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.)**
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.	)	

BRIEF OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL UNIONS 51, 9, 145 and 196

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POINTS AND AUTHORITIES

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NATURE OF THE CASE

These consolidated matters arise from petitions for review of the November 25, 2014 Order (the "Order") of the Illinois Commerce Commission ("Commission" or "ICC") granting a certificate of public convenience and necessity ("Certificate") pursuant to Section 8-406 of the Public Utilities Act ("Act"), 220 ILCS 5/8-406, to Rock Island Clean Line LLC ("Rock Island") to construct, operate and maintain a high voltage direct current electric transmission line (the "Rock Island Project" or "Project") and to conduct an electric public utility business as a transmission public utility in connection therewith.[1] The petitions for review were filed by the Illinois Landowners Alliance NFP, the Illinois Agricultural Association, and Commonwealth Edison Company ("ComEd"); each of these parties had intervened in the Commission proceedings to oppose issuance of a Certificate to Rock Island.

The International Brotherhood of Electrical Workers, AFL-CIO, Local Unions 51, 9, 145 and 196 ("IBEW") intervened in the proceedings before the Commission and presented evidence and filed briefs in support of Rock Island's request for a Certificate. The IBEW also participated in the Appellate Court proceedings as a respondent-appellee and filed a brief in support of affirmance of the Order.

On August 10, 2016, the Third District Appellate Court issued a decision reversing and remanding the Commission's Order in Docket 12-0560. *Illinois Landowners Alliance, NFP v. Ill. Commerce Comm'n*, 2016 IL App (3d) 150099 (the "Decision"). The IBEW filed a Petition for Leave to Appeal ("PLA") the Decision (No. 121302), as did Rock Island (No. 121304), the Commission (No. 121305), and (jointly) the Natural Resources Defense Council ("NRDC") and Wind on the Wires

[1] Pursuant to Supreme Court Rule 315(h), the IBEW adopts the Appendix to Rock Island's Brief ("RI Appendix"). Citations in this Brief in the form "A-xxx" are to the RI Appendix. A copy of the Order is provided at A-0018-A-0243, and a copy of the Appellate Court Decision is provided at A-001-A-017, of the RI Appendix.

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("WOW") (No. 121308). On November 23, 2016, this Court granted and consolidated the PLAs.

ISSUES PRESENTED FOR REVIEW

1. Whether the Appellate Court Decision erroneously construed the Act, and erroneously overturned a reasonable construction of the Act by the Commission, in requiring that an applicant for a Certificate, such as Rock Island, must already own, control, operate or manage utility property in Illinois and have customers in Illinois in order for the Commission to have authority to grant a Certificate for the applicant's proposed project.

2. (a) Whether the Appellate Court erroneously reversed the Commission's determination that Rock Island's proposed Project and service met the "public use" standard, where the Commission's determination was a finding that was supported by substantial evidence. (b) Alternatively, if the Commission's determination that Rock Island's proposal satisfied the "public use" standard is regarded as a construction and application of the Act, whether the Appellate Court Decision erroneously failed to give appropriate weight and deference to the Commission's construction and application of the Act (the statute that the Commission is charged with responsibility for administering and applying), and erroneously overturned a reasonable construction and application of the Act by the Commission.

3. Whether the Appellate Court Decision erroneously reversed the Commission's issuance of a Certificate for a proposed Project that substantial evidence showed would be beneficial to the public and the Commission found would promote the public convenience and necessity, without considering, in the Appellate Court's evaluation of whether the Project would be "for public use," the substantial benefits that the record showed the Project would provide to the public in Illinois.

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JURISDICTON

The Appellate Court Decision was issued on August 10, 2016. The IBEW filed its PLA with this Court on September 13, 2016, which was a timely filing within 35 days following issuance of the Appellate Court's judgement. Supreme Court Rule 315(b). On November 23, 2016, this Court granted the IBEW's PLA as well as the PLAs filed by the Commission, Rock Island, and NRDC and WOW.

STATUTES INVOLVED

The statutes involved in this appeal include the following sections of the Act: 3-105 (220 ILCS 5/3-105), 8-406 (220 ILCS 5/8-406), and 10-201 (220 ILCS 5/10-201). Section 3-105 is the definition of "public utility" and states in part:

> (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.

The remainder of Section 3-105 states exclusions from the definition. Sections 8-406(a) and (b) state:

> (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.
>
> (b) No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or any extension or alteration thereof

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> or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction. Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity. The Commission shall determine that proposed construction will promote the public convenience and necessity only if the utility demonstrates: (1) that the proposed construction is necessary to provide adequate, reliable, and efficient service to its customers and is the least-cost means of satisfying the service needs of its customers or that the proposed construction will promote the development of an effectively competitive electricity market that operates efficiently, is equitable to all customers, and is the least cost means of satisfying those objectives; (2) that the utility is capable of efficiently managing and supervising the construction process and has taken sufficient action to ensure adequate and efficient construction and supervision thereof; and (3) that the utility is capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers.

Section 10-201 sets forth the standard of review for judicial review of the Commission's findings, orders and decisions.

The complete text of each of these sections is set forth in the RI Appendix at A-0244 through A-0250.

STATEMENT OF FACTS

Pursuant to Supreme Court Rule 315(h), the IBEW adopts and concurs with the Statement of Facts set forth in Rock Island's Brief. The IBEW provides the following additional Statement of Facts which focuses on the IBEW's position before the Commission and the Appellate Court and on the specific issues raised by the IBEW before this Court.

The IBEW intervened in the Commission proceedings in Docket 12-0560 and presented evidence and argument in support of Rock Island's request for a Certificate for the Project. The IBEW represents approximately 55,000 members in Illinois in the utility, construction, telecommunications, broadcasting, manufacturing, railroad and government industries. Record Volume ("RV") 9, C-02150. The four IBEW

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Local Unions 51, 9, 145 and 196 who participated in the Commission proceedings represent, in the aggregate, approximately 7,600 IBEW members in Illinois. Specifically, IBEW Local Union 51 is headquartered in Springfield and represents approximately 3,300 members. It is the collective bargaining representative of individuals employed by various public utilities and power generating companies in Illinois. *Id.* IBEW Local Union 9 is headquartered in Hillside and represents approximately 2,400 members who perform work in Cook, Will, Grundy and Kankakee Counties. *Id.* IBEW Local Union 145 is headquartered in Moline and represents approximately 1,100 members who perform work in Carroll, Whiteside, Rock Island, Henry and Mercer Counties. RV 9, C-02151. Finally, IBEW Local Union 196 is headquartered in Batavia and represents approximately 800 members who perform outside line work, utility, maintenance, generation and wind power, among other types of work. The jurisdiction of Local Union 196 spans Carroll, Stephenson, Winnebago, Boone, McHenry, Lake, Whiteside, Jo Davies, DeKalb, Kane, DuPage, Lee and Kendall Counties. *Id.*

The proposed Rock Island transmission line, for which Rock Island requested and was granted a Certificate by the Commission, will run from northwest Iowa to a delivery point on the ComEd electric grid at a ComEd substation (known as the Collins substation) in Grundy County. The purpose of the Project is to bring electricity generated by wind farms in northwest Iowa and nearby areas to Illinois for delivery into the electrical grid at the ComEd delivery point in Grundy County. The Project will connect approximately 4,000 MW of generating capacity in the northwest Iowa area, which has excellent wind resources, to northern Illinois, enabling the output of these plants to be delivered into Illinois. The Project will deliver approximately 15 million megawatthours ("MWh") of electricity annually into

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Illinois, which is enough to serve the annual needs of about 1.4 million homes. A-023-024; RV 1, C-00171-72, C-00178; RV 6, C-01391. However, due to the present lack of adequate transmission infrastructure connecting northwest Iowa to northern Illinois, there is no direct, efficient transmission link to bring the output of the wind farms to northern Illinois, where there is a strong demand for low-cost electricity from renewable resources. A-049-050; RV 1, C-0183-90; RV 5, C-01171-77.

Economic studies and related evidence presented to the Commission showed that construction of the Rock Island Project to connect 4,000 MW of wind generating capacity in the northwest Iowa area to northern Illinois will reduce electricity costs in Illinois and reduce the price of renewable energy credits ("RECs") in the region encompassing Illinois; that constructing the Project and wind farms in northwest Iowa is more cost-effective than constructing a comparable amount of new wind farms in Illinois; and that construction and operation of the Project will promote the development of an effectively competitive electricity market. A-052-061; R.V2, C-0290-98, C-0304-306; R.V22, C-05378-05416; R.V5, C-01186-87; R.V9, C-02112-16, C-02122-25; R.V19, C-04647-52; R.V22, C-05260-62. The evidence showed other benefits of the Project, including improved reserve margins on the electric system in Illinois and increased capability to move power into Illinois, thereby enhancing reliability; reduced emissions of pollutants and reduced amounts of coal ash and scrubber sludge to be disposed of; and, because wind farms have no fuel costs, protection of electricity consumers from volatility in the prices of generation fuels. A-062-065, A-0124; RV 2, C-0296-98, C-0439-61; RV 5, C-01196-97; RV 10, C-02305-06.

James Bates, then Business Manager of IBEW Local Union 51, presented testimony to the Commission in support of Rock Island's request for a Certificate for

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the Project. RV 9, C-02147-54. He testified that the Rock Island Project is important to Illinois' future for several reasons, including to strengthen the transmission grid and provide reliable electric service, to provide access for additional high quality wind generation resources to Illinois electricity markets, and to create good quality jobs and support economic development. RV 9, C-02152. He stated that having a reliable electric grid supports the growth and development of the Illinois economy, and that providing access to Illinois markets for additional, high quality wind generation resources will help to meet the growing demand for clean electricity and help to lower electricity prices for consumers. *Id*. Further, he testified that the creation of quality union jobs is important to the State. He explained that the construction and installation of the Project's facilities in Illinois, including the construction and installation of a converter station at Channahon in Grundy County, will be a very substantial construction project in Illinois. *Id.* Further, Rock Island has committed to construct the Project in Illinois using union labor under a project labor agreement with labor including the IBEW, International Union of Operating Engineers, and Laborers' International Union of North America. RV 22, C-05314.

In his testimony, Mr. Bates emphasized the job creation benefits of the construction of the Rock Island Project in Illinois. He pointed out that a study presented in the record by Dr. David Loomis, who is Professor of Economics at Illinois State University, Director of the Center for Renewable Energy, and Executive Director of the Institute for Regulatory Policy Studies (RV 2, C-00370), estimated that the Rock Island Project will create an average of 362 jobs per year for a three-year construction period specifically associated with the construction of the transmission line. In addition, the construction of the Project's converter station in Grundy County is projected to create an average of 208 jobs per year for a three-year

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period. RV 9, C-02153; RV 2, C-00411. Further, once the Project is completed and placed into operation, there will be permanent employment for maintenance and outside line work. RV 9, C-02153; RV 2, C-00372. Mr. Bates testified that the IBEW supports the Project because of the economic and job creation benefits it will bring to the State of Illinois, and because of its benefits for consumers and for the overall growth and development of the Illinois economy. RV 9, C-02152-54.

IBEW's witness Mr. Bates testified that the Rock Island Project will be beneficial to the overall economy of Illinois. He noted that some components of the Project, such as the cable wire, will be produced or fabricated in Illinois. RV 9, C-02153; RV 24, C-05943. A Rock Island witness, Mr. Detweiler, explained how Rock Island is engaged in efforts to use Illinois manufacturers and local suppliers and service providers for construction of the Project. RV 24, C-05942-43. Additionally, some components of the new wind generation plants that will be constructed to be connected to the Rock Island Project may be produced or fabricated in Illinois, which Dr. Loomis estimated could create from 2,800 to 8,400 jobs during the period in which the wind farms are constructed. RV 9, C-02153; RV 2, C-00374.

Mr. Bates also testified that in addition to the above-described economic benefits of the Rock Island Project in terms of employment and manufacturing and fabrication activity in Illinois, the Project will enable substantial additional wind generating capacity, which will be located in excellent wind resource areas, to access Illinois markets. He stated that the additional wind generating capacity and the electricity it produces will assist utilities and power suppliers in meeting the Illinois statutory Renewable Portfolio Standard ("RPS") as well as, more generally, in meeting the demand for electricity from renewable resources. Mr. Bates explained that by accommodating the construction of additional wind generating capacity, and

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increasing the import capability for electricity into Illinois, the Project will enable more electricity supply to be available to Illinois customers. He stated that this will also reduce the prices in the competitive wholesale electricity markets and should lower retail prices for customers. Mr. Bates testified, therefore, that construction and operation of the Rock Island Project will promote the development of an effectively competitive electricity market. RV 9, C-02153-54.

Finally, Mr. Bates testified that the Rock Island Project will provide for the integration of wind energy from areas remote from Illinois with wind energy from sources within Illinois. He stated that providing access for this additional generating capacity to the Illinois electricity market should also improve reliability of service for Illinois. He concluded that all of the benefits of the Project that he described are important to continuing economic development in Illinois. He testified that the Project will help to provide a reliable, competitive electric supply, and that a reliable, competitive electric supply is good for economic development. RV 9, C-02153-54.

The economic, employment, environmental and other benefits of the Rock Island Project testified to by Mr. Bates were testified to in greater detail, and supported by economic and technical studies, by witnesses on behalf of Rock Island, the Commission Staff, and WOW, including Rock Island witnesses Michael Skelly, Wayne Galli, Gary Moland, Karl McDermott, David Loomis, Leonard Januzik, Hans Detweiler and David Berry, Commission Staff witness Richard Zuraski, and Wind on the WOW witness Michael Goggin, as summarized in the pertinent sections of the ICC Order and in the Statement of Facts in Rock Island's Brief.

The Appellate Court's analysis leading to its Decision that the Rock Island Project was not for "public use" was largely focused on the nature of the transmission service that Rock Island will offer and provide using the Project and who the

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customers are expected to be. The nature of the service that will be provided, the customers who will be eligible to take service on the Project, and the processes through which service will be offered and provided to customers, were described in detail in the testimony of Rock Island Vice President David Berry. RV 6, C-01380-01395. Mr. Berry testified that Rock Island will own and operate the Project to transmit electricity for the use of the public and will hold itself out to serve the public. He explained that the Project will transmit electricity for the use of the public. He stated that Rock Island recognizes that the Project needs to be regulated, that it accepts regulation as a utility, and that it is not attempting to structure its operations to avoid public utility status. RV 6, C-01390-91, C-01395; A-0030.

Mr. Berry testified that Rock Island will offer and provide transmission service to eligible customers on a non-discriminatory basis, pursuant to a filed tariff, in accordance with the requirements of the Federal Energy Regulatory Commission ("FERC"). He testified that eligible customers under the tariff will include: (i) owners of generating plants in the northwest Iowa area who take service to deliver the electricity produced by their plants to the ComEd delivery point in northern Illinois; (ii) electricity purchasers such as utilities, competitive retail electricity suppliers, and municipal and cooperative utilities, who take transmission service to have electricity they purchase from generators in Iowa delivered into Illinois; and (iii) retail customers who purchase electricity from the generators and have it delivered by the Project to Illinois. Under the FERC's requirements applicable to all transmission providers, Rock Island, as Mr. Berry testified, is required to, and will, broadly solicit a wide range of customers and provide them the opportunity to request transmission service on the Project. He described the processes that Rock Island is required to, and will, employ to identify potential customers and offer them the opportunity to contract for

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transmission service on the Project. A-030-031, A-033, A-047; RV 6, C-01380-92.

Mr. Berry summarized the ways in which customers will be able to obtain transmission service on the Rock Island Project:

> First, any eligible customer may request to negotiate a precedent agreement with Rock Island for long-term, firm service during the anchor tenant process. Second, any eligible customer may participate in the open season process and have equal opportunity to procure long-term, firm service. Third, if Rock Island does not sell all of its capacity through the anchor tenant process and open season, any eligible customer may request the remaining service under the Rock Island OATT [Open Access Transmission Tariff]. Fourth, upon the expiration or termination of the initial transmission service contracts entered into during the anchor tenant process and open season, any eligible customer may request the freed-up capacity under the Rock Island OATT. Fifth, 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. Sixth, Rock Island will create a secondary market for the Project's transmission capacity, in which holders of capacity will be able to make their contracted capacity available to eligible customers. (R.V6, C-01386.)

Mr. Berry stated that the "anchor tenant" and "open season" processes referred to above will only apply to the initial allocation of transmission capacity on the Project. Thereafter, transmission service will be offered and provided in accordance with Rock Island's open access transmission tariff. RV 6, C-01387-88. Further, the anchor tenant and open season processes must be carried out in compliance with procedures required by FERC and intended to provide nondiscriminatory opportunities to obtain service on the Project. Mr. Berry testified that Rock Island will not deny any eligible customer the opportunity to buy transmission service on the Project, and that Rock Island is prohibited from, and will not, discriminate against any eligible customer in favor of another customer. RV 6, C-01380-84.

ARGUMENT

I. Standard of Review

This matter originated with an order of the Commission, an administrative

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agency, granting Rock Island's request for a CPCN to construct, operate and maintain the Rock Island Project and to transact an electric public utility business in connection therewith. Therefore, although the case is now before this Court on petitions for leave to appeal the Appellate Court Decision, it is well-established that this Court is to review the decision of the administrative agency, not the Appellate Court. *Provena Covenant Medical Center v. Dep't of Revenue*, 236 Ill. 2d 368, 386 (2010); *Sangamon County Sheriff's Dep't v. Ill. Human Rights Comm'n*, 233 Ill. 2d 125, 136 (2009); *Marconi v. Chicago Heights Police Pension Bd.*, 225 Ill. 2d 497, 531 (2006). Further, as indicated by the IBEW's statement of the Issues Presented for Review, above, the issues before this Court regarding the Appellate Court Decision largely involve whether the Appellate Court applied the proper standard of review to the Commission's findings and decision.

This appeal involves review of both the Commission's findings of fact and construction and application of the Public Utilities Act. Section 10-201 of the Act (220 ILCS 5/10-201) establishes a standard for review of Commission orders and decisions, stating that: (1) findings and conclusions of the Commission on questions of fact shall be held prima facie true and as found by the Commission; (2) orders or decisions of the Commission shall be held to be prima facie reasonable; and (3) the burden of proof on all issues shall be upon the person or corporation appealing from the Commission's order or decision. 220 ILCS 5/10-201(d). It is an overriding principle of review of administrative agency decisions that the agency's determinations on regulatory matters for which it is responsible are entitled to great deference as the judgements of a tribunal appointed by law and informed by experience. *Archer-Daniels-Midland Co. v. Ill. Commerce Comm'n*, 184 Ill. 2d 391, 397 (1998); *United Cities Gas Co. v. Ill. Commerce Comm'n*, 163 Ill. 2d 1, 12 (1994);

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Village of Apple River v. Ill. Commerce Comm'n, 18 Ill. 2d 518, 523 (1960).

With respect to review of the Commission's findings, it is well established that in an appeal of a Commission order, the court must affirm the Commission's findings of fact if the findings are supported by substantial evidence in the record. *Citizens Utility Board v. Ill. Commerce Comm'n,* 166 Ill. 2d 111, 120, 126 (1995); *United Cities Gas Co.,* 163 Ill. 2d 1, 12; *Illinois Power Co. v. Ill. Commerce Comm'n,* 382 Ill. App. 3d 195, 201 (3d Dist. 2008). "Substantial evidence" is evidence that a reasoning mind would accept as sufficient to support a particular conclusion. Substantial evidence is something more than a "mere scintilla," but it does not need to be a preponderance of the evidence. *City of Elgin v. Ill. Commerce Comm'n,* 2016 IL App (2d) 150047, ¶25; *Pliura Intervenors v. Ill. Commerce Comm'n,* 405 Ill. App. 3d 199, 207 (4th Dist. 2010); *Commonwealth Edison Co. v. Ill. Commerce Comm'n,* 398 Ill. App. 3d 510, 514 (2d Dist. 2009); *Central Ill. Public Service Co. v. Ill. Commerce Comm'n,* 268 Ill. App. 3d 471, 479 (4th Dist. 1994).

In challenging the Commission's findings, an appellant must affirmatively demonstrate that the conclusion opposite to the one reached by the Commission is "clearly evident." Merely showing that the evidence could support a different conclusion than the one reached by the Commission is not sufficient for reversal. The reviewing court must affirm the Commission's findings if there is substantial evidence to support them, even if there is also substantial evidence in the record that would support different conclusions. *United Cities Gas Co.,* 163 Ill. 2d 1, 12; *City of Elgin,* 2016 IL App (2d) 150047, ¶52; *Adams County Property Owners & Tenant Farmers v. Ill. Commerce Comm'n,* 2015 IL App (4th) 130907, ¶67; *Ameren Illinois Co. v. Ill. Commerce Comm'n,* 2012 IL App (4th) 100962, ¶129; *Pliura Intervenors,* 405 Ill. App. 3d 199, 206-07; *Illinois Power Co.,* 382 Ill. App. 3d 195, 201. Further,

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in its review of the Commission's findings, the court must not conduct an independent investigation of the facts, reweigh the evidence, or substitute the court's judgement on the evidence for the Commission's judgement, as the Commission, not the reviewing court, is the finder of fact. *Citizens Utility Board v. Ill. Commerce Comm'n*, 2015 IL App (2d) 130817, ¶47; *Pliura Intervenors*, 405 Ill. App. 3d 199, 208; *Abbott Laboratories, Inc. v. Ill. Commerce Comm'n*, 289 Ill. App. 3d 705, 718 (1st Dist. 1997).

With respect to issues relating to the Commission's construction and application of the Act, a reviewing court conducts a *de novo* review of the Commission's determinations, and the Commission's construction of the Act is not binding on the reviewing court. However, the IBEW emphasizes that "not binding" simply means that the court is not mandated to follow the Commission's determination. It is well established that, as with review of the decisions of any administrative agency, the Commission's construction and application of the statute that it is charged with administering is entitled to substantial deference by the reviewing court. *County of DuPage v. Ill. Labor Relations Bd.*, 231 Ill. 2d 593, 608-09 (2008); *Illinois Consol. Tel. Co. v. Ill. Commerce Comm'n*, 95 Ill. 2d 142, 152-54 (1983); *City of Elgin*, 2016 IL App (2d) 150047, ¶26; *Adams County*, 2015 IL App (4th) 130907, ¶33.

Because of the Commission's broad experience and expertise in administering the Act, its interpretation and application of the statute it is charged with administering is considered an informed source in ascertaining the intent of the legislature. *Illinois Power Co. v. Ill. Commerce Comm'n*, 111 Ill. 2d 505, 511 (1986); *Illinois Consol. Tel. Co.*, 95 Ill. 2d 142, 153; *see also Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶16; *Provena Covenant Medical Center v. Dep't of Revenue*, 236 Ill.

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2d 368, 387 n. 9 (2010); *Kankakee County v. Pollution Control Bd.*, 396 Ill. App. 3d 1000, 1006 (3d Dist. 2009). Therefore, the reviewing court should generally defer to the agency's reasonable construction of the statute the agency is charged with administering, particularly where there is debate as to the meaning of the provision in question; the court should not substitute its own construction of the statute for a reasonable construction by the agency, even where the agency's construction is not the only reasonable construction. *City of Elgin*, 2016 IL App (2d) 150047, ¶26; *Adams County*, 2015 IL App (4th) 130907, ¶33; *Illini Environmental, Inc. v. Ill. Environmental Protection Agency*, 2014 IL App (5th) 130244, ¶50; *Lakehead Pipeline Co. v. Ill. Commerce Comm'n*, 296 Ill. App. 3d 942, 953 (3d Dist. 1998). According deference to the Commission's construction and application of the Act conforms to the direction in Section 10-201(d) of the Act that "*orders or decisions* [not just findings of fact] 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 . . . ." 220 ILCS 5/10-201(d) (emphasis added).

II. The Appellate Court Erroneously Ruled that an Applicant for a Certificate, Such as Rock Island, Must Already Own, Control, Operate or Manage Utility Assets in Illinois and Have Customers in Illinois, in Order for the Commission to Have Authority to Grant a Certificate

The Appellate Court ruled that the Commission lacked authority to grant a Certificate to Rock Island for the Project because Rock Island did not yet own, control, operate or manage assets within the State. Decision ¶43 ("Rock Island does not own, control, operate, or manage assets within this State. . . . Rock Island currently does not own any transmission assets in Illinois, nor does it have any agreements for service with renewable energy generators in this State.") The Appellate Court's conclusion represents an unreasonable construction of the Act, and should be reversed. In deciding that a Certificate applicant that is a new entrant in

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Illinois, such as Rock Island, must already have acquired utility assets in Illinois and identified customers for its service in Illinois, the Decision ignored its own "plain reading of the statute" (Decision ¶49). It also ignored long-standing Commission precedent. Further, in overturning the Commission's construction and application of the Act, the Court failed to give deference to a reasonable interpretation of the Act by the regulatory agency responsible for administration and application of the Act.

The Appellate Court Decision stated, in agreement with one of the conclusions in the Commission's Order:

> [W]e acknowledge the Commission's position that public utility status is not a prerequisite to seeking a certificate of public convenience and necessity under sections 8-406(a) and (b). 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. See 220 ILCS 5/8-406(a), (b) (West 2012).

Decision ¶49. Yet, the Appellate Court held that the Commission had no authority to grant Rock Island a Certificate because Rock Island did not own or control any transmission assets in Illinois and did not have any service agreements with customers in Illinois. The Appellate Court, therefore, construed the Act to (1) allow an applicant that is not yet a public utility in Illinois, owns no utility assets in Illinois, and has no customers in Illinois, to *file an application* for a Certificate to construct a utility facility and transact public utility business in Illinois, but (2) *prohibit* the Commission from *granting* the applicant a Certificate if it has not acquired or constructed utility assets in Illinois and secured or identified specific customers in Illinois, by the time the proceedings at the Commission are concluded. The Appellate Court's construction of the Act is internally and inherently contradictory, makes no sense, cannot have been intended by the Legislature, and is unreasonable.

In concluding that an applicant must own or control utility assets in Illinois in

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order to receive a Certificate, the Court ignored that §8-406(a) *prohibits* an applicant from transacting business as a public utility *until* the ICC grants it a Certificate:

> No public utility . . . not possessing a certificate of public convenience and necessity from the [Commission] . . . 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.

The Appellate Court also ignored that §8-406(b) (220 ILCS 5/8-406(b)) prohibits the applicant from constructing any utility facilities in Illinois until it has obtained a Certificate from the ICC authorizing the construction:

> 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.

The Appellate Court simply failed to take these provisions of Sections 8-406(a) and (b) into account.

The Commission, in its Order, correctly recognized that to require an applicant to own utility assets or have contracted with customers to provide service as a precondition to obtaining a Certificate was an impossibility or, as the Commission's Administrative Law Judge put it, a "Catch-22," because it would condition eligibility to obtain a Certificate on doing things that §8-406 prohibits an entity from doing without a Certificate. A-027-028. The Appellate Court inexplicably departed from this sensible construction of the Act. Further, and quite logically, Rock Island had no contracted Illinois customers at the time of the ICC proceeding because it was not yet authorized to transact utility business in Illinois and, in any event, customers will not contract for service on a Project that has not received regulatory approvals. A-0157; RV 19, C-4620-21.

The Appellate Court's construction of the Act to require that an applicant for a

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Certificate must already own or control utility assets in Illinois, and have customers in Illinois, in order for the Commission to have authority to grant the applicant a Certificate for a new project, fails the test of common sense. It makes no sense to construe the Act as reflecting an intent by the General Assembly to preclude the Commission from being able to grant a Certificate to a new entrant for a new project, even where, as here, the Commission has found that the proposed project and the service it will provide will be useful and beneficial to the public, will satisfy one of the General Assembly's specific criteria for granting a Certificate (here, that the Project will promote the development of an effectively competitive electricity market), and will promote the public convenience and necessity. In contrast, it does comport with common sense that the General Assembly would prohibit a new entrant from constructing utility facilities in Illinois and offering and providing utility services in Illinois unless and until the Commission finds that the public convenience and necessity warrant construction of the proposed facilities and provision of the proposed service, and that the General Assembly's specific statutory criteria for authorizing an applicant to construct new facilities have been met – including that the applicant "is capable of efficiently managing and supervising the construction process and has taken sufficient action to ensure adequate and efficient construction and supervision thereof" (220 ILCS 5/8-406(b)(2)).

A statute must be given a reasonable and sensible construction. *Wade v. City of N. Chicago Police Pension Bd.*, 226 Ill. 2d 485, 510 (2007); *Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 64 (2007). Here, the reasonable and sensible construction of the Act, which the Commission followed in determining that Rock Island could be granted a Certificate to construct and operate the Project and to conduct a public utility business in connection therewith, is that the Commission must examine the

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applicant's proposed project and service to determine whether the proposed project satisfies the criteria of §8-406(b), whether the proposed facility and proposed service will be for public use, and whether construction of the proposed project and provision of the proposed service will promote the public convenience and necessity. If the Commission, based on the record, answers these questions in the affirmative, as it did in this case, then it grants a Certificate to the applicant to construct the proposed utility facility and provide the proposed service. The applicant is prohibited from constructing the proposed facility or transacting public utility business unless and until the Commission grants the Certificate, but if the Certificate is granted, the applicant may then proceed to construct the proposed facility and provide the proposed service, as a public utility. The grant of the Certificate makes the applicant a public utility. This construction squares with the language of Section 3-105 of the Act (as well as Sections 8-406(a) and (b)), because it requires that the Commission determine that under the applicant's proposal, it will be owning, controlling, operating and/or managing, for public use, plant, property and/or equipment in Illinois.

The Commission construed and applied the Act, and granted Rock Island a Certificate to construct and operate the Project and transact a public utility business in connection therewith, even though Rock Island did not yet own utility assets in Illinois and did not have service agreements with Illinois customers. The Commission's construction and application of the Act was a reasonable and sensible construction and application by the agency charged with applying and administering the statute. The Commission's construction and application of the Act should have been accorded great weight and deference by the Appellate Court, but the Court failed to follow this established principle of review. *Provena Covenant Medical Center v.*

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Dep't of Revenue, 236 Ill. 2d 368, 387 n. 9 (2010); *County of DuPage v. Ill. Labor Relations Bd.*, 231 Ill. 2d 593, 608-09 (2008); *Illinois Consol. Tel. Co. v. Ill. Commerce Comm'n*, 95 Ill. 2d 142, 152-54 (1983); *City of Elgin v. Ill. Commerce Comm'n*, 2016 IL App (2d) 150047, ¶26; *Adams County Property Owners & Tenant Farmers v. Ill. Commerce Comm'n*, 2015 IL App (4th) 130907, ¶33; *Illinois Bell Tel. Co. v. Ill. Commerce Comm'n*, 282 Ill. App. 3d 672, 676-78 (3d Dist. 1996). In overturning the Commission's construction of the Act, the Appellate Court erroneously and inexplicably departed from this established principle of review.

In the Appellate Court, the IBEW cited numerous cases in which new entities with no utility assets or customers in Illinois were granted Certificates. *See Wabash, Chester and W. R.R. Co. v. Ill. Commerce Comm'n*, 309 Ill. 412 (1923); *Explorer Pipeline Co.*, ICC Docket No. 56052 (ICC 1970) (A-0392-87); *New Landing Utility, Inc. v. Ill. Commerce Comm'n*, 58 Ill. App. 3d 868 (2d Dist. 1977); *Illinois Power Co. d/b/a AmerenIP and Ameren Ill. Trans. Co.*, ICC Docket No. 06-0179, 2007 WL 1617828 (ICC 2007) (A-0346-091). Further, the General Assembly has taken no action to indicate disagreement with the Commission's application of the Act in this regard or to specify that an applicant must already own or control utility assets in Illinois in order for the Commission to have authority to grant the applicant a Certificate for a new utility project. The Appellate Court Decision ignored this precedent, yet it cited no prior cases in which the Commission denied a request for a Certificate, or a court reversed the grant of a Certificate, because the applicant did not yet own utility assets in Illinois or have any specific, identified customers in Illinois.

For these reasons, the Appellate Court's construction of the Act as requiring Rock Island to already own, control, operate or manage utility property in Illinois in order for the Commission to have authority to grant it a Certificate, was unreasonable,

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erroneous, and overrode a reasonable construction of the Act by the Commission.[2] The Appellate Court's construction must be reversed.

III. The Appellate Court Erroneously Reversed the Commission's Determination, Which Was Based on Substantial Evidence, that Rock Island Satisfied the "Public Use" Standard of the Act

A. The Appellate Court Failed to Apply the Proper Standard of Review to the Commission's Determination that Rock Island Satisfied the "Public Use" Standard

The other prong to the Appellate Court's conclusion (in addition to holding that the Commission could not grant a Certificate to Rock Island because Rock Island did not own or control any utility assets in Illinois) was that the Project was not shown to be for public use. Decision ¶46. The Commission, in its Order, expressly found, based on thorough consideration of the record (*see* A-028-048), that "Rock Island's proposal satisfies the public use standard." A-047. In concluding that the Rock Island Project would not be "for public use," the Appellate Court overturned a finding by the Commission that was based on substantial evidence. The Appellate Court either misapplied the applicable standard of review, or applied the wrong standard, but in either event the Court erred.

Section 10-201(d) of the Act (220 ILCS 5/10-201(d)) plainly specifies that:

> [F]indings 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 . . . ."

A reviewing court must affirm the Commission's findings if the findings are supported by substantial evidence in the record. The Commission's findings must be

[2] The IBEW notes the discussion in Rock Island's Brief that the Appellate Court also ignored the evidence that Rock Island did own or control property in Illinois that it intends to use for the Project, including easements, an option to purchase in fee the site in Grundy County on which the Illinois converter station will be located, and an option to purchase other property. This argument is fully presented in Rock Island's Brief and the IBEW adopts it without the need to add any further discussion to it.

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affirmed if there is substantial evidence to support them, *even if* there is also substantial evidence in the record that would support different conclusions. *United Cities Gas Co. v. Ill. Commerce Comm'n*, 163 Ill. 2d 1, 12 (1994); *City of Elgin v. Ill. Commerce Comm'n*, 2016 IL App (2d) 150047, ¶52; *Adams County Property Owners & Tenant Farmers v. Ill. Commerce Comm'n*, 2015 IL App (4th) 130907, ¶67; *Pliura Intervenors v. Ill. Commerce Comm'n*, 405 Ill. App. 3d 199, 206-07 (4th Dist. 2010). In short, the Commission, not the reviewing court, is the finder of fact.

B. The Commission's Finding that Rock Island Satisfied the "Public Use" Standard Was Supported by Substantial Evidence

The Commission's conclusion that Rock Island's Project and proposed service met the "public use" standard was based on a thorough review and analysis of the evidence and arguments, and was supported by substantial evidence. The Appellate Court erred in not affirming this finding. Further, in terms of this Court's review, as stated in Argument §I above, this Court reviews the agency's decision, not the Appellate Court's decision. *Provena Covenant Medical Center v. Dep't of Revenue*, 236 Ill. 2d 368, 386 (2010). Thus, the ultimate question for this Court is: Was the Commission's determination that Rock Island's proposal satisfies the "public use" standard based on substantial evidence?

After extensive review of the evidence and the parties' arguments (A-028-047), the Commission concluded:

> As indicated above, 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 open 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

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> 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.)

As described in the IBEW's Statement of Facts, above, and in greater detail in the Statement of Facts in Rock Island's Brief, evidence showed that Rock Island is accepting regulation as a public utility and is committed to, and will hold itself and its facilities out to, serve the public. (This commitment distinguishes this case from cases cited in the Decision, at ¶45-47, in which the companies disclaimed any intention to serve the public, take on additional customers, or offer their facilities for public use.[3]) The Rock Island Project will transmit electricity for the use of the public and will deliver the electricity it transmits into the electric grid in Illinois. RV 6, C-01390-92.

Evidence showed that Rock Island is committed, and mandated by FERC requirements, to offer open access transmission service on the Project on a non-discriminatory basis to a broad range of eligible customers. These customers include generators at the western end of the transmission line and purchasers of power at the Illinois end. Both groups of customers will be able to obtain service on the Project to

[3] *Mississippi River Fuel Corp. v. Ill. Commerce Comm'n*, 1 Ill. 2d 509 (1953); *Highland Dairy Farms Co. v. Helvetia Milk Condensing Co.*, 308 Ill. 294 (1923); *Peoples Energy Corp. v. Ill. Commerce Comm'n*, 142 Ill. App. 3d 917 (1st Dist. 1986).

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deliver electricity to the ComEd delivery point in Illinois. The eligible customers will include electric utilities, alternative retail electricity suppliers serving customers in Illinois, and municipal utilities and cooperatives in Illinois serving their customers or members. The eligible customers will also include retail customers in Illinois who, under the Act, are entitled to purchase power from suppliers other than their local utility. Transmission service will be provided pursuant to a tariff which must be approved by FERC. Further, in offering service to eligible customers and negotiating contracts for service, Rock Island must use procedures that were submitted to and approved by FERC. *Rock Island Clean Line LLC*, 139 FERC ¶61,142 (2012), 2012 WL 1859937 (A-0329-0345). These procedures are intended to ensure that a wide range of eligible customers are solicited for and offered the opportunity to contract for transmission service on the Project. Rock Island will offer all eligible customers the opportunity to purchase transmission service on the Project. Rock Island will not deny any eligible customer the right to purchase transmission service. Moreover, Rock Island will not unduly discriminate against any transmission customer in favor of another eligible customer. RV 6, C-01380-92.

Further, and contrary to the erroneous description in the Decision (¶46), the eligible customers are not limited to generators in Iowa, but include purchasers in Illinois.[4] Nor will the customers be limited to the anchor tenants and the customers who purchase service in the open season process. Rather, there will be additional

[4] The design of the Project as presented to the ICC for approval only provides for generators to deliver electricity into the transmission line at a converter station in northwest Iowa and for delivery of the electricity into the Illinois alternating current electrical grid at the ComEd substation in Grundy County. The Appellate Court does not appear to have understood this. The Project could, in the future, be modified to accommodate wind generators in Illinois seeking to connect to the Project, but this would alter the nature of the Project for which a Certificate was obtained and likely require applying for and receiving a new or modified Certificate from the Commission. *See* A-035-36; A-048; RV 21, C-05023-25; RV 22, C-05256-57; RV 27, C-06704-06.

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processes through which customers can obtain transmission service, including a secondary market Rock Island will maintain. Rock Island is required to, and will, engage in a broad-based solicitation to a wide range of eligible customers to offer them transmission service; will allow all eligible customers the opportunity to purchase service; and will not deny service to or discriminate against one eligible customer in favor of another. Rock Island will not offer its services "according to its own terms and conditions" or "according to its own wishes" (Decision ¶40), but must comply with detailed FERC requirements that it engage in specific, wide-ranging efforts to solicit a broad range of customers and offer them the opportunity to contract for service, without discriminating against or in favor of any customer. RV 6, C-01380-90; A-030-031, A-033, A-047.

Finally, not to be overlooked in the "public use" determination is that the Project will deliver some 15 million MWhs of electricity annually *into Illinois*, enough to meet the electricity needs of 1.4 million Illinois homes. RV 6, C-01392.

In summary, the Commission's finding that the Project met the "public use" standard was amply supported by substantial evidence, should have been affirmed by the Appellate Court, and should be affirmed by this Court.

At a more fundamental level, the Appellate Court's conclusion that the Rock Island Project will not be for "public use" fails (again) the test of common sense. The IBEW notes the Decision's reference that an entity does not become a utility simply by selling something ordinarily sold by a utility (Decision ¶40), which is a statement taken from a case in which the subject company *disclaimed* any intention to be a public utility or to offer its service and facilities to serve the public. The Rock Island Project, however, will carry the electricity produced by some 4,000 MW of generators over 500 miles (approximately 121 miles in Illinois) and deliver some 15

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million MWh per year of electricity into the electrical grid in Illinois, enough to meet the annual electricity needs of some 1.4 million homes. Moreover, the evidence in this case showed that today, it is not economically feasible to transmit large amounts of electricity produced from renewable resources, using the existing transmission grid, from northwest Iowa and deliver it into northern Illinois, where there is a demand for the electricity. A-023, A-049-050; RV 1, C-0183-91; RV 5, CV-1176-78; RV 10, C-2293-94, C-2300-02. Addressing such a need for service is a quintessential utility function.

The record showed that Rock Island's transmission service will be offered to load-serving entities in Illinois who can use the power the Project delivers into Illinois to serve Illinois consumers. The service will also be offered to end user customers in Illinois. The Commission found, based on the evidence, that "it seems reasonably likely that the line would be used primarily if not entirely for delivery of wind energy from O'Brien County [Iowa] to the [ComEd] Collins substation." A-0138. Given that the Project will deliver all the electricity it transmits into the electrical grid in Illinois at a ComEd substation, that the eligible customers include purchasers of electricity in Illinois who will either consume it directly or use it to serve the electrical needs of end users, and the volume of electricity the Project will deliver into Illinois, it defies logic to conclude (as the Appellate Court seems to have done) that Rock Island will have no Illinois customers and that none of the 15 million MWh of electricity it delivers into Illinois annually will serve Illinois customers.

C. The Appellate Court Failed to Give Deference to the Commission's Construction and Application of the Undefined Statutory Term "Public Use"

The Appellate Court's misapplication of the proper standard of review of the Commission's "public use" finding is compounded by the fact that the statutory term

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"for public use," which the Legislature has not defined, is the type of requirement that the Commission, as the expert administrative agency, is uniquely qualified to evaluate and determine if it is met, based on the facts and circumstances in each case. Such determinations by the Commission should be afforded great deference by a reviewing court. In judicial review of Commission orders, the Commission's determinations on regulatory matters for which it is responsible are entitled to great deference as the judgments of a tribunal informed by experience. *Archer-Daniels-Midland Co. v. Ill. Commerce Comm'n*, 184 Ill. 2d 391, 397 (1998); *United Cities Gas Co. v. Ill. Commerce Comm'n*, 163 Ill. 2d 1, 12 (1994); *Illinois Power Co. v. Ill. Commerce Comm'n*, 111 Ill. 2d 505, 511-12 (1986); *Illinois Consol. Tel. Co. v. Ill. Commerce Comm'n*, 95 Ill. 2d 142, 152-54 (1983).

Case law recognizes that the ICC is afforded great discretion to determine whether a proposed project will promote the "public convenience and necessity," based on a broad range of factors and the facts and circumstances of the particular case (*see, e.g., Egyptian Transp. Sys. v. Louisville & N. R. Co.*, 321 Ill. 580, 584 (1926); *Wabash, Chester & W. R.R. Co. v. Ill. Commerce Comm'n*, 309 Ill. 412, 418 (1923); *Pliura Intervenors v. Ill. Commerce Comm'n*, 405 Ill. App. 3d 199, 209 (4th Dist. 2010); *Commonwealth Edison Co. v. Ill. Commerce Comm'n*, 295 Ill. App. 3d 311, 317 (2d Dist. 1998)); whether "the public will be convenienced" by a proposed utility transaction (*Illinois Power Co. v. Ill. Commerce Comm'n*, 111 Ill. 2d 505 (1986)[5]); what is "cost based" in setting electric utility rates (*Commonwealth Edison Co. v. Ill. Commerce Comm'n*, 322 Ill. App. 3d 846, 854 (2d Dist. 2001)); and

[5] "The legislature, apparently recognizing that it would be impractical to attempt to provide precise criteria to be considered in every transaction regulated under section 27 [now Section 7-102], gave the Commission broad discretion to decide whether a proposed transaction should be approved when it set 'public convenience' as the standard for approval." 111 Ill. 2d at 511.

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whether there is a "public need" for a proposed utility or pipeline project (*Lakehead Pipeline Co. v. Ill. Commerce Comm'n*, 296 Ill. App. 3d 942, 953 (3d Dist. 1998)). The terms and phrases quoted in the preceding sentence are all undefined terms and phrases in the Public Utilities Act. Similarly, the Commission, as the expert agency charged by the General Assembly with responsibility for administering and applying the Act, must be afforded great discretion to determine whether a project for which a Certificate is requested will be for "public use," a term that is not defined in the Act. The Appellate Court should not have substituted its judgement for the Commission's judgement as to whether the facts in this case showed the Project and the service will be for "public use."

The IBEW points out that the Appellate Court's conclusion that the Rock Island Project will not be "for public use" did not involve any parsing of the statutory language, nor could it. The statute simply states that an entity is a public utility if it owns, controls, operates or manages, within this State, for public use, any plant, equipment or property used or to be used for or in connection with certain described functions. The statutory phrase "public use" is undefined. Therefore, the Appellate Court's analysis is based solely on previous case law applications of the phrase to specific fact situations. The debate on this issue involves the parties trading citations to cases decided, for the most part, 60 to 100 years ago, and arguing which ones best apply to this case. The guiding principle controlling this issue, however, should be that the Commission is the agency charged by the General Assembly with responsibility for applying broad, undefined statutory terms and phrases to the facts of particular cases to determine if the facts fall within the statutory term. This principle must apply to the Commission's application of the undefined statutory term "public use" just as it applies to the Commission's application of other undefined terms and

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phrases in the PUA such as "public need," "public convenience and necessity," "the public will be convenienced thereby," and "cost based." *See* cases cited in the immediately preceding paragraph.

Here, the Commission was asked to evaluate whether a new type of entity and project in Illinois – an independent, interstate merchant transmission provider seeking to transmit electricity produced in other states and deliver it into Illinois – met the "public use" requirement of the Act and should be granted a Certificate. The Commission used its expertise to evaluate the evidence, and determined that the Rock Island Project and the service that would be offered will be for "public use."

Thus, even if this Court were to view the Commission's determination, that Rock Island met the "public use" standard, to be a construction of the Act and application of the statutory provision to the facts of the case (rather than a finding of fact), the Appellate Court still erred because it gave no deference to the Commission's construction and application of the statutory provision, and substituted its own construction and application of the statute for a reasonable construction and application of the Act by the expert agency charged with its administration. The Commission's determination should be affirmed.

D. The Appellate Court Incorrectly Focused its "Public Use" Analysis Solely on Whether the Project Had Customers in Illinois or Designated a Portion of the Electricity it Would Deliver for Use by Illinois Customers

In its analysis of "public use," the Appellate Court incorrectly focused on whether Rock Island already has, or will have, customers in Illinois:

> The FERC order approving the sale of excess capacity [on the Project] does not mandate that an Illinois wind generator or other renewable energy generator participate in the bidding process. But if it did, there is no way to know whether an Illinois energy generator will submit a successful bid. Moreover, the project does not designate any part of the renewable energy transmitted along the proposed line for use in Illinois. Thus, it fails to satisfy the statute's public use requirement. (Decision ¶46.)

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The Decision essentially requires that "public use" be based solely on service to customers in Illinois, but cites no statutory or case law basis for this limitation. (Moreover, as described in Argument III.B above, the evidence showed that Rock Island can reasonably expect to have transmission customers in Illinois.) The correct perspective is whether Rock Island will be *offering* the service to customers in Illinois (which the evidence showed it will), not how many Illinois customers actually elect to take the service. *See, e.g., State Pub. Util. Comm'n v. Bethany Mut. Tel. Ass'n*, 270 Ill. 183, 185 (1915), and *Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. 158, 164-65 (1929), each stating that what is relevant to public utility status is the offering of the service to the public, "however few the number who avail themselves of it." *Palmyra* states that "the public character of the utility is not determined by the number resorting to its service or willing to accept it." *Id*. at 165. Both cases also state that the service need not extend to the "whole public" but "may be confined to a particular district."

Further, the service provided and electricity delivered by the Project will be used by and for the benefit of the public over the multi-state region covered by the PJM Interconnection, LLC ("PJM") regional transmission organization ("RTO") grid. As noted in testimony cited in the Decision (¶20), the wholesale markets in which electricity prices are determined are regional in nature, largely defined by the scope of the grids of the PJM RTO and the other RTOs. Evidence showed that by enabling the electricity produced by wind generators in northwest Iowa to be delivered to the PJM grid in Illinois, the Project will lower electricity costs and prices and renewable energy credit prices across the PJM region. *See* RV 2, C-0297-98, C-0304-06; RV 5, C-01186-88; RV 22, C-05400-06. This will benefit the public throughout the PJM region as well as in Illinois. As the Commission has stated, "Illinoisans are also

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citizens of the United States, and a project that provides access to a secure and reliable energy supply and helps to meet our country's energy needs is a project that benefits Illinois citizens, whether directly or indirectly." *Enbridge Pipelines (Illinois) L.L.C.*, ICC Docket No. 07-0446, 2009 WL 2355123 (ICC 2009), at 46-47 (affirmed by *Pliura Intervenors v. ICC*, 405 Ill. App. 3d 199 (4th Dist. 2010)).

E. The Appellate Court's Conclusion on Public Use Ignored Applicable Commission and Case Law Precedent

In its conclusion on "public use," as in its conclusion on the need to own utility assets in Illinois and have Illinois customers, the Appellate Court ignored applicable precedent. In previous transmission line Certificate cases, the Commission has granted Certificates to applicants based on circumstances consistent with those of Rock Island, or even with, arguably, lesser indicia of "public use." For example, in *Illinois Power Co. d/b/a AmerenIP and Ameren Ill. Trans. Co.*, ICC Docket No. 06-0706, Order on Reopening, 2010 WL 2647673 (ICC 2010) (A-0398-0434), the Commission granted a Certificate as a public utility for a transmission line that "will be transmitting electricity for use by the public at rates, terms, and conditions subject to regulation by the [FERC]." A-030; RV 6, C-01394-95. Similarly, in *Illinois Power Co. d/b/a AmerenIP and Ameren Ill. Trans. Co.*, ICC Docket No. 06-0179, 2007 WL 1617828 (ICC 2007) (A-0346-0391), the Commission granted a Certificate as a utility to a newly-formed entity to construct transmission lines where the record showed the applicant "will be transmitting electricity for use by the public at rates, terms, and conditions subject to regulation by the FERC." A-029-030; RV6, C-01393-94. Here, evidence showed that Rock Island, too, will be transmitting electricity for use by the public at rates, terms, and conditions subject to regulation by FERC. RV 6, C-01380-88, C-01390-91, C-01395.

Further, in ICC Docket No. 06-0179, the purpose of the proposed transmission

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lines was to enable a single customer – a new electric generating plant being constructed in Washington County – to deliver its electricity into the bulk electric system. A-029-030; RV 6, C-01393-94. Here, the Rock Island Project will deliver the electricity produced by numerous generators into the bulk electric system in Illinois. In *American Trans. Co., LLC and ATC Management Inc.*, ICC Docket No. 01-0142, 2003 WL 1995923 (ICC 2003) (A-0435-0442), the ICC granted a Certificate as a public utility to a company that had acquired transmission facilities in Illinois and would provide service to eligible customers pursuant to a FERC nondiscriminatory open access tariff, finding that "Petitioners' transmission lines are transmitting power within Illinois to serve Illinois customers" (A-029; RV 6, C-01392-93), even though the Commission had found in a related case that the applicant *offered no retail services to Illinois customers*. *American Trans. Co. LLC*, ICC Docket No. 01-0607, 2002 WL 1943558 (ICC 2002), at 7 (A-0449).

Regarding the Appellate Court's citation of evidence that Rock Island plans (as authorized by FERC) to contract up to 75% of the Project's capacity to anchor tenants (Decision ¶46), the Commission's certificate cases for common carrier pipelines are instructive.[6] Under §15-201 of the Act (220 ILCS 5/15-201), to qualify to receive a certificate as a common carrier pipeline, an applicant must show that it will own, control, operate or manage, within Illinois, equipment, facilities or property to be used "in connection with the conveyance of gas or any liquid other than water for the general public in common carriage." Similar to Rock Island's plan, interstate pipelines delivering product into Illinois (or receiving product for transport out of Illinois) frequently contract with anchor tenants for a significant portion of the pipeline's transportation capacity, and contract the remaining capacity to shippers

[6] As noted earlier, the anchor tenant process will only be used for the initial contracting for transmission capacity and service on the Project.

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using an open season process, with other shippers having the opportunity to obtain service on the pipeline through secondary market transactions. RV 6, C-01395. *See, e.g., Dakota Access, LLC*, ICC Docket No. 14-0754, 2015 WL 9285492 (ICC 2015) (certificate granted to pipeline that contracted 90% of its capacity to shippers under long term contracts, at rates, terms and conditions regulated by FERC); *Energy Transfer Crude Oil Co., LLC*, ICC Docket No. 14-0755, 2015 WL 9257681 (ICC 2015) (certificate granted to pipeline that contracted 90% of its capacity to nine customers); *TransCanada Keystone Pipeline L.P.*, ICC Docket No. 06-0458, 2007 WL 2580551 (ICC 2007) (certificate granted to pipeline that contracted 340,000 bpd of its 435,000 bpd capacity to shippers under long-term contracts); *Illinois Extension Pipeline, LLC*, ICC Docket No. 07-0446, Order on Reopening, 2014 WL 7399717 (ICC 2014), *aff'd Pliura Intervenors v. Ill. Commerce Comm'n*, 2016 IL App (4th) 150084-U (certificate granted to pipeline that contracted 210,000 barrels per day ("bpd") of its total 300,000 bpd capacity to two shippers, including two-thirds of the capacity to an affiliated shipper; ICC stated that it "does not believe the record supports a finding that the availability of approximately one-third of the capacity in a 300,000 bpd line to shippers other than [the affiliate] is too small to be meaningful or too small to quality as common carriage").[7]

In *Iowa RCO Ass'n v. Ill. Commerce Comm'n*, 86 Ill. App. 3d 1116, 1118-19 (4th Dist. 1980), the Appellate Court affirmed the Commission's grant of a Certificate for an interstate pipeline that proposed to transport oil from a single point in Illinois to an affiliated refinery in Minnesota and would offer the capacity on the pipeline not used by the affiliated refinery to other shippers, on a nondiscriminatory

[7] The IBEW recognizes that as a Rule 23 order, the Appellate Court's order affirming the Commission's Order on Reopening in ICC Docket No. 07-0446 cannot be cited as precedent. The IBEW is citing the Appellate Court order solely to show that the Commission's Order on Reopening in ICC Docket No. 07-0446 was affirmed.

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basis as required by federal law. Also, the pipeline would have no terminal points in Illinois. The Appellate Court concluded, on these facts, that a sufficient showing had been made that the proposed pipeline was for public use, and affirmed the Commission's order granting a certificate for the pipeline:

> Plaintiff RCO [a party appealing the Commission's grant of the Certificate] relies upon language in the foregoing [cited] cases stating that to be a public utility, an entity must be under a duty to serve the public, treating each user alike. Here testimony was presented that several nonaffiliated companies wished to use the pipeline and that Northern [the applicant] would furnish service to them. * * * [U]nlike the cited cases except [two], the entity whose status is at issue, claims to be a public utility. It would be operating in interstate commerce and would be required under the Interstate Commerce Act (49 U.S.C. sec. 1, par. 4) to furnish nondiscriminatory service to its nonaffiliated users and others wishing to do so. Because of its claim to be subject to the provisions of the Public Utilities Act it would be estopped to deny that, subject to preemptive federal regulations, it was also required to furnish nondiscriminatory service pursuant to section 38 of the Public Utilities Act (Ill.Rev.Stat. 1977, ch.1112/3, par. 38). A sufficient showing was made that the pipeline would be for a public use.

The General Assembly has not acted to change the Act in response to the Commission's determinations regarding whether an applicant demonstrated it was qualified for public utility/common carrier status, and satisfied the statutory standards of "public use," or "for the general public," in the cases cited in the immediately preceding three paragraphs. The General Assembly, therefore, must be deemed to have acquiesced in the Commission's construction and application of these provisions. *People ex rel. Birkett v. City of Chicago*, 202 Ill. 2d 36, 53-54 (2002); *People ex rel. Spiegel v. Lyons*, 1 Ill. 2d 409, 414 (1953); *Hawthorne Race Course, Inc. v. Ill. Racing Bd.*, 2013 IL App (1st) 111780, ¶35; *see also Union Electric Co. v. Ill. Commerce Comm'n*, 77 Ill. 2d 364, 379-81 (1979) (legislative acquiescence in long-standing judicial construction of the Public Utilities Act).

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IV. In Ruling that the Rock Island Project Was Not Shown to be for "Public Use," the Appellate Court Failed to Consider the Evidence and the Commission's Findings that the Project Will be Useful and Beneficial to the Public

The result of the Appellate Court's analysis was to cancel the Certificate for a major transmission project that the evidence showed, and the Commission found, will be useful and beneficial to the public. In evaluating "public use," the Appellate Court looked at whether Rock Island had agreements with customers, whether there would be customers in Illinois, and whether any of the electricity delivered by the Project into Illinois would be "designated" for use by Illinois consumers. Decision ¶46. Although the Commission, in its Order, found that the Project 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 achieving these objectives, that the Project will be needful and useful to the public, and that the Project will promote the public convenience and necessity (A-0242), the Appellate Court, in concluding that the Project was not for "public use," did not take into account any of these findings or the evidence underlying them. Decision ¶51.

The evidence showed that the Rock Island Project will significantly increase the amount of renewable generation that can access the Illinois electricity market. The evidence showed that the Project, and the ability of significant amounts of new generation to access the Illinois electricity market that it will enable, will increase competition and lower prices in the Illinois electricity market, resulting in lower electricity prices for Illinois electricity consumers. A-052-054, A-058-061; RV 1, C-0190-92; RV 2, C-0290-98, C-00304-06; RV 5, C-01186-88; RV 9, C-02099-02126, C-02130-37; RV 19, C-04478-81; RV 19, C-04647-52; RV 22, C-05258-62, C-05378-05416. On the basis of this evidence, which was comprised of substantial economic studies and analysis presented by multiple witnesses, the Commission

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concluded that the Project will be needful and useful for the public and will promote the development of an effectively competitive electricity market. A-0139. Promoting the development of an effectively competitive electricity market is one of the criteria established by the General Assembly for concluding that a proposed utility project will be beneficial to the public, will promote the public convenience and necessity, and should be granted a Certificate by the Commission. In other words, the Commission found, based on substantial evidence, that the Rock Island Project will be a useful and beneficial project for the public under criteria established by the General Assembly. The IBEW reiterates that the Project will deliver into Illinois each year enough electricity, produced by renewable resources, to meet the electricity needs of 1,400,000 homes. RV6, C-01391.

The evidence also showed that the Project, by increasing the amount of renewable generation that can access the Illinois electric grid and the Illinois electricity market, will support the public policy of this State to increase the use of renewable energy in the State's electricity supply (20 ILCS 3855/1-75(c)), as well as meeting the overall increased demand for "clean" electricity from renewable resources. RV 5, C-01181-92; RV 6, C-01391-92. Evidence showed that the Project, again by enabling thousands of megawatts of renewable generation capacity to access load and population centers, will reduce emissions and other undesirable by-products that result from the production of electricity using fossil fuels. RV 2, C-00296-98, C-00307; RV 5, C-01196-97. Evidence also showed that by enabling wind farms in northwest Iowa to serve Illinois, the Project will increase the diversity of wind generation serving Illinois (because the wind blows most heavily at different times in Illinois and in the northwest Iowa area), thereby providing for steadier production of wind generation serving the Illinois market and lower costs to integrate wind

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generation into the overall generation portfolio serving Illinois. A-064; RV 5, C-01192-96; RV 6, C-01222; RV 19, C-04640-41. Further, evidence showed that because wind generation has zero fuel cost, the additional wind generation that the Rock Island Project will allow to access the Illinois electricity market can protect electricity consumers from volatility in the prices of fuels used to generate electricity. A-0123; RV 22, C-05383; RV 10, C-02305-06.

Additionally, evidence showed (as summarized in the IBEW's Statement of Facts, above) that construction of the Rock Island Project will be a significant economic and employment driver for Illinois, creating hundreds of construction jobs in Illinois for the construction of the transmission line and the Illinois converter station. Illinois manufacturers, fabricators and suppliers of materials and services, will also be used to manufacture components of the Project and to supply materials and services needed in its construction. RV 1, C-0198; RV 2, C-0372-75, C-0397-0436; RV 24, C-05942-43. In terms of government fiscal benefits, Rock Island stated that it proposes to pay each Illinois county the Project crosses $7,000 per mile per year for each mile of the transmission line located in the county, for the first 20 years the transmission line is in operation. Further, the economic activity from construction and operation of the Project will result in additional tax revenues for the State and for local governments in the Project area. RV 24, C-05939; RV2, C-0374, C-0429-31; RV12, C-02912-13.

All of the benefits of the Rock Island Project summarized in the preceding three paragraphs are benefits to the public, including the public in Illinois. This evidence shows that the Project will be useful and beneficial to the public, or as the Commission put it "needful and useful to the public," and that it will promote the public convenience and necessity. The Appellate Court took none of these benefits

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into account in deciding that the Project was not for public use. The IBEW submits that the public benefits and usefulness of the Project, as amply demonstrated by the evidence, should be taken into account in determining that the Project is for public use. The evidence before the Commission showed that, regardless of who the specific transmission customers of the Project are and the specific numbers of customers, the Project will be very useful and beneficial to the public in Illinois and in the region.

Finally, the IBEW urges this Court to consider that the Appellate Court Decision not only is based on a flawed interpretation of the Act and failure to apply accepted principles of review of agency decisions, and is contrary to substantial evidence in the record, but it also has adverse implications for the future development of other beneficial transmission project in Illinois. The Decision creates barriers to new entrants seeking to build transmission lines into or across Illinois, whether for system reliability purposes or to enable additional competitive generation sources to access the Illinois electricity markets. The barriers arise because, based on the Decision, to be eligible to receive a Certificate from the Commission, an applicant that is not an incumbent, operating utility with assets and customers in Illinois must expend an unknown amount of capital resources on acquiring or constructing utility assets in Illinois, and must sign service agreements with an unknown number of Illinois customers (if it can get customers to sign contracts for service on an uncertificated project at all), before the applicant knows whether the Commission will grant a Certificate. This barrier will discourage new entrants who would otherwise propose and build useful, publicly beneficial transmission projects in Illinois. It may also discourage new entrants from seeking to build other types of beneficial new utility projects in Illinois. The potential benefits of new transmission projects in Illinois, in terms of improving reliability, increasing competition in energy markets,

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increasing the availability of low-cost electricity from renewable resources located in excellent wind resource areas outside of Illinois, and lowering electricity prices for Illinois consumers, as well as the employment, economic, and government fiscal benefits from these large construction projects, will likely be lost or severely diminished if the Appellate Court Decision and the rules for public utility status it creates are allowed to stand.

CONCLUSION

For the reasons set forth in this Brief, the IBEW respectfully asks the Supreme Court to reverse the Appellate Court judgment and to remand the case to the Appellate Court to address the remaining issues on appeal that the Appellate Court failed to reach due to the basis on which it decided the case (*see* Decision ¶51).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(b)(1) Statement of Points and Authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters included in the Appendix, is 39 pages.

Dated: February 1, 2017

/s/ Patrick K. Shinners
Patrick K. Shinners
Counsel for Petitioner International Brotherhood of Electrical Workers, AFL-CIO, Local Unions 51, 9, 145 and 196

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Nos. 121302, 121304, 121305 & 121308 Consolidated

IN THE

SUPREME COURT OF ILLINOIS

ILLINOIS LANDOWNERS ALLIANCE, NFP, et al.,	)	**On Appeal from the Appellate Court of Illinois, Third District, Case Nos. 3-15-0099, 3-15-0103 & 3-15-0104 (Cons.)**
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.	)	

APPENDIX TO THE BRIEF OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL UNIONS 51, 9, 145 and 196

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As allowed by the Court's January 30, 2017 order, a copy of which is appended hereto, Appellant International Brotherhood of Electrical Workers, AFL-CIO, Local Unions 51, 9, 145 and 196 adopts the appendix of appellant Rock Island Clean Line LLC (the "RI Appendix"). For the Court's reference, A copy of the November 25, 2014 Order of the Illinois Commerce Commission granting a certificate of public convenience and necessity pursuant to Section 8-406 of the Public Utilities Act, 220 ILCS 5/8-406, to Rock Island Clean Line LLC is provided at A-0018-A-0243 of the RI Appendix. A copy of the Third District Appellate Court Decision *Illinois Landowners Alliance, NFP, et. al. v. Illinois Commerce Commission, et. al.*, 2016 IL App (3d) 150099 is provided at A-001-A-017 of the RI Appendix.

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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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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,**
Appellees,	)	**Case Nos. 3-15-0099, 3-15-0103 & 3-15-0104 (Cons.)**
v.	)	
ILLINOIS COMMMERCE COMMISSION, ET AL.,	)	**There Heard on Review of the Order of the Illinois Commerce Commission,**
Appellants.	)	**ICC Docket No. 12-0560**

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 using the I2File.Net system, the Brief of International Brotherhood of Electrical Workers, AFL-CIO Local Unions 51, 9, 145 and 196 and Appendix, a copy of which is hereby served upon you.

Respectfully submitted,

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***** Electronically Filed *****

121302

02/01/2017

Supreme Court Clerk

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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,**
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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 of International Brotherhood of Electrical Workers, AFL-CIO Local Unions 51, 9, 145 and 196 and Appendix to be electronically filed with the Clerk of the Supreme Court of Illinois using the I2File.Net system.

Pursuant to the "Supreme Court of Illinois Electronic Filing User Manual" and upon acceptance of the electronic Brief of International Brotherhood of Electrical Workers, AFL-CIO Local Unions 51, 9, 145 and 196 and Appendix for filing, I certify that I will cause an original and twelve (12) copies of the Brief and Appendix to the Court within five (5) days of that notice. I further certify that I will cause the Brief of International Brotherhood of Electrical Workers, AFL-CIO Local Unions 51, 9, 145 and 196 and Appendix 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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121302

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