

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

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### ARGUMENT

The International Brotherhood of Electrical Workers, AFL-CIO, Local Unions 51, 9, 145 and 196 (“IBEW”), submits this Reply Brief in response to the briefs filed by the Appellees, Commonwealth Edison Company (“ComEd”), the Illinois Landowners Alliance, NFP (“ILA”), and the Illinois Agricultural Association (“IAA”).

Affirmance of the Illinois Commerce Commission’s Order should be straightforward, despite the Appellees’ arguments.<sup>1</sup> Rock Island Clean Line LLC (“Rock Island”) filed an application with the Commission under Section 8-406 of the Public Utilities Act (“Act”), 220 ILCS 5/8-406, requesting a certificate of public convenience and necessity (“Certificate”) to construct, operate and maintain the Illinois portion of an interstate transmission line (the “Project”) and to transact a transmission public utility business using the Project. After a lengthy evidentiary proceeding, the Commission issued its Order granting a Certificate to Rock Island (with significant conditions imposed on its exercise), finding that Rock Island’s proposal met the criteria for a Certificate in Section 8-406(b). A-0242.<sup>2</sup> In 20 pages of its Order (A-028-048), the Commission thoroughly reviewed the evidence and arguments presented by the parties on the issue of whether Rock Island’s proposed Project and transmission service would satisfy the “public use” requirement of the Act for public utilities (220 ILCS 5/3-105), and stated its conclusion, with reasons, that

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<sup>1</sup> As several parties noted in their Briefs, and there appears to be no disagreement, because this case is an appeal from an administrative agency decision, this Court reviews the decision of the Commission, not the decision of the Appellate Court. *Provena Covenant Medical Center v. Dep’t of Revenue*, 236 Ill. 2d 368, 386 (2010); IBEW Br. p. 12.

<sup>2</sup> As stated in its Brief, the IBEW adopted the Appendix to Rock Island’s Brief. Citations herein to the Commission Order (and to certain other materials) are to the pages of Rock Island’s Appendix, in the form “A-xxxx”. Citations to other parties’ Briefs are in the form “[Party Name] Br. p. xx.”

“Rock Island’s proposal satisfies the public use standard.” A-047. The Commission further found, after an extensive review of the evidence and arguments, that “the Project will be needful and useful to the public.” A-0139. Finally, the Commission made the ultimate, required filing for this case that “the public convenience and necessity require” construction, operation and maintenance of the proposed project and the transaction of a public utility business by Rock Island (A-0242):

- (4) pursuant to Section 8-406 of the Act, a Certificate of Public Convenience and Necessity should be issued to Rock Island as ordered below.

\* \* \* \* \*

IT IS HEREBY CERTIFIED that the public convenience and necessity require (1) construction, operation, and maintenance by Rock Island Clean Line LLC of the proposed DC and AC transmission line Project over the Preferred Routes found appropriate above and as described in [certain exhibits]; and (2) the transaction of an electric public utility business by Rock Island Clean Line LLC, as a transmission public utility, in connection therewith, all as set forth above.

The findings that the Commission made are fully sufficient to support the issuance of the Certificate, are adequately explained in the Order, are supported by substantial evidence, and are based on reasonable applications of the provisions of the Act to the evidence by the agency charged with its administration. Therefore, the Commission’s Order should be affirmed.

Appellees contend the Commission erred in finding that Rock Island’s proposal satisfied the “public use” standard and in concluding that Rock Island qualified to receive a Certificate, and that the Appellate Court correctly reversed the Order, because (1) Rock Island did not yet own any property, plant or equipment in Illinois that was being used or was to be used for the transmission of electricity and did not “commit” that it would complete the proposed Project and place it into service, and (2) the Project was not shown to be for “public use” because Rock Island

will not be offering service to “all comers” or “the entire public,” may have to give some customers “inferior” non-firm service if the demand for service exceeds the capacity of the line, and will be auctioning all its capacity to the “highest bidder.” None of the Appellants’ arguments warrant reversal of the Commission’s findings and Order.

#### **1. Standard of Review**

The IBEW will not repeat the extensive discussion of the applicable standard of review in its Brief (pp. 11-15). However, in response to Appellees, the IBEW points out that the Commission’s interpretation of the Act should be given substantial weight and deference even where its determination involves the scope of its authority. *Illinois Consol. Tel. Co. v. Ill. Commerce Comm’n*, 95 Ill. 2d 142, 152-53 (1983); *Ill. Bell Tel. Co. v. Ill. Commerce Comm’n*, 362 Ill. App. 3d 652, 656 (4th Dist. 2005).

#### **II. The Record Showed that Rock Island Will Own, Control, Operate and Maintain Property, Plant and Equipment in Illinois for the Transmission of Electricity and Will Satisfy that Part of the “Public Utility” Definition**

IAA and ILA argue that only a “public utility” can be granted a Certificate and that, based on the definition of “public utility” in Section 3-105, a public utility must own, control, operate or manage property, plant or equipment in Illinois for one of the utility functions listed in Section 3-105. Therefore, they contend, because Rock Island did not yet own any utility property, plant or equipment, it could not be granted a Certificate. IAA Br. pp. 4-7, 14-32; ILA Br. pp. 10-13, 20-21, 29-30.

IAA’s and ILA’s argument is focused on Section 3-105, but it cannot withstand a proper reading of Sections 8-406(a) and (b). These subsections do use the term “public utility,” but in the context of *prohibiting* a public utility from constructing utility facilities or transacting utility business *unless and until* it has been granted a Certificate by the Commission authorizing the construction of the utility

facilities and the transaction of the public utility business. (If the company did these things without a Certificate, it would become a “public utility” per the definition in Section 3-105, but it would be operating unlawfully in violation of Section 8-406.)

Further, Section 8-406(b) specifies that:

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.

This case fits exactly within the above-quoted language. Rock Island proposed to construct a public utility facility – an electric transmission line – and to use it to transact a public utility business in Illinois. Rock Island proposed, and requested authority, to own, operate and manage property, plant and equipment in Illinois for the transmission of electricity. The Commission found, based on the evidence, that the statutory criteria for granting a Certificate to construct a transmission line (as set forth in Section 8-406(b)) were satisfied and that the transmission line and the service Rock Island proposed to offer would be for public use and would promote the public convenience and necessity. The Commission therefore found that the public convenience and necessity required the construction of the proposed transmission line and the transaction of an electric public utility business by Rock Island, as a transmission public utility, using the transmission line. A-0242. The language of the Certificate granted by the Commission flows directly from the above-quoted provision of Section 8-406(b). By authorizing Rock Island to proceed to construct the proposed transmission line and to conduct its proposed public utility business using the line, as a transmission public utility, the Commission authorized Rock Island to be a public utility, as provided for in the Act.

IAA and ILA contend that the Commission’s 2003 order granting a Certificate to American Transmission Company (“ATC”) in Docket 01-0142 shows that existing

ownership of transmission assets is a necessary requirement for receiving a Certificate. IAA Br., pp. 28-29; ILA Br., pp. 12-13. Their argument manifests faulty logic. ATC already owned transmission facilities in Illinois at the time it applied for and received a Certificate, a fact that the Commission noted in the Docket 01-0142 order. However, the fact that ATC already owned transmission assets does not establish that existing ownership of transmission assets is a requirement to receive a Certificate.

Appellees fail in their attempt to distinguish a number of prior Commission orders, cited by the IBEW and Rock Island in their Briefs, in which the Commission granted Certificates to construct new utility facilities and transact public utility business to applicants that were not yet public utilities and did not own utility facilities in Illinois when granted their Certificates. IAA Br. pp. 40-44 and ComEd Br. pp. 37-38, discussing *Illinois Power Co. d/b/a AmerenIP and Ameren Ill. Trans. Co.*, ICC Docket 06-0179, 2007 WL 1617828 (ICC 2007); *American Trans. Co. LLC*, ICC Docket 01-0142, 2003 WL 1995923 (ICC 2003); *Wabash, Chester & W. R.R. Co. v. Ill. Commerce Comm'n*, 309 Ill. 412 (1923); and *New Landing Utility, Inc. v. Ill. Commerce Comm'n*, 58 Ill. App. 3d 868 (2d Dist. 1978). Despite Appellees' efforts at distinguishing these cases, the *Ameren Ill. Trans. Co.*, *Wabash* and *New Landing* cases all involved applicants for Certificates that did not have utility infrastructure in place when they applied for and were granted Certificates. In Docket 06-0179, Ameren Illinois Transmission Company ("AITC") had the same "deficiencies" that IAA and ILA contend should bar Rock Island from receiving a Certificate: it had no assets or revenues, provided no services, and had never built a

transmission line.<sup>3</sup> (Further, it was proposing to build transmission lines to serve just one customer. IBEW Br. Pp. 31-32; A-0029.) And as IAA (p. 44) quotes the Court in *New Landing*, “everyone concerned seems to agree that the plaintiff is entitled to such a certificate,” even though *New Landing* had no facilities in place when it applied. Appellees make no effort to distinguish another case cited by the IBEW, *Explorer Pipeline Co.*, ICC Docket No. 56052 (ICC 1970), in which the applicant granted a Certificate had no existing facilities, customers or business in Illinois.

Moreover, *Explorer Pipeline*, *Ameren Ill. Trans. Co.*, and *New Landing* were all decided (and the applicants were issued Certificates) after the 1967 amendment to the Act discussed in IAA’s Brief (pp. 20-23). Clearly, the Commission has consistently viewed the Act as authorizing it to grant Certificates to applicants that did not yet own utility property, plant or equipment in Illinois.

In its Brief, IBEW cited *American Trans. Co. LLC and ATC Management Inc.*, ICC Docket No. 01-0142, 2003 WL 1995923 (ICC 2003) and *American Trans. Co. LLC*, ICC Docket No. 01-0607, 2002 WL 1943558 (ICC 2002) for a somewhat different point than discussed above (IBEW Br. p. 32), but Appellees’ efforts at distinguishing these cases also fails. IAA asserts (pp. 43-44) that IBEW was incorrect in stating that American Transmission (“ATC”) was granted a Certificate even though it offered no retail services to Illinois customers, but that is what the order in Docket 01-0607 said:

As a transmission only utility, ATC is currently unique in Illinois. ATC’s rates and tariffs govern only transmission services that fall, for the most part, under the jurisdiction of the FERC. ATC offers no retail services to Illinois consumers, so its services do not fall under the Commission’s rate or tariff jurisdiction. (A-0449)

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<sup>3</sup> IAA argues that AITC was granted a Certificate because it was an affiliate of Illinois Power which built and operated transmission lines and had substantial assets. IAA Br. p. 41. Nonetheless, AITC had to show it satisfied the requirements for a Certificate.

IAA (p. 43) states that ATC had a “small number of Illinois customers,” and that is correct, but based on the Docket 01-0607 order, these were not retail (end user) customers. ATC did what Rock Island will do: it delivered electricity to a distribution utility and other load-serving entities which in turn sold and delivered electricity to retail customers. The Commission nevertheless granted ATC a Certificate.

ComEd takes a different tack than IAA and ILA. ComEd appears to accept that for the Commission to have authority to issue a Certificate, an applicant does not need to own or control utility assets in Illinois at the time of the order and that the applicant can show that it will own property, plant or equipment in Illinois for the transmission of electricity “by virtue of the project which is the subject of its application” (which Rock Island did here). ComEd Br. p. 35. ComEd argues, however, that the applicant must have committed to build the project and place it into service, which, ComEd contends, Rock Island has not done. ComEd bases its argument largely on statements by one Rock Island witness that Rock Island would terminate the Project if it appeared it would not be profitable, and by another witness that the Project will not be constructed unless sufficient customers contract for service. *Id.* pp. 4, 7, 14, 31, 34-36. Contrary to ComEd’s characterizations, these statements do not show Rock Island is not committed to the Project or that it will not be a public utility.

First, the evidence compiled before the Commission on Rock Island’s activities shows that it is committed to completing the Project. Among other things, Rock Island spent two years and considerable resources in developing a route for the Project in Illinois; hired consultants and contractors to conduct environmental and routing studies and perform engineering and design work for the transmission line

(including the structures) and the converter stations; hired a construction contractor for initial construction planning work; hired an engineering firm to act as the owner's engineer for the Project; prepared initial design drawings, specifications and parameters for structures, conductor and other components; identified suppliers for major material and equipment components; devoted significant efforts to having the necessary engineering studies and other analyses performed to be able to interconnect the Project with the PJM Regional Transmission Organization ("RTO") transmission grid and deliver the electricity into the grid in Illinois; obtained the necessary FERC authority; and initiated efforts with numerous State and Federal departments and agencies to obtain necessary studies, permits and approvals from these government entities. RV1, C-0180; RV2, C-0231-41, C-0252-58; RV22, C-05451-75; RV24, C-05896-05930, C-5936-43; RV4, C-00945-51; RV 4, C-0960 – RV5, C-1148; RV6, C-01382-83; A-0073-76, A-0140-41, A-0174-83, A-0198. This evidence shows Rock Island's commitment to the Project.

Second, although ComEd asserts that Rock Island's purported lack of commitment "is unprecedented" (ComEd Br. at 37), Rock Island's statements that it will not proceed to construct the Project if, at the point in time when it is ready to proceed with construction, there is insufficient customer demand to justify the construction or it is not financially viable, is inherent in any proposal to construct a new utility facility that comes before the Commission for approval. Indeed, this should be an obligation of any entity that is granted a Certificate to build a new facility. Given the long lead times involved in such projects, and the need to initiate new construction of facilities in advance of the need in order to be ready to serve when the need materializes, proposals to build a new utility facility are necessarily based on projections – for example, projections of future growth in demand in

particular locations, or for a particular type of service, as well as changes in costs for labor, materials, and other components that go into constructing the facility. ComEd undoubtedly forecasts where the numbers of customers and demand for electricity is growing in certain areas of its service territory and if new transmission facilities need to be installed to serve the growing demand.<sup>4</sup> But if the anticipated growth in demand does not materialize, or occurs at a slower pace than forecasted, or other developments occur that make the proposed construction inadvisable, then the project should be delayed or canceled. To require an applicant for a Certificate to commit to build the project it has been authorized to build, regardless of future conditions, would be bad law and bad public policy.

Third, regardless of the intentions of Rock Island's management, the Commission, in the Order, placed conditions on Rock Island's exercise of its Certificate that Rock Island might not be able to fulfill. As pertains directly to the possibility that construction will not proceed unless there is sufficient customer demand for the service, the Commission imposed the "financing condition," which mandates that before beginning to construct transmission facilities on landowner properties, Rock Island must document to the Commission that it has secured sufficient debt and equity financing to cover the entire construction cost of the Project. A-0154-56, A-0170-71. Making this showing necessitates that Rock Island will have entered into sufficient transmission service contracts with customers to support raising the required amount of capital. This is an appropriate exercise of the Commission's authority and an appropriate regulatory condition imposed by the Commission to ensure that Rock Island does not start to construct a transmission line

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<sup>4</sup> See, e.g., *Kreutzer v. Ill. Commerce Comm'n*, 404 Ill. App. 3d 791 (2d Dist. 2010) (ComEd requested Certificate to construct a line it projected was needed to serve forecasted load growth in portions of Kane and McHenry Counties and prevent future overloading of its system in those areas).

on landowner properties that proves not to be justified by customer demand or financially viable.

This is not to say that the evidence failed to demonstrate that there is a demand for the service the Project will provide, based on current information and projections. To the contrary, the evidence showed that there is and will be customer demand for the service to be provided by the Project. This included evidence that wind farms in the northwest Iowa area can use the excellent wind resources of that area to produce electricity at lower cost than wind farms in Illinois; that there is a lack of efficient and cost-effective transmission infrastructure to bring the low cost electricity that can be produced by renewable resources in the northwest Iowa region to load and customer centers in northern Illinois and other PJM states; that many wind farm developers are actively engaged in wind farm development activities in the northwest Iowa region (RV 21, C-05011 identified 18 wind farm companies by name); and that there is a need to construct new wind generation facilities to meet the growing demand from state renewable portfolio standards, the growing demand for electricity from renewable sources generally, and the demand for new generating facilities to replace older fossil-fueled generating plants that are retiring. RI Br. pp. 3-6, 12-13; IBEW Br. pp. 6, 35-37; A-0049-61. The record compiled in this case showed, based on current information and projections, that there will be sufficient customer demand for the service the Project will provide to enable Rock Island to satisfy the Commission's "financing condition" and proceed to build and operate the Project.

In response to Appellees' arguments, the IBEW reiterates that the Appellate Court's construction of the Act to require that an applicant for a Certificate must already own or control utility assets and have customers in Illinois, for the

Commission to have authority to grant a Certificate for a new project, fails the test of common sense. IBEW Br. pp. 18-19. The reasonable and sensible construction of the Act, which the Commission followed in determining that Rock Island could be granted a Certificate to construct and operate the Project and conduct a public utility business in connection therewith, is that the Commission must examine the applicant's proposed project and service to determine whether the proposed facility satisfies the criteria of Section 8-406(b), whether the proposed facility and service will be for public use, and whether construction of the facility and provision of the service will promote the public convenience and necessity. If the Commission, based on the record, answers these questions in the affirmative, as it did here, it grants a Certificate to the applicant to construct the proposed facility and provide the proposed service. If the Certificate is granted, the applicant is thereby authorized to proceed to construct the proposed facility and provide the service, as a public utility. This construction squares with the language of Sections 3-105 and 8-406(a) and (b), because it requires the Commission to determine that under the applicant's proposal, it will be owning, controlling, operating or managing, for public use, plant, property and equipment in Illinois.

### **III. The Record Showed, and the Commission Correctly Found, that the Rock Island Project Meets the Public Use Standard**

The Commission, after a thorough and detailed review of the evidence and the parties' positions on the issue of whether Rock Island's proposed Project and transmission service would be "for public use" (A-029-045), concluded that it "finds that Rock Island's proposal satisfies the public use standard." A-047. This finding was based on substantial evidence and a reasonable application of the statutory "public use" requirement to the facts of this case. IBEW Br., pp. 22-29. Appellees' arguments attacking the Commission's finding are unpersuasive.

IAA and ComEd cite a statement from the Commission Staff's brief in the Commission proceeding, to the effect that Rock Island is seeking a Certificate only to obtain condemnation authority, while offering only a small portion of the Project's capacity for public use. IAA Br. p. 4; ComEd Br. p. 11. However, the Commission's finding that Rock Island's proposal satisfies the public use standard expressly cited (among other things) the Staff's final position that, in accordance with FERC requirements pertaining to the anchor customers and the open season, "Rock Island would be required to offer its service to all customers in a non-discriminatory manner" and that the requirement of non-discriminatory open access could overcome the "public use hurdle." A-047. The Commission then pointed specifically to Rock Island's commitments that it "will comply with this FERC requirement; will offer all eligible customers the opportunity to purchase transmission service on the Project; will not deny any eligible customer the opportunity to purchase transmission service; and will not unduly discriminate against any transmission customer in favor of another eligible customer." *Id.* The Order also notes that "Staff did not file a brief on exceptions on this issue" (A-037), which means that the Staff *did not object to* the Administrative Law Judge's recommended finding that Rock Island's proposal met the public use standard. RV29, C-07230-31.

While Appellees attack the Commission's "public use" finding in different ways, their arguments essentially reduce to two main points: (1) Rock Island will not be able to furnish service to the "entire public," and (2) Rock Island will be selecting customers for its anchor and open season segments through auctions in which capacity will be awarded to the highest bidders. The Appellees contend this does not conform to what they say is an Illinois requirement that service be provided to all who apply without discrimination. Their arguments, however, are not well-founded.

Appellees' arguments on public utility status and public use go from one extreme to another. On the one hand, in arguing that Rock Island has not shown its Project will ever be built, Appellees assert (as did the Appellate Decision) that Rock Island has no agreements with customers and has not identified any specific customers for its service. On the other hand, in arguing that Rock Island has not shown the Project will be for public use, Appellees argue that some customers who want service will be forced to take non-firm service, or perhaps be precluded from obtaining service, because demand exceeds the Project's capacity. Implicit in the latter argument is an assumption that there will be so much demand for the Project's transmission service that demand will greatly exceed the Project's capacity. These two prongs of Appellees' arguments are premised on fundamentally inconsistent assumptions.

In any event, Appellees' arguments fail to show that the Commission's determination that Rock Island's Project and service satisfies the public use standard was in error (either as a finding of fact or as a construction and application of the Act). Rock Island cannot serve "the entire public" as its customers, because its transmission line has a finite capacity, and absent further filings with and approvals by the Commission (*see* A-048), Rock Island cannot build a larger facility than proposed in this case, or additional transmission capacity, should customer demand exceed the capacity of the Project as approved by the Commission.<sup>5</sup> Further, as this Court has stated, "the public character of [a] utility is not determined by the number

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<sup>5</sup> As the Order described, if demand for service on the Project exceeds capacity, Rock Island will be obligated under FERC's requirements to seek the necessary approvals to expand its capacity to allow additional customers to obtain service. A-035-36. Expanding the capacity of its facilities would also require Rock Island to obtain authority from PJM to interconnect a larger facility and deliver more power into the ComEd/PJM grid than originally requested, which would entail considerable additional work as illustrated by Dr. Galli's testimony. RV2, C-0231-38; RV22, C-5451-74.

resorting to its service or willing to accept it;" what is relevant to public utility status is the entity's willingness to offer the service to the public, "however few the number who avail themselves of it." *Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. 158, 164-65 (1929); *State Pub. Utils. Comm'n ex rel. Pike Cnty. Tel. Co. v. Noble*, 275 Ill. 121, 125 (1916); *State Pub. Util. Comm'n v. Bethany Mut. Tel. Ass'n*, 270 Ill. 183, 185 (1915); IBEW Br. p. 30; RI Br. pp. 32, 42-46. Even *Mississippi R. Fuel Corp. v. Ill. Commerce Comm'n*, 1 Ill. 2d 509 (1953), relied on heavily by Appellees, stated that "it is not necessary that the benefits be received by the whole public." *Id.* at 517.

It is clear from the record that Rock Island, based both on FERC's requirements and its own commitments, will be offering service on a nondiscriminatory open access basis to all eligible customers (which encompasses a broad swath of potential users, both generators and sellers of electricity and buyers and consumers of electricity), and that if demand exceeds capacity for either the anchor customer segment or the open season, the customers obtaining service will be based on application of previously-stated, transparent criteria that are subject to FERC review. *See* IBEW Br. pp. 9-11 and 22-25; RI Br. pp. 6-11, 32-36.

Appellees' arguments are based on the incorrect premise that only customers who obtain service after the anchor customer process and open season are completed are the public. The anchor customer process and open season will be available on a non-discriminatory basis to all eligible customers, and they are part of the public.

Further, while Appellees' arguments focus on access to Rock Island's service by the specific entities that seek service on the transmission line, Appellees ignore that the Project will enable some 4,000 MW of wind generating capacity in the northwest Iowa area to access customer load in northern Illinois, and will deliver approximately 15 million MWh of electricity annually into northern Illinois for the

use of the public, which will be enough electricity to meet the electricity needs of 1.4 million homes. RV 6, C-01391-92; A-031; IBEW Br., pp. 5-6, 25. The Project will address an existing need, the lack of an efficient, cost-effective facility to transmit low-cost electricity from renewable resources that can be produced using the excellent wind resources of northwest Iowa, to northern Illinois where it can be delivered to and used by thousands of electricity consumers. Rock Island's potential customers will include both wind farms in northwest Iowa and load-serving entities who can use the power the Project delivers into Illinois to serve Illinois consumers. Rock Island will be *transmitting electricity for use by the public*, which is the basis on which the Commission has granted Certificates to transmission applicants in the past. RV6, C-01392-95; *Illinois Power Co. d/b/a AmerenIP and Ameren Ill. Trans. Co.*, ICC Docket 06-0179, 2007 WL 1617828 (evidence showed that the proposed transmission line "will be transmitting electricity for use by the public at rates, terms, and conditions subject to regulation by the FERC"); *Illinois Power Co. d/b/a AmerenIP and Ameren Ill, Trans. Co.*, ICC Docket 06-0706, Order on Reopening (2010), 2010 WL 2647673 (evidence showed transmission line "will be transmitting electricity for use by the public at rates, terms, and conditions subject to regulation by the [FERC]"); *American Transmission Co. LLC*, ICC Docket 01-0142, 2003 WL 1995923 (record showed that applicant would be "transmitting electrical energy for use by the public"); A-0029-30.

With respect to Appellees' argument that Rock Island will be "auctioning" its service to the "highest bidders," the record shows that Rock Island has been authorized by FERC to negotiate rates with the anchor customers, but subject to procedures established to ensure that all eligible customers who are interested in entering into anchor contacts have the opportunity to do so, based on published,

transparent criteria, and that the anchor customers are not pre-selected. RV6, C-01380-83; RI Br. pp. 8-9. At the open season stage, however, Rock Island will be offering the service to open season participants at rates, terms and conditions based on the rates, terms and conditions negotiated with the anchor customers. *Rock Island Clean Line LLC*, 139 FERC ¶61,142 (2012), at PP 5, 21 (A-0331, A-0336); RI Br. p. 10. Contrary to Appellees' characterizations, Rock Island will not be auctioning service to the "highest bidder" in the open season. If requests for service in the open season exceed the transmission capacity offered (which must be at least 25% of total capacity), the service will be allocated to open season participants based on published, transparent, non-discriminatory criteria.<sup>6</sup> The remaining capacity will be offered at stated rates pursuant to Rock Island's Open Access Transmission Tariff ("OATT"), which must conform to FERC's specifications. RV6, C-01380-81, C-01384-87; IBEW Br. pp. 10, 23-24.

Rock Island's plan to offer to contract up to 75% of the Project's capacity to eligible customers pursuant to negotiated rates, and to offer the remaining capacity to all eligible customers first through an open season and then through a posted OATT, is consistent with the practice of pipelines, including pipelines granted Certificates by the Commission as common carriers for the conveyance of commodities "for the general public in common carriage" (220 ILCS 5/15-201). In its Brief (pp. 32-33), the IBEW cited a number of these cases involving pipelines that contracted 70% to 90% of their capacity to a small group of customers with the remaining capacity made available for shippers on an open access basis. Appellees failed to respond to these citations.

Appellees argue that Rock Island's situation is a problem of its own making

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<sup>6</sup> Lest the Court think 25% of the Project's capacity is a small amount, it is equal to about 900 MW, the approximate size of a large new fossil-fueled generating plant.

because it chose not to present its Project to the PJM RTO to be included in the PJM regional transmission expansion plan. ComEd Br. pp. 5-6, 40-41. The IBEW supports Rock Island's decision (assuming that Rock Island could have participated in the PJM expansion planning process at all, since it is an interregional line spanning two RTOs), because inclusion in the PJM expansion plan would mean that the costs of building the Project would be allocated and charged to retail customers throughout the region via the PJM regional cost allocation process. Rock Island, instead, is a "merchant" transmission project, meaning that it must recover its costs solely through charges to the transmission users that actually contract for service on the line, and not by spreading those costs over the general body of retail ratepayers. Appellate Decision ¶9; A-0152; A-0334. As ComEd's witness explained, "merchant transmission facilities, in appropriate circumstances, can protect customers from costs by imposing risks on private investors who voluntarily assume them." RV 23, C-05705. This is one of the benefits of the Project for the public.

Finally, the IBEW reiterates that the "public use" determination must take into account the evidence and the Commission's findings that the Project will be useful and beneficial to the public. The evidence showed that the Project will significantly increase the amount of generation that can access the Illinois electricity market, which will increase competition and lower electricity prices in the Illinois electricity market, resulting in lower electricity prices for Illinois electricity consumers. By increasing the amount of low-cost renewable generation that can access the Illinois electricity market, the Project will support the public policy of this State to increase the use of renewable energy in the State's electricity supply (20 ILCS 3855/1-75(c)), as well as meeting the overall increased demand for clean energy from renewable resources. Based on this evidence, the Commission found that the Project will be

“needful and useful to the public,” will promote the development of an effectively competitive electricity market that is equitable to consumers, and will promote the public convenience and necessity. A-0139, A-0242; IBEW Br. pp. 35-36. Other public benefits of the Project were detailed in the record. *Id.* pp. 36-37. All of these benefits of the Project are benefits to the Illinois public. The public benefits and usefulness of the Project, as amply demonstrated by the evidence, should be taken into account in determining whether the Project is for public use. The evidence before the Commission showed that regardless of who the specific transmission customers of the Project are, it will be beneficial and useful to the public in Illinois. *Id.* pp. 37-38.

**IV. Appellees’ Arguments Based on Possible Eminent Domain Should Have No Impact in Evaluating the Commission’s “Public Use” Determination**

Throughout their Briefs, the Appellees argue that this Court should affirm the Appellate Court’s reversal of the Commission’s Order because receipt of the Certificate gives Rock Island a direct path to eminent domain authority. IAA Br. pp. 5, 27-28; ILA Br. pp. 1, 22; ComEd Br. pp. 1-2, 11, 14. Appellees’ arguments and logic are flawed. Whether a determination that a proposed transmission line is for public use, and the issuance of a Certificate to construct the line, may ultimately lead to the use of eminent domain to obtain easements, should not factor into whether the Certificate should be granted. Rather, the Certificate application should be granted or denied based on the evidence as to whether the proposed facility and service will be for public use and whether the evidence shows the Project satisfies the Act’s criteria (in Section 8-406(b)) for granting a Certificate. If an applicant such as Rock Island shows that its proposed transmission line satisfies the statutory criteria for issuance of a Certificate, it is entitled to receive the Certificate, regardless of whether the applicant might later need to use eminent domain. Here, the Commission found,

based on the evidence, that the Project will promote the development of an effectively competitive electricity market, which is one of the specific grounds the Legislature has established for granting a Certificate to construct a new transmission line. 220 ILCS 5/8-406(b)(1).

Appellees' eminent domain-related arguments are flawed in other ways as well. They fail to mention the recent Appellate Court decision in *Adams County Property Owners & Tenant Farmers v. Ill. Commerce Comm'n*, 2015 IL App (4th) 130907 – which was an appeal from a Commission order granting a certificate to construct a new transmission line – holding that a Certificate neither confers property rights on the applicant nor deprives landowners of any protected property interests. *Id.*, ¶51. Second, the receipt of a Certificate under Section 8-406 does not in fact give Rock Island a direct path to eminent domain authority. Rather, by the terms of the eminent domain section of the Act, Section 8-509 (220 ILCS 5/8-509), Rock Island must obtain authority from the Commission under Section 8-503 (220 ILCS 5/8-503), as well as under Section 8-509. (Section 8-509 does not include Section 8-406 as a prerequisite for eminent domain authority.) But in this case, the Commission denied Rock Island's request for authority under Section 8-503. A-0234-36. And in an actual condemnation case, the landowner is entitled to contest whether the criteria in the Eminent Domain Act, that the acquisition of the easement is primarily for the benefit, use, or enjoyment of the public and necessary for a public purpose, are met. 735 ILCS 30/5-5-5(c). Finally, as a basis for affirming the Appellate Court Decision, Appellees' eminent domain arguments fail, as the possibility of condemnation is mentioned only once in the "Background" section of the Decision (¶24), and not at all in the "Analysis" section as a basis for the Decision.

Appellees' eminent domain arguments manifest a concern that Rock Island

might condemn property for easements, but not construct the Project. This seems highly unlikely. Easement acquisition across 500 miles will be a significant cost component for the Project, so it is unreasonable to assume Rock Island would begin a substantial effort to acquire easements unless and until it has entered into sufficient transmission customer contracts and secured financing for the entire Project cost.

However, the record reflects that landowners are treated fairly in many respects: First, in addition to not asking for eminent domain authority in this case, Rock Island made it clear that it intends to try to obtain all the easements it needs for the Project through voluntary agreements with landowners. RV1, C-0039; RV1, C-0170; RV24, C-05932; A-0192-93. Second, Rock Island detailed the compensation it will offer landowners for easements, which will include a payment based on the fair market value of the fee interest for the easement space (even though most of the easement space can continue to be farmed), plus separate payments for each transmission pole on the property, plus payments for any actual damages or losses such as crop losses. RV24, C-05932-33; A-0193-94. Third, Rock Island spent some two years and considerable resources to develop a route for the line that will create as little disturbance as possible to existing structures and activities and to environmentally-sensitive areas. RV 24, C-05896-05930; RV4, C-0941-51; RV4, C-0960 – RV5, C-0148. Fourth, Rock Island entered into an Agricultural Impact Mitigation Agreement (“AIMA”) with the Illinois Department of Agriculture, and committed to other procedures to prevent, mitigate and remediate any adverse impacts of construction on agricultural properties (such as soil compaction or damage to drainage tile). The Commission made compliance with the AIMA and the other procedures conditions to Rock Island’s Certificate. RV9, C-1981-88; A-0202-10, A-0221-25.

#### IV. Conclusion

The parties generally agree that the facts of this case presented a matter of first impression to the Commission. Rock Island's application is the first request for a Certificate to build an interstate, inter-regional transmission line. Rock Island is the first transmission line applicant that is not an incumbent public utility or closely affiliated with an incumbent. It is also the first transmission line applicant that proposes to finance, construct and operate its line as a merchant transmission provider, rather than by charging captive Illinois ratepayers for its costs or recovering them through RTO cost allocation processes that charge captive ratepayers throughout the region for the costs. With Rock Island and the Project viewed in this context, Appellees' repeated assertions that "the Commission has never" and "no court has ever" are unremarkable. The Commission considered the extensive record evidence, used its expertise in utility regulation and oversight and in applying the terms of the Act, and determined that Rock Island satisfies the public use standard, that the Project will be needful and useful to the Project, and that it meets the criteria for a Certificate and will promote the public convenience and necessity. The Commission also used its expertise to impose conditions that recognize Rock Island's differences from typical incumbent utilities. The IBEW urges this Court to keep in mind what it said almost 65 years ago:

The concept of public utility regulation includes of necessity the philosophy that the commission shall have power to deal freely with each situation as it comes before it, regardless of how it may have dealt with a similar or even the same situation in a previous proceeding.

*Mississippi R. Fuel Corp. v. Ill. Commerce Comm'n*, 1 Ill. 2d 509, 513 (1953).

The Commission's findings and determinations at issue before this Court were supported by substantial evidence and reflected reasonable interpretations and applications of the provisions of the Act. The Appellate Court Decision should be

reversed and the Commission Order affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(b)(1) Statement of Points and Authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters included in the Appendix, is 6,733 words.

Dated: April 26, 2017

/s/Patrick K. Shinnors  
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*of Electrical Workers, AFL-CIO, Local Unions*  
*51, 9, 145 and 196*

**Nos. 121302, 121304, 121305 & 121308 (Cons.)**

**IN THE  
SUPREME COURT OF ILLINOIS**

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

**NOTICE OF FILING**

**TO: Attached Service List**

PLEASE TAKE NOTICE that on this 26<sup>th</sup> 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 Reply Brief of the International Brotherhood of Electrical Workers, AFL-CIO Local Unions 51, 9, 145 and 196, a copy of which is hereby served upon you.

Respectfully submitted,

/s/ Patrick K. Shinn

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\*\*\*\*\* Electronically Filed \*\*\*\*\*

121302

04/26/2017

**Supreme Court Clerk**

\*\*\*\*\*

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<b>COMMISSION, et al.</b>	)	<b>Commerce Commission,</b>
	)	<b>ICC Docket No. 12-0560</b>
<b>Appellants.</b>	)	

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 26, 2017, I caused a copy of the attached Reply Brief of the International Brotherhood of Electrical Workers, AFL-CIO Local Unions 51, 9, 145 and 196 to be electrically filed with 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 Reply Brief of the International Brotherhood of Electrical Workers, AFL-CIO Local Unions 51, 9, 145 and 196 for filing, I certify that I will cause an original and twelve (12) copies of the Brief to be transmitted to the Court within five (5) days of that notice. I further certify that I will cause the Reply Brief of the International Brotherhood of Electrical Workers, AFL-CIO Local Unions 51, 9, 145 and 196 to be served upon the parties listed on the attached Service List by e-mail on the 26<sup>th</sup> 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.

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