably considered the constitutionality of the statute that produced the certificate. It might conclude that defendants had overcome that presumption by showing that the Public Utilities Act denied them due process of law, or it might conclude that affording a rebuttable presumption to a constitutionally deficient certificate also denied defendants due process of law. Admittedly, the circuit court's order does not explore these possibilities. The majority's dismissal based on lack of jurisdiction, however, forecloses these possibilities entirely and without any discussion.

¶ 38 The majority's flawed analysis raises significant threats to individual rights. The majority's approach would allow for the following possibility: a utility petitions the Commission for a certificate of public necessity to acquire two lots owned by Alice and Brian. Alice is not notified of the Commission proceedings and does not participate in them. Brian is notified of the proceedings and challenges them, including appealing the decision to the appellate court. The appellate court rejects Brian's challenge and upholds the Commission's order. The utility initiates eminent domain proceedings against both Alice and Brian. Alice argues that the statute that allowed the utility to petition for a certificate without notifying her unconstitutionally deprived her of due process of law. Under the majority's approach, the circuit court would lack jurisdiction to hear this argument but would retain jurisdiction over the eminent domain proceedings. Assuming for the moment that Alice had the right to participate in the Commission proceedings, the circuit court would authorize the utility to seize

Alice's land even though Alice never had the opportunity to participate in those proceedings, regardless of the Public Utility Act's constitutionality.

¶ 39 If defendants were deprived of property rights during the Commission proceedings and if they did not participate in *Adams County Property Owners & Tenant Farmers v. Illinois Commerce Comm'n*, 2015 IL App (4th) 130907, 394 Ill.Dec. 728, 36 N.E.3d 1019, then these eminent domain proceedings represent their first opportunity to challenge the constitutionality of the Public Utilities Act. The majority finds that the circuit court had jurisdiction to take away defendants' property but lacked jurisdiction to consider defendants' constitutional challenge to that taking. The majority's opinion would leave some defendants without any opportunity to assert their constitutional rights.

¶ 40 B. Issue Preclusion

¶ 41 I find the majority's approach especially problematic because we can reach the same result without issuing an opinion that has the potential to be so broadly applicable without being adequately explained. This case differs from the hypothetical with Alice and Brian because these eminent domain proceedings were not defendants' first opportunity to assert their challenge to the Public Utilities Act. They raised the same argu-ments in *Adams County*, and the appellate court rejected those arguments. *Id.* ¶ 76.

¶42 Issue preclusion bars a litigant from raising an argument that the litigant has already raised in a prior case. Issue preclusion applies when there is (1) a final judgment on the merits from a court of competent jurisdiction, (2) identity of the party to be bound by the prior litigation, and (3) an identical issue to the prior

litigation. *Gumma v. White*, 216 Ill. 2d 23, 38, 295 Ill.Dec. 628, 833 N.E.2d 834 (2005). The issue must have been actually litigated and necessary for judgment. *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 390, 258 Ill.Dec. 782, 757 N.E.2d 471 (2001).

¶43 After the Commission issued the certificate of public necessity to ATXI, a group of landowners—named Edgar County Citizens Are Entitled to Due Process (ECCDP)—participated in the appeal of that certificate to the Fourth District. *Adams County*, 2015 IL App (4th) 130907, ¶ 69, 394 Ill.Dec. 728, 36 N.E.3d 1019. Although the appellate court discussed some procedural problems with ECCDP's petition to intervene, the court also found that the Commission had impliedly given ECCDP permission to intervene, so ultimately it concluded "we find it appropriate to address the merits of [ECCDP's] appeal." *Id.* ¶¶ 76, 78. This was a final adjudication on the merits.

¶ 44 ECCDP argued that the Commission had failed to notify them of the pending proceedings regarding the routing of the Illinois Rivers Project. Specifically they argued "that the lack of a clear notice requirement in section 8-406.1 of the Utilities Act renders the statute unconstitutional." *Id.* ¶ 69. The *Adams County* court rejected this argument, finding that the Commission proceedings did not convey any property rights, so no process was due to ECCDP. *Id.* ¶¶ 51, 69, 80. This argument was identical to the argument that defendants raised before the circuit court here.

¶ 45 ECCDP's due process rights argument was actually litigated. The appellate court expressly considered the same arguments that defendants raise in this case. It was also necessary for the judgment against ECCDP. The *Adams County* court moved past the factual disagreement over whether notice was

actually mailed because it found that no notice was necessary. *Id.* ¶ 76. The majority opinion here seems to acknowledge all of this when it comments that the *Adams County* court "considered and rejected the very same due process challenge at issue here." *Supra* ¶ 15.

¶ 46 The only remotely contestable component of issue preclusion here is the "identity of the parties" prong. ATXI concedes that, although the majority of defendants here participated in the *Adams County* decision, some of the defendants in this eminent domain proceeding were not named parties in *Adams County*. Nevertheless, defendants here stipulated to be treated as parties to that earlier litigation. The stipulation states that "the defendants—appearing under the title 'Edgar County Citizens are Entitled to Due Process'—filed a motion to strike the certificate proceedings" in *Adams County*. This stipulation indicates that defendants here considered themselves to have at least an identity of interests with the ECCDP in *Adams County*, which is all that is required to satisfy this component of issue preclusion. *Agolf, LLC v. Village of Arlington Heights*, 409 Ill. App. 3d 211, 220, 349 Ill.Dec. 627, 946 N.E.2d 1123 (2011).

¶ 47 All of the components of issue preclusion are satisfied in this case. Rather than rely on this basis to resolve the appeal, the majority adopts a controversial and unwarranted approach to the circuit court's jurisdiction to conduct judicial review of a statute of the General Assembly. It adopts this unwarranted approach with insufficient discussion. I respectfully disagree with the majority's analysis, but for the reasons stated I would also reverse the circuit court's decision.

¶ 48 JUSTICE KILBRIDE, concurring in part and dissenting in part:

¶ 49 I partially concur with the majority's conclusion to reverse the circuit court's order, but I disagree with its reasoning, and in that respect, I join Part A of Justice Garman's special concurrence on the circuit court's jurisdiction. I agree with Justice Garman that the majority's flawed jurisdictional analysis raises significant threats to individual rights. *Supra* ¶ 38 (Garman, J., specially concurring). I disagree, in part, with Part B of Justice Garman's special concurrence and her conclusion that all of the landowners are barred from challenging the constitutionality of section 8-406.1 of the Public Utilities Act (220 ILCS 5/8-406.1 (West 2016)), based on the appellate court rejecting the same arguments in *Adams County Property Owners & Tenant Farmers v. Illinois Commerce Comm'n*, 2015 IL App (4th) 130907, ¶ 76, 394 Ill.Dec. 728, 36 N.E.3d 1019. I would hold that issue preclusion does not bar those landowners who were not parties to *Adams County* from challenging the constitutionality of section 8-406.1 of the Public Utilities Act in the eminent domain proceedings.

¶ 50 I agree with Justice Garman that the landowners' due process rights argument was actually litigated in *Adams County*. Unfortunately, this court denied the landowners' petition for leave to appeal in that case. Justice Garman notes in her special concurrence, "[t]he only remotely contestable component of issue preclusion here is the 'identity of the parties' prong." *Supra* ¶ 46. The special concurrence acknowledges that "some of the defendants in this eminent domain proceeding were not named parties in *Adams County*." *Supra* ¶ 46. However, Justice Garman concludes that the landowners who were not named in *Adams County*

"have at least an identity of interests with the ECCDP in *Adams County*, which is all that is required to satisfy this component of issue preclusion," based on the landowners stipulating to be treated as parties to the *Adams County* litigation. *Supra* ¶ 46. Nevertheless, I would hold that the requirements of due process prohibit the application of *res judicata* and issue preclusion to bar a claim by the landowners who were not parties in *Adams County* because the right sought to be enforced is personal in nature.

¶ 51 In *Richards v. Jefferson County*, 517 U.S. 793, 794-95, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996), the United States Supreme Court considered whether an action challenging the validity of a tax was barred by a judgment upholding the validity of the tax in a previous suit involving different taxpayers. The Supreme Court held that application of *res judicata* was inconsistent with principles of due process where the taxpayers in the former action "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any * * * taxpayers who were nonparties." *Richards*, 517 U.S. at 801, 116 S.Ct. 1761. The Supreme Court specifically noted that the underlying right asserted by the taxpayers was "personal in nature." *Richards*, 517 U.S. at 802 n.6, 116 S.Ct. 1761. Here, it is undisputed that many of the landowners in this eminent domain action were not parties in the *Adams County* appeal. Because the rights of the landowners who did not participate in *Adams County* are "personal in nature," I believe that applying the doctrine of *res judicata* to them results in a denial of due process. *Res judicata* is an equitable doctrine and "will not be applied where it would be fundamentally unfair to do so." *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 390,

258 Ill.Dec. 782, 757 N.E.2d 471 (2001). In my view it would be fundamentally unfair and inequitable to apply *res judicata* in a manner that results in the denial of due process for the landowners who did not participate in *Adams County*.

¶ 52 For these reasons, I believe the court should address the claim by the landowners who were not parties in *Adams County* that section 8-606.1 of the Public Utilities Act is unconstitutional both facially and as applied.

APPENDIX B

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

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

AMEREN TRANSMISSION COMPANY OF ILLINOIS,

Plaintiffs,

vs.

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

Defendants,

ORDER

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

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

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

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

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

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

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

FACTS

On November 7, 2012 AMEREN petitioned for a certificate of public convenience and necessity with the ICC seeking authority to "construct, operate and maintain" a new electric transmission line through Illinois. The project was designated the Illinois Rivers Project and stretched 375 miles across the state from Missouri to Indiana. AMEREN identified a primary and alternate route; each necessitating a permanent 150 wide right-of-way easement.

Section 5/8-406 of the Public Utilities Act (220 ILCS 5/8-406) outlines the requirements for obtaining a certificate of public convenience and necessity. In 2010 the legislature enacted Section 8406.1 which provided an expedited certification procedure for public utilities where the Commission was required to issue a decision either granting or denying the petition "no later than 150 days after the application is filed."[1] Under this expedited procedure, the Commission could extend the deadline by an additional 75 days if they found good cause to exist; as long as that determination was made within 30 days of the initial filing.[2]

The proceedings, both preceding and subsequent to the Commission's order of August 20, 2013, have been long and circuitous, with at least one trip to the Fourth District Court of Appeals in the process.[3] Various landowners have contended they received no notice of the proceedings before the ICC until receipt of a letter dated September 6, 2013 advising them of the August

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[1] 220 ILCS 5/8-406.1.

[2] 220 ILCS 5/8-406.1(g).

[3] *Adams County Property Owners & Tenant Farmers v. Illinois Commerce Commission,* 2015 IL App(4th) 130907.

ICC order. This order authorized the issuance of a certificate to AMEREN to begin construction. The Defendants argue this was, in many instances, the first time they became aware AMEREN intended to exercise a permanent easement over their property.

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

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

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

[4] Stipulation filed April 24, 2017.

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

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

> "The earliest of ATXI's[6] problems relate to the lists of potentially affected landowners it filed on November 7, 2012. The lists of potentially affected landowners, municipalities, and nearby utilities contained numerous errors and redundancies which required the Chief Clerk's Office to spend considerable time reviewing the lists to ensure they were accurate and usable. At least two weeks under the expedited schedule were lost before notice of the prehearing conference could be sent. Two months later ATXI realized that it neglected to send a complete list of landowners with its initial filing.... due process required the Commission to extend the deadline to provide the newly notified landowners some semblance of an opportunity to respond." ICC Order dated August 20, 2013, p. 7.

The problems with notifying all affected landowners at the very outset of these proceedings resulted in the

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

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

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

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

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

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

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

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

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

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

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

Although ATXI's witness acknowledged receipt of the email, and was responsible for selecting routes for the transmission lines, she took no action in response. It was further noted in the proceedings ATXI had done nothing to notify the federal government of its intention to construct a transmission line across the federal easement.

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

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

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

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

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

considered a simple adjustment of poles." (ICC Order, 8-20-13, p. 118).

The Commission noted ATXI's late attempt to significantly modify its Primary route and labeling it "alternative pole placement" was questionable at least. Their language seemed to indicate they considered ATXI's explanation disingenuous.

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

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

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

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

On September 5, 2013, the Commission received the first of seven applications for rehearing pursuant to the Illinois Administrative Code. This application, which does not relate to the portion of the project in question here, was allowed on September 18, after

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

which the Commission then received six more applications, including one by some of the Defendants here, which was denied. A First Order on Rehearing was entered on February 5, 2014 relating only to the individual property owners in the first application.

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

The Final Order entered on March 9, 2016 involved the verified petition of ATXI filed with the ICC pursuant to Section 8-509 of the Public Utilities Act (220 ILCS 5/1-101 *et seq*.). This petition requested authorization to use eminent domain to acquire rights-of-way across 26 parcels of land in a portion of the route previously approved by the Commission. The Order affected some of the defendants in this case and addressed efforts to negotiate the purchase of rights-of-way from them.

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

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

ANALYSIS

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

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

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

The *Lynn* court also noted how:

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

Contrary to the assertions of AMEREN, the Defendants in these eminent domain proceedings, *even if they had been given some form of notice and actively participated* are not precluded from raising their due

process issues here according to *Adams County*. If the notice provided by statute at the time failed to meet the constitutional requirements for due process, it was not somehow either litigated away or waived by the proceedings before the ICC.

Relying on *Lynn, Chicago, Burlington & Quincy R.R. Co. v. Cavanagh*, 278 111.609 (1917) and *Zurn v. City of Chicago*, 389 Ill. 114 (1945), the court in *Adams County* concluded due process did not require the notice one would expect if property rights were at risk. However, as this Court already noted in the February Order, it is the decision of the ICC authorizing the construction of the transmission line as necessary for the public good which leads to the eminent domain proceedings before this Court for all those who refuse to accept AMEREN's offer to purchase an easement.

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

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

> "Evidence that the Illinois Commerce Commission has granted a certificate or otherwise made a finding of public convenience and necessity for an acquisition of property ... for private ownership or control (including, without limitation, an acquisition for which the use of eminent domain is

> authorized under the Public Utilities Act [220 ILCS 5/1-101 *et seq*.],) to be used for utility purposes creates a rebuttable presumption that such acquisition of that property (or right interest in property) is (i) primarily for the benefit, use, or enjoyment of the public and (ii) necessary for a public purpose."

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

However, the *Enbridge* court found the sort of presumption created by the PUA to be a "strong presumption" which can only be rebutted by "clear and convincing evidence". *Enbridge* at P138. As they pointed out, the clear and convincing standard of proof requires more than a preponderance but less than the criminal standard of proof beyond a reasonable doubt; citing *Altenheim German Home v. Bank of America, NA*., 376 Ill.App.3d 26 (2nd Dist. 2007).

The court concluded:

> "Strong public policy favors that the landowners should be required to present clear and convincing

> evidence before the applicable rebuttable presumption bursts." P140.

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

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

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

Contrary to the courts conclusion, it would appear there is, in fact, something in the PUA which effectively preempts landowners' rights in the condemnation proceedings; namely the strong presumption, and shifting of the burden which would not otherwise exist in normal eminent domain proceedings.

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

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

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

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

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

affected landowners "some semblance of an opportunity to respond." ICC Order of August 20, 2013, p.7.

Section 8-406.1 at the time of these proceedings did not specify the method by which affected landowners were to be apprised of alternate routes proposed after the utility's filing of their petition. Personal notice by mail was considered necessary for those along the Primary and Alternate Routes proposed by AMEREN. In addition, AMEREN was required to provide a complete list of all affected landowners to the Commission.[11]

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

Section (g) provided:

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

[11] Which proved not to be the case.

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

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

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

This would only make sense since the end result of the application proceedings could well result in

landowners being forced to allow rights-of-way across their property they did not otherwise want.

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

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

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

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

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

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

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

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

What is significant about the Notice is the last paragraph:

> "Notice is further given by the Administrative Law Judges that due to the length of the list of entities to receive notice of this proceeding, the Chief Clerk's Office *need not include with this notice the list of potentially affected landowners and entities.* [emphasis added] The list is available electronically on the Commission's e-Docket system under Docket No. 12-0598. The web address for the e-Docket system is: http://www.icc.illinois.gov/e-docket/. Those unable to access the list electronically may request that the

> Commission's Chief Clerk mail a hardcopy to them by calling (217) 782-7434." Stipulation filed April 24, 2017, Ex. #1.

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

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

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

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

> "... perhaps the most compelling information on the record is the lack of intervenors from parcels along that part of Stop Coalition's Route 2 that does not overlap ATM'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." Order of Aug.20, 2012, p.120.

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

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

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

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

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

AMEREN contends their recourse was to appeal. Section 10-201 says the Commission's decisions are appealable to the appellate court of the judicial district in which the subject matter of the hearing is situated. 220 ILLS 5/10-201(a). However, as was seen here, although Defendants were not permitted to intervene for purposes of addressing the lack of due process before the ICC, they were permitted to intervene for the limited purpose of appealing the decision. An

appeal of the Commission's Order would only be a review of the proposed plan and the extent of property sought. The Court in *Adams County* found no due process issues were involved since the ICC proceedings did not actually affect the landowners' property rights.[12]

The Fourth District also noted:

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

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

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

The Supreme Court in *Lyon* also held:

> "The United States Supreme Court has made it clear that due process is a matter of federal constitutional law, so compliance or noncompliance with state procedural requirements is not determinative of whether minimum procedural due

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

process standards have been met." 209 Ill.2d at 274.

Lyon dealt with due process as it related to the standard of proof required at early stages of DCFS's administrative process and the delays involved in processing appeals therefrom. However, they discussed the factors courts are to consider when evaluating procedural due process claims:

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

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

The risk of an erroneous deprivation of their property interests through the procedures used is obvious. Without notice and an opportunity to be heard, their absence was taken by the Commission as a tacit acceptance of Stop Coalitions Alternate Route 2. As indicated above, the ICC Order of August 20, 2013 specifically mentioned the absence of objection or

intervention by the landowners along that particular route as "perhaps the most compelling information on the record." Order, p. 120.

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank Trust Co*., 339 U.S. 306, 314 (1950).

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

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

> "For applications filed after the effective date of this amendatory Act of the 99th General Assembly [P.A. 99-3991, the Commission shall by

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

> 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 ILLS 5/8-406.1(a)(3).

As a result of the amendment, it was made clear landowners affected by primary or alternate rights of way were entitled to notice by registered mail. It is reasonable to conclude, since the ALJs in this case followed the then-existing procedure for all subsequent alternate routes proposed by intervenors, they would be inclined to do so now; thereby entitling any newly identified landowners to registered mail notification.

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

The final *Mathews* factor; "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail", seem obvious. Actual notice to all affected landowners provides everyone the opportunity to participate in the

less expensive, less formal administrative process; preventing the need for litigation such as this. In addition, the process is already in place and notice to all affected landowners is already provided; with cost reimbursed by the utility, so there would be no increased fiscal or administrative burden.

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

It is clear from the record the list of potentially affected landowners became administratively burdensome to the point where the Commission stopped sending the list and made it available electronically. Exhibits 1 and 6 mentioned above do nothing to alleviate the concerns regarding lack of notice and the Court is confronted with 35 affidavits from landowners swearing under oath they received no notice. Coupled with the fact that a segment of the project which appeared to be devoid of objection or intervention also happened to be the same landowners, the Court must conclude they did not receive the notice to which they were entitled.

> "Due process of law is served where there is a right to present evidence and arguments on one's own behalf, a right to cross-examine adverse witnesses and impartiality in rulings upon the

evidence which is offered." *Lakeland Construction Co. v. Department of Revenue*, 62 Ill. App. 3d 1036 (1st Dist. 1996).

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

Conclusion

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

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

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

There was no good or constitutionally permissible reason to distinguish initially affected landowners

from those later identified since the potential for loss of property rights were the same.

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

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

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

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

ENTER: 8-30-17

/s/ Craig H. DeArmond
JUDGE

APPENDIX C

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

Nos. 2016-ED-4, 2016-ED-5, 2016-ED-6, 2016-ED-12, 2016-ED-13, 2016-ED-15, 2016-ED16, 2016-ED-17, 2016-ED18, 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

AMEREN TRANSMISSION COMPANY OF ILLINOIS,

Plaintiff,

vs.

RICHARD L. HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC AND UNKNOWN OWNERS, *et al.,*

Defendants.

ORDER

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

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

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

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

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

support the Court's eventual determination in that Order.

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

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

2. The finding of unconstitutionality is necessary to the decision or judgment rendered, and such decision or judgment cannot rest upon an alternative ground.

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

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

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

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

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

ENTER: 11/3/17

/s/ James R. Glenn
Judge

APPENDIX D

APPELLATE COURT OF ILLINOIS,
FOURTH DISTRICT

Nos. 4-13-0907, 4-14-0249,
4-13-0917, 4-14-0218

ADAMS COUNTY PROPERTY OWNERS
AND TENANT FARMERS,

Petitioner,

v.

The ILLINOIS COMMERCE COMMISSION; Donna Allen; Central Stone Company; Enbridge Pipelines (Illinois), L.L.C.; Prairie Power, Inc.; The City of Champaign; Futuregen Industrial Alliance, Inc.; IBEW Local 51; Beth Bauer; Nancy N. Madigan; Barbara Bergschneider; Joseph Bergschneider; David G. Bockhold; Theresa M. Bockhold; Miso; Wind on the Wires; Prairie Power, Inc.; Gan Properties, LLC; Schuyler County Property Owners; Niemann Foods, Inc.; Michael T. Cody; Ameren Transmission Company of Illinois; Anne Mae Copeland; Pamela J. Copeland; Richard T. Copeland, Jr.; The Village of Savoy; Ameren Services Company; Erbon Doak; Midwest Independent Transmission System Operator, Inc.; Barki/Adams County Property Owners; The Village of Sidney; Lynda McLaughlin; The Nature Conservancy; Kohl Wholesale; Illinois Agricultural Association; The Village of Mt. Zion; IBEW Local 702; Michael Hutchinson; Pamela P. Irwin; Enbridge Energy Company, Inc.; Morgan County Property Owners; Clean Line Energy Partners, LLC; Western Morgan County Property

Owners; Dynegy, Inc.; Michael E. Lockwood; Illinois Laborers and Contractors Training Trust Fund; Thomas McLaughlin; Wiese Farms; Edna Keplinger Trust; Peggy Mills; Rural Clark and Edgar County Concerned Citizens; The Village of Pawnee; Matt Holtmeyer Construction, Inc.; Shelby County Landowners Group; Gregory A. Pearce; Theresa Pearce; James Phillips; Tori Phillips; Barbara Ragheb; Magdi Ragheb; Brian Ralston; Sherry L. Ralston; Justin Ramey; Ann Raynolds; Moultrie County Property Owners; Janey Roney; Deborah D. Rooney; Donna Ruholl; Steve Ruholl; RCECCC; Clark County Preservation Committee; JDL Broadcasting, Inc.; Laura Te Grotenhuis; Piatt, Douglas, Moultrie, and Christian County Property Owners; and Mark Lash,

Respondents.

EDGAR COUNTY CITIZENS,

Petitioner,

v.

The Illinois Commerce Commission; Donna Allen; Central Stone Company; Enbridge Pipelines (Illinois), L.L.C.; Prairie Power, Inc.; The City of Champaign; Futuregen Industrial Alliance, Inc.; IBEW Local 51; Beth Bauer; Nancy N. Madigan; Barbara Bergschneider; Joseph Bergschneider; David G. Bockhold; Theresa M. Bockhold; Miso; Wind on the Wires; Prairie Power, Inc.; Gan Properties, LLC; Schuyler County Property Owners; Niemann Foods, Inc.; Michael T. Cody; Ameren Transmission Company of Illinois; Anne Mae Copeland; Pamela J. Copeland; Richard T. Copeland, Jr.; The Village of Savoy; Ameren Services Company; Erbon Doak;

Midwest Independent Transmission System Operator, Inc.; Barki/Adams County Property Owners; The Village of Sidney; Lynda McLaughlin; The Nature Conservancy; Kohl Wholesale; Illinois Agricultural Association; The Village of Mt. Zion; IBEW Local 702; Michael Hutchinson; Pamela P. Irwin; Enbridge Energy Company, Inc.; Morgan County Property Owners; Clean Line Energy Partners, LLC; Western Morgan County Property Owners; Dynegy, Inc.; Michael E. Lockwood; Illinois Laborers and Contractors Training Trust Fund; Thomas McLaughlin; Wiese Farms; Edna Keplinger Trust; Peggy Mills; Rural Clark and Edgar County Concerned Citizens; The Village of Pawnee; Matt Holtmeyer Construction, Inc.; Shelby County Landowners Group; Gregory A. Pearce; Theresa Pearce; James Phillips; Tori Phillips; Barbara Ragheb; Magdi Ragheb; Brian Ralston; Sherry L. Ralston; Justin Ramey; Ann Raynolds; Moultrie County Property Owners; Janey Roney; Deborah D. Rooney; Donna Ruholl; Steve Ruholl; RCECCC; Clark County Preservation Committee; JDL Broadcasting, Inc.; Laura Te Grotenhuis; Piatt, Douglas, Moultrie, and Christian County Property Owners; and Mark Lash, Respondents. Morgan, Sangamon, and Scott Counties Land Preservation Group,

Petitioner,

v.

The Illinois Commerce Commission; Donna Allen; Central Stone Company; Enbridge Pipelines (Illinois), L.L.C.; Prairie Power, Inc.; The City of Champaign; Futuregen Industrial Alliance, Inc.; IBEW Local 51; Beth Bauer; Nancy N. Madigan; Barbara Bergschneider; Joseph Bergschneider; David G. Bockhold; Theresa M. Bockhold; Miso; Wind on

the Wires; Gan Properties, LLC; Schuyler County Property Owners; Niemann Foods, Inc.; Michael T. Cody; Ameren Transmission Company of Illinois; Anne Mae Copeland; Pamela J. Copeland; Richard T. Copeland, Jr.; The Village of Savoy; Ameren Services Company; Erbon Doak; Midwest Independent Transmission System Operator, Inc.; Barki/Adams County Property Owners; The Village of Sidney; Lynda McLaughlin; The Nature Conservancy; Kohl Wholesale; Illinois Agricultural Association; The Village of Mt. Zion; IBEW Local 702; Michael Hutchinson; Pamela P. Irwin; Enbridge Energy Company, Inc.; Morgan County Property Owners; Clean Line Energy Partners, LLC; Western Morgan County Property Owners; Dynegy, Inc.; Michael E. Lockwood; Illinois Laborers and Contractors Training Trust Fund; Thomas McLaughlin; Wiese Farms; Edna Keplinger Trust; Peggy Mills; Rural Clark and Edgar County Concerned Citizens; The Village of Pawnee; Matt Holtmeyer Construction, Inc.; Shelby County Landowners Group; Gregory A. Pearce; Theresa Pearce; James Phillips; Tori Phillips; Barbara Ragheb; Magdi Ragheb; Brian Ralston; Sherry L. Ralston; Justin Ramey; Ann Raynolds; Moultrie County Property Owners; Janey Roney; Deborah D. Rooney; Donna Ruholl; Steve Ruholl; RCECCC; Clark County Preservation Committee; JDL Broadcasting, Inc.; Laura Te Grotenhuis; Piatt, Douglas, Moultrie, and Christian County Property Owners; Mark Lash; Dean L. McWard; Donald C. McWard; Shirley McWard; Edward Corley Trust; and Eric Sprague, and Laura Sprague, Respondents.
Macon County Property Owners,

Petitioner,

v.

The Illinois Commerce Commission; Donna Allen; Central Stone Company; Enbridge Pipelines (Illinois), L.L.C.; Prairie Power, Inc.; The City of Champaign; Futuregen Industrial Alliance, Inc.; IBEW Local 51; Beth Bauer; Nancy N. Madigan; Barbara Bergschneider; Joseph Bergschneider; David G. Bockhold; Theresa M. Bockhold; Miso; Wind on the Wires; Gan Properties, LLC; Schuyler County Property Owners; Niemann Foods, Inc.; Michael T. Cody; Ameren Transmission Company of Illinois; Anne Mae Copeland; Pamela J. Copeland; Richard T. Copeland, Jr.; The Village of Savoy; Ameren Services Company; Erbon Doak; Midwest Independent Transmission System Operator, Inc.; Barki/Adams County Property Owners; The Village of Sidney; Lynda McLaughlin; The Nature Conservancy; Kohl Wholesale; Illinois Agricultural Association; The Village of Mt. Zion; IBEW Local 702; Michael Hutchinson; Pamela P. Irwin; Enbridge Energy Company, Inc.; Morgan County Property Owners; Clean Line Energy Partners, LLC; Western Morgan County Property Owners; Dynegy, Inc.; Michael E. Lockwood; Illinois Laborers and Contractors Training Trust Fund; Thomas McLaughlin; Wiese Farms; Edna Keplinger Trust; Peggy Mills; Rural Clark and Edgar County Concerned Citizens; The Village of Pawnee; Matt Holtmeyer Construction, Inc.; Shelby County Landowners Group; Gregory A. Pearce; Theresa Pearce; James Phillips; Tori Phillips; Barbara Ragheb; Magdi Ragheb; Brian Ralston; Sherry L. Ralston; Justin Ramey; Ann Raynolds; Moultrie County Property Owners; Janey Roney; Deborah D. Rooney; Donna Ruholl; Steve Ruholl; RCECCC; Clark County Preservation Committee; JDL Broadcasting, Inc.; Laura Te Grotenhuis; Piatt, Douglas, Moultrie, and Christian County Property

Owners; Mark Lash; Dean L. McWard; Donald C. McWard; Shirley McWard; Edward Corley Trust; and Eric Sprague, and Laura Sprague,

Respondents.

Filed July 20, 2015.
Rehearing Denied Aug. 21, 2015.

Attorneys and Law Firms

Brian R. Kalb (argued), of Byron Carlson Petri & Kalb, LLC, Edwardsville, for petitioner Adams County Property Owners and Tenant Farmers.

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Edward R. Gower, of Hinshaw & Culbertson, LLP, Springfield, for respondent Peggy Mills.

OPINION

Justice HARRIS delivered the judgment of the court, with opinion.

¶ 1 These four consolidated appeals involve requests for direct administrative review of an order of the Illinois Commerce Commission (Commission), which authorized Ameren Transmission Company of Illinois (ATXI) to construct a high voltage transmission line and related facilities across several Illinois counties and designated routes and locations for the new construction. Petitioners—Adams County Property Owners (ACPO); Edgar County Citizens are Entitled to Due Process (ECCDP); Morgan, Sangamon, and Scott Counties Land Preservation Group (MSSCLPG); and Macon County Property Owners (MCPO)—are four groups of individuals and entities that own property affected by the Commission's order. ACPO, MSSCLPG, and MCPO intervened in the underlying proceedings and, on appeal, challenge specific portions of the route chosen for the transmission line (challenged by ACPO and MSSCLPG) and the location selected for a specific substation (challenged by MCPO).

ACPO additionally challenges the expedited procedure under which ATXI's petition was considered. Further, ECCDP appeals, arguing its members were not properly notified that their properties would be affected by the underlying proceedings and, thus, their due process rights were violated. We affirm.

¶2 I. BACKGROUND

¶ 3 The Public Utilities Act (Utilities Act) (220 ILCS 5/8–406 (West 2010)) requires that a public utility obtain a certificate of public convenience and necessity from the Commission before transacting business or beginning new construction within Illinois. Section 8–406 of the Utilities Act sets forth requirements for obtaining a certificate. 220 ILCS 5/ 8–406 (West 2010). Effective July 28, 2010, the legislature enacted section 8–406.1 of the Utilities Act (220 ILCS 5/8–406.1 (West 2010)), permitting a public utility to apply for a certificate using an expedited procedure when seeking to construct a new high voltage electric service line and related facilities. Under the expedited procedure, the Commission is required to issue a decision granting or denying a request for a certificate "no later than 150 days after the application is filed"; however, within 30 days after filing, the Commission may extend the deadline by an additional 75 days if it "finds that good cause exists to extend the 150–day period." 220 ILCS 5/8–406.1(g) (West 2010). Further, a certificate must be issued where the Commission finds the proposed project will promote the public convenience and necessity and the following criteria are satisfied:

> "(1) That the Project is necessary to provide adequate, reliable, and efficient service to the public utility's customers and is the least-cost means of satisfying the service needs of the public utility's customers or that the Project will promote

the development of an effectively competitive electricity market that operates efficiently, is equitable to all customers, and is the least cost means of satisfying those objectives.

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

(3) That the public utility is capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers." 220 ILCS 5/8–406.1(f) (West 2010).

¶ 4 On November 7, 2012, ATXI elected to file a petition utilizing the expedited procedure in section 8–406.1. It asked the Commission to issue a certificate of public convenience and necessity that would authorize it "to construct, operate and maintain a new 345 kV electric transmission line * * * and related facilities, including certain new or expanded substations, within * * * Illinois." ATXI's plan for construction was designated the Illinois Rivers Project (Project) and portions of the Project were to be located within several Illinois counties, spanning 375 miles across the state, from its Missouri to Indiana borders.

¶ 5 Due to the magnitude of the Project, the underlying proceedings were complex and involved multiple parties. The record indicates the Commission sent notices of the proceeding to approximately 8,436 potentially affected landowners. Numerous entities and individuals sought, and were granted, leave to intervene. Commission staff members also participated in the underlying proceedings, presenting arguments and recommendations to the Commission. Several

status hearings were held before the Commission's administrative law judges (ALJs) and evidentiary hearings were conducted from March 13 to 17, 2013. Pursuant to statutory requirements, ATXI submitted both a primary and alternative route for its Project, while intervening parties also submitted various routes for consideration.

¶ 6 On August 20, 2013, the Commission issued a 135–page order. To facilitate a resolution of the matter, it evaluated the Project in segments and set forth the parties' arguments, the recommendations of Commission staff, and its own conclusions with respect to each segment. In reaching its decision, the Commission noted that, although virtually all of the involved parties agreed that some form of the Project was necessary, the issue of *where* to construct the transmission lines and related facilities was heavily contested. Ultimately, the Commission found the requirements of section 8–406.1 had been met; approved specific routes for the proposed transmission line, as well as locations for new and expanded substations; and issued a certificate of public convenience and necessity to ATXI with respect to those approved routes and locations. However, the Commission did not grant all of the approvals sought by ATXI and specifically declined to approve routes for the transmission line in two segments and several of the proposed locations for new and expanded substations.

¶ 7 Various parties sought rehearing in the matter, some of which were granted by the Commission. Following further evidentiary hearings, the Commission issued a first order on rehearing on February 5, 2014, and a second order on rehearing on February 20, 2014. Due to the complexity of the underlying proceedings, we provide a more detailed recitation of the facts and

the issues presented as they relate to the specific parties on appeal.

¶ 8 A. ACPO—Appeal No. 4–13–0907

¶ 9 ACPO is a group of landowners affected by the segment of the Project known as the Quincy–Meredosia segment. ACPO intervened in the underlying proceedings and submitted three alternative routes for the proposed transmission line. Before the Commission, ACPO advocated for a route referred to as its "Alternative Route 1," which largely paralleled an existing 138 kV transmission line that ran through the area. Conversely, ATXI recommended approval of a "Hybrid Route" (also referred to by ATXI as the "Rebuttal Recommended Route") that had been developed by Commission staff by combining elements of the primary and alternative routes ATXI originally submitted to the Commission.

¶ 10 The record reflects ACPO's Alternative Route 1 was the shortest and least costly route to construct. It was 43.6 miles in length compared to the Hybrid Route, which was 46.3 miles long. Additionally, Alternative Route 1 cost $9.1 million less to construct than the Hybrid Route. Commission staff expressed a preference for Alternative Route 1 over the Hybrid Route; however, the Commission ultimately selected the Hybrid Route, finding it presented the "least cost" as compared with Alternative Route 1. It stated as follows:

> "The Commission is persuaded that the Hybrid Route is the best option for this project because it is cost-effective and should eliminate concerns raised by almost all of the intervenors who have submitted testimony regarding this portion of the project. The Commission is also troubled by the

> evidence that ACPO Alternative Route 1 would require extensive tree removal, as well as the possible displacement of six residences. It appears to the Commission that any cost savings envisioned by the shorter length of ACPO Alternative Route 1 would be eclipsed by the potential displacement of homes."

¶ 11 On September 19, 2013, ACPO filed an application for rehearing, which the Commission denied. ACPO's appeal followed. Not all of ACPO's members join in its appeal. Although ACPO filed a first amended petition for leave to intervene and listed 29 individuals and entities as its members, only 5 of those 29 members now seek review of the Commission's decision.

¶ 12 B. ECCDP—Appeal No. 4–13–0917

¶ 13 ECCDP is a group of 21 landowners affected by the Kansas–Indiana State Line segment of the Project. With respect to that segment, several individuals or groups with affected property interests were allowed to intervene and five routes were proposed by the parties for consideration by the Commission. Ultimately, in its August 20, 2013, decision, the Commission approved a route proposed by one of the intervening parties, Stop the Power Lines Coalition (Stop Coalition).

¶ 14 ECCDP did not become involved in the underlying proceedings until after the Commission issued its initial decision in the matter. Specifically, on September 18, 2013, ECCDP filed a petition for leave to intervene, asserting its members owned real estate that was directly on, or immediately adjacent to, the alternate route proposed by ATXI. They asserted they would be affected by the transmission line but did not receive notice of the underlying proceedings until

they received letters from ATXI, which were dated September 6, 2013, and advised them of the Commission's August 20, 2013, decision.

¶ 15 On September 19, 2013, ECCDP filed a "DUE PROCESS MOTION TO STRIKE PROCEEDINGS AS TO THE EDGAR COUNTY SEGMENT AND APPLICATION FOR REAHEARING." It asserted its members were directly affected by the Commission's August 20, 2013, decision, but they did not receive proper notice of the underlying proceedings. ECCDP alleged the lack of notice denied its members due process and requested that proceedings pertaining to the segment of the Project affecting them be stricken so that they could be afforded the same rights as other property owners who did receive notice. ECCDP attached the affidavit of one of its members to its motion, wherein the member averred he did not receive notice of either the proposed transmission line Project or the underlying proceedings until receiving ATXI's September 6, 2013, letter. On October 1, 2013, ECCDP filed a motion to supplement its motion to strike and application for rehearing with the affidavits of all but three of its remaining members. In each affidavit, a member of ECCDP averred he or she received no notice of the Project or the underlying proceedings until receiving ATXI's September 6, 2013, letter.

¶ 16 On October 2, 2013, the Commission's ALJs denied ECCDP's petition for leave to intervene. They also recommend the Commission deny ECCDP's September 19, 2013, filing. In a memorandum to the Commission, the ALJs stated as follows:

> "Whether each of the 21 property owners making up [ECCDP] own land directly over which the transmission line will run is not clear from the two

> [ECCDP] filings. Generally, those owning land adjacent to or near a proposed transmission line route would not normally receive notice of such a docket from the Commission. In the instant proceeding, however, several of the [ECCDP] members * * * appear on the service list for a January 31, 2013[,] notice informing landowners of this docket and their opportunity to participate. For some unknown reason, these landowners chose not to participate. While they are free to intervene now, they must accept the record as it exists at the time of their intervention (which they acknowledge in paragraph 4 of their September 18, 2013[,] petition to intervene and paragraph 5 of their September 19, 2013 [,] filing). At this time, the transmission line route segment from the Kansas substation to the Indiana state line through Edgar County is resolved and in light of the reasons given, [ECCDP] cannot reasonably expect the Commission to vacate that part of this proceeding affecting Edgar County and grant rehearing."

On October 3, 2013, the Commission denied ECCDP's motion to strike and application for rehearing.

¶ 17 On October 22, 2013, ECCDP filed a notice of appeal, challenging the Commission's August 20, 2013, order and its denial of ECCDP's request for rehearing. On October 23, 2013, the ALJs granted ECCDP's petition to intervene for the limited purpose of accommodating appellate review.

¶ 18 C. MSSCLPG—Appeal No. 4–14–0218

¶ 19 MSSCLPG is a group of over 60 individuals and entities affected by the segment of the Project referred

to as the Meredosia–Pawnee segment. Several parties intervened with respect to this segment and various routes were proposed for consideration. ATXI and three intervening parties recommended approval of ATXI's alternate route, which was also referred to in the underlying proceedings as the "Rebuttal Recommended Route" and referred to by the Commission as the "Stipulated Route." One of those three intervening parties, Morgan and Sangamon County Landowners and Tenant Farmers (MSCLTF), submitted a route referred to as the "MSCLTF Route," which paralleled an existing transmission line. However, MSCLTF ultimately withdrew its support for its proposed route in favor of ATXI's Stipulated Route. In the underlying proceedings, MSSCLPG and one other intervening party advocated for the MSCLTF Route. Commission staff also supported the MSCLTF Route.

¶ 20 The Commission chose ATXI's Stipulated Route as the least-cost route for the Meredosia–Pawnee segment. In so holding, it found "that little evidence in support of the MSCLTF Route ha[d] been presented by any of the parties" and it was "difficult from the evidence presented to fairly judge whether the MSCLTF Route would be superior to Stipulated Route."

¶ 21 On September 18, 2013, MSSCLPG filed an application for rehearing, which the Commission granted on October 2, 2013. In December 2013, further evidentiary hearings were held in the matter. On February 20, 2014, the Commission issued a second order on rehearing and addressed the Meredosia–Pawnee segment of the Project. The record shows ATXI asked the Commission to reapprove its Stipulated Route, while MSSCLPG again sought approval

of the MSCLTF Route. Once more, the Commission chose the Stipulated Route.

¶ 22 MSSCLPG's appeal followed.

¶ 23 D. MCPO—Appeal No. 4–14–0249

¶ 24 MCPO is a group of 27 individuals and entities affected by the Pana–Kansas segment of the Project. In connection with that segment, ATXI proposed placing a substation near the Village of Mt. Zion. In its August 20, 2013, decision, the Commission agreed that a new substation in the Mt. Zion area was necessary; however, it declined to approve a particular location for the substation at that time, noting the particular routes for all connecting transmission lines had not yet been determined. ATXI sought and was granted rehearing with respect to this issue, and hearings were conducted before the Commission's ALJs.

¶ 25 On rehearing, Commission staff proposed three locations for the substation at issue. The first two locations—referred to as "Option # 1" and "Option # 2"—were a few miles south of Mt. Zion and in close proximity to one another. A third location—referred to as "Option # 3"—was approximately 17 miles southwest of Mt. Zion and near Moweaqua, Illinois. Both ATXI and an intervening party not at issue on appeal (Moultrie County Property Owners) agreed that Option # 1 and Option # 2 were acceptable. Further, ATXI entered into a stipulation with the Village of Mt. Zion (also an intervening party in the case) to recommend Option # 2. Commission staff expressed a preference for Option # 3 and at least one intervening party recommended that route. The record indicates two intervening parties preferred Option # 1. Ultimately, the Commission's ALJs entered a proposed

second order on rehearing in which they concluded Option # 2 was the most appropriate location for the Mt. Zion substation.

¶ 26 On January 29, 2014, MCPO filed a brief addressing its objections to the ALJs' proposed second order. It objected to the selection of Option # 2 and argued Option # 1 was the preferable choice. On February 20, 2014, the Commission issued its second order on rehearing. It noted the parties' positions, including MCPO's objections to the proposed second order, and selected Option # 2 as the site for the Mt. Zion substation. On March 24, 2014, MCPO filed an amended application for rehearing, arguing Option # 1 was not given sufficient consideration in the Commission's decision and was preferable to Option # 2. The Commission denied MCPO's application for rehearing and MCPO appeals.

¶ 27 II. ANALYSIS

¶ 28 A. Standard of Review

¶ 29 "[T]he Commission is entitled to great deference because it is an administrative body possessing expertise in the field of public utilities." *Archer–Daniels–Midland Co. v. Illinois Commerce Comm'n,* 184 Ill.2d 391, 397, 235 Ill.Dec. 38, 704 N.E.2d 387, 390 (1998). "We will not reevaluate the credibility or weight of the evidence, nor substitute our judgment for that of the Commission." *People ex rel. Madigan v. Illinois Commerce Comm'n,* 2011 IL App (1st) 100654, ¶ 9, 354 Ill.Dec. 662, 958 N.E.2d 405.

¶ 30 Pursuant to the Utilities Act, the Commission's findings and conclusions on questions of fact should be held *prima facie* true, the Commission's orders must be held *prima facie* reasonable, and an appealing party has the burden of proof upon all issues raised by the

appeal. 220 ILCS 5/10–201(d) (West 2010). "Review of a Commission order is limited to the following questions: (1) whether the Commission acted within the scope of its authority, (2) whether the Commission made adequate findings in support of its decision, (3) whether the Commission's decision was supported by substantial evidence in the record, and (4) whether constitutional rights have been violated." *Central Illinois Public Service Co. v. Illinois Commerce Comm'n,* 268 Ill.App.3d 471, 476, 206 Ill.Dec. 49, 644 N.E.2d 817, 821 (1994). "Substantial evidence consists of evidence a reasoning mind would accept as sufficient to support the challenged finding; it is more than a scintilla of evidence but requires something less than a preponderance of the evidence." *Ameren Illinois Co. v. Illinois Commerce Comm'n*, 2013 IL App (4th) 121008, ¶ 18, 377 Ill.Dec. 806, 2 N.E.3d 1087.

¶ 31 On review, the Commission's factu findings "will not be overturned unless they are against the manifest weight of the evidence." *Ameren,* 2013 IL App (4th) 121008, ¶ 19, 377 Ill.Dec. 806, 2 N.E.3d 1087. "[A]n appellant must do more than merely show that the evidence presented would support a conclusion different from the one reached by the [Commission]; rather, the appellant must affirmatively demonstrate that the conclusion opposite to that reached by the [Commission] is clearly evident." *Northern Moraine Wastewater Reclamation District v. Illinois Commerce Comm'n,* 392 Ill.App.3d 542, 556, 332 Ill.Dec. 18, 912 N.E.2d 204, 219 (2009). "If the record contains evidence supporting the agency's decision, it should be affirmed." *Caterpillar, Inc. v. Illinois Commerce Comm'n,* 348 Ill.App.3d 823, 828, 283 Ill.Dec. 482, 808 N.E.2d 32, 36 (2004).

¶ 32 "When the Commission's decision presents a question of mixed law and fact, we review the Commission's order under the clearly erroneous standard." *Ameren*, 2013 IL App (4th) 121008, ¶ 19, 377 Ill.Dec. 806, 2 N.E.3d 1087.

> "'The clearly erroneous standard of review lies between the manifest weight of the evidence standard and the *de novo* standard, and as such, it grants some deference to the agency's decision.' [Citation.] In that circumstance, the reviewing court must be left with a 'definite and firm conviction' that the Commission committed a mistake." *Ameren*, 2013 IL App (4th) 121008, ¶ 19, 377 Ill.Dec. 806, 2 N.E.3d 1087 (quoting *People ex rel. Madigan v. Illinois Commerce Comm'n,* 2011 IL App (1st) 101776, ¶ 9, 357 Ill.Dec. 831, 964 N.E.2d 510).

¶ 33 Finally, "the Commission's interpretation of a question of law is not binding on a court of review" (*Archer–Daniels–Midland,* 184 Ill.2d at 397, 235 Ill.Dec. 38, 704 N.E.2d at 390) and such questions are subject to a *de novo* standard (*People ex rel. Madigan v. Illinois Commerce Comm'n,* 2014 IL 116642, ¶ 8, 386 Ill.Dec. 655, 21 N.E.3d 418). However, this court has held that "[t]he Commission's interpretation of a statute it is charged with administering and enforcing is entitled to substantial weight and deference." *Ameren Illinois Co. v. Illinois Commerce Comm'n*, 2012 IL App (4th) 100962, ¶ 61, 359 Ill.Dec. 568, 967 N.E.2d 298 (citing *People ex rel. Birkett v. City of Chicago,* 202 Ill.2d 36, 46, 269 Ill.Dec. 21, 779 N.E.2d 875, 881 (2002)). Further, "[a] court may overturn the Commission's interpretation of its own rules if its

construction is clearly erroneous, arbitrary, or unreasonable." *Ameren*, 2012 IL App (4th) 100962, ¶ 61, 359 Ill.Dec. 568, 967 N.E.2d 298.

¶ 34 B. ACPO—Appeal No. 4–13–0907

¶ 35 On appeal, ACPO's overriding complaint is that the Commission erred by selecting the Hybrid Route over its proposed Alternative Route 1 in connection with the Quincy–Meredosia segment of the Project. It contends the Commission's factual findings were against the manifest weight of the evidence and makes various challenges regarding the expedited procedure under which ATXI brought its petition.

¶ 36 1. *Section 8–406.1's Expedited Procedure*

¶ 37 We first address ACPO's claims related to the Utilities Act's expedited procedure. It asserts the Commission acknowledged that it lacked sufficient time to fully analyze ATXI's petition for a certificate of public convenience and necessity and that, due to the expedited process, the record was incomplete. ACPO contends the Commission should have required further investigation into the matter rather than move forward with the petition and issue ATXI a certificate. It further argues "the lack of time, length of the proposed transmission line, and the number of intervenors * * * resulted in a violation of property owners' due process."

¶ 38 As stated, section 8–406.1 of the Utilities Act (220 ILCS 5/8–406.1 (West 2010)), permits a public utility to apply for a certificate using an expedited procedure when seeking to construct a new high voltage electric service line and related facilities. Under that section, the Commission must issue a decision granting or denying a request for a certificate "no later than 150 days after the application is filed";

however, within 30 days after filing, the Commission may extend the deadline by an additional 75 days if it "finds that good cause exists to extend the 150–day period." 220 ILCS 5/8–406.1(g) (West 2010).

¶ 39 ACPO correctly points out that the Commission was critical of ATXI's request invoking the expedited procedure set forth in section 8–406.1, particularly given the magnitude of the Project before it. In its August 20, 2013, decision, the Commission included a section entitled "Propriety of the Petition," wherein it questioned ATXI's decision to utilize the expedited process and set forth its concerns regarding the possible emergence of future problems or shortcomings with proposed routes, which were not anticipated or identified under the expedited process. In short, the Commission was "troubled by the very real possibility that the expedited schedule for considering such a massive project may result in less than optimal outcomes." Nevertheless, despite its disapproval, the Commission found it was required "to follow the directives set forth by the general Assembly" and stated it would "make every effort to weigh the evidence that [was] before [it] and make the best decisions possible in light of the record." It then proceeded to address the substantive issues presented by the parties.

¶ 40 To the extent ACPO argues the Commission should have declined to move forward with ATXI's petition given its concerns, we disagree. The Utilities Act gives a public utility discretion to proceed under its expedited procedure for seeking a certificate and sets forth no limit to that discretion based upon the scope of the utility's proposed project. 220 ILCS 5/8–406.1(a) (West 2010) (stating "[a] public utility may apply for a certificate of public convenience and

necessity pursuant to" section 8–406.1). Here, ATXI chose to file its petition under section 8–406.1, and the Commission was required to grant or deny the petition within the stated time frame. The broad concern expressed by the Commission—regarding the potential for less than optimal outcomes from an expedited procedure when a project is complex and significant in scope—is a matter for the legislature to address and not a basis upon which the Commission could deny ATXI's petition.

¶ 41 As the Commission argues, its "general misgivings regarding the propriety of expediting the proceeding under review are not a basis for challenging its specific findings of fact and conclusions of law." We agree and find that, contrary to ACPO's contentions, the Commission's general comments in the "Propriety of the Petition" section of its decision do not warrant a finding that the evidence presented with respect to the *entire* Project was insufficient or incomplete. The Utilities Act sets forth the criteria which must be satisfied by a petitioning utility before a certificate may be granted. 220 ILCS 5/8–406.1(f) (West 2010). Clearly, where the evidence is insufficient or the utility fails to meet its burden, its petition should be denied. In this case, no party on appeal challenges the Commission's finding that the Project at issue was necessary. Further, the record shows there were specific instances where the Commission found the evidence lacking and refused to approve routes and locations for particular parts of the Project. Specifically, in its August 20, 2013, decision, the Commission declined to approve a route for the transmission line between Pawnee and Pana and between Pana and Mt. Zion. It also declined to approve proposed new or expanded substations at six locations.

¶ 42 ACPO cites *Citizens United for Responsible Energy Development, Inc. (CURED) v. Illinois Commerce Comm'n,* 285 Ill.App.3d 82, 220 Ill.Dec. 738, 673 N.E.2d 1159 (1996), for the proposition that the Commission commits error when it grants a petition for a certificate of public convenience and necessity based upon a record that is incomplete with respect to the issue of least-cost means. In that case, Commission staff inexplicably failed to investigate or consider the issue of least-cost means when addressing a petition filed pursuant to section 8–406 of the Utilities Act (220 ILCS 5/8–406 (West 1994)). *Citizens United,* 285 Ill.App.3d at 92, 220 Ill.Dec. 738, 673 N.E.2d at 1166. As a result, the Fifth District found the Commission's determination that the petitioning party's "proposal constituted the least-cost means of satisfying the service needs of * * * customers * * * lacked sufficient foundation." *Citizens United,* 285 Ill.App.3d at 92, 220 Ill.Dec. 738, 673 N.E.2d at 1166. It reversed the Commission's order and remanded with directions that "a *complete* investigation" into least-cost means be conducted. (Emphasis in original.) *Citizens United,* 285 Ill.App.3d at 93–94, 220 Ill.Dec. 738, 673 N.E.2d at 1167.

¶ 43 We do not disagree with the holding in *Citizens United* but find that case factually distinguishable from the circumstances presented by this case. Here, neither the Commission nor its staff ignored the issue of least-cost means. Instead, the record reflects issues related to least-cost means were investigated, argued, and considered at length. The holding in *Citizens United* does not warrant reversal of the Commission's decision here.

¶ 44 Finally, as discussed, ACPO argues the expedited procedure set forth in section 8–406.1 violated property owners' due process rights as set forth by the state and federal constitutions. Specifically, it contends that, given the expedited schedule, its members were unable to meaningfully participate in the underlying proceedings.

¶ 45 Pursuant to the United States and Illinois Constitutions, no person may be deprived of life, liberty, or property without due process of law. U.S. Const., amend. XIV; see also Ill. Const. 1970, art. I, § 2. "'The core of due process is the right to notice and a meaningful opportunity to be heard'; no person may be deprived of a protected interest by an administrative adjudication of rights unless these safeguards are provided." *World Painting Co. v. Costigan*, 2012 IL App (4th) 110869, ¶ 14, 359 Ill.Dec. 755, 967 N.E.2d 485 (quoting *Lachance v. Erickson,* 522 U.S. 262, 266, 118 S.Ct. 753, 139 L.Ed.2d 695 (1998)). Further, in the context of an administrative proceeding, "due process is satisfied when the party concerned has the 'opportunity to be heard in an orderly proceeding which is adapted to the nature and circumstances of the dispute.'" *WISAM 1, Inc. v. Illinois Liquor Control Comm'n,* 2014 IL 116173, ¶ 26, 385 Ill.Dec. 1, 18 N.E.3d 1 (quoting *Obasi v. Department of Professional Regulation,* 266 Ill.App.3d 693, 702, 203 Ill.Dec. 499, 639 N.E.2d 1318, 1325 (1994)). "A fair hearing includes the right to be heard, the right to cross-examine adverse witnesses, and impartiality in ruling on the evidence." *WISAM 1,* 2014 IL 116173, ¶ 26, 385 Ill.Dec. 1, 18 N.E.3d 1.

¶ 46 "A due process analysis must begin with a deter-mination of whether a protectible interest in life, liberty, or property exists because if one is not present,

no process is due." *Callahan v. Sledge*, 2012 IL App (4th) 110819, ¶ 28, 366 Ill.Dec. 381, 980 N.E.2d 181 (citing *Chicago Teachers Union, Local No. 1 v. Board of Education of the City of Chicago,* 2012 IL 112566, ¶ 12, 357 Ill.Dec. 520, 963 N.E.2d 918). On review, ACPO generally states its members had property rights at risk in the underlying proceedings but fails to set forth any fully developed argument with respect to that contention. Conversely, the Commission argues the property rights of ACPO's members were not affected by the proceedings at issue and, thus, there was no process to which they were due in the certification proceedings before the Commission. We agree with the Commission and find relevant case law supports its position.

¶ 47 The Commission relies on this court's decision in *Illinois Power Co. v. Lynn,* 50 Ill.App.3d 77, 8 Ill.Dec. 26, 365 N.E.2d 264 (1977). While procedurally, *Lynn* is not directly on point, we do find it instructive. In that case, a utility brought an action to acquire certain tracts of land by eminent domain pursuant to authority granted to it by the Commission in a certificate of convenience and necessity and an enabling order. *Lynn,* 50 Ill.App.3d at 78, 8 Ill.Dec. 26, 365 N.E.2d at 265. The landowners filed a motion to dismiss and traverse, which the trial court denied. *Lynn,* 50 Ill.App.3d at 78, 8 Ill.Dec. 26, 365 N.E.2d at 265. On review, this court identified the question before it as whether the "Commission's finding that the needs and plans of the utility constitute a 'public use,' and that certain properties need be acquired to develop those plans, preempt the courts from inquiring into these same subject matters, where the property owners fully participated as a 'party' before the Commission." *Lynn,* 50 Ill.App.3d at 78, 8 Ill.Dec. 26, 365 N.E.2d at 265.

¶ 48 Ultimately, we determined courts were not preempted from inquiring into the same subject matters as the Commission during certification proceedings and found the trial court erred in dismissing the landowners' motion to dismiss and traverse. *Lynn,* 50 Ill.App.3d at 82, 8 Ill.Dec. 26, 365 N.E.2d at 268. In so holding, we stated as follows:

> "The hearing [before the Commission] was on the reasonableness of the utility's *plans* and could not confer property rights. Appeal of the order of the * * * Commission to the courts as provided by statute would only have been a review of the proposed plan for development of the project and the extent of the property to be sought. The appearance of the owners before the * * * Commission to give input into the plans, or object thereto, could not bar them from later exercising their rights as owners of property being taken for a public use. There is nothing in the * * * Utilities Act preempting the rights of the property owners in the condemnation proceedings." (Emphasis in original.) *Lynn,* 50 Ill.App.3d at 81–82, 8 Ill.Dec. 26, 365 N.E.2d at 267.

¶ 49 Additionally, *Lynn* relied on two supreme court decisions that are relevant to the issue presented here. First, in *Chicago, Burlington & Quincy R.R. Co. v. Cavanagh,* 278 Ill. 609, 614, 116 N.E. 128, 130 (1917), the Public Utilities Commission determined that the public convenience and safety required a relocation of railroad tracks and ordered that the tracks follow a certain course. The defendant property owners complained, in part, that they "were neither notified to be present at the hearing before the commission nor was any certified copy of the order served on them, so that they might appear before the commission and

have a hearing on evidence as to the reasonableness of the order." *Cavanagh,* 278 Ill. at 613, 116 N.E. at 130. In rejecting defendants' argument, the supreme court stated as follows:

> "The order of the commission did not amount to an appropriation of the defendants' property or any interest in it, which could only be accomplished by the filing of a petition and the ascertainment and payment of compensation for the property, so that there was no violation of the due process provision of the constitution. The defendants were not deprived of their property, nor of any interest therein, by the mere making of the order, which neither gave the petitioner any interest in or right to possession of the property." *Cavanagh,* 278 Ill. at 617, 116 N.E. at 131.

¶ 50 Second, in *Zurn v. City of Chicago,* 389 Ill. 114, 115, 59 N.E.2d 18, 19 (1945), a citizen and taxpayer brought constitutional challenges to an act known as the Neighborhood Redevelopment Corporation Law (Ill.Rev.Stat.1943, ch. 32, ¶ 550.1 *et seq.*), the purpose of which was to rehabilitate and rebuild urban areas. The act provided for the creation of a Redevelopment Commission which had the authority to approve proposed development plans by issuing certificates of convenience and necessity. *Zurn,* 389 Ill. at 119, 59 N.E.2d at 21. Relevant to this appeal, one challenge to the act was based on the contention that it did not provide property owners with proper notice of applications for a certificate of convenience and necessity. *Zurn,* 389 Ill. at 129, 59 N.E.2d at 25. Rejecting that argument, the supreme court stated as follows:

> "It is argued that the failure of the act to provide for actual notice of such hearing to the property owners constitutes a denial of due process of law.

> It should be kept in mind that this hearing is merely an application for a certificate of convenience and necessity. The act provides only for general notice by publication. It is argued that when the commission issues its certificate of convenience and necessity, this authorizes the corporation to proceed with the project and to acquire the property located within the development area by eminent domain. It is obvious, however, that no property or property interests are to be taken or interfered with on this hearing. It is simply one of the steps prescribed by the act in the chain of events authorizing the redevelopment corporation to proceed with the development and to acquire property by voluntary conveyance and by eminent domain for that purpose.
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> * * * No property or property rights of the landowners are taken, nor are such rights affected by anything which occurs in the hearing before the commission for a certificate of convenience and necessity. Such property owners are not entitled to notice of such hearing before the commission. The failure of the act to provide for such notice does not constitute a denial of due process of law." *Zurn,* 389 Ill. 114 at 129–32, 59 N.E.2d at 25–27.

¶ 51 As found in *Lynn, Cavanagh,* and *Zurn,* the underlying proceedings before the Commission neither conferred property rights on ATXI nor deprived landowners of their protected property interests. As a result, ACPO's members were not entitled to due process during those proceedings and cannot assert a due process violation. Nevertheless, we note the record

belies ACPO's assertions that its members "effectively" received no notice and no meaningful opportunity to participate in the underlying proceedings. In fact, ACPO's members did receive notice of ATXI's petition for a certificate of public convenience and necessity and intervened and fully participated in each step of the proceedings before the Commission. It presented evidence, cross-examined witnesses, submitted posthearing briefs, and advocated for an alternate route proposal, which it continues to assert is the superior routing option. Thus, we find the record shows ACPO did meaningfully participate in the underlying proceedings and its contention that its members' due process rights were violated is without merit.

¶ 52 2. *Least–Cost Means*

¶ 53 ACPO next contends ATXI failed to demonstrate before the Commission that the Hybrid Route was the "least-cost means" for the Project. It argues the Commission's decision to approve the Hybrid Route was against the manifest weight of the evidence.

¶ 54 For a public utility to obtain a certificate of public convenience and necessity under the Utilities Act, its proposed project must be the "least-cost means" of satisfying its customers' service needs. 220 ILCS 5/8–406.1(f)(1) (West 2010). The Utilities Act does not define "least-cost" or articulate the manner in which "least-cost means" should be determined by the Commission. However, in the context of the proceedings before it, the Commission found that "[r]esolving the question of least-cost involve[d] a comprehensive consideration and balancing of the overall costs and externalities of each proposed route against the benefits of each proposed route." It determined "costs and externalities include[d] not only the financial tally for

manpower and equipment, but also the impact on local residents and resources and present and future land uses."

¶ 55 The Commission also noted that in past certification proceedings, it had utilized 12 criteria for purposes of evaluating proposed routes, including (1) length of the line, (2) difficulty and cost of construction, (3) difficulty and cost of operation and maintenance, (4) environ-mental impacts, (5) impacts on historical resources,(6) social and land use impacts, (7) number of affected landowners and other stake-holders, (8) proximity to homes and other structures, (9) proximity to existing and planned development, (10) community acceptance (11) visual impact, and (12) presence of existing corridors. It stated its decision would result from balancing the 12 criteria and any other relevant factors presented by the parties. Finally, the Commission stated no factor for consideration was inherently more important than another factor.

¶ 56 On review, ACPO does not challenge the Commission's method for determining least-cost means. Instead, it contends the weight of the evidence favored its proposed Alternative Route 1 over the Hybrid Route. ACPO points out that its Alternative Route 1 cost $9 million less to build and was shorter than the Hybrid Route. Further, it maintains Alternative Route 1 used existing rights-of-way for 50% of the route and satisfied all of the intervenors. Finally, ACPO challenges the Commission's factual findings as being based on speculation and not supported by the evidence.

¶ 57 Here, we find the record contains evidence to support the Commission's factual findings and we cannot say that an opposite conclusion from that

reached by the Commission is clearly evident. In reaching its decision, the Commission first concluded that there did not seem to be much difference between the proposed routes with respect to most of the 12 factors. (We note that, in its decision, the Commission sometimes referred to 11 criteria it considered rather than the 12 criteria for consideration it initially set forth. However, the record reflects this discrepancy is the result of the Commission combining factors 7 and 8, as set forth above, into a single factor.) Ultimately, however, it chose to approve the Hybrid Route favored by ATXI over ACPO's Alternative Route 1. It found the Hybrid Route was cost-effective and would eliminate the concerns of almost all intervening parties.

¶ 58 In finding that the Hybrid Route was the least-cost option, the Commission noted its concern that "Alternat[ive] Route 1 would traverse an existing residential area near Interstate 172, potentially requiring the displacement of at least six assumed residences." It also considered that "Alternat[ive] Route 1 would require approximately 40 additional acres of tree removal." The Commission further addressed ACPO's characterization of its route as being on "a partially acquired unoccupied corridor." It found no advantage in favor of ACPO's route on that basis, noting that 50% of the corridor had not been acquired and existing easements were too narrow to accommodate the transmission line at issue. Finally, the Commission noted ATXI's position that ACPO's proposed route presented reliability, operational, and maintenance concerns because it extensively paralleled an existing transmission line.

¶ 59 On appeal, ACPO claims there is no credible evidence in the record that its proposed route would displace six residences. Before the Commission, ATXI

witness Donell Murphy, who assessed the environmental impacts of the Project, testified the Hybrid Route would be located in close proximity to fewer existing residences than ACPO's Alternative Route 1. She asserted Alternative Route 1 had six residences within 75 feet of its centerline, which would require displacement of those residences. As ACPO points out on appeal, Murphy acknowledged on cross-examination that she could not attest to the accuracy of maps which purported to show the location of proposed and existing transmission lines, nor could she verify that buildings which appeared to be residences were actually occupied. However, on cross-examination, Murphy also testified as follows:

> "[W]ith reference to ACPO Route 1 which I believe [ACPO] stated * * * would potentially make use of the partially acquired unoccupied corridor and recognizing where that corridor falls, it does traverse existing residences. [The route] goes right over existing residences."

While Murphy could not identify the precise location of the proposed *transmission line* on maps submitted to the Commission, it appears undisputed that ACPO's recommended *route* traversed a residential area and impacted more residences than the Hybrid Route. Given this evidence, we cannot say the Commission's finding regarding the "possible displacement" of residences was against the manifest weight of the evidence.

¶ 60 ACPO also argues the record contains "no evidence of the trees" the Commission found would have to be removed if ACPO's Alternative Route 1 had been selected. It complains that no evidence was introduced regarding the types of trees to be removed or that the removal of 40 acres of trees had any

negative cost or environmental impact. Despite ACPO's contention of "no evidence," the record contains support for the Commission's finding. In particular, it shows Murphy—who the record reflects had "expertise * * * in environmental impact assessments"—testified that one reason the Alternative Route 1 did not present "a viable alternative for th[e] project" was that it would "require more than 40 additional acres of tree re-moval." ACPO points to no evidence refuting Murphy's testimony and we find it sufficient to support both the Commission's factual finding and its determination that such evidence weighed against ACPO's proposed route. An opposite conclusion from that of the Commission is not clearly evident.

¶ 61 ACPO further challenges the Commission's finding that Alternative Route 1's asserted status as a "partially acquired corridor" provided no meaningful advantage over the Hybrid Route. As stated, Alternative Route 1 paralleled an existing transmission line. Before the Commission, ACPO maintained that some of the land needed to construct the new transmission line along ACPO's proposed route had already been acquired by ATXI through easements. It reasoned that constructing the new transmission line along a route where some of the land had been acquired (Alternative Route 1) would cost less and be less burdensome to property owners than constructing the transmission line along a route where none of the land had yet been acquired (Hybrid Route). The Commission rejected ACPO's argument, stating as follows:

> "While ACPO characterizes the western part of its Alternat[ive] Route 1 as a 'partially acquired unoccupied corridor,' the Commission notes that ATXI contends that approximately 50% of that corridor has not been acquired and any existing

> easements are too narrow to accommodate an additional 345 kV transmission line. Therefore, it does not appear to the Commission that this corridor will offer any meaningful routing advantage over the Hybrid Route."

¶ 62 Again, the Commission's findings are supported by the evidence. Murphy testified that less than 50% of the corridor along Alternative Route 1 had been obtained by easements. Additionally, she stated that ATXI's proposed transmission line required a right-of-way of 150 feet and none of the easements that had been obtained were of that width. Although not referenced by any party on appeal, ATXI witness Jeffrey Hackman, the Director of Transmission Operations for Ameren Services Company, testified that, while overlapping rights-of-way slightly reduced the amount of right-of-way that ATXI would need to purchase for the Project, there were "not any existing rights-of-way with extra width for consideration for th[e] Project." Thus, the evidence indicates that, even if Alternative Route 1 was the approved route for the segment of the Project at issue, ATXI would still need to acquire significant amounts of land to construct its transmission line. We cannot say the Commission's finding that Alternative Route 1 offered no "meaningful routing advantage" over the Hybrid Route was against the manifest weight of the evidence.

¶ 63 Finally, ACPO argues the Commission's finding that the use of parallel transmission lines could present reliability concerns was against the manifest weight of the evidence. ACPO points to testimony from ATXI witness Murphy that, when determining the route for a transmission line, it was advantageous to utilize opportunities where there were existing linear features, such as exiting transmission lines, property

lines, and field lines. ACPO also notes a Commission staff electrical engineer, Greg Rockrohr, testified that he had no reliability concerns regarding two parallel transmission lines where they were located on non-overlapping rights-of-way.

¶ 64 Although ACPO cites evidence to support its position, the record also contains evidence regarding the reliability concerns with parallel transmission lines noted by the Commission. In particular, Hackman testified that with either overlapping or adjoining rights-of-way for transmission lines, "the proximity of the circuits' structures to each other and the likelihood of local weather and wind-blown debris and other objects is * * * a concern." He denied that paralleling transmission lines reduced the costs associated with ongoing maintenance and repair, noting both lines might "have to be taken out of service in order to do maintenance." Further, Hackman testified as follows:

> "[I]t is undesirable to construct parallel transmission lines because, unless there is sufficient separation between the lines, during construction of the second line, the first line must be taken out of service. Paralleling is undesirable from an operations perspective for the similar reason that, while maintenance is being performed on one line, the other may need to be taken out of service so that large equipment can access the area. Having two lines down at any given point risks the reliability of the transmission system at large. Moreover, from a reliability perspective, common or adjoining rights-of-way are susceptible to common-mode failures. In other words, it increases the probability that, if one line fails, it will cause the adjacent line to fail. Likewise, weather events, either directly or from debris, can cause both lines

> to fail. For these reasons paralleling existing transmission lines is generally not preferred."

¶ 65 Finally, Hackman acknowledged that ATXI proposed parallel transmission lines for the Project in "limited circumstances." However, he testified paralleling was not always the best option and "the fact that ATXI has proposed paralleling in appropriate circumstances d[id] not mean than [*sic*] every paralleling opportunity should be used." Hackman asserted that whether to place a proposed transmission line next to an existing one should be based on several factors, including reliability, cost of construction, cost of reinforcements required, impact on the environment, and improvement to system performance. He opined that "[s]ince the Project provide[d] local area reliability benefits," paralleling on the Project "should only be used in very limited circumstances in order to mitigate risks of common-mode failures that could lead to outages for customers." The record further reflects Murphy agreed with Hackman's testimony, agreeing that parallel transmission lines were not the best option when other options were available.

¶ 66 Here, the record contains evidence to support the Commission's finding with respect to parallel line reliability. While the record may be said to contain conflicting evidence on this point, it was the Commission's function to weigh the evidence and reach a determination. An opposite conclusion from that of the Commission is not clearly evident.

¶ 67 As a final matter, ACPO contends the Commission failed to consider the negative impact of the proposed transmission line on ACPO's members. Initially, we note "[t]he Commission need not make a finding on each evidentiary fact or claim." *Central Illinois Public Service,* 268 Ill.App.3d at 480, 206

Ill.Dec. 49, 644 N.E.2d at 824. Further, although the record contained evidence to support ACPO's proposed route, simply showing that evidence in the record could support a different conclusion from that reached by the Commission is not a sufficient basis upon which to overturn the Commission's decision. The Commission is entitled to great deference with respect to its factual findings and it is not the function of this court on review to reweigh the evidence. With respect to the Quincy–Meredosia segment of the Project challenged by ACPO on appeal, the record contains sufficient evidence to support the Commission's decision and it was not against the manifest weight of the evidence.

¶ 68 C. ECCDP—Appeal No. 4–13–0917

¶ 69 On appeal, ECCDP argues its members' due process rights were violated because they failed to receive notice from the Commission that Stop Coalition, an intervening party in the underlying proceedings, proposed an alternate route for the transmission line which would directly affect the property rights of ECCDP's members. ECCDP also contends that the lack of a clear notice requirement in section 8–406.1 of the Utilities Act renders the statute unconstitutional.

¶ 70 1. *Procedural Issues*

¶ 71 Initially, we address two procedural issues presented by ECCDP's appeal. First, the record fails to reflect that the denial of ECCDP's request to intervene is properly before this court on review.

¶ 72 On October 2, 2013, the Commission's ALJs denied ECCDP's petition to intervene. See 83 Ill. Adm.Code 200.200(c), amended at 24 Ill. Reg. 16019 (eff. Oct. 15, 2000) ("Petitions to intervene shall be granted or denied by the Hearing Examiner * * *.").

The Commission's rules contain procedures for seeking review of an ALJ's ruling, which include the filing of a petition for interlocutory review with the Commission within 21 days. 83 Ill. Adm.Code 200.520(a), amended at 35 Ill. Reg. 6327 (eff. Apr. 1, 2011); see also 83 Ill. Adm.Code 200.200(c), amended at 24 Ill. Reg. 16019 (eff. Oct. 15, 2000) (providing that an ALJ's decision regarding intervention is subject to the review procedures set forth in section 200.520 of the Illinois Administrative Code). When reviewing an ALJ's decision, "the Commission may affirm or reverse the ruling in whole or in part, and may take any other just and reasonable action with respect to the ruling, such as declining to act on an interlocutory basis." 83 Ill. Adm.Code 200.520(b), amended at 35 Ill. Reg. 6327 (eff. Apr. 1, 2011). When the Commission's action on an ALJ's ruling involves the denial of a petition to intervene, the aggrieved party may then file a petition to rehear or reconsider the Commission's action. 83 Ill. Adm.Code 200.520(b), amended at 35 Ill. Reg. 6327 (eff. Apr. 1, 2011).

¶ 73 Additionally, pursuant to the Utilities Act, "[n]o appeal shall be allowed from any rule, regulation, order or decision of the Commission unless and until an application for a rehearing thereof shall first have been filed with and finally disposed of by the Commission." 220 ILCS 5/10–113(a) (West 2010). Finally, an appealing party is not permitted to "urge or rely upon any grounds not set forth in such application for a rehearing before the Commission." 220 ILCS 5/10–113(a) (West 2010).

¶ 74 Here, the procedures set forth in the Commission's rules and the Utilities Act for seeking review of Commission and ALJ decisions were not followed by ECCDP. The record fails to reflect ECCDP ever sought

review of the ALJs' decision to deny it leave to intervene or that the Commission ever addressed and resolved that particular issue. Further, in its notice of appeal, seeking administrative review with this court, ECCDP failed to challenge any order related to the denial of its request for intervention. Instead, it identifies the Commission's August 20, 2013, order, and the Commission's denial of its motion to strike and for rehearing as the orders from which its appeal was taken. Thus, the denial of ECCDP's petition to intervene is not properly before this court on administrative review.

¶ 75 Second, the record shows that, while its request to intervene was pending, ECCDP filed a motion to strike and application for rehearing (September 19, 2013) and, later, a motion to supplement its motion to strike and application for rehearing (October 1, 2013). However, only a party to the underlying proceedings was entitled to apply for a rehearing. See 220 ILCS 5/10–113(a) (West 2010) ("Within 30 days after the service of any rule or regulation, order or decision of the Commission *any party* to the action or proceeding may apply for a rehearing in respect to any matter determined in said action or proceeding and specified in the application for rehearing." (Emphasis added.)). At the time ECCDP filed its motion to strike and application for rehearing (as well as its motion to supplement that filing), it was not a party to the proceedings before the Commission as its petition to intervene was pending and had not been granted. In fact, the ALJs ultimately denied ECCDP's petition to intervene and it never became an actual party to the underlying proceedings. As a result, we question whether ECCDP's motion to strike and application for rehearing were ever properly before the Commission.

¶ 76 Nevertheless, we note the Commission's rules provide that "[w]hile a petition for leave to intervene is pending, the [ALJ], in his or her discretion, may permit the petitioner to participate in the proceeding." 83 Ill. Adm.Code 200.200(b), amended at 24 Ill. Reg. 16019 (eff. Oct. 15, 2000). Although our review of the record fails to reflect the ALJs ever expressly permitted ECCDP to participate in the underlying proceedings, they did consider the filings ECCDP submitted while its petition for leave to intervene was pending. Specifically, the record shows the ALJs submitted a memorandum to the Commission and recommended denial of ECCDP's September 19, 2013, filing, *i.e.,* its motion to strike and application for rehearing. On October 3, 2013, the Commission took the recommended action. Given this consideration of ECCDP's filings by the ALJs and Commission, we find it appropriate to address the merits of its appeal.

¶ 77 2. *Due Process Claims*

¶ 78 As stated, ECCDP challenges the Commission's decision on the basis that its members' due process rights were violated because of insufficient notice of the underlying proceedings. Specifically, ECCDP complains that its members did not receive notice of an alternate route proposed by an intervening party, which would directly affect land owned by ECCDP's members.

¶ 79 On review, it appears undisputed that ATXI complied with the notice requirements of section 8–406.1, which provide for notice by publication of both the public meetings required under the expedited process and the public utility's application for a certificate. 220 ILCS 5/8–406.1(a)(3), (d) (West 2010). Further, the parties agree that, although not mandated by the Utilities Act, the ALJs required all intervening parties

to identify landowners affected by proposed alternate routes for the purpose of giving those landowners notice of the proceedings. ECCDP acknowledges that Stop Coalition complied with the ALJs' requirements; however, they deny that the Commission actually followed through with the process set forth by the ALJs by sending them notice of the proposed alternate route.

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

¶ 81 D. MSSCLPG—Appeal No. 4–14–0218

¶ 82 On appeal, MSSCLPG argues the Commission erred in approving the Stipulated Route (also referred to as the Rebuttal Recommended Route) supported by ATXI for the Meredosia–Pawnee segment of the Project. It contends the 12 criteria used by the Commission to evaluate least-cost means clearly favored the MSCLTF Route, which MSSCLPG recommended, and the Commission's selection of the Stipulated Route over

the MSCLTF Route was against the manifest weight of the evidence.

¶ 83 1. *Preservation of Issue for Appellate Review*

¶ 84 On appeal, ATXI contends MSSCLPG failed to preserve the issue it raises for appeal because it did not raise this specific contention in its application for rehearing.

¶ 85 As stated, the Utilities Act requires a party to file a petition for rehearing prior to seeking appellate review of the Commission's decision. 220 ILCS 5/10–113(a) (West 2010). An order of the Commission is final and appealable after one rehearing petition filed by a party has been decided. *Harrisonville Telephone Co. v. Illinois Commerce Comm'n,* 212 Ill.2d 237, 246–47, 288 Ill.Dec. 121, 817 N.E.2d 479, 485 (2004). However, on review, a party may not "urge or rely upon any grounds not set forth in [an] application for a rehearing before the Commission." 220 ILCS 5/10–113(a) (West 2010).

¶ 86 Here, MSSCLPG filed an application for rehearing following the Commission's August 20, 2013, order. The Commission granted its request, considered additional evidence, and issued a new order. As ATXI claims, MSSCLPG's application for rehearing primarily alleged it had insufficient time to present its claims and the record contained insufficient evidence to reach a route determination with respect to the Meredosia–Pawnee segment of the Project. However, MSSCLPG also asserted the Commission's decision was "contrary to the provisions of [section] 8–406.1" and that the Commission authorized "construction of a route that [was] not the 'least-cost means.'" We find this contention sufficiently similar to the arguments raised by

MSSCLPG on review and choose to address the merits of its appeal.

¶ 87 2. *Weight of the Evidence*

¶ 88 As discussed, MSSCLPG argues the manifest weight of the evidence favors the route it desires over the route ultimately selected by the Commission. Although we recognize the record contained evidence supporting the route MSSCLPG recommends, we cannot say the Commission erred in selecting a different route. In particular, the record reflects the Commission relied on appropriate considerations and its factual findings were supported by the evidence.

¶ 89 Before the Commission can grant a certificate of public convenience and necessity pursuant to section 8–406.1, certain criteria must be satisfied. In particular, the Commission must find "[t]hat the Project is necessary to provide adequate, reliable, and efficient service to the public utility's customers *and* is the least-cost means of satisfying the service needs of the public utility's customers." (Emphasis added.) 220 ILCS 5/8–406.1(f)(1) (West 2010).

¶ 90 In its second order on rehearing, the Commission chose the Stipulated Route, stating as follows:

> "As the criteria are weighed, it is clear to the Commission that the deciding factor for this segment is balancing the cost of each route against potential operational reliability. The Commission is presented with one route [(the MSCLTF Route)] which is clearly shorter, cheaper, and involves fewer landowners, but possibly presents operational issues should a massive storm hit the area where the parallel lines would exist. The Commission also has a choice of a longer, more expensive route [(the Stipulated

> Route)], which involves more landowners, but avoids the chance of a large storm taking out two nearby transmission lines. In the Commission's view, providing utility service at least cost is important. Even more important is providing safe and reliable service to utility customers. While the Commission does not make this choice lightly, it appears that the more reasonable choice, and the one supported by the law and the evidence, is to approve the Stipulated Route supported by ATXI. The Commission finds the testimony of ATXI witness Hackman to be particularly convincing regarding potential operational difficulties associated with the MSCLTF Route. The Commission finds that avoiding the extensive paralleling associated with the MSCLTF Route is in the best interests of customers and worth the incremental costs associated with the Stipulated Route."

¶ 91 The Commission's comments show it followed the requirements set forth in section 8–406.1 and considered and balanced reliability concerns posed by the recommended routes, as well as issues related to least-cost means. Further, we note that issues related to least-cost do not necessarily exclude reliability considerations. Hackman testified that one factor which should be considered when determining "least cost" is the "cost to customers of reliability differences that are offered by route selection." Common sense suggests less reliable transmission lines will likely involve increased costs associated with maintenance and re-pair. The Commission's considerations in this instance were appropriate.

¶ 92 Additionally, in reaching its decision, the Commission relied on Hackman's testimony, which supports its reliability concerns. On rehearing, Hackman

testified regarding ATXI's reasons for not supporting the MSCLTF Route, which paralleled an existing transmission line. In part, he testified as follows:

> "It is important to appreciate that when ATXI constructs parallel transmission lines, it gives up reliability, operations, and maintenance benefits, * * * and it takes on reliability risks. Putting transmission lines in close proximity is like putting all of your eggs in one basket. It is easier for both lines to go out, or to be taken out, when they are close together. And even in the most compelling case, paralleling routes now may result in the need for an additional circuit in the future that would not otherwise be needed. Therefore, reliability, operations, maintenance, and even security considerations weigh against paralleling transmission lines when possible. And it is possible to avoid paralleling lines for the Meredosia–Pawnee portion of the Project."

¶ 93 On review, MSSCLPG complains that the Commission relied on Hackman's testimony while disregarding conflicting evidence. We disagree that the Commission disregarded any evidence. To the contrary, the record indicates the Commission carefully weighed and considered the evidence presented. Although the record contains evidence that conflicted with Hackman's testimony, it was the Commission's responsibility to weigh the evidence and determine witness credibility. In this instance, the Commission found "Hackman to be particularly convincing" and the record reflects no error in that determination.

¶ 94 Here, the Commission's decision as to the Meredosia–Pawnee segment of the Project was supported by the record. An opposite conclusion from that of the Commission is not clearly evident and its

decision was not against the manifest weight of the evidence.

¶ 95 E. MCPO—Appeal No. 4–14–0249

¶ 96 On appeal, MCPO argues the Commission erred in choosing the location of the Mt. Zion substation. Specifically, it contends the Commission neglected to consider the issue of least-cost means when choosing Option # 2 over Option # 1.

¶ 97 First, to the extent MCPO claims that the Commission generally failed to consider the issue of least-cost means, we disagree. Here, the record reflects the issue of least-cost means was investigated and considered at length in the underlying proceedings. Although the Commission may not have expressly set forth findings with respect to whether Option # 2 was the "least-cost means" when compared with Option # 1, the lack of express findings does not mean the Commission failed to consider appropriate factors. *Central Illinois Public Service,* 268 Ill.App.3d at 480, 206 Ill.Dec. 49, 644 N.E.2d at 824 ("The Commission need not make a finding on each evidentiary fact or claim."). Further, the record indicates the main source of contention between the parties on rehearing was whether Option # 2 or Option # 3 was the more appropriate location. Thus, it stands to reason that the Commission would primarily address those options in its decision.

¶ 98 MCPO cites *Citizens United,* arguing the Commission commits error when it fails to consider the issue of least cost. Although we do not disagree with this general proposition, as discussed earlier in connection with ACPO's appeal, *Citizens United* is factually distinguishable from the present case. Specifically, in *Citizens United,* 285 Ill.App.3d at 92,

220 Ill.Dec. 738, 673 N.E.2d at 1166, Commission staff inexplicably failed to investigate or consider the issue of least-cost means. The same cannot be said of Commission staff in the case at bar. As a result, *Citizens United* does not warrant reversal of the Commission's decision.

¶ 99 Second, we find MCPO has forfeited any specific challenge to the Commission's finding that Option # 2 was the appropriate location for the Mt. Zion substation. Pursuant to Illinois Supreme Court rules, an appellant's brief must contain a statement of facts with "facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Ill. S.Ct. R. 341(h)(6) (eff. Feb. 6, 2013). It must also contain an argument section with "the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S.Ct. R. 341(h)(7) (eff. Feb. 6, 2013). The failure to comply with relevant supreme court rules results in forfeiture of an argument on appeal. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 11, 358 Ill.Dec. 117, 964 N.E.2d 1139.

¶ 100 Here, MCPO argues Option # 1 was preferable to Option # 2 and the Commission's selection of Option # 2 is not supported by the record. However, it provides no citations to evidence in the record that would support its claims. MCPO's statement of facts contains only two citations to the record—one to the Commission's decision on rehearing and a second to a map submitted in the underlying proceedings—and the argument section of its brief contains no citation to the record at all. Given that this was a complex case that involved multiple parties and a record consisting of thousands of pages, MCPO's failure to properly cite to

the record to support its claims leaves us unable to properly address their merits. On appeal, MCPO has forfeited the argument that the record failed to support the Commission's decision to choose Option # 2 as the location for the Mt. Zion substation.

¶ 101 III. CONCLUSION

¶102 For the reasons stated, we affirm the Commission's judgment.

¶ 103 Affirmed.

Justices TURNER and HOLDER WHITE concurred in the judgment and opinion.

APPENDIX E

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
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Springfield, Illinois 62701-1721

Carolyn Taft Grosboll
Clerk of the Court
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November 26, 2018

Michael Terence Reagan
Law Offices of Michael T. Reagan
633 LaSalle Street, Suite 409
Ottawa, IL 61350

In re: Ameren Transmission Company of Illinois, appellant, v. Richard L. Hutchings et al., appellees. Appeals, Circuit Court (Edgar). 122973, 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, 123018, 123019, 123020, 123021

Dear Michael Terence Reagan:

The Supreme Court today entered the following order in the above-entitled cause: Petition for Rehearing Denied.

The mandate of this Court will issue to the Appellate Court and/or Circuit Court or other agency on 12/31/2018.

Very truly yours,

/s/ Carolyn Taft Grosboll
Clerk of the Supreme Court

cc: Albert Dillon Sturtevant, III
Attorney General of Illinois - Civil Division
Clifford Warren Berlow
David Alan Rolf
Laurie Anne Harmon
Lisa Ann Petrilli
Matthew E. Price
Matthew Ryan Tomc
Nikhil Vijaykar
Richard Gerard Bernet
Sanford Craig Smith

APPENDIX F

SUPREME COURT OF ILLINOIS
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December 19, 2018

Michael Terence Reagan
Law Offices of Michael T. Reagan
633 LaSalle Street, Suite 409
Ottawa, IL 61350

In re: Ameren Transmission Company of Illinois, appellant, v. Richard L. Hutchings et al., appellees. Appeals, Circuit Court (Edgar). 122973, 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, 123018, 123019, 123020, 123021

Dear Michael Terence Reagan:

Enclosed is an order entered December 19, 2018, by Justice Thomas in the above-captioned cause.

Very truly yours,

/s/ Carolyn Taft Grosboll
Clerk of the Supreme Court

cc: Albert Dillon Sturtevant, III
Attorney General of Illinois - Civil Division
Clifford Warren Berlow
David Alan Rolf
Laurie Anne Harmon
Lisa Ann Petrilli
Matthew E. Price
Matthew Ryan Tomc
Nikhil Vijaykar
Richard Gerard Bernet
Sanford Craig Smith

IN THE SUPREME COURT OF ILLINOIS

[Filed: December 19, 2018]

122973

AMEREN TRANSMISSION COMPANY OF ILLINOIS,

Appellant,

v.

RICHARD L. HUTCHINGS, RITA M. HUTCHINGS, FARM CREDIT SERVICES OF ILLINOIS, FLCA, DONICA CREEK, LLC, AND UNKNOWN OWNERS,

Appellees.

ORDER

This matter has come for consideration upon the motion of appellees to stay the mandate of this Court pending appeal or petition for writ of certiorari in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or a petition for writ of certiorari or the expiration of the period within which said petition or notice may be filed. If a petition for writ of certiorari or notice of appeal is filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such petition or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or certiorari may be sought.

Order entered by Justice Thomas.

APPENDIX G

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

APPENDIX H

220 ILCS 5/8–406.1

§ 8–406.1. Certificate of public convenience and necessity; expedited procedure.

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

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

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

(B) The following engineering data:

(i) a detailed Project description including:

(I) name and destination of the Project;

(II) design voltage rating (kV);

(III) operating voltage rating (kV); and

(IV) normal peak operating current rating;

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

(I) conductor size and type;

(II) type of structures;

(III) height of typical structures;

(IV) an explanation why these structures were selected;

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

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

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

(I) miles of right-of-way;

(II) miles of circuit;

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

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

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

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

(II) the operating voltage and frequency; and

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

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

(I) the wind and ice loading design parameters;

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

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

(IV) conductor (phase) spacing; and

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

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

(I) burial depth;

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

(III) cathodic protection scheme; and

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

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

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

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

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

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

(c) Nothing in this Section prohibits a utility from requesting, or the Commission from approving, protection of confidential or proprietary information under

applicable law. The public utility may seek confidential protection of any of the information provided pursuant to this Section, subject to Commission approval.

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

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

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

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

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

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

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

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

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

APPENDIX I

220 ILCS 5/8-503
Formerly cited as IL ST CH 111 2/3 ¶ 8-503

5/8-503. Additions, improvements and new structures; joint construction or other actions

Effective: November 9, 2007
Currentness

§ 8-503. Whenever the Commission, after a hearing, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any 2 or more public utilities are necessary and ought reasonably to be made or that a new structure or structures is or are necessary and should be erected, to promote the security or convenience of its employees or the public or promote the development of an effectively competitive electricity market, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order authorizing or directing that such additions, extensions, repairs, improvements or changes be made, or such structure or structures be erected at the location, in the manner and within the time specified in said order; provided, however, that the Commission shall have no authority to order the construction, addition or extension of any electric generating plant unless the public utility requests a certificate for the construction of the plant pursuant to Section 8-406 and in conjunction with such request also requests the entry of an order under this Section. If any additions, extensions, repairs, improvements or changes, or any new structure or structures, which the Commission has authorized or ordered to be erected, require joint action by 2 or more public utilities, the Commission shall notify the said public utilities that

such additions, extensions, repairs, improvements or changes or new structure or structures have been authorized or ordered and that the same shall be made at the joint cost whereupon the said public utilities shall have such reasonable time as the Commission may grant within which to agree upon the apportionment or division of cost of such additions, extensions, repairs, improvements or changes or new structure or structures, which each shall bear. If at the expiration of such time such public utilities shall fail to file with the Commission a statement that an agreement has been made for a division or apportionment of the cost or expense of such additions, extensions, repairs, improvements or changes, or new structure or structures, the Commission shall have authority, after further hearing, to make an order fixing the proportion of such cost or expense to be borne by each public utility and the manner in which the same shall be paid or secured.

Nothing in this Act shall prevent the Commission, upon its own motion or upon petition, from ordering, after a hearing, the extension, construction, connection or interconnection of plant, equipment, pipe, line, facilities or other physical property of a public utility in whatever configuration the Commission finds necessary to ensure that natural gas is made available to consumers at no increased cost to the customers of the utility supplying the gas.

Whenever the Commission finds, after a hearing, that the public convenience or necessity requires it, the Commission may order public utilities subject to its jurisdiction to work jointly (1) for the purpose of purchasing and distributing natural gas or gas substitutes, provided it shall not increase the cost of gas to the customers of the participating utilities, or (2) for any other reasonable purpose.

APPENDIX J

220 ILCS 5/8-509
Formerly cited as IL ST CH 111 2/3 ¶ 8-509

5/8-509. Eminent domain

Effective: August 13, 2018
Currentness

§ 8-509. When necessary for the construction of any alterations, additions, extensions or improvements ordered or authorized under Section 8-406.1 or 8-503 of this Act, any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain. If a public utility seeks relief under this Section in the same proceeding in which it seeks a certificate of public convenience and necessity under Section 8-406.1 of this Act, the Commission shall enter its order under this Section either as part of the Section 8-406.1 order or at the same time it enters the Section 8-406.1 order. If a public utility seeks relief under this Section after the Commission enters its order in the Section 8-406.1 proceeding, the Commission shall issue its order under this Section within 45 days after the utility files its petition under this Section.

This Section applies to the exercise of eminent domain powers by telephone companies or telecommunications carriers only when the facilities to be constructed are intended to be used in whole or in part for providing one or more intrastate telecommunications services classified as "noncompetitive" under Section 13-502 in a tariff filed by the condemnor. The exercise of eminent domain powers by telephone companies or telecommunications carriers in all other cases shall be governed solely by "An Act relating to the powers, duties and property of telephone companies", approved May 16, 1903, as now or hereafter amended.

APPENDIX K

735 ILCS 30/5-5-5

30/5-5-5. Exercise of the power of eminent domain; public use; blight

Effective: January 1, 2007
Currentness

§ 5-5-5. Exercise of the power of eminent domain; public use; blight.

(a) In addition to all other limitations and requirements, a condemning authority may not take or damage property by the exercise of the power of eminent domain unless it is for a public use, as set forth in this Section.

(a-5) Subsections (b), (c), (d), (e), and (f) of this Section do not apply to the acquisition of property under the O'Hare Modernization Act. A condemning authority may exercise the power of eminent domain for the acquisition or damaging of property under the O'Hare Modernization Act as provided for by law in effect prior to the effective date of this Act.

(a-10) Subsections (b), (c), (d), (e), and (f) of this Section do not apply to the acquisition or damaging of property in furtherance of the goals and objectives of an existing tax increment allocation redevelopment plan. A condemning authority may exercise the power of eminent domain for the acquisition of property in furtherance of an existing tax increment allocation redevelopment plan as provided for by law in effect prior to the effective date of this Act.

As used in this subsection, "existing tax increment allocation redevelopment plan" means a redevelopment plan that was adopted under the Tax Increment Allocation Redevelopment Act (Article 11, Division

74.4 of the Illinois Municipal Code) prior to April 15, 2006 and for which property assembly costs were, before that date, included as a budget line item in the plan or described in the narrative portion of the plan as part of the redevelopment project, but does not include (i) any additional area added to the redevelopment project area on or after April 15, 2006, (ii) any subsequent extension of the completion date of a redevelopment plan beyond the estimated completion date established in that plan prior to April 15, 2006, (iii) any acquisition of property in a conservation area for which the condemnation complaint is filed more than 12 years after the effective date of this Act, or (iv) any acquisition of property in an industrial park conservation area.

As used in this subsection, "conservation area" and "industrial park conservation area" have the same meanings as under Section 11-74.4-3 of the Illinois Municipal Code.

(b) If the exercise of eminent domain authority is to acquire property for public ownership and control, then the condemning authority must prove that (i) the acquisition of the property is necessary for a public purpose and (ii) the acquired property will be owned and controlled by the condemning authority or another governmental entity.

(c) Except when the acquisition is governed by subsection (b) or is primarily for one of the purposes specified in subsection (d), (e), or (f) and the condemning authority elects to proceed under one of those subsections, if the exercise of eminent domain authority is to acquire property for private ownership or control, or both, then the condemning authority must prove by clear and convincing evidence that the acquisition of the property for private ownership or

control is (i) primarily for the benefit, use, or enjoyment of the public and (ii) necessary for a public purpose.

An acquisition of property primarily for the purpose of the elimination of blight is rebuttably presumed to be for a public purpose and primarily for the benefit, use, or enjoyment of the public under this subsection.

Any challenge to the existence of blighting factors alleged in a complaint to condemn under this subsection shall be raised within 6 months of the filing date of the complaint to condemn, and if not raised within that time the right to challenge the existence of those blighting factors shall be deemed waived.

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

In the case of an acquisition of property (or any right or interest in property) for private ownership or control to be used for utility, pipeline, or railroad purposes for which no certificate or finding of public convenience and necessity by the Illinois Commerce Commission is required, evidence that the acquisition is one for which the use of eminent domain is authorized under one of the following laws creates a

rebuttable presumption that the acquisition of that property (or right or interest in property) is (i) primarily for the benefit, use, or enjoyment of the public and (ii) necessary for a public purpose:

(1) the Public Utilities Act,

(2) the Telephone Company Act,

(3) the Electric Supplier Act,

(4) the Railroad Terminal Authority Act,

(5) the Grand Avenue Railroad Relocation Authority Act,

(6) the West Cook Railroad Relocation and Development Authority Act,

(7) Section 4-505 of the Illinois Highway Code,

(8) Section 17 or 18 of the Railroad Incorporation Act,

(9) Section 18c-7501 of the Illinois Vehicle Code.

(d) If the exercise of eminent domain authority is to acquire property for private ownership or control and if the primary basis for the acquisition is the elimination of blight and the condemning authority elects to proceed under this subsection, then the condemning authority must: (i) prove by a preponderance of the evidence that acquisition of the property for private ownership or control is necessary for a public purpose; (ii) prove by a preponderance of the evidence that the property to be acquired is located in an area that is currently designated as a blighted area or conservation area under an applicable statute; (iii) if the existence of blight or blighting factors is challenged in an appropriate motion filed within 6 months after the date of filing of the complaint to condemn, prove by a preponderance of the evidence

that the required blighting factors existed in the area so designated (but not necessarily in the particular property to be acquired) at the time of the designation under item (ii) or at any time thereafter; and (iv) prove by a preponderance of the evidence at least one of the following:

(A) that it has entered into an express written agreement in which a private person or entity agrees to undertake a development project within the blighted area that specifically details the reasons for which the property or rights in that property are necessary for the development project;

(B) that the exercise of eminent domain power and the proposed use of the property by the condemning authority are consistent with a regional plan that has been adopted within the past 5 years in accordance with Section 5-14001 of the Counties Code or Section 11-12-6 of the Illinois Municipal Code or with a local land resource management plan adopted under Section 4 of the Local Land Resource Management Planning Act; or

(C) that (1) the acquired property will be used in the development of a project that is consistent with the land uses set forth in a comprehensive redevelopment plan prepared in accordance with the applicable statute authorizing the condemning authority to exercise the power of eminent domain and is consistent with the goals and purposes of that comprehensive redevelopment plan, and (2) an enforceable written agreement, deed restriction, or similar encumbrance has been or will be executed and recorded against the acquired property to assure that the project and the use of the property remain consistent with those land uses, goals, and purposes for a period of at least 40 years, which execution and recording

shall be included as a requirement in any final order entered in the condemnation proceeding.

The existence of an ordinance, resolution, or other official act designating an area as blighted is not prima facie evidence of the existence of blight. A finding by the court in a condemnation proceeding that a property or area has not been proven to be blighted does not apply to any other case or undermine the designation of a blighted area or conservation area or the determination of the existence of blight for any other purpose or under any other statute, including without limitation under the Tax Increment Allocation Redevelopment Act (Article 11, Division 74.4 of the Illinois Municipal Code).

Any challenge to the existence of blighting factors alleged in a complaint to condemn under this subsection shall be raised within 6 months of the filing date of the complaint to condemn, and if not raised within that time the right to challenge the existence of those blighting factors shall be deemed waived.

(e) If the exercise of eminent domain authority is to acquire property for private ownership or control and if the primary purpose of the acquisition is one of the purposes specified in item (iii) of this subsection and the condemning authority elects to proceed under this subsection, then the condemning authority must prove by a preponderance of the evidence that: (i) the acquisition of the property is necessary for a public purpose; (ii) an enforceable written agreement, deed restriction, or similar encumbrance has been or will be executed and recorded against the acquired property to assure that the project and the use of the property remain consistent with the applicable purpose specified in item (iii) of this subsection for a period of at least 40 years, which execution and recording shall be

included as a requirement in any final order entered in the condemnation proceeding; and (iii) the acquired property will be one of the following:

(1) included in the project site for a residential project, or a mixed-use project including residential units, where not less than 20% of the residential units in the project are made available, for at least 15 years, by deed restriction, long-term lease, regulatory agreement, extended use agreement, or a comparable recorded encumbrance, to low-income households and very low-income households, as defined in Section 3 of the Illinois Affordable Housing Act;

(2) used primarily for public airport, road, parking, or mass transportation purposes and sold or leased to a private party in a sale-leaseback, lease-leaseback, or similar structured financing;

(3) owned or used by a public utility or electric cooperative for utility purposes;

(4) owned or used by a railroad for passenger or freight transportation purposes;

(5) sold or leased to a private party that operates a water supply, waste water, recycling, waste disposal, waste-to-energy, or similar facility;

(6) sold or leased to a not-for-profit corporation whose purposes include the preservation of open space, the operation of park space, and similar public purposes;

(7) used as a library, museum, or related facility, or as infrastructure related to such a facility;

(8) used by a private party for the operation of a charter school open to the general public; or

(9) a historic resource, as defined in Section 3 of the Illinois State Agency Historic Resources Preservation Act, a landmark designated as such under a local ordinance, or a contributing structure within a local landmark district listed on the National Register of Historic Places, that is being acquired for purposes of preservation or rehabilitation.

(f) If the exercise of eminent domain authority is to acquire property for public ownership and private control and if the primary purpose of the acquisition is one of the purposes specified in item (iii) of this subsection and the condemning authority elects to proceed under this subsection, then the condemning authority must prove by a preponderance of the evidence that: (i) the acquisition of the property is necessary for a public purpose; (ii) the acquired property will be owned by the condemning authority or another governmental entity; and (iii) the acquired property will be controlled by a private party that operates a business or facility related to the condemning authority's operation of a university, medical district, hospital, exposition or convention center, mass transportation facility, or airport, including, but not limited to, a medical clinic, research and development center, food or commercial concession facility, social service facility, maintenance or storage facility, cargo facility, rental car facility, bus facility, taxi facility, flight kitchen, fixed based operation, parking facility, refueling facility, water supply facility, and railroad tracks and stations.

(g) This Article is a limitation on the exercise of the power of eminent domain, but is not an independent grant of authority to exercise the power of eminent domain.

APPENDIX L

83 Ill. Adm. Code 200.150

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

APPENDIX M

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

Nos. 2016-ED-4, 2016-ED-5, 2016-ED-6, 2016-ED-12, 2016-ED-13, 2016-ED-15, 2016-ED16, 2016-ED-17, 2016-ED18, 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

AMEREN TRANSMISSION COMPANY OF ILLINOIS,

Plaintiff,

vs.

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

Defendants.

MEMORANDUM IN SUPPORT OF
TRAVERSE AND MOTION TO DISMISS

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

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

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

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

Section 8-406.1 of the Act does not require the utility or the ICC to mail individual notice to owners of property who would be directly affected by the approval of either the utility's primary or alternate routes for a project. That statute does say that the ICC shall grant a Certificate if the utility has met the requisite criteria "after notice and hearing," but it does not explain anything regarding the notice required. 220 ILCS 5/8-406.1(f).

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

Neither Section 8-406.1 of the Act nor Section 83.200.150(h) of the Illinois Administrative Code

explains the procedure for notifying landowners whose property would be directly affected when, while the utility's petition for a certificate is pending, an intervening party proposes an alternate route for the project.

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

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

While Section 8-406.1 of the Act and 83.200.150(h) of the Illinois Administrative Code are silent regarding the notice required to landowners whose property would be affected by an intervener's alternate route proposal, a review of the ALJs' status hearings shows how the judges determined the procedure should be handled. The ALJs wanted to ensure the interveners who proposed alternate routes provided contact information for landowners who would be affected by

the interveners' proposals so that affected landowners could be notified. ICC Docket No. 12-0598, Hearing Before ALJ Albers and ALJ Yoder, Dec. 3, 2012, p. 40.

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

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

Ultimately, on August 20, 2013, the ICC entered an Order granting ATXI a Certificate and authorizing it to begin construction of the Project. The ICC selected Stop Coalition's Route 2 for the Kansas- Indiana State Line segment of the project. In the Order, the ICC admitted, "the record lacks a count of occupied homes near Stop Coalition's Route 2." The ICC also indicated a major consideration was the lack of interveners along Stop Coalition's Route 2. The ICC's Order said:

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

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

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

Some of the Defendants attended the pre-filing public meetings ATXI held in order to confirm their properties were not affected. Because Defendants' properties were not affected by ATXI' s initial primary route or alternate route, this group of landowners never received notice from the ICC of the initial hearing. Additionally, the Defendants never received notice from the ICC of any subsequent hearings, despite the fact that other landowners from other segments of the project whose property would be affected by alternate route proposals were given notice of these alternate routes and attended status hearings. Defendants never received notice of Stop Coalition's alternate route proposals.

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

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

STATUTES INVOLVED

U.S. Const. amend. XIV, §1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ill. Const. art. I, §2.

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

220 ILCS 5/8-406.1 (See Attached)

83 Ill. Admin. Code §200.150(h)

A person filing an application under Section 8-406 of the Public Utilities Act for a Certificate of Public Convenience and Necessity to construct facilities upon or across privately owned tracts of land, or filing under Section 8-503 of that Act [220 1LCS 5/8-503], shall include with the application when filed with the Commission a list containing the name and address of each owner of record of the land as disclosed by the records of the tax collector of the county in which the land is located, as of not more than 30 days prior to the filing of the application. The Commission shall notify the owners of record of the time and place scheduled for the initial hearing upon the application. The foregoing provisions for notice to owners of record shall not be deemed jurisdictional and the omission of the name and address of an owner of record from the list or lack of notice shall in no way invalidate a subsequent order of the Commission relating to the application.

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

ARGUMENT

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

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

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

Both the Fourteenth Amendment to the United States Constitution and Article One, Section Two of the Illinois State Constitution guarantee Illinois citizens the right to due process. The ICC violated the due process rights of landowners in Edgar County, Illinois, when it failed to provide them notice of the hearing before the ICC regarding ATM's petition for a Certificate. They should have been given this notice because an intervening group submitted a route proposal that would directly affect land owned by Defendants. This lack of notice deprived these individuals of the opportunity to meaningfully participate in the hearing process, the outcome of which was directly adverse to their property rights.

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

Pursuant to the United States and Illinois Constitutions, no person may be deprived of life, liberty, or property without due process of law. U.S. Const., amend. XIV; see also Ill. Const. 1970, art.1, § 2. "'The core of due process is the right to notice and a meaningful opportunity to be heard'; no person may be deprived of a protected interest by an administrative adjudication of rights unless these safeguards are provided." *World Painting Co. v. Costigan*, 2012 IL App (4th) 110869, ¶ 14, 967 N.E.2d 485 (quoting *Lachance v. Erickson*, 522 U.S. 262, 266 (1998)). Further, in the context of an administrative proceeding, "due process is satisfied when the party concerned has the 'opportunity to be heard in an orderly proceeding which is adapted to the nature and circumstances of the dispute.'" *WISAM 1. Inc. v. Illinois Liquor Control Comm'n*, 2014IL 116173, ¶ 26, 18 N.E.3d 1 (quoting *Obasi v. Department of Professional Regulations*, 266 Ill. App. 3d 693, 702, 639 N.E.2d 1318, 1325 (1994)). "A fair hearing includes the right to be heard, the right

to cross-examine adverse witnesses, and impartiality in ruling on the evidence." WISAM 1, 2014 IL 116173, ¶ 26, 18 N.E.3d 1; *Adams County Property Owners & Tenant Farmers v. Illinois Commerce Comm'n*, 2015 Ill App (4th) 130907 (III. App. 2015), at p. 11.

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

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

Defendants are entitled to give input into the plans approved by the Commission, as well as objecting to the approved Certificate, as owners of property being taken for a public use at the time of filing their

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

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

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

The Administrative Procedure Act requires that all parties in a contested case be given notice and an opportunity for a hearing. "The statutory requirements of notice and opportunity to be heard are also

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

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

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

In the status hearing on December 3, 2012, ALJ Albers explained the general process interveners should follow when they propose an alternate route. He said a landowner who proposes an alternate route should, "identify any other landowners that are going to be affected by it because we don't want to change

something on these folks[sic] land without giving them notice, just like you wouldn't like if you got a line put on your property without notice." ICC Docket No. 12-0598, Hearing Before ALJ Albers and ALJ Yoder, Dec. 3, 2012, p. 40. More specifically, ALJs mandated that they would expect interveners to provide a map similar to what ATXI had provided, which would distinctly exhibit the proposed route line and exactly how it deviated from ATXI's routes. *Id*. at 61-62. Along with the proposed route, the intervener proposing it would need to provide the names and addresses of the owners of each parcel affected by the alternate route proposal. *Id*. at 62.

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

In light of this review of the status hearing minutes, it is clear that the procedure for notifying landowners who would be directly affected an intervener's proposed route was as follows: 1) the intervener proposes a route and that proposal includes a detailed map of

the route and the names and addresses of all landowners affected by this route; and 2) the Clerk of the Commission was to send notice to the newly affected landowners.

Apparently, this procedure of notifying newly affected landowners was followed in most instances because some newly affected landowners, after receiving notice of the alternate route proposals, attended a subsequent status hearing before the ALJs in January 2013. ICC Docket No. 12-0598, Hearing Before ALJ Albers and ALJ Yoder, Jan. 17, 2013, p. 100. Again, at this hearing, the ALJs explained the general procedure for how the petition for a certificate would be handled. They reminded individuals that if they planned to propose alternate routes they needed to have the names and addresses of the newly affected landowners "because they will have to be given notice that you have now suggested that the route go an affect them." *Id*. at 109. Those newly affected landowners would then have an opportunity to attend a status hearing to have the administrative process explained to them and a date issued to them by which they would need to file any testimony they might wish to provide. *Id*.

All the rhetoric and reminders regarding the procedure and the constant mention of notice highlights the fact that the ALJs were squarely focused on the importance of providing notice to landowners who were going to be directly affected by any proposed alternate routes. In fact, the judges explained that even the slightest deviation in a route merited notice to property owners. *Id*. at 112-113. In other words, even if a property owner had previously been provided notice that the route would affect one portion of his or her property, and even if he or she had not intervened,

if someone proposed an alternate route that modified its location such that it would affect a different side for that same landowner's property, he or she needed to be provided notice. *Id*. The basis for this determination was that even though the landowner was amenable to where the route was currently planned to affect his or her property, he or she might not be so accepting if the route were to change and affect a different portion of his or her property. *Id.*

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

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

Due process represents this country's commitment to ensuring our government engages in a fair decision-making process prior to affecting citizens' property. *Fuentes*, 407 U.S. at 80-81. This time-honored tradition was offended in this case because Defendants did not receive notice of the ICC proceedings. The Defendants had a right to be notified that an administrative proceeding had been initiated that could

result in the ICC granting ATXI a certificate giving it the authority to build a high voltage transmission line on or across their private property. Due process is in place to protect "a person's right to enjoy what is his, free of governmental interference." *Id.* at 81. Notification would have accomplished this goal because it would have allowed the Defendants to intervene in the matter earlier and to more effectively enter testimony to protect their property rights.

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

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

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

situation, but it must be sufficient to inform the individuals whose property interests will be affected. *Mullane*, 339 U.S. at 315.

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

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

meetings who would be affected by the proposed utility's routes still would not be apprised of the time and place for a hearing because the utility would not yet have even filed a petition for a certificate.

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

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

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

of a transmission line being built in their county does not even begin to approach the threshold of what due process requires.

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

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

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

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

CONCLUSION

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

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

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

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

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

Respectfully Submitted,

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

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Illinois General Assembly

Illinois Compiled Statutes

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(220 ILCS 5/8-406.1)

Sec. 8-406.1. Certificate of public convenience and necessity; expedited procedure.

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

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

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

(B) The following engineering data:

(i) a detailed Project description including:

(I) name and destination of the Project;

(II) design voltage rating (kV);

(III) operating voltage rating (kV); and

(IV) normal peak operating current rating;

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

(I) conductor size and type;

(II) type of structures;

(III) height of typical structures;

(IV) an explanation why these structures were selected;

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

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

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

(I) miles of right-of-way;

(II) miles of circuit;

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

(IV) a brief description of the area of the general land uses in the area and the type of terrain crossed by the proposed line;

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

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

(II) the operating voltage and frequency; and

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

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

(I) the wind and ice loading design parameters;

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

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

(IV) conductor (phase) spacing; and

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

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

(I) burial depth;

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

(III) cathodic protection scheme; and

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

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

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

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

(3) Information showing that the utility has held a minimum of 3 pre-filing public meetings to receive public comment concerning the Project in each county where the Project is to be located, no earlier than 6 months prior to the filing of the application. Notice of the public meeting shall be published in a newspaper of general circulation within the affected county once a week for 3 travers 2 contiguous countries and in one country the transmission line mileage and number of landowners over whose property the proposed route traverses is 1/5 or less of the transmission

line mileage and number of such landowners of the other county, then the utility may combine the 3 pre-filing meetings in the county with the greater transmission line mileage and affected landowners. All other requirements regarding pre-filing meetings shall apply in both counties. Notice of the public meeting, including a description of the Project, must be provided in writing to the clerk of each county where the Project is to be located. A representative of the Commission shall be invited to each pre-filing public meeting.

For applications filed after the effective date of this amendatory Act of the 99th General Assembly, the Commission shall by registered mail notify each owner of record of the land, as identified in the records of the relevant county tax assessor, included in the primary or alternate rights-of-way identified in the utility's application of the time and place scheduled for the initial hearing upon the public utility's application. The utility shall reimburse the Commission for the cost of the postage and supplies incurred for mailing the notice.

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

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

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

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

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

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

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

(3) That the public utility is capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers. filed. The Commission may extend the 150,[illegible],

deadline upon notice by at additional 75 days if, on or before the 30th day after the filing of the application, the Commission finds that good cause exists to extend the 150-day period.

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

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

(Source: P.A. 99-399, eff. 8-18-15.)

Illinois General Assembly

Illinois Compiled Statutes

Information maintained by the Legislative Reference Bureau

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(5 ILCS 100/10-25) (from Ch. 127, par. 1010-25)

Sec. 10-25. Contested cases; notice; hearing.

(a) In a contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice. The notice shall be served personally or by certified or registered mail or as otherwise provided by law upon the parties or their agents appointed to receive service of process and shall include the following:

(1) A statement of the time, place, and nature of the hearing.

(2) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(3) A reference to the particular Sections of the substantive and procedural statutes and rules involved.

(4) Except where a more detailed statement is otherwise provided for by law, a short and plain statement of the matters asserted, the consequences of a failure to respond, and the official file or other reference number.

(5) The names and mailing addresses of the administrative law judge, all parties, and all other persons to whom the agency gives notice of the hearing unless otherwise confidential by law.

(b) An opportunity shall be afforded all parties to be represented by legal counsel and to respond and present evidence and argument.

(c) Unless precluded by law, disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(Source: P.A. 87-823.)

APPENDIX N

IN THE SUPREME COURT OF ILLINOIS

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

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

* * *

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:

> "[Thu 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 pro-cess 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.l 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 (1') 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.

* * *

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.