Nos. 121302, 121304, 121305 & 121308 Consolidated

IN THE
SUPREME COURT OF ILLINOIS

ILLINOIS LANDOWNERS ALLIANCE, NFP, *et al.*,	)	**On Appeal from the Appellate Court of Illinois Third District, Case Nos. 3-15-0099, 3-15-0103 & 3-15-0104 (Cons.)**
Respondents-Appellees,	)	
v.	)	**There Heard on Review of the Order of the Illinois Commerce Commission, ICC Docket No. 12-0560**
ILLINOIS COMMERCE COMMISSION, *et al.*,	)	
Petitioners-Appellants.	)	

BRIEF OF RESPONDENT-APPELLEE ILLINOIS LANDOWNERS ALLIANCE, NFP

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

STATEMENT OF FACTS

This Brief includes citations to the record, to Rock Island's Appendix, and to a Supplemental Appendix to this Brief.

A. Illinois Landowners Alliance, NFP. Illinois Landowners Alliance, NFP ("ILA") is a not-for-profit entity that works to protect the prime Illinois farmland of its members. ILA has approximately 300 members who own or have interests in more than 100,000 acres directly impacted by Rock Island Clean Line LLC's ("Rock Island") proposed high voltage direct current ("HVDC") transmission line ("Project"). *Ill. Landowners Alliance, NFP, et al. v. Ill. Commerce Comm'n, et al.*, 2016 IL App (3d) 150099, ¶ 19; A-0008. For most of the ILA members, the impact results from their ownership of or other interest in real property, mainly farmland, on or along the transmission line's proposed path. *Id.*

ILA's opposition is based on a number of factors. Rock Island offered inadequate justification for the potential taking of ILA members' land for the project. The transmission line is not needed, as the Illinois Commerce Commission ("Commission" or "ICC") so found, for reliability or other operational reasons. R.V35, C-08591; A-0134. Rock Island is a privately funded, profit-seeking start-up entity with no record of electric transmission development, operation or ownership, unlike a traditional public utility. The Project is highly speculative and may never be built.

B. Rock Island and its Project. Rock Island is a Delaware limited liability company with its principal offices in Houston, Texas. Rock Island is a wholly owned subsidiary of Rock Island Wind Line, LLC, a Delaware limited liability company, which is a wholly owned subsidiary of Clean Line Energy Partners LLC, a Delaware limited

liability company. Rock Island, along with its direct and indirect parent entities, has never built a transmission line and has no customers, suppliers, or property. R.V44, C-841.

Rock Island's proposed HVDC line would be 500 miles long and originate at a converter station (to convert electricity from alternating current to direct current) in O'Brien County, Iowa. R.V35, C-08595; A-0138. It would traverse Iowa for 379 miles, cross the Mississippi River near Princeton, Iowa, and enter Illinois south of Cordova. R.V35, C-08629; A-0172. Within Illinois, the proposed line would extend across family farms about 121 miles to a second converter station (to convert the electricity back to alternating current) in Grundy County, and then interconnect with ComEd's Collins Substation. R.V35, C-08595; A-0138.

The Project's primary purpose is to connect as yet unbuilt, unidentified new wind powered electric generation facilities in northwest Iowa and nearby areas of South Dakota, Nebraska, and Minnesota, that would be built by as yet unidentified wind project developers, with as yet unidentified electric power customers located in or serving electricity markets within the grid of the PJM Interconnection, LLC, a regional transmission authority.

C. Rock Island's Petition. On October 12, 2012, Rock Island filed a Petition with the Commission seeking (1) a certificate of public convenience and necessity ("CPCN"), pursuant to §8-406 of the Illinois Public Utilities Act ("PUA"), to function as an electric transmission public utility in Illinois; (2) a CPCN for the Project; and (3) a finding under PUA §8-503 authorizing it to construct the line. 220 ILCS 5/8-406 and 5/8-503; R.V1, C-00001-00163. The requested finding under §8-503 is a statutory prerequisite

to the grant of authority for a public utility's forced taking of private property under Illinois' law of eminent domain. R.V35, C-08691.

ILA, along with the Illinois Agricultural Association ("IAA") and Commonwealth Edison Company ("ComEd"), intervened and actively participated in the administrative proceedings before the Commission to oppose Rock Island's Petition.

D. The Commission's Final Order. On November 25, 2014, the Commission issued a Final Order ("Order") approving the Administrative Law Judge's Proposed Order granting Rock Island a CPCN but denying its request under §8-503. R.V34-35, C-08475-08700; A-0018-0243. In its Order, the Commission noted Rock Island did not own, operate, or manage any utility property and that it was entirely possible Rock Island could abandon the Project altogether. R.V34, C-08499; A-0042.

The Order also stated that Rock Island had no customers, that no Illinois entity or individual agreed to be its customer in the future, and that Rock Island was not obligated to expand the Project to meet future needs. R.V34, C-08505-08506; A-0048-0049; C-08595-08596; A-0138-0139; C-08628; A-0171. The Commission relied on Rock Island's promise to "auction" at least 25% of the Project's capacity to satisfy the "public use" requirement, if the Project was ever built. R.V34, C-08504-08505; A-0047-0048.

Furthermore, the Commission found that the Project was not needed either to relieve congestion on the transmission grid or to alleviate an electric reliability problem. "Accordingly, the Commission finds that Rock Island has not demonstrated that the Project is necessary to provide adequate, reliable, and efficient service to customers within the meaning of Section 8-406(b)(1)." R.V35, C-08591; A-0134.

Respondents-Appellees filed Applications for Rehearing, all of which were denied on January 14, 2015. R.V35-36; C8747-8863. Respondents-Appellees then appealed to the Appellate Court for the Third District. A-0251-0264.

E. Third District Appellate Court Opinion.

On August 10, 2016, the Third District published a decision that reversed the Commission's Final Order. *Ill. Landowners Alliance, NFP, et al. v. Ill. Commerce Comm'n, et al.*, 2016 IL App (3d) 150099; A-0001-0017. The court held Rock Island was not a "public utility" within the meaning of PUA §3-105 and that the Commission lacked authority to issue a CPCN under §8-406(b). *Id.* at ¶ 47; A-0016. The court determined that Rock Island was not a public utility because it did not own, control, operate, or manage assets and lacked any agreements for service with renewable energy generators in Illinois. *Id.* at ¶ 43; A-0014-0015.

Additionally, the court found Rock Island's transmission line was not for public use without discrimination because most of the anticipated users resided in other states and it was impossible to know if an Illinois energy generator would bid for any of the remaining capacity. *Id.* at ¶ 46; A-0015-0016. The court did not address whether the Commission's findings on other issues were supported by substantial evidence. *Id.* at ¶ 51; A-0017. It is apparent from the opinion that "other issues" the court referenced and declined to address involved, among other things, Rock Island's capability to finance the Project and to manage its construction. R.V35, C-08596-08628; A-0139-0171.

Petitioners-Appellants filed Petitions for Leave to Appeal. On November 23, 2016, this Court allowed the Petitions and ordered them consolidated.

ARGUMENT

I. Standard of Review.

This case involves review of an Illinois Commerce Commission Order and the interpretation of the Public Utilities Act. When this Court grants leave to appeal from an appellate court judgment in an administrative review case, this Court reviews "the final decision of the administrative agency, not the judgment of the circuit court or the appellate court." *Provena Covenant Med. Ctr. v. Dep't of Revenue*, 236 Ill. 2d 368, 386 (2010) (internal citations omitted). When the only point in dispute is an agency's conclusion on a point of law, the agency's decision is subject to *de novo* review. *Id.* at 387.

The interpretation of a statute is a question of law and is reviewed *de novo*. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 16 (citing *People ex rel. Madigan v. Ill. Commerce Comm'n*, 231 Ill. 2d 370, 380 (2008)); *Commonwealth Edison Co. v. Ill. Commerce Comm'n*, 398 Ill. App. 3d 510, 522 (2d Dist. 2009). When governing statutory language is clear and unambiguous, there is "no need to resort to other means of construction," and it must be applied as written. *Veterans Assistance Comm'n of Grundy County v. County Bd. of Grundy*, 2016 IL App (3d) 130969, ¶ 45 (citing *People v. B.L.S. (In re B.L.S.)*, 202 Ill. 2d 510, 515 (2002)).

Deference is given to an agency's interpretation of an ambiguous statute. *Ill. Consol. Tel. Co. v. Ill. Commerce Comm'n*, 95 Ill. 2d 142, 152 (1983). Administrative interpretations of ambiguous statutes are entitled to less deference when they depart considerably from past practice. *Bus. & Prof'l People for Pub. Interest v. Ill. Commerce Comm'n*, 136 Ill. 2d 192, 228 (1989).

An agency's interpretation of a statute is not binding "and will be rejected when it is erroneous." *Shields v. Judges' Ret. Sys.*, 204 Ill. 2d 488, 492 (2003) (citing *Decatur v. Am. Fed'n of State, County & Mun. Employees, Local 268*, 122 Ill. 2d 353, 361 (1988)). "Courts will not defer to an agency's construction of a statute when the statute is clear and unambiguous because 'an interpretation placed upon a statute by an administrative official cannot alter its plain language.'" *Apple Canyon Lake Prop. Owners' Ass'n v. Ill. Commerce Comm'n*, 2013 IL App (3d) 100832, ¶ 21 (quoting *Burlington Northern, Inc. v. Dep't of Revenue*, 32 Ill. App. 3d 166, 174 (1975)).

II. Rock Island Fails to Satisfy the Statutory Requirements for Public Utility Status.

A. Introduction.

Due to the issue being one of statutory interpretation, the Court should review this issue *de novo*. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 16. In order to be granted utility regulatory authority to construct the Project, Rock Island must show that it is entitled to a CPCN to transact business in Illinois pursuant to §8-406(a) of the PUA, and that public convenience and necessity require the Project's construction pursuant to §8-406(b). These statutory provisions state:

> Sec. 8-406. Certificate of public convenience and necessity.
>
> (a) No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State as of July 1, 1921 and not possessing a certificate of public convenience and necessity from the Illinois Commerce Commission, the State Public Utilities Commission or the Public Utilities Commission, at the time this amendatory Act of 1985 goes into effect, shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

220 ILCS 5/8-406(a).

> (b) No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or any extension or alteration thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction. Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity. The Commission shall determine that proposed construction will promote the public convenience and necessity only if the utility demonstrates: (1) that the proposed construction is necessary to provide adequate, reliable, and efficient service to its customers and is the least-cost means of satisfying the service needs of its customers or that the proposed construction will promote the development of an effectively competitive electricity market that operates efficiently, is equitable to all customers, and is the least cost means of satisfying those objectives; (2) that the utility is capable of efficiently managing and supervising the construction process and has taken sufficient action to ensure adequate and efficient construction and supervision thereof; and (3) that the utility is capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers.

220 ILCS 5/8-406(b).

Both of these subsections of PUA §8-406 require as a prerequisite or as a contemporaneous condition that the CPCN applicant be determined to be a "public utility," as that term appears in the initial portions of both subsections (a) and (b) of §8-406. The definition of "public utility" is contained in §3-105 of the PUA. This section provides in relevant part:

> Public Utility means and includes ... every ... limited liability company ... that owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for ... the ... transmission ... of ... electricity.

220 ILCS 5/3-105.

It is uncontroverted that at the time it filed its Petition, Rock Island was not a public utility as defined by §3-105. Rock Island's Chief Executive Officer admitted during the hearings before the Commission "that on the date of the filing of the petition in this matter that Rock Island Clean Line did not own, control, operate, or manage any plants, equipment, or property used for or in connection with the transmission, delivery, or furnishing of electricity in Illinois." R.V38, RP232. The evidence Rock Island introduced before the Commission fails to establish that it should have been granted public utility status. In presenting its evidence to the Commission, Rock Island had not demonstrated, as a matter of law, that it owned, controlled, operated, or managed, directly or indirectly, for public use, any plant, equipment, or property used, or to be used for or in connection with, electric transmission service in Illinois. R.V38, RP232-233; R.V46, RP1116-1120, 1125. The Third District recognized this shortcoming. *Ill. Landowners Alliance, NFP*, 2016 IL App (3d) 150099, ¶ 35. "[T]he Commission's interpretation of statutory standards is entitled to deference"; however, reviewing courts "are not bound by the Commission's interpretation of law." *Citizens Util. Bd. v. Ill. Commerce Comm'n*, 166 Ill. 2d 111, 121 (1995) (emphasis added). Rock Island at the very least could have invested in some equipment or other property that it intended to use to provide electric transmission service to Illinois customers, but it did not do so. This lack of assets is a central factor in disqualifying Rock Island for public utility status. If Rock Island or others desire a more liberal standard, the legislature is the place to seek such a change.

In granting Rock Island public utility status, the Commission exceeded its statutory authority under the PUA, and given that the scope of the Commission's authority is a

question of law, the review of that action on appeal is properly performed under the *de novo* standard. The issue here is not whether Rock Island's evidence on the public utility issue outweighs evidence presented on the issue by ILA and other opponents of Rock Island. Rather, it is ILA's contention that Rock Island's evidence is simply insufficient to support a conclusion that it is or will be a public utility based on the statutory factors that PUA §3-105 requires. The issue is one of statutory interpretation, and does not require, or involve, weighing of contradictory or inconsistent evidence. In interpreting a statute, a court's primary objective is to ascertain and give effect to the intent of the legislature as shown by the plain and ordinary meaning of the statutory language. *Gaffney v. Bd. of Trs.*, 2012 IL 110012, ¶ 56.

The Third District's Opinion characterized the public utility issue as one involving "whether jurisdiction was properly conferred." *Ill. Landowners Alliance, NFP*, 2016 IL App (3d) 150099, ¶ 49; A-0016. It is the ILA's position that the important issue is whether the Commission properly granted a CPCN to and conferred public utility status on Rock Island. Whether that issue goes to the Commission's jurisdiction is not determinative of the outcome and need not be the focus of this appeal. Rather, the ILA contends that the Commission exceeded its statutory authority, whether or not it exceeded its jurisdiction. *See Zahn v. North Am. Power & Gas, LLC*, 2016 IL 120526, ¶ 14, n.2.

Rock's Island's request for a CPCN should have been rejected, as Rock Island is not an Illinois public utility. Because Rock Island is not a public utility, it is not eligible for, and the Commission lacked statutory authority to grant it, a CPCN under PUA §8-406. Consequently, the Third District's decision should be affirmed.

B. Rock Island Has No Assets to be Used for a Public Utility Purpose.

Not only did Rock Island's Chief Executive Officer admit during the hearings that his company owned no property used for the transmission of electricity as of the date of Rock Island's Petition to the ICC, he stated further that such shortcoming remained as of the date of the hearing. R.V38, RP232. The witness stated that, while he believed Rock Island had some options, it owned no real property in Illinois. *Id.* at 232-233. He acknowledged that Rock Island "does not have any assets in Illinois that could be used to sell, transmit, or deliver electricity. *Id.* at 233. Despite this, Rock Island asserts that its small number of options to purchase real property are sufficient to satisfy the asset ownership requirements of PUA §3-105. Rock Island has neither an ownership nor a possessory right to that real property. The evidence does not demonstrate that Rock Island has any day-to-day rights of control over the real property. Rock Island simply has either access to or an option (but not a commitment or requirement) to purchase the real property sometime in the future. Rock Island asserts that it controls the real property; however, the only aspect of the property Rock Island controls is the right to purchase, and later possess, real property in the future should it obtain its regulatory approvals, satisfy all its myriad other contingencies and requirements, and convince its parent company and investors that the Project would be sufficiently profitable to continue to develop it. It cannot be said that Rock Island has the ability to control or use the subject real property within the State of Illinois, for public use, at any time.

Two ICC Commissioners spoke to this issue in a recent Commission proceeding involving Rock Island's sister company, Grain Belt Express Clean Line, LLC. *Grain Belt*

Express Clean Line, LLC, ICC Docket No. 15-0277 (ICC 2015), now on appeal in the Fifth District (No. 5-15-0551). In that proceeding, a majority of the Commissioners voted to allow Grain Belt to file its application for a CPCN for another transmission line under an alternative section of the PUA (§8-406.1 rather than §8-406), which provided an expedited ICC procedure applicable to the CPCN application. The majority so ruled despite the alternative section's requirement that the applicant be a public utility at the time if filed its application. In their joint dissent to the Commission's order, the two Commissioners who disagreed that the alternative section featuring the expedited procedure should be available to a non-public utility included in their written dissent a statement as to whether the applicant owned Illinois property, which went to the public utility status issue. The dissenting Commissioners included a passage that also applies to Rock Island in their dissent, as follows:

> An "option" to purchase property that would serve as the site to place equipment does not suffice as ownership of property to satisfy Section 3-105(a)'s definition of public utility. See *Terraces of Sunset Park v. Chamberlin*, 399 Ill. App. 3d 1090, 1096 (2nd Dist. 2010) (finding that "an option contract, by definition, does not involve the transfer of property *or an interest therein*" (emphasis added)) (citing *Whitelaw v. Brady*, 121 N.E.2d 785, 789 (1954)). GBX did not present any other evidence of ownership, control, management, or operation.
> (R.V38, C-09315).

Even if Rock Island did own property that conceivably could be used for its Project, Rock Island's refusal to commit to develop the Project negates any conclusion that such property is "to be used" for the transmission of electricity, as PUA §3-105 requires. The same result applies to any further property that Rock Island may acquire or own, as Rock

Island has stated that it may abandon the Project's development if it is unable to obtain financing or sell a sufficient amount of capacity on the line. *See, e.g.,* R.V40, RP286.

The Commission previously addressed whether a transmission company was properly considered a "public utility" under the PUA definition. *See In re Am. Transmission Co. L.L.C.*, ICC Docket No. 01-0142 (ICC 2003); ILA Supp. Appendix pp. 1-8. American Transmission Company L.L.C. ("ATC") was "formed to plan, construct, operate, maintain, and expand transmission facilities to provide an adequate and reliable transmission system that meets the needs of all the system's users, supports effective competition in energy markets without favoring any market participant, and to engage in other incidental and appropriate activities." *Id.* at 2. Like Rock Island, ATC was seeking its first certificate under PUA §8-406(a) to operate in Illinois as a public utility.[1] ATC's transmission assets in Illinois were previously owned and operated by another Illinois public utility from whom ATC acquired them. *Id.* at 3. In analyzing the public utility definition as applied to ATC, in the context of PUA §8-406(a), the Commission properly found:

> The Petitioners own, control, operate, and manage, within this State, for public use, facilities used in the transmission of electricity. Therefore, the Petitioners fall within the definition of a "public utility," as is set forth in Section 3-105 of the Act. Accordingly, Section 8-406(a) of the Act requires the Petitioners to obtain a Certificate of Public Convenience and Necessity prior to transacting any business in this State.

In re Am. Transmission Co. L.L.C., ICC Docket No. 01-0142 (ICC 2003).

[1] The Petition was actually filed by two ATC companies jointly seeking a CPCN under PUA ¶8-406(a); and the ICC treated them and processed their application together.

If the Commission in the *American Transmission Company* proceeding instead had the Rock Island facts before it, the Commission would have appropriately found as follows:

> The Petitioner does not own, control, operate, and manage, within this State, for public use, facilities used in the transmission of electricity. Therefore, the Petitioner falls outside the definition of a "public utility," as is set forth in Section 3-105 of the Act. Accordingly, Petitioner is ineligible to obtain a Certificate of Public Convenience and Necessity under 8-406(a) of the Act to transact business in this State.

In re Am. Transmission Co. L.L.C., ICC Docket No. 01-0142 (ICC 2003) (quote modified).

Rock Island stands in contrast to ATC on this critical factor, and not only does Rock Island not own any of the requisite facilities, it has not committed to construct, acquire, or own any facilities. Consequently, this critical factor is one which should be dispositive of the "public utility" issue and which should cause this Court to affirm the Third District decision. Asset ownership is important first because it is a necessary requirement of the statute and secondly it evinces the serious intention of the project's proponent to proceed with its construction and development.

C. The Line Would Not be For a Public Use.

One of the other threshold statutory requirements for an entity to be categorized as a "public utility" in Illinois is that it satisfy the "public use" requirement. The ICC Order is severely deficient on this issue, and the Commission acknowledged the difficulty it encountered. Significantly, the Order described the public use issue as "complicated by the many uncertainties associated with the 'merchant' nature of the proposed transmission line project." R.V34, C-08504; A-0047. Having so characterized the issue, however, the Commission failed to respect or give any effect to those "many uncertainties" that "complicated" the public use issue. The Commission simply based its determination that

the Project satisfied the public use requirement on two considerations pertaining to federal agency regulation:

1. Federal Energy Regulatory Commission ("FERC") approval of Rock Island's proposal (a) to pre-subscribe up to 75% of the capacity to anchor customers; and (b) to sell the remaining 25% of capacity using an "open season auction," under which Rock Island would have to offer its service "to all customers in a non-discriminatory manner" subject to an RTO (regional transmission organization) open access transmission tariff. R.V34, C-08504; A-0047.

2. Rock Island's representation that it will comply with FERC's requirements: (a) that all eligible customers will have the opportunity to purchase transmission service without being unduly discriminated against; and (b) that potential users would include parties seeking to deliver electricity to northern Illinois. R.V34, C-08492; A-0035.

Given these considerations, the ICC then summarily concluded that Rock Island's proposal satisfied Illinois' statutory public use standard." R.V34, C-08504; A-0047. The ICC's analysis of the public use issue was woefully inadequate, and its conclusion was unsupported by prior cases. The ICC failed to explain how the considerations on which it relied fit into the applicable legal precedent. It failed to delve below the surface of Rock Island's planned marketing of the line's capacity to obtain relevant details. It failed, for example, (because Rock Island did not provide information) to identify the potential anchor customers or describe how many there might be. All the record discloses is that the most likely candidates for anchor customers are large wind energy generators that Rock Island hopes will undertake to successfully develop large, utility-scale wind energy generation

projects in the vicinity of the Project's beginning point in northwest Iowa. R.V1, C-00014, ¶ 18; R.V34, C-08480, A-0023; R.V39, RP271; R.V27, C-06520. Very little is known about who these potential wind energy generators may be; all that is certain is that none will be located in Illinois. Rock Island's evidence, boiled down, discloses nothing more than speculation.

This "anchor tenant" aspect of the proposed Project is analogous to the factual situation this Court faced in an oft-cited case. *Miss. River Fuel Corp. v. Ill. Commerce Comm'n*, 1 Ill. 2d 509 (1953). There, Mississippi River Fuel Corporation sold natural gas to twenty-three industrial customers. In a landmark decision, this Court held that "the company's action in selling gas to a limited group of industrial customers cannot properly be characterized as the devotion of its property to 'public use,' within the meaning of the Public Utilities Act of this State." *Miss. River Fuel Corp.*, 1 Ill. 2d at 519. For all anyone knows based on the record in this case, Rock Island may have far fewer than twenty-three anchor tenants. At least as important, if not more, is that in *Mississippi River*, the industrial customers were not only identified; but they were actually taking natural gas from the gas supplier. The situation in *Mississippi River* significantly contrasts with the situation here, in a way that should result in an even clearer and more certain outcome that Rock Island should not be granted public utility status. Here, not one anchor tenant exists or has been identified, not one has begun constructing a wind energy generation project, not one has obligated itself to construct even a single wind energy turbine, and not one has contracted for or otherwise committed to take transmission service from Rock Island.

Similar shortcomings exist with respect to the planned marketing of the remaining 25% of the Project's capacity. The Commission accepted the FERC-approved plan to sell 25% of the capacity in an open season auction in the absence of any meaningful details about the auction and how such a marketing plan relates to and satisfies Illinois' statutory public use requirement. The Order states in conclusory fashion that Rock Island "would be required to offer its service to all customers in a non-discriminatory manner," subject to an open access transmission tariff. R.V34, C-08504; A-0047.

The Commission's Order fails to explain who those customers may be. Theoretical eligibility to bid at an auction provides very little factual detail as to who may actually find it desirable or even feasible to bid for capacity on the transmission line. Due to the absence of a second "on-boarding" convertor station in Illinois, no Illinois electricity generators will be bidders. Similarly, the only physical point at which a potential customer that wants to purchase any electricity transported by the line may take delivery of that electricity, and purchase any portion of the remaining 25% of capacity on the line to facilitate its electricity purchase, is at the line's terminus. R.V21, C-05023-05024. These physical constraints, due to Rock Island's design of the Project, severely restrict potential users of the line, so that legal availability to "all customers" may actually limit the line's practical availability to only a very few large and unique customers.

These and other factors serve to undercut Rock Island's "public use" contention. The record shows that no retail electricity users will likely be candidates to bid for capacity on the line. Rather, a likely potential bidder would be a large wholesale electricity market participant, such as a public utility or wholesale power marketer. But, in *Mississippi River*,

the fact that the company also sold natural gas at wholesale to two separate public utilities in Illinois, for resale and distribution to the many customers of those two utilities, did not change the result in that case. Illinois courts have long recognized the importance of the "public use" aspect of the definition of public utility. For instance, this Court stated over a century ago that the public use aspect of property may not be confined to "specified or privileged persons." *State Pub. Utils. Comm'n ex rel. Pike County Tel. Co. v. Noble*, 275 Ill. 121, 125 (1916). Rather, "all persons must have an equal right" to use the property, and it must be "upon the same terms" and "be open to all people to the extent that its capacity may admit of such use." *Id.* at 124-25. *See also Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. 158 (1929); *Highland Dairy Farms Co. v. Helvetia Milk Condensing Co.*, 308 Ill. 294 (1923); *State Pub. Utils. Comm'n v. Bethany Mut. Tel. Ass'n*, 270 Ill. 183 (1915).

Rock Island repeatedly asserts that it intends to hold itself out to serve the public to support its position that the Project would be for a "public use." The statutory definition of public use, however, does not include stated intentions of the proponent as a relevant factor in the determination. Rather, the important inquiry is what actions Rock Island took or demonstrably will take to show that the Project will be for a public use. Evidence of such actions is lacking in the record here. Rock Island's self-serving declarations of intent cannot overcome the evidentiary deficiencies. Repeated references to the term "public" without identification of any customers or users of the line or of the electric power to be transmitted across the line, should allow no other conclusion than that the Project will not be for a "public use."

Another important factor cutting against Rock Island regarding the public use issue is Rock Island's stated inability, or refusal, to agree to expand the line's capacity in the event it became over-subscribed or Rock Island otherwise saw demand exceeding the line's capacity. *See Rock Island Clean Line LLC*, 139 FERC ¶ 61,142, p. 8, ¶ 22, p. 12, ¶ 33 (issued May 22, 2012); ILA Supp. Appendix pp. 16, 20. It is a basic duty of a public utility to accommodate similarly-situated customers by providing facilities that are adequate to serve those who are eligible and need service. The Commission's Order notes that Rock Island "has not provided any evidence here that it would be willing and able to expand the capacity of the project at issue to provide service to eligible customers if and when it becomes oversubscribed." R.V34, C-08497; A-0040. The Order then cites another FERC matter requiring public utility transmission providers to be obligated to expand their transmission systems if necessary to provide transmission service. But the ICC sloughed off this factor, stating: "On this issue, it is not known whether the FERC will allow Rock Island to implement a tariff that deviates from the above policy pronouncement and thus this determination is premature." R.V34, C-08505; A-0048. The ICC erred in speculating that Rock Island may seek some sort of variance or special exception from the FERC and erred in concluding that the determination is premature. Rather, the ability and obligation to expand the Project is a central factor to a determination of the public use issue.

As noted above in this Brief (*supra*, p. 13), the Commission stated in its Order that a determination of the "public use" issue is "complicated by the many uncertainties associated with the 'merchant' nature of the proposed transmission line project." R.V34, C-08504; A-0047. But then the Commission, without legal authority and improperly,

relaxed the statutory standard for this "merchant" project. Whether a project is one that, as with most utility projects, is placed into the utility's rate base and is allowed to earn a regulated return, or, as here, is a "merchant" project, with no rate-regulated return, the statutory standards, including whether the project is for a "public use," should be applied consistently.

In *Mockbee v. Humphrey Manlift Co.*, 2012 IL App (1st) 093189, the Appellate Court, First District, admonished courts against judicial expansion of terms the legislature chose to place in statutes, and encouraged courts to leave issues of policy to the legislature. The *Mockbee* court addressed the meaning of "service organization" as that term was used in the Workers' Compensation Act. 820 ILCS 305/5(a). The court rejected arguments that the term should be interpreted other than according to its plain meaning. "If the legislature meant to restrict the application of 'service organization' as the plaintiffs urge before us, it could have expressly imposed any or all of those restrictions in its amendment to section 5(a)...." *Id.*, ¶45. The *Mockbee* court continued:

> The plaintiffs' position is supported by nothing more than policy arguments against giving the term "service organization" its plain meaning of an organization that provides a safety inspection service to an employer. It is not the role of this court to superimpose policy-based restrictions on the scope of section 5(a), given its plain and unambiguous language. "This court has no power to restrict the plain meaning of an unambiguous statute." *Mier,* 28 Ill.App.3d at 384, 329 N.E.2d 1. Only the legislature may restrict the scope of the immunity granted by section 5(a).

Id. See also Divane v. Smith, 332 Ill. App. 3d 548, 553 (1st Dist. 2002) (administrative agency is to construe statute as written and may not, "under the guise of construction," remedy defects, add exceptions, or otherwise change or depart from the plain meaning of

the statutory language). The *Mockbee* court's reasoning is applicable here and buttresses the arguments against a determination that Rock Island's Project is for a "public use."

D. Rock Island Has No Customers and Has Made No Commitments to Build or Obtain Assets or Customers.

Both as of the date of its Petition and the date of the hearings, Rock Island had no customers in Illinois. R.V38, RP233. A former ICC Commissioner who served as a witness for Rock Island stated he was not aware of an entity that the ICC found to be a public utility that did not have a single customer. R.V38, RP149.

The definition of "public utility" in PUA §3-105 does not expressly refer to "customers." The definition does, however, require that the entity's plant, equipment, or property be for public use, which necessarily implies that the entity has customers. Furthermore, the definition requires that the entity use the property for, or otherwise engage in, "the production, storage, transmission, sale, delivery, or furnishing of heat, cold, power, electricity, water, or light...." 220 ILCS 5/3-105. This section of the definition similarly assumes or implies the existence of customers. In addition, PUA §8-406(b) (applicable to a "construction" CPCN) refers to "customers" several times, further strengthening the conclusion that a "public utility" necessarily must have customers. Consequently, the lack of any customers, especially combined with the lack of a commitment to seek or obtain customers, is a disqualifying missing element for Rock Island.

Rock Island admitted the Project may never be built, regardless of regulatory approvals. R.V19, C-04626. Rock Island's Chief Executive Officer testified at the hearings that Rock Island would abandon the Project after it obtained a CPCN if Rock Island determined that it "wasn't worth investing in any further." R.V40, RP286. Rock Island

does not know if the wind projects in Iowa that would generate electric power to be transmitted over Rock Island's line will ever be built, or if demand for any electricity to be produced will ever materialize. As a Rock Island witness who testified on the Project's effect on competition in the electricity market put it: "[C]ompetition will decide whether or not this plant [Rock Island's Project] gets put in place...." R.V38, RP154. The record shows that extreme uncertainty exists surrounding the basic economics and viability of the Project. Rock Island's lack of commitment to obtain customers or assets to be used for transmission utility service, and the substantial possibility that the Project will not be built, together should cause this Court to conclude that Rock Island has not met the statutory definition of "public utility."

E. The Eminent Domain Cloud.

If Rock Island is allowed to retain the CPCN, it may return to the Commission for eminent domain authority. First, Rock Island would need to obtain an order under PUA §8-503 of the PUA that its Project is "necessary and should be erected, to promote the security or convenience of its employees or the public or promote the development of an effectively competitive electricity market, or in any other way to secure adequate service or facilities...." 220 ILCS 5/8-503. Based on the order granting the §8-503 request, the applicant may then proceed to exercise the right of eminent domain pursuant to §8-509, which provides in pertinent part:

> When necessary for the construction of any alterations, additions, extensions or improvements ordered or authorized under Section 8-406.1, 8-503, or 12-218 of this Act, any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain.

The ICC's grant of a CPCN to Rock Island created a clear path to eminent domain authority. The many unique aspects of Rock Island, along with the substantially uncertain and speculative nature of the proposed Project, demand a close examination of whether eminent domain is an appropriate tool to make available to Rock Island. Admittedly, Rock Island did not include a request for eminent domain authority as part of its Petition. That fact, however, should not and does not dispose of the issue.

It is well-established by many ICC eminent domain dockets that a public utility's application for eminent domain authority, after the utility has obtained a CPCN for an electric transmission project, will be granted based solely on the utility's evidence that it made reasonable attempts to acquire interests in needed real estate through negotiation with affected landowners. As the Commission stated in a recent Order authorizing a public utility to exercise eminent domain:

> The Commission has found that under Section 8-509, prior to authorizing a utility to request eminent domain authority in circuit court, a utility must show that it made a reasonable attempt to acquire the property at issue. (See March 11, 2009 Order in Docket No. 06-0706 at 88). This involves an evaluation of whether a utility made a reasonable effort to negotiate for the easements it needs to construct the authorized utility facilities. In previous proceedings, the Commission has relied upon five criteria: (1) the number and extent of contacts with the landowners, (2) whether the utility has explained its offer of compensation, (3) whether the offers of compensation are comparable to offers made to similarly situated landowners, (4) whether the utility has made an effort to address landowner concerns, and (5) whether further negotiations will likely prove fruitful.

Ameren Transmission Co. of Ill., ICC Docket No. 15-0237 Order at 4 (May 14, 2015).

No opportunity exists in a PUA §8-509 proceeding for an interested landowner, or the Commission itself, to (a) re-examine the need for or merits of the transmission line; or (b) consider any other factors (beyond those factors listed above in the quoted passage from

the *American Transmission Company* order) as to whether the applicant and its proposed project merit the right to condemn private land as necessary to construct the project. The prior CPCN proceeding for the line was the only point in the regulatory and legal process where such an examination was permitted. The propriety of clothing Rock Island with relatively easy-to-obtain eminent domain authority is an issue that should not be deferred. Consequently, it is appropriate for this Court on appeal of the CPCN proceeding to consider how eminent domain considerations should affect whether Rock Island qualifies for public utility status that the CPCN conferred and the powerful condemnation tool that such status provides to Rock Island, along with the resulting prejudice to affected landowners.

The Project is highly uncertain and speculative. Rock Island's experience in attempting to gain regulatory approval for the Project in Iowa is but one factor showing that uncertainty. Rock Island filed its request for state regulatory approval for its Project in Iowa ("Petitions for Electric Line Franchise") in November 2014. Then, on December 22, 2016, Rock Island filed a withdrawal of its request for approval, citing the regulatory uncertainty in Illinois and the statutory deadline in Iowa for a decision on its Petitions. ILA requests this Court to take judicial notice of Rock Island's request, a copy of which is in the Appendix to this brief. ILA Supp. Appendix, pp. 26-28. *Heaton v. Quinn (In re Pension Reform Litig.)*, 2015 IL 118585, fn. 4 (taking notice of SEC order), *Blumenthal v.* Brewer, 2016 IL 118781, ¶ 35. Rock Island's Chief Executive Officer testified at the hearing that he expected to receive an order from the regulator in Iowa in 2015. R.V38, RP235. Now, in 2017, not only does Rock Island not have Iowa regulatory approval for the Iowa portion of the Project, Rock Island has withdrawn its request for approval.

Other examples of the significant delays associated with the Project are the achievement of financing for and start of construction of the Project. The Executive Vice President of Clean Line Energy Partners, Rock Island's indirect parent company, testified at the hearing that Rock Island expected to close on both the equity and debt portions of the Project's construction financing in the fourth quarter of 2015. R.V46, RP1090. He testified further that construction of the Project would begin in late 2015, following achievement of the financing. R.V46, RP1087. With Rock Island having to start over in attempting to obtain regulatory approval for the Project in Iowa, the already substantial delays in financing and construction will only lengthen, further contributing more uncertainty to an already uncertain and speculative project. These delays in financing and construction further contribute to the considerable uncertainties that the Project will ever be developed.

Rock Island expects the ILA members to live under these substantial delays and uncertainties. Unless the Third District's decision reversing the Commission's Order is allowed to stand, the many landowner constituents of ILA will have an eminent domain cloud upon title hanging over their heads and threatening their full ownership, control, and enjoyment of their farm land and other property. Affected landowners would have to live under such a cloud for an indefinite period of time and be threatened with a condemnation action, all for an improper purpose, to accommodate a new, inexperienced entrant into the electricity transmission industry for a highly uncertain and speculative project that may never be built. Rock Island has presented its desire to enable more electricity generated from out-of-state renewable resources into the wholesale power market, and put downward

pressure on wholesale electricity market prices. But the Project is not needed for reliability purposes, or to alleviate any capacity constraints on the transmission grid that threaten continued service to any end use electric utility customers, either in Illinois or elsewhere. R.V35, C-08591; A-0134 (Project is not "necessary to provide adequate, reliable, and efficient service to customers").

For this concern over a prolonged cloud on title, it is no answer that the PUA requires a CPCN to be exercised within two years. 220 ILCS 5/8-4069(f) ("Unless exercised within a period of 2 years from the grant thereof authority conferred by a certificate of convenience and necessity issued by the Commission shall be null and void."). Rock Island could "exercise" its CPCN by undertaking minimal activities or investments to avoid having the CPCN become null and void. For example, PUA §8-510 gives Rock Island, as a CPCN holder, the right (without eminent domain authority) to enter onto landowner property to conduct "land surveys and land use studies." 220 ILCS 5/8-510. Many other relatively minor steps could be undertaken, at little expense, to insulate Rock Island from any claims that its CPCN has expired due to non-exercise.

It bears emphasizing that, unless the Third District's decision reversing the ICC's grant of a CPCN to Rock Island is affirmed, private property owners along a 121-mile corridor in Illinois will be subject immediately to a cloud over their property rights – without due process and without compensation – all for an unknown period of time and for a speculative project that may never be built. If the grant of a CPCN to Rock Island is reinstated, the Commission's action will effectively presage the taking and deprivation of

one private party, the property owners, of property rights in favor of another private party, Rock Island, for an inadequate and unjustified purpose.

The adoption of Rock Island's position would vest Rock Island, a private entity with a right to invoke eminent domain proceedings with a rebuttable presumption by law in its favor under the Illinois Eminent Domain Act. It is clear that the issuance of a CPCN in favor of Rock Island raises a number of condemnation-related concerns. First, possible and speculative future benefits do not constitute the tangible, definable and plausible "public use" required by the United States and Illinois Constitutions to take or injure a person's property rights. Therefore, the grant of a CPCN by the Commission constitutes an unlawful action. Second, since a plain reading of the applicable laws applies only to public utilities, and Rock Island does not fall within that definition, the action by the Commission adopting Rock Island's position that it is a public utility was an "arbitrary" exercise of power contrary to the substantive due process rights of the ILA members and other affected landowners. Third, historically the Commission has carefully considered the circumstances under which it will grant a utility the ability to encumber private property for utility purposes and has limited its action to cases where the public interest is concrete, definite, and plausible. This Court should exercise no less consideration to deny adopting Rock Island's position for its speculative proposed transmission line project offering no more than a possibility that it may someday build the Project.

Both the U.S. and the Illinois Constitutions protect the rights of individuals to be free from certain actions that deprive them of private property. The Fifth Amendment "Takings Clause" of the United States Constitution prohibits action that takes private

property "for public use, without just compensation." U.S. Const. Amend. 5. The Illinois Constitution, Article I, Section 15, prohibits action in which private property is "taken or damaged for public use without just compensation as provided by law." The due process clause of the Fourteenth Amendment to the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. 14 § 1.

It is important to note that the protections provided by the U.S. and Illinois Constitutions do not turn on whether the objectionable state action takes place in the context of an eminent domain proceeding. Neither the U.S. Constitution nor the Illinois Constitution provide that its protections against unlawful injury, damage, or taking only apply in the context of an eminent domain proceeding. In other words, the fact that Rock Island has not requested eminent domain authority and that the proceeding before the Commission was not an eminent domain proceeding is not dispositive of, and should not be allowed to deflect, the serious constitutional concerns. Constitutional analysis relating to the concepts of due process and scrutiny of state action that injures, damages, or takes from one private citizen in favor of another private citizen is not solely limited to proceedings in eminent domain. Such analysis applies to any proceeding in which state action injures, damages, or takes from a private citizen. To hold that the rights granted under the Fifth and the Fourteenth Amendments of the U.S. Constitution and similar protections under the Illinois Constitution apply only in eminent domain proceedings would mean that a state action that injures, damages, or takes would never run afoul of the Constitution, even if arbitrary and not for a public use, as long as the state was not acting

in an eminent domain proceeding. Such a holding would render the constitutional protections a nullity in any proceeding outside of eminent domain.

The Illinois public, acting through their elected officials in the State legislature, has taken more seriously the rights of private citizens to be protected from transfers of their property rights to another private party. The Illinois legislature has introduced more stringent requirements into their Eminent Domain Act. In May 2006, the Eminent Domain Act was amended to require a higher standard of proof by a condemning authority if a taking is for private ownership and control. In the case of a taking for private ownership and control, the condemning authority would have to show by "clear and convincing" evidence that a proposed taking is primarily for the benefit, use, and enjoyment of the public and necessary for a public purpose. 735 ILCS 30/5-5-5(c). The legislature has clearly spoken that a high standard should be required of "public use" before personal property rights can be damaged. Speculative future benefits proffered by Rock Island that may never come to fruition certainly do not constitute clear and convincing evidence and cannot be shown to be primarily for the benefit, use, and enjoyment of the public or necessary for the public. In this case, given the current stage of development, the only definable benefits accrue to Rock Island in the ability to attract additional investors, to continue its viability, to entice customers, etc. As Rock Island has made no "clear and convincing" showing of plausible benefits to the Illinois public, this Court should not countenance the Commission's severe undermining of the valuable rights of its citizens in favor of a private party, which has in reality offered little more than a business plan for a transmission line.

In addition, the Commission's action based on a determination that Rock Island is a public utility was so arbitrary as to violate the substantive due process rights of the property owners. Nothing in the PUA allows the Commission the discretion to deem an entity that does not fit within the definition of a "public utility" under the Public Utilities Act, to be a "public utility." *See* 220 ILCS 5/3-105. The Commission's exercise of authority to designate Rock Island a public utility served to cloud, impair, and damage the rights of property owners, and therefore was arbitrary, capricious, and violated the substantive due process rights of the landowners.

Rock Island presented no public interest plausible enough and sufficient to justify the immediate cloud and deprivation of the property rights the landowners along this 121-mile route would experience for an unknown period of time. The record, therefore, discloses no real hardship on anyone (other than Rock Island's investors) if the Project is not constructed and placed into service. As it stands, the Project has neither a private nor a public use; rather, it has no use at all. It does not exist, even in a small part, Rock Island has made no commitment to cause it to exist, and it is far from certain to come into existence even if all regulatory approvals were to be acquired.

F. There is No "Catch-22."

Rock Island need not have undertaken activities prior to receipt of a CPCN for which PUA §8-406 requires a CPCN prior to undertaking those activities. First, §8-406(a) requires a public utility to obtain a CPCN before transacting business in Illinois. In other words, an entity must have a §8-406(a) CPCN prior to conducting public utility business. This section does not prohibit an entity like Rock Island from conducting any business. In

fact, the record discloses Rock Island did conduct business in Illinois prior to the Commission's Order granting a CPCN.

Similarly, under §8-406(b), a public utility is required to obtain a CPCN prior to beginning construction of new plant, equipment, property, or facility. In other words, an entity must have a §8-406(b) CPCN prior to constructing a new public utility project. This section does not prohibit an entity like Rock Island from constructing or acquiring any property, including property that it may use in connection with the public utility service it plans to provide. Here, Rock Island failed to acquire any such property and, perhaps even more significant, it expressly disclaimed any obligation or commitment to do so following its receipt of a CPCN. A CPCN, and public utility status, must mean and must require more than that.

The Third District agreed with the portion of the Commission's Order that an applicant need not own the property as of the date of its CPCN application. The court reassured that the PUA does not require, as a condition of applying for a CPCN, that the applicant have already achieved public utility status. Rather, that status may be properly conferred as part of that Commission proceeding. A-0016.

Beyond the advance of a "Catch-22" situation, if Rock Island does not like the way the PUA applies to its merchant Project, it should take its case to the legislature rather than ask this Court to bless a tortured interpretation of the statute. Illinois courts "may not read into a statute any condition or provision that the legislature did not express." *Commonwealth Edison Co.*, 398 Ill. App. 3d at 537 (citing *Ragan v. Colombia Mut. Ins. Co.*, 183 Ill. 2d 342, 350-51 (1998)).

III. The Third District's Opinion does not Violate the Commerce Clause.

Rock Island argues the Third District's interpretation of the PUA places a constitutionally impermissible burden on interstate commerce because a proposed transmission line would need to set aside some capacity for in-state generators or other customers in order to receive a CPCN. What Rock Island fails to mention is that it chose not to participate in a regional transmission planning process and instead chose to obtain approval for its Project by applying for a CPCN from the Commission. Rock Island was, and still is, free to purchase land in Illinois, acquire easements with Illinois landowners through negotiation, and construct its line, all without a CPCN. The Third District's Opinion only prevents CPCN applicants like Rock Island, with no customers and nothing more than a business plan, from obtaining public utility status (and condemnation authority) to construct a transmission line that Rock Island admitted it might never build. R.V34, C-08499; A-0042.

Rock Island's reliance upon *Ill. Commerce Comm'n v. FERC*, and other cases, is misplaced because those cases do not support the contention that the Third District's Opinion violates the Commerce Clause. For example, the Opinion does not discriminate against out-of-state renewable energy by requiring a utility to use only in-state renewable energy resources to comply with the renewable portfolio standard in *Ill. Commerce Comm'n v. FERC*, 721 F.3d 764 (7th Cir. 2013). Contrary to Rock Island's assertions, federal law does not require Illinois to treat all transmission line developers as public utilities, with the future ability to take private property and family farm ground.

The Commerce Clause allows states to regulate which entities receive public utility status (and ultimately eminent domain authority) and to award public utility status to entities willing to serve customers on non-discriminatory terms. See *GMC v. Tracy*, 519 U.S. 278, 294-97 (1997). "The public need aspect of the statute serves to protect and restrict the exercise of such powers as eminent domain. This is a legitimate purpose as it regulates the traditional state power of eminent domain by ensuring freedom from unnecessary and nonorderly intrusions upon private property." *Lakehead Pipeline Co., Ltd. v. Illinois Commerce Comm'n*, 296 Ill. App. 3d 942, 952 (3d Dist. 1998). In *Lakehead Pipeline Co., Ltd.*, the appellate court analyzed the dormant commerce clause test, which applies when a state law is non-discriminatory on its face but nevertheless encroaches on interstate commerce. The court applied a balancing test adopted by the Supreme Court:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Lakehead Pipeline Co., Ltd., 296 Ill. App. 3d at 951-52 (quoting *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970)).

The *Lakehead* Court emphasized the State's legitimate purpose to protect citizens' rights to own property without the threat of a taking for a private purpose. The court held that the burden on commerce, if one existed, was not excessive. Similarly, the denial of Rock Island's CPCN does not impermissibly interfere with interstate commerce because Rock Island can build its transmission line without obtaining public utility status.

Under federal law, Rock Island could demonstrate a public need for the transmission line through the transmission planning process, allowing it to recover its costs and receive a fair return through rates. Alternatively, the law permits Rock Island to bypass the planning process, assume the market risk, and sell rights at rates negotiated with customers. Order No. 1000, 136 FERC ¶ 61, 051, para. 163; ILA Supp. Appendix pp. 38-39. Under the second approach, federal law does not require Illinois to award public utility status to every transmission developer, especially one that refuses to commit to build the transmission line or serve the public. Therefore, the Third District's decision does not place a barrier upon interstate commerce by preventing the development of new transmission projects.

IV. Summary.

It is apparent that Rock Island and its proponents are attempting to force a square business peg into a round legal hole. All the policy arguments advanced in favor of the Rock Island Project cannot alter the outcome of the sound legal analysis. Rock Island is not a public utility and does not possess the necessary statutory attributes of a public utility. It therefore does not qualify for a CPCN to transact public utility business in Illinois. Rock Island should either (i) develop its Project as a private, non-public utility facility; or (ii) advance its activities, including financing and obtaining customer commitments, and at least make commitments to acquire assets, if Rock Island remains committed to constructing the Project, thereby meeting the statutory definition of and becoming a "public utility," and then apply to the Commission for a CPCN (positioning itself to acquire

eminent domain authority). Based on the record and the evidence Rock Island presented, Rock Island does not qualify as an Illinois public utility as a matter of law.

CONCLUSION

For the reasons stated herein, Illinois Landowners Alliance, NFP respectfully asks this Court to affirm the Third District's judgment. In the alternative, in the event the Court reverses the Third District's decision, Illinois Landowners Alliance, NFP requests that the Court remand the case to the Third District to decide the issues it declined to address.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 34 pages.

Dated: April 12, 2017

/s/ William M. Shay
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Nos. 121302, 121304, 121305 & 121308 Consolidated

IN THE
SUPREME COURT OF ILLINOIS

ILLINOIS LANDOWNERS ALLIANCE, NFP, *et al.*,	)	**On Appeal from the Appellate Court of Illinois Third District, Case Nos. 3-15-0099, 3-15-0103 & 3-15-0104 (Cons.)**
Respondents-Appellees,	)	
v.	)	
ILLINOIS COMMERCE COMMISSION, *et al.*,	)	**There Heard on Review of the Order of the Illinois Commerce Commission, ICC Docket No. 12-0560**
Petitioners-Appellants.	)	

NOTICE OF FILING

TO: All Counsel of Record – See Attached Service List

PLEASE TAKE NOTICE that on this 12th day of April, 2017, I have caused to be electronically filed with the Clerk of the Illinois Supreme Court using the I2File.Net system, the Brief of Illinois Landowners Alliance, NFP, a copy of which is hereby served upon you.

Respectfully submitted,
ILLINOIS LANDOWNERS ALLIANCE, NFP

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CERTIFICATE OF SERVICE

I, William M. Shay, hereby certify that on April 12, 2017, I caused the foregoing Notice of Filing and Brief of Illinois Landowners Alliance, NFP to be submitted to the Clerk of the Supreme Court of Illinois using the I2File.Net system. Pursuant to the "Supreme Court of Illinois Electronic Filing User Manual" and upon acceptance of the electronic Brief of Illinois Landowners Alliance, NFP for filing, I certify that I will cause an original and twelve (12) copies of the Brief to be sent to the Court within five (5) days of that notice.

I further certify that I will cause the Brief of Illinois Landowners Alliance, NFP to be served upon the attorneys of record hereinafter listed by electronic mail transmission and one copy by U.S. First Class mail, postage prepaid, on the 12th day of April, 2017:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ William M. Shay

Nos. 121302, 121304, 121305 & 121308 Consolidated

IN THE
SUPREME COURT OF ILLINOIS

ILLINOIS LANDOWNERS ALLIANCE, NFP, *et al.*,	)	**On Appeal from the Appellate Court of Illinois Third District, Case Nos. 3-15-0099, 3-15-0103 & 3-15-0104 (Cons.)**
Respondents-Appellees,	)	
v.	)	
ILLINOIS COMMERCE COMMISSION, *et al.*,	)	**There Heard on Review of the Order of the Illinois Commerce Commission, ICC Docket No. 12-0560**
Petitioners-Appellants.	)	

AMENDED NOTICE OF FILING

TO: All Counsel of Record

PLEASE TAKE NOTICE that on the 12th day of April, 2017, I have caused to be electronically filed with the Clerk of the Illinois Supreme Court using the I2File.Net system, the Brief of Illinois Landowners Alliance, NFP, a copy of which is hereby served upon you. On the 13th day of April, 2017, I have caused to be electronically filed with the Clerk of the Illinois Supreme Court using the I2File.Net system, the Amended Notice of Filing and Amended Certificate of Service, a copy of which is hereby served upon you.

Respectfully submitted,
ILLINOIS LANDOWNERS ALLIANCE, NFP

s/ William M. Shay
One of its Attorneys

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AMENDED CERTIFICATE OF SERVICE

I, William M. Shay, hereby certify that on April 12, 2017, I caused the foregoing Notice of Filing and Brief of Illinois Landowners Alliance, NFP to be submitted to the Clerk of the Supreme Court of Illinois using the I2File.Net system. Pursuant to the "Supreme Court of Illinois Electronic Filing User Manual" and upon acceptance of the electronic Brief of Illinois Landowners Alliance, NFP for filing, I certify that I will cause an original and twelve (12) copies of the Brief to be sent to the Court within five (5) days of that notice.

I further certify that the Brief of Illinois Landowners Alliance, NFP was served upon the attorneys of record hereinafter listed by electronic mail transmission and one copy by U.S. First Class mail, postage prepaid, on the 12th day of April, 2017:

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I further certify that one copy of the Brief of Illinois Landowners Alliance, NFP was served upon the attorneys of record hereinafter listed by U.S. First Class mail, postage prepaid, on the 12th day of April, 2017, and by electronic mail transmission on the 12th day of April, 2017:

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I further certify that the Amended Notice of Filing and Amended Certificate of Service was submitted to the Clerk of the Supreme Court of Illinois using the I2File.Net system on the 13th day of April, 2017, and served upon the attorneys of record listed above by electronic mail submission on the 13th day of April, 2017.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ William M. Shay

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SUPPLEMENTAL APPENDIX

INDEX TO ILLINOIS LANDOWNERS ALLIANCE, NFP'S SUPPLEMENTAL APPENDIX

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

American Transmission Company L.L.C. and ATC Management Inc.	:	
Application for a Certificate of Public Convenience and Necessity to operate as public utilities under Section 8-406(a).	:	**01-0142**

ORDER

By the Commission:

On February 14, 2001, American Transmission Company, LLC ("ATCLLC") and ATC Management Inc. ("ATC") (jointly referred to as "ATC" or "the Petitioners") filed a Petition with the Illinois Commerce Commission seeking, pursuant to Section 8-406(a) of the Public Utilities Act (the "Act") a Certificate of Public Convenience and Necessity to operate in Illinois as public utilities. The Petitioners also seek Commission approval of certain agreements with its affiliated interests, pursuant to Section 7-101 of the Act. The Petitioners additionally seek permission from the Commission to keep its accounts and records at their business office in Waukesha, Wisconsin.

ATCLLC is a Wisconsin limited liability company that is authorized to conduct business in the State of Illinois. ATC Management Inc. is a Wisconsin corporation and it is the corporate manager of ATCLLC. The two entities function as a single entity, ATC, with its headquarters in Waukesha, Wisconsin.

On July 19, 2001, Petitioners moved for a stay of this proceeding, pending a Declaratory Ruling, as, in Docket 01-0607, the Petitioners sought a declaratory ruling that Section 7-101 of the Act is not applicable to ATC's agreements with its voting members that predate January 1, 2001, (contracts it entered into prior to the time the Petitioners became public utilities) or to future contracts with its voting members which do not involve assets or customers in Illinois. The instant Docket was stayed on July 24, 2001, until a declaratory order issued in Docket 01-0607.

On June 19, 2002, the Commission issued a final order in which it declared that Section 7-101 of the Act requires review of all contracts with Petitioner's affiliated interests, when those contracts relate in whole or in part to Illinois ratepayers or to Illinois property. The Commission concluded that such contracts will not be effective in Illinois unless first reviewed and approved by the Commission.

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Petitioners' Motion for Leave to File an Amended Petition (to conform to the findings made by the Commission in Docket No. 01-0607) in the instant Docket was granted on July 30, 2002. An evidentiary hearing convened on October 8, 2002 before a duly authorized Administrative Law Judge (an "ALJ") of the Commission at its offices in Chicago, Illinois. At the evidentiary hearing, Petitioners appeared by its counsel and presented the testimony of Jeffrey Rauh, the Director of Regulatory Affairs and State Relations for ATC Management Inc., in support of their Petition. The Staff of the Commission also appeared and participated in the hearing. The Staff of the Illinois Commerce Commission offered the direct testimony of four witnesses: Thomas L. Griffin, a Supervisor in the Accounting Department of the Commission's Financial Analysis Division; Richard Zuraski, a Senior Economist for the Policy Program of the Illinois Commerce Commission's Energy Division; Rochelle Phipps, a Financial Analyst in the Commission's Finance Department and J James D. Spencer, a Senior Energy Engineer in the Engineering Department of the Commission's Energy Division. At the conclusion of the hearing, the matter was marked "Heard and Taken."

The Petitioners' Position

Background

Mr. Rauh testified that ATC was formed to plan, construct, operate, maintain, and expand transmission facilities to provide an adequate and reliable transmission system that meets the needs of all the system's users, supports effective competition in energy markets without favoring any market participant, and to engage in other incidental and appropriate activities. ATC is a transmission-only utility.

Mr. Rauh further testified that ATCLLC is owned by twenty-five municipal entities, (including municipalities, municipal utilities, and municipal electric companies) retail electric cooperatives, and investor-owned utilities that contributed transmission assets or cash. Each entity has an ownership interest in proportion to the value of its respective contribution. One of these entities is South Beloit Water, Gas and Electric Company, ("South Beloit") an Illinois electric utility.

Mr. Rauh described the experience of ATC's staff. Mr. Rauh stated that José M. Delgado, President and CEO of ATC, has served as Chairman and President of Mid-America Interconnected Network (MAIN), trustee of the North American Electric Reliability Council (NERC), member of the Midwest Independent System Operator Transmission Owners Committee, and advisor to the Electric Power Research Institute Power Delivery Group. ATC's five vice-presidents all have substantial experience in utility management and operations, as they have worked for many years at companies such as Wisconsin Electric, Wisconsin Power and Light, ("Wisconsin Power") Commonwealth Edison Company, ("ComEd") and Madison Gas & Electric Company. Mr. Rauh stated that a significant number of the approximately 287 employees at ATC come from similar positions at other utilities in the Midwest. Additionally, according to Mr. Rauh, ATC augments its experienced employee base with contracted employees to provide a number of essential services for its electric transmission system.

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ATC's transmission assets in Illinois were previously owned and operated by South Beloit. The first of these sets of assets consists of a 345 kV transmission line and associated facilities, less than a mile in length, that interconnects with the 345 kV system of ComEd. ATC's second set of Illinois assets is a 69 kV transmission line and associated facilities that form a nine-mile loop in Winnebago County, Illinois. This second line serves four distribution substations; it does not interconnect with any other Illinois transmission facilities.

The Petitioners are regulated by the Wisconsin Public Service Commission. Also, the Securities and Exchange Commission must approve their securities issuances, sales, acquisitions of utility assets and acquisitions of interests in other businesses.

Mr. Rauh opined that ATC's operations are necessary to the public. ATC's transmission facilities serve the same basic function in Illinois today that they have been serving for years as part of the previously-certified South Beloit system. Mr. Rauh stated that without the 69 kV transmission line in place, customers in South Beloit's service territory would need to be served via a different path. Also, although only a short piece of ATC's 345 kV line is in Illinois, it serves the important purpose of providing a link between ComEd's 345 kV system and the rest of ATC's transmission system.

Mr. Rauh also testified that ATC keeps its books and records at its corporate headquarters in Waukesha, Wisconsin. He stated that because the amount of books and records relating to ATC's Illinois operations is comparatively small, it would be more efficient to keep the books and records all in one place. Mr. Rauh requested approval from the Commission to maintain the Petitioners' books and records out of state.

Mr. Rauh also stated that ATC is willing and able to make all required filings in Illinois, and it will abide by the Illinois Public Utilities Act. Mr. Rauh's testimony included the description of the affiliate agreements that may affect property or operations in Illinois, in accordance with the Commission's recent ruling in Docket No. 01-0607 (Order, June 19, 2002). He further testified that ATC does not have a franchise, license, permit, or right to furnish or sell electricity to retail customers within a service area in Illinois; accordingly, the Petitioners do not intend to file a delivery service tariff in Illinois. Mr. Rauh also stated that the Petitioners will not own generating facilities to participate in the wholesale electric energy market.

ATCLLC has contracted with Wisconsin Power, the parent company of South Beloit, for certain services related to the transmission lines in Wisconsin and Illinois. Upon expiration of the contracts, the Petitioners plan to either take over all the functions previously relegated to Wisconsin Power pursuant to the contracts, extend the existing contracts, or contract with other parties to provide those services. Mr. Rauh commented that because Wisconsin Power is an affiliated company that is not an Illinois public utility, the Commission's approval is required for these two contracts to be given effect in Illinois, pursuant to Section 7-101 of the Act.

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On cross-examination by the ALJ, Mr. Rauh stated that the non-utility investments of certain Wisconsin utilities were previously limited to 25 percent of total assets, but in 1999, Wisconsin Act 9 provided relief from this limit in exchange for a utility's divestment of transmission assets, so long as the assets were divested to a company of a specific type by a certain date. Asked to explain his reference to "OASIS," Mr. Rauh replied that OASIS is short for "Open Access Same-time Information System," which is an electronic reservation system mandated by the Federal Energy Regulation Commission designed to insure nondiscriminatory access to transmission lines. Mr. Rauh explained his statement that ATC serves South Beloit by describing how ATC transports electricity to South Beloit's distribution system at various substations. Finally, Mr. Rauh explained the affiliate status of ATC and Wisconsin Power, pointing out that Wisconsin Power owns approximately an 18 percent membership share in ATCLLC.

The First Wisconsin Power Contract

Mr. Rauh testified that the first of these two agreements is an "Operation and Maintenance Agreement for Transmission Facilities" between ATCLLC and Wisconsin Power, dated December 29, 2000. This agreement gives ATC the right to direct Wisconsin Power and its subsidiaries to provide operations services and certain maintenance services on the ATC transmission system. This agreement obligates Wisconsin Power to provide maintenance services, such as inspections, monitoring, preventive and corrective maintenance, and other like activities. Mr. Raugh testified that providing these services in this manner is consistent with the way routine operation and maintenance of the lines was handled before ATC owned them. Mr. Rauh stated that the agreement provides a continuity of functions that is critical to reliably operating and maintaining a transmission system, as it provides field personnel who are experienced in, and knowledgeable about, servicing and maintaining these facilities. Mr. Rauh also stated that this agreement provides for a smooth transition of functions from South Beloit to ATC; it currently retains synergies of the transmission-to-distribution function in the most cost-effective and reliable manner.

The Second Wisconsin Power Contract

The second agreement entered into between ATCLLC and Wisconsin Power is a "Transitional Services Agreement for Transmission Facilities," dated December 29, 2000. Mr. Rauh testified that this agreement makes certain services available to ATC by Wisconsin Power and Light until these services can be performed by ATC, or by a contracted third-party. These services include plant accounting, engineering records management, real estate records management and acquisition services, project management, environmental, and planning services. Mr. Rauh concluded that this agreement, like the first agreement with Wisconsin Power, promotes public convenience in Illinois by providing access to qualified, experienced personnel and existing support systems to help assure a smooth transition to ATC ownership, and helps minimize the cost of rendering electric transmission service.

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Staff's Position

Mr. Griffin testified that he reviewed the affiliate agreements, the testimony, and the petition. He stated that his review brought nothing to his attention that would cause him to object to the petition for certification, the agreements with affiliated interests, or maintaining records in Waukesha, Wisconsin.

Richard Zuraski testified that he had reviewed the affiliate agreements. After this review, he concluded that there was no cause for Commission concern regarding these agreements.

Ms. Phipps stated that she examined the petition, the petitioners' testimony, and pertinent financial statements. She also examined the petitioners' credit reports from Moody's, Standard and Poor's, and Fitch. She concluded that the petitioners have a strong financial position, which will serve the public's interests. Accordingly, she had no objection to the petition.

Mr. Spencer testified that he examined the petition and testimony. This examination led him to conclude that the Commission need not have any concern regarding the Petitioners' ability to operate and maintain its transmission system.

Commission Analysis and Conclusions

The Petitioners own, control, operate, and manage, within this State, for public use, facilities used in the transmission of electricity. Therefore, the Petitioners fall within the definition of a "public utility," as is set forth in Section 3-105 of the Act. Accordingly, Section 8-406(a) of the Act requires the Petitioners to obtain a Certificate of Public Convenience and Necessity prior to transacting any business in this State.

Section 8-406(a) requires a petitioner to demonstrate that the public convenience and necessity require the transaction of the business in question. The Commission finds that the Petitioners have met this burden.

South Beloit owned the same transmission facilities and performed the same transmission functions that are currently under review for Petitioners. The Petitioners have presented evidence establishing that ATC is fit, willing, and able to own, operate, and maintain the former South Beloit transmission facilities for public use. ATC has contracted with South Beloit's corporate affiliates for the local operation and maintenance of these transmission lines. When this contract expires, ATC can take over all operation and maintenance of these facilities. We note that the evidence presented established that ATC Management Inc. employs a staff with substantial experience in utility management and operations.

The Petitioners' transmission lines are transmitting power within Illinois to serve Illinois customers; therefore, it is in the public interest that the Commission oversee certain aspects of the Petitioners' operations, especially, those operations that concern the electrical lines in question. Although many aspects of the Petitioners' operations

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are within the jurisdiction of the Federal Energy Regulatory Commission, other aspects of operations are subject to state supervision. As an Illinois public utility, ATC's books and records can be accessed by the Commission, which ensures regulatory compliance with state law.

For these reasons, the Commission is of the opinion that the Petitioners should be granted a Certificate of Public Convenience and Necessity.

Section 7-101 of that Act allows us to approve contracts with affiliated interests when those contracts are in the public interest. In this case, the Petitioners have demonstrated that the agreements with affiliated interests that ATCLLC entered into Wisconsin Power promote the public convenience by providing a smooth transition of functions from the former owners to ATCLLC. Also, there is nothing in this record to indicate that the compensation paid pursuant to these agreements is unreasonable. Thus, the Commission approves these two agreements with affiliated interests, pursuant to Section 7-101 of the Act.

The Commission recognizes that the Petitioners have a single, integrated business headquarters in Waukesha, Wisconsin. The Petitioners have demonstrated that keeping their accounts and records at their headquarters in Waukesha, Wisconsin would be efficient. Thus, the Commission finds that the Petitioners' request to keep their accounts and records at its headquarters promotes the public convenience and should be approved.

FINDINGS AND ORDERING PARAGRAPHS

The Commission, having examined the entire record herein, and being fully advised in the premises, is of the opinion and finds that:

(1) American Transmission Company LLC and ATC Management Inc. are "public utilities" within the meaning of Section 3-105 of the Public Utilities Act but are not "electric utilities" within the meaning of Section 16-102 of the Public Utilities Act;

(2) the Commission has jurisdiction over American Transmission Company LLC and ATC Management Inc. and of the subject-matter herein;

(3) American Transmission Company LLC and ATC Management Inc. seek, pursuant to Section 8-406(a) of the Public Utilities Act, a Certificate of Public Convenience and Necessity to operate in Illinois as "public utilities;"

(4) the recitals of fact heretofore set forth are supported by the evidence in the record and are hereby adopted as findings of fact herein;

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(5) the approval sought by the Petitioners in their Amended Petition of two agreements with affiliated interests should be granted;

(6) the request for permission sought by the Petitioners to keep their accounts and records at their headquarters in Waukesha, Wisconsin, is reasonable and it should be granted;

(7) American Transmission Company LLC and ATC Management Inc. have demonstrated that the public convenience and necessity requires the granting of a Certificate of Public Convenience and Necessity in order to operate in Illinois as public utilities.

IT IS HEREBY ORDERED that the Petition seeking a Certificate of Public Convenience and Necessity filed by American Transmission Company LLC and ATC Management Inc. be, and is hereby, granted.

IT IS FURTHER ORDERED that the Certificate of Pubic Convenience and Necessity herein granted shall be the following:

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

IT IS HEREBY CERTIFIED that the public convenience and necessity require the transaction of business as a public utility in Illinois by American Transmission Company LLC and ATC Management Inc., and they are authorized to perform the functions and services of a public utility in this State.

IT IS FURTHER ORDERED that the consent and approval of the Illinois Commerce Commission is granted to American Transmission Company LLC and ATC Management Inc. to operate under the "Operation and Maintenance Agreement for Transmission Facilities" between ATCLLC and Wisconsin Power and Light Company, dated December 29, 2000 and under the "Transitional Services Agreement for Transmission Facilities," entered into by ATCLLC and Wisconsin Power and Light Company, dated December 29, 2000, and to act in accordance with the terms and conditions of those agreements.

IT IS FURTHER ORDERED that American Transmission Company LLC and ATC Management Inc. are granted permission to keep their books and records out of state at their corporate headquarters in Waukesha, Wisconsin.

IT IS FURTHER ORDERED that pursuant to 220 ILCS 5/10-113 and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

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01-0142

By Order of the Commission this 23rd day of January, 2003.

(SIGNED) KEVIN K. WRIGHT

Chairman

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139 FERC ¶ 61,142
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Rock Island Clean Line LLC Docket No. ER12-365-000

ORDER CONDITIONALLY AUTHORIZING PROPOSAL AND GRANTING WAIVERS IN PART

(Issued May 22, 2012)

1. On November 8, 2011, Rock Island Clean Line LLC (Rock Island) filed a request for authorization to charge negotiated rates for transmission rights on a proposed high voltage direct current (HVDC) merchant transmission project (Project) and for waiver of certain Commission regulations.[1] In this order, the Commission conditionally authorizes Rock Island to charge negotiated rates for transmission rights on the Project and grants in part and denies in part Rock Island's request for waiver.

I. Background

A. Applicant

2. Rock Island is a wholly owned subsidiary of Rock Island Wind Line, LLC, a Delaware limited liability company, which is a wholly owned subsidiary of Clean Line Energy Partners LLC. The majority owner of Clean Line Energy Partners is ZAM Ventures, L.P., the principal investment vehicle for ZBI Ventures, L.L.C. ZBI Ventures,

[1] Commission precedent distinguishes merchant transmission projects from traditional public utilities in that the developers of merchant projects assume all of the market risk of a project and have no captive customers from which to recover the cost of the project. *See, e.g., Hudson Transmission Partners, LLC*, 135 FERC ¶ 61,104 (2011) (*Hudson Transmission*); *Champlain Hudson Power Express, Inc.*, 132 FERC ¶ 61,006 (2010) (*Champlain Hudson*); *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 (2009) (*Chinook*).

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L.L.C is described as focused on long-term investments in the energy sector and is a subsidiary of Ziff Brothers Investments, L.L.C.

B. Description of Project

3. The Project is a 500-mile, ±600 kV HVDC transmission line and associated facilities capable of delivering up to 3,500 MW from renewable energy projects in eastern South Dakota, eastern Nebraska, western Iowa, and western Minnesota to customers in Illinois and other states, interconnecting with the PJM Interconnection, L.L.C. (PJM) extra-high voltage transmission system at a point to be determined.[2] Rock Island expects the Project to deliver approximately 15 million MWh of energy per year, helping to satisfy growing demand for electricity in general and particularly for electricity from renewable resources in states like Illinois, which has adopted a renewable portfolio standard. Rock Island describes the location of the Project as ideal for wind-powered generation, and explains that the foundation of the Project is to connect such generation to major load centers.[3] Rock Island asserts that the Project will relieve current transmission constraints between the Midwest Independent Transmission System Operator (MISO) and PJM systems, provide added stability and reliability to the PJM system, and reduce prices on both the delivery and windward ends of the Project.[4]

4. Rock Island states that, while the specific route of the Project has yet to be determined, it continues to conduct feasibility studies to determine the optimal route for the line.[5] Rock Island states that it has identified two to three corridors approximately 3 to 10 miles wide in which to consider siting the Project, and these study corridors have been distributed to more than 50 governmental agencies and nongovernmental organizations for comment.[6] In addition, Rock Island represents that it has submitted a request to PJM to interconnect the Project with the PJM system in Illinois, has acquired a 2007-vintage interconnection queue position for the same interconnection point as its request, and has submitted a request to MISO to complete the studies required to interconnect with MISO.[7] Upon completion of the Project, Rock Island states that it will

[2] *Id.* at 5.

[3] *Id.* at 10.

[4] *Id.* at 8-9.

[5] *Id.* at 6.

[6] *Id.*

[7] *Id.* at 12.

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turn over operation of the Project to one of the regional transmission organizations (RTO), either MISO or PJM, to which it will interconnect.[8]

C. Application

5. Rock Island requests authority to sell transmission rights on the Project at negotiated rates and approval of its proposal to allocate 75 percent of the planned Project's capacity to anchor customers. Rock Island commits to holding an open season for the remaining 25 percent of the Project's capacity, as well as for any additional transmission capacity not secured by anchor customers.[9] Rock Island also commits to: (1) offer the same rates, terms, and conditions that are offered to anchor customers to all open season participants; (2) ensure transparency in the open season process; and (3) report the results of the open season to the Commission. It also commits to filing with the Commission a rate schedule for inclusion in the Open-Access Transmission Tariff (OATT) of either PJM or MISO.

6. Rock Island also requests that the Commission allow it to give preference to renewable energy resources in its open season. Rock Island argues that establishing a preference for renewable energy is essential to developing the Project because interested stakeholders and potential customers are less likely to support a transmission project that will ultimately be used to transmit electricity from coal-fired generation. Rock Island submits that the renewable energy preference is also consistent with the Commission's recognition that transmission planning should incorporate public policy considerations.

7. Rock Island states that obstacles to financing merchant transmission projects can be reduced to the extent that a transmission developer can negotiate financially secure pre-subscription agreements with creditworthy anchor customers. Rock Island explains that it faces a particularly difficult task in developing the Project because it requires coordinating construction of its transmission facility with the construction of new, renewable energy resources.[10]

8. Rock Island contends that it meets the four factor analysis as outlined in *Chinook* for approval of negotiated rate authority,[11] as discussed more fully below.

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[8] *Id.* at 4.

[9] *Id.* at 33.

[10] *Id.* at 11.

[11] *Chinook*, 126 FERC ¶ 61,134 at PP 37-53.

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II. Notice, Intervention, and Responsive Pleadings

9. Notice of Rock Island's Filing was published in the *Federal Register*, 76 Fed. Reg. 72,193 (2011), with interventions and protests due on or before November 29, 2011. The Illinois Commerce Commission filed a notice of intervention. Motions to intervene were filed by Exelon Corporation and PSEG Companies. American Wind Energy Association (AWEA) filed a comment.[12] Interstate Power and Light Company (Interstate) filed a motion to intervene and protest. On December 14, 2011, Rock Island filed an answer to Interstate's protest.

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Rock Island's answer because it has provided information that assisted us in our decision-making process.

B. Negotiated Rate Authority

12. In addressing requests for negotiated rate authority from merchant transmission providers, the Commission has demonstrated a commitment to fostering the development of such projects where reasonable and meaningful protections are in place to preserve open access principles and to ensure that the resulting rates for transmission service are just and reasonable.[13] The Commission's analysis for evaluating negotiated rate

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[12] In its comments, AWEA does not take a position with respect to the Project but stresses the importance of the Commission facilitating the expansion of transmission service.

[13] *See, e.g., TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,230, at 61,838-39 (2000) (accepting a request to charge negotiated rates on a merchant transmission project, subject to conditions addressing, among other things, the merchant's open season proposal); *Mountain States Transmission Intertie, LLC*, 127 FERC ¶ 61,270, at P 57, 59 (2009) (denying a request to charge negotiated rates on a merchant transmission project because, among other things, sufficient protections did not exist to ensure that rates for service would be just and reasonable); *Hudson Transmission*, 135 FERC ¶ 61,104 at

(continued...)

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applications focuses on four areas of concern: (1) the justness and reasonableness of rates; (2) the potential for undue discrimination; (3) the potential for undue preference, including affiliate preference; and (4) regional reliability and operational efficiency requirements.[14] This approach simultaneously acknowledges the financing realities faced by merchant transmission developers and the consumer protection mandates of the Federal Power Act (FPA) and the Commission's open access requirements. Moreover, this approach allows the Commission to use a consistent framework to evaluate requests for negotiated rate authority from a wide range of merchant projects that can differ substantially from one project to the next.

1. Four-factor Analysis

a. Just and Reasonable Rates

13. To approve negotiated rates for a transmission project, the Commission must find that the rates are just and reasonable.[15] To do so, the Commission must determine that the merchant transmission owner has assumed the full market risk for the cost of constructing its proposed transmission project. Additionally, the Commission must determine whether the project is being built within the footprint of the merchant transmission owner's (or an affiliate's) traditionally regulated transmission system; if so, the Commission must determine that there are no captive customers who would be required to pay the costs of the project. The Commission also considers whether the merchant transmission owner or an affiliate already owns transmission facilities in the particular region where the project is to be located, what alternatives customers have, whether the merchant transmission owner is capable of erecting any barriers to entry among competitors, and whether the merchant transmission owner would have any incentive to withhold capacity.

i. Rock Island's Proposal

14. Rock Island affirms that it will assume the full market risk of the Project and that it will have no captive customers. Rock Island states that it is a new market entrant and it is not building within the footprint of its own or an affiliate's traditionally regulated transmission system. Rock Island also contends that it will operate the Project pursuant

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ordering para. (A) (authorizing Hudson Transmission to charge negotiated rates for transmission service).

[14] *Chinook*, 126 FERC ¶ 61,134 at P 37.

[15] *See Champlain Hudson*, 132 FERC ¶ 61,006 at P 17.

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to the OATT of either PJM or MISO upon completion of the project. Rock Island asserts that use of such an OATT will prevent it from exercising market power or erecting barriers to entry in the region where the Project will operate.[16]

15. Rock Island provides several additional assurances as to why the rates charged will be just and reasonable. Rock Island observes that incumbent transmission owners have an obligation to expand their transmission capacity, upon request, at cost-based rates. Rock Island argues that this requirement limits the negotiated rates that it can offer. Additionally, Rock Island asserts that its rates will be limited by competition from other regional transmission projects, including the MISO Multi-Value Projects, which will also serve wind generators in the Great Plains.[17]

ii. Commission Determination

16. The Commission concludes that Rock Island's request for authority to charge negotiated rates for service on the Project is just and reasonable. Rock Island meets the definition of a merchant transmission owner because it assumes all market risk associated with the Project and has no captive customers. Rock Island has agreed to bear all the risk that the Project will succeed or fail based on whether a market exists for its services. Rock Island also has no ability to pass on any costs to captive ratepayers.

17. No entity on either end of the Project is required to purchase transmission service from Rock Island, and customers will do so only if it is cost-effective. As Rock Island points out, Rock Island will be unable to charge rates in excess of the cost of expansion on neighboring utilities. Pursuant to their OATTs, public utilities have an obligation to expand their transmission capacity upon request, at cost-based rates.[18] Therefore, the cost of expansion provides downward pressure on the negotiated rates that Rock Island will charge. Additionally, because neither Rock Island nor its affiliates own any transmission facilities within the footprint of the Project, Rock Island has no ability to erect barriers to entry or exercise market power in the relevant markets. Accordingly,

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[16] Filing at 1, 29-30.

[17] *Id.* at 31-32.

[18] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on reh'g*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

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these factors lead us to conclude that the requested negotiated rate authority is just and reasonable for service on the Project.

b. Undue Discrimination

18. As explained in *Chinook*, the Commission primarily looks at two factors to ensure that applicants cannot exercise undue discrimination when approving negotiated rate authority: (1) the terms and conditions of a merchant developer's open season; and (2) its OATT commitments (or in the RTO/ Independent System Operators (ISO) context, its commitment to turn operational control over to the RTO or ISO).[19] The Commission requires merchant transmission owners to file reports on the open season results shortly after the close of the open season. Such reports provide transparency to the allocation of initial transmission rights, as well as the basis for an entity to file a complaint if it believes it was treated in an unduly discriminatory manner.[20]

i. Rock Island's Proposal

19. Rock Island asserts that there is good reason to grant its request for authority to presubscribe up to 2,850 MW, or 75 percent of the maximum planned capacity, committing to offering at least 25 percent of the Project's total capacity in the open season. Rock Island asserts that negotiated rates are particularly necessary given this Project's unique circumstances in which new renewable energy resources and new infrastructure are being constructed simultaneously.[21] Rock Island also argues that wind generators, whose energy the Project will likely transmit, present numerous risks that transmission project developers and investors must overcome. For example, Rock Island states that wind energy projects are typically constructed with shorter lead times than other generators and are less willing to commit to large transmission projects well in advance of generator construction. Rock Island argues that pre-subscription of capacity with creditworthy anchor customers can reduce financing obstacles because lenders demand to see a secure source of revenue as a predicate to project financing.[22]

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[19] *Chinook*, 126 FERC ¶ 61,134 at P 40.

[20] *See Montana Alberta Tie, Ltd.*, 116 FERC ¶ 61,071, at P 37 (2006) (*MATL*) ("[T]he Commission's concern in evaluating the open season process is to provide transparency in the bidding process and to enable unsuccessful bidders to determine if they were treated in a fair manner.").

[21] Filing at 11.

[22] *Id.* at 21-22.

20. Rock Island states that it has reached out to known potential power developers and load-serving entities, but will provide information for and consider negotiating with any *bona fide* candidate that expresses interest. It states that the selection of entities with whom it will enter negotiations will be based on selection criteria that are consistent with Commission requirements for negotiated rate authority.[23] Rock Island also commits to holding an open season for all capacity not pre-subscribed by anchor shippers or initially pre-subscribed but that later becomes available.

21. Moreover, Rock Island commits to offering the same rates, terms, and conditions given to anchor customers to any open season participant willing to purchase transmission capacity for the same term.[24] Rock Island also states that to ensure transparency, the specific rules of the open season, detailed bidding guidelines, evaluation criteria, estimated rates, and proposed form agreements will be posted on its internet website and forwarded to interested parties. Rock Island asserts that it will also provide public notice of the open season in appropriate trade publications. Rock Island states that the results of the open season auction will be posted on its website.[25]

22. Rock Island asserts that it would be unable to resize the Project were the solicitation process to reveal market interest in excess of its planned transmission capacity because it would result in delays and additional costs. It states that resizing the Project would require it to resubmit its interconnection request with PJM as well as incur new engineering costs, modify the Project's converter stations, and conduct new studies. Rock Island states that it is unopposed to undertaking additional transmission projects in the future but argues that it is not financially or practically feasible to materially increase the size of this Project.[26]

23. As previously discussed, the Project will be located within the footprints of both the MISO and PJM RTOs. Thus, upon completion, Rock Island states that it intends to turn over operational control of the Project to one of those RTOs and recover its costs through a schedule in that RTO's OATT that is specific to the Project.[27]

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[23] *Id.* at 24.

[24] *Id.* at 23.

[25] *Id.* at 33-35.

[26] *Id.* at 26.

[27] *Id.* at 30, 35.

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24. Rock Island requests Commission approval to grant preferred status to offers from customers transmitting energy from renewable resources in the open season. Specifically, it proposes that it be permitted to score proposals premised on the transmission of electricity from renewable resources more highly than proposals to transmit energy from non-renewables in the open season.[28] Rock Island asserts that such a preference is "not undue given the important public policies encouraging the development and use of energy from renewable resources" and is consistent with the Commission's recognition that transmission planning should incorporate public policy considerations, such as requirements that load-serving entities meet renewable energy mandates.[29]

25. Additionally, Rock Island contends that establishing a preference for renewables is essential in developing the Project because interested stakeholders and potential customers, including environmental organizations and renewable energy developers, are less likely to support a transmission project that will ultimately be used to transmit coal-fired generation.[30] Rock Island states that it will analyze bids received according to pre-determined criteria, post on its website the results of any open season it conducts, and file the results of the open season with the Commission.

26. Rock Island argues that the Commission has permitted transmission developers considerable leeway in constructing an open season suited to the subjective needs of the transmission developer, including allowing use of qualitative considerations in open seasons.[31] It also asserts that, though not approved by the Commission, Zephyr Power Transmission, LLC's open season criteria included a non-price factor providing preference for energy from renewable energy projects.[32]

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[28] *Id.* at 9-10.

[29] *Id.* at 34 (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011)).

[30] *Id.*

[31] *Id.* at 17 (citing *TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,347 (2000); *Northeast Utilities Serv. Co.*, 98 FERC ¶ 61,310 (2002) (*Northeast Utilities*)).

[32] *Id.* at 18-19 (citing Open Season Report for Zephyr Power Transmission, LLC at 10, Docket No. ER09-433-000 (May 20, 2010)).

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ii. Commission Determination

27. The Commission looks specifically at the merchant transmission owner's open season and OATT commitments in determining whether negotiated rate authority could lead to undue discrimination on a particular merchant transmission project. As the Commission explained in *Chinook*, we evaluate on a case-by-case basis proposals to allocate all or a portion of initial capacity outside of an open season.[33]

28. The Commission will accept Rock Island's proposal to pre-subscribe up to 75 percent of transmission capacity to anchor customers. As Rock Island points out, it must secure long-term commitments from creditworthy anchor customers to support financing the Project. We have approved similar requests to allocate capacity to anchor customers in the past in light of the difficulties in financing merchant transmission projects.[34] Rock Island states that it will provide information for and consider negotiating with any *bona fide* candidate that expresses interest, and the selection of entities with whom it will enter negotiations will be based on selection criteria that are consistent with Commission requirements for negotiated rate authority. Additionally, Rock Island has committed to offer at least 25 percent of the Project's capacity in the open season. Therefore, given the specifics of the Project and the facts and commitments presented in the application, we find Rock Island's proposal to seek up to 75 percent presubscription from anchor customers to be reasonable.

29. Consistent with Commission precedent, we will condition acceptance of Rock Island's request on Rock Island making an informational filing with the Commission for any anchor customer transaction describing the terms of the agreement and the relevant facts and circumstances leading to the agreements no later than 30 days after the end of the open season.[35]

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[33] *Chinook*, 126 FERC ¶ 61,134 at P 42.

[34] *See, e.g., Chinook*, 126 FERC ¶ 61,134 at PP 60-63 (approving Chinook's presubscription of up to 50 percent of the project capacity to anchor customers); *Champlain Hudson*, 132 FERC ¶ 61,006 at P 47 (approving Champlain Hudson's proposal to seek up to 75 percent presubscription from anchor customers); *Southern Cross Transmission LLC*, 137 FERC ¶ 61,207, at P 28 (2011) (approving Southern Cross's presubscription of up to 75 percent of the project capacity to anchor customers).

[35] *Champlain Hudson*, 132 FERC ¶ 61,006 at P 44; *Hudson Transmission*, 135 FERC ¶ 61,104 at P 29.

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30. We also approve Rock Island's request to sell the remaining 25 percent of the Project's capacity using an open season auction, subject to the submission of informational reports.[36] As stated in *Chinook* and *Hudson Transmission*, open seasons must be fair, transparent, and non-discriminatory, and we will continue to require open season reports to be filed with the Commission shortly after the close of the open season.[37] The reports must include, at the very least, the terms of the open season (including notice of the open season and the method for evaluating bids), the identity of the parties that purchased capacity, and the amount, term, and price of the capacity. This open season reporting requirement and the process by which parties are afforded an opportunity to file complaints will continue to be the primary tools by which the Commission ensures that merchant transmission developers do not unduly discriminate.[38] The open season informational report should be filed within 30 days of the open season.

31. We do not approve, however, Rock Island's request to apply a preference for energy from renewable resources in its open season. Rock Island argues generally that public policy considerations and its need to attract support from stakeholders such as environmental organizations justify such a renewable energy preference. We find that Rock Island's general arguments do not sufficiently explain how distinctions between renewable energy resources and other types of generators justify its requested preferential treatment in an open season for initial transmission capacity. The Commission has not previously approved the inclusion of a preference for energy from renewable resources in a transmission owner's open season criteria, and Rock Island has failed to provide sufficient justification to do so here.[39]

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[36] Filing at 15-16.

[37] *Chinook*, 126 FERC ¶ 61,134 at P 41; *Hudson Transmission*, 135 FERC ¶ 61,104 at P 30.

[38] *Chinook*, 126 FERC ¶ 61,134 at P 41; *Champlain Hudson*, 132 FERC ¶ 61,006 at P 45; *Hudson Transmission*, 135 FERC ¶ 61,104 at P 30.

[39] The Commission has approved transmission developers' use of qualitative cost- and risk-based factors when scoring open season bids. *See, e.g.*, *Northeast Utilities*, 98 FERC ¶ 61,310 at 62,329 (approving an open season bid evaluation process in which "the possibility of risk-sharing or co-development" in the course of a project would cause a bid to be favored and "a bid that is more demanding administratively would be less desirable because of the risk of incurring additional future project overhead costs."); *TransEnergie*, 91 FERC ¶ 61,347 at 62,167 (approving an open season proposal that included "non-price considerations" which "can reduce the project's risk and/or increase the project's value").

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32. Once the Project has commenced operation, consistent with *Chinook*, Rock Island must file: (1) books and records for the Project that comply with the Uniform System of Accounts found in Part 101 of the Commission's regulations,[40] and will be subject to examination as required in Part 41 of the regulations,[41] and (2) Rock Island's books and records audited by an independent auditor.[42] These commitments will assist the Commission in carrying out its oversight role. Consistent with its commitment, upon the Project's completion, Rock Island must also make the Project subject to either MISO or PJM's OATT.

33. Rock Island asserts that it will be unable to resize the Project if the open season solicitation process reveals excessive market interest because resizing would result in prohibitive delays and additional costs. This issue may be moot, as it uncertain whether the Project will be over-subscribed. However, if Rock Island's open season results in oversubscription, we require that Rock Island in its open season report justify in greater detail its reasons for not expanding the Project and for allocating capacity among open season participants.

c. Undue Preference and Affiliate Concerns

34. In the context of merchant transmission, our concerns regarding the potential for affiliate abuse arise when the merchant transmission owner is affiliated with either the anchor customer, participants in the open season, and/or customers that subsequently take service on the merchant transmission line.

i. Rock Island's Proposal

35. Rock Island pledges that no affiliate will be an anchor tenant for capacity on the Project.[43] Rock Island states that, if an affiliate should subsequently take service on the transmission line, operational control of the Rock Island facilities by an RTO will ensure that no undue preference results. Rock Island also commits to file its open season report with the Commission, which will provide the terms of the open season, including notice of the open season and the method for evaluating bids; the identity of the parties that

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[40] 18 C.F.R. Part 101 (2011).

[41] 18 C.F.R. Part 41 (2011).

[42] *Chinook,* 126 FERC ¶ 61,134 at P 62; *Champlain Hudson,* 132 FERC ¶ 61,006 at P 48; *Tres Amigas LLC*, 130 FERC ¶ 61,207, at P 90 (2010).

[43] Filing at 36.

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purchased the capacity; and the amount, term, and price of that capacity. Finally, Rock Island will file electric quarterly reports of its transactions and comply with the Commission's Standards of Conduct to the extent required of similar transmission providers subject to the jurisdiction of the Commission.[44]

ii. Commission Determination

36. In light of the commitments made in the application, we find that Rock Island adequately addresses any affiliate concerns present at this early stage of the Project. Furthermore, we note that Rock Island commits to comply with the Standards of Conduct and file electric quarterly reports of its transactions as required of transmission providers.[45] Moreover, as discussed above, the commitments made by Rock Island regarding the open season process and reporting requirements will ensure that all transactions are transparent.

d. Regional Reliability and Operational Efficiency

37. Merchant transmission projects, like cost-based transmission projects, are subject to mandatory reliability requirements.[46] Merchant transmission developers are required to comport with all applicable requirements of the North American Electric Reliability Corporation (NERC) and any regional reliability council in with they are located.

i. Rock Island's Proposal

38. Rock Island commits to participating in the reliability planning processes of the RTO to which it turns over operational control of the Project. Additionally, Rock Island commits to complying with all applicable reliability rules, including applicable NERC requirements and procedures.[47] Rock Island states that it has submitted an

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[44] *Id.*

[45] 18 C.F.R. § 35.10(b) (2011); *see also* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 817; Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 394.

[46] *See, e.g., Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

[47] Filing at 36.

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interconnection request with PJM and submitted a request to MISO to complete the studies required to interconnect with MISO.[48]

ii. Protest and Answer

39. In its protest, Interstate states that it cannot support the Project because Rock Island has provided only limited information on the Project's potential effects and demonstrated a lack of due diligence and transparency. Interstate argues that Rock Island makes unsupported claims in its filing regarding the Project's reliability benefits and that, to substantiate these claims, Rock Island should conduct analysis and modeling with PJM and MISO to examine the potential effects of the Project on surrounding systems. Interstate maintains that the results of Rock Island's interconnection requests should be made available to stakeholders so that they can understand the effects of the Project. Finally, Interstate states that it supports the Project's cost allocation approach but requests that the Commission specifically order that costs associated with the Project be only allocated to subscribers in order to protect customers in the Project area from any cost responsibility or potential problems that may occur.

40. In its answer, Rock Island responds that the Project's impact on either MISO or PJM will be determined, and subsequently addressed if needed, in connection with the interconnection process of each RTO. Rock Island states that it has provided MISO and PJM with sufficient detail on the Project to enable them to determine whether the Project meets reliability criteria pursuant to Section 215 of the FPA and that it has initiated the interconnection study process with each RTO. Rock Island also states that, as a merchant transmission developer, it is under no obligation to submit itself to RTO evaluation and selection process.[49] Finally, Rock Island clarifies that it is not seeking cost allocation for the Project, but will recover its costs from customers who have contractually agreed to purchase capacity through a rate schedule in the RTO's OATT specific to the Project.

iii. Commission Determination

41. Rock Island commits that the Project will comply with applicable NERC and PJM/MISO reliability requirements. Additionally, Rock Island indicates that it has already filed an interconnection request with PJM and has submitted a request to complete the studies required to interconnect with MISO. Accordingly, we find that Rock Island has met the regional reliability and operational efficiency requirement,

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[48] *Id.* at 12.

[49] Rock Island Answer at 2-3 (citing Order No. 1000, 136 FERC ¶ 61,051 at P 165).

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subject to Rock Island's continued participation in the necessary regional planning processes.

42. With regard to Interstate's protest, the RTOs will determine the Project's reliability impact on their systems as well as the cost to ameliorate any negative impacts through the interconnection study process. In addition, we note that Rock Island has already represented that it will recover its costs from customers who have contractually agreed to purchase capacity through a rate schedule in the RTO's OATT specific to the Project.

2. Waiver Requests

a. Rock Island's Proposal

43. Rock Island requests that the Commission grant it waivers of the same filing requirements that the Commission previously granted other merchant transmission providers.[50] Specifically, Rock Island requests waiver of: (1) section 35.15(a) of the Commission's regulations (abbreviated cost-of-service filings); (2) the full reporting requirements in Subparts B and C of Part 35 of the Commission's regulations, except for sections 35.12(a) (filing of initial rate schedules), 35.13(b) (general information to be filed with rate schedules), 35.15 (notices of cancellation or termination), and 35.16 (notices of succession); (3) Part 141 (forms and reports, with the exception of sections 141.14 and 141.15), including the requirement to file FERC Form No. 1, Annual Report of Major Electric Utilities, Licensee and Others; and (4) Part 41 (accounts, records, and disposition of audit findings, with the exception of sections 41.1 through 41.8) and Part 101 (uniform system of accounts).

44. Rock Island states that, because it is proposing to charge negotiated rates, the regulations requiring the filing of cost-of-service data are not relevant.[51] Rock Island asserts that granting the requested waivers is appropriate because it will not sell at cost-based rates and does not have captive customers. Rock Island commits to keep separate books and records for the Project, to keep such books and records in accordance with generally accepted accounting principles, and to make such books and records available to the Commission for inspection.

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[50] Filing at 37 (citing *Hudson Transmission*, 135 FERC ¶ 61,104 at P 35; *Chinook*, 126 FERC ¶ 61,134 at PP 68-69; *Champlain Hudson*, 132 FERC ¶ 61,006 at P 59).

[51] *Id.* at 38 (citing *Hudson Transmission*, 135 FERC ¶ 61,104 at PP 42-43).

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b. Commission Determination

45. Because Rock Island is proposing to charge negotiated rates, the Part 35 regulations requiring the filing of cost-based data are not applicable. For good cause shown and consistent with our findings for other merchant transmission proposals, we will grant waiver of section 35.13(a) of the Commission's regulations and the filing requirements of Subparts B and C of Part 35 of the Commission's regulations except for sections 35.12(a), 35.13(b), 35.15, and 35.16.[52]

46. The Commission will also grant Rock Island's request for waiver of Part 141 (with the exception of sections 141.14 and 141.15), including the Form No. 1 filing requirement. The Commission has previously granted waiver of the Form No. 1 filing requirement to merchant transmission owners.[53]

47. The Commission declines to grant Rock Island's request for waiver of Parts 41 and 101.[54] The Commission finds that it is important for all transmission-owning utilities, including merchant transmission owners, to maintain their books and records in accordance with the Uniform System of Accounts should the Commission require Rock Island to produce this information in the future. This finding is consistent with the Commission's established policy of denying waiver of Parts 41 and 101 to merchant transmission owners in *TransEnergie*, *TransEnergie - Hydro One*, *Northeast Utilities*, and *Neptune*.[55] While the Commission departed from this policy by granting waiver of Parts 41 and 101 to a merchant transmission owner in *Hudson Transmission*,[56] upon

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[52] *Hudson Transmission*, 135 FERC ¶ 61,104 at P 42; *Tres Amigas LLC*, 130 FERC ¶ 61, 207, at P 103 (2010); *Wyoming Colorado Intertie, LLC*, 127 FERC ¶ 61,125, at P 62 (2009) (*Wyoming*); *Linden VFT, LLC*, 119 FERC ¶ 61,066 at P 42 (2007) (*Linden*).

[53] *Wyoming*, 127 FERC ¶ 61,125 at P 65; *Linden*, 119 FERC ¶ 61,066 at P 44; *MATL*, 116 FERC ¶ 61,071 at P 66.

[54] *Id.* P 43.

[55] *TransEnergie U.S. Ltd.*, 98 FERC ¶ 61,147 at 61,457 (2002) (*TransEnergie*); *TransEnergie U.S. Ltd. and Hydro One Delivery Services Inc.*, 98 FERC 61,144 at 61,502 (2002) (*TransEnergie – Hydro One*); *Northeast Utilities,* 98 FERC ¶ 61,130 at 62,331; and *Neptune Regional Transmission System, LLC*, 96 FERC ¶ 61,147 at ordering para. (G) (2001) (*Neptune*).

[56] *Hudson Transmission*, 135 FERC ¶ 61,104 at P 43.

further review we conclude that this departure from prior policy was not warranted. Consistent with our previous orders, we find that it is appropriate to deny waiver of these provisions to merchant transmission owners in order to facilitate regulatory oversight. Accordingly, Rock Island will be required to keep its books and records in accordance with the Uniform System of Accounts, consistent with Part 101 of the Commission's regulations, and be subject to examination by the Commission pursuant to Part 41 of the Commission's regulations.

The Commission orders:

(A) Rock Island is hereby granted authority to sell transmission rights on its proposed merchant transmission project at negotiated rates, subject to conditions, as discussed in the body of this order.

(B) Rock Island is hereby directed to file with the Commission a report describing the terms of the anchor tenant agreements and the results of any open season within 30 days after the end of the open season, as discussed in the body of this order.

(C) Rock Island is hereby directed to file, upon completion of the Project, a rate schedule for service under the OATT for the RTO to which it hands over operational control, as discussed in the body of this order.

(D) The Commission grants Rock Island's requests for waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15, and 35.16, as discussed in the body of this order.

(E) The Commission grants Rock Island's request for waiver of Part 141 of the Commission's regulations, with the exception of sections 141.14 and 141.15, as discussed in the body of this order.

(F) The Commission denies Rock Island's request for waiver of Parts 41 and 101 of the Commission's regulations.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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Filed with the Iowa Utilities Board on December 22, 2016, E-22248

STATE OF IOWA
DEPARTMENT OF COMMERCE
BEFORE THE IOWA UTILITIES BOARD

IN RE:	**DOCKET NO. E-22248** (Dockets E-22123 through E-22138)
ROCK ISLAND CLEAN LINE LLC	**WITHDRAWAL OF PETITIONS FOR ELECTRIC FRANCHISE**

COMES NOW, Rock Island Clean Line LLC ("Clean Line"), and hereby withdraws the Sixteen (16) Petitions for Electric Line Franchise filed with the Board on November 6, 2014. In connection with this withdrawal, Clean Line states as follows:

1. The Petitions for Electric Line Franchise were filed in sixteen (16) different counties; but all pertained to a common project, a proposed high voltage, direct current transmission line capable of delivering 3,500 megawatts of power from renewable energy sources located primarily in northwestern Iowa to load and population centers in Illinois and elsewhere in the PJM Interconnection, L.L.C. grid (the "Project").
2. In order for the Project to be completed, regulatory approval is required from both the Iowa Utilities Board and the Illinois Commerce Commission.
3. On August 8, 2016, an Order was issued herein establishing a Procedural Schedule for the Iowa regulatory process. The Order established dates for filings and other actions that would permit the Board to fully consider the Project and render a decision within the time prescribed by new Iowa Code §478.6A, adopted May 27, 2016. Pursuant to said statute, a decision on the Clean Line franchise Petitions must be issued by the Board no later than May 27, 2018. At the time the Procedural Schedule was adopted, the Illinois Commerce Commission had already issued a decision favorable to the Project; however, said decision was on appeal.

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4. On August 10, 2016, the Appellate Court of Illinois, Third District, issued a decision reversing the decision of the Illinois Commerce Commission. Said appellate court decision was appealed to the Illinois Supreme Court on September 14, 2016, by the Illinois Commerce Commission, Clean Line, and other parties. On November 23, 2016, the Illinois Supreme Court agreed to review the appellate Court's decision. It is contemplated that the Illinois Supreme Court decision will not be issued prior to May 2017.
5. The Procedural Schedule issued herein requires Clean Line to file initial Exhibit E documents for at least four counties on or before January 13, 2017, and to file initial Exhibit E documents for at least four counties by the 13th of each month thereafter, with all Exhibit E documents to be filed no later than May 1, 2017.
6. Given the regulatory uncertainty in Illinois and the statutory deadline for a decision on the current Petitions, Clean Line has elected to file this withdrawal of the Franchise Petitions rather than requesting a modification of the Procedural Schedule from the Board. Clean Line understands that it would be difficult for the Board to modify the present Procedural Schedule, and Clean Line does not deem it to be an efficient utilization of resources to proceed with the filing (including the submittal and review of the Exhibit E documents) until after the Illinois Supreme Court issues its decision concerning the Illinois regulatory approval.
7. Clean Line will make a determination concerning a new filing with the Board following resolution of the Illinois Supreme Court appeal.
8. Clean Line appreciates the time and effort devoted to this Project by the Board and its staff and looks forward to continuing to work with the Board following the Illinois Supreme Court decision.

Respectfully submitted

SULLIVAN & WARD, P.C.

/s/

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ATTORNEYS FOR
ROCK ISLAND CLEAN LINE LLC

CERTIFICATE OF SERVICE

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Dated: December 22, 2016.

By: /s/
Dennis L. Puckett

136 FERC ¶ 61,051
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 35

[Docket No. RM10-23-000; Order No. 1000]

Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities

(Issued July 21, 2011)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule

SUMMARY: The Federal Energy Regulatory Commission is amending the transmission planning and cost allocation requirements established in Order No. 890 to ensure that Commission-jurisdictional services are provided at just and reasonable rates and on a basis that is just and reasonable and not unduly discriminatory or preferential. With respect to transmission planning, this Final Rule: (1) requires that each public utility transmission provider participate in a regional transmission planning process that produces a regional transmission plan; (2) requires that each public utility transmission provider amend its OATT to describe procedures that provide for the consideration of transmission needs driven by public policy requirements in the local and regional transmission planning processes; (3) removes from Commission-approved tariffs and agreements a federal right of first refusal for certain new transmission facilities; and (4) improves coordination between neighboring transmission planning regions for new

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interregional transmission facilities. Also, this Final Rule requires that each public utility transmission provider must participate in a regional transmission planning process that has: (1) a regional cost allocation method for the cost of new transmission facilities selected in a regional transmission plan for purposes of cost allocation; and (2) an interregional cost allocation method for the cost of certain new transmission facilities that are located in two or more neighboring transmission planning regions and are jointly evaluated by the regions in the interregional transmission coordination procedures required by this Final Rule. Each cost allocation method must satisfy six cost allocation principles.

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SUPPLEMENTARY INFORMATION:

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136 FERC ¶ 61,051
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities — Docket No. RM10-23-000

ORDER NO. 1000

FINAL RULE

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I. Introduction

1. In this Final Rule, the Commission acts under section 206 of the Federal Power Act (FPA) to adopt reforms to its electric transmission planning and cost allocation requirements for public utility transmission providers.[1] The reforms herein are intended to improve transmission planning processes and cost allocation mechanisms under the *pro forma* Open Access Transmission Tariff (OATT) to ensure that the rates, terms and conditions of service provided by public utility transmission providers are just and reasonable and not unduly discriminatory or preferential. This Final Rule builds on Order No. 890,[2] in which the Commission, among other things, reformed the *pro forma* OATT to require each public utility transmission provider to have a coordinated, open, and transparent regional transmission planning process. After careful review of the voluminous record in this proceeding, the Commission concludes that the additional reforms adopted herein are necessary at this time to ensure that rates for Commission-jurisdictional service are just and reasonable in light of changing conditions in the

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[1] 16 U.S.C. 824e (2006).

[2] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 FR 12266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, *order on reh'g,* Order No. 890-A, 73 FR 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g and clarification*, Order No. 890-B, 73 FR 39092 (July 8, 2008), 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 74 FR 12540 (Mar. 25, 2009), 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 74 FR 61511 (Nov. 25, 2009), 129 FERC ¶ 61,126 (2009).

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associated with participation in the transmission planning process. There, the Commission acknowledged concerns regarding "how state regulators and other agencies will recover the costs associated with their participation in the planning process."[157] The Commission therefore directed public utility transmission providers to "propose a mechanism for cost recovery in their planning compliance filings" and stated that those proposals "should include relevant cost recovery for state regulators, to the extent requested."[158] We decline to expand that directive here to include funding for other stakeholder interests, as requested by certain commenters. However, we also note that, to the extent that public utility transmission providers choose to include a funding mechanism to facilitate the participation of state consumer advocates or other stakeholders in the regional transmission planning process, nothing in this Final Rule precludes them from doing so.

163. With regard to the participation of merchant transmission developers in the regional transmission planning process, we conclude that, because a merchant transmission developer assumes all financial risk for developing its transmission project and constructing the proposed transmission facilities, it is unnecessary to require such a developer to participate in a regional transmission planning process for purposes of

[157] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at n.339 and P 586.

[158] *Id.* n.339.

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identifying the beneficiaries of its transmission project that would otherwise be the basis for securing eligibility to use a regional cost allocation method or methods.[159] However, we acknowledge the concern of some commenters that a transmission project proposed or developed by a merchant transmission developer has broader impacts than simply cost recovery. Because all electric systems within an integrated network are electrically connected, the addition or cancellation of a transmission project in one system can affect the nature of power flows within one system or on other systems.

164. We therefore conclude that it is necessary for a merchant transmission developer to provide adequate information and data to allow public utility transmission providers in the transmission planning region to assess the potential reliability and operational impacts of the merchant transmission developer's proposed transmission facilities on other systems in the region. We will allow public utility transmission providers in each transmission planning region, in consultation with stakeholders, in the first instance to propose what information would be required. Public utility transmission providers should include these requirements in their filings to comply with this Final Rule.

165. Although merchant transmission developers must provide information in the regional transmission planning process as discussed herein, to be clear, we emphasize that the transmission facilities proposed by a merchant transmission developer are not

[159] Proposed Rule, FERC Stats. & Regs. ¶ 32,660 at P 99.

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