Nos. 121302, 121304, 121305 & 121308 (cons.)

IN THE SUPREME COURT OF ILLINOIS

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

BRIEF and ARGUMENT of WIND ON THE WIRES and NATURAL RESOURCES DEFENSE COUNCIL

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NATURE OF THE CASE

This case is an appeal of an Illinois Appellate Court decision (Appellate Decision) overturning an order of the Illinois Commerce Commission (Commission). 2016 IL App(3d) 150099, August 10, 2016 provided at A-001-A-017. The Commission granted Rock Island Clean Line LLC (Rock Island) a certificate of public convenience and necessity (CPCN) to transact business and build its high-voltage transmission line (Project). Several parties, including a large electric utility that owns and operates existing transmission services in Illinois and provides retail electric sales in Northern Illinois, challenged the Commission decision.

The Appellate Decision held the Commission lacked authority to issue a CPCN because Rock Island was not a public utility within the meaning of section 3-105 of the Public Utilities Act (PUA) (220 ILCS 5/3-105) when it applied for the CPCN and because the project in question would not be managed for public use. The Appellate Court concluded that a CPCN cannot be granted to a petitioner who does not already own property in Illinois devoted to public use. This interpretation of the PUA is directly contrary to the ICC's interpretation of the PUA.

The Appellate Court also concluded that the facts in the record before the Commission do not support the Commission's finding that the Project would be managed for "public use" under section 3-105 of the PUA (§3-105). The Court stated that none of the electricity to be transmitted by the Project had been designated for public use in Illinois. This conclusion is directly contrary to the factual findings of the Commission that the Project would be operated for public use, that all of the power would be delivered

into the State of Illinois and that the Project's transmission services would be available to a wide range of parties based in Illinois.

ISSUES PRESENTED FOR REVIEW

I. Did the Appellate Court misapply the standard of review ((220 ILCS 5/10-201(e)(iv)(A)) in reaching its conclusion on "public use"?

II. Is there substantial evidence to support the Illinois Commerce Commission's finding that Rock Island's service was a "public use"? (220 ILCS 5/3-105).

III. Whether the Illinois Commerce Commission's interpretation of the Public Utilities Act -- that an offer of non-discriminatory service to a wide range of customers as required by a Federal Energy Regulatory Commission order and a federal open access tariff is a "public use" under section 3-105 (220 ILCS 5/3-105) -- is entitled to deference by a reviewing Court?

IV. Whether an applicant for a Certificate of Public Convenience and Necessity needs to demonstrate that it already owns and controls assets in Illinois for public use in order to obtain a certificate of public convenience and necessity pursuant to section 8-406 (220 ILCS 5/8-406)?

V. Whether the Appellate Court's construction of the Public Utility Act places a constitutionally impermissible burden on interstate transmission projects?

JURISDICTION

This is an appeal of a decision of an Appellate Court of Illinois pursuant to Supreme Court Rule 315. The August 10, 2016, Appellate Court decision is published at *Illinois Landowners Alliance, NFP, et. al. v. Illinois Commerce Commission, et. al.,* 2016 IL App (3d) 150099 (Appellate Decision). Petitions for leave to appeal were filed

by the following parties: Rock Island Clean Line LLC, the Illinois Commerce Commission, the International Brotherhood of Electrical Workers, AFL-CIO, Local Unions 51, 9, 145 and 196, and (jointly) Wind on the Wires and the Natural Resources Defense Council (NRDC) within 35 days of the date of the Appellate Decision. This Court granted and consolidated the four Petitions for Leave to Appeal.

STATUTES INVOLVED

Section 3-105 of the Public Utilities Act defines a 'Public utility' as:

> (a) "Public utility" means and includes, except where otherwise expressly provided in this Section, every corporation, company, limited liability company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever 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, or owns or controls any franchise, license, permit or right to engage in:
>
> > (1) the production, storage, transmission, sale, delivery or furnishing of heat, cold, power, electricity, water, or light, except when used solely for communications purposes;
> >
> > (2) the disposal of sewerage; or
> >
> > (3) the conveyance of oil or gas by pipe line. 220 ILCS 5/3-105 (2012).

Section 8-406(a) of the Public Utilities Act requires Commission approval prior to transacting business as a public utility in Illinois:

> No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State as of July 1, 1921 and not possessing a certificate of public convenience and necessity from the Illinois Commerce Commission, the State Public Utilities Commission or the Public Utilities Commission, at the time this amendatory Act of 1985 goes into effect, shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business. 220 ILCS 5/8-406(a) (2012).

Section 8-406(b) of the Public Utilities Act requires Commission approval of new utility plant before it is constructed in Illinois:

> No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or any extension or alteration thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction. Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity.

It then provides:

> The Commission shall determine that proposed construction will promote the public convenience and necessity only if the utility demonstrates: (1) that the proposed construction is necessary to provide adequate, reliable, and efficient service to its customers and is the least-cost means of satisfying the service needs of its customers or that the proposed construction will promote the development of an effectively competitive electricity market that operates efficiently, is equitable to all customers, and is the least cost means of satisfying those objectives; (2) that the utility is capable of efficiently managing and supervising the construction process and has taken sufficient action to ensure adequate and efficient construction and supervision thereof; and (3) that the utility is capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers. 220 ILCS 5/8-406(b) (2012).

STATEMENT OF FACTS

On November 25, 2014, the Illinois Commerce Commission (the ICC or Commission) approved, with conditions, the construction of a new high voltage electric transmission line running from northwest Iowa to northeastern Illinois. The Commission's authority to grant a CPCN is found at 220 ILCS 5/8-406. More specifically, the Commission's final Order granted Rock Island Clean Line LLC (Rock Island) a Certificate of Public Convenience and Necessity (Certificate or CPCN) to act as a public utility for the Illinois portion of Rock Island's $1.8 billion, 500-mile high

voltage, direct current (HVDC), electric transmission line (Project). A-0003, A-0005 and A-0007 (Appellate Decision at 3, 5 and 7); A-0023, A-0024 and A-0061 (ICC Final Order at 3, 4 and 41).

As an HVDC line, the Project is an innovative improvement to the existing electric transmission system. A HVDC transmission facility transmits electricity as direct current (DC). Most of the existing transmission system in the United States and Illinois is an alternating current (AC) system. HVDC technology is used for the Project because HVDC is the more efficient and cost-effective technology for moving large amounts of power over long distances, particularly power from variable generating facilities (*e.g.*, wind farms). In particular, a DC line has far fewer losses of electricity during transmission than an AC line, so that more of the power injected into the line reaches the ultimate customers, thereby reducing the overall cost of electric service. A-0023-0024 and A-0201-0202 (ICC Final Order at 3-4 and 181-182); R.V2, C-0245-49; R.V12, C-2816-20; R.V24, C-5942.

This Project will make it possible to deliver large amounts of wind generation from Northwest Iowa, where the absence of adequate transmission capacity prevents wind generation from reaching electric power markets and customers in Illinois. Wind generation is a low cost way to replace aging coal fired power generation, and to maintain a secure electricity supply. A-050-052 (ICC Final Order at 30-32); R.V5, C-1189-91.

All the power carried on the Project would be delivered via an interconnection to the existing electric grid at a Commonwealth Edison substation southwest of Chicago (the Project). A-0007 (Appellate Decision at 7); A-0018 to A-0243 (ICC Final Order). Based on the location of the Project, most or all of the power carried by the Project is

likely to be renewable energy generation from wind generators.

The Commission decision to approve the Project was part of a complex, orderly and deliberative process by which federal and state agencies permit essential electric power infrastructure to assure reliable and affordable electric power services. Section B of the Statement of Facts in the *Brief of Rock Island Clean Line LLC* describes in detail how a wide range of customers will have opportunities to purchase transmission service from Rock Island. Wind on the Wires and Natural Resources Defense Council agree with that description and adopt it as part of our Statement of Facts, pursuant to Illinois Supreme Court Rule 315(h).

The Project is consistent with and will help achieve renewable energy objectives established by the State of Illinois's Renewable Portfolio Standard (RPS), which requires that 25% of electricity demand be met from renewable resources by 2025. 20 ILCS 3855/1-75(c). On December 7, 2016, a new bill (Illinois Public Act 99-0906) was enacted that affirms and improves the function of the Illinois RPS.

The record before the Commission showed that the Rock Island Project would have the following public benefits:

- Reduce cost of electric service (both wholesale and retail electricity prices) in Illinois by hundreds of millions, or billions of dollars over a 40-year period (A-0052-0061; R.V2, C-00290-98, C-00304-306; R.V22, C-05378-05416; R.V5, C-01186-87; R.V9, C-02112-16, C-02122-26; R.V19, C-04647-52; R.V22, C-05260-62 R.V9, C-02153-54);
- Improve reserve margins on the electric system in Illinois, increase capability to move power into Illinois, enhance system reliability (A-062-065, A-0124, A-

00137-139 (ICC Final Order at 42-45, 104 and 117-119); R.V2, C-0296-98, C-0439-61; R.V22, C-05260-05261;);

- Provides a hedge against volatility in fuel prices for natural gas used by natural gas generating plants (R.V10, C-02305-06);
- Reduce air pollution emissions and solid and liquid wastes (ash and scrubber sludge) produced by the generation of electricity (R.V2, C-00298 and C-00307; R.V5, C-01196-97);
- Help achieve Illinois' statutory objectives regarding renewable energy resources and reduce the cost of compliance with the State Renewable Portfolio Standard (5 ILCS 3855/1-75(c); R.V5, C-01181-01192);
- Deliver a supply of electricity into Illinois sufficient to power the annual electricity needs of more than 1,400,000 homes (A-0324 (Additional Supplemental Direct Testimony (Tty) of David Berry, Exh. 10.13 at 15 lines 410-11);
- Create hundreds of construction and operation and maintenance jobs, and thousands of jobs from the fabrication of power line and wind farm components in Illinois (R.V9, C-02153-54; R.V2, C-00372 and C-00374); and
- Produce millions of dollars of economic activity in Illinois. A-0054, 0083, 0103, 0131 (ICC Final Order at 34, 63, 83 and 111); R.V2, C-00372; R.V19, C-04651-52; R.V25, C-16184.

The Appellate Court concluded that a CPCN cannot be granted to a petitioner who does not already own utility property in Illinois devoted to public use. This

interpretation of the PUA is directly contrary to the ICC's interpretation of that law and Illinois case law evaluating whether an entity is a public utility.

The Appellate Court also concluded that the facts in the record before the Commission do not support the Commission's finding that the Project would be for "public use" under section 3-105 of the PUA (220 ILCS 5/3-105). The Court stated that none of the electricity to be transmitted by the Project had been designated for public use in Illinois. This conclusion is directly contrary to the factual findings of the Commission, and its conclusion that the Project would be operated for public use.

ARGUMENT

The Commission granted Rock Island a CPCN to construct and operate a high voltage direct current transmission line that will deliver electricity from generators in northwest Iowa across Illinois to an interconnection point with Commonwealth Edison's transmission grid. In granting the CPCN, the Commission held that Rock Island is a public utility and that it satisfied the "public use" requirement. At issue in this proceeding are Commission decisions relative to that determination. The issues focus on the Commission's decision that the Project is for "public use" and whether an applicant for a CPCN needs to demonstrate that it already owns and controls property for public use, in order for the Commission to have authority to grant it a CPCN. The Commission's decisions on these two points should be affirmed.

There are a number of issues with the Appellate Court's review of the "public use" issue. First, the Appellate Court misunderstood key facts and relied upon those misapprehended facts in finding that the service the Project provides is not a public use. Second, the Appellate Court applied an incorrect standard of review; reweighing the facts

instead of concluding that the Commission clearly explained the facts it relied upon, which were supported by substantial evidence, and deferring to the Commission's expertise and experience in determining whether, in this specific instance, Rock Island's service is a public use. Third, it reversed the ICC even though there is substantial evidence supporting the Commission's conclusion that Rock Island's service is a public use. Finally, the Appellate Court misapplied the case law. The case most similar to Rock Island's situation is *Iowa RCO Association v. Illinois Commerce Commission* (86 Ill. App. 3d 1116 (4th Dist. 1980)), which the Appellate Court did not discuss, and not *Mississippi River Fuel Corporation v. Illinois Commerce Commission* (1 Ill.2d 509 (1953)), which the Appellate Court relied upon. In *Iowa RCO* the Court recognized that status as a public utility can be established by complying with federal regulations that require service to be furnished in a nondiscriminatory manner. *Iowa RCO*, 86 Ill. App. 3d at 1118-19. That directly comports with the Commission's reliance on Rock Island's compliance with a Federal Energy Regulatory Commission (FERC) order and FERC's pro forma Open Access Transmission Tariff, that set guidelines to prevent discriminatory behavior.

The Commission's decision that a utility need not own and control property for public use in order to receive a CPCN is based on common sense, is consistent with the General Assembly's intent in the Public Utilities Act, and avoids an absurd result. In contrast, the Appellate Court did not clearly state which facts influenced its holding (A-0014 and A-0016 (Appellate Decision at 14 and 16 ¶¶43, 47 and 49)) and its decision creates a Catch-22 in which a new entity could only become a public utility if it owns and operates utility assets in Illinois prior to applying to becoming a public utility or

constructing a new utility facility. That interpretation poses an absurd burden to new public utility entrants in Illinois that arguably is in violation of section 8-406(a) of the PUA (220 ILCS 5/8-406(a)). This Court should affirm the Commission's decision because it reached a decision consistent with the overall intent of the Public Utilities Act, which is to provide a pathway for new entities to become utilities prior to owning or building new infrastructure in Illinois. If the Appellate Decision is not reversed it will restrict or prevent entities, *specifically companies who are new to the Illinois transmission market,* from developing transmission projects to bring electricity supplies from new, cost effective wind generation resources into Illinois. Any decision which limits entry by new developers into existing electricity markets tends to benefit incumbent electric utilities, because it shields existing transmission and generation assets from market competition.

I. Standard of Review

The Illinois Public Utilities Act governs the Illinois Commerce Commission's decisions to grant or deny the certificate of public convenience and necessity, and also sets forth the standard of review for the Commission's decisions. See 220 ILCS 5/8-406 and 220 ILCS 5/10-201. The Commission is entitled to great deference because it is an administrative body possessing expertise in the field of public utilities. *Archer-Daniels-Midland v. Illinois Commerce Comm'n,* 184 Ill.2d 391, 397 (1998) citing *United Cities Gas Co. v. Illinois Commerce Comm'n,* 163 Ill.2d 1, 12 (1994) citing *Village of Apple River v. Illinois Commerce Comm'n,* 18 Ill.2d 518, 523 (1960) (wisdom of a Commission decision based upon complex scientific and technological evidence is not open for inquiry); *Illinois Consolidated Telephone Co. v. Illinois Commerce Comm'n,* 95 Ill.2d

142, 153 (1983) (Commission expertise and experience necessary to make informed judgment).

Section 10-201(d) states the following:

> (d) . . . The findings and conclusions of the Commission on questions of fact shall be held prima facie to be true and as found by the Commission; rules, regulations, orders or decisions of the Commission shall be held to be prima facie reasonable, and the burden of proof upon all issues raised by the appeal shall be upon the person or corporation appealing from such rules, regulations, orders or decisions.

Section 10-201(e)(iv) of the Public Utilities Act defines the circumstances under which a Commission order may be reversed, and subsection (A) is most relevant to the issues on appeal -- a court can reverse a Commission order if "the findings of the Commission are not supported by substantial evidence based on the entire record of evidence presented to or before the Commission for and against such rule, regulation, order or decision." 220 ILCS 5/10-201(e)(iv)(A).

In cases involving review of administrative agency decisions, this Court has stated:

> "[W]hen we grant leave to appeal from the judgment of the appellate court in an administrative review case, as we did here, it is the final decision of the administrative agency, not the judgment of the circuit court or the appellate court, which is before us." *Provena Covenant Medical Ctr. v. Dep't of Revenue*, 236 Ill. 2d 368, 386 (2010).

One of the questions before this Court is whether to affirm the Commission's determinations that Rock Island is eligible to seek a CPCN and that the Project's service satisfies the "public use" standard. The determination of public use is a fact based question, thus this Court should review this finding using the standard of review applicable to agency findings of fact. See Arguments §II.B. and II.C. infra. As such, the Commission is not required to make findings regarding every step, however, its findings

of fact must be sufficient to allow for informed judicial review and will be affirmed if they are based on substantial evidence in the record. *United Cities Gas Co. v. Illinois Commerce Comm'n*, 163 Ill.2d 1, 12 (1994) citing *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 148 Ill.2d 348, 266-267 (1992); see also *Business & Professional People for the Public Interest v. Illinois Commerce Comm'n*, 146 Ill.2d 175, 196 (1991); *Apple Canyon Lake Property Owners' Ass'n v. Illinois Commerce Comm'n*, 2013 IL App (3d) 100832 ¶20 (3d Dist. 2013); *Central Illinois Light Co. v. Illinois Commerce Comm'n*, 255 Ill.App.3d 876, 882 (3d Dist. 1993). "Substantial evidence" is evidence that a reasoning mind would accept as sufficient to support a particular conclusion; it is more than a "mere scintilla," but does not need to be a preponderance. *Citizens Utility Bd. v. Illinois Commerce Comm'n*, 2015 IL App (2d) 130817, ¶46 (2d Dist. 2015); *Pliura Intervenors v. Illinois Commerce Comm'n*, 405 Ill. App. 3d 199, 207 (4th Dist. 2010); *Central Ill. Pub. Serv. Co. v. Illinois Commerce Comm'n*, 268 Ill. App. 3d 471, 479 (4th Dist. 1994) (CIPS).

In reviewing the facts of a case the statute does not allow the court to reweigh the evidence (*Illinois Power Co. v. Illinois Commerce Comm'n*, 254 Ill. App.3d 293, 307 (3d Dist. 1994)), reinterpret the evidence or conduct its own investigation of the evidence as a substitute for that of the Commission. *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 117 Ill.2d 120, 147 (1987) *citing Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 55 Ill.2d 461, 469 (1973); *see also Central Illinois Public Service Co. v. Illinois Commerce Comm'n*, 268 Ill. App.3d 471, 479 (4th Dist. 1994); *City of Chicago v. Illinois Commerce Comm'n*, 264 Ill. App.3d 403, 409 (1st Dist. 1993); *see also, Illinois Cent. R. Co. v. Franklin County*, 387 Ill. 301, 319 (1944).

In its determination on whether Rock Island's facilities and service will be for public use, the Commission applied the evidence to determine whether the statutory standard (public use) was met. This Court has repeatedly held that the clearly erroneous standard is applicable to judicial review of administrative agency decisions in which the issue is "whether the facts satisfy the statutory standard" (see e.g., *Beggs v. Bd. of Educ. of Murphysboro Comm. Unit School Dist. No. 186,* 2016 IL 120236, ¶50 (2016)) and three appellate courts have applied the standard to their review of Commission decisions. See *City of Elgin v. Illinois Commerce Comm'n*, 2016 Il App (2d) 150047 ¶26 (2d 2016); *Adams County Property Owners & Tenant Farmers v. Illinois Commerce Comm'n,* 2015 IL App (4th) 130907, ¶30 (4th Dist. 2015); *Ameren Illinois Co. v. Illinois Commerce Comm'n*, 2013 IL App (4th) 121008 at ¶19 (4th Dist 2013); *People ex rel. Madigan v. Illinois Commerce Comm'n*, 2011 IL App (1st) 100654 at ¶5 (1st Dist. 2011). Therefore, this Court may choose to review this issue under the "clearly erroneous" standard. See Argument §II.D. infra. Under this standard, the agency's decision should be affirmed unless the reviewing court, after reviewing the entire record, "is left with the definite and firm conviction that a mistake has been committed" by the agency. *Beggs*, ¶50; *AFM Messenger Service, Inc. v. Dep't of Empl. Sec.*, 198 Ill. 2d 380, 395 (2001); see, *Board of Educ. of Glenview Comm. Cons. School Dist. No. 34 v. Ill. Educ. Labor Rel. Bd.*, 374 Ill. App. 3d 892, 899 (4th Dist. 2006).

This case also involves a question of law related to the definition of "public utility." The Commission interpreted the PUA in its entirety, specifically looking at how section 3-105 (220 ILCS 5/3-105) relates to sections 8-406(a) and 8-406(b) of the Public Utilities Act (220 ILCS 5/8-406(a) and (b)). In doing so the Commission came to a

workable common sense conclusion that is consistent with past Commission orders granting a CPCN. Contrary to the Commission, the Appellate Court concluded that existing ownership or control of utility property in Illinois is necessary in order to receive a CPCN for a new project. See Argument §III, infra.

While issues of law are reviewed *de novo,* "courts will give substantial weight and deference to an interpretation of an ambiguous statute by the agency charged with the administration and enforcement of the statute." *Illinois Consolidated Telephone Co. v. Illinois Commerce Comm'n*, 95 Ill.2d 142, 152 (1983) (ICTC). While the Commission's interpretation of a question of law, however, has not been accorded the same deference as its findings and conclusions of fact (*Citizens Utility Board v. Illinois Commerce Comm'n,* 166 Ill.2d 111, 121 (1995), reviewing courts defer to an agency's interpretation of such statutes because an agency's interpretation "expresses an informed opinion on legislative intent, based upon expertise and experience." *ICTC,* 95 Ill.2d at 153. Deference to the administrative agency's construction is often granted in the case of factual situations, such as determining the need for a certificate of pubic convenience and necessity, where constructions have been consistently followed for a long period of time (s*ee* id.) or where the factual assessment involves technical data (*Abbott Laboratories, Inc. v. Illinois Commerce Comm'n,* 289 Ill.App.3d 705, 717 (1st Dist. 1997)) or the agencies' experience and expertise give it an informed perspective. *Illinois Power Co. v. Illinois Commerce Comm'n,* 111 Ill. 2d 505, 511 (1986); *ICTC,* 95 Ill. 2d at 153; *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n,* 282 Ill. App. 3d 672, 676 (3d Dist. 1996).

II. The Appellate Court failed to give proper deference to the Illinois Commerce Commission's findings of fact supporting its conclusion that the Rock Island Line and service will be for "public use," findings that were supported by substantial evidence.

A. The Appellate Court made several mistakes of fact and improperly relied on isolated parts of the record.

In order to reverse an agency's finding of fact, a court must find that the finding is not supported by substantial evidence. 220 ILCS 5/10-201(e)(iv)(A). Here the Appellate Court determined that Rock Island did not "offer assets for public use without discrimination." In reaching this conclusion the Appellate Court did not address all of the facts supporting the Commission finding. Rather, it narrowed its inquiry to only four elements of the record:

1) That 75% of the project capacity would be sold to anchor generators from another state (A-0015 (Appellate Decision at ¶46));
2) That Rock Island does not have any agreements for service with "renewable energy generators in this state" (though the court recognized there is the potential for Illinois generators to use the proposed Project) (*Id*. at ¶43);
3) That FERC did not mandate "that an Illinois wind generation or other renewable energy generator participate in the bidding process" (*Id*. at ¶46); and
4) That no part of the renewable energy transmitted along the proposed Project has been designated for public use in Illinois (*Id*.).

There are several significant flaws in the Appellate Court's reasoning. First, some of the "facts" the Appellate Court relied on are flatly wrong. It is not true that anchor tenants are limited to wind generators in other states. All "eligible customers", as that

terms is defined in FERC's pro forma OATT, are to be offered the opportunity to participate in the anchor tenant process. In addition to generators, eligible customers also includes purchasers of electricity for Illinois consumers, such as utilities, competitive power suppliers and other load-serving entities, and retail customers in Illinois. A-0314 and A-0316 (Add'l Supplemental Direct Tty of David Berry, at 5 and 7 lines 134-157 and 191-215).

Second, the Appellate Court's opinion ignores a mountain of evidence in the record that the power transmitted by the Project would flow into Illinois and would provide very substantial benefits to electricity consumers in Illinois. It is completely unreasonable for the Appellate Court to assume that none of the 15 million megawatt-hours of electricity delivered by the Project each year *into Illinois* will not be used by the public in Illinois. To the contrary, the evidence demonstrated that the Project will be transmitting and delivering electricity into the transmission grid in Illinois and be used by Illinois electric consumers. The Commission, in concluding that Rock Island's proposal satisfies the public use standard, stated:

> Rock Island also notes that potential users of transmission service to the Collins Substation [the delivery point in Grundy County, Illinois], via the open-access tariff, **would include parties seeking transmission capacity for delivery of electricity to northern Illinois**. The Commission finds this assertion to be reasonable. (A-0047 (ICC Final Order at 27) (emphasis added))

Third, the Appellate Court ignored the fact that the Commission found that Rock Island's commitment, to offer service to all eligible customers in a non-discriminatory manner, satisfies the "public use" requirement.

> As indicated above, FERC approved Rock Island's proposal to pre-subscribe "up to" 75 percent of transmission capacity to anchor customers. (139 FERC ¶ 61,142 at Para. 28-30) The FERC also approved Rock Island's request to sell the remaining 25 percent of the capacity using an

> open season auction. (*Id*. Para. 28-30) 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"). In fact, Staff suggested that the requirement of non-discriminatory open access "could arguably overcome the public use hurdle" since all customers would have an equal right to use the utility on the same terms, as required for public use under Section 3-105 of the Act (Staff IB [Initial Brief] at 16).
>
> Rock Island represents that it will comply with this FERC requirement; will offer all eligible customers the opportunity to purchase transmission service on the Project; will not deny any eligible customers the opportunity to purchase transmission service; and will not unduly discriminate against any transmission customer in favor of another eligible customer. (RI RB [Reply Brief] at 48) Rock Island also notes that potential users of transmission service to the Collins Substation, via the open-access tariff, would include parties seeking transmission capacity for delivery of electricity to northern Illinois. The Commission finds this assertion to be reasonable.
>
> Given the consideration in the two paragraphs immediately above, and subject to the directives below[1], the Commission finds that Rock Island's proposal satisfies the public use standard. (A-047 (ICC Final Order at 27)

The Appellate Court made no reference to this evidence. By ignoring this fundamental basis for the Commission's decision, the Appellate Court bypassed substantial evidence supporting the agency's decision.

It is the manner in which the service is offered that determines public use, not who takes the service. See *Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. 158, 164-65 (1929) ("the public character of the utility is not determined by the number resorting to its service or willing to accept it"). Rock Island is offering its service in a non-discriminatory manner to a broad range of potential customers – that is the definitive

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[1] The phrase "directives below" refers to a directive from the Commission that Rock Island would need to obtain Commission approval for any expansion of the Project that deviated from what the Commission had approved in Docket No. 12-0560. That paragraph is at A-0048.

characteristic of a public utility.

Fourth, the Appellate Court incorrectly states that anchor tenants are limited to out of state entities. A-0015 (Appellate Decision at ¶46). That is incorrect, any eligible customer can be an anchor tenant, including utilities and other load serving entities, and retail customers in Illinois. The Appellate Court also ignored the fact that at least 25% of the Project's capacity would be available to eligible customers on the same terms as the anchor tenants through the "open season" process, and that any remaining unallocated capacity on the Project will be available to eligible customers through Rock Island's federal tariff. A-0314-0317 (Add'l Supplemental Direct Tty of David Berry at 5).

Fifth, the Appellate Court's opinion displays a fundamental misunderstanding of federal energy law and how interconnected electric transmission systems work. Neither FERC, the Commission, nor Rock Island has authority to "mandate" (A-0016 (Appellate Decision, at 16 ¶46) stating "the FERC order approving the sale of excess capacity does not mandate that an Illinois wind generator or other renewable generator participate in the bidding process") that any particular subset of customers participate in a bidding process. By definition, a decision to participate in an open bidding process is made by interested customers, not by a governmental agency or by the entity requesting bids. Nor could either a government agency or Rock Island "designate" (A-0016 (Appellate Decision, at 16 ¶46) that power flowing along a line be used in any particular state or by any particular group of customers. The service being provided by Rock Island is the offer of transmission capacity to eligible customers, not the sale of electricity. Rock Island has no control over how the electricity transmitted via the Project is "designated" for use in Illinois. Rock Island will neither produce nor sell the electricity the Project transmits;

rather, it will transport and deliver the electricity in accordance with its customers' directions. Rock Island cannot allocate portions of its transmission capacity or service for use by particular types or subsets of eligible customers; this would violate FERC's process for providing transmission service on a non-discriminatory basis. And yet the Appellate Court's opinion turns on the assumption that these things are possible and are required elements of "public use."

The four points relied upon by the Appellate Court to reach its conclusion are neither factually correct, legally possible, nor relevant to the statutory standard for granting a CPCN. The Appellate Decision is based on an erroneous view of the record and must be reversed.

B. The Appellate Court failed to review the Commission's finding of "public use" as a fact based decision.

Section 3-105 of the PUA states that an entity operating as a public utility is to use its property for "public use." 220 ILCS 5/3-105. The question of whether a person or company is a public utility necessarily depends on the special facts connected with the management, operation or control of the business. *Austin Bros. Transfer Co. v. Bloom*, 316 Ill. 435, 437 (1925). Whether the business is a public utility depends on the public character of the business or service rendered, making its regulation a matter of public consequence and concern affecting the whole community. *Id*. On questions of fact, the findings of Commission and administrative agencies are conclusive unless they are against the manifest weight of the evidence. *Exelon Corp. v. Department of Revenue*, 234 Ill.2d 266, 272 (2009); *Palmyra Telephone Co. v. Modesto Telephone Co.*, 336 Ill 158, 165 (1929). Section 10-201(e)(iv)(A) states that a court shall reverse a Commission decision if the findings "are not supported by substantial evidence based on the entire

record of evidence presented to or before the Commission." 220 ILCS 5/10-201(e)(iv)(A) (2012). Substantial evidence is more than a scintilla but may be less than a preponderance of the evidence. *Citizens Utility Board v. Illinois Commerce Comm'n*, 215 IL App (2d) 130817 at ¶46 (2d Dist. 2015); *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 283 Ill.App.3d 188, 200 (2d Dist. 1996); *Metro Utility v. Illinois Commerce Comm'n*, 193 Ill.App.3d 178, 184 (2d Dist. 1990). To overturn a Commission's finding the appellant must show that the opposite conclusion is clearly evident. See e.g., *Apple Canyon Lake Property Owners Ass'n v. Illinois Commerce Comm'n*, 2013 IL App (3d) 100832 ¶67 (3d Dist. 2013). "Thus, on review, the question is whether there is sufficient evidence supporting the Commission finding, not whether the court would have reached the same conclusion as the Commission based on the evidence." *Apple Canyon Lake Property Owners Ass'n*, 2013 IL App (3d) 100832 ¶67.

In this case, the Appellate Court did not accord the Commission's findings the statutory deference they are due. The Appellate Court put itself in the place of the Commission, reweighed the evidence and gave no deference to the factual findings of the Commission. See A-0014-15 (Appellate Decision at 14-15).

C. The Commission's finding of "public use" must be affirmed because the record contains substantial evidence to support the Commission's finding and conclusion.

The record contains ample evidence to support the Commission's decision. The Commission issued a comprehensive 223 page decision, in which 20 pages were dedicated to an assessment of the evidence and parties' arguments concerning whether Rock Island could be issued a certificate as a public utility. By comparison, the Appellate Court's Opinion on this issue is extremely short, and does not address the central facts relied upon by the Commission in reaching its conclusion: Rock Island's

commitment to a wide open and fair process for offering transmission services to a broad set of eligible customers.

Here, the Commission complied with sections 8-406(a) and 3-105 in determining that Rock Island's service would be a public use. 220 ILCS 5/8-406(a); 220 ILSC 5/3-105. Section 8-406(a) states that a public utility needs a CPCN prior to transacting public utility business in Illinois. *Id*. The Commission found that Rock Island satisfies the public use standard, by *offering* its service on a non-discriminatory basis to a wide range of eligible customers, including eligible customers in Illinois, "however few the number who avail themselves of it." *Palmyra Tel. Co. v. Modesto Tel. Co.* (336 Ill. 158, 164 (1929) *stating* all persons must have an equal right to use the utility, and it must be in common, upon the same terms, however few the number who avail themselves of it. The Commission, addressed the arguments raised by the parties and explained its conclusion. The Commission demonstrated compliance with each of the factors described in *Palmyra* in the following language:

> The [Federal Energy Regulatory Commission] (FERC) also approved Rock Island's request to sell the remaining 25 percent of the capacity using an open season auction. ([139 FERC ¶ 61,142] at Para. 28-30) 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"). In fact, Staff suggested that the requirement of non-discriminatory open access "could arguably overcome the public use hurdle" since all customers would have an equal right to use the utility on the same terms, as required for public use under Section 3-105 of the Act. (Staff IB at 16)
>
> Rock Island represents that it will comply with this FERC requirement; will offer all eligible customers the opportunity to purchase transmission service on the Project; will not deny any eligible customer the opportunity to purchase transmission service; and will not unduly discriminate against any transmission customer in favor of another eligible customer. (RI RB at 48) Rock Island also notes that potential users of transmission service to the Collins Substation, via the open-access tariff, would include parties

> seeking transmission capacity for delivery of electricity to northern Illinois. The Commission finds this assertion to be reasonable.
>
> Given the considerations in the two paragraphs immediately above, and subject to the directives below, the Commission finds that Rock Island's proposal satisfies the public use standard. A-0047 (ICC Final Order, at 27).

Compliance with the FERC requirements (FERC pro forma Open Access Transmission Tariff (OATT) and *Rock Island Clean Line LLC*, 139 FERC ¶ 61,142 (2012) (A-0329-0345)) ensures that Rock Island will offer and provide open access transmission service on a non-discriminatory basis to those entitled to service under its tariff (which must conform to FERC's requirements in this regard). Rock Island's proposed procedures for offering transmission capacity to customers through the anchor tenant and open season processes were approved by the FERC and requires Rock Island to offer all eligible customers the opportunity to purchase transmission service on the Project. The OATT defines "eligible customers" as: electric utilities; power marketers; persons generating electric energy for resale; Federal power marketing agency; and any retail customer within Illinois. A-0030 (ICC Final Order, at 10); A-0314 and 0322-0323 (Add'l Supplemental Direct Tty of David Berry, at 5, and 13-14).

All eligible customers can request and obtain service, subject to available capacity, in six ways. First, there is the initial offering of capacity, which allows eligible customers to request to negotiate an agreement for long-term, firm service. A-0031 (ICC Final Order at 11). In this first phase Rock Island can enter into contracts that (in aggregate) would use up to 75% of the capacity of the Project. The second way is an "open season" offering in which any eligible customer may participate in an enrollment process. *Id*. The open season process provides an equal opportunity for eligible customers to procure long-term, firm service. A-0319 and 0322-0324 (Add'l

Supplemental Direct Tty of David Berry at 10 and 13-15). FERC has approved Rock Island's "open season" under the condition Rock Island conducts it in a fair, transparent and non-discriminatory manner following procedures Rock Island presented to FERC. FERC requires Rock Island to report the results of the "open season", to enable FERC to monitor and ensure there is no undue discrimination. A-0339 at ¶30 (139 FERC ¶ 61,142); A-0047-0048 (ICC Final Order, at 27-28).

Third, if Rock Island does not sell all of the remaining capacity of the Project through the "open season" process, any eligible customer may request service under the OATT. A-0031 (ICC Final Order at 11).

Fourth, upon expiration or termination of the initial transmission service contracts entered into during the anchor tenant and open season processes, any eligible customer may request the freed-up capacity under the OATT. *Id.*

Fifth, any eligible customer may request non-firm service on the Project at any time, and Rock Island is obligated to grant these requests so long as the transmission capacity is not in use by firm service customers. Sixth, Rock Island will create a secondary market for the Project's transmission capacity, in which holders of contracted capacity will be able to make their contracted capacity available to other eligible customers. *Id.*; A-0319 (Add'l Supplemental Direct Tty of David Berry at 10)

After reviewing the facts the Commission reached the conclusion that Rock Island's FERC-approved non-discriminatory, open season process would meet the public use test, since all customers would have an equal right to obtain service on the Project on the same terms. A-0047 (ICC Final Order at 27). In reaching its conclusion, the Commission placed great weight on Commission Staff's explanation regarding FERC's

approval of how Rock Island is to offer non-discriminatory service to all eligible customers:

> . . . the FERC approved Rock Island's proposal to pre-subscribe "up to" 75 percent of transmission capacity to anchor customers. (139 FERC ¶61,142 at para. 28-30) The FERC also approved Rock Island's request to sell the remaining 25 percent of the capacity using an ope[n] season auction. (id. at para. 28-30). 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"). In fact, Staff suggested that the requirement of non-discriminatory open access "could arguably overcome the public use hurdle" since all customers would have an equal right to use the utility on the same terms, as required for public use under Section 3-105 of the Act. (Staff IB at 16). *Id*.

In reaching its conclusion that the Project met the public use standard, the Commission properly placed weight on Rock Island's commitment to use FERC's non-discriminatory "open access" tariff and the procedures for offering service on the Project that the FERC had approved. The record contains substantial evidence demonstrating the Project would be for public use. Substantial evidence is defined as evidence that a reasoning mind would accept as sufficient to support a conclusion. It consists of more than a scintilla of evidence but may be less than a preponderance. *Central Illinois Public Service Co. v. Illinois Commerce Comm'n*, 268 Ill. App.3d 471, 479 (4th Dist. 1994).

It is proper to give deference to the Commission's weighing of the facts. *Archer-Daniels-Midland Co. v. Illinois Commerce Comm'n*, 184 Ill.2d 391, 397 (1998) (stating the Commission is entitled to great deference because it is the administrative agency possessing expertise in the field of public utilities").

> "All doubts as to the propriety of the means or methods used in the exercise of power clearly conferred should be resolved in favor of the action of the commissioners in the interest of the administration of the law." *State Public Utilities Comm'n ex rel. City of Springfield v. Springfield Gas & Electric Co.*, 291 Ill. 209, 216 (1919).

Giving deference to the Commission is especially important here where the Commission made a technically complex decision on how to address an innovative DC transmission technology proposed by a merchant transmission developer. This called upon the Commission to apply its deep expertise regarding the evolving public utility industry, and its understanding of and participation in the joint oversight of the electric industry with a federal agency. A-0023 (ICC Final Order at 3); A-0171 (ICC Final Order, at 151). As a question of first impression, under a statute giving the Commission broad authority, the Commission's fact based determinations based on its expertise in the electric industry, should receive a high level of deference from reviewing courts. Since there is substantial evidence to support the Commission's determination on "public use," it is appropriate for this Court should reverse the Appellate Court's decision and affirm the order of the Commission.

D. The Commission's decision, that Rock Island's open access tariff demonstrates that the transmission line meets the public use standard is not clearly erroneous and thus is entitled to deference by the Courts.

If the Commission's determination, that Rock Island satisfied the public use standard, were treated as a mixed question of law and fact, then the Appellate Court erroneously failed to give the Commission's construction the deference it is due under established principles of review.

As noted above in our statement on Standard of Review, the interpretation and application of the PUA by the Commission, as the agency charged with responsibility to administer that statute, is entitled to substantial weight and deference. In cases where the question is whether facts satisfy a statutory standard, the courts may not overturn an administrative agency decision unless it is clearly erroneous. See e.g., *Board of*

Education of Springfield Sch. Dist. No. 186 v. Attorney Gen. of Illinois, 2017 IL 120343 ¶68 (2017); *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 391 (2001).

Deferring to the Commission's construction and application of the PUA is especially important on issues in which the Commission is basing the decision on its experience and technical expertise. *See People ex rel. Madigan v. Illinois Commerce Comm'n*, 2015 IL 116005 at ¶31 (2015) (deferring to Commission's choice in how a utility recovers its costs through rates); *Central Illinois Public Service Co. v. Pollution Control Bd.*, 116 Ill.2d 397, 409-410 (1987)*; Cerro Copper Products v. Illinois Commerce Comm'n*, 83 Ill.2d 364, 370-371 (1980)(acknowledging that "in the area of setting rates courts have generally deferred to the Commission's expertise"); *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 405 Ill. App.3d 389, 400-402 (2d Dist. 2010) (deferring to Commission's finding disallowing one-quarter of labor costs for employees who performed both utility and merger-related work); *see also Illinois Power Co. v. Illinois Commerce Comm'n*, 111 Ill. 2d 505, 511 (1986); *Wabash, C. & W. Ry. Co. v. Illinois Commerce Comm'n*, 309 Ill. 412, 418-19 (1923); *Pliura Intervenors v. Illinois Commerce Comm'n*, 405 Ill. App. 3d 199, 209 (4th Dist. 2010) (*holding* that the Commission has broad discretion to determine if a proposed project, service or transaction will promote the "public convenience and necessity" based on the facts of each case); *Transcontinental Bus System, Inc. v. Civil Aeronautics Board*, 383 F.2d 466, 480 (5th Cir.1967), *cert. denied* (1968), 390 U.S. 920, 88 S.Ct. 850, 19 L.Ed.2d 979 (*discussing* the extent of discretion given to an agency as being framed by the delegated authority in the statute and the experience and expertise of the regulating agency on the

matter).

The Commission is charged with regulating public utilities "effectively and comprehensively" so they provide adequate, efficient, reliable, environmentally safe and least-cost public utility services. 220 ILCS 5/1-102. Over the years in which courts have reviewed the Commission's execution of its regulatory authority, courts have acknowledged that "[a] public utility is a private enterprise clothed in a public interest." *People v. Phelps*, 67 Ill.App.3d 976, 979 (1978). The purpose of the Public Utilities Act "is to bring under control of the public, *for the common good*, property applied to a public use in which the public has an interest." *Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. 158, 164 (1929) (emphasis added). The "public character" or "public use" has the following qualities -- all persons must have an equal right to use the utility, and it must be in common, upon the same terms, however few the number who avail themselves of it. See *Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. 158, 164 (1929); *State Public Utilities Comm'n v. Noble Mut. Tel. Co.*, 275 Ill. 121, 125 (1915); *State Public Utilities Comm'n v. Bethany Mut. Tel. Ass'n*, 270 Ill. 183, 185 (1915)). Noteworthy is that the use and enjoyment of a public utility need not extend to the whole public or any subdivision but may be confined to a particular district (See *Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. 158, 164 (1929); *State Public Utilities Comm'n v. Noble Mut. Tel. Co.*, 268 Ill. 411, 415 (1915)) or to those who may apply and are reasonably entitled to such service (220 ILCS 5/8-101 (2016); see also, *Amalgamated Trust and Sav. Bank v. Village of Glenview*, 98 Ill App. 3d 254, 261 (1981). A public utility is to provide service to all who apply to the extent of its capacity and excepting those it may refuse for some other legal reasons. See *South Chicago Coal and Dock Co. v. Illinois Commerce Comm'n*, 365 Ill.

218, 225 (1925); *Chicago Dist. Pipeline Co. v. Illinois Commerce Comm'n.*, 361 Ill. 296, 300 (1935); *Austin Bros. Transfer Co. v. Bloom*, 316 Ill. 435, 437-38 (1925); *State Public Utilities Comm'n v. Bethany Mut. Tel. Ass'n*, 270 Ill. 183, 185 (1915)).

Section 8-406(b) defines the tests for public convenience and necessity for new plant, which include, " . . . that the proposed construction will promote the development of an effectively competitive electricity market that operates efficiently, is equitable to all customers, and is the least cost means of satisfying those objectives." 220 ILCS 5/8-406(b). In implementing these provisions, the statute must be construed in a way to avoid absurd, or undesirable out comes. *Khan v. Deutsche Bank*, 2012 IL 112219 ¶78 (2012); *Roselle Police Pension Bd. v. Village of Roselle*, 232 Ill.2d 546, 559 (2009). An established principle of statutory construction is that legislative intent is to be deduced from the entire statute and every material part of it taken and construed together. See *Black Hawk Motor Transit Co. v. Illinois Commerce Comm'n*, 398 Ill. 542, 552 (1947). One indicator that the Commission properly interpreted the PUA in this case is the series of adverse consequences or lost opportunities that would flow from a rejection of Rock Island's request for a CPCN.

In finding that the Rock Island Project will promote the development of an effectively competitive electricity market, that operates efficiently, is equitable and least cost, the Commission (A-0138 and A-0139 (ICC Final Order at 118 and 119**))** placed strong weight upon Staff's benefit-cost analysis. A-0138 (ICC Final Order at 118). Staff's analysis estimated the cost of the Project plus the cost to produce wind energy delivered into Illinois and compared it to the benefits produced by the Project. A-0097-0099 and A-0102-0103 (ICC Final Order at 77-79 and 82-83). The benefits include the

reduction in wholesale market electric prices (A-0102-0103 (ICC Final Order at 82-83, referred to as "LMP savings" in this section of the Order**))** that occurs with the Project in operation compared to it not being in operation. Adding transmission lines enables more electric generators, in more diverse locations to operate and compete to serve Illinois electric consumers. A-0053 and A-0130 (ICC Final Order at 33, 110). Staff's analysis found that the Project's estimated benefits to Illinois to exceed the costs by billions of dollars (A-0103 (ICC Final Order at 83) over the life of the project (R.V9 C-02130 (Appendix to Direct Testimony of Richard J. Zuraski, Economist, Illinois Commerce Commission Staff Exh. 3.1, see line 5 "RICL Project Useful Life: 40 years")). Rock Island also analyzed the benefits the Project would provide Illinois electricity consumers, and found that electric cost savings would be in the range of $667 to $1,221 million (2013$) in net present value during the initial five-year period the project would be in service. A-0054, A-0083 and A-0131 (ICC Final Order at 34, 63 and 111)**.**

The Commission is also charged with carrying out the PUA in a manner consistent with other state legislation affecting electric utilities, including the state's Renewable Portfolio Standard. 5 ILCS 3855/1-75(c)(1)(*stating* that the Commission is to review and approve plans to procure cost-effective renewable energy resources). Issuance of a CPCN to Rock Island clearly furthers the objectives of the Renewable Portfolio Standard legislation. At least eighteen wind developers are actively developing wind resources in the Resource Area. A-0079 (ICC Final Order at 59). The record showed that the low cost renewable energy the Project could deliver to Illinois would facilitate cost-effective compliance with the Illinois Renewable Portfolio Standard and enable a cleaner electric generation mix to serve retail customers in Illinois. R.V5, C-

01181-01189 (Direct Testimony of David Berry on Behalf of Rock Island Clean Line LLC, Exh. 10.0 at 14-22 59 lines 301-457).

The Commission's Order allows this to happen, without the costs of the Project being directly charged to retail customers. R.V19, C-04656-04657(Rebuttal Testimony of David Berry on Behalf of Rock Island Clean Line LLC, Exh. 10.14 at 58-59). This occurs because the Project provides a larger supply of renewable energy credits (REC) than would be available in the absence of the Rock Island Project, and those RECs can be used by utilities and competitive power suppliers for compliance with the Illinois Renewable Portfolio Standard (as well as to comply with other contractual obligations to supply electricity from renewable resources). Those additional RECs help ensure economic efficiency in the REC market. R.V10, C-02310-02311 (Direct Testimony of Michael Goggin submitted on behalf of Wind on the Wires, at 20-21 lines 474-509). If the Project is not built, Illinois and other PJM states may fail to meet their Renewable Portfolio Standard requirements or may obtain electricity from other renewable resources that are more expensive than what can be provided by the wind resources in the Resource Area, thereby increasing customer costs. R.V19, C-04657 (Rebuttal Testimony of David Berry on Behalf of Rock Island Clean Line LLC, Exh. 10.14 at 59 lines 1402-1421); R.V10, C-02309-02310 (Direct Testimony of Michael Goggin submitted on behalf of Wind on the Wires, at 19-20 lines 460-473).

In addition, testimony was provided that the wind resources that would use the Project will provide a hedge against the cost impacts of existing generating plant retirements (A-0064 (ICC Final Order at 44), unpredictable volatility in the price of generation fuels (coal and natural gas), and other uncertainties in electricity markets to

which Illinois electricity consumers are exposed. R.V10, C-02305-02306 (Direct Testimony of Michael Goggin submitted on behalf of Wind on the Wires, at 15-17 lines 353-404); A-0123 (ICC Final Order at 103). All of this evidence is described in the Commission's final Order.

Finally, Rock Island also presented testimony that the Project is likely to reduce air pollution emissions from the regional electric power system (A-0052, A-0081 and A-0085 (ICC Final Order at 32, 61 and 65), create substantial jobs (A-0094 (ICC Final Order at 74), economic activity (A-0093 (ICC Final Order at 73), and other benefits (A-0093 - 0094 (ICC Final Order at 73-74). These circumstances strongly suggest that an interpretation of the PUA in favor of granting the CPCN in this case is consistent with the Commission's broad duty and wide discretion under the PUA, and should not be disturbed by reviewing courts.

E. The Appellate Court Misapplied the *Mississippi River Fuel Corporation v. Illinois Commerce Commission* and *Highland Dairy Farms Company v. Helvetia Milk Condensing Company* cases

The Appellate Court supported its conclusion that the Rock Island line failed to meet the "public use" standard with references to two previous Illinois court decisions. *Mississippi River Fuel Corp. v. Illinois Commerce Comm'n*, 1 Ill. 2d 509, 516 (1953) (MRF) and *Highland Dairy Farms Co. v. Helvetia Milk Condensing Co.*, 308 Ill. 294, 301 (1923). The reliance on *MRF* is mistaken because Mississippi River Fuel Corp. did not hold itself out to serve the public but instead, "consistently and with great care confined its industrial gas sales to specific and selected customers" and that it, "has done no act by which it gives the reasonable impression that it was holding itself out to serve gas to the public." *MRF*, 1 Ill.2d at 518. In *Highland Dairy*, the Court found that Helvetia Milk Condensing Co., which had jointly constructed a water main with another

company (*Highland Dairy*, *308 Ill. at 296)*, was not a public utility because it provided water service only to certain inhabitants, did not publicly attempt to procure patrons, and refused service to potential customers. (*Id*. at 297-98).

Rock Island's actions are completely different from those taken by Mississippi River Fuel Corp. and by Helvetia Milk Condensing Co. Rock Island, will offer capacity on the Project to all eligible customers in conformance with Rock Island's FERC-approved non-discriminatory anchor tenant, open season, and other processes. A-0047 (ICC Final Order at 27).

Illinois case law firmly states that public use is not determined by the number of customers willing to accept the service. *Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. 158, 165 (1929); *State Public Utilities Comm'n v. Bethany Mut. Tel. Ass'n*, 270 Ill. 183, 186 (1915)). Determining "public use" is a fact based determination (*Austin Bros. Transfer Co. v. Bloom*, 316 Ill. 435, 437 (1925)) that all persons must have an equal right to use the utility, and it must be in common, upon the same terms, however few the number who avail themselves of it. *Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. 158, 164 (1929). Noteworthy is that the use and enjoyment of a public utility need not extend to the whole public or any subdivision but may be confined to a particular district (*Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. 158, 164 (1929); *State Public Utilities Comm'n v. Noble Mut. Tel. Co.*, 268 Ill. 411, 415 (1915)) but only to those who may apply and are reasonably entitled to such service (220 ILCS 5/8-101 (2016); see *Amalgamated Trust and Sav. Bank v. Village of Glenview*, 98 Ill App. 3d 254, 261 (1981)).

The facts of the instant case are most similar to those in *Iowa RCO Association v. Illinois Commerce Commission* (86 Ill.App.3d 1116 (1980)), which was not discussed in the Appellate Court's analysis. In that case, Northern Pipeline sought a CPCN to build a 200 mile pipeline from Illinois to Minnesota to deliver crude oil to an affiliated company's refinery, a refinery owned by an oil company, and to allow other, unaffiliated refineries to rent excess pipeline capacity. Iowa RCO (an opponent of the proposed pipeline) alleged that Northern Pipeline was not a public utility and thus could not receive a CPCN to build its pipeline. *Id*. at 1117. Iowa RCO contended that Northern's pipeline was not shown to be for "public use" within the meaning of the Public Utilities Act because only crude oil companies affiliated with Northern would use the line and that there could be no convenient terminal points in Illinois along the proposed route. *Id*. at 1118. The Court held that Northern Pipeline was a public utility and its pipeline was for public use because Northern Pipeline would be required by the Interstate Commerce Act (49 U.S.C §1, ¶4) to furnish nondiscriminatory service to nonaffiliated users, and Northern Pipeline agreed to subject itself to the provisions of the Illinois Pubic Utilities Act. *Iowa RCO Ass'n*, at 1118-19.

This is similar to the instant case, in that Rock Island is required by FERC to offer and provide nondiscriminatory transmission service to nonaffiliated companies (including companies generating electricity, utilities and power marketers serving retail customers and individual retail customers). Rock Island agreed to subject itself to the Illinois Public Utilities Act and to hold itself out to serve the public. The Appellate Court's analysis and decision conflicts with *Iowa RCO* and should be reversed.

III. Section 8-406 of the Public Utilities Act does not require a CPCN applicant to demonstrate that it already owns, operates or manages assets in Illinois.

The Appellate Decision fundamentally changes the standard for becoming a public utility. If not reversed, the decision will significantly limit the ability of new companies from becoming "public utilities" in Illinois, especially transmission companies. The nation's electricity system is evolving as it integrates new sources of electricity, especially from wind power. The best sources of wind power often are located relatively far distances from consumers, which means that new transmission lines are necessary to access and deliver the wind power. The Appellate Court's decision will restrict or prevent entities – *specifically new companies that do not currently have a certificate authorizing them to operate as public utilities in Illinois* -- from developing affordable transmission projects to bring electricity supplies from new, cost effective wind resources and other sources into Illinois.

The Appellate Court's decision introduces a new, and virtually impossible standard for a new entrant to become a public utility and obtain a CPCN to build a new utility facility in Illinois. It would require applicants, who do not currently operate in Illinois, to act in violation of the Public Utilities Act in order to qualify for a CPCN. The decision creates a 'Catch-22' scenario in which an applicant would need to own utility assets in Illinois and serve customers in Illinois before it could receive a CPCN as a public utility, but cannot become a public utility because it is prohibited from constructing and using assets for the public prior to receiving a CPCN. Under the Appellate Courts opinion, new entrants to Illinois' transmission services market are effectively barred. A legally correct interpretation of section 3-105 (220 ILCS 5/3-105, defining 'public utility') viewed in light of the purpose of the PUA section 8-406 (220

ILCS 5/8-406), is that an applicant planning to construct plant in Illinois to be used for public use can be granted a CPCN.

The Appellate Court reached its improper conclusion because it misconstrued the test for determining whether an entity is a public utility under the Public Utilities Act. Section 3-105 of the Act defines a Public Utility as:

> (a) "Public utility" means and includes, except where otherwise expressly provided in this Section, every corporation, company, limited liability company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever 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, or owns or controls any franchise, license, permit or right to engage in:
>
> (1) the production, storage, transmission, sale, delivery or furnishing of heat, cold, power, electricity, water, or light, except when used solely for communications purposes;
>
> (2) the disposal of sewerage; or
>
> (3) the conveyance of oil or gas by pipe line. 220 ILCS 5/3-105.

According to the Appellate Court, this statutory definition requires applicants for a certificate granting them authority to operate in Illinois as a new public utility to *already*

> (1) own, control, operate, or manage utility assets, directly or indirectly, within the state; and,
>
> (2) be offering those assets for public use without discrimination, by having service agreements with customers in Illinois. A-0014 (Appellate Decision at ¶41).

While section 3-105 unremarkably requires a public utility to own, control, operate or manage actual plants, equipment, or property, the Appellate Court erred by misinterpreting the statute as requiring the entity applying for a CPCN to own and operate assets in the state *at the time the Commission grants it a CPCN*. A-0015 and 0017 (Appellate Decision at ¶¶43, 49 and 51). Section 3-105, however, places no such time

limits or restrictions on when the entity is to own utility plant, equipment or property.

The effect of the Appellate Court's decision is that entities that want to become a public utility cannot do so unless they are *already* operating as a public utility. This is illogical and conflicts with section 8-406(a), which states:

> (a) *No public utility* not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State as of July 1, 1921 and not possessing a certificate of public convenience and necessity from the Illinois Commerce Commission, the State Public Utilities Commission or the Public Utilities Commission, at the time this amendatory Act of 1985 goes into effect, ***shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business***. 220 ILCS 5/8-406(a) (emphasis added)

If the Appellate Court's view is allowed to stand as law, an entity seeking to become a public utility in Illinois faces several unappealing (and in one case unlawful) options -- none of which are in the public's best interest. The entity must either (i) purchase an existing utility or a portion of the assets and services of an existing utility, (ii) purchase or build assets and operate as a public utility in violation of section 8-406(a), or (iii) attempt to make a showing of compliance with section 3-105 by purchasing assets or property of some *de minimis* value to see if it is sufficient to warrant a CPCN. The effect of the first option would be to freeze the status quo (existing public utilities could stifle competition by refusing to sell), unreasonably protect the incumbent utilities, and prevent new entrants from building innovative projects that can benefit Illinois. The second option requires the applicant to violate the Public Utilities Act and therefore cannot be an interpretation the Illinois General Assembly intended. The last option imposes a vague and undefined regulatory test that requires the applicant to guess, at its peril, how much investment in Illinois utility assets and how many Illinois customers are

necessary to pass the Appellate Court's test. Illinois courts strive to avoid interpreting statutes that result in absurd or unreasonable results. See e.g., *Roselle Police Pension Bd. V. Village of Roselle*, 232 Ill.2d 546, 559 (2009).

The Appellate Court's test is inconsistent with other Illinois court decisions, which hold that a public utility is defined by the public good or benefit the service it offers to provide to the public, not whether the applicant owns property at the time it requests authority to provide the service. A public utility is an enterprise clothed in a public interest, whose actions are regulated by the Illinois Commerce Commission for the common good and for a use which the public has an interest. See *Palmyra*, 336 Ill. at 164. Whether an entity is a public utility depends not on a legislative definition, but on the particular facts and circumstances in each case that define the "public character" of the business. See *Austin Bros. Transfer Co. v. Bloom*, 316 Ill. 435, 437 (1925); *State Public Utilities Comm'n v. Noble*, 275 Ill. 121, 127 and 128-29 (1916). As explained in section II.A.(*supra*) the Appellate Court misinterpreted facts and incorrectly reweighed them.

The Appellate Decision also fails to follow the established principle of statutory construction that legislative intent is to be deduced from the entire statute and every material part of it taken and construed together. See *Black Hawk Motor Transit Co. v. Illinois Commerce Comm'n*, 398 Ill. 542, 552 (1947). Several provisions of the PUA make it clear that the General Assembly intends and expects the Commission to promote competition in electric utility services. See 220 ILCS 5/16-101A(b), (c), (d) and (e). This is also directly reflected in one of the criteria specified in the statute for granting a CPCN: "that the proposed construction will promote the development of an effectively

competitive electricity market that operates efficiently and is equitable to all customers . . ." 220 ILCS 5/8-406(b)(1). The Appellate Decision effectively stifles competition in electric transmission services by limiting participation to incumbent utilities. The legislature clearly intended to promote development of infrastructure that lowers cost of electric service in Illinois. *Id*. The Appellate Decision frustrates that objective by preventing new entrants from developing innovative and least cost transmission infrastructure. It is noteworthy that the Appellate Decision does not discuss or reference the Commission's findings that the Project would have these beneficial effects for electric service and electricity consumers in Illinois.

In reaching its conclusion that Rock Island could never be a public utility unless it already owns and controls property the Appellate Court clearly misinterpreted the Public Utilities Act and frustrates legislative intent. This Court should reverse the Appellate Court's decision and affirm the order of the Commission.

IV. The Appellate Court's Construction of the Public Utilities Act Places a Constitutionally Impermissible Burden on Interstate Transmission Projects

Appellants Wind on the Wires and NRDC agree with the analysis in section IV of the brief of Rock Island. Rather than repeat that argument here, Wind on the Wires and NRDC request this Court to allow them to incorporate that argument by reference pursuant to Illinois Supreme Court Rule 315(h).

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners-Appellants Wind on the Wires and Natural Resources Defense Council respectfully request this Court reverse the

decision of the Appellate Court, and affirm the order of the Illinois Commerce Commission in ICC Docket No. 12-0560.

Respectfully submitted,

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February 1, 2017

CERTFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 39 pages and 11,530 words.

Dated: February 1, 2017

___/s/ Sean R. Brady_____

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APPENDIX

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Illinois Supreme Court Order, granting the Joint Motion of Wind on the Wires and Natural Resources Defense Council to adopt by reference the *Appendix to the Brief of Rock Island Clean Line LLC.*

SUPREME COURT OF ILLINOIS

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January 30, 2017

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In re: Illinois Landowners Alliance, NFP, et al., etc., appellees, v. The Illinois Commerce Commission et al., etc., appellants. Appeal, Appellate Court, Third District.
121302

Today the following order was entered in the captioned case:

Joint motion by appellants International Brotherhood of Electrical Workers, AFL-CIO, Local Unions 51, 9, 145, and 196, in case No. 121302, and Wind on the Wires and Natural Resources Defense Council, in case No. 121308, to adopt the Rule 342(a) appendix to appellant Rock Island Clean Line LLC's brief, in case No. 121304. Allowed.

Order entered by Justice Kilbride.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

cc: Charles Yates Davis
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Melissa Nicole Schoenbein
Owen Eliot MacBride
Patrick Keegan Shinners
Richard Gerard Bernet
Thomas Shane O'Neill
William Michael Shay

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

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.)**
Appellees,	)	
v.	)	**There Heard on Review of the Order of the Illinois Commerce Commission, ICC Docket No. 12-0560**
ILLINOIS COMMMERCE COMMISSION, et al.,	)	
Appellants.	)	

NOTICE OF FILING

TO: Attached Service List

PLEASE TAKE NOTICE that on this 1st day of February, 2017, I have caused to be electronically filed with the Clerk of the Illinois Supreme Court in the above captioned consolidated dockets using the I2File.Net system the *Brief and Argument of Wind on the Wires and the Natural Resources Defense Council*, a copy of which is hereby served upon you.

Respectfully submitted,

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IN THE
SUPREME COURT OF ILLINOIS

ILLINOIS LANDOWNERS ALLIANCE NFP, et al.	)	**On Appeal from the Appellate Court of Illinois, Third District,**
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v.	)	
ILLINOIS COMMMERCE COMMISSION, et al.,	)	**There Heard on Review of the Order of the Illinois Commerce Commission,**
Appellants.	)	**ICC Docket No. 12-0560**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 1, 2017, I caused a copy of the attached *Brief and Argument of Wind on the Wires and the Natural Resources Defense Council* to be electronically filed with the Clerk of the Supreme Court of Illinois in the above captioned consolidated dockets using the I2File.Net system.

Pursuant to the "Supreme Court of Illinois Electronic Filing User Manual" and upon acceptance of the electronic *Brief and Argument* for filing, I certify that I will cause one original and twelve court-stamped copies of the *Brief and Argument* to be transmitted to the Court within five (5) days of receipt of the notice of acceptance. I further certify that I will cause the *Brief and Argument* to be served upon the parties listed on the attached Service List by e-mail on the 1st day of February, 2017.

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