

# Grain Belt Express Transmission Line Project: ICC Process and Easement Issues

*Laura Harmon  
Senior Counsel  
Illinois Farm Bureau*



# What should landowners do?

- Gather Background Information on Grain Belt Express Transmission Line Project website:

<http://www.grainbeltexpresscleanline.com>

- Once Petition is Filed before ICC, track the case on ICC's website on e-Docket:

<http://www.icc.Illinois.gov>

# Who participates in and who decides transmission line cases?

## ➤ Participants

- Utility
- Landowners/Intervenors
- ICC Staff (representing the public interest)

## ➤ Decision makers

- Illinois Commerce Commission
  - 5 members appointed by the Governor

# ICC Contested Case Procedures

- Data requests and request for documents
- Prepare written testimony
- Evidentiary hearing
- Briefing and research
- Final Order/Application for Rehearing

# How to Participate in ICC Case

- Intervene
- On your own or hire attorney
- Written testimony is considered by ICC
- Public Comments – file on e-Docket, but is not testimony

# Comment vs. Intervention

- **Comments (protests) are not on the record**
  - The ICC may not base its decision on comments
    - Comments may be looked at by ICC Staff or ALJ
  - Protestors do not receive notice of the hearing
    - Protestors may not participate in the hearing
  
- **Intervenors have more rights**
  - They may participate in the hearing
    - Submit evidence and cross-examine witnesses
  - Intervenors have obligations
    - Follow the rules, including providing service copies
    - Respond to discovery
    - File testimony or a statement of position or be dismissed
    - Appear at the hearing

# Intervention Standards

- **Must be a directly-affected landowner**
  - Transmission line crosses property
  - Landowner within 500 feet of transmission line
- **Other standards**
  - Can include nearby property
  - Interest must be different than general public
- **A landowner who receives notice may intervene**

# Important Dates For Landowners

- Intervention deadline
  - There is none, but you take case as is. Thus, if you intervene after deadline to file testimony may not be included in it.
- Prehearing/Conference
- Utility proposes case schedule
- Pre-filed direct testimony
- Hearing on the merits

# Other Important Dates

- Discovery due throughout the proceeding
- Staff testimony and Intervenor testimony
- Utility rebuttal testimony
- Status Hearings to address Staff and Intervenor proposed routes
- Briefs
  - After hearing
- ALJ's Proposal for Decision (PFD)
  - After hearing
- PUC Open Meeting and Final Order
  - After PFD issued

# What information does the ICC consider to make its decision?

- The utility's application and direct testimony
- Pre-filed direct testimony by intervenors and Staff
- Rebuttal testimony of the utility and intervenors
- The hearing on the merits of the application
  - After the hearing, parties file briefs addressing the evidence and legal issues

# What happens at the hearing?

- Hearings are held at ICC in Springfield
- Admission of pre-filed testimony
  - Including rebuttal testimony
- Admission of other exhibits
  - Data Request responses
- Cross-examination of witnesses
  - Witnesses are under oath
- Transcript is prepared by a court reporter

# Direct Pre-filed Testimony

This is what parties file:

## ➤ Utility/Applicant

- Basic testimony support the application

## ➤ Landowners/Intervenors

- Describe their property and impact of the line
- Identify concerns about proposed routes
- Propose alternatives
- Support other routes

## ➤ Staff

- Discusses the statutory and regulatory requirements
- Recommends a route



- **Before can construct line Utility must show:**
  - **Project will promote public convenience and is necessary**
  - **Reliable and efficient service to its customers and is least cost means of doing so; OR**
  - **Project will promote the development of an effectively competitive electricity market that operates efficiently, is equitable to all customers, and is least cost means; and**
  - **Capable of efficiently managing and supervising the construction process**
  
- **Intervenor can argue CPCN should be denied because project not necessary**
  - **Rock Island Clean Line Docket 12-0560: ICC granted CPCN and Intervenor filed appeals in 3<sup>rd</sup> District Appellate Court**
  - **Grain Belt Express application before MPSC Case # EA-2014-0207**

# ICC looks at the “Least-Cost” Routing Factors

1. Length of line.
2. Difficulty and cost of construction.
3. Difficulty and cost of operation and maintenance.
4. Environmental impacts.
5. Impacts on historical resources.
6. Social and land use impacts.
7. Number of affected owners and other stakeholders.
8. Proximity to homes and other structures.
9. Proximity to existing and planned development.
10. Community acceptance.
11. Visual Impact.
12. Presence of existing corridors.

Environmental Impacts of Transmission Lines:

<http://psc.wi.gov/thelibrary/publications/electric/electric10.pdf>



# Expedited Review Process 8-406.1

- Grain Belt plans to file for a CPCN (authority to construct) under the expedited review section of the Public Utilities Act which requires the ICC to enter an order in 150 days unless good cause shown for an extension of 75 days.
- ICC routinely grants 75 day extension so 225 days to try and issue an order
- Ameren IRP ICC case docket 12-0598 eventually approved by ICC but is on appeal before 4<sup>th</sup> District Appellate Court.
- Due Process is not guaranteed for transmission line project this size under expedited review.
- ILFB proposed legislation to amend 8-406.1 which was introduced by Senator Chapin Rose on February 20, 2015 as SB1727.

# If ICC Approves Project, Utility has Right to Survey

- Section 5/8–510 of Public Utilities Act
- Right to do a Soft Survey– not core boring or invasive activities
- Revise Company’s Right to Survey Form to
  - limit scope of survey activities
  - compensation for any damages

# ICC grant of eminent domain authority

Utility must first have §8-406.1 Order to construct line

Standard under §8-509:

Utility must show it made reasonable attempt to acquire the property (easement)

Factors considered to determine reasonable attempts to negotiate:

- (1) Number and extents of contacts
- (2) Whether utility has explained its offers
- (3) Whether offers of compensation are comparable to similarly situated
- (4) Whether utility has made effort to address landowner's concerns  
(e.g., pole placement, location of line, easement terms)
- (5) Whether further negotiations would be fruitful.

# Lessons Learned from Prior Cases

- Landowners need to get involved as soon as possible and work with their local county Farm Bureaus to keep each other aware of important concerns.
- Bargaining Power: Landowner has more prior to grant of Condemnation Authority.
- Companies will negotiate, and landowners appear to be in a better position if they work as part of a landowner group.
- The only way to formally support or object to a utility project is to intervene in the ICC hearing.

# Can landowners represent themselves?

- Yes, but it can require almost a full-time commitment
  - Have to file testimony, pleadings, discovery responses
- Some intervenors are intimidated by the process
  - Can take a great deal of time to learn the rules
- There is a blizzard of documents
  - Intervenors receive everything filed in the docket
  - Must mail or email everything they file in the docket

# May landowners join together?

- Yes, this is common
  - Most often they are on the same segment or line
  - Align because of similar positions
- Can have conflicts
  - Larger landowners often are not completely aligned
  - One or more landowners may support an alternate route that affects others in the group
- RICL and GBE MO: Landowners opposed project – not each other

# Attorney Representation

- Landowners may want to have an attorney represent them in an ICC proceeding
  - Deciding whether to hire an attorney, and choosing the right representation, is an important decision
- An attorney can help the landowner understand the ICC's procedures and the laws and rules that the ICC applies in deciding whether to approve a proposed pipeline
- An attorney is responsible for presentation of the landowner's case
  - Landowner provides input and information to the attorney

# Cost of Representation

- The cost can vary substantially
  - A single landowner can expect to pay at least \$10,000–50,000 for basic case that goes to hearing
  - A large, complex case with expert witnesses can cost as much as \$200,000
  
- Lower costs are possible
  - Group of landowners can share costs
  - Limited representation
    - Still have a “seat at the table”

# Initial Points to Consider

- Easements are legally binding agreements.
- Need to be carefully reviewed and understood.
- Agreement is going to have a long term effect on you and your land, and will also impact future generations.
- Recommend you consult with an attorney before executing a utility or pipeline easement.

# Negotiating an Easement

1. Follow the Project's status before the ICC.  
Does rehearing impact your property?
2. Review AIMA and Incorporate into Easement.  
Revise and improve AIMA terms – floor not the ceiling
3. Determine compatibility of transmission line with farming operations, mineral leases (or interests), federal floodplain easements or CRP.
4. Negotiate terms of transmission line easement. Do NOT sign their Standard Easement – it is one-sided and does NOT address farmland owner concerns.

# Checklist of farmland issues to address

- Scope of agreement.
  - Limit scope to 1 DC electric transmission line, and specify ROW and include legal description for ROW
  - Limit access rights—designate where access line
  - Limit telecommunications so can't install commercial cable lines
- Reserve all other rights to landowner.
- Limit land subject to easement.
  - Don't grant unlimited access to all adjoining lands.
- Mitigate damages to operations due to construction and maintenance of the line.
  - Drainage tile and irrigation systems.
  - Soil compaction, rutting, fertilization.
  - Construction debris, tree and brush clearing.
  - Soil erosion, weed control.
  - Agricultural inspector.

Note: Need to incorporate AIMA into the easement and modify terms to suit your needs.



## [checklist, continued]

- Indemnification and hold harmless
- Insurance
- Compensation
  - Temporary easement: construction damages, crop loss, restoration.
  - Permanent easement: FMV of land permanently taken out of production, Damage to the Remainder
  - Other Damages: increased cost to farming operations, impact irrigation, loss of right to exploit mineral interests, breach of conservation easement.
- Recover Reasonable Attorneys Fees if have to Enforce Terms of Easement.

# QUESTIONS?

