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

IN THE SUPREME COURT OF ILLINOIS

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

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

Sean R. Brady
WIND ON THE WIRES
P.O. Box 4072
Wheaton, Illinois 60189-4072
(312) 867-0609
sbrady@windonthewires.org
Attorney for Wind on the Wires

John N. Moore
NATURAL RESOURCES DEFENSE COUNCIL
20 North Wacker Drive, Suite 1600
Chicago, Illinois 60606
(312) 651-7927
jmoore@nrdc.org
Attorney for Natural Resources Defense Council

Date: April 26, 2017

POINTS AND AUTHORITIES

ARGUMENT

I. Introduction and Summary

This case turns on the scope of the very broad delegation of power by the Illinois Legislature to the Illinois Commerce Commission (ICC or Commission) to promote an "effectively competitive" electric power market and to regulate entities that offer electricity services for "public use." The ICC's approval of an interstate electric transmission line, proposed by an independent transmission developer (Rock Island Clean Line LLC), fully complies with the "public use" standard, and with the legislative direction to "promote the development of an effectively competitive electricity market," and will provide a wide range of economic and health benefits to the region and to the people of Illinois.

The Appellate Court's Opinion decision to the contrary should be reversed because it construes the term "public utility" in §3-105(a) of the Public Utilities Act ("PUA") (220 ILCS 5/3-105 (2012)) in a way that frustrates legislative intent to expand competition in electric power services by prohibiting development of new power lines by independent transmission developers.

The PUA does not define the term "public use." The clear implication is that the Legislature left the term to be interpreted and applied by the ICC as needed to affect the broad purposes of the law. The ICC found that Rock Island offered transmission service to the public in a variety of ways, including at least 25% of the line capacity through an open season, with customers being able to use the Rock Island Projects (if demand exceeds capacity) through transparent, non-discriminatory criteria set forth in a tariff approved by the Federal Energy Regulatory Commission (FERC). There is nothing in

the statute that prohibits the ICC from granting a Certificate of Convenience and Necessity (CPCN) which allows Rock Island to offer services in this manner. The entire argument to the contrary, as adopted by the Appellate Decision, hangs on a phrase from a 1953 court decision concerning a completely different set of services (retail natural gas suppliers). Similarly, Commonwealth Edison's (ComEd) argument hangs on a phrase from a 1923 court decision regarding water supply. Both cases were decided before the Legislature and federal law deregulated electricity services and introduced competition into electric power generation, transmission and retail electric services.

The other basis for the Appellate Court's decision is that Rock Island cannot receive a CPCN because it does not currently own, control, operate or manage assets in Illinois and therefore cannot apply to be a "public utility" and receive a CPCN to construct new electric transmission infrastructure. This interpretation prevents new public utilities from being approved unless they operate in violation of the PUA prior to being certified as one under section 8-406(a) (220 ILCS 5/8-406(a)), and directly conflicts with the legislative direction in §8-406(b) of the PUA to "promote effectively competitive and efficient" electricity markets. If accepted, it would bar new competitors, and create a de facto monopoly for the incumbent transmission-owning utilities. 220 ILCS 5/8-406(b) (2012).

Although not discussed in the Appellate Court's decision, Appellees' briefs argue at length about the eminent domain implications of the ICC's action to grant a CPCN to Rock Island. In fact, Rock Island did not seek, and was not granted, authority to use eminent domain to develop the power line. A-005, Appellate Decision at ¶7. The CPCN is only one step in a line of decisions needed before a government body can authorize use

of eminent domain. Landowner and agricultural groups retain rights to resist eminent domain for the Rock Island Line and those issues are not ripe for consideration here.

II. ComEd's Definition of the Term "Public Use" Conflicts With the Legislature's Mandate That the ICC Promote Development of an Effectively Competitive and Efficient Electric Market

ComEd argues that the method by which Rock Island would create and allocate electric transmission capacity cannot constitute a "public use" because it relies on an "open season" method available to all customers to allocate transmission capacity. The Illinois Agricultural Association (IAA) and the Illinois Landowner Alliance (ILA) make similar arguments at pages 32-40 and 13-19 of their briefs, respectively. ComEd argues that the only way to offer electric transmission services, so as to be a public utility under Illinois law, is through a regulated tariff rate. This is evident at several places in the ComEd brief. At pages 2 and 19 ComEd claims that customers must be "able to actually use a service at a tariffed price" or "uniform tariffed price." At page 29 ComEd states: "Rock Island could have avoided any question as to whether it satisfies the 'public use' requirement simply by offering 25% of the transmission capacity under an OATT [Open Access Transmission Tariff] offering nondiscriminatory service to all comers." ComEd also argues that "public use" is only present when a transmission provider commits to provide unlimited service to all who ask for it, and makes an irrevocable commitment to finance and build (before getting permission to do so). ComEd Brief at 4, 14.

Illinois law imposes no such conditions on developers of competitive transmission services. WOW/NRDC Brief at 32-34. The term "public use" is not defined in the statute. The implication is that the Legislature has given the ICC authority and discretion to determine whether a utility's services are offered for public use and to interpret the

term consistent with statutory purposes. *Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. 158, 165 (1929) upholding a decision of ICC where: "The decision made by the Commerce Commission was within the scope of its authority, not without foundation in the evidence, and no constitutional right has been infringed by its decision"; *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 322 Ill. App. 3d 846, 854 (2d Dist. 2001) stating, "given the broad delegation of authority to the Commission, this Court must rely on the Commission's interpretation of the statute if there is a reasonable debate as to its meaning."; and *Lakehead Pipeline Co., v. Illinois Commerce Comm'n*, 296 Ill. App. 3d 942, 954 (3d Dist. 1998) stating the legislature's "failure to provide a statutory definition of public need at any time strongly suggests that it intended to allow the Commission to exercise a flexible approach toward these matters." To determine if an entity's proposed service is "for public use" the service is reviewed relative to the public need it is meeting, which in this case is to promote competition in electric services (§8-406(b)).

ComEd's argument ignores the obvious fact that the proposed transmission line will facilitate the development of renewable energy resources and carry power to the broad public of electricity consumers who, directly or indirectly, use power delivered by the wholesale bulk power system. Only through tortured semantics does ComEd conclude that there will be no public use of the Rock Island Line.

ComEd's argument uses an analogy to regulated retail utility services:

> One cannot imagine the ICC making a similar argument if any of the State's utilities were to propose rates that rationed gas or electricity service only to those who paid the most. ComEd Brief at 21.

This betrays a fundamental flaw in ComEd's logic. This case involves a bulk power transmission line that facilitates competition across broad wholesale and retail power

markets. Contrary to ComEd's suggestion, this is not a case about regulation of retail electric utilities that are assigned service area footprints within which they are exclusively responsible for providing service. The *Highland Dairy Farms* and *Mississippi River Fuel* decisions were concerned with retail sales, not competitive interstate transmission services (which in turn facilitate competitive electric power markets). Certainly, a company operating as a monopoly in the 1920's or 1950's as ComEd once did, or as a regulated default provider of retail service as ComEd does today, owes a different set of responsibilities to the public (e.g. can't refuse service to households and small businesses). That does not mean that more modern statutes regulating the electric industry in Illinois today must be interpreted the same way as courts did before the introduction of competition and the elimination of monopoly services. Nothing in the PUA restricts the ICC's delegated powers so woodenly.

ComEd concedes that if Rock Island had offered 25% of the line capacity to the public under a uniformed tariffed price, that would satisfy the "public use" requirement But it fails to explain why Rock Island's FERC authorized open season (open to all eligible customers) does not. ComEd Brief at 23-24 and 29. ComEd does not explain why the ICC's broad discretionary powers prevent it from using a competitive pricing alternative instead of a tariff. Nothing in the statute prevents the ICC from accepting this well-established approach (*infra* pages 6-11), especially given the emphasis in the PUA on promoting competition.

Hence, the ICC is correct that the statute is satisfied where the applicant for a CPCN widely offers the transmission capacity to the public, provides multiple ways for buyers to utilize the transmission capacity and follows a non-discriminatory process to

allocate the available capacity among potential buyers. The ICC's interpretation is consistent with its responsibility to promote low-cost, efficient electricity services and is supported by substantial evidence showing that the Rock Island Project will produce a broad range of benefits to the public. WOW-NRDC Brief at 28-31.

Another reason why ComEd's argument is wrong is that it conflicts with the clear legislative mandate to the ICC to promote, "the development of an effectively competitive electricity market…" 220 ILCS 5/8-406(b). In 1997, the Illinois General Assembly enacted legislation to bring competition to the retail electric market in Illinois. The Customer Choice Law allowed non-utilities to sell and market electricity to retail customers in competition with the established electric utilities. Prior to that, Illinois electric utilities owned the entire generation, transmission and distribution systems and were heavily regulated as monopolies. *Illinois Power v. Illinois Commerce Comm.*, 316 Ill. App.3d 254, 256-257 (5th. Dist. 2000).

In 2007, the Illinois PUA was further amended to acknowledge the need for new infrastructure to promote a competitive electric market in Illinois. Prior to that time, a CPCN could be approved for electric infrastructure needed for adequate, reliable and efficient electric service. The 2007 amendment added a new basis on which the Commission can issue a CPCN; that is, for "proposed construction [that] will promote the development of an effectively competitive electric market that operates efficiently, is equitable, and is the least cost means to satisfying those objectives." 220 ILCS 5/8-406(b) and 220 ILCS 5/8-503. This criterion was placed in the statutory section granting power to the ICC to issue CPCN. Rock Island applied for the CPCN under this provision. This addition to the statute created an opportunity for independent developers to secure a

CPCN which will promote competition by building transmission projects that increase competition in electric power generation.

This change is described in testimony submitted to the ICC by Dr. Karl McDermott, a former ICC Commissioner, on behalf of Rock Island:

> In 1997 ...the state of Illinois restructured its electric market to allow competitive forces more of a role in allocating electricity market resources. ... The General Assembly added, in 2007, in both Sections 8-406 and 8-503 (and subsequently in new §8- 406.1), language that recognized that because competition is important to protecting consumer interests, certain utility infrastructure may be necessary to support and promote competition, quite aside from, or perhaps in additional to, the traditional concern over reliable and safe service. The Project fits this second category of allowable utility construction. R.V.22 C-05381-82, RICL Ech. 4.0 Rev., Direct Tty of Karl McDermott at 5 (Oct. 10, 2012).

This amendment to the PUA parallels similar changes in federal regulation, and the ICC's approval of Rock Island's "open season" proposal is fully consistent with orders of the FERC, which regulates wholesale sales of electricity and transmission. In the same time frame that the Illinois General Assembly amended the PUA as describe above, the U.S. Congress and FERC introduced competition and eliminated monopolies in wholesale power and transmission markets and specifically allowed merchant transmission developers to compete with formerly monopoly transmission services. To this point, the legislative findings for Illinois Customer Choice Act acknowledge that:

> "Competitive forces are affecting the market for electricity as a result of recent federal regulatory and statutory changes. . . Long standing relationships need to be altered to accommodate the competition that could fundamentally alter the structure of the electric services market." 220 ILCS 5/16-101A(b).
>
> "A competitive wholesale and retail market must benefit all Illinois citizens. The Illinois Commerce Commission should act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers." *Id.* §16-101A(d)).

In its Order 888 the FERC required owners of interstate transmission lines to provide open access transmission service to all generators, including those not affiliated with the transmission owner. *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), aff'd in relevant part sub nom *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000). In 2007 FERC began to allow merchant transmission developers to use market-based or negotiated rates (in circumstances where the applicant had no market power). See, *Final Policy Statement, Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects* (AD12-9-000) *& Priority Rights To New Participant-Funded Transmission (AD11-11-000)*, 142 FERC ¶ 61,038 (2013). There has to be some rational way to allocate the finite amount of available capacity on a transmission line. FERC recognized this reality in allowing Rock Island (which FERC found did not have market power) to use the well-established market-based rate method to allocate the limited capacity on the line. The following describes FERC's rationale for market-based negotiated rates.

> The Commission has granted merchant transmission developers the right to charge for transmission service at negotiated rates, unencumbered by the traditional cost of service ratemaking principles and filings usually applied to transmission service.
>
> * * *
>
> Whereas cost-based ratemaking, "focused on preventing the exercise of market power by controlling profits rather than fostering efficiency [,]" market-based rates were intended to "create competitive pressures that would improve efficiency, reduce costs, and lower wholesale power prices." (Emphasis Added).
>
> * * *

> Lacking captive customers, merchant transmission providers do not earn the regulated, cost-based rate of return that captive customers would traditionally pay. Instead, merchant transmission providers' compensation comes from contracts they sign with customers to transmit electricity over their merchant transmission lines. [Citations omitted] ... *see Tres Amigas (Tres Amigas III)*, 132 F.E.R.C. ¶ 61,233, at P 29 (2010).
>
> Heidi Werntz, *Let's Make a Deal: Negotiated Rates for Merchant Transmission*, 28 Pace Envtl.L. Rev. 421, 425, 429 and n.13 (2011) available at: http://digitalcommons.pace.edu/pelr/vol28/iss2/2/.

Federal courts upheld market-based rates for transmission services in *Louisiana Energy & Power Authority. La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998).

It was under this Policy that FERC conditionally authorized Rock Island to charge negotiated market-based rates instead of cost-based rates ("tariffs") for its anchor customers (to whom up to 75% of the capacity can be contracted), and then offer the remaining capacity to customers through an "open season," at rates, terms and conditions based on contracts with the anchor customers. In evaluating Rock Island's application for a CPCN, the ICC concluded that Rock Island's offer of service complied with FERC's approved market-based rates and the PJM Open Access Transmission Tariff (OATT) – and found that it was non-discriminatory and satisfied the public use requirement of section 3-105. A-0047, ICC 12-0560 Order at 27; WOW-NRDC Brief at 23-24. All of Rock Island's eligible customers (*i.e.,* generators, large customers and retail providers) will be have access to the Project's capacity pursuant to the FERC approved PJM OATT, which assures they are treated uniformly. R.V6, C-1385.

ComEd and the Appellate Decision opinion completely ignore these important changes to the state statute and federal wholesale market rules, the use of an OATT that provides common terms for transmission access and how these changes in the past 20

years affect the ICC's CPCN authority. The Legislature's decision to introduce competition in electric service would be frustrated if the ICC were prohibited from granting CPCN's to competitive transmission developers who propose to use market-based rates in accordance with federal law and subject to FERC's safeguards to ensure non-discrimination.

ComEd's hyper-literal reliance on *Highland Dairy Farm's* language, "furnish all who apply," is no basis on which to narrow the ICC's authority. ComEd Brief at 2. The language suggests a return to monopoly electric services and appears in a case decided 84 years before the Illinois legislature changed the PUA to introduce competition as a feature of CPCN decision.

Some of the conditions ComEd would have this Court impose on transmission developers might have been appropriate for electric public utilities during a period when vertically integrated companies had monopolies on electric power generation, transmission, distribution and retail electric sales and the exclusive obligation to serve all customers in their service area. It is important to remember that in return for the obligation to serve "all comers" in their respective territories, the law protected public utilities, in this bygone era, from competition by new entrants. That is no longer the market structure established by the legislature in PUA for electric power and transmission. It ended many years ago when the Illinois legislature and the federal government broadly introduced competition into electric service, eliminated monopolies on electric generation, transmission and retail electric sales (*Illinois Power v. Illinois Commerce Comm.*, 316 Ill. App.3d 254, 262-263, 264 (5th. Dist. 2000)) and, in 2007, specifically gave the ICC power to approve infrastructure projects that "promote the

development of an effectively competitive electricity market." §8-406(b). To meet this objective, it is clearly within ICC's power to permit a transmission developer to use a non-tariff, market-pricing mechanism to allocate capacity on a proposed power line. Neither the Appellate Decision nor the Appellees explain why this is not within the broad powers delegated to the ICC by the Legislature.

The competitive market pricing method proposed by Rock Island and which was found by the ICC to meet the "public use" standard, allocates the finite amount of capacity on the proposed power line efficiently and in a way that increases competition in both transmission and electric generation services. Customers are allowed to purchase firm and non-firm service, in order to most fully utilize the capacity on the line (as well as best suit the particular customers' needs). The result of the ICC's final order is that the low cost renewable power, to be carried on the Rock Island line, can compete against higher cost electricity supplies and thereby lower electricity prices for the public generally. These facts demonstrate the efficiency and competitive qualities of the ICC's CPCN decision in this case. A0047-A0047; see also WOW-NRDC Brief at 6-7.

As stated in the ICC's initial brief, "the Appellate Court's decision is essentially a reversion to a parochial, non-market-based regulatory scheme that law and technology have both passed by." ICC Brief at 44. So too is ComEd's attempt to limit the ICC's power to grant a CPCN to an independent transmission company like Rock Island.

Finally, we strenuously contest ComEd's claim that the ICC's decision is a purely legal issue on which the ICC is entitled to no deference. There is clearly a dispute as to the factual basis for ICC's ultimate findings that Rock Island meets the "public use" standard and that the public convenience and necessity require the construction, operation

and maintenance of the Project and the transaction of a public utility business by Rock Island. A-047, A-0242. The ICC was applying facts from an extensive record, to a complex set of policy choices. It applied those facts to a statutory standard using its expertise and the broad discretion given to it by the Illinois General Assembly. "[T]he Commission is entitled to great deference because it is an administrative body possessing expertise in the field of public utilities." *Adams County Property Owners and Tenant Farmers v. Ill. Commerce Comm'n*, 2015 IL App 130907 at ¶29 (4th Dist. 2015) *citing Archer–Daniels–Midland Co. v. Illinois Commerce Comm'n,* 184 Ill.2d 391, 397 (1998). The ICC's findings and conclusions must be held to be prima facie true and a decision by the Commission should not be disturbed by a reviewing court unless it findings and conclusions were unsupported by substantial evidence. 220 ILCS 5/10-201(d) and (e)(iv). This Court has held that, "[t]he Commission's interpretation of a statute it is charged with administering and enforcing is entitled to substantial weight and deference." *Ameren Illinois Co. v. Illinois Commerce Comm'n*, 2012 IL App 100962, ¶ 61 (4th Dist. 2012). For additional discussion of the scope of Review in this case see WOW-NRDC Brief at 13, 25-31.

III. The PUA Does Not Require an Applicant for a CPCN to Own, Control Manage or Operate Transmission Assets in Order for the ICC to Have Authority to Grant It a CPCN

Despite the Appellee's attempts to rationalize the Appellate Court's Decision, it still results in a "Catch--22" in which applicants would have to violate section 8-406(a) in order to become eligible to seek a CPCN and violates legislative intent to promote competitive electric markets under section 8-406(b). First, the Appellate Court found that Rock Island is not a public utility under section 8-406(a) (220 ILCS 5/8-406(a)) because

it does not own assets, and therefore, the ICC does not have jurisdiction to approve the construction of the Rock Island Project under section 8-406(b) (§8-406(b)). A-0016, Appellate Decision at 16. It acknowledges that Rock Island can't own assets because, "a public utility must obtain a [CPCN to transact business] from the Commission before transacting any business or constructing a high-voltage transmission line." A-0013, *Id.* at 13. The Appellate Decision then reverses course and states that an entity can apply for a CPCN to be a public utility but cannot become a public utility until it owns assets. A-0014-16, *Id.* at 14-16. The Appellate Court's rationale has the absurd result of requiring an entity who wants to become a public utility to acquire and operate utility assets in violation of section 8-406(a). See, e.g., *Roselle Police Pension Bd. v. Village of Roselle*, 232 Ill.2d 546, 559 (2009) stating "that courts are obliged to construe statutes to avoid absurd, unreasonable or unjust results." Hence no entity can become a new public utility unless they are already operating as a public utility without a certificate pursuant to section 8-406(a). This, of course, cannot be right since it results in an absurd interpretation of the PUA and would completely frustrate the central theme of the 2007 amendments to PUA, in which ICC is directed to "promote development of an effectively competitive and efficient electric market." One cannot promote a competitive electric market by barring the door to new market participants.

It is no wonder the Appellees' briefs struggle with this result. The Appellees' arguments fail, primarily, because they use the definition of "public utility" in a way it was never intended and would make the Commission's review and determination under section 8-406(b) a futile exercise, a result the Legislature could not have intended. Section 8-406(b) requires an evidentiary hearing and vests the Commission with the

authority to review and determine whether new infrastructure will promote an effectively competitive electricity market, and whether the applicant has the prospective ability to construct and finance that infrastructure. §8-406(b). Appellees argue that only entities with approval to operate as a public utility under section 8-406(a) may apply to build new infrastructure under section 8-406(b). But why would the Legislature forbid the ICC from reviewing and approving infrastructure planned by a new applicant, and only allow the review of infrastructure improvements proposed by existing utilities? It is illogical to exempt new transmission companies who want to become a public utility from ICC review and approval. The ICC took a much more rational approach than the Appellate Court, recognizing that the use of the present tense in the definition of public utility is not intended to operate as a means to exclude new market entrants but is to have include the future. 5 ILCS 70/1.02. Rather than acting as affirmative requirements for a CPCN, these terms are prohibitions on constructing public utility facilities or transacting utility business in Illinois until the entity has obtained a CPCN. Further explanation of how sections 3-105 and 8-406 are to be interpreted *in pari materia* are provided in the ICC's brief (§§I.A. and II.A. through D.) and Rock Island's Brief (§II).

IAA asserts that the Appellate Decision does not create a "Catch-22" because "Neither section (3-105 nor 8-406) requires or authorizes an applicant to be a certified public utility in order to purchase qualifying transmission assets." IAA at 25-26. Constructing, purchasing or selling transmission lines are utility transactions regulated by the ICC. See §8-406(b) (approving construction of new lines); 220 ILCS 5/7-102 (regulating sale or purchase of utility assets). If a private entity intends to operate as a public utility, it should be encouraged to approach the ICC and demonstrate its

credentials for constructing and financing a new transmission line. It is a misapplication of the PUA -- contrary to its purpose of regulating public utilities effectively and comprehensively (220 ILCS 5/1-102) -- to encourage an entity who intends to be a public utility to first start transacting business as a public utility before it applies for certification to do so. Such an interpretation encourages entities to avoid oversight pursuant to the PUA.

A statute cannot be implemented in a manner that results in an absurd, unreasonable or unjust result, such as fostering a violation of itself. See, e.g., *Roselle Police*, 232 Ill.2d at 559. Such an interpretation can be avoided by affirming the approach the Commission used in the instant matter, which allows entities to apply for and be granted a CPCN if they can comply with section 8-406 criteria. This would allow entities who do not own, control, manage or operate property at the time of application, but who intend to construct facilities for the public benefit to be certified. This also results in a reasonable interpretation of the definition of "public utility" that does not make section 8-406 irrelevant.

The ICC's interpretation also applies the CPCN in a practical manner and keeps pace with changes in the electric industry, including the state's interest in promoting competition (220 ILCS 16-101A). As described in Section II above, federal law allows transmission providers to set their rates based on market/negotiated rates. A-0329, *FERC Order, Rock Island Clean Line LLC*, 139 FERC 61,142 (2012).

ILA also expresses concern that Rock Island would be certified to build the Project but not do so. ILA Brief at 10-12 and 20-21. ComEd shares a similar concern but goes further in arguing that Rock Island needed to make a firm commitment to build the

Project and the Commission needed to find that the Project would actually be built in order to issue a CPCN. ComEd Brief at 35. But requiring an entity to make an irreversible commitment to finance and complete the project in order to become a public utility is in direct conflict with the statute. The CPCN requires *the Commission to find* that the applicant can get the project built (financed and constructed) and placed into service (§8-406(b)(2) and (3). The ICC here found, based on the record, that these statutory criteria were met. A-0150-51 and A-0170-71, ICC 12-0560 Order at 130-31, 150-51. In addition, the Commission established a condition that Rock Island demonstrate, prior to starting to construct transmission facilities on easement properties, that it has secured the necessary financing to cover the entire cost of constructing the transmission line. *Id.* That condition is entirely consistent with the fact that Rock Island does not have a captive customer base, but has been approved by FERC to use market-based/negotiated rates for this specific project. See A-0329-0345, *FERC Order, Rock Island Clean Line LLC*, 139 FERC 61,142 (2012). As explained by Rock Island, transmission customers who will use the Project and sign contracts with Rock Island for service will not do so until regulatory approvals for the transmission line are obtained. R.V26, C -06301 RICL IB at 112. In reaching its conclusion the Commission emphasized the consideration it gave this case and condition in stating:

> The Commission takes seriously the unique balance that must be struck in this proceeding. As observed elsewhere in this Order, this is a case of first impression for the Commission, and there are many uncertainties associated with the "merchant" nature of the Project that require careful evaluation. It is important that the decisions made here do not unfairly disadvantage merchant transmission line projects across the board by setting a precedent that would not allow them to operate within their business model. At the same time, the Commission must ensure that said business model will not harm ratepayers and that the utility meets all of its requirements under Section 8-406 of the PUA. The Commission finds that

> the compromise reached through RI's acceptance of Staff's proposed requirement offers the flexibility necessary for a merchant transmission project to be feasible, while still operating within the parameters of our current regulatory structure. A-0171, ICC 12-0560 Order at 151.

If ComEd's view were to be adopted, the only entities capable of building large infrastructure projects would be those who have a captive customer base. Such an outcome is antithetical to the intent, in Illinois and federal laws, to increase competition in the electric market. ComEd's position would also prevent a company operating under FERC authorized market-based, negotiated, rates from competing in Illinois unless it has an extraordinary bank of capital on hand at the time it applies for its CPCN. By contrast, if this Court affirms the Commission's order, the result would be consistent with the Legislature's objective in the PUA to foster competition in electricity markets.

Finally, we note that at the time it received the CPCN from the ICC, Rock Island did own some property (some easements and options to purchase property) that would be used in the power line project. Rock Island Brief at 29, citing R.V1, C-0037; R. V2, C-0258; R.V41, Tr. 421-22, 491; A-0179; A-0007-8 Appellate Decision ¶17. It does not make sense that eligibility for a CPCN should turn on acquisition of an easement and options for purchase of property. But if this Court were to agree with the Appellate Court that ownership or control of property to be used for the transmission project is necessary for receipt of a CPCN, then it should still affirm the ICC decision. The Appellate Court failed to take this evidence into account in the "Analysis" part of its decision. Had it done so the Appellate Court would have found that ownership of the easement and options would make Rock Island eligible to receive the CPCN.

IV. Eminent Domain Concerns Are Unripe and Outside the Scope of This Case

The opening lines of ComEd's brief focus on eminent domain, accusing Rock Island of seeking a CPCN solely so that it could acquire eminent domain authority. The issue of eminent domain was not before the ICC nor was it reviewed on appeal. In fact, Rock Island did not request eminent domain in its application to the ICC, and the ICC did not grant it. Hence, this Court has no basis upon which to address eminent domain. More to the point, getting a CPCN under section 8-406 does not automatically result in a grant of eminent domain powers – which are governed by separate criteria under §8-509. 220 ILCS 5/8-509. Section 8-509.5 specifies that any power granted under the PUA to acquire property by condemnation or eminent domain is subject to and shall be exercised in accordance with the Eminent Domain Act. 220 ILCS 5/8-509.5. The Eminent Domain Act says that a certificate issued by ICC only creates a "rebuttable" presumption that acquisition of private property by eminent domain is "necessary for a public purpose." 735 ILCS 30/5-5-5(c).

For Rock Island to obtain eminent domain authority, the Commission would need to grant Rock Island a separate order satisfying the criteria of: (i) 8-503 (220 ILCS 5/8-503) (which the ICC actually denied in this case) and (ii) 8-509 and comply with the Illinois Eminent Domain Act. See, §8-509.5.

The recent Appellate Court decision in *Adams County v ICC* (2015 IL App 30907), *supra* confirms that the issuance of a CPCN by the ICC for a transmission project does not affect property rights.

> The hearing [before the ICC] was on the reasonableness of the utility's plans and could not confer property rights. Appeal of the order of the * * * Commission to the courts as provided by statute would only have been a review of the proposed plan for development of the project and the extent of the property to be sought. The appearance of the owners before the * *

> * Commission to give input into the plans, or object thereto, could not bar them from later exercising their rights as owners of property being taken for a public use. There is nothing in the * * * Utilities Act preempting the rights of the property owners in the condemnation proceedings. (emphasis in original.) *Illinois Power Co. v. Lynn*, 50 Ill.App.3d 77, 81–82, (4th Dist. 1977).

The Illinois Eminent Domain Act provides land owners an opportunity to contest that issue when and if a request is made under that law. ICC's decision to require Rock Island to come back later, if it wishes to obtain eminent domain power, means that this issue is not ripe for consideration by this court.

It is surprising and ironic to see ComEd focus so heavily on eminent domain. In two recent dockets ComEd requested and was granted eminent domain authority to acquire easements on numerous properties for construction of its "Grand Prairie Gateway" ("GPG") transmission line in Illinois. See, *Commonwealth Edison, Eminent Domain under Sec. 8-509*, ICC Docket No. 15-0373 at 2 (July 8, 2015); *Commonwealth Edison, Eminent Domain under Sec. 8-509*, ICC Docket No. 15-0545 at 2 (Nov. 12, 2015). The ICC granted ComEd a CPCN to build the GPG line, even though the ICC expressly found that the GPG line was *not* needed for reliable and efficient electricity service, but rather was warranted to promote the development of an effectively competitive electricity market under Section 8-406.1(f)(1). 220 ILCS 5/8-406.1(f)(1). In the CPCN case approving the need for the line, the ICC relied on nearly the same analysis as it did for Rock Island:

> Taking into account Staff's benefit to cost analysis which demonstrates that the project will reduce the cost to serve load in the ComEd Zone, thereby lowering retail prices of electricity for Illinois rate-payers, and taking into account the other resulting benefits which create additional efficiencies in the market, the Commission finds that the project will promote the public convenience and necessity and the development of an effectively competitive electricity market that operates efficiently.

Commonwealth Edison, CPCN sec. 8-406.1 and 8-503, ICC Docket No. 13-0657 at 24 (Oct. 22, 2014).

The suggestion that it is OK for ComEd to use eminent domain to construct a transmission line for which service will be provided under a tariff, but not for a line using market–based pricing as approved for Rock Island, is a distinction without a difference.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners-Appellants Wind on the Wires and Natural Resources Defense Council respectfully request this Court reverse the decision of the Appellate Court, and affirm the order of the Illinois Commerce Commission in ICC Docket No. 12-0560.

Respectfully submitted,

/s/ Sean R. Brady
Sean R. Brady
WIND ON THE WIRES
P.O. Box 4072
Wheaton, Illinois 60189-4072
(312) 867-0609
sbrady@windonthewires.org
Attorney for Wind on the Wires

/s/ John N. Moore
John N. Moore
NATURAL RESOURCES DEFENSE COUNCIL
20 North Wacker Drive, Suite 1600
Chicago, Illinois 60606
(312) 651-7927
jmoore@nrdc.org
Attorney for Natural Resources Defense Council

April 26, 2017

CERTFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

Dated: April 26, 2017

/s/ Sean R. Brady
Attorney for Petitioner-Appellant

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

IN THE SUPREME COURT OF ILLINOIS

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

NOTICE OF FILING

TO: Attached Service List

PLEASE TAKE NOTICE that on this 26th day of April, 2017, I have caused to be electronically filed with the Clerk of the Illinois Supreme Court in the above captioned consolidated dockets using the I2File.Net system the *Reply Brief of Wind on the Wires and the Natural Resources Defense Council*, a copy of which is hereby served upon you.

Respectfully submitted,

/s/ Sean R. Brady

John N. Moore
Counsel for Natural Resources Defense Council
20 North Wacker Drive, Suite 1600
Chicago, IL 60606
(312) 651-7927 (Phone)
jmoore@nrdc.org

Sean R. Brady
Counsel for Wind on the Wires
P.O. Box 4072
Wheaton, Illinois 60189-4072
(312) 867-0609 (Phone)
sbrady@windonthewires.org

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

IN THE SUPREME COURT OF ILLINOIS

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 26, 2017, I caused a copy of the attached *Reply Brief of Wind on the Wires and the Natural Resources Defense Council* to be electronically filed with the Clerk of the Supreme Court of Illinois in the above captioned consolidated dockets using the I2File.Net system.

Pursuant to the "Supreme Court of Illinois Electronic Filing User Manual" and upon acceptance of the electronic *Brief and Argument* for filing, I certify that I will cause one original and twelve court-stamped copies of the *Reply Brief* to be transmitted to the Court within five (5) days of receipt of the notice of acceptance. I further certify that I will cause the *Brief and Argument* to be served upon the parties listed on the attached Service List by e-mail on the 26th 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 instrument are true and correct. Please re-submit your reply brief with these corrections.

/s/ Sean R. Brady
Sean R. Brady
Counsel for Wind on the Wires

Sean R. Brady
Counsel for Wind on the Wires
P.O. Box 4072

Wheaton, Illinois 60189-4072
(312) 867-0609 (Phone)
sbrady@windonthewires.org

SERVICE LIST

IL Supreme Court Nos. 121302, 121304, 121305 & 121308 (Consolidated)

James E. Weging, Matthew L. Harvey
and Douglas P. Harvath
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, Illinois 60601
jweging@icc.illinois.gov
mharvey@icc.illinois.gov
dharvath@icc.illinois.gov

Thomas S. O'Neill
Senior Vice President & General
Counsel
COMMONWEALTH EDISON
COMPANY
440 S. LaSalle Street, Suite 3300
Chicago, Illinois 60605
thomas.oneill@exeloncorp.com

Claire A. Manning and Charles Y. Davis
Brown, Hay & Stephens LLP
205 South Fifth Street, Suite 700
P.O. Box 2459
Springfield, Illinois 62705
cmanning@bhslaw.com
cdavis@bhslaw.com

Richard G. Bernet
Clark M. Stalker
Exelon Corp.
10 South Dearborn Street, 49th Floor
Chicago, Illinois 60603
richard.bernet@exeloncorp.com
clark.stalker@exeloncorp.com

William M. Shay
Melissa N. Scheonbein
Jonathan Phillips
John D. Albers
Shay Phillips, Ltd.
230 S.W. Adams Street, Suite 310
Peoria, Illinois 61602
wshay@shay-law.com
mschoenbein@shay-law.com
jphillips@shay-law.com
jalbers@shay-law.com

Michael T. Reagan
Law Offices of Michael T. Reagan
633 LaSalle Street, Suite 409
Ottawa, IL 61350
mreagan@reagan-law.com

Patrick K. Shinners
Schuchat, Cook & Werner
1221 Locust Street, Second Floor
St. Louis, MO 63103-2364
pks@schuchatcw.com

E. Glenn Rippie
Carmen L. Fosco
ROONEY RIPPIE & RATNASWAMY
LLP
350 West Hubbard Street, Suite 600
Chicago, Illinois 60654
glenn.rippie@r3law.com
carmen.fosco@r3law.com

Owen E. MacBride
Diana Z. Bowman
Schiff Hardin LLP
233 South Wacker Drive, Suite 6600
Chicago, IL 60606
omacbride@schiffhardin.com
dbowman@schiffhardin.com

Laura A. Harmon
Senior Counsel
Illinois Agricultural Association
Office of the General Counsel
1701 Towanda Avenue
P.O. Box 2901
Bloomington, IL 61702-2901
lharmon@ilfb.org

Mara S. Georges
Michael J. Synowiecki
Daley and Georges, Ltd.
20 South Clark St., Suite 400
Chicago, IL 60603
mgeorges@daleygeorges.com
msynowiecki@daleygeorges.com

John N. Moore
Natural Resources Defense Council
20 North Wacker Drive, Suite 1600
Chicago, IL 60606
jmoore@nrdc.org

Clifford Berlow
Jenner & Block LLP
353 North Clark Street
Chicago, IL 60654-3456
cberlow@jenner.com

Sean R. Brady
P.O. Box 4072
Wheaton, IL 60189-4072
sbrady@windonthewires.org

Justin Vickers
Robert Kelter
Staff Attorney
Environmental Law & Policy Center
35 E. Wacker Dr., Ste. 1600
Chicago, IL 60601
jvickers@elpc.org
rkelter@elpc.org

Matthew E. Price
Jenner & Block LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001
mprice@jenner.com

Michael A. Munson
Grant O. Jaskulski
Law Office of Michael A. Munson
22 W. Washington St., 15th Floor
Chicago, IL 60602
michael@michaelmunson.com
grant@michaelmunson.com

David Streicker
Colleen S. Walter
Polsinelli PC
161 N. Clark Street, Suite 4200
Chicago, IL 60601
dstreicker@polsinelli.com
cwalter@polsinelli.com

John Martin
MartinSirott LLC
30 North LaSalle Street, Suite 2825
Chicago, IL 60602
jmartin@martinsirott.com

Michael R. Engleman
Squire Patton Boggs (US) LLP
2550 M Street, NW
Washington, DC 20037-1350
Michael.engleman@squirepb.com

Jacques LeBris Erffmeyer
Kristin Munsch
Citizens Utility Board
309 W. Washington Street, Suite 800
Chicago, IL 60606-3223
jerffmeyer@citizensutilityboard.org
Kmunsch@citizensutilityboard.org

Lisa Madigan
David L. Franklin
Brett E. Legner
James Gignac
Attorneys for the People of the State of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
civilappeals@atg.state.il.us
blegner@atg.state.il.us

CH2\19208277.2