Nos. 121302, 121304, 121305 & 121308 Consolidated

IN THE
SUPREME COURT OF ILLINOIS

ILLINOIS LANDOWNERS ALLIANCE, NFP., ET AL., Appellees, vs. ILLINOIS COMMERCE COMMISSION, ET AL., Appellants.	) On Appeal from the Appellate Court of Illinois, Third Judicial District, Nos. 3-15-099, 3-15-0103 and 3-15-0104 (consolidated), There Heard on Direct Appeal of the Order of the Illinois Commerce Commission in Ill. C.C. Docket No. 12-0560

REPLY BRIEF OF APPELLANT ILLINOIS COMMERCE COMMISSION

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POINTS & AUTHORITIES

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INTRODUCTION

Commonwealth Edison Company ("ComEd"), the Illinois Landowners Alliance, NFP ("ILA") and the Illinois Agricultural Association a/k/a Illinois Farm Bureau ("IAA") (collectively "Respondents") filed briefs in response to the opening briefs of Rock Island Clean Line, LLC ("RICL"), the Illinois Commerce Commission ("Commission") and several other parties. The Commission responds to the arguments of Respondents that warrant a reply but does not concede the merit or validity of any remaining arguments, which it does not answer.

The crux of this case is whether the Commission properly exercised its discretion when it issued a certificate of public convenience and necessity ("CPCN") to RICL pursuant to Section 8-406 of the Public Utilities Act (the "Act"). 220 ILCS 5/8-406. The answer to this question hinges on whether: (a) RICL is a public utility as defined by Section 3-105 of the Act. 220 ILCS 5/3-105, as public utilities may seek a CPCN under Section 8-406; and (b) RICL's proposed transmission line is for a "public use" as required by Section 8-406. As established in the Commission's Opening Brief, these statutory criteria required the Commission to make factual inquiries and determinations and its findings in this regard are entitled to deference. The Appellate Court failed to defer to the Commission due primarily to its flawed finding that the Commission lacked jurisdiction. Respondents' arguments seek to shift the deference owed to the Commission's finding to the Appellate Court's decision and raise irrelevant, new and incorrect arguments concerning eminent domain. Respondents' arguments lack legal basis and are insufficient to salvage the court's defective analysis. Therefore, the Court should affirm the Commission's Order and reverse the Appellate Court.

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ARGUMENT

I. THE COMMISSION POSSESSED THE JURISDICTION TO ISSUE RICL A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

A. The Appellate Court Erroneously Determined The Commission Lacked The Jurisdiction To Issue The CPCN.

The Appellate Court found the Commission lacked jurisdiction[1] to issue RICL a CPCN. *Illinois Landowners Alliance, NFP, et al. v. Illinois Commerce Comm'n, et al.*, 2016 IL App (3d) 150099, ¶49. Before this Court, Respondents do not suggest the Appellate Court's ruling was correct. Rather, Respondents use the "lack of jurisdiction" issue to support their otherwise failed attempt to establish that the Commission's Order is not entitled to deference but should be reviewed *de novo*.

Respondents cite *Zahn v. North American Power & Gas Co.*, 2016 IL 120526[2] for the proposition that this Court owes no deference to the Commission in this case. This Court's ruling in *Zahn* in no way stands for such a proposition. In *Zahn*, the federal Court of Appeals for the Seventh Circuit requested that this Court answer the certified question of whether the Commission has exclusive jurisdiction over a reparations claim brought by a customer against an Alternative Retail Electric Supplier ("ARES"). *Zahn*, ¶1. In answering the certified question, the Court took "the facts as the Seventh Circuit has stated

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[1] Although the Supreme Court's "precedent refers to the 'jurisdiction' of administrative agencies, that is something of a misnomer. The term 'jurisdiction' is not strictly applicable when referring to an administrative agency. [The Court uses] it as shorthand for describing the agency's authority to act." *Zahn v. North American Power & Gas Co.*, 2016 IL 120526 ¶14, *reh'g denied* (Jan. 23, 2017) (citing *J & J Ventures Gaming, LLC*, 2016 IL 119870, ¶23 n.6, 67 N.E.3d 243, 250).

[2] The Court has not released the *Zahn* decision for publication and the decision is subject to revision or withdrawal.

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them. . ." *Id.* at ¶3. Contrary to Respondents' suggestions, the Commission in *Zahn* never asserted ARES were "public utilities" as this Court acknowledged. *Id.* at ¶22.

This Court's pending decision in *Zahn* in no way stands for the proposition that a court owes no deference to the Commission when reviewing its decisions that implicate the scope of its authority. To the contrary, this Court previously announced that "the general principle of judicial deference to administrative interpretation applies in full strength where such interpretation involves resolution of jurisdictional questions." *Illinois Consolidated Telephone Co. v. Illinois Commerce Comm'n*, 95 Ill. 2d 142, 152-53 (1983) (citing *Pan American World Airways, Inc. v. Civil Aeronautics Bd.*, 392 F.2d 483, 496 (D.C. Cir. 1968)). Accordingly, the Court should reject Respondents' assertions that the standard of review in this matter is *de novo* and should apply a deferential standard consistent with its long-standing practice.

B. The Appellate Court Failed To Defer To The Commission's Determination That RICL Is A Public Utility.

This Court's prior decisions make clear that the determination of whether an entity is a public utility involves a fact-intensive inquiry that is not dependent on a statutory definition. The Commission's decision that RICL was a public utility was predicated on substantial evidence and hence, it is entitled to deference. Commission Initial Br., 2-4, 16-21; 220 ILCS 5/10-201(d), (e)(iv)(A) .

The Commission's orders are *prima facie* true and correct, 220 ILCS 5/10-201(d), and given great weight and deference. *Chicago North Shore & Milwaukee R.R. v. Illinois Commerce Comm'n*, 354 Ill. 58, 74 (1933). Although this Court is not bound by the Commission's purely legal interpretations, *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 148 Ill. 2d 348, 367 (1992), the Commission's interpretations of the Act are

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entitled to deference. *Citizens Utility Bd. v. Illinois Commerce Comm'n,* 166 Ill. 2d 111, 121 (1995); *Illinois Consolidated Telephone Co.*, 95 Ill. 2d 142, 152-53 (1983). Courts should afford the Commission this deference because it is able to make informed judgments based upon its experience and expertise in matters arising under the Act. *Id.* Significantly, "the general principle of judicial deference to administrative interpretation applies in full strength where such interpretation involves resolution of jurisdictional questions." *Id.* (citation omitted). Respondents proffer various reasons why the Commission is not entitled to such deference in this case. None of their arguments has merit. ComEd argues that because the facts in this proceeding are undisputed, the Commission's decision is not entitled to deference. ComEd Br., 15-21. This argument ignores the Court's multiple decisions cited *supra. See also,* Commission Initial Br., 17-19. In addition, ComEd forfeited this argument by failing to cite any authority. *Vine St. Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, 301 (2006) (point raised but not supported with citation to relevant authority fails to comply with Supreme Court Rule 341, and is thus forfeited). IAA and ILA also assert no deference is owed to the Commission's decision, (IAA Br., 7-14; ILA Br., 7-9), but each fails to acknowledge the foregoing precedent or establish that the Commission's 223-page Order did not resolve disputed questions of law and fact.

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II. THE COMMISSION'S FINDINGS WITH RESPECT TO THE STATUTORY STANDARDS IN SECTION 3-105 ARE ENTITLED TO DEFERENCE.

A. The Determination Of Whether An Entity Is A Public Utility Is Fact Intensive And The Commission's Determination Is Entitled To Deference.

Whether RICL is a public utility depends on the manner in which RICL proposes to offer its service to the public within the meaning of Section 3-105 of the Act. 220 ILCS 5/3-105. Section 3-105 requires a public utility to offer the service to the public without discrimination. *See, e.g., State Public Utilities Comm'n v. Monarch Refrigerating Co.*, 267 Ill. 528, 533 (1915); *Iowa RCO, Inc. v. Illinois Commerce Comm'n*, 86 Ill. App. 3d 1116, 1118-19 (4th Dist. 1980). Contrary to the Appellate Court's conclusion that it owed no deference to the Commission's findings in this regard, *Illinois Landowners Alliance*, ¶¶40, 45, the question of whether an offering is unduly discriminatory is a question of fact. *See Produce Terminal Corp. v. Illinois Commerce Comm'n*, 414 Ill. 582, 598 (1953) ("ample evidence" supported Commission's finding of fact that gas rate was not unduly discriminatory as to certain customer class). The defect in the Appellate Court's analysis is found in its assemblage of boilerplate statements of law. *Illinois Landowners Alliance*, ¶35. Specifically, the court cites *Burlington N., Inc. v. Dep't of Revenue*, 32 Ill. App. 3d 166, 174 (1st Dist. 1975) for the proposition that no deference is owed to the Commission's interpretation of the Act. *Id.* However, in *Burlington*, the Appellate Court merely noted that an administrative official cannot alter the plain language of a statute. Here, the Commission did not alter the language of the Act. The Appellate Court's error is further highlighted by another of the cases it cites, this Court's decision in *Citizens Utility Bd. v. Illinois Commerce Comm'n,* 166 Ill. 2d 111, 121 (1995) where it expressly noted that the

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Commission's "interpretation of statutory standards is entitled to deference ... [.]" (emphasis added).

ComEd suggests that when Sections 3-105 and 8-406 are read together, an applicant for a CPCN must "commit" in some way to undertake and complete the project for which the CPCN is sought. ComEd Br., 12, 14. Although no authority exists for ComEd's "commitment test," if adopted such a test would necessitate a factual inquiry. And, as established below, no such commitment requirement exists in either section of the Act, rendering the question academic. Respondents' assertions that the standard of review in this matter is *de novo* must be rejected and this Court should apply a deferential standard consistent with its long-standing practice.

B. The Commission Properly Found That The RICL Project Is For Public Use.

1. RICL Is A Public Utility And The Technical Amendments To Section 3-105 In 1967 Are Not Dispositive.

As demonstrated in its Opening Brief, the Commission's construction of Section 3-105 is reasonable, well supported by statutory language, and should be adopted. Commission Initial Br., 30-39. IAA argues that certain 1967 amendments to Section 8-406's statutory predecessor, which struck the words "now or hereafter" from the provision, indicate a legislative intent to limit applications for CPCN under Section 8-406 to entities which presently own transmission assets. IAA Br., 20, *et seq*. This argument should be ignored.

A review of the 1967 amendatory language, R. Vol. 8, C-01743-01752, reveals that the primary purpose of the amendment was to define the term "telephone co-operative," *Id.* at C-01752, and divest the Commission of authority to inquire into the financial affairs

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of telephone co-operatives. *Id.* at C-01746, 01750-51. The amendment revises the definition of the term "public utility" to exclude telephone co-operatives as defined. R. Vol. 8, C-01751. The 1967 amendments moved the enumeration of activities that public utilities engage in to the beginning of the definition; the statute prior to amendment had placed the numerous exclusions at the beginning of the definition and the definition itself at the end, which cannot have aided clarity. R. Vol. 8, C-01751-52.

The 1967 amendments also removed some archaic language, for example, replacing "ten-per-centum" with "10%." See, generally, R. Vol. 8, C-01743-52. Another such outdated term is, of course "now or hereafter," a relic from the adoption of the Act in 1913. The only relevant attempt that can be found to construe "now or hereafter" by any court in the U.S. is *Wilson v. Crews*, 160 Fla. 169, 34 So. 2d 114 (1948), wherein the Florida Supreme Court construed the term "any [justice] District now or hereafter established" to mean, essentially, "any justice District." *Wilson*, 160 Fla. at 176-77, 34 So. 2d at 119.

In other words, IAA urges this Court to ascribe paramount importance in the construction of Section 3-105 to technical amendments associated with the regulatory treatment of telephone co-operatives and on the terms "now or hereafter," which has little, if any, independent meaning. The Court should decline to give any weight to this argument in assessing the Commission's determination that RICL is a public utility.

2. *Iowa RCO V. Illinois Commerce Comm'n* Is Both Applicable And Persuasive.

The decision in *Iowa RCO, Inc. v. Illinois Commerce Commission*, 86 Ill. App. 3d 1116 (4th Dist. 1980) stands for the proposition that the public use requirement is satisfied where a utility uses interstate facilities primarily to supply committed shippers, and makes

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unused pipeline capacity available to other shippers through a federal tariff. Respondents' arguments to the contrary should be rejected.

In *Iowa RCO*, the Appellate Court found that an applicant for a CPCN satisfied the public use requirement where it proposed to construct pipeline facilities primarily to supply two out-of-state refineries, and further proposed to make unused pipeline capacity available to other petroleum shippers through a federal tariff. 86 Ill. App. 3d at 1118-19. In so holding, the court noted that:

> [Northern] would be operating in interstate commerce and would be required under [federal law] ... to furnish nondiscriminatory service to its nonaffiliated users and others wishing to do so. Because of its claim to be subject to the provisions of the Public Utilities Act it would be estopped to deny that, subject to preemptive Federal regulations, it was also required to furnish nondiscriminatory service pursuant to the [non-discrimination] provisions of ... the Public Utilities Act [citation].

Id. (citations omitted).

The *Iowa RCO* decision is on all fours with, and highly instructive to, the case at bar. Like Northern, RICL anticipates that most of its capacity will be devoted to committed shippers but proposes to offer the remaining portion of its capacity pursuant to a federal tariff. Further, as in *Iowa RCO*, RICL, by virtue of its federal tariff, and by subjecting itself to the Public Utilities Act, will be "estopped to deny that, subject to preemptive Federal regulations, it [i]s also required to furnish nondiscriminatory service pursuant to the [non-discrimination] provisions of ... the Public Utilities Act[.]" In *Iowa RCO*, Northern's federally-tariffed offering was found to be a public use under the Public Utilities Act. RICL's offering is scarcely different, in that it offers capacity available over and above presubscribed capacity to the public at large, in a manner that FERC determined to be "fair, transparent, and non-discriminatory[.]" *Order Conditionally Authorizing Proposal and*

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Granting Waivers in Part, ¶30, *Rock Island Clean Line, LLC*, 139 FERC ¶61,142, 2012 WL 1859937 (March 22, 2012) ("RICL FERC Order"). This Court can and should favorably consider the soundly-reasoned *Iowa RCO* decision.

3. The Open Season and Auction Process Is Just, Reasonable And Non-Discriminatory.

As demonstrated in its Opening Brief, the Commission properly found that RICL's Open Season and auction process, as approved by the Federal Energy Regulatory Commission ("FERC") is just, reasonable and non-discriminatory. Commission Initial Br., 24-28. The Commission's findings should be affirmed.

ComEd argues that the Commission's Order errs in finding that RICL is a public utility, because, according to ComEd, neither the open season process nor the sale of unallocated capacity satisfy the "public use" requirement of Section 3-105. ComEd Br., 19-29. IAA advances, cursorily, a similar argument. IAA Br., 14. ComEd's major criticism appears to be that, since the open season process involves an auction of available capacity (which ComEd concedes will be open to the public on fair, transparent, and non-discriminatory terms, ComEd Br., 19, 20) as opposed to making the service generally available, it is not a public use. ComEd Br., 20, *et seq*. ComEd contends that this Court should review the question *de novo*, on the theory that the question is actually a legal one: whether as a matter of law, an auction satisfies the "public use" requirement. *Id.*

ComEd is wrong on all counts. First, as the Commission has previously demonstrated, this Court has held for over 90 years that the question of public utility status under Section 3-105, and inherently the issues such as public use which are subsumed in that question, is a question of fact. Commission Initial Br., 16, *et seq.*; *see also, Austin Bros. Transfer Co. v. Bloom,* 316 Ill. 435, 437 (1925) (public utility status "necessarily

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depends upon the special facts connected with the management, operation, or control of [the] business [in question].") ComEd's aversion to auction processes in allocating transmission capacity does not change this. Moreover, ComEd's fundamental premise is flawed. The Commission's determination that RICL's proposal satisfies the public use standard was based upon a factual analysis of the FERC approval of RICL's proposed offering. R. Vol. 34, C-08503-0 4.

FERC has exclusive jurisdiction over the rates, terms, and conditions of transmission offerings in interstate commerce. *See* 16 U.S.C.A. §824(b)(1) (FERC "shall have jurisdiction over all facilities for … transmission or sale of electric energy[.]"). Federal law, like state law, requires that the rates, term, and conditions upon which transmission service is offered be just and reasonable, and declares rates not just and reasonable to be unlawful. 16 U.S.C.A. §824d(a); *cf.* 220 ILCS 5/9-101 (same). Likewise, federal law, like state law, prohibits discrimination, providing that transmission services offerings cannot grant "undue preference or advantage to any person" or "subject any person to any undue prejudice or disadvantage[.]"16 U.S.C.A. §824d(b); *cf.* 220 ILCS 5/8-101 (prohibiting unreasonable discrimination).

FERC approved RICL's proposal to offer up to 75% of the project's capacity to presubscribed generators, referred to as "anchor customers," and the remaining 25% or more of the capacity to others interested in obtaining capacity through an "open season" provided for in an Open Access Transmission Tariff ("OATT"), on the same rates, terms, and conditions offered to anchor customers. RICL FERC Order, ¶¶5, 28-30. FERC determined that the open season process was "fair, transparent, and non-discriminatory[.]" *Id.* at ¶30. However, FERC did not permit RICL to favor renewable generators in the open

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season process. *Id.* at ¶31. Pursuant to FERC's authorization, any eligible customer may seek transmission capacity on the project, either pursuant to contract, through the open season process, or in other ways, including seeking "non-firm" transmission that becomes available when other customers who have contracted for capacity, or obtained it through the open season, do not need it. R. Vol. 6, C-1383-1386; R. Vol. 34, C-0488-92.

The federal non-discrimination requirements governing transmission provide that transmission rates must be just and reasonable and are close analogues to the corresponding Illinois state requirements. FERC, the federal agency with exclusive authority over transmission rates, found RICL's service offering to be non-discriminatory, and its rates and rate structure to be just and reasonable. As noted above, state and federal statutes are closely analogous. Accordingly, it was reasonable for the Commission to conclude that RICL, by satisfying federal requirements concerning rates and terms and conditions of service, therefore satisfied analogous state requirements, especially where, as here, federal jurisdiction with respect to the rates, terms and conditions in question is exclusive.

The Commission recognized this in its Order, finding that, based upon its FERC-approved open season, RICL would be required to offer transmission service to eligible customers without undue discrimination. R. Vol. 34, C-08504. Again, and contrary to ComEd's assertions, the question of whether a utility's offering of service is unduly discriminatory is a question of fact. *Produce Terminal Corp.*, 414 Ill. at 598. Accordingly, the Commission's finding that RICL's proposed OATT offering is nondiscriminatory is a factual finding, entitled to deference, and may not be disturbed unless it is unsupported by substantial evidence. 220 ILCS 5/10-201(e)(iv)(A).

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4. The Commission Findings Of Public Use And Necessity Were Based Upon Substantial Evidence.

Here, substantial evidence supports the Commission's findings. As noted above, the Commission analyzed RICL's proposed service offering as approved by FERC, and noted "that the requirement of non-discriminatory open access 'could arguably overcome the public use hurdle' since all customers would have an equal right to use the utility on the same terms, as required for public use under Section 3-105 of the Act." R. Vol. 34, C-08503 (citing the Commission Staff's Initial Brief). The Commission further took cognizance of RICL's representation that it would comply with this requirement. *Id.* ComEd's arguments that RICL's offering is discriminatory as a matter of law is both misplaced – since, as seen, the question is one of fact – and unpersuasive, as ComEd has not satisfied its burden of showing that no reasoning mind could conclude that RICL's offering is not discriminatory.

At several points in its brief, ComEd cites *Reinhardt v. Board of Educ. of Alton Community School Dist. No. 11*, 61 Ill. 2d 101 (1975) in support of the proposition that an agency decision cannot be upheld if it is not explained. ComEd. Br., 18, 21, 32. ComEd's attempt to invoke *Reinhardt* in this proceeding is futile. In *Reinhardt*, a school board sought to dismiss a tenured schoolteacher for immorality and because the best interests of the school district required it. *Reinhardt*, 61 Ill. 2d at 101. However, the board elected to do so by enacting a resolution, which contained no findings. *Id.* at 103. This Court remanded the matter to the school board, finding that a decision by an administrative agency must contain findings sufficient to permit judicial review, and that while the school board found that there were "reasons or causes" for the teacher's dismissal, the resolution dismissing her was silent as to what those reasons or causes might be. *Id.* at 103-04.

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Reinhardt is inapposite to this proceeding. Here, in stark contrast to the school board's conduct in *Reinhardt*, the Commission issued a 223-page Order. R. Vol. 34, C-08475 – Vol. 35, C-08700. More specifically, the Commission's Order contains specific findings regarding all relevant matters. ComEd's attempts to support *de novo* review of the Commission's Order based on the *Reinhardt* decision are unavailing.

C. The Public Utilities Act Does Not Require A Utility To Commit To Construct A Project For Which It Has Obtained A CPCN.

As the Commission argued in its Initial Brief, the Appellate Court erred in determining that Section 8-406 requires a utility to commit to construct the facilities authorized by its CPCN. *See* Commission Initial Br., 30, *et seq*. The Commission's position is reasonable, well supported by statutory language, and should be adopted.

ComEd argues the RICL is not a public utility as a matter of law because of the latter's ostensible failure to commit to constructing the project. ComEd Br., 30, *et seq*. This argument founders almost immediately upon the specific terms of Section 8-406.

Section 8-406(f) provides that provides that "[u]nless exercised within a period of 2 years from the grant thereof[,] authority conferred by a [CPCN] issued by the Commission shall be null and void." 220 ILCS 5/8-406(f). The import of this provision is obvious. The General Assembly obviously considered it possible that an applicant for a CPCN might elect not to exercise the CPCN, in which event the CPCN would be void as a matter of law. This being the case, it is *a fortiori* true that the General Assembly did not by implication create a requirement that an applicant for a CPCN commit to construct the facility. Accordingly, the terms of the statute itself belie ComEd's proposition that an applicant for a CPCN must commit to a project. If such a requirement existed, Section 8-406(f) would be mere surplusage, since a commitment requirement would render it

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unnecessary and meaningless. *See Board of Educ. of Springfield School Dist. No. 186 v. Attorney General*, 2017 IL 120343, ¶25 (a court construes a statute so that no part of it is rendered meaningless or superfluous).

Further, by arguing that Section 8-406 requires an entity seeking a CPCN to commit to building the facilities in question, ComEd urges this court to violate yet another canon of statutory construction. It is well established that a court cannot add provisions to a statute that are not found in it, nor can it read into a statute limitations or conditions that the General Assembly did not include, so as to render the statute consistent with the court's "own idea of orderliness and public policy." *Schultz v. Illinois Farmers Insurance Co.*, 237 Ill. 2d 391, 406, 408 (2010). However, ComEd urges this Court to do precisely that here – add a non-statutory requirement to certification under Section 8-406. This Court should decline the invitation to do so. ComEd's assertion, based on *Reinhardt*, that *de novo* review is appropriate because of the "absence" of a Commission finding regarding this non-existent requirement, should be rejected for the same reason. The Commission's failure to make a finding regarding a requirement that does not exist is no basis for reversal, or for *de novo* review.

D. Eminent Domain Is Not At Issue Here And Arguments Regarding It Are Irrelevant.

ILA further argues that, unless this Court affirms the Appellate Court's decision, landowners whose property lies along the route of the transmission line will experience some cloud on the title to their property. *See* ILA Br., 21-29. ILA's argument is that RICL will, if it ultimately obtains a CPCN, be entitled to seek an order under Section 8-503 of the Public Utilities Act, 220 ILCS 5/8-503, specifically directing it to construct the transmission line, *id.*, whereupon RICL may seek eminent domain authority under Section

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8-509 of the Act, 220 ILCS 5/8-509. ILA Br., 21-22. As a result of this possibility, and what ILA considers to be the speculative and uncertain nature of the RICL project--which might according to ILA, result in the project taking an extended time to complete--the ILA contends that landowners' property will be subjected to a pall or cloud to title. *See, e.g.*, ILA Br., 24. ComEd makes a similar argument in passing, arguing that the threat of condemnation is "the elephant in the room." ComEd Br., 36-37. ComEd even argues that the eminent domain "issue" suffuses the question of public use. ComEd Br., 24-25.

ILA further argues that the so-called "cloud" resulting from the possibility RICL might obtain eminent domain authority rises to the level of an unconstitutional taking. ILA Br., 26-27. According to ILA, amendments to the Eminent Domain Act support the proposition that the General Assembly has determined "a high standard should be required of 'public use' before personal property rights can be damaged." *Id.* at 28.

There are several reasons why these arguments are meritless. First, in its Order, the Commission specifically declined to order RICL to construct the project under Section 8-503, as opposed to authorizing it to do so under Section 8-406. R. Vol. 35, C-08693. RICL specifically did not seek eminent domain authority under Section 8-509. R. Vol. 1, C-00007. Accordingly, what might result from a grant of as-yet-unsought eminent domain authority is speculation. It is well established that courts "will not decide moot or abstract questions, will not review cases merely to establish precedent, and will not render advisory opinions." *Condon v. American Telephone & Telegraph Co., Inc.*, 135 Ill. 2d 95, 99 (1990). This, however, is precisely what ILA seeks – a finding that RICL should not be granted a CPCN because ILA members might, possibly, in the future, be required, for compensation, to convey an interest in real property.

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Second, and related, this Court has long held that the granting of a CPCN does not confer any property rights upon the entity that obtains the CPCN, nor does it deprive affected property owners of any protected property interest. *Zurn v. City of Chicago*, 389 Ill. 114, 115 (1945); *Chicago, Burlington & Quincy R.R. Co. v. Cavanagh*, 278 Ill. 609, 614 (1917). Illinois Appellate Courts continue to rely on this Court's reasoning in *Zurn* and *Cavanagh*. *Adams County Property Owners v. Illinois Commerce Comm'n*, 2015 IL App (4th) 130907, ¶¶50, 80. Accordingly, ILA cannot argue that the issuance of a CPCN by the Commission amounts to a taking of any interest in property – constitutional or otherwise – and its arguments regarding takings and clouds to title are therefore meritless.

Third, ILA misapprehends the meaning of amendments to the Eminent Domain Act. ILA argues that such amendments changed the law to require that a condemning authority establish by clear and convincing evidence that a proposed taking is for the public use and benefit, and necessary for a public purpose. In support of this proposition, ILA cites Section 5-5-5(c) of the Eminent Domain Act, 735 ILCS 30/5-5-5(c). ILA Br., 28. ILA argues that this section indicates a legislative desire to place stricter limitations on the use of eminent domain. The ILA is wrong. Section 5-5-5(c) specifically provides that:

> Evidence that the Illinois Commerce Commission has granted a [CPCN] … creates a rebuttable presumption that such acquisition of that property (or right or interest in property) is (i) primarily for the benefit, use, or enjoyment of the public and (ii) necessary for a public purpose.

735 ILCS 30/5-5-5(c) (emphasis added).

Further, in a recent decision, the Appellate Court for the Fourth District found that the presumption of public need and public use created under Section 5-5-5(c) by a Commission Order granting a CPCN can only be rebutted by clear and convincing evidence. *Enbridge Energy (Illinois), L.L.C. v. Kuerth*, 2016 IL App (4th) 150519, ¶¶138,

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140. Indeed, the *Kuerth* court determined that the Commission's grant of eminent domain authority to the utility, although not specifically enumerated in Section 5-5-5(c), should also be presumed proper, and such a presumption must be rebutted by clear and convincing evidence. *Kuerth*, ¶138. The *Kuerth* court reasoned that this Court's decision in *People ex rel. Madigan* required judicial deference to the Commission's decision such that the creation of a rebuttable presumption was warranted. *Id.*, ¶¶138-40. Accordingly, and contrary to the ILA's assertions, the amendments to the Eminent Domain Act demonstrate, if anything, a legislative vote of confidence in the Commission's processes and procedures. Respondents' arguments based upon eminent domain are not only inapposite, they are meritless and should be disregarded.

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CONCLUSION

For the foregoing reasons, the Illinois Commerce Commission respectfully requests that this Court reverse the Appellate Court's decision and affirm the Commission's order in its entirety. Alternatively, this Court should reverse the Appellate Court's decision and remand this matter for the Appellate Court to apply the proper standard of review.

Respectfully submitted,

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April 26, 2017

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CERTIFICATE OF COMPLIANCE

I, Matthew L. Harvey, Special Assistant Attorney General, counsel for the Respondent, Illinois Commerce commission, 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, this Rule 341(c) certificate of compliance, the certificate of service, and those matters to be apprehended to the brief under Rule 342(a), is 18 pages.

/s/ Matthew L. Harvey
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Dated: April 26, 2017

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

IN THE
SUPREME COURT OF ILLINOIS

ILLINOIS LANDOWNERS ALLIANCE, NFP, ET AL.,	
Appellees,	On Petition for Leave to Appeal from the Appellate Court of Illinois, Third Judicial District, Nos. 3-15-0099, 3-15-0103 and 3-15-0104 (consolidated). There Heard on Direct Appeal of the Order of the Illinois Commerce Commission in Ill.C.C. Docket No. 12-0560
vs.	
ILLINOIS COMMERCE COMMISSION, ET AL.,	
Appellants.	

NOTICE OF FILING

TO: Attached Service List

PLEASE TAKE NOTICE that on this 26th day of April, 2017, I have I caused to be electronically filed with the Clerk of the Illinois Supreme Court using the I2File.Net system, the Reply Brief of Appellant Illinois Commerce Commission, a copy of which is hereby served upon you.

Respectfully submitted,

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

121302

04/26/2017

Supreme Court Clerk

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, pursuant to Illinois Supreme Court Rule 12(b) that on April 26, 2017, I caused the foregoing Reply Brief of Appellant, Illinois Commerce Commission to be electronically filed with the Clerk of the Supreme Court of Illinois using the I2File.Net system. Pursuant to the "Supreme Court of Illinois Electronic Filing User Manual" and upon acceptance of the electronic Reply Brief for filing, I certify that I will cause an original and twelve copies of the Reply Brief of Appellant, Illinois Commerce Commission to be transmitted to the Court via hand delivery within 5 days of that notice. I further certify that I will cause the Brief of Appellant Illinois Commerce Commission to be served upon each counsel listed on the attached service list by electronic mail on April 26, 2017.

Respectfully submitted,

/s/ Matthew L. Harvey
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Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

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SERVICE LIST
Illinois Landowners Alliance, NFP, et al. v. Illinois Commerce Commission, et al.
IL Supreme Court Nos. 121302, 121304, 121305 & 121308
(Rock Island Clean Line)
Appellate Court Nos. 3-15-0099, 3-15-0103 & 3-15-0104 (Cons.)
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