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

IN THE SUPREME COURT OF ILLINOIS

ILLINOIS LANDOWNERS ALLIANCE, NFP, ILLINOIS AGRICULTURAL ASSOCIATION a/k/a ILLINOIS FARM BUREAU, and COMMONWEALTH EDISON CO., Respondents-Appellees, vs. ILLINOIS COMMERCE COMMISSION, ROCK ISLAND CLEAN LINE LLC, *et al.* Petitioners-Appellants.	Petition for Leave to Appeal from the Appellate Court of Illinois, Third District, Nos. 3-15-0099, 3-15-0103 & 3-15-0104 (consolidated) There Heard on Review of Orders of the Illinois Commerce Commission in its Docket No. 12-0560

BRIEF OF RESPONDENT-APPELLEE ILLINOIS AGRICULTURAL ASSOCIATION a/k/a ILLINOIS FARM BUREAU

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

Other

ISSUES PRESENTED FOR REVIEW

1. Whether a Certificate of Public Convenience and Necessity ("CPCN") pursuant to 220 ILCS 5/8-406 is limited to public utilities.

2. Whether Rock Island Clean Line, LLC ("Rock Island") is a public utility.

3. Whether the Third District's application of the Public Utilities Act, 220 ILCS 5/1-101, *et seq.* (the "PUA") to the undisputed facts presented constitutes a constitutionally-impermissible burden on the interstate transmission of electricity.

STATEMENT OF FACTS

On October 10, 2012, Rock Island filed a petition in Docket No. 12-0560, styled as a *Verified Petition of Rock Island Clean Line, LLC for a Certificate of Public Convenience and Necessity as a Transmission Public Utility and to Construct, Operate and Maintain an Electric Transmission Line and Authorizing and Directing Rock Island Clean Line to Construct an Electric Transmission Line* ("Verified Petition"). (R.V1, C1-163).[1] The Verified Petition sought an Order from the Illinois Commerce Commission ("Commission") (1) granting Rock Island a CPCN pursuant to Section 8-406(a) of the PUA to operate as a transmission public utility in the State of Illinois, (2) granting Rock Island a CPCN pursuant to Section 8-406 of the PUA to construct, operate, and maintain an electric transmission line, (3) authorizing and directing Rock Island, pursuant to Section 8-503 of the PUA, to construct the electric transmission line, and (4) granting Rock Island certain other relief in connection with its operations as a public utility. *Id.* In the Verified

[1] "V__" refers to the volume number of the Commission record. "C___" refers to the page number of the Commission record. "RICL-A___" refers to the page number of the Rock Island Appendix filed on February 1, 2017.

Petition and throughout the record, the proposed transmission line project is summarily described by Rock Island as the "Project," and such description is also used herein.

Rock Island seeks to construct a high voltage direct current (DC) transmission line to take in energy from hypothetical wind farms in western Iowa, then run the energy across its one-way electric power line through Iowa and Illinois, before terminating in western Indiana. *Id.* at *77-85.* The Project would primarily provide electricity to be distributed to the east coast of the United States. (R.V9, C2158). Because it is a merchant project[2] (R.V34, C8481) and a DC transmission line, the Project would be the first of its kind in Illinois. (R.V9, C2068). Attachment 5 to the Verified Petition depicts the map of the Project, showing that it would cross over Illinois family farms spanning from Illinois' western to eastern edges. (R.V1, C77-85). Rock Island, along with its parent and subsidiary companies, has never built a transmission line before, and it does not have any customers, suppliers, or property. (R.V44, RP841). For these, and many other reasons detailed herein, this Project is a matter of first impression in Illinois. (R.V34, C8486).

Many interested parties intervened in the Commission proceeding, objecting to the Verified Petition ("Intervenors"). The Farm Bureau and other Intervenors join in opposition to this Project because of the threat of, among other things, eminent domain authority being granted to a non-public utility for a private purpose transmission line. The Intervenors steadfastly oppose this regulatory action of first impression, which is not grounded in the legislature's definition of "public utility," and which will enable Rock

[2] "[M]erchant transmission projects are defined as those for which the costs of constructing the proposed transmission facilities will be recovered through negotiated rates instead of cost-based rates." FERC Order No. 1000. See https://www.ferc.gov/whats-new/comm-meet/2011/072111/E-6.pdf

Island to acquire valuable private farm ground across Illinois in order to construct a private purpose transmission line for non-existent energy sources and customers.

On November 25, 2014, the Commission issued a Final Order approving the ALJ's Proposed Order conditionally granting a CPCN to Rock Island. (R.V34-35, C8475). The Illinois Landowners Alliance, NFP ("ILA"), the Farm Bureau, and Commonwealth Edison Co. ("ComEd") filed Applications for Rehearing, all of which were denied on January 14, 2015. (R.V35-36, C8747-8863).

The Intervenors appealed from the Commission's Order to the Third District Appellate Court ("Third District"). As argued by the Intervenors before the Commission, in their Motions to Dismiss, and throughout the proceeding, Rock Island was not a public utility under the PUA; accordingly, the Commission lacked jurisdiction to regulate Rock Island by issuing it a CPCN. The Third District found in favor of the Intervenors, finding that Rock Island was not a "public utility" as defined by the PUA because it did not have utility assets in Illinois dedicated to public use at the time of the issuance of the CPCN. (RICL-A16). The Third District found that Rock Island was jurisdictionally ineligible for a CPCN. (*Id.*).

Four separate Petitions for Leave to Appeal ("PLAs") were then filed in response to the Opinion issued by the Third District ("Third District Opinion"), and each were later consolidated by this Court: (1) Rock Island Clean Line, LLC, No. 121304; (2) Illinois Commerce Commission, No. 121305; (3) International Brotherhood of Electrical Workers, AFL-CIO Local Unions 51, 9,134 & 196, No. 121302; and, (4) Wind on the Wires and National Resources Defense Council, No. 121308. Since that time, the Appellants filed Briefs and the following parties filed Amicus Briefs: (1) Citizens Utility Board, (2) People

of the State of Illinois *ex rel.* Lisa Madigan, Attorney General of Illinois, (3) Infinity Renewables, and (4) LSP Transmission Holdings, LLC.

STANDARD OF REVIEW

The Illinois PUA "governs the courts, and their review of the Commission's decisions." *People ex rel. Madigan v. Illinois Commerce Comm'n*, 2015 IL 116005, ¶20. "While the Commission's interpretation of statutory standards is entitled to deference," reviewing courts "are not bound by the Commission's interpretation of law." *Citizens Util. Bd. v. Illinois Commerce Comm'n*, 166 Ill. 2d 111, 121 (1995) (internal citations omitted). The interpretation of a statute by the Commission is "a question of law subject to *de novo* review." *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 398 Ill. App. 3d 510, 522 (2d Dist. 2009). In this appeal, the Commission's erroneous interpretation of the definition of "public utility" in the PUA, and the application of the undisputed facts to this legal issue, is subject to *de novo* review.

ARGUMENT

I. CPCNs pursuant to Section 8-406 of the PUA are limited to public utilities only, and Rock Island is ineligible as a non-public utility.

A. Introduction

"What Rock Island is asking the Commission to do is grant it a CPCN so it looks like a 'public utility' for purposes of condemning private property to build its line, while at the same time it plans to offer only a token percentage of that line's capacity for 'public use'. The transmission service that Rock Island plans to provide on its transmission line does not meet the public use standard under Section 3-105 of the PUA." (R.V27, C6629). These are the words of the ICC Staff at the close of a five day evidentiary hearing at the Commission on Rock Island's Verified Petition. Rock Island is not a public utility, and it

does not commit to serve the public. Despite the express language of the PUA, Rock Island, as a non-utility startup company, sought a CPCN from the Commission for which it is not statutorily eligible. Rock Island's public policy arguments regarding an apparent desire for an expansion to the statutory definition of "public utility" should have been, and still can be, made to the legislature. This Court is not required to clarify a clear statute.

The Farm Bureau is an organization with over 80,000 farmer members in Illinois. It represents members in Grundy, Henry, Bureau, La Salle, Rock Island, and Whiteside counties, where this Project is proposed to run. This is the first case at the Commission that the Farm Bureau has ever intervened in on behalf of its members, and it is because of the threat to Illinois farmers by a non-public utility startup company which seeks the power of eminent domain for a private purpose transmission line. Although the Verified Petition does not make a specific request for eminent domain, there is no conceivable reason why Rock Island would otherwise seek a CPCN for this private project. Rock Island's failure to rise to the statutory level of "public utility" status is a failure of its business model and makeup, and not a failure of statutory interpretation or public policy. The investors in Rock Island and its parent, Clean Line Energy Partners, LLC, certainly have the right to invest in any speculative business ventures as they wish; however, Illinois farmers should not be forced to participate in such a risky scheme. Although the Farm Bureau has never opposed a transmission project before, it is opposed to its members being burdened by the construction of a large-scale merchant DC transmission line with no apparent need, led by a start-up company that has never built a transmission line. The Third District Opinion does not discourage merchant transmission development. It discourages, as it should, developers from seeking CPCNs with nothing more than speculative business plans.

Two primary schools of thought have existed in this litigation as to when an applicant must be a public utility: (1) at the time of application for a CPCN, and/or (2) prior to the issuance of a CPCN. Rock Island and other Appellants have suggested that it need not be a public utility at all prior to application or issuance. At the outset of the Commission proceedings, the Farm Bureau asserted that the Commission should dismiss this matter given Rock Island's inability to meet the statutory definition of "public utility" as an applicant. (R.V7, C1618). This position was denied both by the ALJ on the Motion to Dismiss and again by the Third District. The Third District's Opinion focused on the issuance of the CPCN, denying that public utility status is required at the time of application.

This Court should follow a simple roadmap to determine if the Commission erred in issuing the CPCN without jurisdiction, and whether the Third District was correct when vacating it. First, the Court should analyze whether being a public utility is required at either, or both, the time of (1) the issuance of a Section 8-406 CPCN, and/or (2) application for a Section 8-406 CPCN. The Third District Opinion found that public utility status is required at issuance, but not at application. Although the Farm Bureau agrees with the Third District's conclusion on the issuance of a CPCN being limited to public utilities, it asserts that not requiring an applicant to be a public utility at the time of application also constitutes an erroneous interpretation of Section 3-105(a) of the PUA. The Farm Bureau urges that the plain language of the statute requires that an entity be a public utility at both the time of issuance and at the time of the application. Next, this Court should analyze whether Rock Island was and is a public utility as defined in Section 3-105 of the PUA based upon the uncontroverted evidence. The PUA's requirement that an entity own,

control, operate, or manage equipment or property to be considered a public utility, and commit to offer the same for "public use" in Illinois, is clear. As detailed below, this analysis requires nothing more than a plain reading of the statute, but it can also be completed with a review of the legislative history and case law. At every angle of analysis, it is clear that Rock Island is not a public utility entitled to a CPCN. Rock Island fails all of these inquiries. As done by the Third District, this Court should reverse the Commission's Final Order pursuant to 220 ILCS 5/10-201(e)(iv) because the Commission lacked jurisdiction to enter the Final Order. See 220 ILCS 5/10-201(e)(iv).

B. *De novo* is the appropriate standard of review

Whether Section 8-406 is limited to public utilities, and whether Rock Island is a public utility and eligible for a Section 8-406 CPCN, involve questions of law, and accordingly are subject to a *de novo* standard of review. In this appeal, the Third District appropriately overturned the Commission's expansion of Section 8-406 to non-public utilities, and found that it lacked the legal jurisdiction to issue a CPCN to Rock Island as a non-public utility. It also found that, based upon the uncontroverted facts, Rock Island did not have the qualifying attributes of a public utility. Here, as at the Third District, these issues are subject to *de novo* review.

Respectfully, the Farm Bureau disagrees with Appellants that a "manifest weight" of the evidence standard or even a "clearly erroneous" standard, is appropriate here. Admittedly, such standards are applicable where the reviewing court is reviewing findings of fact (manifest weight) or mixed questions of law and fact (clearly erroneous), but that is not our case. *See AFM Messenger Serv. Inc. v. Dep't of Employment Sec.*, 198 Ill 2d 380, 391-96, 763 N.E, 2d 272, 279-82 (2001). With respect to Rock Island's purported evidence

at the Commission supporting that it met the statutory definition of a public utility, the Intervenors did not present conflicting evidence that Rock Island was not a public utility; rather, the Intervenors' position was that what Rock Island presented was either absent, lacking, or not enough. Put simply, the undisputed facts did not meet the statutory threshold. Like with a motion for summary judgment, this Court is simply being asked to make a ruling as a matter of law, relying upon the undisputed facts.

Historically, Illinois courts applied a *de novo* standard of review "[w]here facts are not in dispute, [because] their legal effect becomes a matter of law and the rule as to the power of the court to set aside the decision only when it was made against the manifest weight of the evidence has no application." *Kensington Steel Corp. v. Indus. Comm'n*, 385 Ill. 504, 509, 53 N.E.2d 395, 397 (1944). *See also, Eden Ret. Ctr., Inc. v. Dep't of Revenue*, 213 Ill. 2d 273, 284, 821 N.E.2d 240, 246 (2004) (holding *de novo* standard of review applies when the administrative decision "depends solely on the application of the appropriate legal standard to the undisputed facts, which is a question of law.").

In administrative review cases, the standard of review applied by the court to the agency determination depends on what is in dispute: the facts, the law, or a mixed question of fact and law. *Cinkus v. Vill. of Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 210, 886 N.E.2d 1011, 1018 (2008). Findings of fact are reviewed under the manifest weight of the evidence standard, whereas questions of law are reviewed *de novo*, a review that is "independent and not deferential." *Id.* However, mixed questions of law and fact are treated differently depending on the circumstances. The Illinois Supreme Court has held that "where the historical facts are admitted or established, the controlling rule of law is *undisputed* and the issue is whether the facts satisfy the statutory standard, the case

presents a mixed question of fact and law for which the standard of review is clearly erroneous." (Emphasis added.) *Goodman v. Ward*, 241 Ill. 2d 398, 406, 948 N.E.2d 580, 585 (2011). However, "where the historical facts are admitted or established, but there is a *dispute* as to whether the governing legal provisions were interpreted correctly by the administrative body, the case presents a purely legal question for which our review is *de novo.*" (Emphasis added.) *Id.* Courts have routinely reviewed Commission decisions *de novo*. *See W. Illinois Elec. Coop. v. Illinois Commerce Comm'n*, 67 Ill. App. 3d 603, 606, 385 N.E.2d 149, 152 (4th Dist. 1979). (Where the facts are not in dispute and the issue is one of law, courts are not bound by the determinations of the Commerce Commission, nor is that determination entitled to a presumption of prima facie correctness). *See also Citizens Utilities Co. of Illinois v. Illinois Commerce Comm'n*, 153 Ill. App. 3d 28, 31–32, 504 N.E.2d 1367, 1370 (3d Dist. 1987), *aff'd*, 124 Ill. 2d 195, 529 N.E.2d 510 (1988).

In this case, the facts are undisputed and the issue is whether the Commission misinterpreted the PUA in determining Rock Island was eligible for a Section 8-406 CPCN. Accordingly, the standard of review is *de novo*.

C. The Commission does not have jurisdiction and its analysis is not entitled to deference by this Court.

"The Commission derives its power and authority solely from the statute creating it, and it may not, by its own acts, extend its jurisdiction." *Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 60, 923 N.E.2d 1259, 1268 (1st Dist. 2010), *aff'd.* 2011 IL 110166, 955 N.E.2d 1110. The determination of the scope of the Commission's power is a legal issue, to which the agency's interpretation is not entitled to deference, and is reviewed *de novo*. *Peoples Gas Light & Coke Co. v. Illinois Commerce Comm'n*, 222 Ill. App. 3d 738, 743, 584 N.E.2d 341, 344 (1st Dist. 1991); *City of Chicago v. Illinois*

Commerce Comm'n, 294 Ill. App. 3d 129, 135, 689 N.E.2d 241, 245 (1st Dist. 1997). As noted by the appellate court, the Commission could not take any action outside of its authority under the PUA. As such, any decision by the Commission which extends beyond its jurisdiction necessarily relies on an interpretation of the PUA and is subject to a *de novo* review.

The Appellants' extensive arguments as to deference, and their lengthy recitation of the facts in the record, are further misplaced here. First, it is not necessary for this Court to defer to the specialized rate-making and utility regulatory expertise of the Commission here, since the question before the Court is a threshold one: did the Commission have jurisdiction to exercise its regulatory authority over Rock Island? As this Court found in *People's Energy Corp. v. Illinois Commerce Comm'n*, 142 Ill. App. 3d 917, 492 N.E.2d 551 (1986), the Commission action lacks jurisdiction when the subject entity is not a public utility. *Id.* Second, the Intervenor's consistent position throughout this proceeding, and here, is that the undisputed facts do not qualify Rock Island for treatment as a public utility entitled to a CPCN under the PUA. Quite simply, what Rock Island presented on the record in support of its status as a public utility was insufficient to meet the express statutory language.

Courts have declined to give Commission interpretations and decisions deference in four general situations. First, while courts will sometimes give deference to an agency's interpretation of an ambiguous statute, "courts will not defer to an agency's construction of a statute when the statute is clear and unambiguous because "an interpretation placed upon a statute by an administrative official cannot alter its plain language." *Apple Canyon Lake Prop. Owners' Ass'n v. Illinois Commerce Comm'n*, 2013 IL App (3d) 100832, ¶21, 985

N.E.2d 695, 703. For example, in *Apple*, the court rejected the Commission's contention that the PUA did not require it consider public comments on website when reviewing ALJ's decision because the statute unambiguously provided that such comments were part of the Commission's record for decision. *Id.* at ¶36. *See also*, *Harrisonville Telephone Co. v. Illinois Commerce Comm'n*, 212 Ill. 2d 237, 252, 817 N.E.2d 479, 488 (2004) (Statute required Commission to adopt rule in conformity with FCC's determination on universal service support for phone lines; accordingly, Commission erred in adding exception to FCC's rule.).

Second, courts may "examin[e] whether the Commission acted within the scope of its authority," (*People ex rel. Hartigan v. Illinois Commerce Comm'n*, 117 Ill. 2d 120, 142, 510 N.E.2d 865, 874 (1987)) and can reverse a Commission order or decisions if it "is without the jurisdiction of the Commission." 220 ILCS 5/10-201(e)(iv)(B). As stated above, the Commission cannot extend its jurisdiction unilaterally (*Sheffler, supra*) and consequently, courts have declined to defer to the Commission in matters which exceed its authority. *See Business & Professional People for Public Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 217–19, 555 N.E.2d 693, 704–05 (1989) (Commission lacked authority to enter order that was in actuality a proposed settlement which had not been agreed to by all the parties, and further had no authority under the designated statute to set a rate for a five-year period.). *See also*, *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 343 Ill. App. 3d 249, 258, 797 N.E.2d 716, 724 (3d Dist. 2003) (Commission lacked authority to enter an order which would allow competing local exchange carriers to opt in to a tariff without engaging in negotiations, mediations, or arbitrations required by federal law.).

Illinois courts have also declined to follow the Commission interpretation when the interpretation was unreasonable. *See Monarch Gas Co. v. Illinois Commerce Comm'n*, 261 Ill. App. 3d 94, 101, 633 N.E.2d 1260, 1266 (5th Dist. 1994) (Commission order forcing gas company to refund overage charges was clearly unreasonable where company incurred charges by purchasing gas which saved its customers' rates being increased by 100%.) and *Bloom Township High School v. Illinois Commerce Comm'n*, 309 Ill. App. 3d 163, 175, 722 N.E.2d 676, 686 (1st Dist. 1999) (Commission's interpretation of tariff was unreasonable and inconsistent with the PUA where it gave a utility company the ability to arbitrarily decline to offer buy-through energy to certain customers.).

Finally, the Commission's decisions are entitled to little or no deference when the action is a drastic departure from longstanding precedent without sufficient evidence to support the departure. *See Citizens Utility Board v. Illinois Commerce Comm'n*, 166 Ill. 2d 111, 132, 651 N.E.2d 1089, 1099 (1995) (declining to give deference to Commission's policy decision regarding treatment of coal-tar cleanup expenses when Commission had previously taken opposite stance and failed to provide support for its change in position).

The situation here parallels a case this Court decided in November 2016 related to the Commission's jurisdiction when it agreed to review the Commission's authority over an alternate retail electric supplier ("ARES") upon the request of the Seventh Circuit Court of Appeals. *See Zahn v. North American Power & Gas, LLC*, 2016 IL 120526 (2016). In its request to this Court to answer the question whether the Commission has exclusive jurisdiction over reparation claims brought by a residential consumer against an ARES, the Seventh Circuit Court of Appeals noted the Commission's order in *Chiku Enterprises, Inc. v. GDF SUEZ Energy Resources NA, Inc.*, No. 10-0157, 2011 WL 1474049 (April 12,

2011), where the Commission "found without any explanation that an ARES was a 'public utility' under 220 ILCS 5/3-105, even though that exact provision excludes ARESs. *Zahn v. North American Power & Gas, LLC.*, 815 F.3d 1082, 1094 (2016). In the context of analyzing whether the Commission has exclusive jurisdiction over reparation claims brought by a residential customer against ARES, this Court pointed out:

> When the legislature established the regulatory structure for public utilities under the Public Utilities Act and then conferred on the Commerce Commission responsibility for determining whether rates charged by those utilities are just and reasonable, it also vested exclusive jurisdiction in the Commerce Commission to consider complaints that a utility has charged an amount for its product, commodity or service that is excessive or unjust. *Id.* ¶ 41; 220 ILCS 5/9-252 (West 2014). This is entirely logical. If technical expertise is needed to determine whether a utility rate is just and reasonable, it follows that the same technical expertise may be necessary to ascertain whether the rate subsequently charged by the utility is unjust or excessive. The two go hand in hand.
>
> Such considerations are not present, however, when it comes to ARESs. ARESs were not part of the traditional regulatory system established to govern public utilities. They were introduced under the Rate Relief Law as part of an effort to partially deregulate Illinois's electricity market (*Zahn*, 815 F.3d at 1084-85). As we have already pointed out, ARESs are expressly excluded from the definition of "public utility" under the Public Utilities Act (220 ILCS 5/3-105(b)(9) (West 2014)) and are not "electric utilities" under section 16-102 of the Rate Relief Law (220 ILCS 5/16-102 (West 2014)). They are simply "nonutilities licensed to sell retail electricity" (*Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 328 Ill. App. 3d 937, 939 (2002)). As such—and there is no dispute on this point—the prices they are permitted to charge are not established by the Commerce Commission through the conventional rate-making process and do not have to be submitted to the Commerce Commission for approval under the "just and reasonable" standard. In contrast to public utilities, an ARES's prices are a matter of contract between the ARES and its customers. The technical and regulatory expertise of the Commerce Commission does not come into play. Accordingly, the justification for giving the Commerce Commission exclusive original jurisdiction over the disputes involving rates charged by public utilities is absent where, as here, the complaint concerns overcharging by an ARES.
> *Id.* at 7-8.

Rock Island's own business plan contains all the facts necessary to conclude that Rock Island is not a public utility as set forth in the PUA, or as envisioned by the legislature. As addressed in more detail in later sections of this brief, Rock Island's project financing model for this merchant project permits it to sell 75% of the Project's capacity to anchor tenants, then sell the remaining 25% to the highest bidder through FERC's "open season" bidding process. (R.V6, C1383-1384). The proposed electric service is not being offered without discrimination to all who apply, but instead it is being offered discriminatively to the highest bidders to fund this startup business, to hopefully produce a return for its investors.

As in *Zahn*, Rock Island is setting its own prices by contract with its customers. The prices are not set through the conventional rate-making process by the Commission, requiring that the prices be just and reasonable. Like in *Zahn*, for similar reasons, this Court should not offer deference to the Commission for its review of a project that falls outside of its statutory jurisdiction.

Based on the above, the Commission is not entitled to deference, and this Court should apply a *de novo* standard of review.

D. Only public utilities may obtain Section 8-406 CPCNs.

The Appellants here attempt to complicate an issue which is frankly quite straightforward. In order to obtain a CPCN pursuant to Section 8-406 of the PUA, an applicant must be a public utility, as defined in Section 3-105 of the PUA and as later referenced in Section 8-406(a). That section permits only a "public utility" to be issued a CPCN to transact business in Illinois:

> No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity

> within this State as of July 1, 1921 and not possessing a certificate of public convenience and necessity from the Illinois Commerce Commission, the State Public Utilities Commission or the Public Utilities Commission, at the time this amendatory Act of 1985 goes into effect, shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business. 220 ILCS 5/8-406(a). (Emphasis added.)

Similarly, Section 8-406(b) of the PUA permits only a "public utility" to be issued a CPCN to construct electric transmission plants, equipment, property, and facilities:

> No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or any extension or alteration thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction. Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity. The Commission shall determine that proposed construction will promote the public convenience and necessity only if the utility demonstrates: (1) that the proposed construction is necessary to provide adequate, reliable, and efficient service to its customers and is the least-cost means of satisfying the service needs of its customers or that the proposed construction will promote the development of an effectively competitive electricity market that operates efficiently, is equitable to all customers, and is the least cost means of satisfying those objectives; (2) that the utility is capable of efficiently managing and supervising the construction process and has taken sufficient action to ensure adequate and efficient construction and supervision thereof; and (3) that the utility is capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers. 220 ILCS 5/8-406(b). (Emphasis added.)

The Commission, in its Final Order, interpreted Sections 8-406(a) and (b) of the PUA to permit "non-utility applicants to both become public utilities and to subsequently operate, for public use, plant and equipment that transmit electricity" contrary to the plain text of Section 3-105(a). (R.V34, C8503). The Appellants agree with this position. However, Section 3-105(a) defines a "public utility" as an entity 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 ... production, storage, transmission, sale, delivery or furnishing" of electricity. See 220 ILCS 5/3-105. The Third District was correct in analyzing whether Rock Island was statutorily eligible to receive the relief it obtained in the Final Order, and treating it as a jurisdictional issue. In Illinois, the PUA governs (and the Commission regulates) the transmission of electric service and public utilities. In order to transact business in Illinois as a public utility, or to construct electric transmission plants, equipment, property, and facilities, or take any action *as a public utility*, an entity must first qualify as a public utility pursuant to the PUA. Rock Island does not. Rock Island's unique business plan should be rewritten to comport with the law, not the other way around.

The Commission and the Appellants take a liberalized view that Section 8-406 CPCNs are not limited to existing public utilities or those companies that commit to serve the public. In addition, each make statutory interpretation and public policy arguments in support of an expansive reading of the statute. In the following section, the Farm Bureau will address these issues and the undisputed evidence presented in the context of the express language of the PUA. In the end, only a plain reading of the statute is required.

E. Rock Island is not, and was not, a public utility.

Before this Court analyzes the extensive legal arguments made herein and in other briefs regarding whether Rock Island is a public utility, it is important to understand what is not in dispute in this litigation. The following is not in dispute:

1. The Commission's Final Order did not make a finding that Rock Island was a public utility. (R.V34-35, C8475).

2. Rock Island has never built a transmission line anywhere. (R.V44, RP841).

3. Rock Island has never delivered electricity to anyone, anywhere. (R.V44, RP841).

4. The wind farms proposed to provide the energy that will be pumped into the proposed transmission lines of Rock Island do not exist. (R.V38, RP235).

5. There is not one customer that came forward and committed to this proposed project. (R.V44, RP841).

6. Rock Island has not previously ever received a CPCN from the Commission to construct utility facilities, to conduct utility business, or to deliver electricity.

7. The proposed transmission line, which has to be fed from Iowa, has not been approved in Iowa by its utilities commission.[3] See *In Re Rock Island Clean Line, LLC*, IUB Docket No. E-222480 (IUB December 23, 2016).

8. In its PLA, Rock Island affirmatively states that "during the ICC proceeding, Rock Island did not own any transmission facilities in Illinois to be used for the Project." Rock Island PLA, p. 5.

By its own admission, Rock Island is not and was not a public utility. As detailed hereinbelow, there is also no reasonable interpretation of the law that would lead the Court to believe it is a public utility, or that Section 8-406 is available to non-public utilities.

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[3] On November 6, 2014, Rock Island filed with the Iowa Utilities Board ("IUB") 16 petitions for electric transmission line franchises in 16 different counties which were consolidated into Docket No. E-22248. On December 22, 2016, Rock Island withdrew its 16 petitions for electric transmission line franchises, and the IUB entered an Order accepting Rock Island's withdrawal of petitions on December 23, 2016, which may be accessed here: https://efs.iowa.gov/cs/groups/external/documents/docket/mdax/njew/~edisp/1610798.pdf.

1. Rock Island is not a public utility pursuant to the clear and unambiguous language of Section 3-105 of the PUA.

While the language of the applicable statutory sections plainly say one thing, Rock Island has repeatedly insisted, before the Commission, the Third District, and now this Court, that it cannot be so simple; the language must mean something other than what is expressly and unambiguously stated. Despite the Appellants' protests, the text of Section 3-105 and Section 8-406 are clear and unambiguous. As an administrative agency, the Commission has only that jurisdiction conferred upon it by the legislature. *Ill.-Ind. Cable Television Ass'n v. Ill. Commerce Comm'n*, 55 Ill. 2d. 205, 207 (1973), *citing, Lambdin v. Commerce Comm'n*, 352 Ill. 104, 106 (1933). The legislature provided a clear and unambiguous definition of "public utility." The Commission may not, by its own acts, expand its jurisdiction. *Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51 (1st Dist. 2010).

When interpreting a statute, "our duty is to ascertain and give effect to the intent of the legislature." *Board of Trustees of the Teachers' Retirement System of Illinois v. West*, 395 Ill. App. 3d 1028, 1032 (2009). That intent is best derived from the statutory language, which, if unambiguous, must be enforced as written. *Id.* at 1032. "Courts must not construe words and phrases in isolation and, instead, should construe them in light of other relevant portions of the statute so that—if possible—no term is rendered superfluous or meaningless." *Id.* at 1035. The Commission may only apply the plain language of Section 3-105, and because Rock Island does not meet the statutory criteria to operate as a public utility because it owns neither electric transmission infrastructure nor property, the Commission had no jurisdiction to provide the relief sought.

Rock Island simply appeared before the Commission with a business plan, unnamed anchor tenants, and an assertion that it's to-be-determined transmission project will likely benefit Illinois consumers. (R.V38, RP226-227). Neither during the pendency of the Commission proceedings, nor now, does Rock Island own, control, operate, or manage, directly or indirectly, for public use, any plant, equipment, or property used, or to be used for or in connection with, electric transmission service in Illinois. (R.V38, RP231-233; R.V46, RP1116-1120, 1125).

The Commission improperly ignored the clear language of Section 3-105(a) in holding that the PUA does not require present ownership of transmission facilities or property in order for an entity to meet the clear statutory definition of "public utility" for the issuance of a CPCN. Here, Rock Island has not established that it "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 ... production, storage, transmission, sale, delivery or furnishing" of electricity. 220 ILCS 5/3-105. Accordingly, it is not a public utility, and the Commission cannot make it so by ignoring the legislature's clear definition of public utility. The potential to own and operate transmission assets in the future does not meet the definition of a public utility, and Rock Island does not even commit to do the same. (R.V6, C1380). If Rock Island had invested in some property or equipment in Illinois to provide transmission to Illinois customers, it may have had an argument that it was a public utility. The fallacy exists in Rock Island's business plan, not in a clearly written statute for which it does not qualify. The Commission erred by granting Rock Island a CPCN. If a more expansive definition of "public utility" is required for the

purposes of public policy, this is a question for the legislature, and not for the Commission or this Court on review.

2. The legislative history further demonstrates that the Commission's expansive definition of "public utility" to include Rock Island is erroneous.

Since the language of Section 3-105(a) is clear and unambiguous, the Court's inquiry should end here. However, as evidenced by a recent decision of this Court, even where the language of a statute is clear and unambiguous, legislative history is often still helpful. *See Kanerva v. Weems*, 2014 IL 115811, 13 N.E. 3d 1228 (2014). In *Kanerva*, the Court determined that the legislature acted unconstitutionally in reducing state employee health insurance benefits. *Id.* In doing so, the Court looked to basic principles of statutory construction ("The construction of constitutional provisions is governed by the same general principles that apply to statutes. *Id.* at 1238-1239, citing *People ex rel. Chicago Bar Ass'n v. State Board of Elections*, 136 Ill.2d 513, 526–27, 558 N.E.2d 89 (1990)). Finding the relevant constitutional provision clear and unambiguous, it nonetheless consulted the 1970 constitutional debates, as well as decisions on this same point in other states. *Id.*

Here, while there are no debates to consult[4], the legislative history of the public utility definition available nonetheless supports the clear reading espoused above. Indeed, prior to amendments to the PUA that occurred in 1967, the public utility definition read as the Commission erroneously interprets it here. Specifically, it defined "public utility" as an entity "*that now or hereafter*: (a) may own, control or manage, within the State ... any

[4] Records of legislative debates and other legislative history are not maintained in the State of Illinois prior to 1970.

plant, equipment or property used or to be used for or in connection with the ... transmission ... of ... electricity..." (R.V7, C1637-1638) (emphasis added).

As this Court keenly and recently observed in *Kanerva*, the legislature is presumed to act with knowledge of its previous acts:

> Just as the legislature is presumed to act with full knowledge of all prior legislation (*People v. Jones*, 214 Ill.2d 187, 199, 291 Ill.Dec. 663, 824 N.E.2d 239 (2005)), the drafters of a constitutional provision are presumed to know about existing laws and constitutional provisions and to have drafted their provision accordingly (see 16 Am.Jur.2d Constitutional Law § 35 (2009)); *Plymouth Township v. Wayne County Board of Commissioners*, 137 Mich.App. 738, 359 N.W.2d 547, 552 (1984). If they had intended to protect only core pension annuity benefits and to exclude the various other benefits state employees were and are entitled to receive as a result of membership in the State's pensions systems, the drafters could have so specified. But they did not. *Kanerva* at 1240.

Moreover, with an amendment of previously unambiguous statutory provision, as here, the legislature is presumed to have acted intentionally, to change the law. *See People v. Bailey*, 375 Ill. App. 3d 1055, 1063-64, 874 N.E.2d 940, 948-949 (2007).

The Commission ignored the historical language changes made by the legislature to the definition of "public utility" in the PUA. In 1967, the Illinois General Assembly amended the definition of "public utility" to a form substantially similar to what it is today. (R.V7, C1635-1636). The 1965 version of the statute defined "public utility" as an entity "that now or hereafter: (a) may own, control or manage, within the State ... any plant, equipment or property used or to be used for or in connection with the ... transmission ... of ... electricity..." (*Id.* at 183-184; *Id.* at 1637-1638) (emphasis added). After amendment, the 1967 version of the statute then restricted the language as it does almost identically in today's version of the definition of "public utility," requiring that a public utility must first own transmission infrastructure prior to being deemed a public utility.

Here, the Commission reads the PUA as it read pre-1967, ignoring the important change the legislature made in deleting the words "now or hereafter" and "may." As succinctly put by this Court:

> Where a statute is clear and unambiguous, we cannot restrict or enlarge its meaning. Rather, we must interpret and apply it in the manner in which it was written. We cannot rewrite a statute to make it consistent with the court's idea of orderliness and public policy. *In re Estate of Schlenker*, 209 Ill. 2d 456, 466, 808 N.E.2d 995, 1001 (2004); *Henrich v. Libertyville High School,* 186 Ill.2d 381, 394–95, 238 Ill.Dec. 576, 712 N.E.2d 298 (1998).

The Commission's revision of the definition of public utility constitutes an *ultra vires* act, not contemplated by the legislature in its revision of the definition. Simply, the Commission had no jurisdiction to second guess the intent of the legislature by expanding the definition of "public utility" to include an entity with absolutely no current property or *vested* business interest in Illinois, or a commitment to serve. The erroneous interpretation of the statute proffered by the Commission and advocated by the Appellants is contrary to the clear intention of the legislature.

Illinois courts have long held administrative agencies to the principle that they only have that jurisdiction conferred upon it by the legislature, and may not expand such jurisdiction, including by improperly expanding the plain meaning of a statute. In *Dusthimer v. Bd. of Trustees of Univ. of Illinois*, 368 Ill. App. 3d 159 (4th Dist. 2006), a student and his parents challenged the University of Illinois' decision that the student, whose parent worked at an Illinois community college, was not considered a resident for tuition purposes. In interpreting the definition of "state-supported institution of higher education" in its own regulation on residency, the University's Board of Trustees denied that Black Hawk College, as a community college, fell under the definition of a "state-supported institution of higher education," and cited certain legislative history. *Id.* at 160.

When confronted with the University's assertion that its interpretation of the regulation should be given deference, the Court stated:

> When we defer to an agency's interpretation, our justification for doing so is the agency's experience and expertise (*LaBelle*, 265 Ill. App. 3d at 735), but all the experience and expertise in the world cannot change what a regulation plainly says. If the regulation is unambiguous, "that is the end of the matter" (*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)), and deference goes out the window. "'[O]nly as the interpreter of a doubtful law'" does an agency deserve deference. *Hetzer*, 49 Ill. App. 3d at 1047, quoting *Whittemore v. People*, 227 Ill. 453, 471 (1907), quoting *2 Lewis' Sutherland on Statutory Construction* § 473 (2d. 1904). *Id.* at 164-165.

Upon review, the court concluded that the definition of "state-supported institution of higher education" was clear and unambiguous, and therefore should be afforded its plain and ordinary meaning, and the University's expansive reading was reversed. See *Id.*

Here, the law is not in doubt. Section 3-105 was crafted by the legislature intentionally to require present ownership or control of defined infrastructure; that is axiomatic given the deletion of the pre-1967 phrase "now or hereafter" and "may." If the legislature wished for the text to have the interpretation proffered by the Commission and Appellants, the legislature would have drafted the text to so reflect, and could have stated: "that will own...," "that may own...," "that could own...," "that intends to own...," etc. Rock Island is not a public utility pursuant to statute and Section 8-406 CPCNs are not available to non-public utilities.

3. Under a similar statutory definition of public utility in another state, Rock Island's sister company was denied approval utilizing the same considerations urged here.

Rock Island's Project is not isolated to Illinois. Rather, its proposed transmission system will cross America's heartland and requires approvals from two other states. Moreover, while the issue presented here may be one of first impression in Illinois, it is not

without parallel in other states that had to consider an arm of related projects for Rock Island's sister companies. Rock Island's sister company, Plains and Eastern Clean Line, LLC, was denied public utility status in Arkansas. (R.V7, C1639). Notably, Arkansas' definition of public utility is similar to that of the current Illinois definition of public utility, and it denied Rock Island's sister company public utility status. (R.V7, C1651). Conversely, Oklahoma's definition of public utility (R.V7, C1657) is similar to Illinois' 1965 definition of public utility in that it provides for potential ownership of transmission equipment and capacity, which is the reason that Rock Island's sister company was able to attain public utility status in Oklahoma.

The Commission's interpretation of the statute improperly read a "latent ambiguity" into the definition of public utility. The court in *Dusthimer* (mentioned *supra*) spoke to the core of this issue, stating:

> A latent ambiguity arises if the words of the legislation are clear in themselves but, because of external circumstances (in this case, the liberality of state grant programs), the literal application of those words would create an absurdity that the legislative body could not possibly have intended. *Gibson v. Country Mutual Insurance Co.*, 193 Ill. App. 3d 87, 90 (1990). To maintain the separation of the legislative and judicial branches and avoid compromising our fidelity to the text, we should be extremely reluctant to second-guess the clear language of legislation in the name of preventing a latent ambiguity. *In re Estate of Snodgrass*, 336 Ill. App. 3d 619, 623 (2003). Whenever a court disregards the clear language of legislation in the name of 'avoiding absurdity,' it runs the risk of implementing its own notions of optimal public policy and effectively becoming a legislature. Interpreting legislation to mean something other than what it clearly says is a measure of last resort, to avoid "great injustice" or an outcome that could be characterized, without exaggeration, as an absurdity and an utter frustration of the apparent purpose of the legislation. *In re Detention of Lieberman*, 201 Ill.2d 300, 319-20 (2002), quoting *People ex rel. Cason v. Ring*, 41 Ill.2d 305, 312-13 (1968), quoting *Village of Glencoe v. Hurford*, 317 Ill. 203, 220 (1925). *Dusthimer*, 368 Ill. App. 3d at 168-169.

No latent ambiguity exists in this circumstance. The language of Section 3-105 clearly and unambiguously requires the present ownership of transmission infrastructure in Illinois to be deemed a public utility.

In other states, such as Oklahoma, the statutory definition of a public utility includes entities that "now or hereafter may own" transmission infrastructure. Okla. Stat. tit. 17, § 151. The experience of these two states, on Rock Island's sister company's project, illustrates that statutory language is drafted as it is for a reason. The Commission's interpretation of the statutory language underpinning the public utility definition failed to respect the clear and unambiguous text provided by the General Assembly.

It was clear that both the Commission and Rock Island confused the explicit requirement set forth by the statute. Before the Commission, Rock Island synthesized the statutory requirements to create a "chicken-egg" dilemma. In its Brief before this Court, it asserts a "catch-22." Rock Island Brief, p. 22. Rock Island is wrong to cast the Farm Bureau's argument as creating a circular loop, such that it must purchase infrastructure to become a public utility, but it must be a public utility to purchase infrastructure. Sections 3-105 and 8-406 of the PUA require the ownership of qualifying transmission assets or authorization for use to assets to construct a new transmission line. Neither section requires or authorizes an applicant to be a certified public utility in order to purchase qualifying transmission assets.

Rock Island is wrong for two important reasons: (1) it is based upon an erroneous statutory interpretation, and (2) it could build this project as a private project without being certificated as a public utility under a statute which does not recognize it as such. First, Rock Island's interpretation of the statute is in error because the PUA simply authorizes

regulation of utilities upon their creation; the statutory framework does not provide a regulatory process for the formation of utilities. *State Pub. Utilities Comm'n v. Monarch Refrigerating Co.*, 267 Ill. 528, 543 (1915). An entity can only become a utility when property is offered to the public. *Central Trust Co. v. Calumet Co.*, 260 Ill. App. 410, 416 (1st Dist. 1931), *see also, Austin Bros. Transfer Co. v. Bloom*, 316 Ill. 435, 437 (1925) ("property becomes clothed with a public interest when used in a manner to make it a public consequence"). The PUA will only regulate a public utility while the owner of the public infrastructure maintains the use thereof in the public interest, and not after public use has ceased. *Munn v. Illinois*, 94 U.S. 113 (1876).

Second, there is nothing stopping Rock Island from constructing this Project as a private project without seeking public utility status from the Commission. Petitioners' assertion that the Third District's holding will make it practically impossible for non-incumbents to have the capability to develop new transmission projects is unsupported; neither the record evidence nor persuasive case law supports such a claim.

A non-incumbent company that engages in developing transmission lines has options besides obtaining a CPCN from the Commission. Specifically, a non-incumbent could obtain an easement, or right-of-way, through private negotiations and build transmission lines on that property without invoking the State's eminent domain authority. This is not a new concept for Illinois. Wind farms and other non-utilities throughout Illinois, without having a CPCN, have constructed transmission lines that interconnect with ComEd's system.[5]

[5] *See, e.g.*, Specifications for Interconnection Service Agreement by and among PJM Interconnection, L.L.C., and Bishop Hill Energy LLC and Commonwealth Edison Co. ¶

Additionally, private electric lines are frequently built without Commission involvement in Illinois. They too are constructed utilizing privately and voluntarily negotiated easements with landowners. If Rock Island were to take these steps, then seek public utility status at a later time, it could potentially make a stronger argument that it has public utility assets immediately available and committed for public use. The *possibility* of owning utility assets in the future does not make an applicant a public utility. There must be more than a business plan for the Commission to grant a CPCN to serve the public, and there must be a reason the legislature wanted the ownership of utility assets to be a prerequisite and not an aspiration before a company serves the public and seeks to condemn private land. Rock Island must have utility assets *at least* "to be used" under the strictures laid out in Section 3-105.

There are only two reasons why a company would seek public utility status in Illinois: (1) cost allocation, and (2) eminent domain. A CPCN provides a public utility with significant rights and duties by statute, including a direct path to eminent domain authority where a public utility project requires rights of way across private real property. The only reason that Rock Island filed for a CPCN from the Commission was in order to obtain the ability to request eminent domain authority in the event it does not obtain voluntary easements throughout the Project planning and construction. This possibility would not be available to a purely private project. Although the proceedings before the Commission did not include a request for eminent domain authority, if the Commission's Order is allowed to stand, Rock Island inevitably would have returned to the Commission

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4.0(a)(1) (requiring generator to construct 27.9 mile line), *available at* http://elibrarybackup.ferc.gov/idmws/common/opennat.asp?fileID=12701775.

to seek authority, as a newly-certificated public utility, to exercise eminent domain to acquire rights of way across those farms and lands.

The ability to obtain eminent domain by a public utility is found at Section 8-509 of the PUA. 220 ILCS 5/8-509. In order to be able to go to the Commission and obtain eminent authority, a public utility must first have authority under Section 8-503 of the PUA, which was denied by the Commission in this case for the time being. (R.V35, C8691-8693). In order to obtain the relief under Section 8-503 of the PUA (220 ILCS 5/8-503), the public utility also must have obtained proper authority under Sections 406(a-b) of the PUA. This process has provided a pathway to eminent domain for Rock Island. At a minimum, Rock Island could have used the threat of condemnation in voluntary easement negotiations. Based upon the attributes of Rock Island as an entity, and the nature and purpose of the Project, Rock Island is not legally entitled to a certificate to conduct business as a public utility or to construct the Project as public utility property and the Commission was wrong to exercise jurisdiction over the Project. Because infrastructure dedicated for the public use is necessary for an entity to be considered a public utility, not an order from the Commission, there is no "chicken-egg" dilemma created by the PUA. Rock Island is not a public utility.

4. The Commission has previously recognized that current ownership of infrastructure in Illinois was an element necessary to meet the public utility definition.

The Commission has previously faced the question of whether a transmission company was properly considered a "public utility" under the PUA definition. *See In re American Transmission Co. LLC*, (ICC Docket No. 01-0142) 2003 WL 1995923 (Ill.C.C).

There, the Commission provided the proper analysis and ruling with respect to American Transmission Co. ("ATC").

The Commission in the above-referenced docket recognized that ATC was "formed to plan, construct, operate, maintain, and expand transmission facilities to provide an adequate and reliable transmission system that meets the needs of all the system's users, supports effective competition in energy markets without favoring any market participant, and to engage in other incidental and appropriate activities." *Id.* Like here, Docket No. 01-0142 above was filed by a company seeking its first certificates under Sections 8-406(a) and 8-503. Unlike here, however, the Commission recognized that ATC had previously purchased the "transmission assets, consisting of transmission lines and substation facilities providing a transmission function" in Illinois from South Beloit Water, Gas and Electric Company. *Id.* Properly analyzing the public utility definition as to that case, with respect to Section 8-406(a), the Commission properly found:

> The Petitioners own, control, operate, and manage, within this State, for public use, facilities used in the transmission of electricity. Therefore, the Petitioners fall within the definition of a "public utility," as is set forth in Section 3-105 of the Act. Accordingly, Section 8-406(a) of the Act requires the Petitioners to obtain a Certificate of Public Convenience and Necessity prior to transacting any business in this State.
> *Id.*

Unlike in the instant case, the Commission made an affirmative finding that because ATC owned, controlled, operated, and managed, within Illinois, for public use, facilities for the transmission of electricity, it was a public utility and was awarded a CPCN. The Commission erred with Rock Island by not making a similar finding, or engaging in a similar analysis.

5. Rock Island did not and does not possess transmission property and infrastructure satisfactory to meet the public utility definition.

The Final Order here is contrary to the Commission's prior analysis in the ATC case and, more importantly, is contrary to the definition carved by the legislature. The intent of the General Assembly is clearly and unambiguously established in Section 3-105. Rock Island asserts that it satisfied the definition of public utility because it (1) has an option to purchase two properties, including one in Grundy County, Illinois, and (2) holds a small percentage of the easements needed for the route. Rock Island Brief, p. 29.

With regard to its options to purchase property, an option contract is simply an option; it is neither an ownership right, nor a possessory right to real property. The evidence does not demonstrate that Rock Island has any day-to-day control rights over the real property. Rock Island simply has an option to purchase the real property at some point in the future, but it is not required to do so. Rock Island asserts that it controls the real property, but in truth, the only thing that it controls is the ability to purchase the real property, and later possess the real property in the future should it obtain its regulatory approvals and hit its other milestones. An "option" or "option contract" is a unilateral contract that gives the optionee the right to purchase the property on the terms and conditions named, but the optionee is not bound to do so. In *Keogh v. Peck*, 316 Ill. 318 (1925), this Court said: "[a]n 'option' contract differs from a 'sale of lands' and an 'agreement to sell lands.' A sale of lands is the actual transfer of the title from grantor to grantee by an appropriate instrument of conveyance. An agreement to sell lands is a contract to be performed in the future, and if fulfilled results in a sale. An option, originally, is neither a sale nor an agreement to sell." *Id.* at 328.

It cannot be said that Rock Island has the ability to control or use the subject real property within the State of Illinois, for public use, at the time of the CPCN application, at the time of CPCN issuance, or today. As stated in the Dissenting Opinion to the Final Order at the Commission for Rock Island's sister company, Grain Belt Express Clean Line, LLC, in Docket No. 15-0277:

> An "option" to purchase property that would serve as the site to place equipment does not suffice as ownership of property to satisfy Section 3-105(a)'s definition of public utility. See *Terraces of Sunset Park v. Chamberlin*, 399 Ill. App. 3d 1090, 1096 (2nd Dist. 2010) (finding that "an option contract, by definition, does not involve the transfer of property *or an interest therein*" (emphasis added)) (citing *Whitelaw v. Brady*, 121 N.E.2d 785, 789 (1954)). GBX did not present any other evidence of ownership, control, management, or operation.
> *In Re Grain Belt Express Clean Line, LLC*, Docket No. 15-0277 (2015), Dissenting Opinion, p. 6.

Rock Island also states that it "holds a small percentage of the easements needed for the route..." (R.V1, C37; R.V2, C258; R.V41, Tr. 421-22, 491; Third District Opinion, ¶17). Yet, the record is devoid of actual evidence of any specific easements; the record references above are simply, as here, assertions. A review of the record indicates that no specific easements were introduced into the record in support of this contention. In addition to not meeting its burden regarding this statutory element to establish that the easements were satisfactory ownership or control of utility properties in Illinois, this Court has previously determined that "an easement is a right or privilege in the real estate of another" and by definition it is a nonpossessory interest. *Nationwide Fin., LP v. Pobuda*, 2014 IL 116717, ¶ 29, 21 N.E.3d 381, 391. *See also*, Restatement (Third) of Property (Servitudes) § 1.2(1) (2000) ("An easement creates a nonpossessory right to enter and use land in the possession of another.").

In addition, the U.S. Supreme Court further held, that "if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land." *See also, Smith v. Townsend,* 148 U.S. 490, 499, 13 S.Ct. 634, 37 L.Ed. 533 (1893) ("[W]hoever obtained title from the government to any ... land through which ran this right of way would acquire a fee to the whole tract subject to the easement of the company, and if ever the use of that right of way was abandoned by the railroad company the easement would cease, and the full title to that right of way would vest in the patentee of the land.") The vague reference in the record by Rock Island in cross examination to a small percentage of the easements needed for the route not only does not suffice to meet Rock Island's burden of proof at the Commission level, the easements also do not rise to the level of an ownership or control interest in utility properties to be used in Illinois. For all of the above reasons, Rock Island has not provided any evidence that it has utility properties under its ownership or control for public use in Illinois.

6. The Project and Rock Island's alleged utility property is not for "public use."

As detailed by the Third District, to be a "public utility" in Illinois, it must satisfy the "public use" requirement. A public utility is an entity that "owns, controls, operates, or manages, within this State...for public use...property...used or to be used for or in connection with...the...transmission...of...electricity. 220 ILCS 5/3-105(a) (Emphasis added). Rock Island must have a commitment to service the public.

The facts regarding the supply of energy from the generators of the product, and the resulting distribution of such energy to end-users, is not in dispute and is clearly articulated on pp. 15-16 of the Third District Opinion. The anchor tenants, who are the

"build it and they will come" windfarms in western Iowa that do not currently exist, will purchase 75% of the Project's capacity under Rock Island's stated plan. (R.V6 C1380-1386). These generators will then deliver the electricity to the PJM grid, which will in turn distribute the energy to the members of its multi-state regional transmission organization. *Id.* The remaining 25% of the capacity will then be sold to those seeking electricity through an "open season" bidding process as approved by FERC. *Id.* The "open season" does not mandate that the Project serve Illinois customers in its rules established by FERC. *Id.* In this process, the electricity simply goes to the highest bidder for the service. Only after this process is complete, will the service be offered generally to the public in Illinois. *Id.* That said, by Rock Island's own admission, "as a practical matter, residential and smaller non-residential customers will not be transmission customers of the Project..." (R.V6, C1389).

In *Highland Dairy Farms Co. v. Helvetia Milk Condensing Co.*, 308 Ill. 294, 139 N.E. 418 (1923), this Court affirmed a Commission decision finding two corporations were not operating a public utility. *Id.* In that case, a dairy farm company brought a suit against a milk condensing company and a brewing company, alleging that they were jointly engaged in furnishing water as a "public utility," and as such, they were subject to the jurisdiction of the Commission. *Id.* at 296.

The companies had entered into a contract to share a water reservoir and, with the mutual agreement of the city, constructed pipes along public roads and city streets. *Id.* at 297. The water service formed by the companies was intended for private business use; however, the service permitted approximately 16 city inhabitants to connect their premises to the pipes. They denied all other applicants. *Id.* at 421.

The Commission determined the service was not a public utility, as it does not serve a public purpose. In affirming the Commission's decision, the Court's rationale is as pertinent today as it was then:

> Whenever any business or enterprise becomes so closely and intimately related to the public, or to any substantial part of a community, as to make the welfare of the public, or a substantial part thereof, dependent upon the proper conduct of such business, it becomes the subject of the exercise of the regulatory power of the state. When once determined to be a public utility under the statute the company must furnish all who apply, and the service it furnishes must be without discrimination and without delay. The nature, however, of a corporation and the purpose of its organization must be ascertained very largely by reference to the terms of its charter. *Utilities Com. v. Bethany Telephone Ass'n, supra.* It is clear from the evidence in the record that the appellees did not furnish all applicants with water who applied for service, without discrimination or delay; that they furnished the water that was furnished according to their own wishes, and not without discrimination and without delay.
> *Id.* at 300–01.

The key and undisputed facts in that case are pertinent here: (1) the water service appellees denied several applicants access to their water supply; (2) those permitted access to the water supply were decided according to service's own desires and plans (*i.e.* in a discriminatory manner); (3) there was no established or uniform rate; (4) the water service was not capable of furnishing water to the entire city; and (5) the water service never attempted to procure patrons for the water supply. *Id* at 301. The Court held that the record did not provide sufficient evidence of a close relationship with the public. As such it concluded that the water service was not a public utility; thus, the Commission had no jurisdiction to enter an order against it. *Id.* at 302 (stating, "the jurisdiction of the commission is by the terms of the statute confined to the control and supervision of owners and operators of property devoted to a public use...").

Another relevant case was examined by the Third District, and it too provides guidance here. This Court in *Mississippi River Fuel Corp. et al. v. Illinois Commerce Commission,* 1 Ill.2d 509 (1953), upheld the Circuit Court's reversal of a Commission decision that found the Mississippi River Fuel Company ("Mississippi") to be a public utility. *Id.* At issue was Mississippi's contracts which permitted them to make direct sales of natural gas to approximately 23 industrial customers in Illinois. *Id.* at 512-13. In reaching its decision, the Court reviewed the record before the Commission and found that "Mississippi has never intended to assume the status of a public utility...it did not exercise the right of eminent domain in laying its pipelines... it has never taken any municipal or other public franchise to sell its gas...[and] it has not established uniform rates" *Id.* at 515. The fact that Mississippi was in the business of selling gas was not sufficient by itself to render Mississippi a public utility. *Id.* at 516. The Court reasoned that "while it is not necessary that the benefits be received by the whole public [] it is necessary that all persons have an equal right to the use, and such use must not be confined to specific privileged persons to make it a public use within the meaning of the Public Utilities Act." *Id.* at 517. According to the Court, Mississippi's sales to specific and select customers could not be classified as devotion of its property to "public use" and thus Mississippi did not qualify as a public utility. *Id.* at 519.

Rock Island emphasizes the "anchor tenant" aspect of the proposed Project. This is analogous to the twenty-three industrial customers to whom Mississippi River Fuel Corporation sold natural gas in which this Court held that "the company's action in selling gas to a limited group of industrial customers cannot properly be characterized as the devotion of its property to 'public use,' within the meaning of the Public Utilities Act of

this State." *Id.* For all the record discloses, Rock Island may have far fewer than twenty-three anchor tenants. At least as important, if not more, is that in *Miss. River*, the industrial customers *were actually taking* natural gas service from the company; unlike here where not one anchor tenant exists or has been identified, not one has begun constructing a wind energy generation project, not one has obligated itself to construct even a single wind energy turbine, and not one has contracted for transmission service with Rock Island.

Similar shortcomings exist with respect to the planned marketing of the remaining 25% of the Project's capacity. The Commission in its Order accepted the FERC-approved plan to sell 25% of the capacity in an open season auction without delving into any details that should impact the relationship of the marketing plan to the public use requirement. Rock Island "would be required to offer its service to all customers in a non-discriminatory manner," subject to an open access transmission tariff. (R.V33, C8269). Rock Island places great emphasis on this transmission service offer requirement, but the Final Order fails to explain who those customers may be. Theoretical eligibility to bid at an auction provides very little as to who may actually find it feasible to bid for capacity on the transmission line. Again, we do know that no Illinois electricity generators will be bidders, as the DC nature of the line forecloses any generator to feed electricity into the line other than at the line's point of beginning. (R.V6, C1388-1389). Similarly, the only physical point at which a potential customer that wants to purchase any electricity transported by the line, and purchase any portion of the remaining 25% of capacity on the line to facilitate its electricity purchase, is at the line's terminus. The physical constraints evident in Rock Island's own design of the Project severely restricts potential users of the line, so that legal availability to "all customers" may actually be very few large and unique customers. *Id.*

These and other factors serve to severely undercut Rock Island's "public use" contention. The record shows that no retail electricity users will be candidates to bid for capacity on the line. Rather, a likely potential bidder would be a large wholesale electricity market participant, such as a public utility or wholesale power marketer. (R.V6, C1389). But, as we saw in *Miss. River*, the fact that the company also sold natural gas at wholesale to two separate public utilities in Illinois, for resale and distribution to the many customers of those two utilities, did not change the result in that case. This is not furnishing electricity "to all who apply...without discrimination and without delay." *Highland Dairy Farms Co.*, 308 Ill. at 300-301.

In its brief, Rock Island makes much of its stated intention to hold itself out to serve the public. See pp. 6-12. Indeed, it states that federal regulations, under FERC, require that it offer transmission to "eligible customers" as that is defined in Section 212(h) of the Federal Power Act, 16 USC Sec. 824k(h)). Yet, it admits that this federal regulation "prohibits FERC from ordering that transmission service be provided directly to end user customers". *Id.* Nonetheless, to satisfy the PUA, Rock Island will "offer" transmission service to retail end-users. What is important to a public use determination, however, is what actions Rock Island has taken or will take. Rock Island's self-serving characterizations should not be allowed to overcome the evidentiary deficiencies in the record. As the Third District detected, Rock Island presented a paucity of evidence as to what "public" it would be able or willing to serve, or what "public" might find a purchase of capacity or service on the transmission line to be plausible, useful or desirable.

An important factor that underlies the Third District Opinion, and distinguishes Rock Island from other companies that have appropriately qualified for and been granted

CPCNs, is the substantial uncertainty over whether the Project will ever be constructed, placed into service, and successfully operated. Rock Island's own testimonial evidence shows that the Project is only in its initial development stage. (R.V22, C5287). David Berry of Rock Island testified that the "permanent installation of facilities cannot and will not commence unless and until the need for the Project is actually established through the market test of transmission customers contracting for sufficient service on the transmission line to support and justify financings that raise sufficient capital to cover the total Project cost." (R.V6, C1380). Further, Rock Island witness Michael Skelly stated that supplying wind farms on the western side of the Project in Iowa do not exist because "it would be foolhardy to build them unless you had a transmission path to get to market." (R.V38, RP235). At hearing, Rock Island could not positively answer all of the following queries: (1) whether transmission customers exist that need this proposed transmission line, (2) whether transmission customers exist needing this proposed line in a sufficient quantity to economically justify the Project, (3) whether the capital markets will finance the Project, (4) whether wind farms will spring up in Iowa to supply electric load, and (5) whether PJM and MISO will arrive at a positive or negative decision on the proposed project's effect on the reliability of the electric systems. (*Id.*; R.V44, RP841; R.V38, RP235). When pressed as to the uncertainty of the Project, Rock Island failed to provide any precedent for the Commission to rely upon. Instead, Rock Island's expert, Karl McDermott, a former ICC Commissioner, characterized Rock Island's Verified Petition for a merchant line as a matter of first impression, and was unaware of <u>any</u> situation where the ICC: (1) issued a CPCN to an applicant that indicated it would not construct a transmission line if customer demand did not materialize; or (2) issued a CPCN where the applicant had not

unconditionally committed to build a transmission line if granted the CPCN. (R.V38, RP140-141).

Rock Island is under no duty to develop the Project, being obligated neither to the Commission nor to any other party – and especially not to the Illinois public. Rock Island may either voluntarily or involuntarily not proceed with the Project, and it specifically refused to commit to constructing and operating the Project. (R.V38, RP235). Indeed, the record is replete with considerable and significant obstacles and unprecedented contingencies that stand in the way of Rock Island ever exercising that option and constructing the Project. In essence, the Commission provided Rock Island a regulatory umbrella, authorizing it to operate in Illinois when and if it opted to do so. Issuing a CPCN to Rock Island, which has no transmission assets, no customers, wholly inadequate financing, and who will not commit to build the proposed Project establishes an unprecedented process which allows any developer with a business plan and seed money to become an Illinois public utility. This renders Sections 3-105 and 8-406 of the PUA meaningless.

The Project is highly tenuous, and at this point speculative. Unless the Third District Opinion reversing the Commission Order is allowed to stand, the many landowner constituents of the Farm Bureau will have an eminent domain cloud upon title hanging over and threatening their full ownership, control and enjoyment of their farm land and other property. For what purpose would affected landowners have to live under such a cloud and be threatened with a condemnation action? Rock Island has stated its hope and desire of bringing more electricity generated from renewable resources into the wholesale power market, and putting downward pressure on wholesale electricity market prices. The

record, however, discloses no real hardship on anyone (other than Rock Island's investors) if the Project is not constructed and placed into service.

Rock Island has not committed to serve the public. As it stands, the Project has neither a private nor a public use; rather, it has no use at all because it does not exist and may never exist. That sole factor is highly relevant if not determinative, as to whether Rock Island and the Project qualify for certification under Illinois law.

7. The case law relied upon by Appellants in support of the Commission's Final Order is unpersuasive.

Rock Island attempts to use previous Commission decisions to argue that a newly formed entity does not need to have public utility status in Illinois for the Commission to grant it a CPCN. (*See i.e.,* IBEW Brief, pp. 20, 32, and Rock Island Brief, pp. 26, 44-46). The cases relied on, however, are sufficiently dissimilar to negate any possible application to the instant matter.

In *Illinois Power C. d/b/a Ameren IP and Ameren Ill. Trans. Co.,* ICC Docket 06-0179 (ICC May 16, 2007), AmerenIP and Ameren Illinois Transmission Company ("Ameren Transco") together filed an Amended Petition with the Commission requesting the grant of a CPCN for both entities. There, both AmerenIP and Ameren Transco were wholly-owned subsidiaries of Ameren Corporation. *Id.* AmerenIP, previously Illinois Power, engages in the business of supplying electric power and energy and is certified to provide service within the State of Illinois. Prior to the transition from Illinois Power to AmerenIP, Illinois Power was performing services and had facilities in Illinois. *Id.* AmerenIP simply took over those operations.

Ameren Transco, on the other hand, was formed for the primary purpose of funding, constructing and operating the proposed project in conjunction with AmerenIP; because

AmerenIP was incapable of satisfying Section 8-406 of the Act on its own. *Id.* (Section 8-406 requires a utility to be capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers). Ameren Transco's only service was to construct the Project.

Rock Island uses *Illinois Power* to support its contention that the Commission is authorized to grant CPCNs to applicants that do not own or operate utility facilities in Illinois at the time they applied for and/or received the certification. *See* Rock Island Brief, p. 26. This application of *Illinois Power* is misplaced. Although the Commission did grant both Ameren Transco and AmerenIP CPCNs, Rock Island inaccurately emphasizes Ameren Transco's new formation. The Commission granted a CPCN to both AmerenIP and Ameren Transco, based on the finding that the two subsidiaries of Ameren Corporation were essentially proposing a "financing tool to decrease the amount of debt on [Ameren]IP's balance sheet." *Illinois Power C. d/b/a Ameren IP and Ameren Ill. Trans. Co.,* ICC Docket 06-0179 (ICC May 16, 2007). In granting the certifications, the Commission relied on the "integrated nature" of the two as affiliates. *Id.* As affiliates of Ameren Corporation, the prior presence of Illinois Power services and facilities in Illinois refutes Rock Island's contention that the Commission granted a CPCN to an entity that had no property or facilities in Illinois.

Rock Island also inappropriately applies *In re American Transmission Co. LLC,* (ICC Docket No. 01-0142) 2003 WL 1995923 (Ill.C.C). As detailed earlier in this Brief, this case actually damages Rock Island's cause, but more detail of this case will be provided herein to reply directly to Rock Island's arguments. In that matter, American Transmission Company, LLC ("ATCLLC") and ATC Management Inc. ("ATCMI") filed a joint Petition

with the Commission seeking a CPCN to operate in Illinois as public utilities. ATCLLC is a Wisconsin company authorized to conduct business in Illinois; while, ATCMI is a Wisconsin corporation that is the corporate manager of ATCLLC. The two entities function as a single entity (collectively referred to as "ATC"). *Id.* ATC purchased the transmission assets, located in Illinois, from South Beloit Water, Gas and Electric Company (South Beloit). *Id.* South Beloit had previously owned and operated those transmission assets in Illinois. *Id.*

Rock Island's application of this Commission Order is misplaced because of South Beloit's prior presence and certification. The Commission did not review this application under the belief that ATCLLC or ATCMI was new to Illinois. *See Order*, (stating, "ATC's transmission facilities serve the same basic function in Illinois today that they have been serving for years as part of the previously-certified South Beloit system").

Further, Rock Island (through IBEW's Brief) contends that the Commission has granted a Certificate as a public utility to an applicant that "offered no retail services to Illinois customers." IBEW Brief, p. 36. This characterization of the Commission's Order in *American Transmission Company LLC*, ICC Docket No. 01-0607, 2002 WL 1943558 (Ill. C.C.) is not only misplaced, but wholly inaccurate. In that matter, ATCLLC and ATCMI filed a Request for a Declaratory Ruling with Commission that would allow ATC to enter agreements in Illinois without the Commission's approval if such agreements were previously approved in Wisconsin or from FERC; neither certification of ATCLLC nor ATCMI was at issue or decided. *See, American Transmission Company LLC*, ICC Docket No. 01-0607, 2002 WL 1943558 (Ill. C.C.) (stating, "ATC seeks to resolve this issue before proceeding with certification"). Further, the Commission specifically indicated that ATC

had "Illinois facilities and a small number of Illinois customers" in relation to its Wisconsin and Michigan operations; the Commission did not, as the IBEW Brief suggests, grant a Certificate as a public utility to a company that "offered no retail services to Illinois customers." IBEW Brief, p. 36.

IBEW attempts to further support its contention using *Wabash, Chester and W. R.R. Co. v. Ill. Commerce Comm'n*, 309 Ill. 412 (1923) and *New Landing Utility, Inc. v. Ill. Commerce Comm'n*, 58 Ill. App. 3d 868, 374 N.E.2d 6 (1977). These cases are also inapposite. IBEW and Rock Island use these cases in an attempt to illustrate examples of the Commission granting CPCNs to new entities with no utility assets or customers in Illinois.

In *Wabash,* promoters of a railroad applied for a CPCN with the Commission to allow construction and operation of a railroad that would carry coal and passengers. *Wabash, Chester and W. R.R. Co. v. Ill. Commerce Comm'n,* 309 Ill. 412 (1923). The issue on review for the Illinois Supreme Court in *Wabash* was "whether the decision of the Illinois Commerce Commission has any support in the record." The Commission granted the certificate because the record supported that public convenience and necessity required the construction of the railroad in question, and the Supreme Court agreed. *Wabash*, 309 Ill. 412, 417 (1923) ("the Commission having found that from those circumstances a case of public necessity for the construction of the railroad arose..."). The record supported the Commission's conclusion, however, because the railroad intended to service an existing coal mine, and the parties as well as the Commission agreed that "a railroad is essential to the operation of a coal mine." *Id.* at 416. As such, the railroad did have assets and customers

in Illinois since the Commission found the mine and the construction of the railroad to be "inseparably connected." *Id.* at 419.

In *New Landing Utility*, the Commission granted a CPCN to New Landing Utility. *New Landing Utility, Inc. v. Ill. Commerce Comm'n*, 58 Ill. App. 3d 868 (1977). The issue on review was the Commission's authority regarding the availability of charges. *Id.* Prior to the application for a CPCN, plaintiff entered into a private contract to construct and operate utilities in a development located in Ogle County. *Id.* To suggest, as Rock Island and IBEW do, that the Commission granted a CPCN in this case to an entity with no utility assets or customers in Illinois is blatantly misleading. The plaintiff in *New Landing Utility* had not yet established its public utility status through the Commission, however, through its independent and private negotiations it had utility assets and customers in Illinois. This is further supported, in the Appellate Court's supplemental opinion where it affirmed the Commission's decision to grant the CPCN. *New Landing Utility v. Ill. Commerce Comm'n*, 58 Ill. App. 3d 868, 375 N.E.2d 578 (1978) (stating, "everyone concerned seems to agree that the plaintiff is entitled to such a certificate").

Finally, Rock Island's Brief argues that this Court should look to the intention of the applicant for a CPCN to determine public utility status. Rock Island Brief, pp. 42-44. Essentially, if it is "holding itself out" to serve the public then the inquiry should end there. It cites the above cases, as well as *Iowa RCO Ass'n v. ICC*, 86 Ill. App. 3d 1116 (4th Dist. 1980) for this proposition. *Iowa RCO* is distinguishable because it involved a pipeline, not a transmission line, but the question of whether it was a public utility for public use was nonetheless before the Court. There, the applicant for the CPCN, Northern Pipeline, was an existing company, with existing infrastructure, and existing customers. *Iowa RCO Ass'n*

v. ICC, 86 Ill. App. 3d 1116 (4th Dist. 1980). The Court upheld the Commission's decision to grant the CPCN, finding that the interstate nature of the pipeline did not prevent it from becoming a public utility under the PUA. Without an existing infrastructure or customers, Rock Island is clearly not similarly situated to Northern Pipeline in any way.

II. The Third District Opinion does not violate the Commerce Clause.

Rock Island's assertion that the Third District Opinion violates the dormant commerce clause by impermissibly burdening interstate transmission projects is baseless. A requirement that a proposed transmission line crossing into Illinois boundaries must set aside some capacity for Illinois residents does not conflict with federal requirements for non-discriminatory, open access interstate transmission service. Rock Island could have obtained approval of its Project on the basis of public need if it had participated in a regional transmission planning process. Instead, Rock Island sought approval as an Illinois public utility. Rock Island was subsequently denied public utility status and now it complains that the Third District Opinion impermissibly burdens interstate transmission projects in an attempt to circumvent the requirements for obtaining a CPCN. At its crux, this case is nothing more than Rock Island's failure to meet the requirements of a public utility under Illinois law; the Third District Opinion does not conflict with federal law nor implicate the dormant commerce clause.

The Federal Power Act expressly respects the authority of states in public utility regulation. 16 U.S.C. § 824(a). Further, FERC recognizes states' right to regulate public utilities and determine whether a company should be granted authority to operate as a public utility. *Transmission Planning and Cost Allocation by Transmission Owning and*

Operating Utilities, Order No. 1000, 76 Fed. Reg. 49,842 (Aug. 11, 2011), FERC Stats. & Regs. -U 31,323 (2011), at pp. 107, 156.

Contrary to Rock Island's assertions, the Third District Opinion in no way burdens interstate commerce. The Third District Opinion does not prohibit Rock Island from conducting its business or building its line in the state of Illinois; rather, it only prevents an applicant like Rock Island, with no customers and nothing more than a business plan, from obtaining public utility status (and condemnation authority). Even with the Third District Opinion, Rock Island is free to enter into the state, purchase land, acquire easements (through negotiation) and build its line, all without first acquiring a CPCN.

Rock Island argues that the Third District Opinion requires entities to give preferential access to Illinois customers if it wants permission to construct transmission lines in Illinois. Rock Island relies on *ICC v. FERC*, 721 F.3d 766, 776 (7th Cir. 2013) to support this contention. In *ICC v. FERC*, Michigan argued that its renewable portfolio law prevented it from crediting out of state wind power against the renewable energy requirements imposed on its utilities. Rock Island's reliance upon *ICC v. FERC*, and other cases in its Brief and PLA, is misplaced because those cases do not support the contention that the Third District Opinion violates the dormant commerce clause. Unlike *ICC v. FERC*, the Third District Opinion does not impermissibly discriminate against out of state entities by requiring a utility to use only in-state renewable energy resources to comply with a renewable portfolio standard.

In *General Motors Corp. v. Tracy,* 519 U.S. 278 (1997), this Court upheld a state's right to treat regulated entities differently than independent marketers and held that these entities were not similarly situated for the purposes of a claim of discrimination under the

Commerce Clause. *Id.* at 310. In 2007, this Court affirmed the distinction between public and private business when it held that the "approach of treating public and private entities the same under the dormant Commerce Clause would lead to unprecedented and unbounded interference by the courts..." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt Authority, et al.*, 550 U.S. 330, 343 (2007) (local ordinances favored public entities while treating all private businesses the same); *See also*, *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) (internal quotation marks omitted) (Scalia, J., concurring) (stating that "none of this Court's cases concludes that public entities and private entities are similarly situated for Commerce Clause purposes. To hold that they are would broaden the negative Commerce Clause beyond its existing scope and intrude on a regulatory sphere traditionally occupied by...the States").

Here, Rock Island's merchant project business model is significantly dissimilar to the traditional public utility business model. As such, it was appropriate for Rock Island to be denied public utility status. This is not a situation of discriminating against out-of-state interests—the problem is simply Rock Island's failure to meet the requirements of Illinois law. Therefore, as a private entity, Rock Island cannot apply the approach used by a public utility when analyzing the application of the Commerce Clause. In *Lakehead Pipeline Co. v. Ill. Commerce Comm'n*, 296 Ill. App. 3d 942, 696 N.E.2d 345 (3d Dist. 1998), the Appellate Court used the *Pike* balancing test which applies when a state law is non-discriminatory on its face but nevertheless encroaches on interstate commerce. The *Pike* test states: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative

local benefits." *Lakehead Pipeline Co. v. Ill. Commerce Comm'n*, 296 Ill. App. 3d at 951-952, *quoting Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The *Lakehead* Court affirmed a State's legitimate purpose in protecting its citizens' right to own property without the threat of a taking for a private purpose. There, the Appellate Court held that the burden, if any, on commerce by protecting the freedom from unnecessary and non-orderly intrusions on private property is not excessive. *Id.* at 952. The court further stated, "Indeed, the statute does not appear to place any burden on interstate commerce *since* it is not restricting any federal scheme or interstate traffic." (Emphasis added). *Id.*

Thus, the Third District Opinion does not violate the dormant Commerce Clause and Rock Island is not impermissibly denied access to the Illinois transmission line market because it intended to provide services out of state. Like in *Lakehead*, Rock Island is free to build its private merchant transmission line under a federal scheme without obtaining public utility status and a subsequent CPCN from the Commission. As such, Rock Island is undeniably afforded the same opportunity as a public utility to participate in this market. Any differential treatment between these two statuses is offset by the legitimate local public interest of ensuring the safety and protection of property rights for Illinois citizens.

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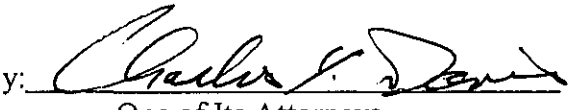
CONCLUSION

Only public utilities are entitled to Section 8-406 CPCNs. Since Rock Island is not a public utility as defined by Section 3-105(a) of the PUA, the Third District's Opinion should not be disturbed and the Final Order of the Commission should be reversed by this Court. As a consequence, this Court should find that the Commission lacked the jurisdiction to enter the Final Order pursuant to 220 ILCS 5/10-201(e)(iv), and for the other reasons detailed herein.

ILLINOIS AGRICULTURAL ASSOCIATION a/k/a ILLINOIS FARM BUREAU, Respondent-Appellee

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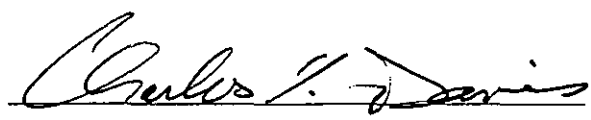
Nos. 121302, 121304, 121305 & 121308 (Cons.)

IN THE SUPREME COURT OF ILLINOIS

ILLINOIS LANDOWNERS ALLIANCE, NFP, ILLINOIS AGRICULTURAL ASSOCIATION a/k/a ILLINOIS FARM BUREAU, and COMMONWEALTH EDISON CO., Respondents-Appellees, vs. ILLINOIS COMMERCE COMMISSION, ROCK ISLAND CLEAN LINE LLC, *et al.* Petitioners-Appellants.	Petition for Leave to Appeal from the Appellate Court of Illinois, Third District, Nos. 3-15-0099, 3-15-0103 & 3-15-0104 (consolidated) There Heard on Review of Orders of the Illinois Commerce Commission in its Docket No. 12-0560

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 49 pages.



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via electronic transmission on this 12th day of April, 2017.

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 Certificate of Service are true and correct.