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.	)	

BRIEF AND SUPPLEMENTAL APPENDIX OF RESPONDENT-APPELLEE COMMONWEALTH EDISON COMPANY

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

INTRODUCTION

This case concerns whether Petitioner Rock Island Clean Line LLC ("Rock Island"), a company seeking regulatory approval for a potential for-profit transmission line project, is a "public utility," and therefore eligible to exercise the power of eminent domain to involuntarily take the property of Illinois residents to build its line. Illinois law does not *require* Rock Island to be a "public utility" in order to build its line. Other private transmission developers in Illinois regularly build transmission lines without being a "public utility." But Rock Island wants to be a "public utility" so that it can acquire the power to condemn land—or at least to be able to use the threat of condemnation in its negotiations with landowners on its desired 120-mile right-of-way—and to impress the lenders from whom it needs to obtain the financing that it currently lacks. So, Rock Island has clothed itself as a "public utility" and on that basis has petitioned the Illinois Commerce Commission ("ICC" or "Commission") to obtain regulatory approval before constructing its transmission line. Obtaining that type of Certificate of Public Convenience and Necessity ("CPCN") is the prerequisite for Rock Island to be able to exercise the power of eminent domain.

The power of a private company to take another's property must be carefully circumscribed to prevent unfairness and to protect the public. Both the Illinois Constitution and the United States Constitution safeguard against such unfairness by requiring that any taking of property be "for public use." Ill. Const. art. 1 § 15; U.S. Const. amend. V. The definition of a "public utility" in 220 ILCS 5/3-105(a)—one of the very few types of private entities able to exercise the power of eminent domain—echoes that same safeguard. To qualify as a "public utility," a company must be one that "owns, controls, operates or

manages, within this State" property that the company dedicates "*for public use*." 220 ILCS 5/3-105(a) (emphasis added). As a public utility itself, ComEd appreciates the fundamental importance of limiting the power of eminent domain to companies whose property is pledged to serve the public.

Unlike ComEd, Rock Island falls outside the definition of a "public utility" under the unambiguous terms of Illinois law. First, Rock Island will not offer its transmission line for "public use." As this Court held nearly a century ago, a "public utility" must "furnish all who apply, and the service it furnishes must be without discrimination and without delay." *Highland Dairy Farms Co. v. Helvetia Milk Condensing Co.*, 308 Ill. 294, 300-01 (1923). Transmission developers, new or existing, can easily meet this requirement by pledging that, if their application is approved, they will build their proposed facility and then offer nondiscriminatory service on it at a uniform tariffed price to any member of the public who asks for it—just like ComEd and innumerable other public utilities in this state and nationwide. But Rock Island claims it cannot get the financing it needs to build unless it can secure in advance creditworthy customers to sign up for long-term, large-scale contracts. So, instead of building its line and dedicating the line to serve the public, Rock Island offers something altogether different. It offers a select group of generators and other very large market participants the chance to sign up as "anchor tenants." It offers other such potential customers the chance to bid against one another in an auction in which Rock Island will sell service to the highest bidder. Rock Island will not furnish its service to losers of the auction—or anyone else—on the same terms as the winners. The losers of the auction may get only non-firm service—that is, they get to use the line on a

subordinated basis only if there happens to be spare capacity at any given moment. The winners of the auction are prioritized.

This Court has never held or even suggested that an entity can be a "public utility" by offering to sell its service to the highest bidder. This Court's test requires a "public utility" to "*furnish* all who apply," *Highland Dairy Farms*, 308 Ill. at 300 (emphasis added)—not merely provide an opportunity to bid for service. The fact that Rock Island may provide some losers of the auction and other members of the public with non-firm service does not change matters. Non-firm service is inferior—it is service that may not be available when requested and that can be terminated the moment that an auction winner or anchor tenant needs the capacity. Providing auction winners with firm service and members of the public with only a chance to receive non-firm service does not satisfy the requirement that a public utility must furnish its service "without discrimination and without delay." *Id.* at 301. In sum, the public does not have any right to actually *use* Rock Island's line on non-discriminatory terms. Nothing stops Rock Island from building its project and selling its capacity to whomever it wants—but it cannot claim to be a "public utility" in order to exercise the sovereign power of eminent domain when it does not provide service equally and without delay to all who apply.

Rock Island also fails to satisfy the definition of "public utility" for a second, independent reason. Rock Island never showed, and the ICC never found, that Rock Island will actually ever provide service to *anyone*. A public utility is defined as an entity that "owns, controls, operates or manages, within this State, … for public use," property "*used or to be used* for or in connection with … transmission … of … electricity." 220 ILCS 5/3-105(a) (emphasis added). Yet Rock Island does not own, control, operate, or manage

property in Illinois that currently is being used to transmit electricity. Nor did it show that it will *ever* own, control, operate, or manage property in Illinois that will actually *be used* to transmit electricity in the future. Even as it lays the groundwork to condemn the property of Illinois residents, Rock Island refuses to make any commitment to build the line. Instead, Rock Island seeks to be recognized as a "public utility" as a preliminary step to obtaining the property in Illinois on which it *could* build a line if it unilaterally determines that the line will be profitable. Rock Island expressly reserves the right to abandon the project altogether if it determines at some future time that the project will not be sufficiently profitable.

Petitioners' response is to aim at a straw man, arguing that the statute does not require an entity to be a "public utility" at the time it files its application for a CPCN. True enough, but that argument misses the point. The minimum prerequisite to obtaining a CPCN is a showing that, *at some point*, the project for which it seeks approval will satisfy the statutory requirement that its property in Illinois will "*be used* for or in connection with … transmission … of … electricity." 220 ILCS 5/3-105(a) (emphasis added). Rock Island never even tried to make that showing. To the contrary, Rock Island explicitly acknowledged that it would not build the project unless future market conditions were right. Under the statute's plain terms, that acknowledgment was fatal to Rock Island's application.

ISSUES PRESENTED FOR REVIEW

1. Whether Rock Island qualifies as a "public utility" when it refuses to furnish service to the public on non-discriminatory terms and without delay.

2. Whether Rock Island qualifies as a "public utility" when it refuses to make any commitment to own, control, operate, or manage property that will be used in connection with the transmission of electricity.

STATEMENT OF THE CASE

A. Factual Background.

Rock Island seeks Illinois regulatory approval to build a roughly $2 billion high-voltage electric transmission line running from northwest Iowa into and across Illinois. It claims the line would carry power from wind farms that might in the future be built in Iowa and other states west and northwest of Illinois into the power market serving northern Illinois and states to the East. Rock Island App. A-0049 (C-08506).[1] Ordinarily, new transmission lines are constructed only after the entity charged with regional transmission planning—in this part of Illinois, PJM Interconnection, L.L.C. ("PJM")[2]—conducts a detailed transmission study and determines that a new line is needed to ensure reliability or to relieve transmission congestion. ComEd Supp. App. 15-21 (C-05708-14); *see generally PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, paras. 65-67 (2013). When PJM determines that a new line is needed to serve the public, the developer of the new line is permitted to recoup its costs and to earn a regulated return on its investment through cost-based rates assessed on the bills of the customers who benefit from the improvement.

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[1] References to "Rock Island App. A-__" are to the Separate Appendix to the Brief of Rock Island Clean Line LLC, filed on February 1, 2017. References to "ComEd Supp. App.__" are to ComEd's Supplemental Appendix bound with this brief. References to "C-__" are to the page number in the Commission record assembled for this case.

[2] PJM is regulated by the Federal Energy Regulatory Commission ("FERC") and is responsible for planning and operating the high-voltage electric transmission system in parts of thirteen states and the District of Columbia, including northern Illinois.

Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils., Order No. 1000, 136 FERC ¶ 61,051, paras. 148, 163 (2011) ("Order No. 1000").

Rock Island, however, chose a different approach. Instead of participating in the regional planning process that would have required Rock Island to demonstrate an operational or reliability need for the line and offer to serve the public at cost-based rates, Rock Island instead decided to bypass that process to preserve its private control over the project and enjoy the potential to earn profits in excess of a rate-regulated return on investment. Thus, Rock Island did not ask PJM to determine, and PJM did not determine, that Rock Island's line was needed for reliability or to relieve congestion. ComEd Supp. App. 7-8 (C-05700-01). Therefore, Rock Island cannot recover its costs from the public through regulated rates.

Instead, Rock Island's profitability will depend upon the revenues it can earn from selling its capacity under privately negotiated contracts and to the highest bidders in an open season auction. Rock Island App. A-0317 (C-01384); *Rock Island Clean Line LLC*, 139 FERC ¶ 61,142, para. 16 (2012) (Rock Island "assumes all market risk associated with the Project" and "the Project will succeed or fail based on whether a market exists for its services"); *see also* Order No. 1000, 136 FERC ¶ 61,051, para. 163 (contrasting transmission developers that participate in regional planning processes and can charge the public cost-based rates, and transmission developers exempt from regional planning processes who assume "all financial risk" in connection with the project); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 77 (D.C. Cir. 2014) (same).

Because Rock Island's profitability depends upon whether the market is interested in its idea at all and, if so, how much users will pay to use it, Rock Island has made clear

that it "will not install transmission facilities ... until such time as Rock Island has obtained commitments for funds in a total amount equal to or greater than the total project cost." Rock Island App. A-0311 (C-01378). That is, in order to actually commence construction, Rock Island must not only have the expectation of future customers, but also must have secured advance long-term commitments sufficient to cover the project's more-than-$2 billion cost. As Rock Island's witness explained, "in order for Rock Island to begin to construct and install the transmission line, it must ... first, secure sufficient contracts for transmission service ... to support raising the capital to finance construction of the Project"; second, actually raise the capital; and third, "only then, actually commence construction and installation of the permanent transmission facilities." Rock Island App. A-0312-13 (C-01379-80). Thus, Rock Island's witness concluded:

> The bottom line is that permanent installation of facilities cannot and *will not commence unless* and until the need for the Project is actually established through the market test of transmission customers contracting for sufficient service on the transmission line to support and justify financings that raise sufficient capital to cover the total Project cost.

Rock Island App. A-0313 (C-01380) (emphasis in original).

Rock Island's chosen financing model also requires Rock Island to procure substantial pre-commitments from buyers of its capacity. Accordingly, it intends to "sell[] up to 75% of the capacity to anchor tenant customers" in privately negotiated contracts. Rock Island App. A-0315 (C-01382). Then, Rock Island will auction off the remaining 25% of its capacity to the highest bidders in an "open season process." *Id.* at A-0317 (C-

01384). Nothing requires Rock Island to charge the same rate to all of its anchor tenants, or to any other potential user of the other 25% of the line's capacity.

A customer who wishes to use the line, but who neither is selected by Rock Island to be an anchor tenant nor is a winner in the open season auction process, can use the line only in three circumstances: First, if Rock Island fails to sell all of its capacity by auction, Rock Island will make the remaining capacity available to the public—but only if it decides to build the line at all under such circumstances, which according to Rock Island's own witness is doubtful. *See* Rock Island App. A-0313 (C-01380). Rock Island's witness explained: "Any capacity *that becomes available* will be offered to any eligible customer under the Project's OATT." *Id.* at A-0318 (C-01385) (emphasis added). Second, if Rock Island's contracts with anchor tenants and open season auction winners expire or are terminated, so that capacity becomes available, Rock Island will make that capacity available to the public in the future. *Id.* But this prospect is many years in the future, as Rock Island is seeking long-term commitments both from anchor tenants and in the auction. *See* Rock Island App. A-0319 (C-01386). Third, if anchor tenants and auction winners are not using all of their capacity at any particular time, Rock Island will make that temporarily unused capacity available to the public—but only for as long as that capacity is unused by the anchor tenants and auction winners. *Id.* This is known as "non-firm" service. *Id.* As Rock Island's witness explained:

> If firm service is not available because the Project's capacity is fully subscribed, an eligible customer can request non-firm service. Under the terms of the FERC pro forma OATT, Rock Island must provide non-firm

service to any eligible customer *so long as the same capacity is not being used by the holder of firm transmission rights*.

Rock Island App. A-0318 (C-01385) (emphasis added).

In those three situations—and *only* in those three situations—will the public even have the chance to use the line pursuant to an Open Access Transmission Tariff ("OATT") filed with the Federal Energy Regulatory Commission. *Id.*

Thus, although Rock Island and the ICC repeatedly assert that Rock Island will provide service to the public pursuant to the OATT (Rock Island Br. 36-37; ICC Br. 25-26), Rock Island will do so only under the three circumstances just described. If Rock Island successfully sells all of its capacity through privately negotiated contracts and to the highest bidders in the auction, as it hopes to do, and if those customers then use the line, there will be no remaining capacity to sell to any other customers under the OATT. Rock Island App. A-0317-18 (C-01384-85). As Rock Island's witness explained, "any eligible customer *may request non-firm service* on Rock Island at any time, and Rock Island is obligated to grant these requests *so long as the capacity is not in use by firm transmission customers*." *Id.* at A-0319 (C-01386) (emphasis added).

B. Regulatory Background.

The term "public utility" does not include every entity engaged in the transmission of electricity. *See Mississippi River Fuel Corp. v. Illinois Commerce Comm'n*, 1 Ill. 2d 509, 516 (1953) ("The mere fact that the thing sold by a company is water or gas or electricity or telephone service, such as are ordinarily sold by public utility companies, does not of itself render the seller a public utility."); *Zahn v. N. Am. Power & Gas, LLC*, 2016 IL 120526, ¶ 10 (Dec. 1, 2016) (explaining that non-utilities can sell electricity).

Instead, the term "public utility" describes a subset of such entities, and is specifically defined by statute:

> "'Public utility'" means and includes ... every ... 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 or in connection with ... transmission ... of ... electricity.

220 ILCS 5/3-105(a).

An entity that is *not* a "public utility" (with certain special exceptions not relevant to this case) is not subject to regulation by the Commission. A non-utility need not obtain a CPCN from the Commission before beginning construction of a new transmission line. Over the last decade, thirteen non-public utilities have built transmission lines connecting to Illinois substations owned by ComEd alone.[3] However, a transmission developer that is not a public utility will not be able to take property by eminent domain. Instead, it will need to privately negotiate the acquisition of a right-of-way for its transmission line.

In contrast, when a "public utility" seeks to build a new transmission facility, that process is regulated by the Commission under the Public Utilities Act. Under Section 8-406, "[n]o public utility shall begin the construction of any new ... facility ... unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction." 220 ILCS 5/8-406(b). In order to grant a CPCN, the Commission must make specific findings set forth in the statute. *Id.*

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[3] *See, e.g.*, Specifications for Interconnection Service Agreement by and among PJM Interconnection, L.L.C., and Bishop Hill Energy LLC and Commonwealth Edison Co., Paragraph 3.0(a)(1) (requiring generator to construct 27.9 mile line), http://elibrary-backup.ferc.gov/idmws/common/opennat.asp?fileID=12701775.

Once a public utility has obtained a CPCN, it may then obtain the power to exercise eminent domain. To gain that power, the public utility must demonstrate under Section 8-503, after a hearing, that new structures are "necessary and should be erected, to promote the security or convenience of ... 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. The Commission may then "authorize[]" and "direct[]" that the new facility be built. *Id.* On the basis of those findings and that Commission order only, the "public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain." 220 ILCS 5/8-509.

C. Procedural History.

In 2012, Rock Island filed an application with the Commission for a CPCN under Section 8-406, authorizing it to construct, operate, and maintain its transmission line as a "public utility." Rock Island App. A-0004. Commission Staff opposed Rock Island's eligibility for a CPCN, arguing that Rock Island was '"asking the Commission to ... grant it a CPCN so it looks like a 'public utility' for purposes of condemning private property to build its line, while at the same time it plans to offer only a token percentage of that line's capacity for 'public use.'" Rock Island App. A-0041 (C-08498) (Commission Order quoting Staff's reply brief before the Commission). ComEd and other parties made the same point. Rock Island App. A-0037-45 (C-08494-502). The Commission nevertheless rejected its Staff's position and similar arguments by ComEd and others, and held that Rock Island was a public utility because it would be required to offer its service to the public under its federal OATT tariff, Rock Island App. A-0047 (C-08504)—*if* Rock Island ever builds the line at all, and *if* Rock Island happens to have any spare capacity left over after selling its capacity to anchor tenants and through the open season auction.

On review, the Appellate Court reversed.[4] The Appellate Court, applying the established criteria for public utility status, identified two aspects of Rock Island's project that, in its view, disqualified Rock Island from being a "public utility" as a matter of law.[5]

First, the definition of "public utility" in Section 3-105 requires the company to "own[], control[], operate[] or manage[], within this State, … plant, equipment or property used or to be used for or in connection with" the transmission of electricity. 220 ILCS 5/3-105. Yet Rock Island "does not own, control, operate, or manage assets within the State" that it has committed to use in connection with electric transmission. Rock Island App. A-0014, ¶ 43. Indeed, as the Appellate Court emphasized, Rock Island "admitted that the project was in the planning stages and that it would only pursue construction if the company determined that it would be profitable in light of future market developments and financial support." *Id.*

Second, the definition of "public utility" requires the company's property to be "for public use." 220 ILCS 5/3-105(a). Drawing on long-standing precedents from this Court and the requirements of the Public Utilities Act, 220 ILCS 5/9-241, the Appellate Court reasoned that, in order for property to be '"for public use,"' the owner must "serve the public and treat all persons alike, without discrimination." Rock Island App. A-0014, ¶ 40. "A private company that provides public utility services according to its own terms and conditions does not meet the statutory definition…." *Id.* Here, the Appellate Court

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[4] The Appellate Court's opinion is set forth at Rock Island App. A-0001 through A-0017.

[5] The Appellate Court therefore did not reach the additional argument that the Commission's findings were unsupported by substantial evidence. Rock Island App. A-0017, ¶ 51.

held, Rock Island failed to satisfy the "public use" requirement as a matter of law because its plan "does not devote assets for public use in Illinois without discrimination." *Id.* at A-0015, ¶ 46. Instead, "75% of the project's capacity will be sold" to anchor tenants, and the "remaining 25% will be sold ... through an 'open season' bidding process." *Id.* at A-0015-16, ¶ 46. Thus, the project "fails to satisfy the statute's public use requirement." *Id.* at A-0016, ¶ 46

SUMMARY OF ARGUMENT

Rock Island is not a "public utility" for two independent reasons. *First,* Rock Island is not a "public utility" because it has not dedicated its property "for public use," as required under Section 5/3-105(a). Instead, Rock Island proposes to offer the public merely the opportunity to bid in an auction, in which Rock Island will sell its capacity to the highest bidders. Members of the public who are not the high bidders will be relegated to "non-firm service"—service that will be available only when Rock Island's anchor tenants and auction winners happen not to be using the capacity they purchased, and that can be curtailed any time that the anchor tenant or auction winner wants to use that capacity. Rock Island thus does not "furnish [its service to] all who apply," and the non-firm service it furnishes is *not* "without discrimination and without delay." *Highland Dairy Farms*, 308 Ill. at 300-01. Instead, members of the public are expressly subordinated to the anchor tenants and winners of the open season auction.

Appellants' argument boils down to the notion that, because Rock Island has offered all members of the public an opportunity to participate in an auction, it qualifies as a "public utility." Never in the history of the Public Utilities Act has a court accepted that argument. To the contrary, to be a "public utility," an entity must actually "*furnish* [to] all

who apply," *id.* (emphasis added)—not merely offer an opportunity to compete to pay the most for that service. No public utility in Illinois only serves the highest bidders.

Second, Rock Island fails to qualify as a "public utility" because it has not made any commitment—and the Commission has not made any finding—that Rock Island's property *actually "will be used"* to transmit electricity. Under Section 3-105(a) of the Public Utilities Act, a "public utility" is defined as an entity that "owns, controls, operates or manages, within this State, ... for public use," property "*used or to be used* for or in connection with ... transmission ... of ... electricity." 220 ILCS 5/3-105(a) (emphasis added). But even as Rock Island lays the groundwork to take the property of Illinois residents through eminent domain, it refuses to make the commitment required by the statute. Instead, Rock Island has expressly reserved the right to abandon the project if it determines that the project will not be sufficiently profitable.

Contrary to the suggestions by Appellants and *amici*, applying the Public Utilities Act according to its terms and as it has been applied for decades will not destroy the renewable energy industry. Private developers can and, in fact, actually do, build transmission lines to serve renewable energy generation without obtaining a CPCN from the Commission. Prospective transmission developers can also participate in the regional transmission planning process that allows developers to charge cost-based rates for new lines actually needed to relieve congestion or ensure electric reliability. This Court should not contort the plain meaning of the statute, depart from nearly a century of precedent, and subject Illinois landowners to the threat of eminent domain merely to satisfy Rock Island's particular business model.

ARGUMENT

I. ROCK ISLAND'S PLAN DOES NOT SATISFY THE STATUTORY "PUBLIC USE" REQUIREMENT.

Section 3-105(a) of the Public Utilities Act defines a "[p]ublic utility," in relevant part, as a "corporation ... 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 or in connection with ... the production, storage, transmission, sale, delivery or furnishing of heat, cold, power, electricity, water, or light, except when used solely for communications purposes." 220 ILCS 5/3-105(a) (emphasis added).

As a matter of law, Rock Island is not a public utility because its transmission facilities are not "for public use." Nearly a century ago, this Court held that a "public utility" must "furnish all who apply, and the service it furnishes must be without discrimination and without delay." *Highland Dairy Farms*, 308 Ill. at 300-01. Rock Island does not do that. It offers the opportunity to *bid* for capacity to "all who apply," but it does not *furnish* "all who apply." Instead, Rock Island furnishes service to the winners of an auction and to the parties with which it has negotiated private contracts. All others who apply can use capacity only if there happens to be unallocated capacity remaining at the moment it is needed, and only for as long as there is unallocated capacity—that is, they buy it on a discriminatory basis relative to the anchor tenants and auction winners. Thus, Rock Island's service is not in "public use" under the unambiguous terms of the statute.

A. The Court Need Not Defer to Any Factual Findings by the ICC Because All Relevant Facts Are Undisputed.

Appellants argue that this Court is reviewing the ICC's factual findings, and should therefore apply the deferential "substantial evidence" standard of review. They are wrong. This case presents a dispute of law, not fact.

To be sure, in some cases, a "public use" determination will be based on factual findings that are entitled to deference. For example, the question of whether an entity's property is "for public use" might depend on a disputed factual issue concerning that entity's policies and practices—for instance, whether it actually sells its service to all buyers who request it.

In *this* case, however, all relevant facts are undisputed. Rock Island's own brief describes its plan for selling transmission capacity:

- "FERC ... granted Rock Island authority to initially contract up to 75% of the transmission capacity on the Project to 'anchor tenant' customers." Rock Island Br. 9.
- "Transmission capacity that is not contracted to anchor tenant customers (this will be at least 25% of the Project's capacity) will be offered to eligible customers through an 'open season' process. FERC reviewed and approved Rock Island's proposed open season process as fair, transparent and nondiscriminatory. Rock Island will offer open season participants the same rates, terms, and conditions offered to the anchor customers. All eligible customers can participate in the open season." *Id.* at 10 (citations omitted).
- "If transmission capacity on the Project remains available after the open season is concluded, it will be offered and available to any eligible customers (not just those who participated in the anchor tenant or open season processes). Transmission capacity that becomes available (*e.g.*, as initial contracts expire) will be offered, pursuant to the Rock Island OATT, to any eligible customer. Any eligible customer will be able to request service at any time. If non-interruptible ('firm')

> transmission service is not available because it is fully subscribed, Rock Island, as required by FERC, must provide interruptible (non-firm) service to requesting customers. Non-firm service is available whenever a firm service customer is not using its contracted capacity." *Id.* at 10-11 (citations omitted).

This description of Rock Island's plan comes straight from the testimony of David Berry, Rock Island's Vice President of Strategy and Finance. Rock Island App. A-0310, A-0317-21 (C-01377, C-01384-88). No one disputes the veracity of Mr. Berry's testimony or the factual details of how this plan will work. Rather, the sole dispute is one of law: Is a facility in "public use" if the public has a right to participate in an auction for that facility, and where members of the public who lose the auction or do not participate in the auction are able to purchase only on a "non-firm" basis if capacity happens to be available? That question turns on the meaning of the statutory phrase "public use." The Court should review this question of statutory interpretation *de novo*. *People ex rel. Madigan v. Illinois Commerce Comm'n*, 231 Ill. 2d 370, 377 (2008).

Alternatively, the question might be framed as a mixed question of fact and law: whether the ICC correctly applied the "public use" standard to the undisputed facts as outlined in Rock Island's written testimony. The standard of review for that question is *not* the deferential standard applicable to agency fact-finding. Rather, this Court has stated that in cases involving a "mixed question of fact and law," "the applicable standard of review should be between a manifest weight of the evidence standard and a *de novo* standard so as to provide some deference to the [agency's] experience and expertise." *City of Belvidere v. Illinois State Labor Relations Bd.*, 181 Ill. 2d 191, 205-06 (1998). Of course, that standard of review applies only if the agency decision establishes that the

agency actually used its "experience and expertise." *Id.* The Court may not uphold an agency decision without a clear explanation for the agency's conclusions. *Reinhardt v. Board of Ed. of Alton Cmty. Unit Sch. Dist. No. 11*, 61 Ill. 2d 101, 103-04 (1975) ("the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained" (quotation marks omitted)). As explained below, many of Appellants' arguments for affirming the ICC's decision do not appear in the ICC decision, and there is therefore nothing to which this Court can defer.

Regardless of whether the question is viewed as a statutory interpretation question, or a mixed question of fact and law, the critical point is that all relevant facts are undisputed. Therefore, the adequacy of the ICC's fact-finding is irrelevant.

B. The Undisputed Factual Record Establishes That Rock Island's Transmission Facilities Are Not for "Public Use."

Rock Island's plan offers the public the nondiscriminatory right to *bid* for transmission capacity. But it does not offer the public the nondiscriminatory right to *use* transmission capacity. Under well-settled authority dating back a century, Rock Island's plan does not meet the "public use" requirement.

1. "Open Season" Winners Do Not Buy on the Same Terms as the Rest of the Public.

In the agency decision under review, the ICC stated:

> The FERC also approved Rock Island's request to sell the remaining 25 percent of the capacity using an open season auction. As explained by Staff, this means that Rock Island would be required to offer its service to all customers in a non-discriminatory manner subject to a regional transmission organization ('RTO') open access transmission tariff ('OATT').

Rock Island App. A-0047 (C-08504) (citation omitted).

As a threshold matter, it is important to clarify what this means. As Rock Island's witness makes clear in his testimony, the open season auction will be open to the public on non-discriminatory terms. In other words, any member of the public can bid. But there is a difference between being able to bid for a service through an auction and being able to actually use a service at a tariffed price. When Christie's auctions a painting, any member of the public can bid on non-discriminatory terms; but only the winner takes the painting home. Similarly here, FERC approved an open season auction process in which anyone can bid on non-discriminatory terms. *See Rock Island Clean Line LLC*, 139 FERC ¶ 61,142, para. 30. But only the winners of the auction get firm service on Rock Island's line. Every other member of the public is relegated to the possibility of non-firm service under the OATT—available "whenever a firm service customer is not using its contracted capacity" (Rock Island Br. 10-11), and interruptible when a firm service customer wishes to use its contracted capacity. Rock Island App. A-0310, A-0317-21 (C-01377, C-01384-88). Beyond that chance at inferior service, they get nothing.

The ICC's appellate brief repeatedly conflates the distinction between buying firm service by winning an auction and buying non-firm service after losing the auction. It asserts, for instance, that "all that is required for a public use" is the ability to "obtain capacity" through an "OATT capacity auction." ICC Br. 40. And it states that "[Rock Island] holds itself out to serve without discrimination through its open season under the FERC OATT." ICC Br. 25. To be clear, however, a participant in an auction neither "obtain[s] capacity" nor is "serve[d] without discrimination" unless the participant *wins* the auction. If the participant does not win the auction, he can buy under the OATT, but only on a discriminatory (non-firm) basis relative to the auction winners.

The ICC points out that the *open season* will be "fair, transparent and non-discriminatory." ICC Br. 25-26. ComEd agrees. But this simply means that the auction process will be fair, and that all bidders would have the same opportunity to bid. It does *not* mean that all members of the public can use the service on equal terms. Those who cannot pay the auction price are left with only the chance of receiving non-firm service and are expressly subordinated to anchor tenants and auction winners. Non-auction winners who do not, or who cannot use non-firm service, are left completely empty- handed.

2. The "Open Season" Auction Does Not Satisfy the "Public Use" Requirement.

Appellants nevertheless claim that an entity satisfies the "public use" requirement under Illinois law, and thereby qualifies as a "public utility" eligible to condemn private property, so long as all members of the public have an equal opportunity to *participate* in *an auction* for the service. *See* Rock Island Br. 11 (explaining that "all eligible customers will have equal opportunity to contract for service as anchor customers or in the open season process"); Ill. AG Br. 11 (arguing that ICC's ruling should be upheld because "[w]hat matters is that Illinois generators are not discriminated against in the bidding for use of the transmission line."). [6]

This too is a pure question of law that the Court should review *de novo*—does the phrase "public use" mean that the public can participate in an *auction* to use a service, or instead that the public can actually *use* it? That question turns entirely on what the word

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[6] In addition to being legally irrelevant for the reasons described herein, this statement is also wrong as a factual matter. Illinois generating facilities cannot use the line to transmit power. There are no points on the proposed line between northwestern Iowa and its end point in Grundy County, Illinois, where any generator could inject or withdraw power, or interconnect with the line in any way. ComEd Supp. App. 23 (C-00258), Tr. 33:713-16.

"use" means—it does not depend on any facts, or even the application of law to facts. *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 148 Ill. 2d 348, 367 (1992) ("The Commission's interpretation of a question of law … is not binding on a reviewing court."). No deference is owed to the ICC's answer to this question, as the ICC's Order does not analyze the issue, identify any ambiguity in the statute that could justify its interpretation, or apply its expertise to explain why this novel interpretation of the phrase "public use" is justified. Absent any "clearly disclosed and adequately sustained" explanation for *why* the agency was interpreting the "public use" requirement in this manner, there is no expertise and experience to which the Court can defer. *Reinhardt*, 61 Ill. 2d at 103 (internal quotation marks omitted).

Defining "public use" to mean "public participation in an auction" would be an extraordinary sea change to the way the "public use" requirement has been understood for the last century. Until now, "use" has always meant "use," not "the right to participate in an auction." No public utility in the history of this State has satisfied the "public use" requirement by offering the public the opportunity to bid on services to be actually provided only to the highest bidder. One cannot imagine the ICC making a similar argument if any of the State's utilities were to propose rates that rationed gas or electricity service only to those who paid the most.

This argument is also contrary to this Court's decisions in *Highland Dairy Farms Co. v. Helvetia Milk Condensing Co.*, 308 Ill. 294 (1923), and *Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill. 2d 509 (1953), which confirm that Rock Island's transmission facilities will not be in "public use." In *Highland Dairy Farms*, the Court concluded that "[a] public utility implies a public use of an article, product, or service,

carrying with it the duty of the producer or manufacturer, or one attempting to furnish the service, to serve the public and treat all persons alike, without discrimination." 308 Ill. at 300. The Court elaborated, "[w]hen once determined to be a public utility under the statute the company must furnish all who apply, and the service it furnishes must be without discrimination and without delay." *Id.* at 300-01. In this case, Rock Island may offer the opportunity to participate in an auction, but it does not "*furnish* all who apply ... without discrimination and without delay." *Id.* at 300 (emphasis added). To the contrary, it reserves the right to *deny* service to the public if anchor tenants and auction winners are using the line. Rock Island is therefore not a public utility.

Similarly, in *Mississippi River*, this Court applied the *Highland Dairy Farms* rule and concluded that a natural gas supplier's "direct sales of gas to twenty-three industries in the industrial area" near East St. Louis did not make it a "public utility." 1 Ill. 2d at 513. The Court held that although the supplier had negotiated contracts with several industrial customers, it could not satisfy the "public use" requirement because "[r]equests by additional [customers] for gas have been refused." *Id.* at 512-13. Here, Rock Island reserves the right to refuse service to anyone who does not win the auction. It is therefore not a public utility under *Mississippi River*.

This case is easily distinguishable from *Iowa RCO Ass'n v. Illinois Commerce Commission*, 86 Ill. App. 3d 1116 (4th Dist. 1980), the Appellate Court decision on which Appellants principally rely. In *Iowa RCO*, the Appellate Court held that an oil pipeline company was a public utility, based on "testimony ... that several nonaffiliated companies wished to use the pipeline and that [the pipeline company] would furnish service to them" and that they would be served on nondiscriminatory terms. *Id.* at 1118-19. By contrast,

Rock Island will offer capacity to the public outside the auction process only if it happens to have spare capacity.

Highland Dairy Farms and *Mississippi River* are old cases, but "public use" means the same thing now as it did then. If a person wants to turn on the lights in his house, he has a right to buy that service from the public utility, and the utility has a duty to furnish the service at a non-discriminatory rate. That is what it means for a utility to furnish service to *the public*. Public utilities like ComEd are not permitted to tell their customers that they may participate in an auction for delivery of their power, but if they lose the auction, they may be left in the dark. The Court need only try to imagine such an argument being made by a traditional utility in defense of a claim that it only needs to supply electricity or gas to the customers who "won the auction." Rock Island is trying to get the benefits of being declared a public utility—which include the sovereign power to condemn—without committing to furnish its service to all who apply. This Court should not permit that result, which would contravene the purpose of the Public Utilities Act and a century of cases construing it.

In responding to this straightforward logic, Appellants largely attack straw men. For instance, Appellants spill much ink describing the hundreds of pages of factual findings in the ICC's order and the importance of deferring to factual findings. *E.g.*, Wind on the Wires Br. 25-31. However, ComEd is not challenging any of the ICC's factual findings, so that argument is irrelevant.

Appellants also insist that an entity need not offer 100% of its capacity to be a public utility; 25% should be enough. *E.g.*, ICC Br. 41-42. Again, ComEd does not dispute that point, nor did the Appellate Court so hold. The problem with Rock Island's proposal

is how Rock Island treats that remaining 25%, the portion that Rock Island relies on to support the claim that it is "serving the public." With respect to that portion of its capacity, Rock Island is *not* "furnish[ing] all who apply ... without discrimination and without delay," *Highland Dairy Farms*, 308 Ill. at 300-01; rather, it is offering that 25% of its capacity to the winners of an auction.

Appellants next contend that "'public use' is determined based on the *offering* of a service to the public on non-discriminatory terms; it does not require that the public actually avail itself of the service in significant numbers, or even at all." *E.g.*, ICC Br. 39-40. They emphasize that the public utility statute contains no requirement that "Illinois shippers ... *affirmatively seek and obtain* capacity through the auction." *E.g.*, ICC Br. 40 (emphasis in original). This argument, too, is beside the point. The problem with Rock Island's proposal is that it does *not offer* to furnish service to the public on non-discriminatory terms. Rather, it offers the opportunity to participate in an *auction* where only the winners are served on non-discriminatory terms, which is not the same thing.

Appellants note that FERC approved Rock Island's application and concluded that the open season auction would be fair and nondiscriminatory under FERC standards applicable to the interstate and wholesale market. *E.g.*, Rock Island Br. 6-11, 33-35. But that is irrelevant to the statutory question this Court must address, which is whether an auction process that allows all bidders to participate on a non-discriminatory basis suffices to establish "public use" under Section 5/3-105(a) of the Public Utilities Act. Appellants do not ever suggest that FERC's approval of the open season auction somehow preempts Illinois law defining a "public utility," and any such argument would plainly fail. An entity's status as a "public utility" under Illinois law is the critical prerequisite to the

exercise of eminent domain authority, and the power to condemn property is the State of Illinois's sovereign power. *Forest Preserve Dist. of Du Page Cty. v. West Suburban Bank*, 161 Ill. 2d 448, 495 (1994). It is the Legislature's prerogative to decide when to delegate that power to a private entity, and it has decided that such delegation will occur only when an entity's services are in "public use." FERC cannot override, and has not overridden, the State's inherent sovereign powers merely by declaring that Rock Island's open season auction will be fair and nondiscriminatory.

Finally, Appellants argue that vacating the ICC's decision would somehow result in a burden on interstate commerce in violation of the Dormant Commerce Clause and Illinois statutes. *E.g.* ICC Br. 40-41. That argument, too, misfires. A transmission developer is treated the same under the law regardless of whether the developer is located exclusively inside the state, or instead brings power into Illinois from other states. Either way, to qualify as a "public utility" and gain the power of eminent domain, the developer must furnish its service to the public, rather than subordinating the public to the winners of an auction. That rule is neutral with respect to geography, and thus the Dormant Commerce Clause has no bearing on the case. *See American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 434 (2005) ("neutral" statute that "applies evenhandedly to all carriers" did not violate the Dormant Commerce Clause).

3. The Sale of Unallocated Capacity Under an OATT Does Not Satisfy the "Public Use" Requirement.

Rock Island (but not the ICC) advances the alternative argument that it complies with the "public use" requirement because the public can obtain service *after* the open season auction process, on a non-firm basis through the OATT or through a secondary market. As Rock Island points out, "*if transmission capacity on the Project remains*

available after the anchor tenant and open season processes are concluded, that capacity will be offered and available to any eligible customers." Rock Island Br. 35 (emphasis added). Of course, in that scenario, Rock Island might not build the line at all, and no one would be offered any service. Rock Island App. A-0313 (C-01380) (testimony by Rock Island's witness that "permanent installation of facilities cannot and will not commence unless and until the need for the Project is actually established through the market test of transmission customers contracting for sufficient service on the transmission line to support and justify financings that raise sufficient capital to cover the total Project cost"). But if it did, according to Rock Island, members of the public could buy capacity "as initial contracts for service expire," or on a "non-firm service" "whenever the firm service customer is not using its contracted capacity." Rock Island Br. 35-36. They could also potentially buy capacity that was resold by others on a "secondary market." *Id.* at 36. Rock Island maintains that these contingent possibilities of obtaining capacity after the auction suffice to satisfy the statutory "public use" requirement.

Once again, this argument presents a pure question of law: is the statutory requirement of "public use" satisfied when Rock Island offers to sell the public unallocated capacity contingent on its availability, and when the public's use of that capacity can be interrupted if the capacity is reclaimed by an anchor tenant or auction winner? Because this is a pure question of law, it should be reviewed without deference. Even if this Court deems it a mixed question of fact and law, no deference is warranted because the ICC did not address the theory now advanced by Rock Island. Nowhere does the ICC suggest that the "public use" requirement can be satisfied by a scheme in which post-auction buyers are assigned a lower priority than anchor tenants and auction buyers. If the ICC had meant to

issue such a holding, it would presumably have said so clearly, given how dramatic a shift such a holding would be from a century of cases requiring *nondiscriminatory* treatment of all comers.

Under any standard of deference, Rock Island's offer of non-firm capacity does not satisfy the "public use" requirement. In *Highland Dairy Farms*, this Court held: "When once determined to be a public utility under the statute the company must furnish all who apply, *and the service it furnishes must be without discrimination and without delay*." 308 Ill. at 300-01 (emphasis added). As applied to members of the public who did not prevail in the auction, however, Rock Island is serving *with* discrimination because those members of the public can purchase only non-firm capacity on an interruptible basis—that is, the service can be interrupted if a firm customer (an anchor tenant or open season auction winner) wants to use the line. Rock Island App. A-0319 (C-01386). And it is serving *with* delay because the members of the public can only buy service if it happens to be available when they need it, and if not, must wait until firm customers are not using the line. Rock Island's position is akin to a private golf club that claims to be "open to the public" because it maintains a wait-list for the public just in case one of its members cancels and there is an open tee-time—but then reserves the right to kick the member of the public off the course if a club member shows up after all. To use another analogy, it is akin to a system in which a baseball team allows fans to buy tickets to use seats held by season-ticket holders—but if the season-ticket holder shows up at the game, the fan must leave. The Court should reject the absurd contention that such a scheme satisfies the requirements for "public use."

Rock Island points out that there *may* be a "secondary market" in which anchor tenants or auction winners can resell capacity. However, nothing in the ICC's decision or

in this Court's cases supports the extraordinary proposition that an entity can be deemed a "public utility" merely because *other entities* might *resell* its service and that hypothetical resale might also be on a nondiscriminatory basis. By Rock Island's logic, an entity could have the power to condemn property while selling 100% of its service in a discriminatory fashion to the highest bidder, so long as it could show that the service might later be resold without discrimination. The Court should reject this theory.

Rock Island also notes that "if requests for firm service exceed the Project's capacity, Rock Island will be obligated under FERC requirements to seek to expand the capacity beyond the scope of the Project that was presented to the ICC for approval." Rock Island Br. 36. But the prospect that Rock Island might expand its capacity to serve new customers is too speculative to satisfy the "public use" requirement. The ICC recognized as much. It pointed to the FERC Order, in which Rock Island represented to FERC 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." Rock Island App. A-0048 (C-08505) (internal quotation marks omitted). The ICC then noted a statement in a "subsequent FERC matter" (unrelated to Rock Island) in which FERC stated that public utilities are required to expand transmission system to provide transmission service. *Id.* (citing *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects Priority Rights to New Participant-Funded Transmission*, 142 FERC ¶ 61,038 (2013)). But that "subsequent FERC matter," *id.*, was a "policy statement" expressly stating that it would apply "on a prospective basis to filings received after this issuance"—*i.e.*, it would not include Rock Island's FERC filing. 142 FERC ¶ 61,038, para. 1. Apparently

recognizing this point, the ICC stated that "it is not known whether the FERC will allow Rock Island to implement a tariff that deviates from the above policy pronouncement," and that, even if Rock Island was required to expand capacity, such expansion "would necessarily deviate from the project under review in the present case" and "would require further review." Rock Island App. A-0048 (C-08505). Thus, any promise by Rock Island to build more transmission capacity in response to a demand by the public for firm service depends on three levels of speculation: (1) speculation that FERC would impose such a requirement on Rock Island, contrary to FERC's express position that its policy statement was prospective only; (2) speculation that the ICC would approve the expansion; and (3) speculation that Rock Island could find the money to build the project. A member of the public might have to wait a very long time for this new transmission capacity—and while waiting, be relegated to the chance of being able to buy potentially unallocated capacity on a non-firm basis. This is a far cry from how this Court and the ICC have long understood the "public use" requirement.

If Rock Island's scheme were sufficient to satisfy the "public use" requirement, that statutory requirement would be drained to near meaninglessness. It is very easy for an entity to promise that any buyer can buy its product—but only if it cannot sell out its product to its preferred purchasers and cannot find anyone else to pay a higher rate at auction. This unimpressive promise has never been, and should not be, sufficient to obtain the power to condemn property.

C. Rock Island's Predicament Is a Consequence of Its Own Choices.

Rock Island has only itself to blame for its current predicament. Rock Island could have avoided any question as to whether it satisfies the "public use" requirement simply by offering 25% of the transmission capacity under an OATT offering nondiscriminatory

service to all comers. This would have offered genuinely open access to purchasers from Illinois and elsewhere.

Instead, however, Rock Island felt that it would make more money by auctioning off that transmission capacity. It thus made the strategic decision to relegate OATT buyers to *unallocated* capacity—which may or may not exist at any given time. Rock Island gambled that Illinois courts would ignore the plain text of the Public Utilities Act and interpret "public use" to mean "public participation in an auction." That gamble failed in the Appellate Court and it should fail in this Court as well.

Of course, there is nothing wrong with trying to make as much money as possible. But Rock Island must take the bitter with the sweet. If it is not willing to devote any portion of its transmission capacity to public use on a non-discriminatory basis, then it cannot enjoy the extraordinary right to condemn property to build its transmission facilities. Rather, it must use the extra money it earns in the auction to buy space on an existing right-of-way or negotiate with land-owners, just like any other business developer in this State. That is the basic bargain struck by the Public Utilities Act and this Court should enforce it.

II. ROCK ISLAND HAS NOT SHOWN THAT IT WILL EVER OWN ANY PROPERTY "USED OR TO BE USED" IN CONNECTION WITH THE TRANSMISSION OF ELECTRICITY.

Rock Island is not a "public utility" for a second independent reason as well: it has not shown that it "owns, controls, operates or manages"—or *will ever* "own[], control[], operate[] or manage[],"—"any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in" the transmission of electricity. 220 ILCS 5/3-105(a). Rock Island wants to be declared a public utility now, but refuses to commit to building its line. Rock Island's plan is to obtain the power to condemn property in order to impress potential lenders and customers. If

those potential lenders and customers are suitably impressed, then Rock Island will—maybe—build the transmission facilities. The Public Utilities Act does not confer the status of "public utility"—and the concomitant power to condemn private property—based on such speculative contingencies.

A. The Court Need Not Defer to Any Factual Findings by the ICC Because All Relevant Facts Are Undisputed.

Once again, the Court should not defer to the ICC on whether Rock Island meets the statutory "owns, controls, operates or manages" requirement because no facts are in dispute. All parties agree that Rock Island does not currently own any transmission facilities, and that its plans to build transmission facilities are contingent on the decisions of its future lenders and customers. In fact, Rock Island's own witness testified that "permanent installation of facilities cannot and will not commence unless and until the need for the Project is actually established through the market test of transmission customers contracting for sufficient service on the transmission line to support and justify financings that raise sufficient capital to cover the total Project cost." Rock Island App. A-0313 (C-01380). And Michael Skelly, the President of Rock Island, testified that if "'the project wasn't worth investing in any further, then we would abandon it.'" Rock Island App. A-0008, ¶ 18; A-0042 (C-08499) (citation omitted). Rock Island's appellate brief confirms this testimony. *E.g.*, Rock Island Br. 28 (acknowledging that "construction will not begin unless and until Rock Island has entered into sufficient contracts with customers for transmission service to provide credit support for the issuance of debt and equity to finance construction of the Project").

Thus, this issue presents a question of law. Can an entity meet the statutory "owns, controls, operates or manages" requirement if it does not represent that it *will* build the

project, but only that it *might* build the project if the private developer and its financiers unilaterally determine that project will prove sufficiently profitable? That question turns entirely on the meaning of the statutory "owns, controls, operates or manages" requirement; it does not present a question of fact, or even an application of law to facts. Thus, the Court should consider the issue *de novo*. Indeed, even Rock Island agrees that *de novo* review is appropriate on this issue. Rock Island Br. 22.

Even if this issue presented a mixed question of fact and law, no deference is warranted. As explained below, the flaw in the ICC's decision is not an *incorrect* finding, but the *absence* of a finding that Rock Island will ever satisfy the "owns, controls, operates or manages" requirement. Insofar as the record is devoid of any agency decision on this issue, it is impossible for the Court to defer to the agency's conclusions. *Reinhardt*, 61 Ill. 2d at 103.

B. The ICC's Rejection of a Current-Ownership Requirement Is Irrelevant to this Case.

Under Section 5/3-105(a) of the Public Utilities Act, an entity is not a public utility unless it "owns, controls, operates or manages" "any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in" the transmission of electricity. *Id.* In its agency decision, the ICC concluded that this statute does not require the public utility to meet this requirement at the time it applies for a CPCN. The ICC reasoned that imposing a requirement that the entity "own[], control[], operate[] or manage[]" the property at the time of the *application* would create a "Catch-22": An entity could not obtain a CPCN until it owned the property, but it could not own the property until it obtained the CPCN. Rock Island App. A-0027 (C-08484).

Appellants, as well as the People's *amicus* brief, accuse the Appellate Court of having disapproved of this statutory interpretation and having created a "Catch-22" that makes it impossible for any new transmission developer to become a "public utility." Again, however, Appellants are attacking straw men. The Appellate Court *agreed* with the agency's statutory interpretation that an entity need not "own[], control[], operate[] or manage[]" the property at the time of the application. As the Appellate Court explicitly stated: "The Act does not require an applicant to be a public utility before it seeks certification under the appropriate provisions. A plain reading of the statute shows that an applicant may seek public utility status while, at the same time, applying for a certificate of public convenience and necessity to transact business and construct facilities." Rock Island App. A-0016, ¶ 49. Indeed, this holding is obviously correct. It would be absurd to interpret the Public Utilities Act in a manner that would prevent any new public utility from coming into existence.

Appellants either ignore this passage from the Appellate Court's decision or accuse the Appellate Court of being "self-contradictory." But, as explained below, Appellants refuse to engage with the Appellate Court's *actual* rationale for reversing the ICC.

C. As a Matter of Law, Rock Island Is Not a Public Utility Because It Has Not Shown That It Will Ever Own Transmission Facilities.

As the Appellate Court held, Rock Island is not a "public utility" for a different reason. It has not shown that it currently "owns, controls, operates or manages"—or *will ever* "own[], control[], operate[] or manage[]"—"any plant, equipment or property *used or to be used* for or in connection with, or owns or controls any franchise, license, permit or right to engage in" the transmission of electricity. 220 ILCS 5/3-105(a) (emphasis added).

Even interpreting the phrase "owns, controls, operates or manages" to apply both to the present and to the future, Rock Island cannot meet this requirement.

The Appellate Court noted that "[i]n testimony before the Commission, Rock Island admitted that the project was in the planning stages and that it would only pursue construction if the company determined that it would be profitable in light of future market developments and financial support." Rock Island App. A-0014, ¶ 43. It pointed out that Rock Island not only "does not own any transmission assets in Illinois," but also does not "have any agreements for service." *Id.* at A-0015, ¶ 43. Thus, Rock Island did not make a showing—*either now or in the future*—that it will meet the statutory criteria to be a public utility. Rock Island merely showed that it *might* do so, depending on unpredictable market developments. It made no firmer commitment than that.

The Appellate Court's description is consistent with the undisputed record and Rock Island's brief. Rock Island's President explicitly testified that Rock Island would abandon the project if it "wasn't worth investing in any further," and Rock Island's appellate brief confirms that fact. *See supra* at 32. Rock Island's brief claims that it has worked hard and made progress (Rock Island Br. 27-28), but it candidly acknowledges that its ultimate decision on whether to build the line at all depends on market conditions and the decisions of third party lenders. Rock Island Br. 9-11, 28.[7]

Under the unambiguous statutory text, these facts foreclose Rock Island's argument that it is a "public utility." For an applicant to acquire public utility status, the ICC must

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[7] Indeed, Rock Island recently *withdrew* its application before the Iowa Utilities Board for permission to construct the portions of the line that were to run through Iowa. *See* Iowa Utils. Bd., Order Accepting Withdrawal of Petitions, Docket No. E-22248 (Dec. 23, 2016), https://efs.iowa.gov/cs/groups/external/documents/docket/mdax/njew/~edisp/1610798.pdf

find that the applicant "owns, controls, operates or manages" a "plant, equipment or property *used or to be used*" for the transmission of electricity. This is a mandatory requirement and there are no statutory exceptions. Thus, to approve an application for a CPCN, the ICC must make a finding that the statutory requirement is met either because the applicant owns and controls transmission assets when it applies, or will do so in the future by virtue of the project which is the subject of its application. Rock Island did not make either showing, and the ICC did not make either finding. Instead, Rock Island showed that it would use its CPCN to impress lenders and customers who would—*hopefully*—lead Rock Island to conclude it could make a large enough profit to decide to proceed with building the transmission line. This showing does not satisfy the statute.

Of course, it is never possible to show with *certainty* that any future project will be completed. There will always be the risk of an unexpected scenario that scuttles an applicant's plans. And ComEd does not suggest that absolute certainty is necessary to obtain a CPCN—if it was, no CPCN would ever be issued. But the statute does require that, to be a "public utility," a developer must actually commit to satisfying the statutory "public utility" criteria with the facilities it owns or controls. The law does not allow a developer to acquire the power of eminent domain while building "on spec."

The problem in this case is that the ICC never found Rock Island would *actually* operate a transmission line, nor given the evidence Rock Island presented, could it have made that finding. The ICC explained at great length that *if* the project was built, *then* it would have benefits for Illinois. ComEd does not challenge those predictive judgments in this appeal. But the ICC did not make the more basic finding that the project *would, in fact, be built*. Nor could it have, in light of Rock Island's steadfast refusal to make any

commitment to actually build the project. Without such a finding by the ICC, a CPCN cannot issue, because there is no finding that Rock Island will *ever* "own[], control[], operate[] or manage[]" a "plant, equipment or property used or to be used" for the transmission of electricity.

The Commission actually did just the opposite. As Rock Island points out (Rock Island Br. 28), the Commission prohibited Rock Island from starting construction of the project unless it obtained the funding: "Rock Island will not be able to install transmission facilities on landowners' property unless such commitments are obtained, thereby establishing proper protection for ratepayers." Rock Island App. A-0171 (C-08628). But this finding simply proves ComEd's point: the ICC affirmatively imposed a future condition that may or may not ever be satisfied. The ICC thus recognized that the project may or may not occur. That is the antithesis of a finding that the project *will* occur, as required by the statute. The statute does not authorize the ICC to issue a contingent CPCN.

Moreover, this analysis overlooks the elephant in the room: the effect on landowners' title if the CPCN is granted. Any landowner potentially affected by Rock Island's request would be faced with the possibility that, at some point in the future, Rock Island could show up and start building, so long as the transmission lines prove financially beneficial to it. That prospect would make it uneconomical to develop the land and would cause land value to plummet, regardless of whether the construction ever actually occurs. Indeed, landowners may be even worse off under the ICC's order than if their land was actually condemned—they cannot develop the land because of the prospect of condemnation, but they also cannot get just compensation for the land because it has not yet been condemned. The ICC's order places landowners in a limbo, awaiting Rock

Island's decision about whether it can or cannot get financing, and then whether it will or will not go forward with its project. Enforcing the unambiguous terms of Illinois law would avoid this unfair outcome.

Granting a CPCN would also be contrary to the purpose and history of the public utility statute. A CPCN is a prerequisite to the sovereign power of eminent domain. That is why the ICC may only grant a CPCN if the applicant shows a firm commitment to serve the *public*. If an applicant can establish that it *does* or *will* serve the public—thus permitting the ICC to make a finding that it will be a public utility in the future, even if not in the present—the applicant can get a CPCN. If an applicant is unable to make that commitment, and simply says that it will serve the public if it chooses, based on whether the project is expected to be sufficiently profitable, it is not a public utility and cannot get a CPCN.

This purpose is confirmed by history. Rock Island's application is unprecedented. Never once has the ICC granted a CPCN to an applicant who refused to commit to building a public utility unless it could obtain uncertain funding and large enough profits. IBEW points to past cases in which "new entities with no utility assets or customers in Illinois were granted Certificates." IBEW Br. 20, 31-32. But in the cases cited by IBEW, the applicant was: (a) ready to commence construction upon certification, or (b) contractually bound to acquire and then operate existing utility property. *See, e.g., In re American Transmission Company L.L.C.*, Docket No. 01-0142, 2003 WL 1995923, at 3 (I.C.C. Jan. 23, 2003) ("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"); *In re Illinois Power Co.*, Docket No. 06-0179, 2007 WL 1617828, at 21 (I.C.C. May 16, 2007) ("the issuance of a certificate to both IP and Transco, with 90% of construction costs to be funded by Transco, represents, on balance, a reasonable proposal that would allow both companies to finance the proposed construction without significant adverse financial consequences for them or their customers"); *Illinois Power Company*, Order on Reopening, Docket No. 06-0706, 2010 WL 2647673, at 2 (I.C.C. June 23, 2010) ("AITC is an Illinois corporation that Petitioners proposed would fund, construct, and operate the subject transmission lines in conjunction with IP."). Thus, the entity *would* become a public utility and *would* serve the public if the application was approved. Until this case, the ICC has never granted a CPCN to an applicant which did not meet that bedrock obligation.

Appellants' responses to this straightforward reasoning are beside the point. For instance, Appellants argue that Rock Island should be classified as a public utility because it "holds itself out" as such. *E.g.*, ICC Br. 17-18, 22. But the fact remains that Rock Island will not be able to "hold itself out" as a public utility unless the contingent possibilities of funding and customers come to fruition, and an entity cannot be declared a public utility based on such contingencies.

Appellants argue on this point, too, that the Appellate Court should have deferred to the agency's determinations of the facts. *E.g.*, ICC Br. 15-29. For instance, the ICC points out that Rock Island owns options to purchase land in Grundy County, Illinois, *id.* at 23; that FERC approved Rock Island's offering, *id.* at 25; and that if Rock Island's project ever gets built, some of the capacity will be used in Illinois, *id.* at 28. However, all

of these facts are irrelevant. Rock Island does not own land or facilities used to transmit power and it does not commit to ever do so. The relevant point is that Rock Island's "get CPCN now, maybe get funding later, and then maybe build" approach is inconsistent with the unambiguous terms of Illinois law.

Rock Island argues that "construing the PUA as requiring an applicant to have service agreements in place with customers in order to receive a CPCN is highly impractical and does not comport with commercial realities, as the evidence showed. Customers will not contract for service on a transmission line that has not obtained its regulatory approvals." Rock Island Br. 24. Perhaps so, perhaps not. But Rock Island's need to obtain "contracts" prior to commencing construction is also a function of its own choice to cater to a speculative contract market rather than an established public need. Few transmission line developers use or rely on such a model, and the regional process eschewed by Rock Island specifically offers alternatives.

Moreover, ComEd does not suggest imposing a rigid requirement that an applicant must have service agreements in place in order to receive a CPCN. Tentative service agreements contingent on approval of the application, or even some lesser showing, may be enough, so long as the applicant commits to offering service. The courts must enforce the unambiguous statutory requirement that the ICC actually *make* the finding—that the ICC not grant a CPCN unless it finds that, either now or in the future, the entity will be a public utility. That finding is necessary to ensure that the ICC does not give away the eminent domain power in order to make an applicant look better to its hypothetical lenders, as the ICC did here. Because the ICC did not make the finding required by the statute, its decision must be reversed.

D. Rock Island's Predicament Is a Consequence of Its Own Choices and Will Not Impede Future Transmission Lines From Being Built.

Once again, Rock Island has only itself to blame for its predicament. Illinois law provides a mechanism to build transmission lines that does not depend on the contingent decisions of lenders. Rock Island chose not to avail itself of that mechanism, and it therefore does not qualify as a public utility.

As previously discussed, new transmission lines are typically constructed only after PJM determines as part of a regional transmission planning process that a new line is needed to ensure reliability or to relieve congestion. *Supra* at 5-6. When PJM determines that a new line is needed to serve the public, the developer of the new line is permitted to recoup its costs and to earn an appropriate return on its investment through cost-based rates assessed on the bills of the customers who benefit from the improvement. *Id.* Under those circumstances, the construction of the transmission facilities does not depend on whether lenders are sufficiently impressed by an entity's power to condemn property. To the contrary, because such a line truly is "for public use," a developer who commits to build such a line can qualify as a "public utility" under Illinois law and, if necessary, condemn property to obtain the necessary right-of-way.

Rock Island, however, chose a different approach. Instead of participating in the regional planning process that would have required Rock Island to demonstrate a reliability or congestion need for the line, Rock Island instead decided to bypass that process to preserve private control over the project and enjoy the potential to earn profits in excess of a rate-regulated return on investment. Rock Island did not ask PJM to determine, and PJM did not determine, that Rock Island's line was needed.

There is nothing inherently wrong with preserving private control over a project and earning high profits. But as with Rock Island's choice to refuse to offer service to all comers, Rock Island's choice to reject the regional planning process has consequences. Rock Island's ability to build its transmission line is contingent on the decisions of unaccountable lenders and Rock Island's own view of the future profitability of the project, which means that Rock Island cannot acquire the power to condemn property in order to impress those lenders.

This point also addresses the concern by the parties, as well as *amicus* Illinois and *amicus* LSP Transmission Holdings, Inc., that the Appellate Court's decision will inhibit the growth of renewable energy. Any transmission developer could satisfy the statutory ownership requirement simply by following PJM's ordinary process, which is the process described in LSP's *amicus* brief.

In fact, ComEd agrees with LSP's core points, as they establish the ability of a transmission developer to build a new transmission line through a regional planning process that would allow recovery of the developer's costs through cost-based rates and ensure public use of the line—but only so long as the line is actually needed. ComEd agrees that "the harm to ratepayers is substantial if the definition of public utility is viewed narrowly so as to allow incumbent utilities to argue that Illinois law prohibits new transmission developers of cost-of-service transmission from seeking a CPCN or obtaining public utility status, notwithstanding that the CPCN statute requires a finding that the proposed project is the least cost means to address the need." LSP Br. 19. The plain language of the statute is not so narrow. It allows new transmission developers of cost-of-service transmission to seek a CPCN and obtain public utility status. Such a line, developed

as part of the regional planning process, would be needed (and thus would be built) and its developer and operator would serve the public without discrimination.

ComEd also agrees that "the expectation is that regionally planned cost-of-service projects are needed to address reliability, market efficiency, public policy or other recognized concerns and will need to be built whether competition occurs or not." *Id.* And ComEd also agrees that public utility status is not reserved exclusively for incumbent public utilities. *Id.* at 20. Again, an entity participating in the regional planning process—including one that anticipates serving renewable energy producers, and regardless of whether it is an incumbent—would be eligible for a CPCN under the plain text of the statute, precisely as LSP advocates.

Indeed, the long-term implication of classifying Rock Island as a public utility will be not to promote renewable energy, but to alter the regulatory process in Illinois. The ICC's decision, if upheld by this Court, will have the effect of attracting similar speculative projects by developers that seek to use ICC approval as a bargaining chip in negotiations with lenders. Designation as a public utility—formerly a determination by the ICC that the entity actually provided, or would provide, a service to the public—will turn into a kind of credit check. If, notwithstanding the credit check, the developer cannot obtain funding commitments from lenders, then the developer will have tied up the resources of the ICC and other stakeholders, not to mention placed a cloud on the title of landowners. The Court should not alter the regulatory process in this manner.

Finally, if the State of Illinois believed that new transmission lines were necessary in order to achieve its public policy goals of encouraging renewable generation, it could

simply direct that the line be built as part of the regional transmission planning process.[8] There is no need to contort the meaning of the statute, as Rock Island seeks to do here, in order to achieve these public policy goals. And a policy argument of this kind cannot override the clear language of the statute in any event.

* * *

This case is not about the promotion of renewable energy. Rather, it is about whether an entity such as Rock Island, which neither made a commitment to build its facilities nor a commitment to furnish non-discriminatory service to the public if those facilities are ever built, can qualify as a "public utility" and thereby gain the eminent domain power. Under the statute's plain terms, the answer is no.

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[8] *See PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214 para. 42 n.68.

CONCLUSION

The judgment of the Appellate Court should be affirmed.

Dated: April 11, 2017

Respectfully submitted,

/s/Matthew E. Price

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CERTIFICATE OF COMPLIANCE

I, Matthew E. Price, hereby certify that this **Brief And Supplemental Appendix For Respondent-Appellant Commonwealth Edison Company** conforms to the requirements of Illinois Supreme Court Rule 341(a) and (b). The length of this Brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the Rule 342 supplemental appendix is 44 pages.

/s/ Matthew E. Price
Matthew E. Price

Counsel for Respondent-Appellee
Commonwealth Edison Company

INDEX TO COMMONWEALTH EDISON COMPANY'S
SUPPLEMENTAL APPENDIX

ComEd Ex. 1.0 2nd REV

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ROCK ISLAND CLEAN LINE LLC	:	
	:	
Petition for an Order granting Rock Island Clean Line LLC a Certificate of Public Convenience and Necessity pursuant to Section 8-406 of the Public Utilities Act as a Transmission Public Utility and to construct, operate and maintain an electric transmission line and authorizing and directing Rock Island pursuant to Section 8-503 of the Public Utilities Act to construct an electric transmission line.	:	No. 12-0560

Direct Testimony of

STEVEN T. NAUMANN, P.E.

Vice President
Transmission and NERC Policy
Exelon Business Services Company

C-05694

ComEd Supp. App. 1

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I. INTRODUCTION

A. Witness Identification

Q. Please state your name and business address.

A. Steven T. Naumann. My business address is 10 South Dearborn Street, 47th Floor, Chicago, Illinois 60603.

Q. By whom are you employed and in what capacity?

A. I am the Vice President, Transmission and NERC Policy of Exelon Business Services Company ("EBSC"). EBSC is the services company affiliated with Commonwealth Edison Company ("ComEd") and other Exelon Corporation operating utilities, and many EBSC officers and employees provide services to Exelon utilities. For example, I provide advice and guidance to Exelon's transmission-owning utilities, such as ComEd, on policy and regulatory questions concerning transmission system planning, design, operation, and rates, terms, and conditions of service.

B. Summary of Testimony

Q. What, in sum, has ComEd concluded about the requests of Rock Island Clean Line LLC ("RI") at issue in this Docket?

A. RI asks the ICC[1] to (1) issue a Certificate of Public Convenience and Necessity ("CPCN") authorizing RI to operate under Illinois law as a transmission-only public utility; (2) issue a second CPCN authorizing RI to construct, operate, and maintain within Illinois a major portion of RI's multi-billion dollar transmission project (the "Project"),

[1] I refer to the Illinois Commerce Commission as the "ICC" and the Federal Energy Regulatory Commission as "FERC" to avoid any confusion between the two Commissions.

and (3) order it, under Section 8-503 of the Illinois Public Utilities Act ("PUA"), to build the Project.

For many reasons, the Petition, direct testimony, and data request responses – as revised and supplemented through June 21, 2013 – do not justify issuance of a CPCN at this time. The Project is simply not developed enough for final regulatory evaluation. Moreover, RI's request for an order under Section 8-503 is both premature and inconsistent with RI's own testimony and the conditionality of RI's commitment to build the Project.

Q. **How is your direct testimony organized in relation to these conclusions?**

A. First, in **Section II,** I explain ComEd's recommendations in detail.

In **Section III,** I discuss specific gaps in the Project itself, *i.e.*, important ways in which analysis, planning, and design of the Project remain incomplete and/or are in flux, and the uncertainties and risks that result.

In **Section IV**, I address how these uncertainties affect the costs and benefits of the Project and how they may affect customers. The direct testimony of Ms. Ellen Lapson (ComEd Ex. 2.0) addresses RI's own financial condition and its ability to complete the Project.

Section IV addresses other flaws in RI's submissions, including inaccuracies in claimed reliability and economic benefits.

Finally, in **Section V**, I address RI's request that the ICC rule that the public need requires construction of this line and issue an order directing RI to build the line, despite the fact that RI has not claimed or proved public need in the FERC-jurisdictional regional

planning process and despite the fact that RI's own witnesses underscore that this is a "spec"-like project that RI may not even try to build.

C. Background and Qualifications

Q. **Please describe your professional and educational background.**

A. I have almost forty years of experience in dealing with transmission matters and, in particular, with the ComEd transmission system, the transmission systems now operated by PJM Interconnection, L.L.C. ("PJM"), and coordination between PJM and the Midcontinent Independent System Operator, Inc. ("MISO"), formerly known as the Midwest Independent Transmission System Operator, Inc. That experience includes planning, technical analysis, reliability, security, and regulation. I am licensed in Illinois as a Professional Engineer and an attorney, although I do not practice law. I hold a Bachelor of Science degree in Electric Power Engineering, a Master of Engineering degree in Electric Power Engineering, both from Rensselaer Polytechnic Institute in New York, and a Juris Doctor from Chicago-Kent College of Law. My biographical summary, attached as ComEd Exhibit ("Ex.") 1.01, provides more detail on my qualifications, my publications, and my previous testimony.

D. Attachments to Direct Testimony

Q. **Are you sponsoring any attachments to your testimony other than ComEd Ex. 1.01?**

A. Yes. ComEd Ex. 1.02 is a redacted version of Attachment 1 to RI's response to Data Request ComEd → RI 3.10. The unredacted document was designated as "Confidential" by RI. Counsel for RI provided the redacted version.

II. OVERVIEW OF THE PROJECT AND COMED'S RECOMMENDATIONS

A. The Project and Its Relation to the Transmission System

Q. **Please summarize the Project, as described in RI's Petition and the transmission facilities that it will involve?**

A. The Project is a $2 billion plus set of additions to the transmission system designed to provide a "direct" connection between generators located in or interconnected to northwestern Iowa and load in the Chicago area and, importantly, points east. Its largest single component is a single-circuit ±600kV direct current ("DC") line between these endpoints. As described by RI, the west end of that line will be in O'Brien County, Iowa. The east end of the DC line is proposed to terminate southwest of Chicago.

Because it is a DC line, it has several features of importance. First, to connect with the alternating current transmission grid and allow for voltage transformation an AC-DC converter station ("Converter Station") is required at each end. These are significant and costly "substation-like" installations. As proposed, the converter station at the Iowa end of the DC line would interconnect with the transmission system owned by MidAmerican Energy Company ("MidAmerican"). At the Illinois end the converter station would deliver AC power to the ComEd transmission system. The Petition describes an interconnection that includes several new 345kV AC lines that extend several miles from the Converter Station before connecting to the transmission system at ComEd's Collins substation in Grundy County, Illinois. However, RI has also proposed a different form of interconnection involving cutting existing 345 kV lines and rerouting them through facilities at the Converter Station, which I discuss further below.

Electrically, the DC line behaves in many ways like a more conventional "generator lead" – typically a radial line whose purpose is simply to move power from a generator to an interconnection point where it is injected into the transmission system. In addition, because it is a DC line terminating at either end in converter stations, its flow can be throttled unlike an AC line integrated into the bulk power system. In this way, the operators of the line could limit the power flowing across it to the output of those generators who have contracted with the operators for that service. Essentially, the technology allows the operators to limit the use of the line only to those who have paid the operator to use the line. This "toll gate" like characteristic is key to the "merchant" economic model.

Q. **What is a "merchant" transmission project and how does that differ from a traditional project funded through transmission rates?**

A. A "merchant" transmission project refers to a project where the owner assumes "the full market risk of the cost of constructing the proposed transmission project."[2] Merchant transmission line owners also must pay all the costs of operating and maintaining the merchant transmission line.

A concept developed and defined by FERC, if a merchant project meets all of FERC's conditions, FERC will grant its operators "negotiated rate authority" which means that the owner of the project can charge users of the project whatever rates the customer agrees to pay. It also means that those rates should only be paid by those

[2] *Rock Island Clean Line LLC*, 139 FERC ¶ 61,142 at P 13 (2012) (hereinafter "*Rock Island Clean Line*").

customers (in this case, RI says they hope to secure generators and suppliers) who agree to pay them in exchange for rights to use the project. This differs from normal rate-based transmission facilities that serve all customers, such as those that ComEd has recently built, the cost of which are recovered through cost-based rates analogous to distribution rates.[3] Thus, merchant transmission line owners get to charge whatever rates customers agree to pay but in return they agree not to impose any project risks on customers.

Q. **How does the Project's status as a merchant project affect its participation in the regional planning process typically applicable to transmission projects?**

A. Because the owners assume all financial risk, a merchant project need not demonstrate a public need, operational benefit, or net market efficiency benefit to be approved by PJM and/or MISO. Indeed, it need not even participate in that aspect of the regional planning process.

At the regional level, RI has not claimed or shown that the Project is necessary for reliability, operating efficiency, or market efficiency in the regional planning process conducted by PJM. The ICC should not confuse the Project with projects included in the PJM Regional Transmission Expansion Plan ("RTEP") or with an expansion or "multi-value project" approved under the MISO regional planning process. Those projects have demonstrated a public benefit in a regional planning process. This Project has not. Yet, at the ICC, the Project is being presented as a project that is entitled to a CPCN, which presumes a public need.

[3] As I stated above, the term merchant transmission line is a FERC term of art, and should not be confused with a non-utility transmission developer building a cost of service line which would go into rate base (if in PJM it were approved in the PJM regional plan). While merchant lines are almost exclusively non-utility, a non-utility developer may or could develop a non-merchant transmission project.

126 Q. **In evaluating a transmission addition such as the Project, are the actual project**
127 **facilities the only new facilities that are required or that a regulator should**
128 **consider?**
129 A. No. The facilities proposed by a developer are often only a subset of what is required to
130 integrate the proposed facilities into the system. Additions to the transmission system,
131 particularly those proposing to "inject" significant quantities of power at one location,
132 often have significant effects on the existing system that require substantial additions and
133 modifications to that system.
134 In this case, the facilities for which RI seeks a CPCN are far from the complete
135 story. As I will explain later, at this stage of the study process, among the upgrades that
136 PJM has identified as required if the Project is built is a substantial 765 kV line from
137 Illinois well into Indiana.

138 Q. **Who should bear the cost of these added facilities?**
139 A. In addition to the cost of developing a project, i.e., the cost of the line, merchant
140 transmission owners must pay all other costs necessary to connect the line to the existing
141 transmission system. This means all the costs of upgrades necessary to reliably
142 interconnect the project and allow the delivery of energy. This is an important protection
143 for customers, and the ICC should ensure that the Project is not built as a "merchant"
144 project outside the planning process, but then turned into a rate-based line, paid for by
145 customers, at a later date.

146 Q. **How would the Project function as part of the regional transmission system?**

A. The Project's stated purpose is to connect generation in Iowa or further west and deliver the energy into the ComEd system. That is, essentially, how it will function. While the Project will connect on the west end to the MidAmerican system, for all intents and purposes, it is a long generator lead. It should be evaluated on that basis.

Q. **Is it accurate to describe the RI Project as one that, if built, will deliver 100% wind-generated or 100% renewable electricity to Illinois customers or PJM?**

A. I am aware that RI has described the Project, even very recently, as being aimed at "connect[ing] some of the best wind energy resources in the country..." and "delivering clean energy ..."[4] No one knows what generation might ultimately utilize the line, and based on FERC's ruling concerning RI's request for market pricing authority[5] and on statements made by RI in other venues, I believe the answer is no. Any generator could use the line on equal terms, although they may end up negotiating different charges.

Second, in its discussions with PJM concerning the use of the line for reliability studies, RI has argued that PJM should not model the line as delivering 100% wind energy.[6] RI specifically told PJM that PJM should not assume that RI should be modeled as "a wind-sourced injection."[7]

Third, real market uncertainties prevent accurate predictions of what generation, if any, might find use of the line to be economic. At this point, no one can predict if

[4] Petition, Attachment 11 (RI Landowner Information Packet) Revised, p. 1. Although this document bears that date June 19, 2012, it was served this month and it appears that is should be dated June 19, 2013.

[5] *Rock Island Clean Line* at P 31.

[6] Response to Data Request ComEd → RI 3.26.

[7] ComEd Ex. 1.02. This document in unredacted form was marked "Confidential." Counsel for RI provided the redacted version, to which I refer. It is not Confidential.

renewable generation will contract with RI to transmit energy over the line or whether other generation will want to do so in order to access the PJM market. The market will make that determination.

B. ComEd's Position on the Petition

Q. **What actions does the Petition ask the ICC to take in this Docket?**

A. RI asks the ICC for three things. First, RI asks for a CPCN to operate under Illinois law as a transmission-only public utility. Second, RI seeks a CPCN to construct, operate, and maintain the Project within Illinois. Third, it asks the ICC to order it, under Section 8-503 of the Illinois PUA, to build the Project.

Q. **What action should the ICC take on RI's request for a CPCN to construct, operate, and maintain the Project, given the information currently provided by RI?**

A. A party seeking a CPCN from the ICC should, at a minimum, tell the ICC what must be built, where it will be built, how it will affect reliability, how much it will cost, and how that cost will be recovered. RI, at this time, can establish none of these things with reasonable certainty. The Project simply is not ready for ICC regulatory approval.

The ICC should, therefore, deny the request for a CPCN without prejudice to future resubmission at such a time as (a) the major uncertainties surrounding the Project become resolved, and (b) RI unconditionally commits that the Project will remain a merchant transmission project. Alternatively, RI could ask the ICC to stay this Docket until those conditions are met. But, based on the information filed by RI, and given the important uncertainties and risks to ComEd and Illinois transmission customers, the ICC should not issue a CPCN for the Project now.

187 Q. **What action should the ICC take on RI's request for an Order under Section 8-503**
188 **of the PUA, given the information provided by RI?**
189 A. The ICC should deny the request for an Order under Section 8-503 of the PUA. As a
190 merchant facility that has not been demonstrated to have a public need under the
191 applicable regional planning standards – indeed, RI did not even submit the Project to
192 PJM as one that has such public benefits – RI's request for an Order under Section 8-503
193 should be rejected. Moreover, this request appears baffling because RI witness Berry
194 acknowledges that the appetite of generators to pay for the costs of the Project is
195 uncertain and that RI will only build the Project if future market developments permit it
196 to be financed.[8] Since no one, not even RI, can be sure if RI will build the Project, RI
197 cannot justify an order unconditionally directing that it be built.

198 Q. **Do these recommendations reflect opposition by ComEd to new transmission**
199 **construction in general or to merchant transmission projects in particular?**
200 A. No. ComEd does not oppose new transmission projects in general and it does not object
201 to merchant transmission facilities, in particular. Indeed, merchant transmission
202 facilities, in appropriate circumstances, can protect customers from costs by imposing
203 risks on private investors who voluntarily assume them. But, the function of this Project,
204 its design, the hundreds of millions of dollars of other upgrades it may require, its
205 potentially risky reliability implications, its uncertain and unspecified financing, and even
206 its continued status as a merchant project all remain subject to material uncertainties.

[8] RI Ex. 10.13, 2:27 – 4:111; *see* Response to Data Request Staff RJZ → RI 1.18 ("It is unlikely that the Project would be built with only 60% of the capacity contracted.").

Those uncertainties, and the reliability and financial risks they entail, including to Illinois delivery customers, are far too great to warrant issuance of a CPCN at this time. They are certainly too great to support issuing an ICC Order mandating the line's construction.

III. THE PROJECT IS INSUFFICIENTLY DEVELOPED AND SPECIFIED TO WARRANT CERTIFICATION

A. Overview

Q. **Is the Project sufficiently described and specified in the Petition and RI's direct testimony to allow an analysis of the full impacts of its potential construction and operation of the system and Illinois delivery customers?**

A. No. In important respects, the Proposal is not fully described. Nor could it be, because it is not complete. Basic factors, which have typically been firmed up in advance of a CPCN filing, here remain open. In addition, there appear to be inconsistencies in how the Project has been described at the ICC and elsewhere. The importance of these gaps and inconsistencies are great. Until the gaps are filled and the inconsistencies resolved, ComEd cannot assess the final impact of the Project on ComEd's transmission system or customers. Nor, in my opinion, can the ICC.

Q. **What, in summary, are the uncertainties, gaps, and inconsistencies to which you refer?**

A. The major issues to which I refer include:

- To build and operate the Project, and connect it to the existing ComEd transmission system in a reliable manner, hundreds of millions of dollars in additional upgrades may be required. Those upgrades are not limited to the

ComEd system in Illinois, but could include other transmission systems, some in other states. We simply do not know what will be required. For this type of project, those upgrades are the responsibility of the project developer and the Project could not be integrated, as proposed, without them. Yet, none of these upgrades are finalized and, in some cases, they are not even known at this time. The range of possible upgrades is not described in the Petition. Nor are the studies concerning these upgrades discussed by RI witnesses.

- The ICC cannot be certain whether or not RI will challenge the ability of PJM to assign the costs of certain upgrades to RI. Moreover, the ICC cannot be certain whether RI will at some point in the future, after this Docket is over, attempt to convert all or part of the Project from a merchant transmission project to a rate-base transmission project, thereby imposing costs on Illinois delivery customers.
- As I mentioned above, the nature of the generation to be delivered, *i.e.*, whether the Project can or will deliver 100% renewable energy, cannot be assured and RI's treatment of that fact appears to be inconsistent. The ICC cannot be sure what type of generation, if any, will contract with RI to utilize the line. This uncertainty also relates to how the Project is analyzed for reliability purposes.
- Whether and how those lines will connect to facilities at Collins Station or if, in fact, the connection will be to Collins Station itself or to some alternate connection point or points has not been finalized.
- Finally, there is a basic uncertainty as to whether or not the market will support the cost of the Project as a whole, i.e., whether any customer(s) will contract with

RI in sufficient volume to support the required investment, and thus whether the Project actually will be built.

In my opinion, the ICC cannot reach a final regulatory conclusion concerning the Project, its certification, and a possible Section 8-503 order, absent this information.

B. How RI Addressed the PJM Planning and Interconnection Process

Q. Please explain the regional planning process for new transmission facilities?

A. As individual utilities joined regional transmission organizations such as PJM and MISO, those regional organizations took over responsibility for planning the transmission system. Using a formal process that considers stakeholder input, these organizations each develop a regional transmission plan. In PJM, this is the RTEP; in MISO it is called the MISO Transmission Expansion Plan ("MTEP"). The PJM regional planning process is set out in detail in Schedule 6 to the PJM Operating Agreement, entitled "Regional Transmission Expansion Planning Protocol," which is filed with FERC and any changes must be accepted by FERC.

As part of this process, the regional planners also apply criteria to decide whether upgrades need to be made to the transmission system. The most common driver, and the one most familiar to the ICC, is reliability. Regional planners test to ensure that their transmission system meets all the mandatory reliability standards promulgated by the North American Electric Reliability Corporation ("NERC"), by regions in which the systems are located (such as ReliabilityFirst and SERC for ComEd and Ameren, respectively), and local reliability criteria. The regional planners also determine whether an upgrade could relieve congestion in an economic manner, meaning that the benefits of

the upgrade exceed the costs by a specific margin. Regional planners have, or in compliance with FERC Order No. 1000 will, also consider public policy requirements which are federal, state and local statutes and regulations.

Q. **How does the PJM RTEP process determine whether there is a need for a new transmission facility sufficient to support its inclusion in rate base?**

A. A proposed project must meet one or more requirements to be included in the RTEP. The first, and by far the most prevalent, is reliability. As PJM states, "The Regional Transmission Expansion Plan shall conform at a minimum to the applicable reliability principles, guidelines and standards of NERC, ReliabilityFirst Corporation, and SERC, and other Applicable Regional Entities in accordance with the planning and operating criteria and other procedures detailed in the PJM Manuals."[9]

A closely related criterion is operational performance. This criterion is met if PJM determines that there are operating difficulties that require expansion of the system, even if reliability criteria can be met. An example would be where excessive switching of transmission lines in and out of service would be required to prevent overloads or voltages outside of the acceptable range.

A third driver is market efficiency. Simply stated, if PJM finds that new transmission can relieve congestion, thus lowering costs to customers, and the cost of the new transmission is less than the reduction in congestion, PJM will require new economic transmission to be built. There are strict metrics governing market efficiency projects

[9] Section 1.2(d) of Schedule 6 to the PJM Operating Agreement.

and in PJM the benefit to cost ratio must be greater than or equal to 1.25.[10] There are other requirements in the PJM Operating Agreement for system expansion, such as Stage 1A Auction Revenue Rights[11] or enhancements required as a result of coordination with other planning regions.[12]

The PJM RTEP only includes merchant facilities, such as RI, or other enhancement or expansions requested by an entity (referred to as Participant-Funded Projects) provided such projects are consistent with all reliability and operating criteria and the requester is responsible for all costs of the facilities which includes design, construction, operating and maintaining those facilities. Such projects are, however, not required to meet PJM planning criteria, such as being needed for reliability, operating, or market efficiency reasons.[13]

Procedurally, as stated in Schedule 6 to the PJM Operating Agreement, "The Regional Transmission Expansion Plan shall consolidate the transmission needs of the region into a single plan which is assessed on the bases of (i) maintaining the reliability of the PJM Region in an economic and environmentally acceptable manner, (ii) supporting competition in the PJM Region, (iii) striving to maintain and enhance the market efficiency and operational performance of wholesale electric service markets and (iv) considering Public Policy Requirements."[14] The recommendations of PJM Staff are

[10] Section 1.5.7(d) of Schedule 6 to the PJM Operating Agreement.

[11] Section 1.5.3(h) of Schedule 6 to the PJM Operating Agreement.

[12] Section 1.5.5 of Schedule 6 to the PJM Operating Agreement.

[13] Section 1.5.6(i) of Schedule 6 to the PJM Operating Agreement.

[14] Section 1.4(a) of Schedule 6 to the PJM Operating Agreement.

reviewed by the Transmission Expansion Advisory Committee ("TEAC") and all RTEP projects must be approved by the PJM Board of Managers.[15]

Q. **How can a transmission project that cannot show a public need through the RTEP process nonetheless be constructed?**

A. Such projects are allowed and can be constructed if they pass the "'no harm' to reliability" test. To qualify, the developer of such a project requests that PJM analyze the project to ensure all reliability standards are met. If they are not, the developer will have to include any additional upgrades required to maintain reliability. The largest categories of such "no harm" projects are new or enlarged generator interconnections and merchant transmission interconnection projects.[16]

Q. **What is the process that RI would have to complete in order to tie its proposed new transmission facilities into the existing PJM transmission system?**

A. To tie its proposed new transmission facilities into the PJM transmission system, RI must first make a request to interconnect and be assigned a queue position. As explained later, that much has occurred. Thereafter, interconnection requests, whether for generators or merchant transmission, are processed according to the PJM tariff, which requires the customer, in this case RI, to pay all the costs of studies to determine what facilities are needed for a reliable interconnection, the cost of the facilities needed to interconnect to the PJM transmission system, and all additional facilities, referred to as "network

[15] Section 1.6 of Schedule 6 to the PJM Operating Agreement.

[16] This category also includes "supplemental projects" by transmission owners, such as equipment replacement with more modern equipment with greater capability.

upgrades" that PJM determines are needed for a reliable interconnection. This is different than a project which meets RTEP criteria and passes one of the PJM need tests, where "load," *i.e.*, customers, pay the costs of the new transmission facility. The two processes – interconnection, where the requesting customer pays, and RTEP where the load pays –are mutually exclusive.

Q. **How does the PJM Interconnection Process work for merchant and interconnection projects such the Project?**

A. In addition to expansion of the transmission system as described above, PJM also has processes to evaluate requests from generators and merchant transmission projects such as RI to interconnect to the PJM transmission system. For simplicity, I will refer to these parties as the "interconnection customer." As opposed to RTEP transmission upgrades, which are required to meet the objectives of the PJM expansion plan, interconnection customers propose voluntary projects and do not have to justify the need for those projects to PJM. In accordance with FERC rules and regulations, PJM must include in its tariff processes for such interconnections such as the types of studies, the types of agreements and the terms of those agreements and requirements for funding of any costs of any facilities required to allow the interconnection.

The PJM interconnection process requires a number of studies to determine the reliability impact of a project on the system and the necessary facilities and network upgrades to accommodate the project. The studies, in their order, include the Feasibility Study, System Impact Study, and Facilities Study.[17] These studies are sequential with

[17] *See* Sections 36.2, 203, 205, and 206 of PJM Tariff.

each study being more detailed. An important result of these studies is to inform the interconnection customer what new facilities must be installed to (1) interconnect to the transmission system (interconnection facilities); and (2) upgrade the existing transmission system to ensure that the interconnection meets all applicable reliability standards (network upgrades), and their associated costs. These studies are essential because until the Facilities Study is completed, the facilities that need to be installed and the costs of those facilities are not known. Because the facilities that must be installed to ensure the reliable interconnection of a given customer may depend on whether an interconnection customer in an earlier queue position continues to go forward with its project, PJM must update the System Impact Study if higher queued projects are cancelled to account for the changed impacts on the system. The updated study is known as a re-tool study.

Q. **How must the costs of interconnection projects be determined and paid?**

A. As I stated, under the PJM Tariff, interconnecting customers are responsible for the costs of all interconnection facilities and network upgrades required to maintain reliability. This methodology is sometimes referred to as 'but for' cost allocation because the interconnection customer is responsible for the costs of all facilities that would not be required 'but for' its interconnection project.

The next step is to conduct a Facilities Study for developing detailed engineering designs and cost estimates of the required facilities and network upgrades. After completion of the Facilities Study, the interconnection customer and the interconnected transmission owner must sign an Interconnection Service Agreement.

While the interconnection customer is not required at that point to complete the interconnection project, no work is performed on the interconnection facilities and network upgrades until the interconnection customer, PJM and the interconnected transmission owner sign a Construction Service Agreement. If the interconnection customer wishes the work to proceed before all the studies are complete, the interconnection customer may sign an Interim Construction Service Agreement. Under the PJM tariff, the interconnection customer has the option of constructing the network upgrades or paying the interconnected transmission owner or other affected transmission owners to site and construct the network upgrades. In appropriate cases, upgrades also could be required on the system operated by MISO.

C. Remote Upgrades and their Costs

Q. **What does RI's direct testimony say about the studies to determine the upgrades required for interconnection of the RI Project, and the costs thereof?**

A. Dr. Galli states that PJM has completed a Feasibility Study for three of RI's active interconnection requests (Queue Numbers S57, S58, and U3-026) and has completed an initial System Impact Study for two of those requests (Queue Numbers S57 and S58). He states that PJM's light load analysis "has delayed the start of the Facility Study" but does not make clear that this light load analysis is actually part of PJM performing an updated System Impact Study.[18]

[18] Galli Dir., RI Ex. 2.0, 9:176-184. I note that while no testimony update was filed on this question, Dr. Galli and RI witness Mr. Detweiler filed revised and new exhibits following an Agricultural Impact Mitigation Agreement between RI and the Illinois Department of Agriculture.

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Rock Island Clean Line LLC	)	
	)	
Petition for an Order granting Rock Island Clean Line a Certificate of Public Convenience and Necessity pursuant to Section 8-406 of the Public Utilities Act as a Transmission Public Utility and to Construct, Operate and Maintain an Electric Transmission Line and Authorizing and Directing Rock Island Clean Line pursuant To Section 8-503 of the Public Utilities Act to Construct an Electric Transmission Line	)	**Docket No. 12-____**

DIRECT TESTIMONY OF

DR. WAYNE GALLI

ON BEHALF OF

ROCK ISLAND CLEAN LINE LLC

ROCK ISLAND EXHIBIT 2.0

OCTOBER 10, 2012

construction area. Any temporary construction easement would revert to the landowner when the Project has been constructed and placed into operation.

Q. Please describe any substations that will be associated with the Project.

A. There are two primary substations (referred to as converter stations) associated with the project: the "windward" or western converter station will be located in O'Brien County, Iowa, and the eastern converter station will be located in Grundy County, Illinois. No intermediate substations are planned along the DC line. As noted before, a new AC substation adjacent to the Collins substation for the 345/765 kV transformers may be required. If a new substation adjacent to the Collins substation is necessary, Rock Island will need to purchase 20 acres or less of land in fee adjacent to or close to the Collins substation on which to place the new substation. The Routing Report, Rock Island Exhibit 8.2 to Mr. Koch's testimony, and the legal description for Preferred Route A provided in Mr. Detweiler's Rock Island Exhibit 7.2, identify the specific location of the eastern converter station in Grundy County, Illinois. Rock Island has acquired an option to purchase the land in fee on which the converter station will be located. A typical plan drawing for an HVDC converter station, such as the converter station that will be installed in Grundy County, Illinois, is presented as Rock Island Exhibit 2.10.

Q. Does this conclude your prepared direct testimony?

A. Yes, it does.

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,
ILLINOIS COMMERCE COMMISSION, et al.,	)	
Petitioners-Appellants.	)	ICC Docket No. 12-0560

To: See attached certificate of service

NOTICE OF FILING

PLEASE TAKE NOTICE that on April 11, 2017, the undersigned caused the foregoing **Brief And Supplemental Appendix Of Respondent-Appellee Commonwealth Edison Company** to be electronically filed with the Clerk of the Supreme Court of Illinois by using the i2File system.

April 11, 2017

By: */s/ Matthew E. Price*

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CERTIFICATE OF SERVICE

I, Matthew E. Price, an attorney, hereby certify that on April 11, 2017, I caused the foregoing **Notice of Filing** and **Brief And Supplemental Appendix Of Respondent-Appellee Commonwealth Edison Company** to be submitted to the Clerk of the Supreme Court of Illinois by using the i2File system. Pursuant to the "Supreme Court of Illinois Electronic Filing User Manual," and upon acceptance of the electronic notice for filing, I certify that I will cause one copy of the **Notice of Filing** and the original and twelve copies of the **Brief And Supplemental Appendix Of Respondent-Appellee Commonwealth Edison Company** to be transmitted to the Court via UPS overnight delivery postage prepaid within 5 days of that notice date.

I further certify that I will cause one copy of the above named filings to be served on counsel listed below via electronic mail and via UPS overnight delivery, postage prepaid (unless otherwise noted), on April 11, 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/ Matthew E. Price

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