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

REPLY BRIEF OF ROCK ISLAND CLEAN LINE LLC

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ORAL ARGUMENT REQUESTED

ARGUMENT

Rock Island Clean Line LLC ("Rock Island" or "RI") submits this Reply Brief in response to the briefs of Commonwealth Edison ("ComEd"), Illinois Agricultural Association ("IAA"), and Illinois Landowners Alliance, NFP ("ILA"). Appellees fail to overcome the showing made by Rock Island and the other Appellants and *amici* that the Appellate Court's decision ("Opinion") should be reversed and the Illinois Commerce Commission's ("ICC") Order, granting a Certificate of Public Convenience and Necessity ("CPCN") to Rock Island to construct its proposed transmission line ("Project"), should be affirmed. The ICC found, based on an extensive record, that Rock Island satisfied the "public use standard," and that public convenience and necessity require the construction of the Project and the transaction of a public utility business by Rock Island as a transmission public utility. A-047, A-0242. As shown in Appellants' briefs, the ICC's findings and determinations were supported by substantial evidence and were based on reasonable and appropriate constructions and applications of the statutory terms and provisions, including "public use" (220 ILCS 5/3-105) and §8-406 of the Public Utilities Act ("PUA"), 220 ILCS 5/8-406. Accordingly, this Court should reverse the Appellate Court's judgement.[1]

I. Standard of Review

Appellees contend that the standard of review for all issues before this Court should be *de novo* because there are no disputed facts and the issues raised are pure questions of law, and that under *de novo* review, reversal of the ICC's Order was warranted. ComEd Br. 15-17, 31-32; IAA Br. 7-8. However, while there may or may not be dispute as to what particular witnesses said in testimony, there is clearly dispute

[1] Citations to a party's initial brief are in the form (*e.g.*) "RI Br. xx." Citations to the Appendix to Rock Island's Brief are in the form "A-xxxx." Citations to the ICC Order are to the copy in Rock Island's Appendix.

as to the ICC's ultimate, statutorily-required findings that Rock Island met the "public use" standard and that public convenience and necessity require the construction, operation and maintenance of the Project and the transaction of a public utility business by Rock Island. A-047, A-0242. These were the required findings by the ICC in order to issue a CPCN to Rock Island. They must be reviewed in accordance with §10-201(d) and (e)(iv) of the PUA, 220 ILCS 5/10-201(d), (e)(iv), which specify that the ICC's findings and conclusions shall be held to be prima facie true and as found by the ICC and should be reversed only if "not supported by substantial evidence based on the entire record of evidence presented." RI Br. 18-20, 30-31.

Regarding *de novo* review, Appellees fail to recognize that substantial weight and deference must be given to the ICC's expertise in interpreting and applying the statute the Legislature has charged the ICC with administering. The ICC's interpretation and application of the PUA should be upheld if reasonable, even if that interpretation is not the only reasonable construction. RI Br. 20-21, 46-47. This is particularly the case here where a principal term at issue, "public use," is undefined in the PUA. The Legislature has given the ICC responsibility to apply the statutory term and determine if this requirement is met based on the facts of each case. *Id*. 46-47.

ComEd argues that the ICC's decision is not entitled to deference because the ICC failed to explain its conclusions. ComEd Br. 18, 21. ComEd's assertion does not accurately describe the ICC's analysis and conclusions. In the case ComEd cites, *Reinhardt v. Bd. of Educ. of Alton Community Unit School Dist. No. 11*, 61 Ill. 2d 101 (1975), a school board voted to dismiss a teacher with no statement of reasons or cause, a far cry from the ICC's detailed Order in this case. The ICC thoroughly considered arguments on whether Rock Island needed to already be a public utility, and stated its conclusion, reiterating and adopting the Administrative Law Judge's thorough

reasoning for rejecting the contention. A-025-028. The ICC also thoroughly considered parties' arguments on whether Rock Island satisfied the public use standard and stated its conclusion with reasoning, identifying the factors supporting its conclusion. A-028-048. ComEd (at 21, 26-27, 32, 35-36, 39) attacks the ICC's analysis by concocting an increasingly narrower set of arguments on which, it contends, the ICC should have made findings. However, the ICC is not required to make a specific finding on every claim or issue raised by a party, so long as its findings permit an informed review of the order and it makes the ultimate findings necessary to support the relief being granted, which the ICC did here. *United Cities Gas Co. v. ICC*, 48 Ill. 2d 36, 40 (1971); *City of Chicago v. ICC*, 281 Ill. App. 3d 617, 623-24 (1st Dist. 1996).

The ICC's determinations should be affirmed under any of the standards of review. If this Court concludes that the matters at issue are findings of fact by the ICC, Appellants have shown that the findings are supported by substantial evidence. If this Court concludes the matters at issue are mixed questions of fact and law (application of the evidence to determine if a statutory standard is met), Appellants have shown that the ICC's determinations are not "clearly erroneous," *i.e.*, they do not leave a definite and firm conviction that the ICC has committed a mistake. And if this Court concludes that the matters at issue are questions of law, Appellants have shown that, giving appropriate deference to the ICC's construction of its statute, the ICC's interpretation and application of the PUA was reasonable and must be affirmed.

II. The Appellate Court Erroneously Held that Rock Island Must Already Own Utility Property in Illinois for the ICC to Grant a CPCN

The Appellate Court improperly overrode the ICC's interpretation of the PUA and erroneously held that Rock Island must already own or control utility assets in Illinois and have Illinois customers for the ICC to have authority to grant a CPCN. RI Br. 21-30. Appellees' attempted defense of the Opinion's erroneous analysis and

conclusion is unpersuasive and must be rejected.

Focusing on the term "public utility" in §8-406(a) and (b), IAA and ILA argue that the PUA mandates that an applicant must already have attained public utility status to receive a CPCN. IAA Br. 14-20; ILA Br. 6-8. IAA and ILA are misreading the statute. The provisions in §8-406(a) that "[no] public utility . . . 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," and in §8-406(b) that "[n]o public utility shall begin the construction of any new plant, equipment, property or facility . . . unless and until it shall have obtained a certificate from the Commission that public convenience and necessity require such construction," do not require an applicant to be a public utility to receive a CPCN. These provisions are not affirmative requirements for an entity to receive a CPCN, but rather are prohibitions on constructing public utility facilities or transacting utility business in Illinois until the entity has obtained a CPCN.

IAA and ILA fail to acknowledge the affirmative grant of authority to the ICC in §8-406(b): "Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity." This provision authorizes the ICC to consider an applicant's proposal and, if it finds the criteria for a CPCN (in §8-406(b)(1)-(3)) are satisfied, issue a CPCN to the applicant to construct the proposed facility and use it to transact business as a public utility. This is the determination the ICC made in this case: that "public convenience and necessity require (1) construction, operation and maintenance by [RI] of the proposed DC and AC transmission line Project . . . and (2) the transaction of an electric public utility business by [RI] as a transmission public

utility, in connection therewith." A-0242. This finding also answers Appellees' contention that the ICC did not make a finding that Rock Island would be a public utility (ComEd Br. 39; IAA Br. 16). The ICC found that public convenience and necessity required that Rock Island be authorized to construct its proposed Project and transact its proposed business as a public utility.

ILA's and IAA's arguments continue to be based on the same faulty reasoning underlying their original motions to dismiss at the ICC, which the ICC rejected. Specifically, Appellees attempt to construe the statute as requiring an applicant to do something prohibited by §8-406 (construct public utility facilities, or transact utility business, without a CPCN) in order to be eligible to receive a CPCN to do those same things. *See* RI Br. 22-25; A-047-048.

Zahn v. North American Power & Gas, LLC, 2016 IL 120526, cited by IAA (at 12-14), ILA (at 9) and ComEd (at 9), provides no guidance for this case. At issue there was whether the ICC had the same authority over alternative retail electric suppliers ("ARES") as over public utilities, but the PUA expressly excludes ARES from the definition of "public utility," as this Court pointed out three times (¶10, 15, 20).

Appellees also argue that the ICC's Order was erroneous because Rock Island did not demonstrate it was committed to build the Project. They focus on statements by Rock Island witnesses to the effect that the Project would not be constructed if not financially viable or there were not customer demand to justify it. ComEd Br. 4, 7, 14, 31, 34-36; IAA Br. 38-39; ILA Br. 20-21. But these statement manifest prudent management. Indeed, given Appellees' concerns about construction of a transmission line across Illinois farmland, they should be pleased with Rock Island's acknowledgement that it will not proceed with construction if, at the time it is ready to start construction, customer demand does not justify proceeding. (As shown below,

however, there was substantial evidence that if the Project is approved, Rock Island is likely to be able to obtain the necessary customers.)

Further, the statements Appellees cite mirror a condition imposed by the ICC on its grant of the CPCN, that Rock Island is prohibited from beginning to construct transmission facilities on easements acquired from landowners unless and until Rock Island has documented to the ICC that it has secured financing for the entire cost of the Project. A-0155-57, A-0170-71. Fulfilling this condition necessitates that Rock Island has secured sufficient customer contracts to support raising the required amount of capital. (This flows from the project financing method Rock Island will use, in which the revenues from transmission contracts with customers provides the basis to raise capital to construct the Project. RI Br. 28; A-0151-54.) The condition imposed by the ICC is prudent regulation. Although determining, based on the evidence, that the Project "will be needful and useful to the public" and "will promote the development of an effectively competitive electricity market" (A-0139), the ICC prudently required, as a condition to the CPCN, that by the time Rock Island is ready to start construction, it must have obtained sufficient customer contracts to support securing financing for the entire cost of the Project.

Rock Island's efforts in developing the Project over a period of years, as documented in the record (RI Br. 27-28), show Rock Island's commitment to building and operating the Project. However, Rock Island cannot build the Project unless it (1) fulfills the conditions imposed in the ICC Order, (2) obtains comparable authority to the Illinois CPCN from the Iowa Utilities Board ("IUB"),[2] and (3) obtains required

[2] Appellees cite Rock Island's December 2016 withdrawal of its application at the IUB. IAA Br. 17; ILA Br. 23; ComEd Br. 34. As that filing, provided in ILA's Supplemental Appendix ("SA"), shows, the Iowa application was withdrawn due to the Appellate Court's reversal of the ICC Order and uncertainty as to the timing of this Court's decision. There was no reason to require the IUB and interested parties to conduct a

permits, licenses and approvals from other government agencies (R.V3, C-0612-14). Notably, RI witness Skelly's statement that "[If] the project wasn't worth investing in any further, we would abandon it" was in response to a question asking what Rock Island would do if the IUB denied a certificate for the Project. R.V 39, TR 286.

Appellees also argue that the Order was properly reversed because, in addition to not owning utility facilities, Rock Island did not identify any customers and did not show it will have customers or that wind farms are likely to be built in the northwest Iowa area to use the Project, even though, as ComEd acknowledges (at 35), certainty as to the future is not required. IAA Br. 32-33, 36, 38-39; ILA Br. 15-17, 20. As Rock Island explained in its Brief, it is not reasonable to expect it to have contracts with customers at the pre-CPCN stage because customers will not sign contracts for service on a Project that has not obtained regulatory approvals, and Rock Island could not even develop pricing for its service until the ICC issued its Order approving a route for the Project and detailing other construction requirements. RI Br. 24.

However, substantial evidence showed there is customer interest in and demand for the Project's transmission service, and that new wind farms are being developed in the northwest Iowa area. Evidence showed that at least 18 wind farm developers are actively developing wind projects in the northwest Iowa area, and have already acquired sufficient land options to support 2,000 MW of wind farms. Five of these companies are developing approximately 2,900 MW of new wind farms in the area, and ten of them have signed memoranda of understanding or confidentiality agreements with Rock Island to facilitate commercial discussions. R.V19, C-4639; R.V21, C-5011; A-049-50; RI Br. 4-5. Substantial evidence also showed significant demand for the low

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proceeding to authorize the Project in Iowa until the question of Rock Island's CPCN authority in Illinois is resolved.

cost electricity that can be produced by wind farms using the excellent wind resources of northwest Iowa, if there were a direct transmission link to efficiently and economically move the electricity from northwest Iowa to northern Illinois. *Id.* The ICC found it to be a reasonable projection that users of the transmission service will include parties seeking transmission capacity for delivery into Illinois. A-047.

Appellees attempt to minimize the evidence that Rock Island already owned and controlled property (easements and options on land) to be used for the Project in Illinois. *See* RI Br. 29. IAA discounts the evidence that Rock Island had acquired a small percentage of the easements needed in Illinois because it only came into the record through testimony. IAA Br. 31. However, sworn witness testimony is legally competent evidence. *Comm. Edison Co. v. ICC*, 322 Ill. App. 3d 846 (2d Dist. 2001). IAA and ILA also cite the dissent in *Grain Belt Express Clean Line LLC*, Docket 15-0277, where two Commissioners argued that an option to purchase property is not ownership. IAA Br. 31; ILA Br. 10-11. However, Rock Island's position is that an option to purchase property constitutes control of the property during the term of the option, and PUA §3-105 states that a public utility "owns [or] *controls*" property in this State. Moreover, the dissenters in *Grain Belt* were among the Commissioners who voted unanimously to grant a CPCN to Rock Island in this case; they rejected the arguments in this case that Rock Island did not qualify for a CPCN.

IAA's arguments that (1) under a 1967 amendment to the PUA, only an entity that already owns utility property can become a public utility and be granted a CPCN, and (2) a decision of the Arkansas Public Service Commission ("APSC") denying a certificate to a sister company of Rock Island is persuasive authority for this case (IAA Br. 20-25), must be rejected. Although IAA made these arguments to the ICC and the Appellate Court, they were not adopted by the ICC nor mentioned in the Opinion.

Nothing in the 1967 amendment indicates a legislative intent to limit public utilities to entities already owning utility property, and both before and after 1967, the ICC has granted CPCNs to applicants that did not yet own utility assets in Illinois. RI Br. 26; IBEW Br. 20. In the APSC case, the applicant's request for a certificate as a public utility was denied because it did not include a proposal to construct facilities in Arkansas. IAA's arguments were fully refuted at R.V8, C-1725-38.

Appellees' arguments do not overcome the logical construction of the statute that Rock Island explained in its Brief (24-25) and the ICC followed in this case: For the ICC to grant a CPCN to construct a proposed utility facility and conduct utility business, the applicant must be proposing to own, control, manage or operate property, plant or equipment in Illinois, and the proposed project and the service it will be used to offer must be shown to be "for public use." This construction avoids requiring the applicant to do things prohibited by §8-406 in order to obtain a CPCN. Upon receiving the CPCN, the applicant is thereby authorized, and can proceed, to construct its proposed facility and use it to provide its proposed utility service, as a public utility. There is no logic to construing §3-105 and §8-406 as expressing a legislative intent to require an applicant for a CPCN to already own utility assets in Illinois in order for the ICC to have authority to grant a CPCN. Appellees' arguments must be rejected and the Appellate Court's erroneous construction and application of the PUA must be reversed.

III. Substantial Evidence Showed, and the ICC Correctly Found, that Rock Island Satisfies the Public Use Standard

Rock Island showed in its Brief that substantial evidence amply supported the ICC's finding that Rock Island's proposal satisfied the "public use" standard, and that the Appellate Court erroneously overturned the ICC's determination, regardless of whether that determination is reviewed as a finding of fact or an application of the statutory term "public use" to the facts of this case. RI Br. 6-11, 30-47. Appellees'

arguments in defense of the Opinion misapprehend the evidence and misapply case law.

ComEd's lengthy argument on public use largely boils down to the assertion that to be a public utility, an entity must be able to provide service to the entire public. ComEd fixates on the word "furnish" in *Highland Dairy Farms Co. v. Helvetia Milk Condensing Co.*, 308 Ill. 294 (1923). ComEd Br. 2-3, 13-14, 21. But like any piece of equipment, the Project's ability to serve customers is limited by its finite capacity. Case law (as well as logic) recognizes that a utility's obligation to provide service is limited by the capacity of its facilities. *Pub. Util. Comm. v. Bethany Mut. Tel. Ass'n.*, 270 Ill. 183, 185 (1915); *Ill. Hwy. Transp. Co. v. Hantel*, 323 Ill. App. 364, 376 (3d Dist. 1944). Rock Island requested a CPCN for a specific facility and cannot unilaterally expand its capacity beyond what the ICC approved, as the ICC made clear in its Order. A-048. Further, Rock Island cannot *require* any customer to take its service, but "the public character of the utility is not determined by the number resorting to its service or willing to accept it." *Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. 158, 164-65 (1929); *State Pub. Utils. Comm'n ex rel. Pike Cnty. Tel. Co. v. Noble*, 275 Ill. 121, 125 (1916); *Bethany Mut. Tel. Ass'n*, 270 Ill. 185-86. This is why it is the *offering* of the service to all eligible customers that is the hallmark of public utility status. RI Br. 42-46.

ComEd agrees that Rock Island can satisfy the public use requirement by offering 25% of its transmission capacity on a nondiscriminatory basis "to all comers" (which Rock Island will do). ComEd Br. 29-30. But ComEd contradicts itself by arguing that *offering* the service to all comers is not enough because the finite capacity of the Project is insufficient to "furnish" service to the entire public.

If requests for service exceed the Project's capacity, Rock Island will be obligated, under FERC requirements, to seek to expand the capacity of the Project or add additional facilities (and will need to obtain regulatory approvals for the

expansion). RI Br. 36; A-035-36, A-048. Appellees (ILA Br. 18; ComEd Br. 28-29) question whether Rock Island is obligated to expand its capacity if demand exceeds initial capacity. However, the Order accurately summarizes Rock Island's obligation and commitment to expand (A-035-36):

> Rock Island states it does not object to the obligation to expand its facilities or service offering to meet an increased demand for its transmission service after the Project, as now proposed, is completed. Rock Island asserts that it has such an obligation based on the provisions of the FERC's pro forma OATT [Open Access Transmission Tariff] . . . . According to Rock Island, an obligation to expand a transmission provider's service offering in response to increased demand is embodied in §15.4 of the FERC's pro forma OATT, and while a transmission provider can propose deviations in its tariff from the pro forma OATT, these must be approved by the FERC. Based on the FERC's pronouncements in the Final Policy Statement cited by Staff, Rock Island "believes the FERC would not approve a tariff provision that deviated from §15.4, and therefore the obligation to expand applies to Rock Island."

Appellees contend that Rock Island's service offerings will be discriminatory because Rock Island has been authorized by FERC to negotiate rates with anchor customers and then to offer at least 25% of its capacity to customers through an open season. ComEd Br. 18-29; IAA Br. 14, 33. Appellees are wrong. Rock Island's procedures for offering its service have been approved by FERC, which has jurisdiction over the rates and charges for Rock Island's transmission service (R.V1, C-0180) and applies a non-discrimination standard to transmission providers' service offerings. Further, FERC will review Rock Island's OATT, when filed, to determine that it does not unduly discriminate against, or provide any undue preference to, any eligible customers. RI Br. 7, 33-34. Rock Island must offer service to any eligible customers, which essentially means any potential buyer of transmission service that can use the Project. The eligible customers include generators in the northwest Iowa area seeking to deliver output to northern Illinois; and utilities and other load-serving entities (competitive power suppliers, municipal utilities and cooperatives) in Illinois and other

states in the PJM region, as well as end user (retail) customers in Illinois, seeking to purchase low cost renewable energy produced in the northwest Iowa area.[3] *Id*. 8, 33.

Although Rock Island is authorized by FERC to negotiate rates with the anchor customers, it cannot deny any eligible customer the opportunity to participate in the anchor customer process. It must broadly solicit customers to participate in this process and cannot pre-select customers. RI Br. 9, 34-35. If the demand for capacity from customers exceeds the amount FERC authorized Rock Island to offer to this segment, Rock Island must determine the anchor customers based on objective criteria consistent with FERC requirements, such as creditworthiness or contract length. *Id.*

Rock Island must also offer at least 25% of the Project's capacity to all eligible customers through an open season, using processes FERC has approved as fair, transparent and nondiscriminatory. Although the open season has been described as an "auction," the capacity will not be awarded to the "highest bidders." As stated in the FERC Order, "Rock Island also commits to offer the same rates, terms and conditions that are offered to anchor customers to all open season participants." *Rock Island Clean Line LLC,* 139 FERC ¶61,142 (2012), para. 5 (A-0331); RI Br. 10. In other words, service will be offered to open season participants at rates based on the rates negotiated with the anchor customers, and these rates will be posted in advance. All requests for service in the open season will receive equal priority and will be evaluated using posted, non-discriminatory criteria and conditions. *Id.* 10, 35. ComEd (at 16) ultimately acknowledges that Rock Island will offer open season participants the same rates, terms

[3] IAA (at 37) erroneously asserts that 16 U.S.C. §824(k)(h) prohibits Rock Island from providing transmission service to retail end user customers. This Section prohibits FERC from ordering transmission service to be provided directly to end user customers unless allowed by state law, which it is in Illinois. RI Br. 7-8. Contrary to IAA (at 37) and ILA (at 16), the evidence showed that retail electricity users can be customers of the Project. R.V6, C-1389-90; A-031.

and conditions offered to anchor customers.

After the open season, any remaining capacity will be made available to all eligible customers pursuant to tariff, and non-firm service will be offered. RI Br. 10-11, 35-36. (Rock Island will offer non-firm service whether or not the capacity of the line is fully subscribed, as some customers may prefer non-firm service, as discussed below.) ComEd misstates the ICC's conclusion by asserting that the ICC based its "public use" finding solely on the post-open season offering of service to customers. ComEd Br. 11; *see also* IAA Br. 36. The ICC based its "public use" finding on the fact that *all* of Rock Island's service will be offered on a non-discriminatory, open access basis in accordance with FERC requirements. A-047; RI Br. 36-37.

Despite ComEd's attempted distinction (ComEd Br. 22), the fact that Rock Island will offer its service to all eligible customers on a non-discriminatory basis in accordance with FERC requirements, and will offer at least 25% of its capacity to customers through an open season at posted prices, makes this case directly analogous to *Iowa RCO Ass'n v. ICC*, 86 Ill. App. 3d 1116 (4th Dist. 1980). Indeed, Rock Island presents an even clearer example of public use. In *Iowa RCO*, the pipeline was dedicating the bulk of its capacity to a corporate affiliate, and offering unaffiliated shippers only the pipeline's excess capacity (RI Br.44-45), whereas Rock Island will be offering all its transmission capacity to unaffiliated shippers. *See* R.V1, C-0194-95.

Thus, ComEd's contentions that Rock Island can arbitrarily and discriminatorily pick and choose its customers is incorrect and mischaracterizes both the record and FERC's nondiscrimination requirements with which Rock Island must comply. Also misplaced are ComEd's contentions that the service is not for public use because (1) Rock Island can negotiate rates with customers, rather than charging all customers a uniform rate, and (2) some customers may have to take non-firm service,

which ComEd calls "inferior." ComEd Br. 3, 27; IAA Br. 14. First, as shown above, Rock Island can only negotiate rates with the anchor customers; open season participants will be offered uniform rates. Second, as shown above, if demand exceeds the capacity authorized for anchor and open season customers, Rock Island must determine which customers to contract with using stated criteria applied on a non-discriminatory, non-preferential basis. Moreover, Rock Island must comply with the obligation under its FERC-approved OATT to expand facilities (subject to obtaining required regulatory approvals for expanded facilities).

Third, with respect to the anchor customers, charging different rates to different customers based on differing customer characteristics and requirements is common in utility service. For example, customers may be charged different rates based on the size of their electrical demand, amount of usage, who pays for substation facilities, or length of the customer's contract. Such rate differences are not discriminatory. *Wedron Silica Co. v. ICC*, 387 Ill. 581 (1944); *see also City of St. Charles v. ICC*, 21 Ill. 2d 259 (1961). Additionally, a utility may charge different rates to similar customers to meet competition; that is, a customer with alternatives available to the utility's service may be charged a different rate than a customer that does not have alternatives, to discourage the first customer from leaving the utility's service for the alternative. *Citizens Util. Co. v. ICC*, 50 Ill. 2d 35 (1971); *Produce Terminal Corp. v. ICC*, 414 Ill. 582 (1953) (rates may be based on price of alternate fuels available to customers).

Fourth, FERC's decision to authorize Rock Island to negotiate rates with anchor customers is premised on FERC's determination that Rock Island has no ability to erect barriers to entry or exercise market power in the relevant markets.[4] *Rock Island Clean*

[4] The price Rock Island can charge is essentially capped by the difference in the cost of power generated by northwest Iowa wind farms and the price of power in northern Illinois and other PJM areas. *Hudson Transmission Partners LLC* 135 FERC ¶61,104

Line LLC, 139 FERC ¶61,142 (2012) at para. 17 (A-0334). The cases ComEd cites for the proposition that a public utility must furnish service to all comers come from an era in which utilities had exclusive territories and were protected from competition. *Illini State Tel. Co. v. ICC*, 39 Ill. 2d 239, 243 (1968); *Ill. P. & L. Corp. v. ICC*, 320 Ill. 427, 429-30 (1926). But beginning in 1997 (P.A. 90-561) and continuing with the 2007 amendment to §8-406 (P.A. 95-700), the Legislature introduced competition in the provision of electric service, including transmission.

Fifth, non-firm service is a standard service offering of electric and gas utilities, transmission providers and pipelines. ComEd and other PJM transmission providers offer non-firm service pursuant to the PJM OATT.[5] Non-firm service may be interrupted in accordance with the tariff or contract terms, but in return, typically carries a lower price than firm service. Some customers whose operations can accommodate interruptions or limited availability elect non-firm service for the lower price. Providing interruptible service to utility customers is appropriate where there is a shortage of capacity or product. *See Institute of Shortening & Edible Oils v. ICC*, 45 Ill. App.3d 98 (4th Dist. 1977). Moreover, here, offering non-firm service will enable more customers to obtain transmission service than if only firm service to the limits of the Project's capacity were offered. Finally, the record showed non-firm service should be available much of the time, since many firm service customers will be wind generators that operate only part of the time. RI Br. 10-11.

The bottom line for Appellees' arguments about Rock Island's negotiated rates is this: FERC, which requires transmission providers to offer service to customers on

(2011), para. 20 (negotiated transmission rates are capped by differential between power prices in markets at the two ends of the line).

[5] http://www.pjm.com/media/documents/merged-tariffs/oatt.pdf (p. 652).

a non-discriminatory, non-preferential basis, authorized Rock Island to negotiate rates with anchor customers, finding that it lacks market power and there are sufficient safeguards in the processes FERC approved to prevent discrimination and preferential treatment among customers. The ICC, citing the obligation to offer open access transmission service on a non-discriminatory basis in accordance with FERC requirements, including the open season service offering, concluded that Rock Island's service offerings satisfy the public use standard. A-047. There was no reason for the Appellate Court, and should be no reason for this Court, to second guess the decisions of the two expert regulatory agencies.

Finally, while Appellees quibble over whether Rock Island will be able to furnish service to the "entire public" and if its negotiation of rates with anchor customers in accordance with FERC-approved non-discrimination procedures is contrary to "public use," they ignore that the Project will deliver over 15 million MWh of electricity annually into Illinois, an amount sufficient to meet the electricity needs of 1.4 million homes, will reduce electricity prices in Illinois by hundreds of millions of dollars annually, and that the ICC found it will be "needful and useful to the public." RI Br. 3, 12-13; A-0139. The evidence demonstrates that the Project will transmit electricity for the use of the public in Illinois.

IV. Appellees' Arguments Concerning Eminent Domain Are Unfounded

Appellees argue that Rock Island should be denied a CPCN because it would provide a direct path to condemning easements. They also argue that the grant of a CPCN, standing alone, constitutes a taking without compensation because it creates a cloud on landowners' use of their property. ComEd Br. 1-2, 36-37; IAA Br. 2-3, 39; ILA Br. 21-29. These arguments are unfounded.

First, Appellees fail to mention *Adams Cnty. Prop. Owners & Tenant Farmers*

v. ICC, 2015 IL App (4th) 130907, an appeal from an ICC order granting a CPCN for a transmission line, where the court held that a CPCN neither confers property rights on the applicant nor deprives landowners of protected property interests. *Id.*, ¶51. (*Adams* was supported by longstanding precedent. *Zurn v. City of Chicago*, 389 Ill. 114, 132 (1945); *Ill. Power Co. v. Lynn*, 50 Ill. App. 3d 77, 81 (4th Dist. 1977).)

Second, it is clear in §8-509 of the PUA (220 ILCS 5/8-509) that a §8-406 CPCN does not provide a direct path to condemnation authority, and that §8-406 authority is **not** one of the statutory authorities that allows a utility to obtain eminent domain authority:

> When necessary for the construction of any alterations, additions, extensions or improvements ordered or authorized under Section 8.406.1, 8-503, or 12-218 of this Act, any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain.

Third, to acquire eminent domain authority, Rock Island would have to obtain two *additional* orders from the ICC: one under §8-503 (220 ILCS 5/8-503) authorizing or directing construction of the Project, in accordance with the criteria set forth in that Section; and a second under §8-509, in which Rock Island must show that eminent domain authority is "necessary for the construction" of the project the ICC approved under §8-503. (Appellees admit that obtaining authority under §8-503 is a prerequisite to obtaining eminent domain authority under §8-509. ComEd Br. 11; IAA Br. 28; ILA Br. 2-3, 21.) Further, in this case the ICC *denied* Rock Island's request for authority under §8-503. A-0225-236.

Fourth, were it actually to need to use eminent domain to acquire an easement for the Project, Rock Island would have to file and litigate a condemnation action in circuit court, in which the landowner could contest whether acquisition of the easement is primarily for the benefit, use, or enjoyment of the public and necessary for a public

purpose. 735 ILCS 30/5-5-5(c).

Fifth, ILA's lengthy discourse (at 25-29) that the CPCN is a taking of landowners' properties lacks any citations to authority to support ILA's constitutional theories, and should receive no consideration. Sixth, there is nothing in the Appellate Opinion to indicate the Court based its decision on these arguments.

Appellees assert that Rock Island requested a CPCN only to obtain eminent domain authority. IAA Br. 5; ComEd Br.1-2. They are wrong. Rock Island requested a CPCN because it believes its Project will be a public utility facility and the service it will offer will be a public utility service, and Rock Island needs to comply with the law (§8-406(a)-(b)) by obtaining a CPCN. Additionally, receiving a CPCN places Rock Island under preemptive, uniform regulation by the ICC with respect to siting, construction and other requirements (R.V6, C-01390), rather than separate and possibly disparate regulation by each of the six counties the Project will cross. *City of Geneseo v. Illinois N. Utils. Co.*, 363 Ill. 89 (1936); *Comm. Edison Co. v. City of Warrenville*, 288 Ill. App. 3d 373 (2d Dist. 1997).

Further, Rock Island made it clear that it will strive to obtain all easements needed for the Project through negotiated agreements with landowners. R.V1, C-0039; R.V1, C-0170; A-0192-93. In fact, condemnation is an undesirable option for a utility, because (i) the condemnation case can take considerable time, thereby delaying construction of a project and commencement of service; (ii) the jury may award substantially more in compensation than the landowner might have accepted for a voluntary easement; and (iii) the utility must then construct and maintain its facilities for many years on the property of a landowner with which it has bad relations.

V. The Appellate Court Construed the PUA in a Way that Places a Constitutionally-Impermissible Burden on Interstate Transmission

Rock Island's Brief showed that the Appellate Court construed the PUA in a

way that places a constitutionally-impermissible burden on interstate transmission, by requiring interstate projects crossing Illinois to dedicate a portion of their capacity to Illinois customers. Appellees' responses fail to focus on the burdens imposed on interstate commerce by requiring projects to dedicate part of their capacity to Illinois customers, and the disincentives to developing publicly-beneficial transmission projects. RI Br. 17-18, 47-49. Further, the cases Appellees cite are not on point. *American Trucking Ass'n v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429 (2005) (ComEd Br. at 25), upheld a $100/year fee on trucks engaged in intrastate shipping to help maintain the state's roads. The law did not require trucks engaged in interstate commerce to also engage in intrastate shipping. *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (ILA Br. 32; IAA Br. 46-47), upheld a law that taxed natural gas sales by marketers but not those by local gas distribution companies, finding the two groups were not similarly situated. *Tracy* did not involve a burden on interstate commerce. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (IAA Br. 47) upheld a law requiring all waste generated in two counties to be processed at the county-owned facility, recognizing the traditional local government function of waste disposal and noting that the trial court found no disparate impact on out-of-state waste haulers. A more relevant case is *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (distinguished in *United Haulers*), invalidating a law that required all waste, whether it was being disposed of locally or hauled to an out-of-state location, to be processed at a specified local, privately-owned transfer station.

VI. Other Issues Raised by Appellees

ComEd contends the Project should have been submitted to the PJM RTO planning process for approval. ComEd Br. 6, 40. But the purpose of the PJM planning process is to review and approve proposed transmission projects that want to recover

their costs from all utility ratepayers in the region through RTO cost allocation; *i.e.*, the costs are recovered through the RTO's tariff and paid for through charges to all electricity consumers in the region. As stated in FERC Order 1000, ¶163 (ILA SA 38-39) and explained by ComEd's witness (ComEd SA 7-8), merchant transmission projects such as Rock Island, which will not recover their costs through RTO cost allocation methods but rather through charges directly to the transmission customers using the Project, are not required to be approved by a RTO such as PJM in the RTO planning process. Rock Island is not seeking to use (and has specifically eschewed) RTO cost allocation to recover its costs. RI Br. 6; R.V1, C-0180-81; A-070-71. Further, the PJM planning process is for projects that will be located within the PJM footprint. Rock Island is an interregional transmission line, originating in the MISO RTO and terminating in the PJM RTO, and there is currently no mechanism in place to allocate the costs of an interregional transmission line. R.V1, C-0181; A-0070.

In a recent transmission CPCN case, the ICC rejected a contention that approval of a line in the PJM planning process establishes that it will promote development of an effectively competitive electricity market, stating that the ICC "has to apply its own analysis on any proposed project in Illinois in determining whether to grant a CPCN." *Comm, Edison Co.*, Docket 13-0657 (2014), at 22-23 (2014 WL 5425009).

Appellees also contend that Rock Island does not need a CPCN to construct the Project because it can build it as a "private" transmission line. ComEd Br. 10, 14; IAA Br. 25-27. They assert that in the last 10 years, 13 non-utilities have built lines to connect to the ComEd grid, and cite as an "example" a 27.9 mile line built by Bishop Hill Energy. ComEd Br. 10; IAA Br. 26. The information Appellees cite is not in evidence in the ICC record and therefore should not be considered. 220 ILCS 5/10-201(d). However, information concerning these "private lines" is available on the PJM

website (http://pjm.com/pub/planning/project-queues/). The 27.9 mile line cited by Appellees is by far the longest of these lines; the next longest is 19 miles, seven are less than 9 miles, and three are less than one mile. Four of the lines are 345 kV voltage, the others are 138 kV. These lines connect a single wind farm or generating plant to a ComEd substation to deliver the owner's electricity to the ComEd transmission grid. These lines are a far cry from the Rock Island Project, which will cross 500 miles, have a voltage of ±600 kV, transmit the electricity from multiple wind farms totaling over 4,000 MW capacity, and deliver over 15 million MWhs per year for the use of the public in Illinois and other PJM states. RI Br. 3; A-023-24. The lines Appellees refer to are not providing transmission service to the public like Rock Island will, nor are they anywhere near the scope of the Project.

The ICC's decision to grant the CPCN correctly applied the PUA and was supported by substantial evidence. The Appellate Court judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b). The length of this Brief, excluding the 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, and the certificate of service, is 6,937 words.

Dated: April 26, 2017

/s/ Owen E. MacBride
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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, 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 26th day of April, 2017, I have caused to be electronically filed with the Clerk of the Illinois Supreme Court using the I2File.Net system, Rock Island Clean Line LLC's Reply Brief, a copy of which is hereby served upon you.

Respectfully submitted,

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Appellants.	)	**ICC Docket No. 12-0560**

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I certify that on April 26, 2017, a copy of the attached Reply Brief of Rock Island Clean Line LLC was electronically filed with the Clerk of the Supreme Court of Illinois using the I2File.Net system and served upon the parties listed on the attached Service List by e-mail.

Pursuant to the "Supreme Court of Illinois Electronic Filing User Manual" and upon acceptance of the electronic Reply Brief for filing, I certify that I will cause an original and twelve (12) copies of the Reply Brief to be transmitted to the Court within five (5) days of that notice

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