No. 122973

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IN THE SUPREME COURT OF ILLINOIS

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

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

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

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

BRIEF *AMICUS CURIAE* OF COMMONWEALTH EDISON COMPANY IN SUPPORT OF APPELLANT AMEREN TRANSMISSION COMPANY OF ILLINOIS

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POINTS AND AUTHORITIES

INTRODUCTION

In the decision below, the Circuit Court for Edgar County invalidated a portion of the then-existing version of 220 ILCS 5/8-406.1, holding that when the Illinois Commerce Commission ("ICC") considers an application for a certificate of public convenience and necessity ("CPCN") to build a new transmission line under the ICC's "expedited procedure," due process requires "personal notice … to any landowner" whose property may be affected by any "route[] proposed throughout the certification process." Order at 23, R. C1014. The Circuit Court then dismissed complaints filed by Ameren Transmission Company of Illinois ("Ameren") seeking to acquire by eminent domain property of landowners (the "Defendants") who claimed not to have received such notice during the ICC proceeding that approved a new transmission route. *Id.* at 9, 24, R. C1000, C1015.

That holding was error. This Court has already decided this issue, holding in *Chicago, Burlington & Quincy Railroad Co. v. Cavanagh*, 278 Ill. 609 (1917), that due process does not require individualized notice to landowners who may be affected by commission-approved routes. *Cavanagh* and its progeny recognize that when the ICC considers a CPCN, landowners have no *property* rights at issue in that proceeding, even if the ICC's order might someday contribute to the filing of an eminent domain action. Ameren's brief explains these points. Ameren Br. 19-25.

ComEd submits this brief to make an additional point: the Circuit Court's holding would be indefensible even if *Cavanagh* and its progeny had not been decided, and even if the ICC's order simultaneously approved a new route and triggered the filing of a condemnation action against the affected landowners. The Circuit Court erred by failing to recognize that this is an *eminent domain* case. The General Assembly has unlimited

power to take property via eminent domain, or to authorize others to do so, constrained only by the requirement that the property be necessary for a public use, and that just compensation be paid. Those two issues—public use and just compensation—are *all* that the Constitution entitles landowners the chance to litigate. Because the Defendants had that chance in the eminent domain proceeding, they received all the process due.

The Circuit Court believed the Defendants were entitled to individualized notice so they could *also* litigate the different set of questions before the ICC—whether the Illinois Rivers Project is wise policy and what route it should follow. The law of eminent domain, however, is clear that landowners have *no* constitutional right to contest those issues, which are legislative judgments vested in the discretion of the General Assembly, or in the ICC exercising its delegated power. And with no constitutionally protected right at stake in the ICC's proceedings, the Defendants had no constitutional right to notice.

Indeed, the Defendants received far more process than the Constitution requires. When the General Assembly delegated to the ICC its power to authorize eminent domain, it subjected the ICC's decisions to the panoply of protections of Illinois administrative law. The ICC's proceedings are public and publicly available through the ICC's docket, and Ameren held public meetings in each county after publishing notice. Any interested person can seek to intervene in ICC proceedings, present evidence and argument, and appeal an adverse decision—as the Defendants here did.

The Constitution does not require these administrative procedures as a condition precedent for the commencement of an action to take property, but the General Assembly chose to create them nonetheless. In doing so, it decided which classes of people should be provided notice of the proceedings, balancing a desire with public participation against a

need for expeditious resolution of the matter. By contrast, under the Circuit Court's rule, every time a party suggests a new route, a new round of notice would be needed—also triggering, potentially, other rights, including (but not limited to) a new set of hearings. Landowners affected by the new route could then propose their own alternatives, necessitating yet further notice to more potentially affected landowners, requiring new hearings, and resulting in new proposed routes, and on and on. And if notice were deemed inadequate for just one person, moreover, that could send an entire project back to the ICC—as will likely be the case here if the Circuit Court's order stands. Precisely to avoid these untenable results, the General Assembly struck a balance in the statute between providing individualized notice and accomplishing the public purpose of building new transmission lines. The General Assembly was free to strike a different balance if it wished—requiring more notice, or less—and it has from time to time changed the rules for notice, including by amending the very statute at issue here, 220 ILCS 5/8-406.1. Here, the parties stipulated that the relevant statutory requirements were satisfied.

The question for this Court, however, is not the wisdom of the procedures that the General Assembly enacted and that existed when the ICC made the decision at issue here. Rather, the question is whether to *constitutionalize* individual notice procedures, as the Circuit Court did, and require endless cycles of notice and hearings, every time any party raises an alternative route, even if doing so paralyzes the ICC's important work. ComEd respectfully submits that 100 years of precedent and sound policy forbid that result. The Court should leave those procedures to the General Assembly and the ICC's sound discretion, subject to ordinary mechanisms of judicial review.

ARGUMENT

I. *CAVANAGH* RESOLVES THE QUESTION PRESENTED BY THIS CASE.

The question presented by this case is not an open one; this Court answered it 100 years ago in *Cavanagh*. There, as here, the utility commission—then, the Public Utilities Commission—authorized a new route, ordering a railroad "to relocate its tracks … [to] follow a certain course." 278 Ill. at 611. There, as here, the commission's order contemplated that the company would "acquire ... by … eminent domain, whatever property might be necessary." *Id.* at 612. And there, as here, when the company duly filed a condemnation petition, affected landowners claimed a "violation of … due process" on the ground 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, and … appeal." *Id.* at 613, 617.

This Court rejected that claim. It held that the commission's order fixing the route "did not amount to an appropriation of the defendants' property or any interest in it." *Id.* at 617. The landowners' property was at stake only after "the filing of a petition," which would entitle the landowners to contest whether the requirements for eminent domain were met. *Id.* Hence "there was no violation of … due process." *Id.* Indeed, "[t]here was no more necessity of notifying the defendants of the hearing or serving them with a certified copy of the order than there would be in any case of notifying owners of land that the power of eminent domain was about to be conferred upon a corporation or administrative board or officer where the exercise of the power would require the taking of their property." *Id.*

In the years since *Cavanagh*, this Court has repeatedly reaffirmed *Cavanagh*'s holding, explaining that "the *Cavanagh* case is a complete answer to th[e] contention" that "due process of law" required "actual notice … to the property owners within the [affected] area …, of the hearing before the commission for a certificate of convenience and necessity." *Zurn v. City of Chicago*, 389 Ill. 114, 132 (1945); *see City of Chicago v. R. Zwick Co.*, 27 Ill. 2d 128, 130 (1963) (rejecting, based on *Zurn*, argument that "failure to give [defendants] a full hearing before the designation of an area as" potentially subject to eminent domain, "and an immediate separate review prior to an eminent domain proceeding, was a violation of due process"). Likewise, lower courts have steadfastly adhered to *Cavanagh*. *Ill. Power Co. v. Lynn*, 50 Ill. App. 3d 77, 81 (4th Dist. 1977); *Adams Cty. Prop. Owners & Tenant Farmers v. ICC*, 2015 IL App (4th) 130907, ¶ 49. And *Cavanagh*'s holding is conclusive here. It arose in the same posture (condemnation suit filed pursuant to commission order), and considered the same argument (that lack of notice in commission proceedings required dismissing the condemnation suit). The Circuit Court impermissibly departed from *Cavanagh* and its progeny—and this Court must reverse.

II. *CAVANAGH*'S HOLDING WAS COMPELLED BY BEDROCK CONSTITUTIONAL PRINCIPLES.

Because *Cavanagh* decides this case, the Court need go no farther to reverse, as requested by Ameren. But even if *Cavanagh*'s on-point holding did not exist, the result would be the same. *Cavanagh* followed fundamental constitutional principles that compelled the result it reached.

A. The Defendants Received All The Process Due Via The Condemnation Action Below.

The key fact about this case is that it is a *condemnation* case. "The General Assembly has unlimited power to take private property for public use, or to authorize it to be taken, upon making compensation." *Cavanagh*, 278 Ill. at 617. And in a condemnation case, the questions—the only questions—"reserv[ed] to the property owner [are] the right to contest the question whether the proposed use is public or private, and whether the power is to be exercised for the purpose for which it was conferred." *Id.*; *see S. Park Comm'rs v. Montgomery Ward & Co.*, 248 Ill. 299, 318 (1910) ("Subject to the requirement of just compensation to the owner," the power of eminent domain "is without limitation, except that it can be exercised only for the public use."); *Zurn*, 389 Ill. at 131.

Here, the Defendants had the right to contest all the prerequisites for the eminent domain power's exercise. They could challenge whether the acquisition of their property was "primarily for the benefit, use, or enjoyment of the public." 735 ILCS 30/5-5-5(c). They could litigate whether taking their property was "necessary for a public purpose." *Id.* And they could demand "just compensation" for the property taken, based on "a trial by jury." 735 ILCS 30/10-5-5(a). As this Court held in *City of Chicago v. R. Zwick Co.*, so long as "a property owner may be heard in the condemnation proceeding on the question of whether all conditions precedent to the exercise of eminent domain have been met, … due process is thereby satisfied." 27 Ill. 2d at 131 (citing, *e.g.*, *Zurn*, 389 Ill. at 114). The Defendants had that chance here, and thus, due process required nothing more.

B. Due Process Did Not Entitle The Defendants To Individualized Notice Prior To The ICC's Approval Of A New Transmission Line Following A Particular Route.

No party disputes that the Defendants had, in the condemnation action below, the chance to challenge whether the requirements for eminent domain were met. Instead, the Defendants claim, and the Circuit Court found, that due process *also* entitled the Defendants to individualized notice before the ICC addressed different and additional questions—whether a new transmission line was sound policy (including the use of the eminent domain power that it would require), and what route it would follow.

What the Circuit Court missed is that landowners have no right, under due process or any other law, to individualized notice so that they can litigate the project's wisdom, or the choice to pursue one version of the project instead of another. That is because these questions are fundamentally *legislative* questions, and the Constitution does not create any individual right to litigate about them. The law of eminent domain is express. So long as "the use is public," landowners have no constitutional right to an "inquir[y] into the … propriety of exercising the right of eminent domain," which is "political in its nature"; instead, "[o]f the … expediency of exercising the right of eminent domain in the appropriation of private property to public uses, the opinion of the legislature *or of the corporate body or tribunal upon which it has conferred the powe*r to determine the question, is conclusive." *Zurn*, 389 Ill. at 126-27 (quoting *Chicago, Rock Island & Pac. R.R. Co. v. Town of Lake*, 71 Ill. 333, 336 (1874) (emphasis added)); *accord Sholl v. German Coal Co.*, 118 Ill. 427, 427 (1887) ("It belongs to the legislative power of the government to determine for what public purposes private property shall be taken, and the necessity and expediency of such appropriation"); *Limits Indus. R.R. Co. v. Am. Spiral Pipe Works*, 321 Ill. 101, 105-06 (1926) (no right to "inquire into the necessity or propriety of

the exercise of the right of eminent domain, which is …. a legislative question"); *Eckhoff v. Forest Pres. Dist. of Cook Cty.*, 377 Ill. 208, 213 (1941) (similar); *Poole v. City of Kankakee*, 406 Ill. 521, 532 (1950) (similar); *People ex rel. Dir. of Fin. v. Young Women's Christian Ass'n of Springfield*, 86 Ill. 2d 219, 234 (1981) (similar).

Because a project's wisdom, and its precise form, are legislative and political questions, due process does not entitle landowners the chance to individually litigate issues beyond those specified in the Eminent Domain Act. To be sure, as noted above, in the Eminent Domain Act itself, the General Assembly gave landowners the chance, not itself required by due process, to challenge whether a taking is "necessary for a public purpose." 735 ILCS 30/5-5-5(b)-(c). That is consistent with Illinois law holding that although "whether the exercise of the power of eminent domain is necessary or expedient to accomplish an authorized purpose is not a question within the province of the court to determine," courts may—when eminent domain power is delegated to a corporation or agency—conduct a limited inquiry under a "clear abuse" standard. *Dep't of Pub. Works & Bldgs. v. Keller*, 61 Ill. 2d 320, 325 (1975). But the critical point is that this inquiry, whatever its contours, occurs in the eminent domain action, which both *provides* all the process due and is the *limit* of the process due. Neither the Eminent Domain Act nor any other law creates any right to individually litigate issues *outside* this inquiry.

The bedrock due process rule is that plaintiffs "who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under" governing law. *Village of Vernon Hills v. Heelan*, 2015 IL 118170, ¶ 33 (quoting *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003)). Here, Illinois law is clear that the legislative and political questions resolved by the ICC, and outside of the

limited inquiry authorized by the Eminent Domain Act, are irrelevant to whether the condemnation of the Defendants' property was lawful.

This Court's holdings in *Cavanagh* and *Zurn* reflect a commonsense point. If the General Assembly had itself declared the Illinois Rivers Project to be a public use, approved its route, and authorized the use of eminent domain to acquire rights-of-way on that route, no one could claim that the Defendants had a due process right to present, on the legislative floor, their case that the project should follow another route. It makes no difference that the General Assembly instead "has conferred the power to determine the question" upon a "tribunal" like the ICC; the ICC's determination still is "political in its nature," *Zurn*, 389 Ill. at 126-27 (internal quotation marks omitted), and a "legislative question," to which no due process right of notice applies. *Limits Indus.*, 321 Ill. at 105-06; *see Golden Triangle Reg'l Solid Waste Mgmt. Auth. v. Concerned Citizens Against Location of Landfill*, 722 So. 2d 648, 654 (Miss. 1998) ("[T]he Authority's choice of locations for its landfill was an exclusive legislative function of the Authority" and individual landowners had "no due process right to be heard"); *Reel Pipe & Valve Co. v. Consol. City of Indianapolis-Marion Cty.*, 633 N.E.2d 274, 278 (Ind. Ct. App. 1994) ("property owner has no constitutionally protected right to participate in a legislative decision" addressing "the extent of the public necessity for a proposed improvement, the suitableness of the location selected, and the consequent necessity of taking the land selected," including when that "legislative function" is delegated to a commission (quoting *Rassi v. Truckline Gas Co.*, 240 N.E.2d 49, 53 (Ind. 1968)); *United States ex rel Tenn. Valley Auth. v. An Easement and Right-of-Way 200 Feet Wide and 874 Feet Long*, 235 F.

Supp. 376, 377 (N.D. Miss. 1964) ("The necessity for taking a particular tract, and the location of the power line, are legislative or administrative questions.").

Indeed, the Defendants have already received vastly more process than the Constitution requires. Ameren invoked the power of eminent domain pursuant to the ICC's exercise of legislative authority delegated to it by the General Assembly. *See, e.g., Adams v. N. Ill. Gas Co.*, 211 Ill. 2d 32, 64 (2004) (ICC exercises "legislative … function[s] …. under authority delegated by the legislature"). And when the General Assembly delegated this authority, it imposed *statutory* conditions on its use. A utility may ask the ICC to authorize use of eminent domain only "[w]hen necessary for the construction" of projects meeting statutory criteria, 220 ILCS 5/8-509, and before the ICC will authorize eminent domain, utilities must show that they have made reasonable efforts at negotiation, *see, e.g.*, Order at *4, *Ameren Transmission Co. of Illinois*, Docket No. 15-0562 (Nov. 24, 2015), 2015 WL 7767462. The ICC's approval process thus provides an opportunity, not required by the Constitution, to litigate the wisdom of a project and a proposed route—facilitated by notices and public meetings in the affected counties. Ameren Br. 23. In this case, the ICC and Ameren complied with the preconditions imposed by the General Assembly, and the Fourth District affirmed that they followed the law in doing so. *Adams Cty.*, 2015 IL App (4th) 130907, ¶ 103. The General Assembly did not, by creating these self-imposed preconditions, trigger an *additional* constitutional obligation under the due process clause to provide individualized notice to every potentially affected landowner.

Adhering to this settled law is essential, as the Circuit Court's contrary ruling could hamstring critical public projects. When a new transmission line is proposed, the group of property owners potentially affected is unbounded. This is particularly true here, as

Ameren's project includes many segments and covers 375 miles. R. C152. Ameren originally proposed two routes; intervenors then can propose new routes, affecting a new group of landowners—who, in turn, can intervene and propose yet another alternative. But under the Circuit Court's ruling, the Constitution *itself* requires, after each iteration, a new round of notice and a new round of hearings, persisting as long as new routes can be imagined. That requirement, moreover, is especially disruptive because in ComEd's experience, new routes may be proposed late in the process. Moreover, under the Circuit Court's ruling, the remedy for missed notice—whether due to inaccurate land records or some other reason—is that the landowner acquires effective *immunity* from an eminent domain action. That ruling threatens to grind to a halt important public projects that *already* take too long; the Illinois Rivers Project, for example, commenced planning in 2006. R. C152.[1]

[1] Because the Defendants had no due process right to individually litigate the questions resolved in the ICC proceeding, the Circuit Court erred by invoking *Mathews v. Eldridge*, 424 U.S. 319 (1976), which applies to define the process due *only* when such an individual rights exists. The Circuit Court then compounded its error by misapplying *Mathews*. The Circuit Court considered the "'private interest that will be affected,'" and perceived a risk that absent individualized notice, there was a heightened "risk of an erroneous deprivation." Order at 20, R. C1011 (quoting *Mathews*, 424 U.S. at 335). If the Defendants had participated before the ICC, the Circuit Court appeared to believe, they might have persuaded the ICC to select an alternative route, and the loss of this chance thus risked an "erroneous deprivation." *Id.*

The Circuit Court erred because it misunderstood what "private interests" are protected in this context, and what it means for a deprivation to be "erroneous." This is a condemnation case, where the Defendants' only protected interest is that eminent domain occur only if it is necessary for a public use and only in return for just compensation. *Supra* at 5-6. Likewise, a condemnation is "erroneous" only if it is *not* necessary for a public use, or does *not* provide for just compensation. *Id.* Lack of notice to the Defendants did not increase that risk at all. Contra the Circuit Court's impression, an eminent domain action does not yield an "erroneous" result just because, in an alternate universe, an agency might have decided that a *different* version of a project—here, a different route—might *better* serve its purposes.

Moreover, the Circuit Court's ruling creates severe risks of opportunism. If a landowner claims he or she did not receive the required notice, but his or her property is essential for the project to proceed, the landowner can threaten to hold up the project unless the utility pays vastly more than "just compensation" for the property right it must acquire. That would allow landowners to obtain, via the expedient of the due process clause, amounts far in excess of what they are entitled to receive under the law of eminent domain. These untenable results confirm the wisdom of the century of law holding that individualized notice is not required for decisions like those at issue here.

Indeed, the Circuit Court's ruling is especially indefensible judged against the backdrop of Illinois' administrative law. The Circuit Court had no jurisdiction to review the ICC's order approving Ameren's application for a CPCN; that jurisdiction is exclusively vested in the appellate courts. 220 ILCS 5/10-201(a). That appellate-court jurisdiction includes both the question of whether the ICC acted "in violation of the … constitution," and whether—in addressing policy questions like whether a new transmission line is warranted and should follow a particular route—the ICC's decision was "supported by substantial evidence based on the entire record." 220 ILCS 5/10-201(e)(iv)(A), (D). Here, the Defendants participated in appellate proceedings before the Fourth District, litigating and losing their due process claim. *Adams Cty.*, 2015 IL App (4th) 13090736, ¶ 80. Yet, the upshot of the Circuit Court's ruling is to invalidate the ICC's decision, least as to the Defendants, by precluding Ameren from exercising eminent domain as to them, thus halting the project for an undetermined amount of time. The Defendants thus have obtained the equivalent of a remand—requiring Ameren to return to the ICC for further proceedings before the project can go forward, even though the Fourth

District *affirmed* the ICC's order. This Court should reject the Circuit Court's attempt to construe the due process clause to create an end run around the General Assembly's carefully crafted scheme of administrative review.

C. The Eminent Domain Act's Statutory Presumption Does Not Create A Due Process Right To Individualized Notice Of The ICC's Proceedings.

When the ICC has made a finding of public convenience and necessity for the acquisition of property for utility purposes, the Eminent Domain Act creates "a rebuttable presumption that such acquisition … is (i) primarily for the benefit, use, or enjoyment of the public and (ii) necessary for a public purpose." 735 ILCS 30/5-5-5(c). The Circuit Court found this provision troubling, contributing to its holding that the Defendants had a due process right to individualized notice of the ICC proceeding—on the theory that the ICC's order "preempts landowners' rights in … condemnation proceedings" by a "shifting of the burden which would not otherwise exist." Order at 12-23, R. C1003-14.

For at least three reasons, the Circuit Court was wrong.

First, this case does not implicate the presumption, and the Circuit Court thus erred by invoking the presumption to find a due process violation. In the eminent domain proceeding, Ameren presented evidence on both the "public use" and "necessity" issues, and the Defendants presented *none*, putting forward no evidence or argument as to the issues affected by the presumption. Ameren Br. 30. So with or without the presumption, the result here would have been the same.

Second, the Circuit Court's statement that the "landowners' *rights*" were "preempt[ed]" by the ICC's approval, and the presumption it yielded, is plainly wrong. Order at 12, R. C10003 (emphasis added). A rebuttable presumption does not deprive anyone of substantive rights; it is an evidentiary device carrying solely a "procedural

effect" in allocating evidentiary burdens. *Diederich v. Walters*, 65 Ill. 2d 95, 100 (1976); *see Schuttler v. Ruark*, 225 Ill. App. 3d 678, 684 (2d Dist. 1992) ("a presumption is a procedural rule that dictates the effect of the absence of evidence" (citing *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 460-62 (1983)). Had the Defendants presented evidence (which they did not), and had that evidence been deemed persuasive under the governing standards, the Circuit Court could have concluded that the condemnation was not necessary for a public use—even if the ICC had found the opposite. *See, e.g.*, *Enbridge Energy (Illinois), L.L.C. v. Kuerth*, 2016 IL App (4th) 150519, ¶ 51. The ICC's approval thus did not "preempt[]" any substantive right.

Third, even if, counterfactually, the presumption had a substantive effect on the landowners' rights, that *still* would not create any due process problem. While the Circuit Court regarded this presumption as suspect, in fact presumptions are commonplace. Even in criminal prosecutions, this court has approved them as consistent with due process. *See, e.g.*, *People v. Dinelli*, 217 Ill. 2d 387, 399 (2005). To avoid a due process violation, "it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27-28 (1976) (quotation marks omitted). When the ICC has approved a utility project as necessary for a public use, it is certainly rational to presume that this finding is correct. *Cf.* 220 ILCS 5/10-201(d) ("The findings and conclusions of the Commission on questions of fact shall be held prima facie to be true and as found by the Commission; rules, regulations, orders or decisions of the Commission shall be held to be prima facie reasonable, and the burden of proof upon all issues raised by the appeal shall

be upon the person or corporation appealing from such rules, regulations, orders or decisions.").

Especially relevant here, a slew of jurisdictions presume that when the legislature has identified a project as necessary for a public use, the "public use" requirement is satisfied, unless the landowner rebuts the presumption. *See, e.g., United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 552 (1946) ("But whatever may be the scope of the judicial power to determine what is a 'public use' …, this Court has said that when Congress has spoken on this subject [i]ts decision is entitled to deference until it is shown to involve an impossibility." (internal quotation marks omitted)); *Hallauer v. Spectrum Properties, Inc.*, 18 P.3d 540, 545 (Wash. 2001); *City of Jamestown v. Leevers Supermarkets, Inc.*, 552 N.W.2d 365, 369 (N.D. 1996); *Hous. Fin. & Dev. Corp. v. Castle*, 898 P.2d 576, 597 (Haw. 1995); *Arco Pipeline Co. v. 3.60 Acres, More or Less*, 539 P.2d 64, 72 (Alaska 1975); *Ace Ambulance Serv., Inc. v. City of Augusta*, 337 A.2d 661, 663 (Me. 1975); *Timmons v. S.C. Tricentennial Comm'n*, 175 S.E.2d 805, 814 (S.C. 1970); *David Jeffrey Co. v. City of Milwaukee*, 66 N.W.2d 362, 373-74 (Wis. 1954); *Foeller v. Hous. Auth. of Portland*, 256 P.2d 752, 769 (Or. 1953); *Reter v. Davenport, R.I. & N.W. Ry. Co.*, 54 N.W.2d 863, 867 (Iowa 1952); *Spafford v. Brevard Cty.*, 110 So. 451 (Fla. 1926); *Johnston v. Sonoma Cty. Agric. Pres. & Open Space Dist.*, 123 Cal. Rptr. 2d 226, 235 (Cal. App. 2002); *Bevley v. Tenngasco Gas Gathering Co.*, 638 S.W.2d 118, 121 (Tex. App. 1982). Here, the General Assembly merely directed the same result via delegation: A similar presumption applies if, but only if, the ICC approves the taking as necessary for

a public purpose. 735 ILCS 30/5-5-5(c). This presumption no more violates due process than the similar presumptions myriad states apply to legislative declarations.[2]

Indeed, the presumption here does not fundamentally change what would occur *anyway* under Illinois eminent domain law. Absent the statutory presumption, the party seeking condemnation would indeed bear the initial burden—but it could carry that burden by introducing, among other things, a "resolution of the governing body … finding" the acquisition to be necessary for a public purpose. *Trs. of Sch. of Twp. 37 N., Range 11, Cook Cty. v. Sherman Heights Corp.*, 20 Ill. 2d 357, 359 (1960). Then, it would be "the duty of the defendant to proceed … with evidence in support of his contention" that these requirements were unmet. *Id.* So here, with or without the statute, Ameren could have carried its burden by introducing the ICC's approval, shifting the burden to the Defendants to overcome this showing with contrary evidence. And again, they did not even attempt to do so. That is no surprise: Use of property by a utility with an obligation to serve the public is a classic "public use." *See, e.g., Cent. Ill. Pub. Serv. Co. v. Vollentine*, 319 Ill. 66, 70 (1925). This underscores that the General Assembly's presumption is rational.

Part of the Circuit Court's concern stemmed from the *strength* of the presumption it believed applied, which under Fourth District precedent must be overcome by clear and convincing evidence. ComEd suggests that this emphasis was misplaced. Whatever the presumption's precise strength, the Defendants here presented *no* evidence to challenge

[2] For the same reason, the Circuit Court erred by relying on concerns that one *predicate* for the presumption's application—the ICC's approval of a project following a particular route—occurred without individualized notice to the Defendants. Order at 12-13, R. C1003-04. This was a legislative decision that the ICC made pursuant to delegated authority. So even if this legislative decision *caused* the presumption to apply to the Defendants, they had no due process right to individualized notice, any more than if the General Assembly approved the Illinois Rivers Project directly.

"public use" or "necessity." They have forfeited any challenge to those issues and cannot prevail whether the standard is "clear and convincing" or something lesser. Likewise, the parties have not briefed the issue of the proper standard. Thus, this case is not an appropriate vehicle for deciding the issue.[3]

D. The Circuit Court's Concerns With The ICC's Decision Do Not Justify The Constitutional Holding It Reached.

This case is not about whether the then-existing version of 220 ILCS 5/8-406.1 created the best possible notice rules. In the ICC's complicated administrative proceedings, notice rules raise complex policy judgments requiring tradeoffs among competing interests. Here, the General Assembly and the ICC have balanced those tradeoffs to require different amounts of notice in different types of proceedings at different times. When a utility invokes the ICC's regular (non-expedited) procedure to obtain a CPCN for a new transmission line, it must notify the "owner of record" only for properties in the line of the single route proposed by the utility. 220 ILCS 5/8-406(i). Meanwhile, for the "expedited" procedure at issue here, the General Assembly—after the ICC's proceeding below—amended the rules to require notice to record owners of land "included in the primary *or alternate* rights-of-way identified in the utility's application." 220 ILCS 5/8-406.1(a) (emphasis added).

This case, however, is not about what notice rules the General Assembly or ICC *should adopt*—but solely whether this Court should *preempt* further action by the General Assembly or the ICC by *constitutionalizing* these notice rules, as the Circuit Court did.

[3] If the "clear and convincing" standard were properly part of this case, and created a constitutional problem, the Circuit Court would have independently erred by relying on this standard to invalidate the notice provisions of 220 ILCS 5/8-406.1. Instead, the proper remedy would have been to deem the "clear and convincing" standard inapplicable in this particular case.

ComEd respectfully submits that this step would be a mistake—not just because settled law forecloses the Circuit Court's holding, but for important practical reasons. While expanding notice of course has benefits, there are costs as well. To recap: Under the Circuit Court's rule, notice must be given to any landowner along any "routes proposed throughout the certification process," Order at 23, R. C1014—no matter how many are proposed, or how late a route is added or changed. The right the Circuit Court found, moreover, is unlikely to stop at *notice*: When due process requires individualized notice, it pairs that requirement with individualized "opportunity for hearing … at a meaningful time and in a meaningful manner." Order at 18, R. C1009 (citing *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)). Inevitably, landowners will demand that the ICC also hold new hearings. And again, under the Circuit Court's holding, the remedy is to prohibit the use of eminent domain, perhaps delaying important public projects for years. When the General Assembly or ICC set the rules, they can mitigate these costs, if deemed appropriate—for example, by placing some limit on how much notice must be provided, by putting boundaries on what *other* procedural rights accompany notice, and by crafting remedies for any violations that do not unduly hinder important public projects. A constitutional holding allows none of this fine-tuning. ComEd thus respectfully suggests that this Court should leave the issue where it belongs, with the General Assembly and the ICC.

ComEd also understands the Circuit Court to have been troubled by an inference that it believed the ICC had drawn—that the ICC "mentioned the absence of objection or intervention by the landowners along that particular route" as evidence of "a tacit acceptance of" the route. Order at 20, R. C1011. If these landowners never received notice in the first place, the Circuit Court observed, this inference may not be sound. *Id.* But that

it is not a *due process* concern. Rather, it is an objection to the quality of the ICC's reasoning and the record evidence that supported its decision. The ICC's decisions may be subject to invalidation on judicial review if they are not "supported by substantial evidence based on the entire record," 220 ILCS 5/10-201(e)(iv)(D), or if they are "arbitrary and capricious," *Cent. Illinois Pub. Serv. Co. v. Illinois Commerce Comm'n*, 268 Ill. App. 3d 471, 480 (4th Dist. 1994). That objection might have been raised on appeal of the ICC's order, but for whatever reason, the Defendants chose not to do so. The Commission's decision was affirmed by the Appellate Court, and that judgment is final. The Court should not countenance the Defendants' attempt to smuggle into their due process claim arguments that they failed to make to the Fourth District.

CONCLUSION

The judgment of the Circuit Court should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Matthew E. Price, hereby certify that this **Brief *Amicus Curiae* of Commonwealth Edison Company in Support of Appellant Ameren Transmission Company of Illinois** conforms to the requirements of Illinois Supreme Court Rule 345(b) and 341(a) and (b). The length of this Brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, and the Rule 341(c) certificate of compliance, is 19 pages.

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