

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

**Dakota Access, LLC and Energy Transfer** :  
**Crude Oil Company, LLC** :  
: :  
**Joint Petition for an Order under** : **19-0673**  
**Section 8-503 of the Public Utilities Act for** :  
**authority to install additional pumping** :  
**stations and pumping facilities on** :  
**existing certificated pipelines in the State** :  
**of Illinois.** :

**ORDER**

**October 14, 2020**



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By the Commission:

**I. BACKGROUND**

**A. Procedural History**

On June 14, 2019, Dakota Access, LLC (“Dakota Access”), and Energy Transfer Crude Oil Company, LLC (“ETCO”) (collectively “Joint Petitioners”), filed a Joint Petition with the Illinois Commerce Commission (“Commission”) for an order or orders pursuant to Section 8-503 of the Public Utilities Act (“Act”), 220 ILCS 5/8-503, authorizing Dakota Access and ETCO to install additional pumping station facilities on their existing certificated common carrier pipelines in Illinois.

Staff of the Commission (“Staff”) participated in this proceeding. The following parties were granted leave to intervene: Save Our Illinois Land (“SOIL”) and Sierra Club (“SC”) (collectively “SOIL-SC”); Laborers’ International Union of North America (“Laborers’ Union”), Southwestern Illinois Laborers’ District Council, Great Plains Laborers’ District Council (“GPLDC”), Southern and Central Illinois Laborers’ District Council and its affiliated Local Unions, 231, 622, 773, 1197 (collectively “LIUNA”); International Brotherhood of Electrical Workers, Local No. 702 (“IBEW”); and William J. Klingele (“WK”), a landowner. SOIL-SC filed testimony jointly, but in the post hearing position statements, Mr. Klingele joined SOIL-SC’s position. (“SOIL-SC-WK”).

A prehearing conference was held in this matter before a duly authorized Administrative Law Judge (“ALJ”) at the Commission’s office in Chicago, Illinois on July 3, 2019, wherein a procedural schedule was established for this proceeding. Status hearings took place on September 4, 2019, December 19, 2019, and January 27, 2020.

On August 20, 2019, SOIL-SC filed a Verified Motion for Amendment or Dismissal of Joint Petition, for Investigation and to Stay Schedule (“Motion”). In its Motion, SOIL-SC argue that the Joint Petition is defective, and that Joint Petitioners need to amend their Joint Petition to include an application under the Common Carrier by Pipeline portion

of the Act. 220 ILCS 5/15-100. Joint Petitioners and Staff filed Responses to the Motion on August 27, 2019, and SOIL-SC filed a Reply on August 29, 2019. On September 9, 2019, SOIL-SC filed a Motion to Submit Supplemental Authority. On September 11, 2019, Joint Petitioners filed a Response to SOIL-SC's Motion to Submit Supplemental Authority. The ALJ issued a ruling on September 12, 2019 denying SOIL-SC's Motion to Submit Supplemental Authority and finding that Joint Petitioners already possess certificates to operate as common carriers by pipeline pursuant to Section 15-401 of the Act. 220 ILCS 5/15-401. The ALJ's ruling stated that SOIL-SC have not shown that the Joint Petition is defective or fails to state a cause of action, and that when viewing the Joint Petition in the light most favorable to Joint Petitioners, an assumption is made that they are seeking the appropriate relief; therefore, dismissal of the Joint Petition is not warranted in this matter. The ALJ's ruling also denied SOIL-SC's request for the Commission to initiate an investigation into Joint Petitioners' pipelines. Part of SOIL-SC's argument for the investigation is the existence of pipelines in Pennsylvania run by Sunoco, an affiliate of Joint Petitioners.

On September 18, 2019, SOIL-SC filed a Petition for Interlocutory Review of the ALJ's ruling. On October 1, 2019, the Commission denied the Petition for Interlocutory Review of SOIL-SC and affirmed the ALJ's September 12, 2019 ruling.

On October 24, 2019, SOIL-SC filed a Motion to Compel. The ALJ issued a ruling on December 5, 2019 granting SOIL-SC's Motion to Compel in part and denying it in part. On December 9, 2019, SOIL-SC filed another Petition for Interlocutory Review of the ALJ's ruling. On January 21, 2020, the Commission granted the Petition for Interlocutory Review and overruled the ALJ's December 5, 2019 ruling.

The evidentiary hearing was held on March 5, 6, and 9, 2020. At the hearing, testimony and exhibits filed by Joint Petitioners, Staff, SOIL-SC-WK and the Laborers Union were admitted into evidence.

On March 13, 2020, SOIL-SC filed a Petition for Interlocutory Review of a March 5, 2020 ruling by the ALJ during the evidentiary hearing denying SOIL-SC the opportunity to cross-examine Joint Petitioners' witnesses concerning the record of the operator of the pipeline in other states. On April 2, 2020, the Commission denied the Petition for Interlocutory Review and affirmed the ruling of the ALJ.

On March 26, 2020, SOIL-SC filed a Verified Motion to Stay the Proceedings and Take Additional Evidence. The ALJ issued a ruling denying the motion on April 16, 2020. On May 14, 2020, SOIL-SC filed a Petition for Interlocutory Review. On May 18, 2020, SOIL-SC filed an Errata to its Petition for Interlocutory Review indicating two corrections. On May 21, 2020, Joint Petitioners, IBEW and the Laborers' Union filed Responses to the Petition for Interlocutory Review. On June 4, 2020, the Commission denied the Petition for Interlocutory Review and affirmed the ALJ's April 16, 2020 ruling. The record was marked "Heard and Taken" on September 9, 2020.

A Proposed Order was issued on September 10, 2020. On September 24, 2020, Brief on Exceptions were filed by Joint Petitioners, SOIL-SC-WK, LIUNA and IBEW. On October 1, 2020, Joint Petitioners, Staff and SOIL-SC-WK filed Reply Briefs on Exceptions.

## B. The Petition

Joint Petitioners initiated this proceeding by filing a Joint Petition on June 14, 2019 requesting an order, pursuant to Section 8-503 of the Act, authorizing them to install additional pumping stations on their existing common carrier pipelines in Illinois to ensure adequate service and facilities and to promote the security and convenience of the public. Joint Pet. at ¶1. Joint Petitioners request an order authorizing them to construct the following additional pumping facilities in Illinois:

- (1) A new pump station on the Dakota Access pipeline in Hancock County, near the City of Carthage, with pumps installed totaling up to 30,000 horsepower (“HP”). This pump station will be installed on land purchased and owned in fee by Dakota Access. The estimated cost of this pump station is \$35 million to \$40 million. Joint Pet. at ¶¶23a, 27; DA-ETCO Ex. 2.0C at 3, 5, 11.
- (2) At the Patoka terminal, where the Dakota Access pipeline terminates and the ETCO pipeline begins, two new 6,000 HP pumps to replace two existing pumps, bringing the total pumping capacity at this location to 24,000 HP. Associated piping, control valves, and metering, and additional storage facilities, will also be installed or modified at this location. The pumping facilities will be installed on existing properties of Joint Petitioners, with no acquisition of additional land or land rights required. The estimated cost of the new pumping facilities and associated additions and modifications to equipment and facilities is approximately \$120 million. Joint Pet. at ¶¶23b, 27; DA-ETCO Ex. 2.0C at 4, 11.
- (3) A new pump station on the ETCO pipeline in Massac County, Illinois, near the Village of Joppa, with pumping capacity up to 18,000 HP. This pump station will be installed on land currently owned by an affiliate of Joint Petitioners, on which a natural gas compressor station is already located. ETCO will take fee title to the property on which the new pump station will be located. The estimated cost of this pump station is \$35 million to \$40 million. Joint Pet. at ¶¶23c, 27; DA-ETCO Ex. 2.0C at 3-4, 5, 11.

Joint Petitioners state that the new Hancock County and Massac County pump stations will include electrically powered, motor-driven centrifugal pumps, which will be housed in buildings with acoustic controls to ensure each facility complies with State and local standards. Each station will include above ground valves and piping, an electrical substation, and a service building to house electrical, measurement, and control system components. The stations will be fully secure with six-foot high metal fencing and designated points of access. DA-ETCO Ex. 2.0C at 6-7. Joint Petitioners state that in addition to the pumping capacity to be installed in Illinois, they are installing more pumping capacity on their pipelines in North Dakota, South Dakota, Iowa, Tennessee, Mississippi, Louisiana, and Texas. DA-ETCO Ex. 2.0C at 7.

Joint Petitioners state that in Docket Nos. 14-0754 and 14-0755, the Commission granted Dakota Access and ETCO certificates in good standing as common carriers by pipeline in Illinois. They state that Dakota Access proposed to construct and operate an interstate common carrier crude oil pipeline from the Bakken/Three Forks-Williston Basin crude oil production region of North Dakota, through South Dakota and Iowa, to the crude

oil terminal and hub in Patoka, Illinois; and ETCO proposed to construct, repurpose, and operate an interstate common carrier crude oil pipeline from the Patoka terminal to two terminals in Nederland, Texas, in the Gulf Coast refinery region. They state that the Commission found a public need for the interstate common carrier crude oil transportation service that Dakota Access and ETCO proposed to provide, and authorized them to construct and operate their pipelines in Illinois along the route and with the facilities as described and approved in the Commission's Orders. Docket No. 14-0754, Order at 51-53; Docket No. 14-0755, Order at 25-27.

Joint Petitioners state that, in recent years, the principal sources of crude oil for U.S. refineries and processors have changed from being largely domestic production in Texas and Oklahoma and waterborne foreign imports entering the U.S. at East Coast and Gulf Coast locations, to being heavily sourced from new "tight oil" production areas in the U.S., including North Dakota, as well as heavy crude oil from Alberta. DA-ETCO Ex. 5.0C at 5-9; DA-ETCO Ex. 4.0 at 4. They state that as recently as 2014, 44% of oil processed in U.S. refineries was imported, with the U.S. importing a net of some 7 million barrels per day ("bpd"); however, this is no longer the case due to development of domestic production sources such as the Bakken/Three Forks region and development of new pipeline takeaway capacity, such as Dakota Access, from the Bakken/Three Forks region. DA-ETCO Ex. 4.0 at 6. Joint Petitioners state, however, that the Patoka hub remains a significant part of the U.S. oil transportation infrastructure.

Joint Petitioners claim that the growth in crude oil production in the Bakken/Three Forks region of North Dakota has been remarkable. The Dakota Access and ETCO pipelines were developed to provide an efficient, economical and safe means of transporting crude oil from the Bakken/Three Forks region to the crude oil hub at Patoka and on to the Gulf Coast. Joint Petitioners cite data from the U.S. Energy Information Administration ("EIA") that in 2007, the Bakken region produced only 138,072 bpd of crude oil; but by 2014, when Joint Petitioners filed their original applications with the Commission, Bakken crude oil production had grown to 1,117,255 bpd, and in 2019, had grown to 1,426,865 bpd. DA-ETCO Ex. 5.0C at 6.

Joint Petitioners state that the continued development of the nation's crude oil pipeline transportation infrastructure to support the changing mix of supply sources, particularly domestic sources, is critical to Illinois. Illinois is the sixth-highest petroleum-consuming state in the U.S., consuming 21,117,000 gallons per day in 2019; but that Illinois' crude oil production, at 924,000 gallons per day, is only a small fraction of Illinois' refined products consumption. Illinois' consumption of refined products is about 23 times its production of crude oil. DA-ETCO Ex. 1.0 at 3; DA-ETCO Ex. 5.0C at 16-17. Joint Petitioners also state that refineries in Illinois and nearby Midwest states do not produce sufficient refined products to meet the demand for these products from consumers and businesses in the region; therefore, the region must import refined products from other regions, including the Gulf Coast refineries served by Joint Petitioners' pipelines. DA-ETCO Ex. 1.0 at 4. Joint Petitioners emphasize that Illinois is dependent for its refined products supply on crude oil produced in other regions of the country and transported through other states to refineries in Illinois and in other states that produce the products used by consumers and businesses in Illinois.

Joint Petitioners state that in Docket Nos. 14-0754 and 14-0755, they explained that the Patoka terminal would have the pipelines' only pump station in Illinois, and that no other pumping facilities were needed in Illinois to achieve a daily throughput level of 570,000 bpd. Pet. at ¶12; Docket No. 14-0754, Order at 3-4; Docket No. 14-0755, Order at 3. Joint Petitioners state, however, that the demand for crude oil transportation service on Joint Petitioners' pipelines has far exceeded the maximum throughput of 570,000 bpd that is achievable with the pipelines' existing facilities. They state that crude oil production in the Bakken/Williston Basin region has continued to grow substantially from the levels of production when the pipelines were originally certificated and placed into service. Joint Petitioners state that shippers have entered into long-term capacity contracts for service on the pipelines that substantially exceed their current maximum daily throughput capacity, and that nominations (requests to ship volumes) by shippers have exceeded 570,000 bpd in 14 of the last 15 months through December 2019, by hundreds of thousands of bpd in some months. DA-ETCO Ex. 1.0 at 5-6; DA-ETCO Ex.1.6 at 3; DA-ETCO Exs.1.7, 1.8.

Joint Petitioners are common carriers, both under federal law and as certificated in Illinois by this Commission pursuant to Section 15-401 of the Act. Joint Petitioners maintain that both federal and Illinois law include duties of pipeline common carriers to meet customers' reasonable requests for the transportation services they offer, without discrimination or delay, pursuant to their tariffs filed with the Federal Energy Regulatory Commission ("FERC"). Pet. at ¶17; DA-ETCO Ex. 6.5 at 3. DA-ETCO Ex. 10.0 at 3 (*citing* 49 U.S.C. App. §1(4) (1988); *Director Gen. of Railroads v. Viscose Co.*, 254 U.S. 498, 500-01 (1921); *CHS Inc., et al. v. Enterprise TE Prod. Pipeline Co., LLC, et al.*, 155 FERC ¶61,178 (1978)). Joint Petitioners state that in Illinois, a common carrier is "one who undertakes for hire or reward to transport from place to place the goods of those who choose to employ him" citing *Morrison v. Parmelee Co.*, 222 Ill. App. 90, 94 (1st Dist. 1921); *State Pub. Utils. Comm'n v. Pittsburgh, C., C. & St. L. Ry.*, 290 Ill. 580, 585 (1919); *Ill. Highway Transp. Co. v. Hantel*, 323 Ill. App. 364, 374 (3d Dist. 1944).

Joint Petitioners state that Section 8-101 of the Act, made applicable to common carrier pipelines by Section 15-101 of the CCPL (220 ILCS 5/15-101), states in pertinent part: "A public utility shall furnish, provide, and maintain such service instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of patrons, employees and the public and as shall be in all respects adequate, efficient, just, and reasonable. . . . A public utility shall, upon reasonable notice, furnish to all persons who may apply therefor and be reasonably entitled thereto, suitable facilities and service, without discrimination and without delay." 220 ILCS 5/8-101. Additionally, Section 15-401(h) of the CCPL, "Duties and obligations of common carriers by pipeline," states: "Each common carrier by pipeline shall provide adequate service to the public at reasonable rates and without discrimination." 220 ILCS 5/15-401(h).

Joint Petitioners state that installation of the proposed additional pumping equipment in Illinois (and other states) is needed to enable Joint Petitioners to serve those customers with capacity contracts that they are currently unable to serve, as well as additional demand from "walk-up" shippers. Joint Petitioners stated that a "walk-up" shipper is a shipper of crude oil that has not entered into a long-term contract for capacity on the pipeline, and therefore typically seeks to ship oil on a month-by-month basis. In

accordance with FERC guidelines, Joint Petitioners reserve 10% of the capacity on their pipelines for walk-up shippers (meaning that no more than 90% of the pipelines' capacity can be contracted to shippers under long-term capacity contracts); however, a common carrier pipeline can ship crude oil in a given month for walk-up shippers totaling more than 10% of the pipeline's capacity if contracted capacity is not being fully utilized by shippers with long-term capacity contracts. Joint Pet. at ¶¶13-14; DA-ETCO Ex. 1.0 at 5-6. They state that the additional pumping facilities will enable them to transport up to 1.1 million bpd of crude oil to meet both current, contracted-for demand and future growth in demand for crude oil transportation service from the Bakken/Williston region of North Dakota to the Patoka terminal and from Patoka to the Nederland, Texas, terminals. Joint Pet. at ¶¶3,33.

Joint Petitioners state that no new pipeline or physical enlargement of existing pipeline is needed to increase throughput on their pipelines to 1.1 million bpd. DA-ETCO Ex. 1.0 at 8. The installation of the new pumping capacity and related equipment will enable the existing, certificated, in-place pipelines to be fully utilized, or "optimized," to meet shipper demand. Joint Petitioners emphasize that no authority for eminent domain is being requested, and no exercise of eminent domain will be required, because in Illinois, the new pumping capacity will be installed at two existing locations already owned by Joint Petitioners or an affiliate, and at a third location which Dakota Access is acquiring in fee through a private transaction. Joint Pet. ¶4; DA-ETCO Ex. 2.0Corr. at 5-6. Joint Petitioners state that there has been no objection to the planned locations or the physical layout, configuration, or construction of the additional pumping equipment and their structures in Illinois; and no intervenor or nearby landowner raised any such objection to the proposed pump stations.

Joint Petitioners also emphasize that the costs of the additional facilities will not be paid by captive retail ratepayers; rather, the capital investment to construct and install the proposed additional pumping stations and equipment will be funded by Joint Petitioners and their owners, with the costs to be recovered through charges for transportation capacity and service to their shipper customers. Joint Petitioners state that their ultimate parent companies are four of the nation's largest pipeline and/or refining companies, with substantial financial and capital resources to finance construction and installation of the proposed pumping facilities. Joint Pet. at ¶29 and DA-ETCO Ex. 2.0C. at 11-12. Joint Petitioners state that they would not be planning to invest hundreds of millions of dollars in additional pumping equipment in Illinois and other states if they did not have sufficient shipper contracts to justify the investment, as well as confidence in projections of future increases in crude oil production in the Bakken/Williston region and in the demand for transportation service on their pipelines from that region to the market hubs and refinery centers at Patoka and the Gulf Coast. DA-ETCO Ex. 1.6 at 7.

Joint Petitioners continued to emphasize that the long-term transportation service agreements ("TSAs") entered into by shippers in the 2018 open season that exceed the pipelines' current throughput capacity, plus demands for service in recent months that also exceed the pipelines' current throughput capacity, are requests for service on the pipelines that Joint Petitioners are attempting to serve by installing the additional pumping stations and equipment to increase the pipelines' throughput capacity. DA-ETCO Ex. 1.7.

## II. STATUTORY AND LEGAL STANDARDS

### A. Joint Petitioners' Position

Joint Petitioners seek, pursuant to Section 8-503 of the Act, approval to add or improve plant, equipment and structures that they contend will enable them, as common carriers, to meet the demands for service that their pipelines currently cannot accommodate. Section 8-503 states in pertinent part:

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 structures or structures is or are necessary and should be erected, to promote the security or convenience of its employees or the public . . . 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. . . .

220 ILCS 5/8-503. Section 8-503 is made applicable to common carriers by pipeline by Section 15-101 of the CCPL. 220 ILCS 5/15-101.

Joint Petitioners state that “necessary” as used in the Act does not mean “indispensably requisite” but rather “needful and useful to the public.” *Eagle Bus Lines, Inc. v. Ill. Commerce Comm’n*, 3 Ill. 2d 66, 78 (1954) (“if [the service] is needful and useful to the public it is necessary”); *Gerand v. Ill Commerce Comm’n*, 286 Ill. App. 3d 934, 945 (4th Dist. 1997) (same); *King v. Ill Commerce Comm’n*, 39 Ill. App. 3d 648, 653 (4th Dist. 1976) (same). Joint Petitioners note that the Illinois Supreme Court, in construing the similar term “necessity” in the certificate section of the Act, stated:

When the statute requires a certificate of public convenience and necessity as a prerequisite to the construction or extension of any public utility, the word ‘necessity’ is not used in its lexicographical sense of ‘indispensably requisite.’ If it were, no certificate of public convenience and necessity could ever be granted. . . . [A]ny improvement which is highly important to the public convenience and desirable for the public welfare may be regarded as necessary. If it is of sufficient importance to warrant the expense of making it, it is a public necessity. . . . The word connotes different degrees of necessity. It sometimes means indispensable; at others, needful, requisite, or conducive. It is relative rather than absolute.

*Wabash, C. & W. Ry. Co. v. Ill. Commerce Comm’n*, 309 Ill. 412, 418 (1923).

Joint Petitioners contend that in evaluating “necessity” in the context of interstate crude oil pipelines in Illinois, *i.e.*, whether the proposal is “needful and useful to the public,” the Commission has consistently considered the extent of shipper contracts and commitments for service on the pipeline, as well as the potential benefits of the pipeline to shippers, refiners, and the public in the U.S. and even in the world, not just to Illinois or the Midwest. Joint Petitioners cite *Enbridge Energy, Limited Partnership*, Docket No. 13-0134, Order at 39-41 (Apr. 29, 2014); *Enbridge Pipelines (FSP) L.L.C.*, Docket No. 12-0347, Order at 29-30 (Feb. 14, 2013); *Enbridge Pipelines (Illinois) L.L.C.*, Docket No. 07-0446, Order at 45-47 (Jul. 8, 2009); *TransCanada Keystone Pipeline, LP*, Docket No. 06-0458, Order at 11, 13, 21, 23 (Apr. 4, 2007). Joint Petitioners also cite the Commission’s conclusion in Docket No. 12-0347 on public need/public convenience, where the Commission quoted Staff witness Mark Maple for the following point: “I believe that the commitments that Enbridge has secured from shippers on the proposed pipeline are an indication of the demand in the Midwest and the Gulf Coast regions for Canadian crude. If shippers are interested in bringing in supplies, there must be a market willing to take those increased supplies.” Docket No. 12-0347, Order at 29. According to Joint Petitioners, in Docket No. 07-0446, the Commission looked to the benefits to Illinois, the Midwest, and the nation of bringing additional crude oil supplies by pipeline from secure sources to the Patoka hub, and the Appellate Court affirmed the Order, rejecting intervenors’ argument that the Commission could only consider the needs of Illinois citizens and could not consider regional, national, or global benefits. *Pliura Intervenors v. Ill. Commerce Comm’n*, 405 Ill. App. 3d 199, 208-209 (4th Dist. 2010).

Joint Petitioners also state that pursuant to the federal Pipeline Safety Act (“PSA”), 49 U.S.C. §60101 *et seq.*, the federal Pipeline and Hazardous Materials Safety Administration (“PHMSA”) has exclusive jurisdiction over design and operational safety matters for interstate crude oil pipelines, preempting state authority over these matters. The PSA and regulations thereunder establish a comprehensive program for pipeline safety, addressing design, construction, testing, operation, and maintenance, and that Congress has expressly reserved jurisdiction over pipeline safety to the federal program for interstate pipelines administered by PHMSA. 49 C.F.R. Part 195. Joint Petitioners cite 49 U.S.C. §60104(c) (“A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.”). They also state that federal courts have repeatedly held that states and municipalities are prohibited from regulating interstate pipeline safety in any way, citing *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 358 (8th Cir. 1993); *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 878 (9th Cir. 2006); *Wash. Gas Light Co. v. Prince George’s Cty. Council*, 711 F.3d 412, 420 (4th Cir. 2013); and *Tenneco Inc. v. Pub. Serv. Comm’n of W. Va.*, 489 F.2d 334, 336 (4th Cir. 1973). Joint Petitioners point out PHMSA has not certified Illinois to regulate intrastate crude oil or other liquid pipelines, nor entered into an agreement with Illinois to act as an interstate agent that would have inspection oversight of interstate hazardous liquid pipeline safety in the state. Absent such a certification from or agreement with PHMSA, the Commission has no authority to regulate hazardous liquid pipelines with respect to pipeline safety.

Joint Petitioners respond to SOIL-SC-WK’s argument that Joint Petitioners should have requested a certificate in good standing under Section 15-401 of the CCPL, in addition to requesting authority under Section 8-503 of the Act to install the additional

pumping stations and pumping equipment. Joint Petitioners state that in response to a previous motion filed by SOIL-SC early in this case seeking to compel Joint Petitioners to amend their Joint Petition to seek a certificate under Section 15-401, the ALJ ruled that Joint Petitioners already possess certificates in good standing to operate as common carriers by pipeline pursuant to Section 15-401 and that SOIL-SC failed to show that the Joint Petition is defective or fails to state a cause of action, but that SOIL-SC could challenge the sufficiency of the Joint Petition through testimony. The Commission denied SOIL-SC's petition for interlocutory review of the ALJ's ruling on October 10, 2019.

Joint Petitioners argue that SOIL-SC-WK's attempt to raise the same issue in its briefs is barred by the Commission's Rules of Practice and the law of the case doctrine, which the Commission has applied to bar relitigation of issues in the same proceeding. Joint Petitioners note that Part 200.520(b) of the Commission's Rules of Practice states that "[p]etitions to rehear or reconsider Commission action taken under this Section shall not be entertained by the Commission and are not allowed under this Part, except as to persons who have been denied leave to intervene by such action." 83 Ill. Adm. Code 200.520(b).

Joint Petitioners state that SOIL-SC-WK's attempt to re-litigate this issue is also improper under the law-of-the-case doctrine. Joint Petitioners aver that, as the Commission has recognized, under this doctrine, once a court renders a decision in a case, later decisions in that same case are closed to reconsideration, except by a court of review. Joint Petitioners cite *Hiatt v. Ill. Tool Works*, 2018 IL App (2d) 170554, ¶ 19; *People ex rel. Madigan v. ICC*, 2012 IL App (2d) 100024, ¶¶ 31-32; *Norris v. Nat. Union Fire Insurance Co. of Pittsburgh*, 368 Ill. App. 3d 576 (1st Dist. 2006). Joint Petitioners also cite cases in which the Commission has applied law-of-the-case to reject parties' attempts to re-litigate issues that were decided by the ALJ and Commission earlier in the same proceeding.

Joint Petitioners state that in the present case, SOIL-SC-WK are attempting to re-litigate a claim - that Joint Petitioners needed to seek a new certificate of good standing under Section 15-401 - which the ALJ's September 12, 2019 ruling rejected, and the Commission affirmed on October 10, 2019 when it denied SOIL-SC's petition for interlocutory review. Joint Petitioners state that SOIL-SC-WK had the opportunity to fully brief the issue in connection with the earlier motion and petition for interlocutory review. Joint Petitioners point out that the ALJ's order plainly denied SOIL-SC-WK's motion and the Commission denied interlocutory review, which left the ALJ's ruling standing. Joint Petitioners also point out that the parties have now filed seven rounds of testimony and engaged in a three-day evidentiary hearing. Joint Petitioners state that in these extensive proceedings, a full evidentiary record has been compiled. Joint Petitioners state that it would be arbitrary and capricious to reconsider SOIL-SC-WK's arguments on this issue at this stage of the case after SOIL-SC-WK's claim was rejected at the outset of the case. Jt. Pet. RB at 6-7.

Joint Petitioners argue that should the Commission nevertheless decide to reconsider SOIL-SC-WK's Section 15-401 issue, that SOIL-SC-WK's arguments are meritless. Joint Petitioners stated that Section 8-503, not Section 15-401, governs Joint Petitioners' request for authority to install and operate additional pumping stations and associated equipment in Illinois on their existing, approved pipelines. They point out that,

as the ALJ recognized in his September 12, 2019 ruling on SOIL-SC's original motion, Petitioners already hold certificates in good standing as common carriers by pipeline to provide common carrier transportation services using the Dakota Access and ETCO pipelines; however, because Joint Petitioners are unable to meet the current and projected demands for service on their pipelines with the existing pumping stations and equipment, they require authority to make "additions ... or improvements to, or changes in, the existing plant, equipment ... [or] facilities" and to erect certain "new structures." 220 ILCS 5/8-503. Joint Petitioners state that this is the literal purpose of Section 8-503. By contrast, Section 15-401 deals solely with granting certificates to an operator to begin providing common carrier services - which Joint Petitioners already hold - not improving existing common carrier facilities or equipment. They point out that Section 15-401(a) states:

No person shall operate as a common carrier by pipeline unless the person possesses a certificate in good standing authorizing it to operate as a common carrier by pipeline. No person shall begin or continue construction of a pipeline or other facility, other than the repair or replacement of an existing pipeline or facility, for use in operations as a common carrier by pipeline unless the person possesses a certificate in good standing.

220 ILCS 5/15-401(a).

Joint Petitioners reiterate that they already possess certificates in good standing, satisfying both the first and second sentences of Section 15-401, and that Section 15-401 does not state nor suggest that a common carrier already holding a certificate in good standing must seek *another* certificate to improve or add to a pipeline which it has *already* been granted authority to operate. Joint Petitioners claim that SOIL-SC-WK are construing Section 15-401 as though the second sentence ended with "for that pipeline or other facility," but it does not. Joint Petitioners note that, in contrast, the comparable provision in the certificate section of the Act for public utilities ends with the words "unless and until it shall have obtained from the Commission a certificate that public convenience and necessity *require such construction.*" 220 ILCS 5/8-406(b)(emphasis added). Joint Petitioners point out that Section 15-401(b) states that the Commission, after a hearing, "shall grant an application for a certificate in good standing authorizing *operations* as a common carrier by pipeline" if it finds the criteria stated in the statute are met. 220 ILCS 5/15-401(b)(emphasis added). Joint Petitioners were already granted certificates authorizing operation as common carriers by pipeline.

Joint Petitioners state that Section 8-503 has long been the statutory provision under which authority is requested and granted for an existing public utility to install additional equipment needed to provide its public utility service, including to meet growing demand for its service. Joint Petitioners are now requesting authority to install and operate additional pumping capacity in Illinois on their existing pipelines (not to construct separate, new pipelines), pursuant to Section 8-503, which provides expressly for the grant of such authority. Joint Petitioners aver that SOIL-SC-WK's argument that an additional certificate in good standing pursuant to Section 15-401 must be obtained in these circumstances would render Section 8-503 superfluous, even though Section 15-

101 of the CCPL, 220 ILCS 5/15-101, expressly makes Section 8-503 applicable to common carrier pipelines.

Joint Petitioners state that the Commission has recognized, in a case factually identical in all relevant respects to those in this proceeding, that Section 8-503 governs the grant of authority to install additional pumping equipment on an existing common carrier pipeline. In *Enbridge Energy Partners, LP and Enbridge Energy, Limited Partnership*, Docket No. 06-0470, Order (Apr. 4, 2007) (“*Enbridge*”), the pipeline operator had previously received a certificate in good standing as a common carrier to operate a crude oil pipeline that terminated in Illinois and obtained authorization to construct the pipeline pursuant to Section 8-503. The pipeline’s original capacity upon commissioning was 400,000 bpd. Due to increased demand, the operator later sought to add three new pump stations in Illinois, which would increase the pipeline’s capacity to 1.2 million bpd. The operator thus requested an order pursuant to Section 8-503, *not* Section 15-401, to construct, operate, and maintain the three new pump stations in Illinois. Like Joint Petitioners, the operator did not seek authority to install any new or additional pipeline outside the new pump stations. The Commission issued an order granting the request to make “additions to the Line 61 pipeline.” *Enbridge* Order at 2. (Joint Petitioners pointed out that “additions” is a term used in Section 8-503 but not in Section 15-401.) Joint Petitioners claim that nowhere in its order granting authority to construct the new pump stations in Illinois did the Commission suggest the operator would need to obtain a new certificate in good standing to construct or operate the new pump stations. Joint Petitioners also point out that the pipeline’s original capacity of 400,000 bpd cited in the original order in *Enbridge* granting a certificate in good standing was not deemed a limitation on the certificate of good standing such that a new or amended certificate was required to triple the original capacity of the pipeline from 400,000 bpd to 1.2 million bpd.

Joint Petitioners state that SOIL-SC-WK cite no contrary precedent to *Enbridge* and note that SOIL-SC-WK argue that the Commission should not follow the *Enbridge* order because Commission orders are not *res judicata*. Joint Petitioners assert that the 2013 order in *Enbridge* is squarely on point and supports the sufficiency of Joint Petitioners’ request under Section 8-503. Joint Petitioners also state that *res judicata* is not relevant to this situation, but rather the longstanding rule that the Commission cannot depart from past practice without articulating a reasoned basis. Joint Petitioners cite *Bus. and Prof. People for the Pub. Interest v. Ill. Commerce Comm’n*, 136 Ill. 2d 192, 227-28 (1989); *Citizens Utility Bd. v. Ill. Commerce Comm’n*, 166 Ill. 2d 111, 132-33 (1995); and *Ill. Power Co. v. Ill. Commerce Comm’n*, 339 Ill. App. 3d 425, 439-40 (5th Dist. 2003). Joint Petitioners argue that there is no sound basis for departing from the *Enbridge* precedent (where the capacity of the pipeline was tripled without a new or amended certificate being required) by suddenly holding that a common carrier pipeline that already holds a certificate in good standing must obtain both authorization under Section 8-503 *and* a certificate of good standing under Section 15-401 to add pumping stations to an existing pipeline to increase throughput capacity.

Joint Petitioners further state that nothing in the Commission’s orders granting the certificates in good standing to Joint Petitioners suggests that the certificates were conditioned on a limit of 570,000 bpd flowing through the pipelines. In those dockets, Joint Petitioners did not request a certificate authorizing them to transport up to 570,000

bpd of crude oil; they did not propose any limit on the amount of crude oil they would be authorized to transport; and no party asked the Commission to impose such a limit. In each of those orders, the only mention of the 570,000 bpd capacity came in background sections describing the proposed pipelines generally. Joint Petitioners state that the text of the certificates in those orders, which stated that Joint Petitioners were “authorized to construct, operate and maintain the [p]ipeline along such route and as described in this Order” was referring to the approved route of each pipeline and its physical construction and equipment, which was described at length in both orders. Joint Petitioners state that had the Commission intended to impose a specific volumetric cap on the amount of crude oil the pipelines were authorized to transport (assuming it had the authority to impose such a limit), it would have done so explicitly in the orders. Joint Petitioners also state that they reviewed numerous Commission orders granting certificates to operate as a common carrier pipeline and did not find any order that limited or capped the volumes of product the pipeline was authorized to transport; and that SOIL-SC-WK have not cited any such order by the Commission.

Finally, on this issue, Joint Petitioners state that even if a new certificate in good standing were required, the extensive record compiled in this proceeding amply shows that Joint Petitioners have satisfied the criteria for obtaining a certificate under Section 15-401, and Joint Petitioners’ evidence addressed each concern. Joint Petitioners state that SOIL-SC-WK have not identified any evidence relevant to the Section 15-401 factors (public need; public convenience and necessity; and whether Joint Petitioners are “fit, willing and able” to operate as common carriers by pipeline) that was excluded from this proceeding on the grounds that it pertained to Section 15-401 but not to Section 8-503 criteria. A complete record on these issues was compiled with no distinction or limitations based on whether Section 8-503 or Section 15-401 applies. Thus, Joint Petitioners conclude, even if the Commission were to determine that a new certificate in good standing were required, the record fully supports granting one.

## **B. Staff’s Position**

Staff understands Joint Petitioners to seek relief in this proceeding pursuant to Section 8-503 of the Act. Staff assert that, in their Petition, Joint Petitioners stated that Section 8-503 of the Act was the appropriate statutory provision pursuant to which the Commission should review the Petition because Joint Petitioners hold certificates in good standing for the pipelines and are seeking to add new structures to existing, certified pipelines. While Joint Petitioners stated they would not object to the Commission amending their certificates in this proceeding to reflect the new pumping stations, Joint Petitioners did not believe they needed, and did not request, authorization under any other statutory provision. Staff agrees with Joint Petitioners.

Staff observes that Section 8-503 of the Act provides, in relevant part that the Commission is authorized to direct the construction of additional facilities of the type Joint Petitioners seek authority to construct here where it finds that the security and convenience of the public or utility employees require it, or where it determines that existing facilities are not adequate to assure the security and convenience of the public or utility employees.

Staff asserts it is within the Commission's broad discretionary power to determine what constitutes the public convenience. *New Landing Utility, Inc. v. Ill. Commerce Comm'n*, 58 Ill. App. 3d 868, 871 (2d Dist. 1978). Moreover, Staff asserts the Commission has broad discretionary power to define what constitutes the "public" and need not consider the impact of the project only in relation to citizens of Illinois. Rather, the Appellate Court has determined that:

In the context of public need, it is appropriate to look at the larger group of the general public to see if it requires the service, not whether some components of the public are in fact using the service. Only by looking to the public at large can one determine whether there is an actual existing or expected popular need for the proposed service which should not be denied. This broader understanding of public has been consistently employed by our courts.

*Lakehead Pipeline Co., L.P. v. Ill. Commerce Comm'n*, 296 Ill. App. 3d 942, 955 (3d Dist. 1998).

Staff points out that the Appellate Court has found that, in considering whether a public need exists, the Commission properly considers regional, national, and even global need and benefits, as opposed to Illinois-specific needs and benefits. *Pliura Intervenors v. Ill. Commerce Comm'n*, 405 Ill. App. 3d at 209.

Thus, despite arguments to the contrary from SOIL-SC-WK, it is Staff's position that the issue before the Commission is quite narrow: whether the addition of pumping stations to pipelines that are already certified and operating in good standing are necessary to promote the security and convenience of the general public. Staff asserts there is no need for Joint Petitioners to seek authority pursuant to Section 15-401 of the Act.

Staff observes that both Dakota Access and ETCO are operating their respective pipelines pursuant to certificates issued pursuant to Section 15-401 of the Act. Thus, Staff asserts that clearly, the first sentence of this Section has been satisfied. Staff argues that the second sentence must be read in concert with the first, since a court should consider a statute in its entirety. *Hayashi v. Dept. of Fin. and Prof'l Regulation*, 2014 IL 116023 at ¶16, and not consider words and phrases in isolation. *Relf v. Shatayeva*, 2013 IL 114925 at ¶23. Staff reads the second sentence to state that no person can begin "construction of a pipeline or other facility unless the person possesses a certificate in good standing." Staff notes that Dakota Access and ETCO each possess a certificate in good standing to operate as a common carrier by pipeline. SOIL-SC-WK argue that Section 15-401 requires a certificate in good standing specifically to construct the requested pumping stations, but Staff asserts this argument relies on reading additional language into Section 15-401 that simply is not there. Staff contends that SOIL-SC-WK's argument must fail, since a court or tribunal may not "rewrite a statute, and depart from its plain language, by reading into it exceptions, limitations or conditions not expressed by the legislature." *Ravenswood Disposal Serv. v. Workers' Comp. Comm'n*, 2019 IL App. (1st) 181449WC, ¶22, quoting *People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73 (2009); see also *People v. Fort*, 2017 IL 118966, ¶20 (courts may not read exceptions, limitations

or conditions into unambiguous statutes). Moreover, Staff asserts that it is clear that the General Assembly knew how to specifically require a certificate for a specific project, rather than a general certificate that the possessor is operating in good standing, as it did in Section 8-406 of the Act, which provides that “[n]o public utility shall begin the construction of any new plant, equipment, property or facility...unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction.” 220 ILCS 5/8-406(b). Staff observes that in Article XV, and more specifically in Section 15-401, no analogous requirement exists. 220 ILCS 5/15-401. Staff argues that this must be presumed to be something the General Assembly intentionally omitted from Article XV; accordingly, it is clear that the General Assembly intended a different outcome. See *Julie Q. v. Dep’t of Children & Family Serv.*, 2013 IL 113783, ¶41 (where the General Assembly uses certain language in one instance and different language in another, it intends different results).

Staff asserts a clear reading of the plain language of the statute makes clear the operator must possess a certificate of good standing, not a certificate of good standing for the proposed project. Staff notes that the primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Bruso v. Alexian Bros. Hosp.*, 178 Ill.2d 445, 451; 227 Ill. Dec. 532, 534, 687 N.E.2d 1014, 1016 (1997). Had it been the legislature’s intent that a pipeline operator must obtain a separate certificate of good standing to operate as a common carrier by pipeline every time the operator sought to change or modify the pipeline for which it already possess a certificate, Staff thinks it would have said so, and observes it did not.

Staff does not suggest Commission approval is unnecessary; clearly, the Commission must authorize Joint Petitioners to construct the pumping facilities contemplated by the Joint Petition. In Staff’s view, the proper statute under which the Joint Petition is considered is Section 8-503. Staff asserts it is not necessary for Joint Petitioners to request an additional certificate in good standing to operate as a common carrier by pipeline when they already possess such certificates. Instead, Staff contends they must request and be granted permission to build the additional pumping stations under Section 8-503.

Staff asserts that, even assuming for the sake of argument that Joint Petitioners are required to seek Commission approval pursuant to Section 15-401(b), the issue of whether Joint Petitioners have met that burden is not before the Commission. SOIL-SC-WK suggest that not only should the Commission determine that Section 15-401(b) applies, but also that Joint Petitioners have failed to satisfy it, stating “Joint Petitioners also have the burden of demonstrating under Section 15-401 that their Joint Petition was properly filed, a public need for the capacity optimization plan exists, that they are both fit, willing, and able to increase crude oil throughput ... and that the public convenience and necessity requires issuance of a new or amended Certificate authorizing implementation of the capacity optimization plan.” In Staff’s opinion, this is simply wrong.

Staff asserts that whether Joint Petitioners have satisfied Section 15-401 is clearly not an issue before the Commission. Staff notes that the Commission may grant or deny a petition based on the relief sought. Staff further notes that the Commission may also determine that the relief sought is not that which should be requested and deny a petition on those grounds, with leave to refile a petition that seeks the relief determined to be

necessary. Further still, Staff notes that the Commission may not determine that additional relief must be sought and then render an opinion on whether that relief should be granted. Staff considers it to be a simple proposition that Joint Petitioners are not obligated to demonstrate they are entitled to relief which they have not sought, and the record has not been fully developed as to any issue not before the Commission. Staff understands that Joint Petitioners have sought to demonstrate that the Joint Petition as *filed* should be granted and, in Staff's opinion, they have succeeded. However, should the Commission determine that some other relief is necessary, Staff thinks due process requires that Joint Petitioners be given the opportunity to seek that relief, and to demonstrate that such other relief should be granted.

### **C. SOIL-SC-WK's Position**

SOIL-SC-WK state that the Commission's authority over facility changes made by common carriers by pipeline emanates in part from Section 8-503 of the Act, which is applicable to common carriers via Section 15-101. Section 15-101 identifies other provisions of the Act outside of Article XV that are applicable to common carriers, which include Section 8-503.

No party disputes that Section 8-503 is applicable to Joint Petitioners' proposed capacity optimization plan. The plain language of this Section makes clear that it (a) authorizes Commission jurisdiction over "additions, extensions, repairs or improvements to, or changes in" existing pipelines; and (b) contains the standard under which the Commission may authorize such "improvements or changes."

Section 15-401 requires a common carrier to apply for and possess a Certificate and provides in relevant part:

(a) No person shall operate as a common carrier by pipeline unless the person possesses a certificate in good standing authorizing it to operate as a common carrier by pipeline. No person shall begin or continue construction of a pipeline or other facility, other than the repair or replacement of an existing pipeline or facility, for use in operations as a common carrier by pipeline unless the person possesses a certificate in good standing.

(b) Requirements for issuance. The Commission, after a hearing, shall grant an application for a certificate authorizing operations as a common carrier by pipeline, in whole or in part, to the extent that it finds that the application was properly filed; a public need for the service exists; the applicant is fit, willing, and able to provide the service in compliance with this Act, Commission regulations, and orders; and the public convenience and necessity requires issuance of the certificate. Evidence encompassing any of the factors described in items (1) through (9) of this subsection (b) that is submitted by the applicant, any other party, or the Commission's staff shall also be considered by the Commission in determining whether a public need for the

service exists under either current or expected conditions. The changes in this subsection (b) are intended to be confirmatory of existing law.

In its determination of public convenience and necessity for a proposed pipeline or facility designed or intended to transport crude oil and any alternate locations for such proposed pipeline or facility, the Commission shall consider, but not be limited to, the following:

In its written order, the Commission shall address all of the evidence presented, and if the order is contrary to any of the evidence, the Commission shall state the reasons for its determination with regard to that evidence.

220 ILCS 5/15-401.

Put another way, Section 15-401 provides the enforcement and procedural requirements needed to implement the jurisdictional authority and decision standards established by Section 8-503. SOIL-SC-WK point out that no party in this proceeding contends, and no party in any Commission proceeding has ever contended that Sections 8-503 and 15-401 are mutually exclusive such that an applicant would never be required to seek and obtain approval under both statutory sections. They aver that no reasonable argument can be made that they are. Rather, they are appropriately read together as requiring Commission approvals under both for pipeline and pipeline facility projects. SOIL-SC-WK argue that petitions seeking to construct “additions,” “improvements,” “extensions,” or “changes” to existing pipelines are subject to both Sections 8-503 and 15-401.

SOIL-SC-WK point out that the complementary and co-existing nature of Sections 8-503 and 15-401 is also demonstrated by the scope of the single jurisdictional exception to Section 15-401. Specifically, Section 15-401 states that, “other than the repair or replacement of an existing pipeline or facility,” it is applicable to all common carrier pipeline construction. The fact that this specific exception pertains to existing pipelines indicates that all other instances of construction related to existing pipelines are subject to and require certification under Section 15-401. The only pipeline construction activities that are subject to Section 8-503 but not subject to 15-401 are repairs and replacements of existing pipelines or facilities. Since repairs and replacements would not change the transportation service authorized by the Commission when a pipeline is approved, SOIL-SC-WK maintain that it makes sense that the Commission actions related to repairs would not be subject to the full requirements of Section 15-401. It also makes sense, they continue, that any subsequent changes to the transportation service approved for a new pipeline would be subject to the same Section 15-401 procedural requirements. Nothing in the language of these sections, SOIL-SC-WK aver, indicates that they are mutually exclusive, and as such that the Commission must give each section full independent force. Moreover, Section 15-401(d) removes any ambiguity about the complementary roles of these laws by stating that an existing “common carrier by pipeline may request any other approvals as may be needed from the Commission for completion of the pipeline under Article VIII . . . at the same time, and as part of the same application, as

its request for a certificate of good standing under this Section,” which includes Section 8-503. The plain language of the law, supported by logic and reason, and thus reflecting perceived legislative intent, provides a mechanism by which applicants may comply with both Sections 8-503 and 15-401 at the same time.

Throughout this proceeding SOIL-SC-WK have continuously asserted that the Joint Petition should have been filed pursuant to and is subject to the requirements of Section 15-401, such that Joint Petitioners erred in not seeking authorization under that provision.

SOIL-SC-WK assert that the Joint Petition should have been filed pursuant to and is subject to the requirements of Section 15-401, such that Joint Petitioners erred in not seeking authorization under that provision.

SOIL-SC-WK contend that Joint Petitioners’ possession of a Certificate based on the record in Docket Nos. 14-0754 and 14-0755 does not create a license to add new facilities or otherwise augment the underlying pipelines without regard to Section 15-401. SOIL-SC-WK maintain that the above emphasized language from subsection (a) of Section 15-401 addresses the very situation at hand. Joint Petitioners propose to construct new facilities along their previously certificated pipelines and in no way have suggested that the new facilities merely constitute a “repair or replacement of an existing pipeline or facility.” Without the “repair or replacement” qualifier, SOIL-SC-WK assert there is simply no basis on which to conclude that Section 15-401 certification is unnecessary. Under the plain language of subsection (a), SOIL-SC-WK assert that Joint Petitioners must obtain either a new or amended Certificate to construct the facilities contemplated under their capacity optimization plan because those facilities are not repairs or replacements of their existing pipelines. To conclude that Joint Petitioners may rely on their earlier Certificates from Docket Nos. 14-0754 and 14-0755 establishes a dangerous precedent not only in the context of common carriers, but also in the context of other utilities that must obtain a certificate of public convenience and necessity for their facilities. SOIL-SC-WK state that the Commission should not allow common carriers to add substantial new equipment (not repair or replacement) and substantially expand the scope of their services absent compliance with, and meeting the safeguards and requirements of, Section 15-401.

To the extent Joint Petitioners argue that the Commission’s Order in *Enbridge* establishes precedent for a pipeline capacity expansion without regard for Section 15-401, SOIL-SC-WK aver that such reliance is misplaced. SOIL-SC-WK recognize that in 2007 the Commission granted Enbridge authority under Section 15-401 to construct and operate a 400,000 bpd pipeline; then, under the same docket number, Enbridge returned in 2013 obtained authority to install additional pumping capacity pursuant to Section 8-503. The distinction, however, is that unlike the case at hand, Enbridge raised in its original common carrier filing that it may later increase the capacity of the subject pipeline with the addition of new pumps. *Enbridge*, Docket No. 06-0470, Application at 13, fn 8. Therefore, the possibility of such expansion was within the scope of that docket. SOIL-SC-WK claim the Commission did not consider whether Enbridge’s 2013 application was required to comply with Section 15-401, because no party argued that it was necessary.

SOIL-SC-WK argue that even if Enbridge had not foreshadowed its capacity increase, and even if the 2013 order is considered an express ruling that Section 15-401 does not apply to pipeline additions, improvements, and changes, nothing prevents the Commission from either (a) acknowledging that it was error to not consider Section 15-401 in Docket No. 06-0470 or (b) not assigning any precedential value to it. SOIL-SC-WK explain that it is well established that the Commission is not limited by *res judicata*.

Moreover, SOIL-SC-WK point out that the Commission has previously held that uncontested cases should not be relied upon as precedent when presented with conflicting positions in a similar but contested case. In its order on the application of Lakehead Pipe Line Company (“Lakehead”) for a certificate under Section 15-401, the Commission noted that it had considered the merits of similar applications based only on the testimony of the applicant company. *Lakehead Pipe Line Co., L.P.*, Docket No. 96-0145, Order (May 7, 1997); 1997 Ill. PUC Lexis 255 (Order, May 7, 1997), *aff’d*, 296 Ill. App. 3d 942, 696 N.E.2d 345 (3d Dist. 1998). Based on the testimony of the applicants in prior dockets and in the absence of any alternative testimony provided for the Commission’s consideration in those dockets, the Commission found in favor of the applicants. In the context of *Lakehead*, however, the Commission was presented with testimony opposing Lakehead’s application. The Commission concluded that it was not bound by past uncontested cases and specifically held that “[a]n uncontested case should not be considered as precedence to judge the instant proceeding.” Docket No. 96-0145, Order at 33. Just as the Commission found with regard to Lakehead’s application, the Commission should not feel compelled to follow the uncontested Order in Docket No. 06-0470 when deciding whether Section 15-401 of the Act should apply to Joint Petitioners’ proposed pipeline capacity expansion.

#### **D. LIUNA’s Position**

LIUNA argues that Joint Petitioners, as common carrier pipelines, are obligated to meet customer demands for the transportation services they offer, without discrimination or delay. LIUNA agrees with Joint Petitioners that Section 8-503 of the Act governs the granting of authority to install additional pumping equipment on an existing common carrier pipeline and it is not necessary to obtain a new certificate under Section 15-401.

#### **E. IBEW’s Position**

IBEW states that Section 8-503 of the Act provides sufficient and proper authority for the Commission to grant Dakota Access and ETCO’s Joint Petition. IBEW notes that the Commission affirmed the ruling of the ALJ which denied the motion of SOIL-SC that Joint Petitioners be required to file an amended Joint Petition also requesting authority under Section 15-401 of the Act.

IBEW asserts that Section 8-503 provides sufficient and proper authority for the Commission to grant the Joint Petition for authority to install the additional pumping capacity in Illinois to provide additional common carrier transportation services to shippers on their pipelines, with the increased maximum daily capacity that would be achieved with the increased pumping capacity. IBEW notes that Joint Petitioners are certificated by the Commission as common carriers by pipeline and the Commission found in its Orders in the certification cases, Docket No. 14-0754 (Dakota Access) and Docket No. 14-0755 (ETCO), that a public need existed for the crude petroleum transportation services that

Joint Petitioners propose to provide. IBEW Local 702 contend that as common carriers, Joint Petitioners are obligated to provide transportation service to shippers who request the service.

IBEW states that Joint Petitioners are unable currently to meet all the demands for transportation services from shippers. Therefore, IBEW states that Section 8-503 is the appropriate section for Joint Petitioners, as existing, certificated common carriers, to request, and for the Commission to grant, authority to install additional facilities to enable Joint Petitioners' pipelines to meet the demands for crude oil transportation services being placed on them by shippers.

#### **F. Commission Analysis and Conclusion**

Both Dakota Access and ETCO are operating their respective pipelines pursuant to Section 15-401 certificates of good standing issued by this Commission. Joint Petitioners are requesting authority pursuant to Section 8-503 of the Act to add pumping stations to the pipelines to increase output. The Commission notes that the pipelines have been in operation since 2017. The proposal of Joint Petitioners is not extending or constructing an additional pipeline. Joint Petitioners propose adding pumping stations to the existing certified pipeline. SOIL-SC-WK argue that this type of improvement to the pipelines requires a new or amended certificate pursuant to 15-401. The Commission does not agree that a common carrier by pipeline would be required to obtain a new certificate of good standing pursuant to Section 15-401 each time it wants to make improvements to an existing pipeline. Section 8-503 authorizes the Commission to determine whether extensions, repairs or improvements to, changes in, the existing plant, equipment, apparatus, facilities or other physical property of any utility are necessary and ought to be made. 220 ILCS 5/8-503. Section 8-503 applies to common carriers by pipeline through Section 15-101 of the Act. 220 ILCS 5/15-101. The Commission finds that Joint Petitioners' request seeking authority to make improvements to existing pipelines in the form of new pumping stations and equipment in Illinois should be authorized under Section 8-503 of the Act.

Finally, this Joint Petition was brought pursuant to Section 8-503 and not Section 15-401. SOIL-SC-WK argue that not only does Section 15-401 of the Act apply in this docket, but request that the Commission issue a finding that Joint Petitioners failed to satisfy it. Joint Petitioners argue that if the Commission finds that Section 15-401 applies, the Commission should find that Joint Petitioners have satisfied this provision. The Commission finds that because it has concluded that the Joint Petition was properly brought pursuant to Section 8-503 and is sufficient to grant Joint Petitioners authority to install additional pumping equipment on their pipelines to increase the pipelines' capacity, the issue of whether Joint Petitioners have also satisfied the criteria for a certificate under Section 15-401 is not before the Commission in this docket. The Commission is limited to the relief requested in the Petition.

### **III. NEED FOR THE PROPOSED ADDITIONAL FACILITIES**

#### **A. Joint Petitioners' Position**

Joint Petitioners contend that the proposed additional pumping stations and pumping equipment are necessary to secure adequate service and facilities and promote

the public convenience because these improvements will allow Dakota Access and ETCO to meet present and future demand for pipeline capacity that currently cannot be met through their existing throughput capacity. Joint Petitioners state that by increasing throughput, they can provide more economic, more efficient, and safer crude oil transportation than alternative methods and ensure that their pipelines can effectively serve as common carriers to meet the public's crude oil transportation needs. They state that the proposed capacity of 1.1 million bpd on the pipelines is needed to serve both (1) the current contracted-for capacity and other demands for transportation services on the pipelines that they presently cannot accommodate, including additional long-term capacity that shippers contracted for in the 2018 open season and the associated 10% provision for walk-up shippers, that Joint Petitioners are currently unable to serve, and (2) future growth in crude oil production and demand for transportation service on the pipelines. DA-ETCO Ex. 1.6 at 8. Joint Petitioners state the additional structures, equipment, and pumping capacity are needed and ought reasonably be made to secure adequate service and facilities for shippers on Joint Petitioners' common carrier pipelines, now and in the future.

Joint Petitioners state that refineries in the regions to which Dakota Access and ETCO deliver crude oil continue to increase their capacities in response to demand for refined petroleum products. Demand for refined petroleum products increased between 2010 and 2019 in Illinois, in the PADD II region, in the United States, and in the world. EIA projects that world demand for petroleum liquids will increase from 102.2 million bpd in 2020 to 121.5 million bpd in 2050. DA-ETCO Ex. 5.0C at 14-16; DA -ETCO Ex. 5.2 at 5-6; Tr. 665-67. Joint Petitioners state that refineries in PADD II, which includes Illinois, have total refining capacity of approximately 4.1 million bpd as of 2019, an increase of approximately 300,000 bpd, or 7.9%, in the five years since 2014; and that refineries in PADD III, which includes the Gulf Coast region served by the ETCO pipeline, have refining capacity of approximately 9.8 million bpd as of 2019, which is an increase of approximately 687,000 bpd, or 7.5%, since 2014. DA-ETCO Ex. 5.0C at 13-14; DA-ETCO Ex. 1.2 at 4. They state that the Gulf Coast region accounts for about 50% of U.S. refinery capacity and produces refined products serving markets and customer demands throughout the U.S., including Illinois. DA-ETCO Ex. 1.0 at 3.

Joint Petitioners point out that refineries in Illinois and nearby Midwest states do not produce enough refined products to meet the demand for these products from consumers and businesses in the region; therefore, the PADD II region, which includes Illinois, must import refined products from PADD III, which includes the Gulf Coast area served by Joint Petitioners' pipelines. DA-ETCO Ex. 1.0 at 4; DA-ETCO Ex. 5.0C at 16-17. Joint Petitioners reiterate that Illinois is the sixth-highest petroleum-consuming state in the U.S., but Illinois' consumption of refined products is about 23 times its production of crude oil; therefore, Illinois is dependent for its refined products supply on crude oil that is produced in other regions of the country and transported through other states to the refineries in Illinois and in other states that produce the refined products that the Illinois public consumes. DA-ETCO Ex. 1.0 at 3; DA-ETCO Ex. 5.0C at 16-17.

Joint Petitioners state that, as the only direct pipeline link between the Bakken/Three Forks region and the Gulf Coast, the ability of the Dakota Access and

ETCO pipelines to meet increased demand is essential to the nation's crude oil production infrastructure.

Joint Petitioners state that the demand for crude oil transportation service on their pipelines has substantially increased over the demand anticipated when the pipelines were being developed, and already exceeds their maximum throughput capacity. DA-ETCO Ex. 1.0 at 5. They state that at the time of the original certificate applications in Docket Nos. 14-0754 and 14-0755, shippers had entered into long-term transportation contracts with Dakota Access for approximately 450,000 bpd and with ETCO for approximately 360,000 bpd. DA-ETCO Ex. 1.0 at 5. Joint Petitioners state that the pipelines went into commercial operation in June 2017 and reached their maximum daily throughput (with current facilities) of 570,000 bpd in September 2018. They state that volumes shipped on the pipelines have essentially remained at the maximum daily throughput in the ensuing 15 months through December 2019, while nominations (requests to ship volumes) have far exceeded the pipelines' capacity in every month in that period. DA-ETCO Ex. 1.0 at 6; DA-ETCO Ex. 1.6 at 3; DA-ETCO Ex. 1.7.

Joint Petitioners state that the increased demand for crude oil transportation service on the pipelines has been driven primarily by increased crude oil production from the Williston Basin area, including the Bakken/Three Forks region. They note that when the pipelines began operating in June 2017, approximately 1,045,000 bpd of crude oil was being produced in the Williston Basin; by December 2018, production in the Williston Basin had increased to 1,349,000 bpd, an increase of 304,000 bpd, or 29%, in 18 months. DA-ETCO Ex. 1.0 at 6; DA-ETCO Ex. 5.0C at 5-6. By early 2020, production on a monthly basis reached 1.5 million bpd (Tr. 411), a 43% increase in less than three years. Joint Petitioners state that factors contributing to the increased production in the Bakken/Three Forks-Williston Basin region include the presence of in-place drilling and production facilities and ongoing advances in drilling technology. They state that the petroleum industry continues to get more efficient and improve its drilling and recovery technology, due to increased productivity and efficiency of individual drilling wells, crude oil production from the Bakken region has increased despite a decrease in the number of drilling wells. They cite industry analyses as projecting additional increases in recoverable reserves in the Bakken/Three Forks region. DA-ETCO Ex. 1.0 at 7; DA-ETCO Ex. 1.6 at 7-8, 10-11; DA-ETCO Ex. 1.9; Tr. 411-412. Joint Petitioners also state that in addition to the significantly increased crude oil production in the region, the attractiveness to shippers of using Joint Petitioners' pipelines for direct, economical and efficient crude oil transport to the Patoka hub and to the Gulf Coast has driven the increased demand for transportation service on their pipelines. DA-ETCO Ex. 1.6 at 4-5, 6-7, 18; DA-ETCO Ex. 6.2 at 4-8.

Joint Petitioners state that shippers' demands for service on Joint Petitioners' pipelines have far outpaced their current maximum throughput capacity. In an open season concluded in the December 2018, shippers entered into long-term contracts for capacity on the Dakota Access and ETCO pipelines, resulting in oversubscription of the pipelines' current 570,000 bpd capacity by a significant amount. DA-ETCO Ex. 1.0 at 6; DA-ETCO Ex. 1.2 at 2, 6; DA-ETCO Ex. 1.6 at 3; DA-ETCO Ex. 1.8; SOIL-SC Cross Ex. 9. They emphasize this is actual, contracted demand for pipeline capacity and service that Dakota Access and ETCO, as common carriers, cannot meet with their current equipment. DA-ETCO Ex. 1.0 at 6. In addition, there is the need to reserve 10% of the

pipelines' capacity for walk-up shippers. *Id.* Joint Petitioners state that in 14 of 15 months from October 2018 to December 2019, they received nominations to ship volumes on their pipelines in each month that exceeded the current 570,000 bpd capacity by tens of thousands to hundreds of thousands of bpd. DA-ETCO Ex. 1.0 at 6; DA-ETCO Ex. 1.2 at 2; DA -ETCO Ex. 1.6 at 2; DA -ETCO Ex. 1.7.

Joint Petitioners note that Staff witness Seagle cited the substantial increase in demand for crude oil transportation service on the Dakota Access and ETCO pipelines as supporting his conclusion that a public need for the additional pumping capacity has been demonstrated. Staff Ex. 1.0Corr. at 7. Mr. Seagle supported his conclusion that a public need for the additional pumping capacity has been shown with the facts that seven new shippers participated in the 2018 open season and that current and new shippers have expressed significant interest in contracting for additional capacity for future transportation needs at volumes that well exceed the pipelines' current capacity. *Id.* Mr. Seagle also stated that information provided by Joint Petitioners in response to Staff's discovery requests provided further evidence that demand for shipping capacity is increasing and indicates that a need exists for the proposed additional pumping capacity. *Id.* at 8.

Joint Petitioners argue that SOIL-SC-WK's lengthy discussion of prior Commission orders in pipeline cases, most of them pertaining to original applications to install and operate new pipelines, did not support SOIL-SC-WK's arguments. Joint Petitioners state that they cited and discussed many of the same orders in their Initial Brief and showed that these prior orders supported granting their Petition. The 1997 order in the *Lakehead* case is the only case cited by SOIL-SC-WK (and of which Joint Petitioners are aware) in which the Commission denied an application to build a new pipeline. *Lakehead Pipeline Co. v. Ill. Commerce Comm'n.* 296 Ill. App.3d 942. Joint Petitioners argue that nothing in the *Lakehead* order requires denial of the Petition in this proceeding, and that SOIL-SC-WK failed to explain how the Commission's reasoning in *Lakehead* supports their position. Joint Petitioners state that, in contrast to the facts in *Lakehead*, the evidence presented in the instant case by both Joint Petitioners and Staff shows a need for the proposed improvements and increased capacity of the pipelines. Staff Ex. 1.0Corr. at 6, 8.

Joint Petitioners state, additionally, that it is clear from the Commission's Order and the Appellate Court decision in *Lakehead* that the need for eminent domain authority - which, although not yet requested by the applicant in that case, was widely acknowledged as an eventual necessity - dictated a higher degree of scrutiny of the application in that case. They point out that SOIL-SC-WK stated that in *Lakehead*, the Commission centered its "public need" analysis around whether public need would justify the future use of eminent domain. Similarly, in the appeal, the Appellate Court noted that obtaining a certificate would be "a first step toward acquiring eminent domain authority," *Lakehead*, 296 Ill. App. 3d at 947, and that "[t]he public need aspect of the statute serves to protect and restrict the exercise of such power as eminent domain." *Id.* at 952. Joint Petitioners state that both the Commission and the Appellate Court were strongly influenced by, and concerned about, the fact that certification is a necessary step to obtaining eminent domain authority. Joint Petitioners point out that in this proceeding; however, they are not proposing to build a new pipeline in Illinois, and eminent domain

authority is not needed and is not being requested for the proposed pumping stations. DA-ETCO Ex. 2.0C. at 5-6.

Joint Petitioners state that the post-*Lakehead* cases do not support SOIL-SC-WK's position either. Joint Petitioners aver that in the proceedings on reopening in *Ill. Extension Pipeline Co., L.L.C.*, Docket No. 07-0446, Order on Reopening (Dec. 17, 2014), the Commission found that public need was shown even though the proposed pipeline had only two contracted shippers, one of which had contracted for approximately two-thirds of the pipeline's capacity, with 10% of capacity reserved for walk-up shippers. *Id.* at 50-53. Joint Petitioners reiterate that in the appeal of the original order in Docket No. 07-0446 (where the Commission granted approval to construct a new pipeline), *Enbridge Pipelines (Illinois) L.L.C.*, Docket No. 07-0446 (Order, July 8, 2009), the Appellate Court affirmed the Commission's decision and similarly confirmed that in assessing need the Commission is not limited to considering just the needs of Illinois citizens, but can also consider regional, national, or global benefits, as the Commission had done. *Pliura Intervenors v. Ill. Commerce Comm'n*, 405 Ill. App. 3d 199, 208-209 (4th Dist. 2010). ("Pliura"). Similarly, Joint Petitioners note that in another post-*Lakehead* order, *Enbridge Pipelines (FSP) L.L.C.*, Docket No. 12-0347, Order (Feb. 14, 2013), the Commission concluded that public need and public convenience and necessity were shown for a proposed new pipeline, and quoted testimony by Staff stating, in relevant part, that "commitments that [the pipeline applicant] has secured from shippers on the proposed pipeline are an indication of the demand in the Midwest and the Gulf Coast for Canadian crude. If shippers are interested in bringing in supplies, there must be a market willing to take those increased supplies." Docket No. 12-0347, Order at 29. Joint Petitioners point out that Staff similarly supported Dakota Access's position in its original certificate case, testifying that the pipeline would help ensure Illinois and the rest of the country have an adequate supply of oil, particularly domestically-produced oil; that the pipeline would help meet the demand for oil and petroleum-based products in Illinois and the nation as a whole; and virtually every U.S. citizen uses petroleum products; as well as noting as justification for public need that the pipelines would move crude oil from North Dakota not just to Illinois but to Texas. Docket No. 14-0754, Order at 20-21. They state that in the certificate Order for ETCO, the Commission concluded that "ETCO has demonstrated that there is a public need for the Project and that it would promote the public convenience and necessity by providing transportation for crude oil from the Patoka Hub to the Gulf Coast region." Docket No. 14-0755, Order at 16. Joint Petitioners summarize by stating that since *Lakehead*, the Commission, Staff, and the Appellate Court have consistently based decisions in pipeline cases on the view that public need and public convenience may be shown by shippers' demand for service on a proposed pipeline, since shippers would not contract for capacity on a pipeline if there is not market demand for the crude oil they plan to ship, and since all citizens use petroleum and petroleum products, either directly or indirectly.

Joint Petitioners state that their request in this case is similar on its facts and should have the same outcome as *Enbridge*, Docket No. 06-0470, Order on Reopening (Aug. 6, 2013), cited above. They state that in that case, a certificated common carrier crude oil pipeline, already in operation, requested an order pursuant to Section 8-503 authorizing the pipeline to construct three pumping stations on its operating common carrier pipeline in Illinois to enable the pipeline to serve increased shipper demands for transportation

service to ship oil from secure North American sources that had manifested since the pipeline was originally certificated by the Commission. *Id.* at 1-2. The Commission's order authorized the pipeline to install the proposed three pump stations in Illinois. *Enbridge*, Order on Reopening at 4. Joint Petitioners contend that the Commission should reach the same result here.

Joint Petitioners state that, while installation of the additional pumping capacity is needed to increase the throughput capacity of their pipelines and thereby enable them to serve the existing, contracted-for demand and walk-up shipper demands for transportation services on the pipelines, crude oil production in the Bakken/Williston region is also projected to continue to increase from current levels. It is reasonable to expect that shippers will want to ship significant portions of the increased production on Dakota Access to the Patoka hub, and from there, on ETCO to the Gulf Coast region. Therefore, installation of the additional pumping capacity will enable Joint Petitioners to accommodate additional demands for transportation service from growth in production in the Bakken/Williston region, in order to "secure adequate service [and] facilities" for shippers of that crude oil pursuant to Section 8-503.

Joint Petitioners state that experience since their pipelines went into service makes it reasonable to expect that shippers will seek to ship a significant portion of future Bakken production to the Patoka hub and the Gulf Coast on their pipelines. Before the Dakota Access and ETCO pipelines went into service, substantial volumes of crude oil were being shipped from the Bakken region by rail, but rail shipments declined as the Dakota Access pipeline approached completion and went into operation. DA-ETCO Ex. 1.1; DA-ETCO Cross Ex. 4 at 5-6. They note that as crude oil production from the Bakken/Williston region has grown, shippers have placed increasing volumes with Joint Petitioners' pipelines for shipment to Patoka and the Gulf Coast. DA-ETCO Ex. 1.6 at 2-4. Joint Petitioners conclude that given the consistent and rapid growth of demand for service on their pipelines, market demand for transportation services on the pipelines is expected to continue growing. DA-ETCO Ex. 1.6 at 4. They state that this expectation is strengthened by the fact that Dakota Access is the only pipeline providing direct pipeline transportation service from the Bakken region to the Patoka hub, and, through ETCO, directly on to the Gulf Coast, and that shippers place value on the direct service Joint Petitioners' pipelines uniquely provide to those destinations. DA-ETCO Ex. 1.6 at 4-6; DA-ETCO Ex. 6.2 at 6-7.

Joint Petitioners also respond to the contention of SOIL-SC witness Hughes that the EIA's projection of future Bakken production is overstated because it would result in production of more crude oil in the Bakken region than the total estimated technically recoverable reserves in the region projected by the U.S. Geological Survey ("USGS") in a report issued in 2013. SOIL-SC Ex. 8.0 at 6. Joint Petitioners state that the 2013 USGS report on which Mr. Hughes relied is based on outdated technologies and assumptions that do not reflect current, actual conditions and do not account for advances in drilling and recovery techniques and technologies. Joint Petitioners state that these improvements and advances have resulted in increases in the estimated ultimate recovery amounts from wells in the Bakken region. They state that crude oil production in the Bakken region has increased due to increases in productivity and efficiency of individual wells. DA-ETCO Ex. 1.6 at 9-11; DA-ETCO Ex. 5.0C at 7; DA Ex. 6.2 at 7; Tr.

411-412. Joint Petitioners note that the U.S. EIA's estimate of proven oil reserves in the Bakken/Williston area as of 2018 was 5,862,000,000 barrels, which represented an increase of 7.6% from the 2017 estimate, and that EIA's estimate of unproved but technically recoverable resources as of January 2018 was 16.9 billion barrels. Tr. 716-717, 719-721. Joint Petitioners state that even if actual crude oil production levels in the Bakken/Williston region in future years prove to be somewhat lower than projections, the purpose of adding the pumping capacity to their common carrier pipelines is to "secure adequate service and facilities," as specified in Section 8-503, by enabling the pipelines to serve both current contracted-for capacity and demands for service that they are presently unable to serve, as well as future demand for service. Jt. Pet. IB at 32-33.

Joint Petitioners respond to SOIL-SC witness Hughes' contention that the proposed additional pumping capacity on Joint Petitioners' pipelines is not needed because of unused pipeline and rail takeaway capacity in North Dakota that he contended is capable of transporting the anticipated increased Bakken crude oil production. SOIL-SC Ex. 8.0 at 4-5. Joint Petitioners note that SOIL-SC witness Stuckey also made this assertion. SOIL-SC Ex. 4.0 at 6-7. They point out that Mr. Hughes' contention was based solely on reported capacities of railroad crude oil loading facilities in North Dakota (*i.e.*, facilities at which crude oil can be loaded onto railroad tank cars), and failed to take into account either historical use of rail transport versus the Dakota Access pipeline by producers and shippers or the demonstrated strong preference of shippers for the pipeline transportation that Dakota Access and ETCO provide for shipping volumes efficiently and economically to the Midwest and Gulf Coast. DA-ETCO Ex. 1.6 at 4, 6; DA-ETCO Ex. 6.2 at 5-7. They also note that Mr. Hughes' analysis of takeaway capacity represented by rail loading facilities in North Dakota was based solely on the amount of oil that the rail loading facilities can load into railroad tank cars in a day. Tr. 743-44. However, he provided no information on the availability of the numbers of oil tank cars and railroad engines that would be needed to utilize the loading capacities of the rail loading facilities. They state that rail loading capacity is of no use without rail cars to carry the oil and train engines to pull those cars. They state that it would require loading about 740 tank cars per day, every day at the rail loading facilities to transport the incremental crude oil production that Dakota Access will be capable of transporting with the additional pumping capacity. They also note that since each unit train of loaded oil tank cars will take some number of days to reach its destination and then return empty (Tr. 746), a multiple of 740 rail cars (and engines to move them) would be needed every day to transport the incremental transportation volumes that Dakota Access will be able to transport each day after the additional pumping stations and equipment is installed. They also note that some portion of existing rail capacity is dedicated to moving other freight, such as agricultural commodities, fertilizer, ethanol, and retail goods. DA-ETCO Ex. 4.4 at 2. Joint Petitioners also pointed out that several rail loading facilities have gone out of operation and one of the other pipelines reduced its capacity by 95,000 bpd. DA-ETCO Ex. 6.3; Tr. 729-30, 733-34. Finally, Joint Petitioners state, Mr. Hughes failed to take into account the efficiency and safety benefits of shipping crude oil via pipeline as opposed to rail.

Joint Petitioners state that virtually all the North Dakota rail loading facilities, and the other pipelines Mr. Hughes included in available takeaway capacity, were already in place when the Dakota Access pipeline went into service in mid-2017. They argue that this shows that the capacity of rail loading facilities and other pipelines in North Dakota is

“underutilized” because of shippers’ strong preference for direct pipeline transportation service from the Bakken/Three Forks region to Patoka and the Gulf Coast that Joint Petitioners’ pipelines provide. DA-ETCO Ex. 1.6 at 4-5; DA-ETCO Ex. 6.2 at 6.

Joint Petitioners state that SOIL-SC failed to take into account why shippers prefer to place their crude oil volumes on Joint Petitioners’ pipelines rather than on other pipelines or rail facilities: the economic and efficiency advantages to shippers of the direct transportation service provided by Joint Petitioners’ pipelines. Joint Petitioners point out that Dakota Access and ETCO provide both a straight line transportation service to a major oil hub at Patoka and a more direct route to the major U.S. refining center in the Gulf Coast, and that no other pipeline out of the Bakken region provides such a direct “highway” to market. They state that, in contrast, other Bakken takeaway pipelines take oil through Montana or Wyoming for eventual transfer to Cushing, Oklahoma, and then to the Gulf Coast, using smaller pipes and requiring more interconnected transfers and storage. DA-ETCO Ex. 1.6 at 4-5; DA-ETCO Ex. 6.2 at 6; DA-ETCO Cross Ex. 4 at 7. These other potential pipelines routes offer no advantage to shippers over Dakota Access in terms of either markets or tariff rates. DA-ETCO Ex. 6.2 at 3-6; DA-ETCO Ex. 4.4 at 5; Tr. 511-12. Joint Petitioners state that shipment of oil by rail is, and historically has been, only a stopgap option for shippers where and when pipeline transport is unavailable, as per-barrel transportation costs on pipelines are about half those for rail; rail transport is not a long-term solution for transporting incremental Bakken crude oil production, whereas Dakota Access and ETCO are the most efficient and economical way for crude oil production to be transported to the Patoka hub and the Gulf Coast region. DA-ETCO Ex. 1.6 at 4, 6-7, 18; DA-ETCO Ex. 4.0 at 18; DA-ETCO Ex. 6.2 at 5-6. Joint Petitioners claim that they provided more recent data, postdating the Congressional Research Service (“CRS”) report cited by SOIL-SC witness Hughes, which was based on data only through 2007, and that the more recent data, which shows pipelines have fewer spill incidents than railroads and have a significant rate of recovery of spilled oil. DA-ETCO Ex. 6.2 at 11-12. They note that the CRS report stated that the data it used predated the dramatic increase in oil transportation by rail, that the rapid increase in crude oil transportation by rail will likely increase the number of oil spills from rail transportation, that “the increase in rail shipments of crude has raised safety and environmental concerns,” and that the “increasing deployment of unit trains” to transport crude oil “concentrate[s] a large amount of potentially environmentally harmful and flammable material, increasing the probability that, should an accident occur, large fires and explosions could result.” DA-ETCO Ex. 6.2 at 9. They also note an academic study cited by SOIL-SC witness Christensen stated that pipelines have the lowest failure rates among methods of transporting fuels. Tr. at 129.

Dakota Access and ETCO state that installation of the additional pumping capacity to enable Joint Petitioners to transport up to 1.1 million bpd of crude oil will promote the security and convenience of the public in a number of ways. First, they state, the pipelines transport a commodity (crude oil) used to produce refined petroleum products that consumers and businesses rely upon. Further, Illinois’ native crude oil production is only a small fraction of its annual consumption of refined petroleum products. Therefore, to meet its citizens’ and business’s needs for petroleum products, Illinois is dependent on crude oil being produced in other regions and transported through other states to refineries both inside and outside Illinois to produce refined products used by the public

in Illinois. DA-ETCO Ex. 1.0 at 3-4; DA-ETCO Corr. Ex. 5.0 at 16-17. Because Dakota Access delivers a substantial amount of crude oil to the market in Illinois, the Illinois public benefits even though the Dakota Access-ETCO pipeline system continues on through Illinois and delivers crude oil to the Gulf Coast refinery region (which, in turn, produces refined petroleum products, some of which are used in Illinois and the Midwest). Joint Petitioners note a previous pipeline case in which Staff stated, and the Commission agreed:

According to Staff, there are many states that serve merely as pathways for energy transmission facilities, with little or no local consumption of the product being transported through that state. Staff adds, “Fortunately for Illinois and the United States, the regulatory bodies in these states did not disapprove these projects on the grounds that they do not serve local interests.”

*Enbridge*, Order at 45

Joint Petitioners state that in that same case, the Commission stated:

[I]f the pipeline is meeting demand in another state, it is beneficial to Illinoisians because it benefits our nation as a whole and helps to divert other supplies that would have gone to those regions, possibly keeping them locally. Illinoisians are also citizens of the United States, and a project that provides access to a secure and reliable energy supply and helps to meet our country’s energy needs is a project that benefits Illinois citizens, whether directly or indirectly.

*Id.* at 45. Joint Petitioners state that the U.S. oil pipeline system, including Joint Petitioners’ pipelines, is an interstate system of common carriers transporting crude oil for shippers to support the public interest in the development of competitive U.S. markets for the sourcing and use of crude oil. DA-ETCO Ex. 6.0 at 8-10. They claim that the public interest in the efficient and competitive operation of the U.S. petroleum industry is a national, not a local, concern. *Id.* at 12.

Second, Joint Petitioners state the addition of the pumping capacity, and the overall optimization project for their pipelines to enable them to increase their daily throughput, is an efficient use of existing, constructed, in-place transportation infrastructure, without the need to increase the pipelines’ size or footprint, or to construct an additional pipeline to transport the increased volumes that shippers want to have transported. No additions or modifications to the existing, in-the-ground pipelines, and no new pipeline construction, will be needed. DA-ETCO Ex. 1.0 at 8.

Joint Petitioners dispute SOIL-SC-WK’s contention that forecasts of crude oil production in the Bakken/Williston region are “not sufficient” given the anticipated life of the pipeline system. Joint Petitioners state that the forecasts are more than sufficient proof of long-term shipper demand and the public need for the proposed improvements. They state that SOIL-SC-WK mischaracterize the timing of the forecasts, which were first referred to in Joint Petitioners’ Petition and direct testimony filed in June 2019. They state

that these independent, third-party forecasts were issued in late 2018 or early 2019, before Joint Petitioners filed their Joint Petition in June 2019 and covered a 5-year period. DA-ETCO Ex 1.6 at 9. Moreover, the forecasts do not all extend only to 2023. The U.S. EIA forecast projects production through 2050, with the projected volumes at 5-year intervals, as follows: 2025 – 1.75 million bpd; 2030 – 2.03 million bpd; 2035 – 2.01 million bpd; 2040; 1.89 million bpd; 2045 - 1.78 million bpd; and 2050 – 1.63 million bpd. DA-ETCO Cross Ex. 4 at 8-9. Joint Petitioners aver that the EIA forecasts higher production levels in the Bakken/Williston region in the years cited above than the current and recent production in the region.

Third, Joint Petitioners state transportation of crude oil by pipeline is the most economical, efficient, and safest means of transporting crude oil as compared to other modes of transportation, particularly over long distances. DA-ETCO Ex. 1.0 at 7-8; DA-ETCO Ex. 1.6 at 4, 6-7, 18; DA-ETCO Ex. 4.0 at 8-9; DA-ETCO Ex. 4.4 at 5; DA-ETCO Ex. 6.0 at 4-5, 7; DA-ETCO Ex. 6.2 at 3-7, 8-12. They reiterate that transporting oil over the long distances from the Bakken region to Patoka and to the Gulf Coast through the Dakota Access and ETCO pipelines requires less handling and fewer transfers between or among carriers and modes of transportation, than would be required with other potential transportation options. DA-ETCO Ex. 6.2 at 6. Joint Petitioners cite data that transporting crude oil by pipeline is more economical than railroad and truck transport; costs of shipping crude oil by pipeline are in the range of \$2-\$5 per barrel, as compared to \$10-\$15 per barrel by rail and \$10-\$20 per barrel by truck. DA-ETCO Ex. 6.2 at 4-5; DA-ETCO Ex. 4.4 at 5. Joint Petitioners claim that concerns about railroad transportation of crude oil are exacerbated by the fact that the railroad system was developed to pick up and deliver freight and passengers to or from cities and towns; as a result, railroad lines generally run through numerous populated communities. Joint Petitioners note that the passage of multi-car trains of crude oil through populated communities has been a significant cause of public concern over the transportation of oil by rail. They cite examples of significant derailments and other accidents involving trains transporting crude oil, some with significant damage to persons and property, that have occurred in the last 6-7 years. DA-ETCO Ex. 6.2 at 10-11; DA-ETCO Ex. 6.4. Joint Petitioners state that if oil pipeline transportation capacity cannot be increased, such as through the addition of pumping capacity as proposed in this case, transportation of oil will increasingly move to railroads as existing pipeline capacity limits are reached. They reiterate that this is already happening as shipments on Joint Petitioners' pipelines have reached the current maximum capacity of the pipelines. DA-ETCO Ex. 1.0 at 7; DA-ETCO Ex. 1.1; DA-ETCO Ex. 1.2 at 3; DA-ETCO Ex. 1.6 at 4; DA-ETCO Ex. 4.0 at 8.

Joint Petitioners note that Staff witness Seagle cited the evidence that pipeline transportation of crude oil is safer, more efficient, and less expensive than rail or truck transportation, which present safety issues not presented by pipeline transportation, as supporting the conclusion that public convenience and necessity require approving the request to install additional pumping capacity. Staff Ex. 1.0Corr. at 8-9.

Fourth, Joint Petitioners state, increasing the ability of Joint Petitioners' pipelines to move volumes of domestically produced crude oil from the Bakken/Williston production region to locations such as the Patoka hub and the Gulf Coast where the supplies can be accessed by refiners and other processors provides additional optionality for refiners and

processors and increases the competitiveness of the petroleum market. DA-ETCO Ex. 4.0 at 3, 4-5, 8; DA-ETCO Ex. 4.4 at 4-5; DA-ETCO Ex. 1.2 at 7-9; DA-ETCO Ex. 1.6 at 15-17.

Fifth, Joint Petitioners state, increasing the ability of their pipelines to move volumes of domestically produced crude oil from the Bakken/Williston production region to locations (such as the Patoka hub and the Gulf Coast refinery area) where it can be accessed by refiners and other processors of crude oil will support and enhance our nation's domestic energy security. DA-ETCO Ex. 1.5; DA-ETCO Ex. 4.0 at 3-4.

Joint Petitioners cite the September 14, 2019 attack on Saudi Arabian oil facilities which reduced Saudi oil production by about 5.7 million bpd. Crude oil prices spiked after this event, but the price increase was short-lived and prices returned to pre-attack levels in about a week. DA-ETCO Ex. 4.0 at 6. Joint Petitioners note that a factor in limiting the impact and duration of this event was the availability of crude oil supplies from U.S. production sources, which is a domestic production buffer that did not exist at the time of previous global supply disrupting events such as the 1973-1974 OPEC oil embargo and the Iranian revolution. *Id.*; DA-ETCO Ex. 4.4 at 3; Tr. 105-108.

Joint Petitioners state that increased domestic production of crude oil cannot provide the benefits to the U.S. and its consumers that Joint Petitioners cite if the country lacks sufficient infrastructure to move the crude oil from production regions to refineries and other processors. The ability of U.S. domestic production to mitigate impacts of future supply disruptions and curtailments, due to actions of foreign producers and governments other causes, is critically dependent on the ability and capacity of the domestic crude oil transportation infrastructure to efficiently and safely move crude oil from production areas such as the Bakken region to major transportation and processing hubs. Joint Petitioners conclude that installation of the additional pumping capacity on the Dakota Access and ETCO pipelines will both "secure adequate service and facilities" and promote the security and convenience of the public. DA-ETCO Ex. 4.0 at 5-7; DA-ETCO Ex. 4.4 at 3-4; DA-ETCO Ex. 6.2 at 15.

Joint Petitioners respond to the contentions of SOIL-SC witnesses that allowing the pipelines to increase their capacity will result in an increase in carbon emissions from consumption of the additional crude oil the pipelines will transport. Joint Petitioners note that they are common carrier transporters of crude oil from the area in which it is produced to delivery points (Patoka or Nederland) specified by the customer, and do not control the amount of crude oil produced, the manner in which refiners and others process it, or end users' consumption of the refined products. DA-ETCO Ex. 9.0 at 8; DA-ETCO Exs. 1.3, 1.5. The amount of crude oil consumed (resulting in emissions) is driven by the global demand for petroleum products produced from crude oil, not by how much crude oil is shipped on Joint Petitioners' pipelines nor by what mode of transportation is used; therefore, the availability or lack of availability of one transportation option for crude oil is unlikely to have any significant effect on overall refined petroleum products use. DA-ETCO Ex. 9.2 at 3, 11. If Dakota Access and ETCO were unable to increase their capacity above the current level, the incremental amount of crude oil that Dakota Access and ETCO would be unable to transport, or the resulting refined products, would likely still be delivered to markets (and ultimately consumed) by a combination of the following means, among others: (1) other transportation of Bakken-produced crude oil –

Transportation of the same crude oil by some other method (rail, truck, and/or other pipelines); (2) greater production of other U.S. domestic crude oil – replacement of the incremental Bakken crude oil that would have been transported on Joint Petitioners’ pipelines by other crude oil produced in other regions of the U.S.; (3) increased imports of crude oil – replacement of the incremental Bakken crude oil that would have been transported on Joint Petitioners’ pipelines by increased crude oil imports; and (4) increased imports of refined products – replacement of the refined products that would have been produced by the incremental Bakken crude oil that would have been transported on Joint Petitioners’ pipelines, by increased imports of refined petroleum products. DA-ETCO Ex. 9.0 at 10-13; DA-ETCO Ex. 9.2 at 11-12.

Joint Petitioners state that none of these alternative, replacement sources would lead to a material long-term change in consumption of crude oil as compared to transportation by Dakota Access and ETCO of the incremental amounts of oil at the pipelines’ proposed increased capacity. Thus, denial or approval of Joint Petitioners’ proposal to install additional pumping capacity would have little effect on global carbon emissions. DA-ETCO Ex. 9.0 at 8-9, 13; DA-ETCO Ex. 9.2 at 8; DA-ETCO Ex. 1.3.

Joint Petitioners state that there will be only insignificant incremental carbon emissions from the incremental electricity usage needed to operate the added pumps at the three locations in central and southern Illinois. They note that while some portion of that electricity may be produced at fossil-fueled electric generating stations, it may also be generated by zero-emission generation such as renewable energy resources. Joint Petitioners point out that Illinois has added significant amounts of renewable electricity generating resources to its generating portfolio, through both the State’s renewable portfolio standard legislation and private transactions. Additionally, a substantial number of coal-fueled generating stations in Illinois recently have been or are being retired. They state that the overall impact is that the percentage of the State’s generating portfolio fueled by fossil fuels, particularly in central and southern Illinois, has been declining and can be expected to continue to decline, so that electricity usage will decline in fossil-fuel intensity. DA-ETCO Ex. 1.6 at 19; DA-ETCO Ex. 1.3. They state that these changes will reduce the already insignificant carbon emissions caused by operation of the pipelines. They cite U.S. Environmental Protection Agency (“EPA”) data that crude oil transportation activities account for less than 1% of methane emissions and less than 0.01% of total CO<sub>2</sub> emissions from petroleum systems. DA-ETCO Ex. 9.0 at 8; DA-ETCO Ex. 9.2 at 21.

Joint Petitioners continue to dispute SOIL-SC’s assertion that an increase in the pipelines’ throughput will result in a substantial increase in global carbon emissions. They reiterate that the purported increase in carbon emissions claimed by SOIL-SC is not the result of the transportation of additional oil on Joint Petitioners’ pipelines, but rather would be the result of consumption by businesses and consumers of the petroleum products into which the crude oil is refined or processed. Joint Petitioners argue that the consumption of refined products is driven by consumers’ and businesses’ demands for those products, not by how the crude oil used to make those products is transported from production regions to refinery locations. Joint Petitioners also note that SOIL-SC witness Hughes testified that “the only real emissions” resulting from Petitioners’ project “would be from all the pumping stations that are going to be added.” Tr. 714. Joint Petitioners state that demand for refined products would drive demand for added crude oil

throughput, meaning that the incremental crude oil production would either be transported from the Bakken region (likely by other more carbon-producing means of transportation), or produced in other domestic and foreign production regions and transported to refineries (including foreign refineries) by those means. DA-ETCO Ex. 9.0 at 10-13; DA-ETCO Ex. 9.2 at 11-12; DA-ETCO Ex. 6.2 at 23.

Joint Petitioners state that because increasing the capacity of Joint Petitioners' pipelines would have at most a *de minimis* impact on global carbon emissions, the Social Cost of Carbon ("SCC") estimate used by SOIL-SC witness Christensen and cited by SOIL-SC, is irrelevant to this proceeding. Further, Joint Petitioners aver, this estimate is unreliable and should be given no weight in any event. They note that SOIL-SC witness Hansen described it as "based on a quick calculation," while Dr. Christensen described it as a "back-of-the-envelope" estimate. SOIL-SC Ex. 3.0 at 15; SOIL-SC Ex. 7.0 at 7. Joint Petitioners witness Harrison described at length the uncertainties and ambiguities in the SCC estimate used by Dr. Christensen. DA-ETCO Ex. 9.2 at 27-35. Joint Petitioners state that SCC estimates are widely recognized to be replete with uncertainties and underlying variables that have a wide range of potential future values. *Id.* at 29-30; Tr. 138-40; DA-ETCO Ex. 9.2 at 31-33. Joint Petitioners claim that a 2018 article co-authored by Dr. Christensen recognized that the economics of climate change involves a vast array of uncertainties. Tr. 138-39. They state that despite these uncertainties, Dr. Christensen did not use a range of cost estimates, but only a single point estimate of \$41.50 per ton for the SCC. Further, Joint Petitioners note, the recent article co-authored by Dr. Christensen developed a mean estimate of the SCC of \$13.30 per ton of SCC, one-third of the \$41.50 per ton SCC used by Dr. Christensen in his testimony. Tr. 143.

Joint Petitioners respond to SOIL-SC's reliance on several additional items related to carbon emissions. First, they state that both the Future Energy Jobs Act and proposed Clean Energy Jobs Act, cited by SOIL-SC witness Stuckey, are directed to encouraging development and preservation of renewable energy resources and zero-emission resources in the electric generation sector, not to pipelines. Joint Petitioners argue they are unaware of any laws enacted by the General Assembly to limit use of carbon-based fuels or incentivize reduced use of carbon-based fuels, let alone prohibit or limit construction or operation of crude oil pipelines in this State to reduce carbon emissions. They state that any such policies should be enacted by the General Assembly, not through *ad hoc* decisions of regulatory agencies. Joint Petitioners note that the 19-cent-per-gallon increase in the State's motor fuel tax on gasoline enacted in 2019, generally designates these new taxes to be used for road and bridge construction and rehabilitation and transit projects, and that this revenue stream, and the public infrastructure improvements it will fund, depend on continued consumption of gasoline in Illinois. Public Law 101-32; 35 ILCS 505/2

With respect to Public Act 101-373, also cited by Mr. Stuckey, Joint Petitioners state that all it did was repeal the Kyoto Protocol Act of 1998, which prohibited the State from taking steps to reduce greenhouse gas emissions unless the Kyoto Protocol Treaty was ratified by the U.S. Senate (which never happened). With respect to Illinois Executive Order 2019-6, cited by Mr. Stuckey, Joint Petitioners stated that its operative clauses only provide a specific directive to the Illinois EPA, and specify that "[n]othing" therein "shall affect or alter the existing statutory powers of any State agency or be construed as a

reassignment or reorganization of any State agency.” Finally, Joint Petitioners state that the survey submitted as SOIL-SC Ex. 4.18 is hearsay.

Joint Petitioners dispute SOIL-SC’s argument that a quantitative benefit-cost calculation should be performed for the proposed improvements and capacity increase. Joint Petitioners state that such an exercise is not required or even contemplated by Section 8-503 (or even Section 15-401). They cite Dr. Makholm’s testimony which explained why a quantitative cost-benefit analysis in this case would not be appropriate. DA-ETCO Ex. 6.2 at 19-25. Joint Petitioners state that while SOIL-SC witness Christensen characterized the type of benefit-cost analysis he envisioned as a “well-established standard when considering the impacts of public programs” and in government rulemakings, he acknowledged in his testimony that the proposal before the Commission “is not a public program or a rulemaking proceeding.” SOIL-SC Ex. 7.0 at 3.

Joint Petitioners state that there is no evidence of any increased risk of leaks or spills from operating the pipelines at the higher capacity. They reiterate that maximum operating pressures on the pipelines, which have been established in accordance with the formula specified in federal pipeline safety regulations, will not be increased. They also state that testing at pressures in excess of the requirements of federal safety regulations have shown the pipelines can withstand pressures at or above 125% of MOP. Further, the average operating pressures across the pipelines will not be increased. They also point out that existing equipment and protection features, new equipment to be added, and operating procedures will protect against surge overpressures.

Joint Petitioners note that SOIL-SC raise issues with respect to surge overpressure and corrosion on the ETCO pipeline. Joint Petitioners point out that two qualified experts determined that the potential for surge on the pipelines when operating at the increased throughput levels had been adequately addressed and mitigated and did not present a risk. They state that Joint Petitioners witness Hein was the only witness who performed a surge analysis, and he concluded that the procedures implemented by Joint Petitioners would ensure surge pressures will remain below 105% of MOP, thus ensuring that the type of event hypothesized by SOIL-SC’s witness could not happen. DA-ETCO Ex. 7.0 at 4. Joint Petitioners also point out that SOIL-SC’s witness failed to identify any additional steps he would recommend to prevent a surge overpressure event. Joint Petitioners state that the risk from a surge event would require the simultaneous occurrence of so many unrelated and unlikely failures of both primary and backup components as to be virtually impossible.

With respect to SOIL-SC’s argument that for any corrosion on the ETCO pipeline, the threat level could rise in the future if not adequately addressed, Joint Petitioners state that there is no evidence that Joint Petitioners will not adequately address the risk of future corrosion on the ETCO pipeline. They argue that they will monitor any anomalies that could indicate corrosion over time and remediate them should they become actionable. DA-ETCO Ex. 2.6 at 8-9; DA-ETCO Ex. 8.2 at 19-21; Tr. 376-77. Joint Petitioners also note that SOIL-SC’s witness stated that Joint Petitioners’ actions to date to stay ahead of any anomalies has been “rational/reasonable.” SOIL-SC Ex. 5.0 at 12; Tr. 171-72. They aver that there is no evidence that their “rational” and “reasonable” approach to monitor and remediate corrosion will not continue.

In response to SOIL-SC's argument that the pipeline capacity increase will impose a burden on landowners on whose properties Joint Petitioners' pipelines are already located, Joint Petitioners reiterate that there will be no new pipeline construction or installation, only construction and installation of the pumping stations and associated equipment on two specific properties in Illinois that ETCO or an affiliate already own in fee and a third property that Dakota Access is acquiring in fee. They state that no one has objected to construction of the pump stations or installation of pumping equipment at these locations. Further, they stated, no landowner on whose property the pipelines are located in Illinois, and only one landowner near the pipeline (Mr. Klingele), has intervened to object to the proposed construction and installation of the new pumping stations and equipment or operation of the pipelines at the higher capacity level. Finally, Joint Petitioners state, there is no evidence that the proposed improvements will "burden" any landowners in any measurable fashion.

Joint Petitioners argue that the Constitution's Commerce Clause forbids the analysis urged by SOIL-SC; that is, it forbids a consideration of public need (and, potentially, a State-imposed limit on the amount of crude oil or other products that can be transported in interstate commerce into or through the State) that either accounts only for in-state benefits or gives them greater weight than benefits outside of Illinois. They also state that SOIL-SC's argument that a new certificate is required under Section 15-401 of the CCPL in order to increase the pipelines' throughput above 570,000 bpd, is ultimately premised on the contention that the Commission can and should regulate and cap the amount of crude oil that common carrier pipelines can transport in interstate commerce into and through Illinois. Joint Petitioners argue that the Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const. Art. I, § 8, cl. 3. Joint Petitioners explain that the Clause has long been understood to have a "negative" [or dormant] aspect that denies states the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce. They argue that a state violates the dormant Commerce Clause when it takes action that discriminates against interstate commerce by providing for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" citing *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 98-99 (1994), or imposes a burden on interstate commerce that "is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Joint Petitioners state that as an interstate pipeline, the Dakota Access-ETCO system provides economic benefits on a multi-state and national level, as would the proposed capacity increase. Ignoring or discounting these benefits, such that only benefits in Illinois could be considered, would be a textbook violation of the dormant Commerce Clause, as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" (*Or. Waste Sys.*, 511 U.S. at 99), and would lead to the "economic Balkanization" the Commerce Clause was intended to eliminate (citing *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)). They also cite *Dakota & Minn. E. R.R. Corp. v. S. Dakota*, 236 F. Supp. 2d 989, 1015-16 (D.S.D. 2002), *aff'd in part, vacated in part, and remanded on other grounds*, 362 F.3d 512 (8th Cir. 2004), where the court invalidated a state law limiting eminent domain authority to railroads providing in-state shipping and solely for products produced, mined, grown or consumed in the state.

Joint Petitioners state that in granting the original authorization in Iowa for the Dakota Access pipeline, the Iowa Utilities Board (“IUB”) explained that consideration of only benefits to Iowans in its determination of “public convenience and necessity” would violate the Commerce Clause. *In re Dakota Access, LLC*, Docket No, HLP-2014-0001, Final Decision and Order at 21 (Iowa Utils. Bd., Mar. 10, 2016). Joint Petitioners also note that the Seventh Circuit U.S. Court of Appeals has observed that if states could self-servingly ignore the benefits in other states and the nation at large by regulating purely on the basis of in-state benefits, it “would serve as a clog on interstate commerce” by potentially “stop[ping] all traffic at state borders.” *Nat’l Solid Wastes Mgmt. Ass’n v. Meyer*, 165 F.3d 1151, 1153 (7th Cir. 1999). Joint Petitioners also cite *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994), which held that states may not “discriminate against an article of commerce by reason of its origin or destination out of State.” They conclude that, while Illinois will receive benefits from the proposed capacity increase sufficient to warrant granting the Petition, a public need/necessity analysis that is limited, or assigns greater weight to, in-state benefits over benefits for states and the nation as a whole, would violate the U.S. Constitution.

Joint Petitioners state that if their request is denied and incremental Bakken crude oil production were transported using other means, these alternative shipping methods would likely result in higher emissions than those projected from the increased capacity of Joint Petitioners’ pipelines. They point out that trains and trucks transporting the replacement crude oil and/or refined products would likely be diesel-fueled and involve consumption of substantial amounts of refined petroleum products for motive power. DA-ETCO Ex. 1.3. Joint Petitioners cite information from the International Energy Agency on potential electrification of truck and rail systems that in North America the dominance of freight diesel is projected to continue. DA-ETCO Ex. 9.2 at 20. They state that other pipelines, if transporting the crude oil that Joint Petitioners’ pipelines could not transport, also have pumps and motors that could be fueled directly by fossil fuels or by electricity generated by fossil fuels. Similarly, imports could be transported to the U.S. on ships powered by oil-based marine fuels. Jt. Pet. IB at 43.

Joint Petitioners reiterate that many Midwest and Gulf Coast refineries are capable of processing, and will process, the light, sweet crude oil transported on the Dakota Access-ETCO system. They further state that the prospect that a portion of the oil transported on the Dakota Access-ETCO system will be exported does not diminish the public need for the capacity increase. Joint Petitioners point out that exports of crude oil, like exports of many other products ranging from agricultural commodities to manufactured goods, are generally regarded as good for the U.S. economy and beneficial to the U.S. public. They state that export opportunities spur investment and development of new technologies, provide revenues to producers and manufacturers, put wages in the pockets of employees of the businesses producing the products for export and those involved in the exporting chain (from which they pay federal income and other taxes including Social Security and Medicare taxes), and support favorable trade balances, all of which improve the nation’s economic and fiscal condition. DA-ETCO Ex. 4.0 at 7-8; DA-ETCO Ex. 6.2 at 16. Joint Petitioners note that with limited exceptions, exporting crude oil was prohibited by federal law from 1975 to 2015. They argue that in enacting the statute to lift the crude oil export ban in 2015, Congress found that exports of crude oil support the national public interest, by strengthening the U.S. economy, improving the

nation's energy security and enhancing national security, and spurring economic investment and creating jobs. DA-ETCO Ex. 6.0 at 12, 14-15. Joint Petitioners also point out that U.S. refineries produce substantial amounts of refined petroleum products for export, which further negates SOIL-SC-WK's characterization that crude oil deliveries to domestic refineries are good but exports of crude oil are bad. SOIL-SC Exs. 1.11-1.12; Tr. 568-73; DA-ETCO Ex. 5.2 at 4.

Joint Petitioners state that the record shows the need for the proposed additional pumping stations and pumping equipment to increase the pipelines' throughput capability in order to satisfy both existing demand for service that exceed the pipelines' current capacity, and projected long-term demands for shipping crude oil on Joint Petitioners' pipelines. Joint Petitioners argue that they have met their burden of proof to obtain an order authorizing them pursuant to Section 8-503 to install the additional pumping stations and pumping equipment to increase the capacity of the pipelines.

### **B. Staff's Position**

Staff observes that the Commission previously found that Joint Petitioners demonstrated the need for a grant of authority to construct each pipeline pursuant to Section 8-503. Staff further observes that Joint Petitioners utilized the same evidence provided in this docket to demonstrate that, first, there was a public need for both construction and operation of the pipelines and for the service those pipelines will provide, and, second, that the public convenience and necessity required the issuance of a certificate.

Staff therefore concludes that an order granting authority pursuant to Section 8-503 in this proceeding must similarly find that Joint Petitioners have demonstrated a public need for the project and that the project will serve the public convenience and necessity. Staff asserts Joint Petitioners have demonstrated that a public need exists for the additional capacity. Staff states that pipeline transportation for crude petroleum is safer, more efficient, and less expensive than railroad or truck transportation. Staff further observes that transportation of crude petroleum by railcars and trucks presents safety issues not presented by pipeline transportation. Further, Staff observes that the additional pumping capacity does not require the pipelines to expand their existing size or footprint. Therefore, it seems unlikely to Staff that any new pipeline construction will be needed.

Further, Staff notes Joint Petitioners have performed hydraulic modeling to determine the optimum amount of pumping capacity. Staff states that the modeling enabled Joint Petitioners to avoid high consequence areas and environmental or culturally sensitive areas with respect to locations of the additional pumping facilities in Illinois. Staff further states that constructing a new pipeline or replacing the existing pipelines with larger diameter pipe would be both unnecessary and more impactful than the addition of new pumping stations.

Mr. Seagle gave primary consideration to two points: (1) whether Joint Petitioners' request for additional capacity will serve the public convenience and (2) whether the public's security will be promoted with the requested additional capacity. Staff Ex. 1.0 at 5. Staff concludes that: (1) the requested authority, if granted, will serve a public need; and (2) the public convenience and necessity require the requested authority.

### C. SOIL-SC-WK's Position

SOIL-SC-WK recognize the Commission's Order in *Lakehead* (affirmed by the Appellate Court) as a leading, oft-cited decision for several purposes, but most importantly on the issue of public need. "This [public need] is the most contested issue in this proceeding. It is of overreaching importance that there be a showing of public need because it forms a condition precedent for any determination of necessity and, therefore, convenience." *Lakehead, supra*, (1997 Ill. PUC LEXIS 255, at \*11, 12. The Commission stated in its Order that "the public need, like the public convenience and necessity, 'required to support an order of the Commission is that of the public and not of any individual or number of individuals.'" *Id.* at \*34, quoting *Roy v. Ill. Commerce Comm'n*, 322 Ill. 452, 458 (1926).

The Commission, SOIL-SC-WK observe, also addressed the public convenience and necessity standard as it relates to public need in its *Lakehead* Order. "Public convenience and necessity and public need are not mutually exclusive. If a showing of public need cannot be made for a proposed pipeline project such as Lakehead's, the public convenience and necessity is not being served." *Id.* at \*38. The Commission in effect established a showing of public need as a prerequisite to or required component of, public convenience and necessity. SOIL-SC-WK state further that the similarities and applicability of the Commission's analysis in *Lakehead* to the current docket continue. Mr. Hughes explains that existing take-away capacity from the Bakken region exceeds the additional throughput Joint Petitioners claim is needed to serve the public. SOIL-SC Ex. 8.0 at 3-4. The Commission considered the availability of other transportation options in *Lakehead* as well and concluded that the failure to consider other options was another shortcoming in the company's arguments.

Like *Lakehead*, SOIL-SC-WK assert that Joint Petitioners have simply stated their belief that demand is growing and they want to supply that demand, but they have provided no analysis that current transportation options could not meet the demand. DA-ETCO Ex. 1.0. Likewise, SOIL-SC-WK observe, Staff has not offered any such analysis. Mr. Hughes is the only witness who investigated whether current capacity is sufficient to meet future demand for crude oil transportation. SOIL-SC-WK aver that the conquest of market share, while beneficial to Joint Petitioners, is not a public need, it is a private goal.

SOIL-SC-WK note that *Lakehead* appealed the Commission's Order in Docket No. 96-0145. The Appellate Court affirmed the Commission in every respect. *Lakehead Pipeline Co., Ltd. Pshp. v. Ill. Commerce Comm'n*, 296 Ill. App. 3d 942 (1998). With regard to who to consider in determining public need, the Appellate Court stated:

For direction in determining what group should be considered when investigating public need, the Commission turned to the Supreme Court's decision in *Roy v. Ill. Commerce Comm'n*, 322 Ill. 452, 153 N.E. 648 (1926). In the context of discussing public necessity and convenience, the *Roy* court stated that the "convenience and necessity required to support an order of the commission is that of the public and not any individuals or number of individuals." *Roy*, 322 Ill. at 458; 153 N.E. at 648. The Commission adopted this same approach in this

case, determining that the public is larger than a limited number of market players and the need of a few refiners does not in and of itself establish a public need. A public need, in the Commission's opinion, cannot be defined as involving only a limited number of private interests: "We can find no fault with this reasoning which takes into account the public as a whole."

*Lakehead Pipeline*, 296 Ill. App. 3d at 954-55. The Appellate Court went on to state:

In the context of public need, it is appropriate to look at the larger group of the general public to see if it requires the service, not whether some components of the public are in fact using the service. Only by looking to the public at large can one determine whether there is an actual existing or expected popular need for the proposed service which should not be denied. This broader understanding of public has been consistently employed by our courts.

*Lakehead Pipeline*, 296 Ill. App. 3d 942, 955 (citations omitted).

SOIL-SC-WK argue that it is clear that the Commission should consider in this docket who would actually benefit from Joint Petitioners' proposed capacity optimization plan. With only six shippers offering to use a portion of the additional capacity Joint Petitioners seek to implement (and no prospect for that number growing) and enough existing take-away capacity in the Bakken region to transport substantially more crude than Joint Petitioners seek to transport, SOIL-SC-WK consider it is easy for the Commission to conclude that the benefits of this proposal will go to a few private companies, Joint Petitioners, and Joint Petitioners' parent companies.

SOIL-SC-WK contend that Joint Petitioners' reliance on Illinois Extension Pipeline Company, L.L.C. to support their project is misplaced. Docket No. 07-0446. SOIL-SC-WK observe that Joint Petitioners cite to historical transportation nominations that exceeded their pipelines' capacity, and a certain portion of the proposed additional capacity for which they have received commitments. Joint Petitioners could only offer little more than expert witness speculation that refiners in the market areas served by the pipelines would expand further in the future.

Thus, SOIL-SC-WK state, Joint Petitioners are asking the Commission to sanction a project that is supposedly needed for decades based on two years of third-party data. By any standard, such evidence is insufficient to meet Joint Petitioners' burden to prove a public need, and any approval based on this limited evidence would be arbitrary and capricious.

Perhaps recognizing the weakness of production forecasts that only extend to 2023, SOIL-SC-WK note that Joint Petitioners reference EIA data over a longer period than SOIL-SC witness Hughes provided in response to discovery from Joint Petitioners. Page 8 of Dakota Access-ETCO Cross Ex. 4 contains Mr. Hughes' response to a discovery question regarding SOIL-SC Ex. 8.4. As an initial matter, SOIL-SC-WK question the usefulness of citing Mr. Hughes' data since Joint Petitioners clearly did not

rely on it in their evaluation of the need for their capacity optimization plan. Had they relied on a forecast period beyond 2023, SOIL-SC-WK presume that Joint Petitioners would have provided it when asked to do so in discovery. Instead, Joint Petitioners only provided the forecast data that appears in confidential SOIL-SC Cross Ex. 5 running through December 2023. Therefore, SOIL-SC-WK maintain that any reference to Mr. Hughes' data does not demonstrate that Joint Petitioners made a reasoned decision to invest in their capacity optimization plan.

SOIL-SC witness Hughes offers another reason why the production forecasts relied on by Joint Petitioners do not meet Joint Petitioners' burden of proof. He points out that EIA forecasts, to be accurate, require production of more oil than the aggregate of EIA estimates of proven reserves plus unproven resources. SOIL-SC Ex. 8.0 at 5. The chart indicates that Bakken production will peak in 2021 and remain on a rough plateau through 2031, after which it will decline to zero over two decades. *Id.* at 6.

SOIL-SC-WK argue that Joint Petitioners' criticism of the United States Geological Survey ("USGS") data being outdated due to advances in recovery technology lacks merit because Joint Petitioners witness Emery merely lists "multilateral, extended reach, and complex drilling techniques" to discredit the USGS data. DA-ETCO Ex. 1.6. He offers no explanation as to any specific productivity improvements any of these techniques are responsible for or any evidence that the USGS data did not consider them or other advances in technology. Mr. Emery does not even describe for the record what these techniques entail that could lead to greater productivity. Similarly, SOIL-SC-WK's contention that Joint Petitioners drilling and recovery technology will improve (in measurable ways) simply because it has in the past can be dismissed as optimistic speculation, as there is no guarantee of such occurring particularly if the oil industry is declining due to climate mitigation efforts and other current events.

SOIL-SC-WK aver that Joint Petitioners' reliance on only three-year, incomplete, overly optimistic production forecasts that fail to account for growing electric vehicle use, fail to consider climate change mitigation efforts, fail to consider critical USGS data, and completely disregard the economics underlying extraction does not justify a project with a multi-decade lifespan. The shortcomings in Joint Petitioners' production forecasts, according to SOIL-SC-WK, fail to move them any closer to meeting their burden to demonstrate that their project is necessary for the security or convenience of the public under Section 8-503.

With regard to Joint Petitioners' claim that their project will enhance U.S. energy security and provide additional crude for domestic refineries, SOIL-SC-WK state that it is difficult to see how that is possible since, as noted above, Joint Petitioners have repeatedly pointed out that they do not know where the crude they transport ends up and it has been established that PADD II and PADD III refineries are operating at near 100% capacity. Joint Petitioners' reference to providing the only "direct pipeline link" between the Bakken region and the Gulf Coast and therefore their ability to meet increased demand "is essential to the nation's crude oil production infrastructure" seems to be related to their claim that their project is necessary to promote U.S. energy security. JP IB at 18-19. SOIL-SC-WK note, however, that Joint Petitioners do not explain how exactly their pipeline is "essential" in that regard. SOIL-SC-WK reiterate that many domestic refineries rely on imports of their preferred crude grade, not the light, sweet crude from

the Williston Basin. SOIL-SC Ex. 4.0. Dr. Makhholm's argument that the expanded capacity will aid in the transportation of fuel during a national crisis fails to validate Joint Petitioners' claim of benefit since SOIL-SC-WK point out that sufficient transportation capacity from the Williston Basin already exists to satisfy domestic needs. DA-ETCO Ex. 6.2. Moreover, since the goal of Joint Petitioners' primary parent appears to be to export the light, sweet Bakken crude overseas, it is not clear how doing so enhances U.S. energy security. Exporting limited energy resources overseas would seem more likely to reduce U.S. long-term energy security.

In terms of safety advantages of pipelines over truck or railroad transportation, Joint Petitioners speculate that increases in rail traffic carrying crude oil "can" cause bottlenecks that "may not" be quickly resolved. The record reflects no additional insights by Joint Petitioners on rail congestion – just their speculation. In this docket SOIL-SC-WK have never contended that any particular form of crude oil transportation is 100% safe or accident free. The important point to consider in the context of safety, SOIL-SC-WK aver, is what is actually being measured in the statistics cited by the parties. SOIL-SC-WK note that Dr. Makhholm cites studies to argue that there are fewer spill incidents for pipeline transportation of crude oil than for rail transportation. DA-ETCO Ex. 6.2. But as SOIL-SC witness Hughes observes, the CRS has recognized that "railroads consistently spill less crude oil per ton-mile transported than other modes of land transportation." SOIL-SC Ex. 8.0. The CRS reports that rail oil spillage rates are less than one-third that of pipeline per ton-mile. *Id.*

Another generally claimed benefit relates to Joint Petitioners' assertion that their pipeline system is "the most efficient and economical way to move crude oil from the Bakken production region to the Patoka hub and to the Gulf Coast refinery region." The problem perceived by SOIL-SC-WK is that Joint Petitioners' only analysis relating to the economics of crude oil transportation is Dr. Makhholm's general cost comparison of pipeline, rail, and truck transportation methods. DA-ETCO Ex. 6.2, Table 1. Absent any actual evidence of rail or competitor pipeline rates, SOIL-SC-WK assert that it is not possible for the Commission to conclude that Joint Petitioners in fact offer the most economical way to move crude from North Dakota to the Gulf Coast. SOIL-SC Ex. 4.4 reflects pipeline and crude oil rail terminals in the U.S. Crude can be transported by rail from North Dakota to Texas. There is also clearly more than one pipeline path between North Dakota and Texas. SOIL-SC-WK emphasize that the record contains no information whatsoever regarding the actual cost to move oil using any of the alternatives.

The last category of benefits offered by Joint Petitioners (royalties, jobs, and a "general benefit" to people involved in exports) lacks sufficient specificity to know to what extent such alleged benefits exist. SOIL-SC-WK do not deny that exports of crude oil will support some jobs and involve the payment of some amount of royalties. SOIL-SC Ex. 4.0. But any benefits attributable to such have certainly not been quantified in any way by any party in this proceeding. Joint Petitioners' general reliance on an undefined number of jobs and an unspecified financial gain to the handful receiving royalties can be accorded little weight as a benefit.

More telling, according to SOIL-SC-WK, than the nature of the benefits Joint Petitioners identify are the beneficiaries Joint Petitioners identify when evaluating the public need for the capacity optimization plan. The members of the public that Joint

Petitioners identify as benefiting from their proposal fall into two groups: (1) the direct beneficiaries consisting of the shippers and processors of the additional crude oil Joint Petitioners seek to transport; and (2) members of the general public that use petroleum products and/or use the roads and rail systems that would otherwise be used to transport the additional crude if Joint Petitioners' request is denied. Considering the second group first, there is no evidence of any measurable benefit to the general public. Notably, when asked whether Illinois citizens will experience any change in the price of refined petroleum products as a result of the capacity optimization plan, Joint Petitioners essentially acknowledge that they cannot assure any change in consumer prices relating to their proposal, since consumer prices are impacted by multiple factors. SOIL-SC Ex. 7.2. SOIL-SC witness Christensen agrees with this assessment. In the absence of any compelling rationale for why a relatively small expansion in the global context would affect the price of gasoline or other refined products, he concludes that any benefits to U.S. consumers in term of price effects will be negligible. SOIL-SC Ex. 7.0.

Since Joint Petitioners, IBEW, LIUNA, and Staff recognized no burdens or costs associated with capacity optimization plan, the burdens to examine are those identified by SOIL-SC-WK. The burdens to address include the increased risk of releases, the deleterious effects of climate change, and the additional burden imposed on landowners. SOIL-SC-WK characterize Joint Petitioners as essentially arguing that everyone should trust them and their software, any downsides to their project are *de minimis*, and that everything will be fine. The court in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-1534 (D.C., March 25, 2020) ("*Standing Rock*"), criticized such an approach with the Dakota Access pipeline.

SOIL-SC-WK note that the crude oil flow velocity under Joint Petitioners' capacity optimization plan will exceed 15 feet/second. While there is no rule against such an extreme velocity, pipeline safety expert and SOIL-SC-WK witness Kuprewicz expressed significant concern related to the possibility of surge overpressure. Surge is the change in pressure in liquid pipelines caused by a major change in flow, such as a pump shutdown/startup or inadvertent remotely operated mainline valve closure. Mr. Kuprewicz noted that inadvertent remotely operated mainline valve closure is not an uncommon occurrence on a hazardous liquid pipeline. Surge pressure increases occur within large diameter liquid hydrocarbon pipelines in microseconds and can move up and down many miles along a pipeline system at slightly under one mile per second. SOIL-SC Ex. 2.0 at 8. When surge overpressure occurs, the result can easily be a rupture of the pipeline.

SOIL-SC-WK point to Joint Petitioners' surge analysis offered as confidential Dakota Access-ETCO Ex. 7.3. Dakota Access-ETCO Ex. 7.3, at 23, 24, 31, 32, 39, 40, 64, and 70. Mr. Kuprewicz does not consider such systems failsafe and cautions the Commission against assuming that pipeline operations will always go as planned. Notably, on March 25, 2020, the U.S. District Court for the District of Columbia issued an opinion criticizing the U.S. Army Corps of Engineers' ("USACE") evaluation of Dakota Access' worst-case discharge on the same pipeline under consideration in this docket. In that case, the court found that assuming the Dakota Access pipeline people and systems will function as expected was wrong. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-1534, at 31-32.

Mr. Kuprewicz also raised concerns regarding rupture at a point along the ETCO Pipeline unrelated to surge. Briefly, when refurbishing the natural gas pipeline south of Patoka, Illinois to transport crude oil, ETCO replaced a roughly 30-mile segment with new pipe having a MOP of 1,440 pounds per square inch gauge (“psig”). At the end of that new segment, the old pipe has a MOP of 900 psig. SOIL-SC Ex. 5.0 at 11. In the event that crude oil leaving the Patoka pump station at a pressure higher than 900 psig does not lose enough pressure by the time it arrives at the older ETCO pipe segment (having a MOP of 900 psig), SOIL-SC-WK are concerned that the older pipe will not tolerate the higher pressure and rupture. SOIL-SC-WK contend that this risk of rupture and release poses another burden on the public unaccounted for by Joint Petitioners.

SOIL-SC-WK observe that Joint Petitioners witness Godfrey expressed different comments about remotely operated facilities when criticizing Mr. Kuprewicz. Although Mr. Kuprewicz suggested no particular equipment to remedy the concerns where the new higher pressure pipe meets the old lower pressure pipe along the ETCO pipeline, in criticizing Mr. Kuprewicz’s concern, Mr. Godfrey asserted that a surge relief valve and surge tank at this location should be avoided. SOIL-SC-WK point out that Mr. Godfrey also references the “increased risk associated with remote facilities.” Mr. Godfrey testifies further, “Additional remote surge relief facilities increase the risk of leakage from installed equipment, incorrect operations, tank overflow, and the threat of corrosion in piping dead legs.” DA-ETCO Ex. 8.2 at 24.

SOIL-SC-WK also relate that the threat of catastrophic release is present where corrosion exists because it can weaken a pipe, making it more susceptible to surge overpressure. Mr. Kuprewicz expressed concern about a cluster of corrosion anomalies identified along the ETCO Pipeline during a 2019 inline inspection (“ILI”). While not an immediate concern, he explained that the threat level could rise in the future if not adequately addressed. SOIL-SC Ex. 5.0 at 13. Unfortunately for the public, Joint Petitioners do not plan on evaluating the corrosion Mr. Kuprewicz references. According to Joint Petitioners, the cluster of corrosion anomalies Mr. Kuprewicz discusses is not actionable under integrity management regulations of PHMSA. DA-ETCO Ex. 8.2 at 20. As someone who was involved in the development of PHMSA’s integrity management regulations and in light of the characteristics of the coal tar coating on the subject pipe, Mr. Kuprewicz believes verification digs are warranted. SOIL-SC Ex. 2.0 at 1-2; SOIL-SC Ex. 2.1; SOIL-SC Ex. 5.0 at 12-13.

Mr. Klingele is an intervenor in this docket who owns 385 acres of farmland adjacent to the Dakota Access Pipeline route in Brown County, Illinois. Klingele Ex. 1.0 at 1. SOIL-SC-WK relate that Mr. Klingele has lived with the risk of a crude oil release on the adjacent land spreading onto his property since the pipelines became operational. In light of the undisputed increase in flow velocity, Mr. Klingele is troubled by the greater associated risks and larger spill volumes that may occur in the event of a release. *Id.* at 5. Mr. Klingele is not comfortable with the increased burden Joint Petitioners’ proposal subject him and his property to, particularly in light of the insufficient demonstration of need and public benefit made by Joint Petitioners.

SOIL-SC-WK argue that the burden and risk associated with Joint Petitioners’ capacity optimization plan are not limited to releases of crude oil directly jeopardizing lives and property. A decision by the Commission to allow Joint Petitioners to implement their

proposal and pump up to 1,100,000 bpd will also expose Illinois, as well as the nation and world, to greater harm from the effects of climate change. The phenomenon of climate change is generally recognized by science, as are its causes and impacts on the Earth. To be clear, the negative impacts of climate change are not just a matter of more severe weather. For example, Moody's Investors Service recognizes that local government debt, particularly in Illinois, will be adversely affected as heat stress becomes a greater issue facing local governments. See SOIL-SC Ex. 1.2.

SOIL-SC-WK observe that Joint Petitioners do not acknowledge environmental degradation as a cost associated with facilitating the consumption of nearly twice the amount of crude oil. As discussed above in the context of production forecasts, Joint Petitioners witness Olive also acknowledges that she did not perform an analysis of how efforts to mitigate climate change may impact demand for fossil fuels. SOIL-SC Cross Ex. 14 at 1. During cross examination, SOIL-SC-WK continue, it also became clear that Joint Petitioners witness Emery did not want to admit that the efforts Illinois has taken to move away from carbon-based energy sources is aimed at mitigating the effects of climate change. Tr. at 429-32.

Dr. Harrison also criticizes SOIL-SC-WK's concern with the climate impact of Joint Petitioners' proposal on the basis that there are better ways to mitigate climate change than by denying pipeline projects. DA-ETCO Ex. 9.0 at 6-7. He prefers market based environmental policies and characterizes the denial of the Joint Petition as an ad hoc means of addressing climate change. DA-ETCO Ex. 9.2 at 9. Dr. Harrison's position, however, does not comport with reality or recognize the seriousness of the climate situation.

If any doubt remains as to the need for the proposed capacity expansion, SOIL-SC-WK state that Joint Petitioners witness Makhholm provided clarification under cross-examination. Dr. Makhholm recognizes that shippers do not "need" to use Joint Petitioners' pipelines, they "desire" to do so. Tr. at 515. Joint Petitioners assert that "the market desires" the transportation method they propose to offer. SOIL-SC-WK aver that the "market" and the public, however, are not the same. The private business interests of Joint Petitioners and the six shippers that signed TSAs for a portion of the additional capacity are not the public interest that the Commission is statutorily required to consider.

#### **D. LIUNA's Position**

LIUNA states that the extensive record developed in this matter clearly demonstrates the need for the proposed additional facilities.

The Capacity Optimization Project will allow investments in facilities in the State of Illinois that will increase construction jobs, create economic benefit locally, throughout the state, and nationally. Members of LIUNA reside and/or work in every county in Illinois. Laborers' Ex. 1.0 at 3. The investment will put Laborers, welders, mechanics, electricians, pipefitters, heavy equipment operators and others within the heavy construction industry to work. There will also be increased demand for those who manufacture the steel pipes, fittings, valves, pumps and control devices necessary for a major pipeline. *Id.* at 4. Projects of this nature increase employment rates for workers in the construction industry by creating a substantial number of construction career opportunities for construction industry workers, which perform highly skilled jobs.

Opportunities for construction industry employers will also increase when this project is approved. The construction professionals also have established industry training funds which ensure that the next generation of highly skilled workers are being trained and ready to perform work on future project. *Id.*

#### **E. IBEW's Position**

IBEW states that it has considered the testimony of Joint Petitioners' witnesses, as well as the witness for Staff and the witnesses for SOIL and SC on the "need" issue. IBEW argues that the record in this case establishes that there is a need for installation of the proposed additional pumping stations and pumping equipment on the Dakota Access and ETCO pipelines, in order to enable Joint Petitioners to increase the capacity of the pipelines above the current maximum of 570,000 bpd, meet the current demands for transportation service on the pipelines, and be positioned to meet future demands for service. IBEW states that the record amply supports a finding that the proposed additional pumping stations and pumping equipment are necessary and ought reasonably to be installed to secure adequate service and facilities on Joint Petitioners' pipelines and promote the security and convenience of the public. IBEW argues that based on this evidence in the record, the Commission should find and conclude that the additional pumping stations and pumping equipment that Joint Petitioners propose to install in Illinois are necessary and ought reasonably to be installed to secure adequate service and facilities on Joint Petitioners' pipelines and to promote the security and convenience of the public. IBEW Brief at 12.

#### **F. Commission Analysis and Conclusion**

Under Section 8-503 of the Act, the Commission is required to determine whether Joint Petitioners' proposed additional facilities on the existing pipelines are necessary and ought reasonably to be made, and whether they will promote the security or convenience of the public or secure adequate service and facilities. Joint Petitioners demonstrated that the pipelines have reached their current capacity, and that there is a need to increase the throughput capacity of the pipelines to serve the demands for transportation service, and that by increasing throughput, they can provide more economic, more efficient, and safer crude oil transportation than alternative methods and ensure that their pipelines can effectively serve as common carriers to meet the public's crude oil transportation needs. The Commission has broad discretionary power to define what constitutes "the public" and need not consider the impact of the project only in relation to citizens of Illinois. The Commission should look at the larger group of the general public and determine the regional, national and even the global needs and benefits. *Lakehead Pipeline Co. v. Ill. Commerce Comm'n*, 296 Ill.App.3d at 955. Illinois reviewing courts have made it clear that the Commission must address this in considering the need and benefits, as opposed to Illinois-specific needs and benefits. See *Pliura Intervenors v. Ill. Commerce Comm'n*, 405 Ill. App. 3d at 209.

SOIL-SC-WK rely on *Standing Rock* concerning another portion of Dakota Access' pipeline and they argue it supports their position that the pipeline is not safe. The Commission does not agree. The Commission notes that there will be no new pipeline construction or installation, only construction and installation of the pumping stations and associated equipment on two specific properties in Illinois that ETCO or an affiliate

already own in fee and a third property that Dakota Access is acquiring in fee. No one has objected to construction of the pump stations or installation of pumping equipment at these locations. No landowner on whose property the pipelines are located in Illinois, and only one owner of land near the pipeline, has intervened to object to the proposed construction and installation of the new pumping stations and equipment or operation of the pipelines at the higher capacity level. Further, the Commission is persuaded by Joint Petitioners' argument that there is no evidence that the proposed improvements will burden any landowners in any measurable fashion. The Commission also notes that the record shows there is no need to increase or expand the pipelines and that Joint Petitioners have provided evidence the pipelines have been tested and will be able to accommodate the additional flow. Additionally, the Commission determines that adding the additional pumping stations to increase the flow is more environmentally friendly than adding additional trucks and railcars to transport the oil. The Commission finds that based on the record, Joint Petitioners have provided the evidence and details to establish that this project is reasonable and necessary and will be beneficial for and convenience the public and ought reasonably be made in accordance with Section 8-503.

#### **IV. DESIGN, ENGINEERING, AND OPERATIONS**

##### **A. Joint Petitioners' Position**

Joint Petitioners reiterate that the federal PHMSA has exclusive jurisdiction over design and operational safety matters for interstate crude oil pipelines, preempting state authority over these matters; therefore, they state, PHMSA is the appropriate body to resolve any safety concerns about increasing the capacity of the Dakota Access and ETCO pipelines. Nevertheless, Joint Petitioners state that the record in this proceeding demonstrates that they have taken and will continue to take comprehensive efforts to ensure safe and reliable operation of the pipelines, including at the higher throughput levels after adding the proposed pumping equipment.

Joint Petitioners point out that in approving the initial certificates in good standing for the Dakota Access and ETCO pipelines, the Commission found Joint Petitioners "fit, willing and able" to offer the proposed crude oil transportation service, and further found that the record "confirms Dakota Access' assertions regarding the. . . safety of the Pipeline." Docket No. 14-0754, Order at 27, 51; Docket No. 14-0755, Order at 25. Joint Petitioners argue that the evidence the Commission cited in the Docket 14-0754 Order included extensive testimony describing the numerous safety features in the design and planned operation of the pipelines, including but not limited to: factory application of fusion-bonded epoxy coating; the non-destructive testing of all (100%) pipeline welds (rather than just 10% as required by federal regulations); use of thicker-walled pipe in certain sensitive areas of the pipeline route; and use of "remote controllable sectionalizing valves. . . to allow rapid isolation of impaired segments in the event of an emergency." Docket No. 14-0754, Order at 10, 14; Docket No. 14-0755, Order at 5-7; DA-ETCO Ex. 2.0 at 9-10; DA-ETCO Ex. 3.0 at 2-4. Joint Petitioners state that the Dakota Access pipeline and the new portions of the ETCO Pipeline were built above and beyond regulatory safety requirements, and the converted ETCO pipeline was upgraded and tested above and beyond required federal pipeline safety standards. DA-ETCO Ex. 2.0 at 10; DA-ETCO Ex. 3.0 at 2-4.

Joint Petitioners also state that in the conversion of the existing portion of the ETCO pipeline to crude oil transportation service, all existing valves were replaced with new remotely controllable valves that included leak detection capabilities; launcher/receiver sites were added to facilitate in-line inspections (“ILI”); ILIs were run prior to the conversion of the pipeline to oil transportation; and the ETCO pipeline was hydrotested by pumping water through the pipeline at pressures greater than federal testing requirements. Docket No. 14-0755, Order at 6-7; DA-ETCO Ex. 2.5 at 10-11, 14; DA-ETCO Ex. 2.6 at 8-9. Joint Petitioners note that SOIL-SC’s technical witness agreed that both pipelines have taken numerous safety precautions above and beyond federal safety requirements. Tr. 168-72.

Joint Petitioners state that their pipelines have been in commercial operation since June 2017, delivering domestic crude oil supplies safely and efficiently to market areas including the Patoka hub, and that there is nothing in the record to indicate that will change if the additions and improvements are installed and the pipelines are operated at higher throughput levels. They argue that in the Capacity Optimization Project, they have applied the same commitment to safety in the design, installation, and operation of the additions and improvements to the pipelines. DA-ETCO Ex. 2.0C. at 10; DA-ETCO Ex. 3.0 at 2-4. Joint Petitioners state that they have demonstrated that the new pump stations and related equipment will be designed and operated, and that the pipelines at the higher capacity level can and will be operated, in a safe and reliable manner and consistent with applicable federal pipeline safety regulations. They further state that the concerns raised by SOIL-SC have been and will be fully addressed in the design, construction, and operation of the added equipment and operation of the pipelines at the higher capacity levels, pursuant to applicable federal pipeline safety regulations. Joint Petitioners also claim that the proposed additions and improvements will make efficient use of existing, in-place pipeline infrastructure, and that increasing capacity of their pipelines is the safest, most efficient way to serve increased demand for oil transport from the Bakken region to Patoka and the Gulf Coast, particularly when compared to additional use of rail or truck transportation.

Joint Petitioners state that the pipelines will continue to meet or exceed applicable federal safety standards after the new pumping stations and equipment are in place. DA-ETCO Ex. 2.0 at 10; DA-ETCO Ex. 3.0 at 2-5; DA-ETCO Ex. 2.5 at 5; DA-ETCO Ex. 2.6 at 8-9; DA-ETCO Ex. 8.0 at 13-14. They point out that they continue to prioritize safe operation of the pipelines. In the Capacity Optimization Project, they are designing the improvements to include additional safety and protective equipment, and have engaged in additional analysis and testing, all of which meet or exceed federal safety requirements. Joint Petitioners state that the new equipment will include the remote monitoring, control, leak detection, shutoff, and isolation capabilities described in Docket Nos. 14-0754 and 14-0755. DA-ETCO Ex. 3.3. Joint Petitioners retained a third-party expert (Dr. Michael Hein) to conduct a surge pressure analysis on the pipelines at the increased capacity and engaged another third-party expert (John Godfrey and DVN-GL) to further review surge pressure and engineering issues. Joint Petitioners note that based on Dr. Hein’s analyses and recommendations, they committed to install or resize surge relief valves (“SRVs”) and surge relief tanks at pump stations, and to revise pump station intake and discharge pressure settings in accordance with his recommendations. DA-ETCO Ex. 2.5 at 2-3; DA-ETCO Ex. 8.0 at 8.

Joint Petitioners also explain that ETCO has installed monitoring equipment at what has been referred to as the “spec break,” where the newer portion of the ETCO pipeline meets the repurposed portion, to ensure that crude oil does not reach the “spec break” at pressures exceeding the MOP for the repurposed portion of the pipeline. They also pointed out that, as SOIL-SC’s technical witness confirmed, the repurposed portion of the ETCO pipeline was hydrostatically pressure-tested at a pressure higher than what is required by federal regulations before crude oil service commenced in 2017. Tr. 170-71; SOIL-SC Ex. 5.0 at 12; DA-ETCO Ex. 2.5 at 5. Joint Petitioners point out that the SOIL-SC witness further agreed that the ILIs that have been conducted for the repurposed portion of the ETCO pipeline are “rational and reasonable.” SOIL-SC Ex. 5.0 at 12. Joint Petitioners state that in the pre-conversion testing, ETCO evaluated the results of the ILIs and made repairs or replacements as necessary. DA-ETCO Ex. 2.5 at 11; DA-ETCO Ex. 2.6 at 8-9. Additionally, both pipelines will be reassessed in Illinois prior to increasing their capacity. Tr. 170-72. Joint Petitioners explain that under the Integrity Management Plan (“IMP”) for the ETCO pipeline, they have and will continue to periodically monitor the condition of the pipeline through integrity assessments to ensure it remains safe. DA-ETCO Ex. 8.2 at 19-20; DA-ETCO Ex. 8.0 at 13-14.

Joint Petitioners respond to arguments of SOIL-SC-WK that the higher flow rate at which the pipelines will operate at the increased throughput levels will increase the risk of operating them. The key technical parameter for evaluating safety of operation at the higher throughput levels is the pipelines’ MOP, not the flow rate of the oil. Joint Petitioners point out that the previously established MOP for the pipelines will not change, and the average pressure across the pipeline will not materially change from what it is today. DA-ETCO Ex. 2.5 at 5, 8, 12; DA-ETCO Ex. 2.6 at 2; DA-ETCO Ex. 3.0 at 4; DA-ETCO Ex. 8.0 at 12. They argue that there is no support for SOIL-SC’s characterization of the flow rate at which the pipelines will operate with the new pumping capacity, approximately 15 feet per second (“fps”), as an “extreme” velocity. SOIL-SC Ex. 2.0 at 8. Joint Petitioners note that their witnesses explained why a 15 fps flow rate is not “extreme.” DA-ETCO Ex. 8.0 at 3-4; DA-ETCO Ex. 8.2 at 24; DA-ETCO Ex. 2.5 at 6; DA-ETCO Ex. 2.6 at 9-10. They also point out that SOIL-SC’s witness admitted that his characterization of an “extreme” flow rate is not based on any definition or regulatory limit. Tr. 172-73. Joint Petitioners cited testimony that other existing pipelines operate at flow rates similar to or above 15 fps, and that in any event 15 fps is not an “extreme” flow rate, nor even unusual. DA-ETCO Ex. 8.0 at 3-4; Tr. 299; DA-ETCO Ex. 2.6 at 9-10. Further, they state, there is no evidence that a 15 fps flow rate by itself increases the risk of any failure of the pipelines or their safety features. Joint Petitioners point out that the flow rate is one of many characteristics that are accounted for in the design, engineering, and operation of the pipeline, which they have done. DA-ETCO Ex. 2.5 at 6; DA-ETCO Ex. 2.6 at 9-10; DA-ETCO Ex. 8.0 at 3-4; DA-ETCO Ex. 8.2 at 24.

Joint Petitioners emphasize that the much more important variable in designing and operating a pipeline is MOP, which PHMSA appropriately focuses on in its regulations. They state that a pipeline’s MOP is based on materials science, a function of the physical characteristics of the pipe itself, and established by federal regulations based on scientific formulas to ensure the safety of a pipeline based on its specific characteristics. The federal pipeline safety regulations governing pipeline design, calculation of the MOP, and hydrostatic pressure testing (conducted as specified in

PHMSA regulations to identify any defects that may exist or that none exist), provide for significant margins of safety, citing 49 C.F.R. §195.106 (specifying a 38% margin of safety in calculation of a pipeline's internal design pressure in most circumstances and greater in certain circumstances); 49 C.F.R. §195.406 (establishment of MOP); and 49 C.F.R. §§195.300-195.310 (requirements for hydrostatic pressure testing, generally at 125% or greater of MOP for at least 4 hours without leakage). DA-ETCO Ex. 2.5 at 5-6. They explain that the pipelines were subjected to hydrostatic pressure testing well above the levels specified in PHMSA regulations, without failure: for Dakota Access and the new portion of ETCO, 125% of MOP, and for twice as long as required by the regulations; and for the repurposed portion of ETCO, between 100% and 105% of the specified minimum yield strength of the pipe, which equates to 139% to 145% of the MOP of the repurposed portion and exceeds the pressure testing requirement of the PHMSA regulation of 125% of MOP. DA-ETCO Ex. 2.5 at 5, 10-11; DA-ETCO Ex. 2.6 at 2; DA-ETCO Ex. 8.0 at 14; Tr. 170-71.

Joint Petitioners state that the current MOP for the Dakota Access pipeline and the new portion of the ETCO pipeline is 1,440 psi; and for the repurposed segment of the ETCO pipeline, the MOP is 900 psi, both calculated (and hydrotested) in accordance with the PHMSA regulations, which provide significant margins of safety. They note that these values will continue to be the MOPs after the new pumping capacity is added and the pipelines are operating at the higher throughput levels. DA-ETCO Ex. 2.5 at 5; DA-ETCO Ex. 2.6 at 2; DA-ETCO Ex. 3.0 at 5; DA-ETCO Ex. 3.1 at 6. Joint Petitioners aver that, consistent with federal safety regulations, the pipelines are approved for and capable of being safely operated at every point and at all times at any pressure up to the MOP in normal operation, and up to 110% of MOP in transient circumstances. The pipelines operate within these limits today and will continue to do so after the new pumping capacity is installed and operating. DA-ETCO Ex. 2.5 at 5; DA-ETCO Ex. 2.6 at 2; DA-ETCO Ex. 3.0 at 5.

Joint Petitioners state that, similarly, there will be no material change in the average operating pressure in the pipelines. DA-ETCO Ex. 8.0 at 12; DA-ETCO Ex. 2.5 at 6, 8; DA-ETCO Ex. 2.6 at 1-2. They state that the higher daily throughput will be accomplished by adding more pump stations. Pump stations increase the pressure on the discharge sides of the pumps, but they create suction, and therefore lower pressure, on the intake sides of the pumps. DA-ETCO Ex. 8.0 at 12; DA-ETCO Ex. 2.5 at 8. Joint Petitioners explain that the net result of adding pump stations is that some locations on the pipelines will experience higher pressures than they experience today, while still operating at less than the MOP, but for every location with a higher pressure there will also be a location with a lower pressure than today. Because these will balance out, the average pressure across the pipeline will be essentially unchanged. DA-ETCO Ex. 8.0 at 12; DA-ETCO Ex. 2.5 at 8. Joint Petitioners emphasize that the pipelines are designed to be, are already, and will continue to be operated safely at any pressure under their MOPs (and above MOP during any theoretical transient circumstances), which will not change. Joint Petitioners conclude that there is no evidence in the record that the pipelines are not designed to be operated safely at the 15 fps flow rate, or that with the higher throughput levels they will be operated at any point above the MOP established in accordance with federal safety regulations.

Joint Petitioners respond to questions raised by SOIL-SC witness Kuprewicz concerning protection of the pipelines against surge overpressure events. The main thrust of his testimony pertained to the concept of “surge,” a sudden increase in pressure in the fluid content in a pipeline that can result in overpressure. Surge overpressure consists of a pressure in excess of the regulatory maximum for transient events, 110% of a pipeline’s MOP, and is typically postulated to occur in the rare occurrence of an inadvertent pump station shutdown or inadvertent closure of a mainline valve (“MLV”) on a pipeline. Joint Petitioners state that the potential for surge overpressure events and how to prevent and mitigate them have always been a part of the engineering for the Dakota Access and ETCO pipelines. DA-ETCO Ex. 2.6 at 2-3; DA-ETCO Ex. 8.2 at 4-5. Dr. Hein’s company prepared a surge analysis prior to the original start-up of the Dakota Access and ETCO pipelines, and surge mitigation devices such as SRVs and surge relief tanks have always been installed at various pump station locations on the pipelines. Joint Petitioners further point out that the original pipeline design, under which the pipelines have been operating since 2017, includes programmable logic controllers (“PLC”) and a Supervisory Control and Data Acquisition (“SCADA”) system to coordinate operation of MLVs and upstream pumps. SOIL-SC Ex. 5.2; DA-ETCO Ex. 2.5 at 3-4.

Joint Petitioners state that, similarly, the possibility of a transient surge pressure event has been taken into account in planning the capacity optimization and the addition of the new pump stations. In January 2019, Dr. Hein was retained to prepare a surge analysis for higher capacity scenarios for the Dakota Access and ETCO pipelines. Tr. 277; DA-ETCO Ex. 2.6 at 2-3; DA-ETCO Ex. 7.3. Moreover, to ensure an extra margin of safety, Joint Petitioners asked Dr. Hein to model the system to remain under 105% of MOP in the event of a surge transient, rather than the 110% threshold required by federal safety rules. DA-ETCO Ex. 7.0 at 3; DA-ETCO Ex. 2.5 at 1-2; DA-ETCO Ex. 2.6 at 4; DA-ETCO Ex. 8.0 at 7; DA-ETCO Ex. 8.2 at 9-10. Joint Petitioners argue that Dr. Hein’s study found that the pipelines’ operating pressures could be maintained under 105% of MOP, even in transient surge situations, if his specific recommendations were followed. DA-ETCO Ex. 7.3 at 3; DA-ETCO Ex. 2.5 at 2-3; DA-ETCO Ex. 8.0 at 7-8. Joint Petitioners have committed to following Dr. Hein’s recommendations. DA-ETCO Ex. 2.5 at 2-3; DA-ETCO Ex. 2.6 at 3. Joint Petitioners state that there is no evidence in the record that Dr. Hein’s recommendations will not be sufficient for the pipelines to be operated safely, just as they have been for nearly three years by following the guidance from his previous surge analysis.

Joint Petitioners respond to six concerns raised by SOIL-SC witness Kuprewicz in his rebuttal testimony concerning the mitigation steps taken by Dakota Access and ETCO based on the surge analysis. SOIL-SC Ex. 5.0. Joint Petitioners note, however, that none of Mr. Kuprewicz’s points questioned Dr. Hein’s analysis, results, or recommendations. DA-ETCO Ex. 7.0 at 1-2; DA-ETCO Exs. 7.1- 7.2.

Joint Petitioners respond to Mr. Kuprewicz’s first two points, which related to whether the surge protection regarding inadvertent MLV closures meets the undefined term “failsafe.” SOIL-SC Ex. 5.0 at 2-6. Joint Petitioners explain that the prevention and mitigation of a surge initiated by an MLV closure involves multiple layers of safety. They state that prevention of surges starts with selection of the MLVs, and that Dakota Access and ETCO utilize valve models with either a 3-minute or 3.9-minute close time (depending

on the MLV's location), which allows oil flow to decrease gradually as an MLV closes, thereby minimizing surge pressures. They state that the manner in which the specific type of MLV used on the pipelines closes also minimizes the pressure that would build up if the MLV closed while oil is flowing. DA-ETCO Ex. 2.6 at 3, 5; DA-ETCO Ex. 8.2 at 10-15. In contrast, surge pressures would be maximized if an MLV suddenly "slammed shut," but this cannot happen with the long closing times and closing patterns of the MLV types used on Joint Petitioners' pipelines. They note that the type of valve used on their pipelines is the best type for preventing surge overpressures, and that Joint Petitioners chose the particular valve type, despite additional costs compared to other commonly used valve types, to provide an additional measure of safety. DA-ETCO Ex. 8.2 at 10-15.

Joint Petitioners state the next layer of protection against surge overpressure events is open flow-path logic. They explain that the PLC is a component of the pipelines' SCADA system. If an MLV is open, it will not close without being commanded to close by remote communications (or manually closed by operating personnel at the valve site). DA-ETCO Ex. 2.5 at 6-8, 14; DA-ETCO Ex. 2.6 at 4; DA-ETCO Ex. 3.5 at 9; DA-ETCO Ex. 8.0 at 9-11; DA-ETCO Ex. 8.2 at 8. Joint Petitioners state that this is a physical, mechanical characteristic of the MLV that does not depend on the PLC or SCADA working correctly. DA-ETCO Ex. 2.5 at 7-8; DA-ETCO Ex. 2.6 at 4; DA-ETCO Ex. 8.2 at 7-8. Further, the actuators on the MLV are programmed to communicate with the upstream pumps in an interlocking way; as soon as the MLV begins to travel (*i.e.*, move) out of an open position, a signal is sent to the upstream pumps to shut down. DA-ETCO Ex. 2.5 at 7-8; DA-ETCO Ex. 2.6 at 4; DA-ETCO Ex. 3.5 at 9; DA-ETCO Ex. 8.0 at 8, 10; DA-ETCO Ex. 8.2 at 7. Joint Petitioners explain that if there is no open flow-path for the oil, the pumps will not run; the system is designed to flow oil only when there is an open flow-path. DA-ETCO Ex. 8.2 at 7-8. Joint Petitioners further point out that each MLV and pump station has both redundant communications systems (both terrestrial cellular and a wholly independent satellite link), and battery backup to the primary commercial power supply from the local utility to operate communications and monitoring systems. DA-ETCO Ex. 3.5 at 8-9; DA-ETCO Ex. 8.2 at 8-9. If there were a failure in the ability to communicate with or control an MLV, the MLV will "fail" (*i.e.*, stop) in its last position. DA-ETCO Ex. 2.6 at 4; DA-ETCO Ex. 8.2 at 8. If the last position were that the MLV is already closed before the loss of communications or power, the upstream pumps would not be running. If the loss of communications and power occurred when oil was still flowing in the pipeline, the MLV would stop in the open position – that is, it would "fail" in a safe position. Tr. 303-304; DA-ETCO Ex. 8.2 at 7-9. Therefore, Joint Petitioners aver, the MLV itself is "failsafe." It is not possible to come up with a plausible scenario where the PLC, the primary and backup power, the primary and backup communications systems, the pump stations, and the MLV all would fail in a way that the MLV would close shut against flowing oil being driven by the pump stations. DA-ETCO Ex. 8.2 at 6-10; Tr. 264-69.

Joint Petitioners state that there are additional layers of protection. They explain that an MLV closing while upstream pumps are still operating will trigger an alarm in the pipeline's control center. DA-ETCO Ex. 8.2 at 9; DA-ETCO Ex. 3.5 at 10. The 3-minute or greater valve closure time provides ample opportunity for control room personnel to shut down upstream pumps.

Joint Petitioners note that Dr. Hein testified that he is personally familiar with many other pipeline companies relying on PLC and SCADA systems to prevent surges at MLVs and that this is the most commonly used solution in the industry (Tr. 302, 327, 340), and that Mr. Godfrey testified that it is the commonly used approach to safety at remote MLVs. DA-ETCO Ex. 8.2 at 7, 18. They state that SOIL-SC-WK provide no evidence to the contrary, nor any testimony as to any better approach.

Joint Petitioners respond to Mr. Kuprewicz's third point regarding surge pressures, in which he called it "misdirection" to run surge models that hold the pipelines to a lower transient pressure than required by federal safety regulations (*i.e.*, 105% of MOP rather than 110% of MOP). SOIL-SC Ex. 5.0 at 6-7. Joint Petitioners state that Mr. Kuprewicz did not and cannot contend that using a more conservative maximum pressure for the surge modeling makes the pipelines either less safe or more likely to have a surge overpressure event; therefore, his point has no relevance. Further, Joint Petitioners argue constructing the pipelines to remain at or below a lower pressure in transient surge scenarios than required by PHMSA regulations may require larger SRVs or surge relief tanks, or different discharge and suction settings at pump stations, which are real, physical safety benefits resulting from designing the pipelines to not exceed a lower pressure than the 110% of MOP specified in federal pipeline safety regulations. DA-ETCO Ex. 8.2 at 9-10; DA-ETCO Ex. 2.6 at 4.

With respect to Mr. Kuprewicz's fourth points, concerning valve types and "C<sub>v</sub>" curves for valves (SOIL-SC Ex. 5.0 at 7-8), Joint Petitioners state that their response to his first two points demonstrated why his discussion regarding valve curves is incorrect. They reiterate that, as explained in their discussion of his first two points, the valve type used by Dakota Access and ETCO on the pipelines serves to reduce surge pressures in the event of an inadvertent MLV closure.

Joint Petitioners state that Mr. Kuprewicz recommended that Joint Petitioners incorporate the guidance in API Standards 520 and 521 for SRV installations. SOIL-SC Ex. 5.0 at 8. Joint Petitioners argue, however, that Mr. Kuprewicz never stated what guidance in API Standards 520 and 521 he believes is important to SRV installations, what guidance he believes Joint Petitioners are not following, or why that guidance is applicable to Joint Petitioners' SRVs or to their pipelines at all. Joint Petitioners state that API Standards 520 and 521 are intended for a different type of valve in an entirely different setting (specifically, slower pressure relief valves at refining facilities), and are of limited applicability, at most, to oil pipeline SRVs. They state that Mr. Godfrey, a former chairman of the API pipeline integrity management committee, testified that API 520 and 521 are not applicable to pump station SRVs. Joint Petitioners also state that the relevant industry standard for the pump station SRVs is ASME B31.4, which Joint Petitioners comply with and which overlaps with any relevant recommendations in API 520 and 521. DA-ETCO Ex. 8.2 at 15; DA-ETCO Ex. 2.6 at 6. Joint Petitioners also claim that Mr. Kuprewicz did not provide any evidence to indicate that Dakota Access and ETCO have not or would not install or use SRVs correctly. Nonetheless, Joint Petitioners note that they already engage in practices recommended under API Standards 520 and 521 that have applicability to their pipelines. *Id.* at 6. They also state that the existing pump stations have SRVs which were correctly installed and have been functioning properly since they were commissioned. Jt. Pet. RB at 54-55.

Joint Petitioners state that Mr. Kuprewicz also claimed that he needed additional information on how a postulated dramatic reduction in the effectiveness of drag reducing agent (“DRA”) was modeled in Dr. Hein’s surge report. SOIL-SC Ex. 5.0 at 8-9. Joint Petitioners explain that DRA is injected into crude oil pipelines to reduce friction between flowing oil and the pipe wall; the smoother flow allows oil to move faster than it otherwise would at any given amount of HP being used to pump the oil. DA-ETCO Ex. 8.2 at 15-16. Joint Petitioners state that it is not clear what phenomenon Mr. Kuprewicz is referencing; there are two possibilities but neither passes common sense review. One possibility is that Mr. Kuprewicz is simply saying that degradation of DRA will exacerbate surge pressures; however, that would be inconsistent with SOIL-SC’s argument that an increased flow rate will increase surge pressures. Joint Petitioners argue that Mr. Kuprewicz cannot logically have it both ways, *i.e.*, that faster flow increases surge risks but also slow flow increases surge risks. They state that DRA is used to reduce friction between flowing oil and the pipe wall; the smoother flow allows oil to move faster than it otherwise would at any given amount of pump station HP being used to pump the oil. DA-ETCO Ex. 8.0 at 4-5. Conversely, absent the effect of DRA (*i.e.*, if it is not used or if it degrades), at a given HP the flow will be slower than if DRA were used and functioning. They argue that if oil is flowing more slowly, the energy available to generate a surge in a transient event is also reduced. Joint Petitioners conclude that there would be no point in having the surge pressure analysis model this condition, because the flow rate will be lower than the throughput rate Dr. Hein actually modeled, which assumed functioning DRA in the pipeline. DA-ETCO Ex. 8.2 at 16-17; DA-ETCO Ex. 2.6 at 3.

Joint Petitioners state that the second possibility in Mr. Kuprewicz’s sixth point is that he is suggesting that DRA can fail so completely and quickly that the flow of oil immediately slows from its with-DRA rate to essentially a no-DRA rate, initiating a surge. They state that this is a speculative hypothetical that lacks any support; Mr. Kuprewicz provided no model or mathematics to show what kind of change of flow rate he believes would occur, and how much pressure that would generate and whether it would be sufficient to create any surge or overpressure at all. Joint Petitioners point out that, more importantly, there is no evidence that the premise of an instantaneous, simultaneous failure of all DRA in the system is physically possible; to the contrary, it is not possible. DA-ETCO Ex. 8.2 at 15-17. They explain that DRA comprises a series of polymer strips suspended in the flowing oil, with each strip independent of the others. While the polymers can break down, each is in a different location and they will break down at different times and different places. Joint Petitioners state that, as a result, the loss of effectiveness of the DRA will be gradual; moreover, the broken-down DRA is replaced by injection of new DRA at each pump station. *Id.* They argue that there is no scenario under which all (or even most) DRA effectiveness throughout the pipeline or a pipeline segment is lost in an instant. Joint Petitioners conclude that there is no merit to Mr. Kuprewicz’s sixth point relating to surge overpressure.

Joint Petitioners conclude that the record shows they have carefully and prudently designed and operated both pipelines, and have designed the pump station additions and capacity expansion to prevent and mitigate surges, using the best available information from qualified experts, and the best available practices, incorporating multiple layers of safety.

Joint Petitioners state that the only other specific issue raised by Mr. Kuprewicz (in addition to the surge protection concerns) related to “integrity management” with respect to the repurposed portion of the ETCO pipeline. They explain that “integrity management” refers to PHMSA regulations (49 C.F.R. § 195.452) which require pipelines located in or which could impact “high consequence areas” (“HCA”) to prepare and implement an IMP. They state that Dakota Access and ETCO are covered by the Energy Transfer IMP for its pipelines, and they conduct integrity management reassessments of the pipeline segments in both HCA and non-HCA areas with the same frequency. DA-ETCO Ex. 2.6 at 8-9; Tr. 172. Joint Petitioners describe the required elements of an IMP, per the PHMSA regulations, and noted that PHMSA routinely reviews and inspects against the IMP manual an operator has prepared to implement 49 C.F.R. § 195.452 and 49 C.F.R. §195.452(l)(i).

Joint Petitioners point out that despite his purported integrity management concerns, Mr. Kuprewicz generally praised the integrity management work conducted for the ETCO pipeline to date, including 2016 hydro testing which “exceed[ed] federal requirements in several important and relevant areas,” and ILI runs performed on the ETCO pipeline in 2019. SOIL-SC Ex. 5.0 at 12-13. SOIL-SC Ex. 5.0 at 12-13. Joint Petitioners note that the “several precautions” Mr. Kuprewicz raised, and in particular the specific caveats in his subparagraphs 2.a. and 2.c. of his comments, are that while the properly conducted testing shows the pipelines are safe today with sufficient safety margins, this is a static picture and can change over time. Joint Petitioners state, however, that SOIL-SC-WK and Mr. Kuprewicz have not shown (and cannot show) that Dakota Access and ETCO will not properly attend to and remediate or mitigate changes that occur over time. DA-ETCO Ex. 2.6 at 10-11 (explaining ETCO’s comprehensive programs to “ensure ongoing integrity of its pipeline”). DA-ETCO Ex. 8.2 at 19 (noting ETCO’s IMP includes future integrity assessments and that any anomalies will be evaluated in future integrity assessments). Joint Petitioners state there is no evidence that they will not engage in appropriate maintenance to ensure the pipelines remain safe into the future. To the contrary, their testing today meets or exceeds federal requirements and supports the conclusion that they engage in good integrity management practices and will continue to do so. Tr. 169-70. Joint Petitioners point out that the evidence shows that they test the integrity of the pipelines regularly, as required by federal regulation and the IMP. DA-ETCO Ex. 3.5 at 7; DA-ETCO Ex. 8.0 at 13; DA-ETCO Ex. 8.2 at 19. They further state that they have evaluated the results of the 2019 testing of the ETCO pipeline and are aware of conditions to monitor going forward. DA-ETCO Ex. 2.6 at 8-9. 10-11; DA-ETCO Ex. 8.2 at 19-20. Most importantly, they state, the evidence is that the repurposed portion of the ETCO pipeline is safe for the capacity optimization. DA-ETCO Ex. 2.5 at 10-11; DA-ETCO Ex. 2.6 at 8-9; DA-ETCO Ex. 8.2 at 19-20; Jt. Pet. IB at 61-62.

Joint Petitioners state that the only other issue regarding the repurposed portion of the ETCO pipeline that has been raised in this case involves the “spec break,” that is, the point where the newly built (2017) portion of the ETCO pipeline meets the repurposed portion and the MOP specification changes from 1,440 psi to 900 psi. Joint Petitioners claim that SOIL-SC have raised unsupported questions, unaccompanied by any evidence, about how the spec break is protected from overpressure. Joint Petitioners state that such “spec changes” on a pipeline are not uncommon, however, and are a

known characteristic that pipeline operators account for in design. DA-ETCO Ex. 8.2 at 23. Joint Petitioners have taken several specific steps to ensure MOP is not exceeded at the spec break. DA-ETCO Ex. 8.2 at 23-24.

First, Joint Petitioners point out that ETCO is not relying solely on friction loss from the Patoka pump station (the preceding upstream pump station) to the spec break to reduce the pressure at the spec break. ETCO has control over the discharge pressure and intake (suction) pressure settings at both the upstream and downstream (from the spec break) pump stations to enable it to control the pressure at points between the pump stations. Tr. 337-38; DA-ETCO Ex. 8.2 at 23-24. The discharge setting at the Patoka pump station will be 1,140 psi, substantially lower, than the MOP of 1,440 psi at that point. DA-ETCO Ex. 7.3 at 57. Joint Petitioners state that, further, a hydraulic model based on the upstream pump station discharge pressure settings and downstream pump station intake pressure settings demonstrates that the pressure will be below 900 psi at the spec break. DA-ETCO Ex. 7.3 at 57; Tr. 309-13 and 338-339; DA-ETCO Ex. 8.2 at 23-24. Joint Petitioners also explain that the pressure as oil flow approaches the spec break is also monitored, by MLVs located between the Patoka pump station and the spec break and on which pressure sensors are installed. If the pressure is not as expected, alarms will sound in the pipeline control center, notifying the operator to take action to reduce the pressure. Finally, they state that a pressure sensor at the spec break itself is set to sound an alarm if the pressure exceeds 900 psi and will automatically shut the Patoka pump station down if pressure at the spec break reaches 105% of MOP (945 psi). DA-ETCO Ex. 8.2 at 23-24; Tr. 357-59. Joint Petitioners conclude that the spec break on the ETCO pipeline has been responsibly accounted for in both current design and operations and in planning for the capacity increase.

Overall, Joint Petitioners conclude that they have built and tested the Dakota Access pipeline and the new portions of the ETCO pipeline to exceed applicable safety requirements, and significantly upgraded and tested the converted portion of the ETCO pipeline to do the same. They state that they have operated both pipelines in a safe manner since they began operation; and that in the capacity optimization project, they have demonstrated the same commitment to safe design, installation, and operation of the proposed additions and improvements.

Joint Petitioners state that surge is well known in the industry, is an engineering consideration for every pipeline, and is addressed in the PHMSA regulation on MOP, which sets the maximum pressure allowed in temporary or transient deviations from normal operations, like a surge. 49 C.F.R. 195.406(b). Joint Petitioners reiterate that they had a surge model developed and run for the initial start-up of the pipelines, and installed surge mitigation equipment on the pipelines from the start. They then retained Dr. Hein to conduct additional surge modeling for the increased volumes prior to filing for approval to install the additional pumping equipment. Tr. 279-80. Joint Petitioners have agreed to follow all of Dr. Hein's recommendations, adding additional protections to the pipeline, and also retained a second expert, Mr. Godfrey, to review the surge analysis, confirm it, and confirm that the mitigation steps would be adequate.

Joint Petitioners state that SOIL-SC fail to explain how a surge overpressure event could actually happen on the pipelines and provided no evidence that it will happen. Joint Petitioners explain that the pipelines have numerous layers of protection against surge

overpressure caused by an MLV closure. The MLVs installed are chosen and designed to address surge in two ways: (a) they have a gradual closure, and default to their then-current position meaning that if there is a problem, the valve does not close; and (b) power and a command are required to close the valve. The system is designed with open flow-path logic. The valves and pumps communicate and are programmed to only pump oil when there is an open path. Therefore, as soon as a valve starts to close, the pumps will shut down. Joint Petitioner further explain that the ability of the valves and pumps to communicate with each other and the control room is protected through redundant communications systems, comprised of entirely independent cellular and satellite communications. The status of the system is monitored, both automatically and manually, and there is backup power to ensure the monitoring and communications capability. Additionally, as a backup to all of these protections, control room operators have the ability to shut down the system based on monitoring and alarms. DA-ETCO Ex. 2.6 at 4-5; DA-ETCO Ex. 8.2 at 5-10, 10-15; DA-ETCO Ex. 3.5 at 8-11; Tr. 264-69.

Joint Petitioners state that the valve type and design used for the pipelines show that they have gone to great expense and care to make the pipelines as safe as possible. DA-ETCO Ex. 8.2 at 12-13. They explain that the MLVs have either a 3-minute or 3.9-minute closure time, and that the particular type of valve installed helps to prevent surge by allowing a very gradual closure, especially as the valve approaches complete closure. They argue that SOIL-SC witness Kuprewicz completely misunderstood the closure characteristics of the particular valve type installed on the pipelines. DA-ETCO Ex. 2.6 at 5-6. Joint Petitioners explain that with the type of valve installed on the pipelines, the valve closes more rapidly in the first 20% of valve closure (still leaving 60% oil flow, so that no surge occurs), but the valve closure becomes more gradual (as compared to other, less expensive valve types that could have been used) after the 20% closure point, which prevents a surge from occurring. DA-ETCO Ex. 8.2 at 10-14. They also point out that a second important safety feature of the MLVs is that they “fail in place.” If something goes wrong, the MLV does not suddenly close; it only does so if commanded, and if there is external power to close the valve; the valve cannot close without external power to drive the valve operator. DA-ETCO Ex. 2.6 at 4; DA-ETCO Ex. 8.2 at 8-9.

Joint Petitioners state that every MLV and pump station has a PLC, and that every valve’s PLC is programmed, consistent with Dr. Hein’s recommendation, such that if the valve begins to move out of an open position, it will immediately signal upstream pumps to shut down. They point out that the PLC and the SCADA systems are tested prior to operation, as well as when there is any subsequent change to the system’s programming or equipment. DA-ETCO Ex. 3.5 at 10; DA-ETCO Ex. 8.2 at 8. The pumps can shut down faster than the 3-minute valve closure time, and flow from the pump will decrease even sooner. As Dr. Hein’s analysis showed, this programming fully mitigates the risk of a surge from an MLV. Additionally, the system has redundant communication links, wholly independent from each other, that use different providers and different technologies, and there is battery backup power in the event the electricity supplier or local utility has an outage. The backup power can run communications and monitoring, including sensors at the valve. DA-ETCO Ex. 3.5 at 8-9. Joint Petitioners state that these components provide further protection against a surge.

Joint Petitioners argue that SOIL-SC did not provide a single example of a known PLC failure on a pipeline, nor an explanation of how a hypothetical surge event on the pipelines could actually happen. They state that SOIL-SC have not explained how an inadvertent MLV closure would occur in normal operations with the MLVs open and upstream pumps operating. Further, since MLVs can only close in response to a command, if a control room operator attempted to close a MLV, he/she would get a signal that oil is still flowing, followed by the PLC signaling the upstream pumps to shut down, so that oil would stop flowing and there would be no surge. If there is a power outage/loss while oil is flowing, the valve will stop in place (open), so again there could be no surge. As another hypothetical, if the pipeline system was not operating, and there was a power failure with an MLV in the closed position, and an operator attempted to restart the system, the open-flow path logic in the pump station would see the closed MLV and not start the pump, so there would be no surge. Joint Petitioners also explain that if the PLC at a pump station fails, the pump station shuts down, stopping the flow of oil. DA-ETCO Ex. 3.5 at 10. Joint Petitioners further state that, contrary to SOIL-SC's assertion, the programmable logic for the open-flow path is not complex; it is based on two states, open and closed for the valve; on or off for the pumps. They reiterate that communication is backed up and is redundant and power is backed up and is redundant. Finally, Joint Petitioners state, even if all the above-described protective measures failed simultaneously, alarms would be activated in the control center if there was a loss of power, loss of communication, loss of a PLC, a MLV closing despite oil flowing, or changes at pressure sensors, and the operator would have several minutes to shut down pump stations, assuring there would be no surge.

Joint Petitioners state that SOIL-SC's technical witness failed both to explain why the layers of protection against a surge were insufficient and to explain what else should be done. Nonetheless, Joint Petitioners' considered and evaluated the only other common option: physical mitigation equipment at the MLV sites. However, as Mr. Godfrey explained, the addition of such equipment actually creates additional risks that outweigh any incremental protection against surge overpressures, and in modern pipelines, as valves, communication systems, and SCADA and PLC software have all improved, engineers have moved away from the use of additional equipment at remote MLVs, for good reason. DA-ETCO Ex. 8.2 at 18. Joint Petitioners note that Mr. Godfrey also testified that "SCADA systems and PLCs are in use and relied on every day on pipeline systems," and that "[t]he technology is well understood and has a long track record of performance;" and that Dr. Hein testified that the use of PLCs on MLVs is "the predominantly accepted mitigation technique for valves away from the stations." DA-ETCO Ex. 8.2 at 7; Tr. 339-40.

Joint Petitioners aver that they are well aware of the "spec break" where the new portion of the ETCO line meets the repurposed portion and that it has been there all along during the three years of the pipeline's operations. They state that they have studied the spec break in connection with planning to increase the transport volume. However, the spec beak issue is unrelated to the increase in the capacity of the pipeline; rather, it is based on the difference between the MOP in the new portion of the ETCO pipeline and the MOP in the repurposed portion – which are the same as they have been since ETCO went into service for oil transportation nearly three years ago, and will remain the same after the pipeline's throughput capacity is increased. Further, Joint Petitioners point out

that Dr. Hein and Mr. Godfrey testified that in their expert opinions, the spec break is safe, given the protections installed. DA-ETCO Ex. 8.2 at 23-24; Tr. 327-29; Tr. 357-60.

Joint Petitioners state that the Dakota Access and ETCO pipelines have a strong safety record. Further, after all the Sunoco-operated pipelines came fully under Energy Transfer Partners (“ETP”) management, control, and practices, their performance greatly improved. DA-ETCO Ex. 3.5 at 4-5. Joint Petitioners point out that for 2019, SOIL-SC Ex. 4.10 shows only five incidents with a total release of approximately 16.5 barrels for Sunoco-operated pipelines. *Id.* They further state that ETP and subsidiaries operate approximately 16,000 miles of liquids pipelines and over 100 liquids pump stations and storage facilities, and after all the systems came fully under ETP management, reportable incidents decreased 50% from 2017 to 2018, and in 2019 ETP pipelines experienced just 1.42 reportable incidents per 1,000 miles of pipeline. DA-ETCO Ex. 3.5 at 4-5. Additionally, SOIL-SC Ex. 4.10 shows just six incidents total for Dakota Access and ETCO: four in 2017, two in 2018, and zero in 2019. They state that two incidents occurred during commissioning, before commercial operation began; in five of the six no product left Dakota Access or ETCO property; and four of the six were releases of less than five barrels. *Id.* Joint Petitioners conclude that there is no evidence that either the recent and current Sunoco/ETP incident figures or the Dakota Access and ETCO-specific results are out of line for the industry or otherwise are cause for any concern.

Joint Petitioners argue that SOIL-SC’s concern about the pipelines’ leak detection systems is based on unsupported speculation about unlikely future events and a misreading of the record. They state that the pipelines’ leak detection system complies with federal pipeline safety rules and the relevant industry technical standards and is a state-of-the-art system. DA-ETCO Ex. 3.1 at 9-10. Since the Commission found Joint Petitioners to be fit in Docket Nos. 14-0754 and 14-0755, the leak detection system software has continued to be upgraded; further, the Capacity Optimization Project will add pump stations to the pipelines with additional monitoring and sensors, as well as additional personnel to monitor for and address any incidents. DA-ETCO Ex. 3.0 at 3; DA-ETCO Ex. 3.1 at 7-8; DA-ETCO Ex. 3.5 at 2-3. Joint Petitioners also state that small leaks can be detected, and that the Computational Pipeline Monitoring system (“CPM”) is set to detect leaks of 1% of flow past a point in an hour. Further, they point out that other information from the extensive array of system sensors on the pipelines’ SCADA system can alert the control center to smaller leaks, and Joint Petitioners also conduct aerial and ground monitoring and other measures as part of their leak detection efforts. DA-ETCO Ex. 3.1 at 10.

Joint Petitioners dispute SOIL-SC’s contention as to whether Joint Petitioners’ anticipated time to respond to a leak after discovery is realistic. Joint Petitioners state that it is not a complex or time-consuming matter for the well-trained operators to shut down the pipelines’ pumps from the control center. They also claim that SOIL-SC’s argument that Joint Petitioners cannot detect or address small leaks is disproven by the last three years of the pipeline system’s operation, as among the small number of minor releases in 2017-2019, the majority were identified and stopped when smaller than five barrels, nearly all of the oil released was contained at the facilities or on company property, and the small amount of oil that escaped company property was quickly remediated. Joint Petitioners state that this experience shows that such small leaks as

do occur are being detected and remedied well before they amount to large volumes of releases.

Joint Petitioners reiterate that the best approach to leaks is to prevent them in the first place, and that, they have gone above and beyond federal pipeline safety requirements to build and operate safe pipelines. They state that, specifically in connection with the capacity increase, they will add, or replace with larger, SRVs and surge relief tanks, will add monitors and sensors, and will add personnel in Illinois to increase the safety of the pipeline and increase the ability to prevent, detect, and mitigate any releases.

### **B. Staff's Position**

Staff asserts the proposed pumping stations will allow the existing pipelines to transport increased volumes of crude oil but will not require or result in an increase in the pipelines' MOP. Staff understands the pipelines will continue to operate within the specifications of the Commission's approvals and Staff has no objection to the proposed design or engineering of the pumping stations or to the subsequent operations of the pumping stations and the pipelines.

Staff notes that safety regulation of petroleum pipelines is, as a matter of federal law, within the jurisdiction of PHMSA. See 49 U.S.C. §5103 (Secretary of Transportation, of whose Department PHMSA is part, charged with regulating safe transportation of hazardous materials); 49 C.F.R. §195.2 (petroleum designated a hazardous material); 49 C.F.R. §195.48, *et seq.* (regulations promulgated, administered and enforced by PHMSA governing construction, operation, testing, maintenance and decommissioning of such pipelines). Staff observes that unlike natural gas pipeline safety, responsibility for safety oversight of hazardous materials pipelines has not been delegated to states, but rather is retained by federal authorities, and inconsistent state requirements are specifically preempted. 49 U.S.C. §§5122, 5125; *cf.* 49 U.S.C. §60105 (states may enforce natural gas pipeline safety regulations by certifying that they are doing so).

### **C. SOIL-SC-WK's Position**

SOIL-SC-WK first note that a facility would not be deemed necessary under Section 8-503 if it was unreliable or unsafe. Similarly, under Section 15-401, an unreliable or unsafe facility or service would not be needed by the public or required by the public convenience and necessity, and an applicant would not be deemed fit and able to provide a service that was unreliable or unsafe.

SOIL-SC-WK next point out that, nothing in the record shows that when Joint Petitioners designed and built the pipelines and integrated the newly built portion of the ETCO pipeline with the older natural gas pipeline, they contemplated any greater oil throughput volume than 570,000 bpd. SOIL-SC-WK emphasize that nothing in Docket Nos. 14-0754, 14-0755, or in the instant docket, indicates that the pipelines were designed with a near doubling of the planned capacity in mind.

SOIL-SC-WK point out that Mr. Kuprewicz had significant concerns over possible surge overpressure. After reviewing Joint Petitioners' direct testimony and related information pertaining to their proposal to increase their pipeline capacity to 1,100,000 bpd, Mr. Kuprewicz expressed his major areas of concern. Included in his list of concerns

were (i) not having been provided (despite being requested in discovery) a pipeline system map showing approximate locations of pump stations and mainline valves, and (ii) the high potential for surge over-pressures exceeding 110% of MOP at what he termed the extremely high actual flow velocities resulting from the increased capacity. Mr. Kuprewicz calculated that the liquid flow velocity will exceed 15 feet/second, which he stated is extreme for crude oil pipelines, and which significantly increases the risk of surge pressure increases. He explained that “surge pressure increases occur within large diameter liquid hydrocarbon pipelines in microseconds and can move up and down many miles along a pipeline system at slightly under one mile per second.” SOIL-SC 2.0 at 8.

Mr. Kuprewicz also expressed concerns about the DRA included in Joint Petitioners’ plans, based on his operational experience with DRA injection on crude oil pipelines. He stated that, while the use of DRA can permit higher flow rates for a given addition of pumping HP, it can further increase the risk of surge resulting from the higher flow velocities. In addition, loss of DRA effectiveness can affect surge pressures.

Mr. Kuprewicz claims two such impacts exist. First, the risks of pipeline rupture and oil spill will increase significantly compared to the pipeline’s existing capacity (which was the capacity described to the Commission in Docket Nos. 14-0754 and 14-0755). Second, in the event of a rupture, the volume of oil released compared to a rupture occurring today would be significantly greater.

Mr. Kuprewicz noted that Joint Petitioners stated that, as designed, the pipelines’ mainline valves can be controlled, and will be operated, remotely. *Id.* at lines 190-191. According to Mr. Kuprewicz, remotely operated mainline valving is subject to being inadvertently closed and must be designed carefully to prevent overpressure. He urged Joint Petitioners to provide sufficient mainline valve design detail to protect against overpressure, such that it can be independently verified that, at the higher flow rate, surge pressure will not exceed 110% MOP. Given the high liquid velocities, Mr. Kuprewicz stated that he does not believe pump station relief valves are adequate to prevent surge overpressures on the mainline pipelines, and that additional safety equipment is likely needed.

Mr. Kuprewicz continued to have concerns regarding the design, operational, and safety aspects of the proposed additional pumping facilities. SOIL-SC Ex. 5.0. The surge protection system for this high flow rate, where surge is a very real risk, appears not to be failsafe to prevent overpressure in excess of 110 % MOP. He stated that additional information is needed from Fluid Flow Consultants (“FFC”). Mr. Kuprewicz is very concerned because he does not view this as failsafe. He states further that the complexity/complications associated with communication (such as satellite or cellular networks) is not failsafe. In addition, software programming in complex SCADA systems is not considered a failsafe protection against surge overpressure, such as are the mechanical SRVs proposed at the pump stations for some causes of surge. *Id.* at 4. Mr. Kuprewicz stated that the surge reports are unclear. He suggested these critically important protections and their ability to failsafe protect against surge overpressure, especially mainline valve closure, need to be clarified by FFC. *Id.* at 5-6.

Mr. Kuprewicz observed that Joint Petitioners witness Hein indicated that he conducted his surge analysis with the intent of limiting operating pressure due to surges

to 105% of MOP rather than to 110% of MOP as provided for in PHMSA regulations. DA-ETCO Ex. 7.0 at 3; *Id.* at 6. He stated that Dr. Heim's approach provides a false sense of assurance that surge risks have been accounted for using this method. If the safety approaches are not failsafe, overpressures can quickly far exceed 110% MOP to a pressure level that would likely cause the pipeline to rupture. *Id.* "This is just one reason that federal pipeline safety regulations (citation in testimony omitted) setting minimum pipeline safety standards require that pipeline operating manuals address an abnormal condition related to "unintended closure of valves or shutdowns." *Id.*

Relying on a control room operator to fix the problem is insufficient, according to Mr. Kuprewicz. The experience of being in a pipeline control room while a control center operator tries and fails to stop a mainline valve that is unexpectedly closing on its own makes it obvious why failsafe protection on a pipeline moving at high velocities is necessary to prevent surge overpressure. *Id.* at 6-7.

Mr. Kuprewicz stated that SRVs are special fast acting overpressure protection devices that can actually contribute to mainline surge overpressure. He stated that he has observed rapid overpressures in mainline pipelines in microseconds if SRVs are not properly installed, designed, calibrated, and maintained. Mr. Kuprewicz recommended that Joint Petitioners incorporate into the relief valve installations the guidance contained in API Standards 520 and 521, as these standards help protect against improper installation. *Id.* at 8-9.

Mr. Kuprewicz further addressed the potential adverse effects of injecting DRA into the pipelines, which is a component of Joint Petitioners' plans to increase oil volume throughput. His experience with DRA in crude oil systems is that the material does not take shear well and its effects can disappear quickly. If the DRA breaks down, a pipeline may experience a large volume of crude oil slowing down very quickly. A fast change from the high velocity Joint Petitioners plan to a significantly lower velocity can lead to a dangerous situation. *Id.* at 8.

Joint Petitioners witness Stamm was asked about PHMSA's role pertaining to Joint Petitioners' proposal. He acknowledged that a PHMSA permit or approval is not required for the project. Tr. at 215-16.

Mr. Frey admitted that (conservatively) setting the limit for the surge analysis at 105% MOP, instead of 110%, is meaningless if the safety features called for do not work. Tr. at 237. At Energy Transfer's control center in Houston, a single operator is responsible for monitoring the entire DA-ETCO pipeline, from North Dakota to Texas. Tr. at 240. The operator in Texas controls the equipment located along the pipeline in Illinois remotely, via cellular communication, with satellite backup. Tr. at 244. While mainline valves have backup battery power for communications, commercial (utility) power is required to actuate (open or close) a valve. *Id.* at 245. While a loss of communication is "pretty rare," it "can happen." *Id.* at 245-46.

In summary, SOIL-SC-WK contend that the evidence shows that the design and operational components and plans for the proposed additional pumping capacity and injections of DRA, with the significantly high fluid flow velocity, give rise to significant risks, risks of a pipeline rupture and risks of significant crude oil spill volumes in the event of a rupture. If any of the valves and other safety equipment do not work as designed, if the

PLC software is not kept current, if the satellite and cellular communications experience outages, if the utility electrical power experiences an outage, if the single operator in the Houston control center is not sufficiently attentive or trained to react quickly and correctly, SOIL-SC-WK point out that a catastrophic rupture and release could occur. They argue that Joint Petitioners have not made a sufficiently convincing showing for their proposed project to be approved.

As SOIL-SC-WK note, Joint Petitioners openly acknowledge that they cannot detect leaks less than 1% of the throughput on the pipelines. SOIL-SC Ex. 4.13. This means, by Joint Petitioners' own calculation, that at a flow rate of 1,100,000 bpd, in one hour 458 barrels of crude oil can escape undetected. Even at the current throughput of 570,000 bpd, Joint Petitioners witness Stamm acknowledges that 237.5 barrels could escape over one hour without detection. DA-ETCO Ex. 3.5 at 2. With regard to Mr. Klingele's concern with leaks (see generally Klingele Exs. 2.0 and 2.1) and his observation that leaked oil can rise to the surface and contaminate farmland, Mr. Stamm responds, "Whether leaked crude oil will rise to the surface, and if so within what time period, in a leak at a particular location, will depend on a number of site-specific conditions including soil and rock type and condition at the location, pipeline burial depth, elevation, surface gradient, and other factors." DA-ETCO Ex. 3.5 at 3. In other words, according to SOIL-SC-WK, given Joint Petitioners' admitted inability to detect "small" leaks (*i.e.*, leaks that can release 457 barrels, or over 19,000 gallons, in one hour), such a leak could continue for hours or perhaps days undetected by Sunoco Pipeline or anyone at the site if the crude does not rise to the surface due to the circumstances at the site of the leak. SOIL-SC-WK find no reassurance in Mr. Stamm's offer that the probability of detecting a small leak "will increase as the volume imbalances increase." *Id.* at 7. They note that Joint Petitioners have not indicated how much time needs to pass before a volume imbalance is detectable. SOIL-SC-WK find Joint Petitioners' lack of concern over these undisputed facts to be shocking. As with Sunoco Pipeline's operational track record, SOIL-SC-WK conclude that apparently this level of risk to others and their property is acceptable to Joint Petitioners and their owners.

SOIL-SC-WK note that Joint Petitioners proclaim that PHMSA has exclusive jurisdiction over design and operational safety matters for their pipelines, preempting state authority. They view Joint Petitioners' position to be that the Commission should turn a blind eye to any factors involving the design, operation, maintenance, and safety and risks pertaining to their pipelines. First, no one questions that no permit or approval by PHMSA is required for the proposed project. Secondly, as SOIL-SC-WK explain, the Commission is well within its authority to examine and consider such factors in determining whether the project is in the public interest, particularly the interest of Illinois citizens and other affected constituents. By doing so, SOIL-SC-WK assert the Commission would be fulfilling its statutory mandate and not "regulating" Joint Petitioners and the pipelines.

Because Joint Petitioners readily admit that they cannot detect "small" leaks capable of releasing up to 458 barrels of crude in one hour and can offer only a rudimentary explanation of their ability to respond to operating problems within minutes, SOIL-SC-WK contend the Commission should not find that Joint Petitioners have met

their burden to demonstrate that their proposal is in the public interest under Section 8-503.

#### **D. LIUNA's Position**

The Laborers Union and other trades will be instrumental as workers who build the project. These workers have the background, training, and experience to ensure that this project is built to the highest standards. LIUNA alone invests about \$100 million a year in skills training for construction workers through more than 70 mobile and fixed training centers. Those centers offer 164 hours of pipeline specific training. Safety training includes safe work practices to avoid injury which is critical to workers, families and employers, and procedures that help avoid an adverse impact on the environment.

#### **E. IBEW's Position**

IBEW encourages the Commission to take into account the significance of the facts that the original pipeline construction and installation for the Dakota Access pipeline and ETCO pipeline in Illinois was performed by contractors using skilled, well-trained workers from the IBEW Local 702 and other construction trades unions, and that construction and installation of the proposed additional facilities in Illinois is also expected to be conducted by skilled workers from the IBEW and other construction trades unions.

#### **F. Commission Analysis and Conclusion**

The Commission notes that the information provided by Joint Petitioners shows that in the proposed design or engineering of the pumping stations and the subsequent operations of the pumping stations and the pipelines, they have taken and will continue to take comprehensive efforts to ensure safe and reliable operation of the pipelines, including at the higher throughput levels after adding the proposed pumping equipment. However, the Commission agrees with Staff that the safety regulation of petroleum pipelines is, as a matter of federal law, within the jurisdiction of PHMSA. The responsibility for safety oversight of hazardous materials pipelines has not been delegated to states, but rather is retained by federal authorities, and inconsistent state requirements are specifically preempted. 49 U.S.C. §§5122, 5125; *cf.* 49 U.S.C. §60105. Therefore, the Commission will not rule on this issue.

### **V. OTHER – INTERSTATE COMMERCE ACT COMPLIANCE**

#### **A. Joint Petitioners' Position**

Joint Petitioners note that SOIL-SC express concerns that two of the shippers with long-term capacity contracts on Joint Petitioners' pipelines are subsidiaries of indirect equity owners of Dakota Access and ETCO. SOIL-SC Ex. 9.0 at 2-5. Joint Petitioners point out that these shippers are current shippers and are not shippers that Joint Petitioners are unable to serve because they hold contracts for capacity in excess of the current maximum 570,000 bpd throughput. One of the shippers is a subsidiary of Marathon Petroleum Corporation ("MPC"), which is part owner of an entity that owns a partial equity interest in Dakota Access and ETCO; the other shipper is a subsidiary of Phillips 66, which holds an indirect 25% ownership interest in Dakota Access and ETCO. DA-ETCO Ex. 1.0 at 2-3. Joint Petitioners state that the practice of a pipeline's affiliates shipping on that pipeline is lawful, common in the pipeline industry, and irrelevant to the need analysis.

First, Joint Petitioners note that, federal law allows an interstate common carrier oil pipeline to provide transportation service on its pipeline to an affiliated shipper. In amending the ICA in 1906 to bring oil pipelines under the ICA, Congress included an amendment to prohibit railroads from transporting any product in which the railroad had a direct or indirect interest (49 U.S.C. §1(8)), thereby prohibiting affiliated shippers of a railroad from transporting goods on that railroad. However, Congress did not extend this prohibition to common carrier oil pipelines. DA-ETCO Ex. 10.0 at 3-4; DA-ETCO Ex. 6.5 at 4-5. Joint Petitioners also state that FERC, which regulates interstate oil pipelines under the ICA, has long deemed it lawful for shippers (both affiliates and non-affiliates of a pipeline) to enter into long-term volume commitment contracts with pipelines, at preferential rates and terms of service compared to those offered to uncommitted or “walk-up” shippers, without violating the ICA’s prohibition on undue discrimination or preference among shippers, as did the Interstate Commerce Commission, which regulated interstate crude oil pipelines under the ICA before Congress moved jurisdiction to FERC. DA-ETCO Ex. 10.0 at 6-7; *Express Pipeline P’ship*, 76 FERC ¶ 61,245, *reh’g denied*, 77 FERC ¶61,188 (1996); *Dakota Access, LLC and Energy Transfer Crude Oil Co., LLC*, 149 FERC ¶61,275 (2014); *Sea-Land Serv., Inc. v. Interstate Commerce Comm’n*, 738 F. 2d 1311, 1316-17 (D.C. Cir. 1984).

Second, Joint Petitioners state, there is nothing unusual about interstate oil pipeline companies having multiple owners; pipeline companies have long found multiple ownership or joint-venturing is the most effective means of developing these capital-intensive projects. DA-ETCO Ex. 6.5 at 6-8. Joint Petitioners note that interstate oil pipelines are enormously capital-intensive projects, so the initial developer has good reasons to welcome co-owners to share the capital investment burden and risk; further, the additional owners/investors, particularly if they are industry participants (such as a refiner operating in the pipeline project’s destination market), may have incentives to assist the project to come to fruition. *Id.* Joint Petitioners point out, however, that the additional investor’s participation in the project does not give it an advantage over other shippers in obtaining transportation capacity and service on the pipeline, because if the owner/investor (or an affiliated shipper) wants to ship oil on the pipeline, it must participate with other potential shippers in the pipeline’s open season and accept the same tariffed rates and other terms and conditions as other shippers on the pipeline, whether affiliates or not. *Id.* at 8; DA-ETCO Ex. 1.10 at 5-6. Joint Petitioners state that they fully comply with these requirements.

With respect to the transactions singled out by SOIL-SC, Joint Petitioners explain that the shipper subsidiaries of MPC and Phillips 66 entered into “precedent agreements” with attached proposed TSAs, which specified that if Joint Petitioners held an open season for capacity on the pipelines, the shipper will have been deemed to have submitted, in the open season, a binding commitment for capacity in the amount specified in the agreement. DA-ETCO Ex. 1.10 at 3-4; Tr. 437-39. The precedent agreements also specified that in the event the aggregate amount of capacity requested by all shippers in the open season exceeds the amount of capacity offered or available, the shipper with the precedent agreement will be subject to allocation of the available capacity, just like all other shippers participating in the open season, which may result in the shipper receiving less capacity than specified in the precedent agreement or attached TSA. As a result, the shipper that enters into a precedent agreement does not thereby receive or hold any

advance claim or reservation of capacity relative to other shippers requesting capacity in the open season. DA-ETCO Ex. 1.10 at 3-4; Tr. 437-39. Moreover, Joint Petitioners state, if during the open season, other shippers request changes to the form TSA and Joint Petitioners agree, the TSA attached to the precedent agreement is modified to conform to the revised terms of the form TSA, and all interested shippers, both affiliates and non-affiliates, are given notice and opportunity to enter into a TSA with the revised terms. DA-ETCO Ex. 1.10 at 4; Tr. 396-97, 437-39. Thus, Joint Petitioners explain, at the end of the open season, all shippers entering into binding commitments for capacity, including the shippers with precedent agreements, must agree to the same TSA terms in order to secure capacity on the pipelines. Joint Petitioners also note that in addition to applying to the shipper affiliates of MPC and Phillips 66, the open season procedures just described also applied to the open seasons in which shippers that are subsidiaries of Joint Petitioners' parent company, Energy Transfer, participated. They state that these procedures are typical and common in the oil pipeline industry. DA-ETCO Ex. 1.10 at 4-5.

Joint Petitioners also explain that the shipper subsidiaries of MPC, Phillips 66, and Energy Transfer do not receive discounts to, or other reductions in, the rates applicable to unaffiliated contracted shippers. All shippers, both affiliates and non-affiliates, choosing a particular service offering are subject to Joint Petitioners' same tariffs for that service, which are incorporated into their TSAs, including the same rates and charges for capacity and service. DA-ETCO Ex. 1.10 at 5-6.

Joint Petitioners also respond to SOIL-SC's concern that Energy Transfer and MPC provided parent guaranties to Joint Petitioners for the contractual obligations of Energy Transfer's and MPC's shipper subsidiaries on Joint Petitioners' pipelines. SOIL-SC Ex. 9.0 at 5-6. Joint Petitioners state that their credit policies for shippers apply equally to all shippers, whether affiliated or non-affiliated. They explain that under these policies, if a shipper does not have an investment grade credit rating, the shipper must provide additional credit enhancement, which may include (among other options) a parent guaranty. Joint Petitioners point out that these requirements apply equally to all shippers, and they have received parent guaranties on behalf of both affiliated and non-affiliated shippers. DA-ETCO Ex. 1.10 at 9; DA-ETCO Ex. 10.0 at 11-12.

Joint Petitioners state that these types of transactions cited by SOIL-SC have long been lawful for oil pipelines under the ICA; and that the fact that MPC and Phillips 66 acquired indirect equity interests in Joint Petitioners is not relevant to, and does not affect the legality of, TSAs entered into by their shipper subsidiaries on Joint Petitioners' pipelines. They note that the open seasons Joint Petitioners conducted, in which the TSAs with shipper affiliates of MPC and Phillips 66 were executed, were open to all shippers on equal, non-discriminatory terms, and consistent with FERC requirements to comply with the ICA's anti-discrimination provisions; and that an affiliated shipper may lawfully agree to terms offered through an open season and available to all shippers. Finally, Joint Petitioners state that their credit and financial assurance requirements have been consistently applied to all shippers, both affiliates and non-affiliates.

Joint Petitioners dispute SOIL-SC's assertion that the "relationship" of MPC's and Phillips 66's equity investments in Joint Petitioners to the contracts for capacity on the pipelines by subsidiaries of MPC and Phillips 66 constitute examples of transactions by

which an affiliate of a shipper makes an equity investment in a pipeline company (or its owner) tied to, or conditioned upon, the shipper making a commitment to contract for capacity on the pipeline. Joint Petitioners reiterate that the shipper subsidiaries of MPC and Phillips 66 could have participated in an open season and entered into TSAs for capacity, on the same terms as other interested shippers, even if MPC and Phillips 66 had not acquired equity interests in Joint Petitioners. They state that they did not condition an award of capacity to the shipper subsidiaries of MPC and Phillips 66 on MPC and Phillips 66 committing to purchase equity interests in Joint Petitioners' pipelines; MPC's and Phillips 66's shipper subsidiaries could have participated in an open season and acquired contracts for capacity on the pipelines even if MPC and Phillips 66 had not acquired equity interests in Joint Petitioners. Further, they said, SOIL-SC have not shown anything unlawful about MPC and Phillips 66 acquiring equity ownership interest in the pipelines, about MPC's and Phillips 66's shipper subsidiaries entering into contracts for capacity and service on the pipelines, or about the "relationship" between the two sets of transactions.

Joint Petitioners responded to SOIL-SC's arguments based on FERC's order in *Magellan Midstream Partners, L.P.*, 161 FERC ¶61,219 (2017) ("*Magellan*"), which is still in the rehearing process at FERC. Joint Petitioners argue that in *Magellan*, a pipeline company, filed a petition with FERC for a declaratory order, stating that it planned to form a "marketing affiliate" and describing the proposed activities of the to-be-formed "marketing affiliate." FERC denied the request for declaratory order, stating that "taken together," the transactions *Magellan* planned for the marketing affiliate to engage in would violate provisions of the ICA, primarily the prohibition of rebates by a pipeline to shippers. *Id.* at 11. Joint Petitioners note that based on the description of the proposed activities of the "marketing affiliate" in *Magellan*, it was a new company being formed by *Magellan* as an alter ego specifically for the purpose of engaging in transactions that, if engaged in by *Magellan* itself, would violate the ICA. However, Joint Petitioners point out that notwithstanding its denial of *Magellan*'s specific request, FERC made it clear that it is perfectly lawful and appropriate for a pipeline's affiliate to ship crude oil on the pipeline. *Magellan*, 161 FERC ¶ 61,219 at 12.

The creation of a Marketing Affiliate by an oil pipeline is permissible under the ICA [Interstate Commerce Act], and does not require [FERC's] express permission. Marketing Affiliates of oil pipelines have become commonplace in the industry. As *Magellan* notes in its Petition, in passing the Hepburn Act, Congress specifically rejected any prohibition against oil pipelines shipping products in their own name and on their own pipelines. Similarly, a Marketing Affiliate may ship on an affiliated/parent pipeline. By definition a pipeline is a common carrier, and is bound by the ICA to ship product as long as a reasonable request for service is made by a shipper, including affiliates. Affiliates are also allowed to participate in open seasons, just as non-affiliated shippers are. Under [FERC's] standards, the same rates, terms, and conditions are required to be offered to similarly situated shippers.

Joint Petitioners discuss and distinguish four Supreme Court decisions FERC cited in *Magellan*, in which violations of the ICA were found. They state that the cases involved

railroads not pipelines, were decided in the early 1900s, and involved fact situations inapplicable to Joint Petitioners, including acts or practices in which Joint Petitioners have not engaged. Jt. Pet. RB at 71-72.

Joint Petitioners point out that three other Supreme Court cases cited by SOIL-SC-WK did not involve pipelines, any factual situations remotely analogous to this proceeding, or any conduct in which Joint Petitioners have engaged. *Id.* at 72-73.

Joint Petitioners dispute SOIL-SC-WK's argument based on a statement in a filing made by Energy Transfer in the rehearing proceeding in the *Magellan* case that Energy Transfer is aware of unaffiliated third-party shippers transporting product on its pipelines at times when the price differential for the product between the originating location of the shipment and the destination is lower than the applicable filed tariff rate and that it would be discriminatory for an affiliated shipper to be prohibited from engaging in the same transactions in which an unaffiliated shipper engages. Joint Petitioners state that this statement, which was not specific to Dakota Access and ETCO, did not assert that any pipelines or shippers owned by Energy Transfer engage in such practices; rather, it only points out, accurately, that prohibiting a shipper affiliated with a pipeline from shipping crude oil when the price differential for the product is lower than the tariffed transportation rate would preclude an affiliated shipper from engaging in transactions that are permissible for a non-affiliated shipper. They state that Energy Transfer was simply arguing for equal regulatory treatment of affiliated and non-affiliated shippers; and that in any event the statement did not support SOIL-SC-WK's allegations that Joint Petitioners have somehow violated the ICA. Jt. Pet. RB at 74-75.

Joint Petitioners also dispute SOIL-SC-WK's argument based on a one-paragraph description of the *Magellan* proceeding in Energy Transfer's 2018 10-K. Joint Petitioners note that the statement reported that the *Magellan* case was on rehearing, that there were numerous requests filed for rehearing or clarification, and (as is typical for 10-K disclosures of pending proceedings) that "[w]e are unable to predict how FERC will respond to such requests." It also stated that FERC's determination may have an impact "on the way a marketer of crude oil or petroleum products that is affiliated with an interstate pipeline can price its services" and that "[d]epending on how FERC responds [to the requests for rehearing or clarification], it could have an impact on the rates we are permitted to charge." Joint Petitioners state that read in context, the statement cited by SOIL-SC-WK referred to prices charged by shippers, not by pipelines. Joint Petitioners again note that the statement cited by SOIL-SC-WK was part of a discussion in the 10-K of the regulation of all of Energy Transfer's crude oil, natural gas liquids, and products pipelines, and it did not state that Dakota Access or ETCO have engaged in any of the practices that FERC declined to approve for *Magellan's* proposed marketing affiliate. Jt. Pet. RB at 75-76.

Joint Petitioners state that there were numerous significant flaws in an exhibit prepared by SOIL-SC witness Stuckey, which purported to show that "during several months," there were "several instances of losses experienced by the shipper" due to the crude oil price differential between the Bakken region and Nederland, Texas, being less than the tariffed shipping cost. SOIL-SC Ex. 4.6. Joint Petitioners argue that the exhibit contained no analysis of any individual shipper transactions, and was seriously flawed, unreliable, not based on verifiable data, not representative of actions of long-term

shippers on Joint Petitioners' pipelines and did not support the assertions SOIL-SC contended they support. Joint Petitioners observe that to prepare his exhibit, Mr. Stuckey took monthly published spot West Texas Intermediate ("WTI") Index crude oil prices at Cushing, Oklahoma, and applied "adjustment[s]" reported by a service called NE2 Group ("NE2"), apparently based on a limited number of transactions in North Dakota, at Patoka, and at Nederland, to create purported monthly spot prices at each of those three locations. Petitioners note that Mr. Stuckey acknowledged that the "prices" he derived were not based on published price indexes for these locations. Tr. 578. Mr. Stuckey then calculated a difference between these assumed prices at Patoka and Nederland, on the one hand, to the assumed prices in North Dakota plus the Dakota Access and ETCO transportation rates, on the other hand, to see if the prices at Patoka or Nederland were more or less than the price at North Dakota plus the transportation rate. Joint Petitioners point out that no witness from NE2 was provided to testify on how NE2 developed the "adjustments" between the reported WTI Index prices at Cushing and the prices in North Dakota, at Patoka, and at Nederland, and Mr. Stuckey provided no explanation or literature from NE2 to describe how NE2 collected its data, from whom it collected its data, or how it calculated the "adjustments." Tr. 578-84. Joint Petitioners state that there is no basis on which the Commission can evaluate whether the prices Mr. Stuckey calculated for North Dakota, Patoka and Nederland based on the NE2 "adjustments" are in any way representative of actual prices at those locations in the respective months.

Joint Petitioners also state that the NE2 "adjustments" Mr. Stuckey used, and therefore the monthly prices in North Dakota and at Patoka and Nederland, were based on a limited volume of crude oil shipments compared to the total volumes shipped from North Dakota on the Dakota Access pipeline each month. Joint Petitioners illustrate this with a table on pages 77-78 of their Reply Brief showing the number of barrels per day of shipments used by NE2 compared to the total bpd shipped on Dakota Access in each month from July 2017 to December 2019.

Joint Petitioners point out, as another flaw, that in developing the purported crude oil prices in North Dakota, Mr. Stuckey used only the NE2 "adjustment" each month at a single location in North Dakota at which shippers deliver oil into the Dakota Access pipeline, even though shippers deliver oil to Dakota Access at multiple points in North Dakota, and the NE2 data available to Mr. Stuckey showed different "adjustments" for these other locations in the Bakken region. Tr. 680-82, 686-88; DA-ETCO Cross Ex. 3.

Joint Petitioners state that their witnesses provided multiple other reasons why Mr. Stuckey's analysis is unreliable and unrepresentative of real-world shipper activities. They note that Mr. Stuckey's starting point, the Cushing, Oklahoma WTI Index prices, are highly sensitive to particular conditions at Cushing and are not relevant for actual prices at other locations. Further, the NE2 spot prices cannot be held to apply any particular transaction by a shipper. Dakota Access-ETCO Ex. 6.2 at 18. Additionally, Joint Petitioners state, shippers with a long enough perspective to enter into multi-year pipeline transportation contracts do not buy and sell oil for shipment at the kind of spot prices used in Mr. Stuckey's exhibit; rather, such long-term shippers will take steps to protect against short-term price risks by entering into hedging contracts against future price changes or avoiding the spot market altogether. *Id.* at 18-19. They aver that Mr. Stuckey's analysis ignored that shippers with long-term transportation contracts likely will have entered into

long-term contracts for purchase and/or sale of oil, or otherwise hedged against short term price movements; therefore, the actual prices they pay to buy and receive when selling crude oil will be different than monthly spot prices such as depicted on Mr. Stuckey's exhibit. DA-ETCO Ex. 6.2 at 19.

Joint Petitioners further state that Mr. Stuckey's analysis and the hypothetical transactions it depicts are incomplete and unrealistic, as those type of hypothetical transactions would only possibly be engaged in by day traders operating solely in spot markets. Joint Petitioners' witness Emery stated that, based on his years of experience in the oil industry, shippers do not enter into long-term pipeline transportation capacity contracts, which account for most of the crude oil shipped on Dakota Access and ETCO pipelines, in order to ship crude oil that they will buy and sell in the future at spot prices at the injection and receiving locations. Rather, shippers enter into long-term pipeline transportation capacity contracts to either deliver product that they produce to a liquid market or to ensure the availability of a consistent supply of feedstock to an end user such as a refinery. He stated that the economics used by these customers are entirely different, more complicated, and party specific as compared to the simplistic and unrealistic scenario depicted on Mr. Stuckey's exhibit. Finally, Mr. Emery pointed out that if shippers on Dakota Access and ETCO pipelines were frequently "under water" in purchasing crude oil in the Bakken region, shipping it on Dakota Access and ETCO pipelines to Patoka and Nederland, and selling the oil at the destination point, at an overall loss, then the majority of the production in the Bakken would be under water and Joint Petitioners' pipelines would not be receiving the substantial volumes of crude oil they receive for shipment. DA-ETCO Ex. 1.6 at 17-18.

Joint Petitioners argue that, for the reasons summarized above, SOIL-SC-WK's description of how Marathon could hypothetically profit from a "capacity for equity arrangement," even while buying and selling crude oil at a loss, is completely without foundation. They state that a large, sophisticated market participant such as Marathon Petroleum Company L.P. ("MLP") would not enter into a long-term transportation capacity commitment with the intention of engaging in unprofitable purchase and sale transactions. Moreover, as the owner of major U.S. refining operations, including one of the four refineries in Illinois, Marathon would be focused on the delivered price of crude oil to its refineries as an input into its production of refined products. Joint Petitioners also argue that MPC, as holder of an indirect partial equity interest in Joint Petitioners, receives (through intermediate companies), distributions from Joint Petitioners, but the distributions are MPC's return on its equity investment and are not tied to particular shipping transactions and, in particular, not to shipments by MPC's subsidiary MLP. Joint Petitioners state that distributions are paid to the owners on a pro rata basis based on the respective amounts of their equity investments. Joint Petitioners point out that in discovery, SOIL-SC-WK were provided with copies of the agreements by which Energy Transfer, MPC, Enbridge, and Phillips 66 hold equity interests in Joint Petitioners (or their immediate parent companies), and SOIL-SC-WK have not pointed to any provisions in these agreements by which the owners receive distributions other than based on their proportionate equity investments.

Joint Petitioners state that during the course of this case, SOIL-SC-WK were provided with copies of all of Joint Petitioners' TSAs with shippers, and conducted follow-

up discovery and submitted testimony based on their review of the TSAs, but SOIL-SC-WK found nothing in these contracts that violates the ICA. Joint Petitioners also note that the record shows that no complaints have been filed at FERC against either Dakota Access or ETCO alleging that affiliated shippers of Joint Petitioners have received any preferential treatment, including preferential access to pipeline capacity, preferential service on the pipeline, or rebates or discounts. DA-ETCO Ex. 10.0 at 5.

Finally, with respect to SOIL-SC-WK's argument that the same practices they contend violate the ICA also violate Section 8-101 of the Act (220 ILCS 5/8-101), Joint Petitioners conclude that SOIL-SC-WK cite no additional facts or any Commission orders or court decisions concerning discrimination by common carrier pipelines under Section 8-101. Joint Petitioners aver that because SOIL-SC-WK's arguments that Joint Petitioners have violated the non-discrimination provisions of the ICA are groundless, their argument that Joint Petitioners have violated Section 8-101 are also groundless.

### **B. SOIL-SC-WK's Position**

SOIL-SC-WK note that the ICA and its companion statute, the Elkins Act of 1903 (49 App. U.S.C. §§41-43 (1903)), were both designed to prevent discrimination and rebates. While both statutes were initially limited to rail and water carriers, their reach was subsequently extended to cover interstate oil pipelines. The ICA provides in pertinent part:

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

49 U.S.C. § 60502; 49 App. U.S.C. § 2 (1988).

Under the relevant portion of the Elkins Act:

[I]t shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act . . . whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof.

49 U.S.C. § 60502; 49 App. U.S.C. §§ 41(1), 43 (1988).

SOIL-SC-WK aver that courts have historically interpreted the ICA and Elkins Act broadly. In support of such broad interpretation, they quote applicable language from cases decided by the U.S. Supreme Court in which different types of discrimination or rebates were held to be illegal. As noted above, while initially applicable mainly to railroads, the ICA and Elkins Act were also made applicable to interstate common carrier oil pipelines by a statutory amendment in 1906 (the Hepburn Act), which statute also added a provision, referred to as the commodities clause, that prohibits a railroad from transporting any commodity which it owns in whole or in part, except to the extent such commodity is for the use of the railroad. The commodities clause was not extended to the pipelines. As SOIL-SC-WK point out, however, the presence or absence of the commodities clause has not been determinative as to discrimination or rebate issues.

SOIL-SC-WK point out that, in reaching its conclusions, FERC cited and relied upon, as precedent, several of the older Supreme Court decisions in railroad cases. *Id.*, ¶ 14. FERC cited three cases wherein the Court held the subject transactions violate the ICA's prohibition against rebates. One cited case was *N.Y., New Haven & Hartford R.R. Co. v. Interstate Commerce Comm'n*, 200 U.S. 361, 392 (1906) ("*New Haven*"). In that case, the Chesapeake & Ohio Railway purchased and transported coal under contract with the New Haven Railroad. The Court found that the coal company/carrier/seller bought and sold the coal without reference to whether the net result to it would realize its published [transportation] rates. *Id.* It is not a factor whether the carrier intended to violate the statute, but instead whether the effect of the acts done violate those prohibitions. *Id.* at 398.

SOIL-SC-WK believe *U.S. v. Braverman*, is applicable, wherein an individual who worked for a shipper had been charged with soliciting concessions and rebates respecting shipments of the shipper's goods by an interstate motor carrier. *U.S. v. Braverman*, 373 U.S. 405 (1963). There was no allegation that the shipper benefitted from the rebate. The district court had dismissed an indictment brought against the individual under the Elkins Act because any alleged advantage or discrimination in favor of the shipper was lacking. The Supreme Court reversed, stating that the Elkins Act outlaws solicitations of rebates by anyone, without regard to who may benefit. *Id.* at 406. Quoting portions of the statute, the Court stated that the Elkins Act "aims in unmistakable language at preserving published tariffs inviolate." *Id.*

SOIL-SC-WK referred to and described relevant portions of the record to demonstrate how and why they believe Energy Transfer and Joint Petitioners have violated the ICA and the Elkins Act. SOIL-SC witness Stuckey provided testimony pertaining to the possibility of shippers affiliated with a pipeline shipping at a loss. SOIL-SC Ex. 4.0 at 10-12. Mr. Stuckey compared crude oil prices in the Bakken region to the prices at Nederland, Texas, during certain months, and then factored in DA-ETCO tariff shipping rates. Based on these comparisons, Mr. Stuckey found several instances of losses experienced by the shipper. *Id.* The losses resulted from the crude price differential between Bakken and Nederland during the same month being less than the tariff shipping cost. SOIL-SC-WK contend the situation Mr. Stuckey described is similar to what Magellan Midstream described to FERC. They argue that as the case law shows (e.g., *New Haven; Magellan*), in a transaction like that described by Mr. Stuckey, under

the ICA the law will presume that, for a shipper affiliated with the pipeline carrier, the carrier effectively granted a discount in the transportation rate. Such a transaction would be in violation of the ICA, including the prohibition against rebates and discrimination.

Joint Petitioners witness Emery's attempt to discredit Mr. Stuckey as having performed "a seriously flawed analysis" and discredit his description of hypothetical shipping transactions is, according to SOIL-SC-WK, belied by his own company's filing at FERC. Energy Transfer contended in its *Magellan* filing that affiliated shippers should be allowed to ship at times when the price differential is lower than the applicable transportation tariff rate. SOIL-SC-WK deem Energy Transfer's advocacy for the kind of transaction Mr. Stuckey described, but which Mr. Emery dismissed as unrealistic, to be contrary to Mr. Emery's claims that such transactions are antithetical to the way business is conducted. SOIL-SC-WK contend that Mr. Emery thereafter actually buttressed the legitimacy of Mr. Stuckey's hypothetical shipping transaction, when he acknowledged there are times where the shipper incurs a loss for legitimate business reasons, such as establishing a shipping history on the pipeline. Tr. at 458. Mr. Emery also was asked on cross about Energy Transfer's 10-K report to the Securities and Exchange Commission for the year 2018. Appearing in the regulatory risks portion of the 10-K report, and relating to the *Magellan* Order, Mr. Emery read the following sentence into the record: "Depending on how FERC responds [to requests for rehearing], it could have an impact on the rates we are permitted to charge." Tr. at 464. SOIL-SC-WK characterize such a statement to strongly suggest that the FERC Order in *Magellan*, if not reversed or overturned, would require Energy Transfer to change the way its pipeline business is conducted. If Energy Transfer was in fact compliant with the *Magellan* Order, SOIL-SC-WK question why such a disclosure in its 10-K report would be unnecessary.

SOIL-SC-WK add that, in his next, and last, round of written testimony, Mr. Stuckey testified in response to additional discovery information the Commission had compelled Joint Petitioners to provide. SOIL-SC Ex. 9.0. The additional discovery information pertained to certain shipper identities and alleged demand for transportation service.

The newly-provided discovery responses and documents shed more light on the business relationship between MLP and its parent MPC on the one hand, and Energy Transfer and Joint Petitioners on the other. As Mr. Stuckey testified, additional information about that business relationship was sought because of the apparent tie between Marathon's purchase of an equity interest in the pipelines and MLP's transportation volume commitment on the pipelines as a shipper. SOIL-SC Ex. 9.0 at 2.

Mr. Stuckey explained that public information pointed to Phillips 66 having entered into a similar arrangement as the one by MLP. *Id.* at 1, 4-5.

The relationship of the equity investments in Joint Petitioners' pipelines by MarEn Bakken and Phillips 66 to the commitments for capacity on the pipelines by, respectively, Marathon (or an affiliate) and by Phillips 66 (or an affiliate), according to SOIL-SC-WK, constitute examples of transactions by which an affiliate of a shipper makes an equity investment in a pipeline company (or its owner) tied to, or conditioned upon, the shipper making a commitment to contract for capacity on the pipeline.

To SOIL-SC-WK, a logical way to reframe the capacity-for-equity arrangement is to focus on whether it results in a more *Magellan*-like rebate. If Marathon, as the affiliated

shipper, incurs a loss on shipping at the August 2016 open season's tariff rate, but the transaction is still economically beneficial from Marathon's perspective given its ownership stake in DA (although it would not be beneficial for a non-affiliated shipper), it encompasses a rebate. The overall transaction would be beneficial for Marathon, for example, if an open season tariff price is less than the expected price differential for the delivered oil, but greater than the variable cost of transportation, Marathon can still make a profit depending on how much of DA's profits on Marathon's tariff rate payments (*i.e.*, above the variable cost) Marathon receives back through the dividend it receives through its ownership share.

SOIL-SC-WK point to other new Joint Petitioner discovery responses Mr. Stuckey described concerning credit ratings of and credit support for affiliated marketers shipping on Joint Petitioners' pipelines. SOIL-SC Ex. 9.0 at 5-6. To begin with, as SOIL-SC-WK note, to assure themselves of a shipper's ability to pay, Joint Petitioners' policy is to impose creditworthiness requirements through their TSAs. See DA-ETCO Ex. 1.10 at 9. (stating that Joint Petitioners' TSAs "have credit policies for shippers that apply equally to all shippers, both affiliated shippers and unaffiliated shippers...")

AS SOIL-SC-WK note, Energy Transfer has admitted that it has "received parent guarantees for credit support on behalf of both affiliated and unaffiliated shippers." *Id.* As SOIL-SC-WK characterize it, by providing its wholly-owned, affiliate shippers with a parental guarantee, Energy Transfer is providing a benefit (or rebate) – that is outside of DA's filed rate – to affiliated shippers that it is not providing unaffiliated shippers. Energy Transfer's affiliates that are below investment grade can thereby ship on DA's pipeline while avoiding letter of credit costs that may be applicable to non-affiliated shippers. Such a guarantee, according to SOIL-SC-WK, may also be considered a benefit outside of the filed rate prohibited by ICA Section 2.

Parental guarantees by pipelines (or pipeline owners) of affiliated shippers may be commonplace in the oil pipeline industry, but, as SOIL-SC-WK contend FERC found in *Magellan*, that fact does not make the practice legal. Energy Transfer (or at least its witnesses) has conceded that the ICA – and by extension FERC – prohibits it from favoring its own shipping affiliates.

SOIL-SC-WK next note that, as an additional witness for their last round of prepared written testimony, Joint Petitioners brought in a former FERC attorney, Derek Anderson, to address Joint Petitioners' compliance with the ICA. His role was limited to providing background legal requirements under the ICA and, while stating he did not observe that Joint Petitioners had violated the ICA, he acknowledged that he was not providing a legal opinion to that effect, and his observations were based solely on the very few documents Joint Petitioners had provided to him. Mr. Anderson also stated, "I believe Congress intended to protect other shippers on the pipeline, who would be competitively and financially harmed if some shippers (either affiliated or unaffiliated) were afforded more favorable treatment." DA-ETCO Ex. 10.0 at 4-5. On cross-examination, Mr. Anderson acknowledged that similar prohibitions in the Elkins Act do not require a showing of competitive harm to other, non-affiliated shippers. Tr. at 492. To the extent that Joint Petitioners rely on the testimony of Mr. Anderson to absolve them of any bad acts, SOIL-SC-WK caution the Commission to be aware that Mr. Anderson was

not offering a legal opinion and based his testimony only on what Joint Petitioners presented him. Tr. at 493-94.

SOIL-SC-WK point out that Joint Petitioners' evidence shows that, in the absence of an investment grade credit rating or similar arrangement, a shipper—whether an affiliate or non-affiliate—must have some form of satisfactory financial assurance to ship on Joint Petitioners' pipelines. Financial assurances are important for “oil pipelines like Dakota Access and ETCO . . . to obtain a reasonable assurance that the pipelines will recover their costs.” DA-ETCO Ex. 6.5 at 3.

As SOIL-SC-WK describe it, Energy Transfer has publicly admitted that it has “received parent guarantees for credit support on behalf of both affiliated and unaffiliated shippers.” *Id.* at 10. SOIL-SC-WK contend that extending to sub-investment-grade affiliated shippers a parental guarantee from Energy Transfer—a part owner of Dakota Access—is the functional equivalent of waiving the financial assurances requirement for its affiliated shipper because Energy Transfer's only assurance that it will be paid by its affiliated shipper is that it will be able to pay itself. As SOIL-SC-WK put it, a self-guarantee is no guarantee at all. Energy Transfer is therefore, according to SOIL-SC-WK, seemingly incentivized to favor its affiliated shippers by providing a parental guarantee that effectively waives its financial assurance requirements so they are eligible to ship on Joint Petitioners' pipelines and, in turn, to discriminate against unaffiliated shippers by applying those financial assurance requirements to them.

SOIL-SC-WK note that Joint Petitioners assert that federal law allows pipeline companies like Joint Petitioners to contract with affiliated shippers. They also note that the Hepburn Act's prohibition on railroads from transporting the railroad's own products (the so-called Commodities Clause), did not extend to pipelines. Joint Petitioners then assert that FERC permits shippers to enter into long term contracts with their affiliated pipelines. Lastly, Joint Petitioners point out that it is not unusual for interstate oil pipelines to have multiple owners. SOIL-SC-WK do not dispute such assertions, but point out that Joint Petitioners' assertions and arguments do not go far enough.

Joint Petitioners acknowledge first that MPC and Phillips 66 are indirect equity investors in and owners of Joint Petitioners. They also acknowledge that shipper subsidiaries of MPC and Phillips 66 entered into “precedent agreements” with attached proposed TSAs. As Joint Petitioners further note, the precedent agreements specified that if Joint Petitioners subsequently held an open season, the affected shipper would be subject to a legal commitment for capacity at a specified volume level. They then describe examples to illustrate how such precedent agreement shippers that become subscribers to capacity via an open season may not be granted any preferences as to actual capacity awarded, TSA contract terms, or rates compared to other shippers that subscribed to capacity in the same open season, but without having been bound to do so through a precedent agreement. Joint Petitioners also clarify that the shippers affiliated with MPC or Phillips 66 could have voluntarily participated in the open season even without having signed a precedent agreement.

SOIL-SC-WK contend that the agreements and practices of Joint Petitioners that violate the ICA's anti-discrimination provisions also are violative of Section 8-101 of the Act (made applicable to common carrier pipelines by Section 15-101). Section 8-101

provides in pertinent part: “Duties of public utilities; nondiscrimination. ... A public utility shall, upon reasonable notice, furnish to all persons who may apply therefor and be reasonably entitled thereto, suitable facilities and service, without discrimination and without delay.” Non-affiliated potential shippers are included in “all persons who may ... be reasonably entitled ...[to] suitable facilities and service, without discrimination....” According to SOIL-SC-WK, the above discussion of Joint Petitioners’ discriminatory practices, to the extent they violate federal statutory non-discrimination requirements in relation to non-affiliated shippers, would be equally violative of Section 8-101.

### **C. Commission Analysis and Conclusion**

The Commission notes that the record reflects that no complaints have been filed against Dakota Access or ETCO alleging violations of the ICA’s anti-discrimination provisions or that Dakota Access or ETCO has provided discounts, rebates, or other preferential treatment to shippers.

While SOIL-SC-WK allege that the actions of Joint Petitioners are discriminatory, the Commission finds that the evidence fails to provide that the actions of Joint Petitioners violate the anti-discrimination provisions of the ICA. The calculations provided by Mr. Stuckey were developed based on spot market prices and unsubstantiated adjustments. Joint Petitioners state that most of the shipping contracts are long term and those shippers do not rely on the spot market for their shipping needs. The Commission notes that it is not unlawful for a shipper to have an equity interest in the pipeline. Joint Petitioners have indicated that all of these shippers are required to enter into TSAs for capacity and service on Joint Petitioner’s pipeline. During open season, if any shipper requests changes to the form TSA and Joint Petitioners agree, the TSA attached to the precedent agreement is modified to conform to the revised terms of the form TSA, and all interested shippers, both affiliates and non-affiliates, are given notice and opportunity to enter into a TSA with the revised terms.

SOIL-SC-WK did not provide any evidence that Joint Petitioners discriminate against non-affiliated shippers by requiring that if a shipper does not have an investment grade credit rating, the shipper must provide additional credit enhancement, which may include a parent guaranty. The record shows that Joint Petitioners’ credit and security provisions and policies are applied on a non-discriminatory basis to both affiliated and non-affiliated shippers. The Commission does not agree that additional credit enhancement or parent guaranty provided by an affiliate are worthless. The Commission does not find that the actions of Joint Petitioners violate the anti-discrimination provisions of the ICA. For the same reasons, and based on the evidence presented, the Commission does not find that the actions of Joint Petitioners violate Section 8-101 of the Act.

## **VI. FINDINGS AND ORDERING PARAGRAPHS**

The Commission, having considered the entire record and the arguments of the parties is of the opinion and finds that:

- (1) Dakota Access, LLC is a Delaware limited liability company authorized to conduct business in the State of Illinois and holds a certificate in good standing pursuant to Section 15-401 of the Public Utilities Act to operate as a common carrier by pipeline in the State of Illinois;

- (2) Energy Transfer Crude Oil Company, LLC, is a Delaware limited liability company authorized to conduct business in the State of Illinois and holds a certificate in good standing pursuant to Section 15-401 of the Public Utilities Act to operate as a common carrier by pipeline in the State of Illinois;
- (3) the Commission has jurisdiction over Dakota Access, LLC and Energy Transfer Crude Oil Company, LLC and the subject matter hereof;
- (4) the findings of fact and conclusions reached by the Commission are hereby adopted as findings of fact and conclusions for purposes of this Order;
- (5) the construction, installation and operation of the proposed additional pumping stations and pumping equipment in the State of Illinois, for the purpose of enabling Dakota Access, LLC's and Energy Transfer Crude Oil Company, LLC's common carrier crude oil pipelines to transport up to 1.1 million bpd of crude oil, as described in the Joint Petition and in this Order, are, within the meaning of Section 8-503 of the Public Utilities Act, additions and improvements to the existing plant, equipment, apparatus, facilities and other physical property of Dakota Access, LLC's and Energy Transfer Crude Oil Company, LLC's respective common carrier pipelines in the State of Illinois; pursuant to Section 8-503 of the Public Utilities Act; the proposed additions, improvements and structures are necessary and ought reasonably to be made and erected to promote the security and convenience of the public and to secure adequate service and facilities on Dakota Access, LLC's and Energy Transfer Crude Oil Company, LLC's common carrier pipelines;
- (6) the Joint Petition filed by Dakota Access, LLC and Energy Transfer Crude Oil Company, LLC on June 14, 2019, should be granted;
- (7) Dakota Access, LLC should be granted authority, pursuant to Section 8-503 of the Public Utilities Act, to construct, install, and operate the proposed new pumping station in Hancock County, Illinois, as more fully described in the Joint Petition and in this Order, for the purpose of enabling the Dakota Access Pipeline to transport up to 1.1 million bpd of crude oil;
- (8) Energy Transfer Crude Oil Company, LLC should be granted authority, pursuant to Section 8-503 of the Public Utilities Act, to construct, install, and operate the proposed new pumping station in Massac County, Illinois, and the additional pumping equipment at its existing pumping station at Patoka, Illinois, as more fully described in the Joint Petition and in this Order, for the purpose of enabling the ETCO Pipeline to transport up to 1.1 million bpd of crude oil;
- (9) the additional pumping stations and pumping equipment authorized for construction, installation, and operation by this Order are: (i) in Hancock County, Illinois, near the City of Carthage, Illinois, a new pumping station on the Dakota Access Pipeline with pump motors up to 30,000 HP; (ii) at or near Patoka, Illinois, replacement of two pumps and addition of two 6,000 HP pumps at the existing pump station on the ETCO Pipeline, and

associated additional or modified piping, control valves, and metering; and (iii) in Massac County, Illinois, in or near the Village of Joppa, Illinois, a new pumping station on the ETCO Pipeline with pump motors up to 18,000 HP; and

- (10) any objections, motions, or petitions filed in this proceeding that remain unresolved should be disposed of in a manner consistent with the ultimate conclusions contained in this Order.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that installation, construction, and operation of the additional pumping stations, pumping equipment, and associated equipment on the Dakota Access Pipeline and ETCO Pipeline in Illinois, to enable the pipelines to transport up to 1.1 million bpd of crude oil, as more fully described in Findings (7), (8) and (9) of this Order, are necessary and ought reasonably to be made and erected to promote the security and convenience of the public and to secure adequate service and facilities on Dakota Access, LLC's and Energy Transfer Crude Oil Company, LLC's common carrier pipelines.

IT IS FURTHER ORDERED that the Joint Petition filed by Dakota Access, LLC and Energy Transfer Crude Oil Company, LLC on June 14, 2019 is granted.

IT IS FURTHER ORDERED that Dakota Access, LLC is granted authority, pursuant to Section 8-503 of the Public Utilities Act, to construct, install, and operate the proposed new pumping station in Hancock County, Illinois, as more fully described in the Joint Petition and in this Order, for the purpose of enabling the Dakota Access Pipeline to transport up to 1.1 million bpd of crude oil.

IT IS FURTHER ORDERED that Energy Transfer Crude Oil Company, LLC is granted authority, pursuant to Section 8-503 of the Public Utilities Act, to construct, install, and operate the proposed new pumping station in Massac County, Illinois, and the additional pumping equipment and associated equipment at its existing pumping station at Patoka, Illinois, as more fully described in the Joint Petition and in this Order, for the purpose of enabling the ETCO Pipeline to transport up to 1.1 million bpd of crude oil.

IT IS FURTHER ORDERED that any objections, motions, or petitions filed in this proceeding that remain unresolved are hereby deemed disposed of in a manner consistent with the ultimate conclusions contained in this Order.

IT IS FURTHER ORDERED that pursuant to Section 10-113(a) of the Public Utilities Act and 83 Ill. Adm. Code 200.880, any application for rehearing shall be filed within 30 days after service of the Order on the party.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 14th day of October, 2020.

(SIGNED) CARRIE ZALEWSKI

Chairman

Commissioner Bocanegra concurs.