No. 121304

IN THE SUPREME COURT OF ILLINOIS

ILLINOIS LANDOWNERS ALLIANCE, NFP, ILLINOIS AGRICULTURAL ASSOCIATION a/k/a ILLINOIS FARM BUREAU, and COMMONWEALTH EDISON CO., Respondents-Appellants, vs. ILLINOIS COMMERCE COMMISSION, ROCK ISLAND CLEAN LINE LLC, *et al.* Petitioners-Appellees.	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

JOINT ANSWER OF ILLINOIS AGRICULTURAL ASSOCIATION a/k/a ILLINOIS FARM BUREAU AND ILLINOIS LANDOWNERS ALLIANCE, NFP TO PETITION FOR LEAVE TO APPEAL

BROWN, HAY & STEPHENS, LLP
Claire A. Manning (Reg. No. 3124724)
Charles Y. Davis (Reg. No. 6286010)
205 South Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705
(217) 544-8491
Fax: (217) 544-9609
cmanning@bhslaw.com
cdavis@bhslaw.com

SHAY PHILLIPS, LTD.
William M. Shay (Reg. No. 3122123)
456 Fulton St., Ste. 255
Peoria, IL 61602
(309) 494-6155
Fax: (309) 494,6156
wshay@shay-law.com

I. Introduction

Four separate Petitions for Leave to Appeal ("PLAs") were filed following publication of and directed to the Opinion issued by the Third District Appellate Court ("Third District Opinion"): (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. This Answer is being filed separately in response to each of the four PLAs pending before this Court.[1]

The Illinois Agricultural Association is an organization with over 80,000 farmer members in Illinois, better known as the Illinois Farm Bureau ("Farm Bureau"). Illinois Landowners Alliance, NFP ("ILA") is comprised of approximately 300 members who own or have interests in approximately 100,000 acres of land, mainly farmland, that lies on or along the proposed route for the high voltage electric transmission line ("Project") for which Rock Island Clean Line, LLC ("Rock Island") is seeking regulatory approval. The members of the Farm Bureau and the ILA are disproportionately affected by the Illinois Commerce Commission's (the "Commission") Final Order that was appropriately overturned by the Third District Appellate Court ("Third District").

The Farm Bureau and the ILA intervened in opposition to Rock Island's Project because of the threat of eminent domain. The many member-landowners of these two organizations steadfastly oppose having to face the prospect of Rock Island forcing its way onto their farms and other lands through legal process in order to build its

[1] At times, this Answer may refer to a position or argument of Rock Island, but the same position or argument has been taken or made by the other parties in the separately filed PLAs referenced herein. For the sake of simplicity, this Answer should be considered in response to the arguments of all parties and their PLAs.

transmission line. Although the proceedings before the Commission did not include a request for eminent domain authority, had the Commission's Order been allowed to stand, Rock Island inevitably would have returned to the Commission to seek authority, as a newly-certificated public utility, to exercise eminent domain to acquire rights of way across those farms and lands. Based upon the attributes of Rock Island as an entity, and the nature and purpose of its proposed Project, the Farm Bureau and ILA members do not believe Rock Island is legally entitled to a certificate to conduct business as a public utility or to construct the Project as public utility property.

Rock Island, like its parent and sister companies, is a start-up company that has never built a transmission line, let alone Illinois' first-ever high voltage DC transmission line. It also has inexperienced management, insufficient funding, no customers, no suppliers, and no property. Moreover, Rock Island refuses to commit to build the 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. For these reasons and others as detailed herein, this Court should deny the Petitions for Leave to Appeal.

II. The facts demonstrate that this case is neither exceptional nor novel, presents no issues of general importance, and presents no conflict with any prior opinion of this Court or the Appellate Court.

Supreme Court Rule 315 dictates that a petition for leave to appeal should not be granted when petitioners cannot make a showing either (a) that the question presented is one of "general importance;" or (b) of the existence of a conflict between the opinion and a decision of this Court or of another division of the Appellate Court. *See* Sup. Ct. Rule 315. The Third District applied a straightforward application of the plain language of the

pertinent provisions of the Illinois Public Utilities Act, 220 ILCS 5/1-101 *et seq.* ("PUA") to the relevant, undisputed facts to arrive at the conclusion that the Commission erred when it granted Rock Island's application for a Certificate for Public Convenience and Necessity ("CPCN").

Rock Island's claims of general importance, while grandiose, are more hyperbolic than substantive, and are meant to subvert the Third District's application of basic principles of statutory construction. Rock Island attempts to paint a picture of dire importance and consequence, but with no factual support. Not only do Rock Island's arguments fail to elevate the case to the level of great importance sufficient to warrant review by this Court, the Third District reached the proper result in this unexceptional and ordinary administrative review case.

A. Rock Island is a private company seeking to provide a private service to private buyers, not a public service to the public at-large.

Rock Island is a subsidiary of Clean Line Energy Partners, LLC. R.V2, C00214. Both are Delaware limited liability companies with principal offices located in Houston, Texas. R.V1, C0004. Rock Island was formed solely and specifically to develop the Project. Rock Island's economic model assumes that out-of-state generators, not Illinois retail customers, will pay for the Project. R.V1, C00014. Indeed, Rock Island has committed to the Federal Energy Regulatory Commission ("FERC") that a mere 25% of its capacity will be sold through a competitive auction process, even though FERC-regulated capacity auctions are not the realm of the public generally. The auction process includes no obligation to serve any Illinois customer. R.V6, C01384. The other 75% of Rock Island's capacity will be held for pre-subscribed private use to be sold to particular buyers at negotiated rates not established by FERC. R.V1, C00014.

Illinois law is clear that, to be a public utility, assets must be held for the public use and a utility must offer service to the public generally. *Miss. River Fuel Corp. v. Ill. Commerce Comm'n*, 1 Ill. 2d 509 (1953). All eligible customers must be offered service pursuant to nondiscriminatory terms and conditions. *Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. 158 (1929); *State Pub. Utils. Comm'n v. Bethan Mut. Tel. Ass'n*, 270 Ill. 183 (1915).

Rock Island's business model is directly contrary to the public utility model, and is more akin to private entities making transmission purchases and deliveries entirely between themselves. An electricity transmission project that is not intended to serve or benefit Illinois generators of electricity or is needed by the Illinois public does not present any issue of "general importance" for Illinois citizens. Therefore, the Third District's Opinion need not and should not be disturbed.

B. A project that Rock Island itself refuses to commit to build should not create issues of general importance to Illinois citizens.

Rock Island has admitted that the Project may never be built, regardless of regulatory approvals. R.V19, C04626. Rock Island's Chief Executive Officer testified in front of the Commission and confirmed that Rock Island would abandon the Project after it obtained a CPCN if Rock Island determined that it "wasn't worth investing in any further." R.V40, RP286. Rock Island does not know if the wind farms in Iowa that would generate electricity to be carried over Rock Island's lines will ever be built, or if demand for any electricity to be produced will ever materialize. Rock Island's uncertainty surrounding the basic economics of the Project undercuts its assertion that this case is somehow of general importance to Illinois.

C. The Project is not needed to alleviate any bottlenecks on or unreliability of the electric transmission system.

Nothing in the record indicates that "the lights will go out" if the Project is not constructed and placed into service. That is, as the Commission so found, the Project is not needed either to relieve congestion on the transmission grid or to alleviate an electric reliability problem. ("Accordingly, the Commission finds that Rock Island has not demonstrated that the Project is necessary to provide adequate, reliable, and efficient service to customers within the meaning of [PUA] Section 8-406(b)(1)."). Order at 116; R. V34, C-08358.

D. The Third District Opinion does not conflict with any opinion of this Court or the Appellate Court.

Rock Island and other Petitioners accuse the Third District of applying the wrong standard of review, but when the pertinent facts are considered (as further explained below), it is evident that the Third District applied the correct standard of review. Furthermore, in determining that the newly formed and non-utility affiliated limited liability company does not meet the statutory definition of "public utility," the Opinion does not create a conflict with any other appellate opinion in this State.

III. The Third District's Opinion correctly concludes that only public utilities with utility assets are entitled to a CPCN, and that Rock Island is not a public utility.

Rock Island and the other Petitioners complain that the Third District got it wrong with respect to Rock Island's public utility status, arguing that it need not already own or control utility assets in Illinois to obtain a CPCN from the Commission. In Illinois, the PUA governs (and the Commission regulates) many aspects of the transmission of electric service by 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.

The PUA's definition of "public utility" is found at Section 3-105 of the PUA which provides, in relevant part, that a public utility is 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, or owns or controls any franchise, license, permit or right to engage in [transmission]." 220 ILCS 5/3-105.

Section 8-406(a) of the PUA only permits a "public utility" to be granted 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).

Section 8-406(b) of the PUA only permits a "public utility" to be granted 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. 220 ILCS 5/8-406(b).

As stated previously by the First District Appellate Court, the PUA and the Commission "seek[s] to regulate entities and individuals which actually operate and manage the property devoted to public use." *Peoples Energy Corp. v. Ill. Commerce*

Comm'n, 142 Ill. App. 3d 917, 924 (1986). (Internal citations omitted). Despite this, before the Commission, the Third District, and now this Court, Rock Island repeatedly insists that although the plain language of the applicable statutes plainly says one thing, it cannot be so simple and the language must mean something other than what it plainly and unambiguously says. There is no split of authority or question of great importance to which this Court should turn its attention. Section 8-406 CPCNs are only available to public utilities. Rock Island is simply a private square peg trying to force itself into a public round hole.

IV. The Third District is correct – Rock Island is not a public utility pursuant to the clear and unambiguous language of Section 3-105 of the PUA.

Rock Island simply appeared before the Commission with a business plan, a promise of (unidentified) anchor tenants, an assertion that it may obtain utility assets in the future, and that its hoped-for Project will likely benefit Illinois consumers. At the conclusion of presenting its evidence to the Commission, Rock Island had not demonstrated, as a matter of law, that it owned, controlled, operated, or managed, 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 Third District got it right, and the Commission got it wrong.

The Third District's Opinion correctly looks at whether Rock Island is a public utility, as defined by Section 3-105, as jurisdictional for the issuance of, *and not for the application for*, a CPCN. Although the Farm Bureau and the ILA respectfully disagree with the Third District's Opinion that an applicant does not have to be a public utility prior to application to the Commission, that issue is not before this Court – the issue is related to being a public utility after the application but prior to being awarded a CPCN.

Rock Island and the Commission Staff present a significant amount of argument to the questions of whether a jurisdictional analysis was appropriately done, and whether appropriate deference was given to the Commission's determination of the facts. First, as in *Peoples Energy*, precedent clearly exists determining that Commission action lacks jurisdiction when the subject entity is not a public utility. *See Peoples Energy*, 142 Ill. App. 3d at 929. Second, with respect to Rock Island's purported evidence at the Commission supporting that it met the statutory definition of a public utility, the adverse intervenors did not seek to 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.

In its *de novo* review on this jurisdictional point, the Third District appropriately reviewed the evidence and determined, as a matter of law, that based upon the applicable, undisputed facts, Rock Island was not a public utility. "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. Ill. Commerce Comm'n*, 166 Ill. 2d 111, 121 (1995) (emphasis added; internal citations omitted). The Third District's Opinion should stand.

Rock Island and the other Petitioners ignore the clear language of Section 3-105(a) by arguing that the PUA does not require, at the time of the issuance of a CPCN, present ownership of transmission facilities or property in order for an entity to meet the clear statutory definition of "public utility." The text of Section 3-105 is 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). In drafting the PUA, the legislature has provided a clear and unambiguous definition of a 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).

Here, Rock Island has not established that it "owns, controls, operates, or manages within this state, directly, for public use, any ... plant, equipment or property used or to be sued for or in connections with ... the transmission, delivery, or furnishing of ... electricity." 220 ILCS 5/3-105. Accordingly, it is not a public utility, and neither the Commission nor any Court can make it so by ignoring the legislature's clear definition of public utility. Unless and until Rock Island invests in some property or equipment in Illinois that it intends to utilize to provide transmission to Illinois customers, it is not a public utility. If a more expansive definition is desired, then it is up to the legislature to provide one, and not the Commission or this Court on review.

V. The legislative history demonstrates that an expansive definition of Public Utility would be erroneous.

Since the language of Section 3-105(a) is clear and unambiguous, nothing exists to merit this Court's inquiry. To buttress this position even further, this Court's recent decision in *Kanerva v. Weems* demonstrates that 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). Here, while there are no debates to consult, the legislative history of the public utility definition 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 Rock Island advocates for it here. Specifically, it

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..." (R.V7, C1637-1838) (emphasis added).

As this Court keenly 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 Section 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 a 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).

Rock Island ignores 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, Rock Island advocates for a version as it read pre-1967, ignoring the important change the legislature made in deleting the words "now or hereafter."

As succinctly put previously 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).

Here, the law is not in doubt. The legislature crafted Section 3-105 intentionally to require present ownership or control of the defined infrastructure; that is axiomatic given the deletion of the pre-1967 phrase "now or hereafter." If the legislature wished for the text to have the interpretation proffered by the Commission and advocated by Rock Island, the General Assembly 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. The Third District's correct conclusion should stand.

VI. The Commission has previously recognized that current ownership of infrastructure in Illinois is 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*, 01-0142, Order (Jan. 23, 2003). 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." *See In re American Transmission Co. LLC*, 01-0142, Order at 2 (Jan. 23, 2003). Like here, Docket No. 01-0142 above was filed by a company seeking its first certificate under Section 8-406(a) and approval under Section 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. *In re American Transmission Co. L.L.C.*, Docket 01-0142, Petition at 2 (Feb. 14, 2001). 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. *In re American Transmission Co. L.L.C.*, Docket 01-0142, Order at 5, 2003 WL 1995923 (Jan. 23, 2003).

Rock Island's position 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, and the Rock Island's erroneous interpretation of the statute should not be given any credence.

VII. Rock Island does not own any qualifying property or utility assets in Illinois.

In its PLA, Rock Island affirmatively stated that "during the ICC proceeding, Rock Island did not own any transmission facilities in Illinois to be used for the Project." Rock Island PLA at 5. Despite this, Rock Island believes that its small number of easements and options to purchase real property are sufficient for the property and utility asset ownership requirements of Section 3-105. As to both of these assertions, Rock Island has neither an ownership right nor a possessory right to the real property. The evidence does not demonstrate that Rock Island has any day-to-day control rights over the real property, and legally it does not. Rock Island simply has either access or 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 real property in the future should it obtain its regulatory approvals and hit its other unpublished business plan milestones. 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 anytime.

This issue has come before the Commission in the case involving Rock Island's sister company, Grain Belt Express Clean Line, LLC[2]. In that case, Commissioner Ann

[2] *Grain Belt Express Clean Line, LLC*, ICC Docket 15-0277 (ICC 2015), now on appeal (No. 5-15-0551). Rock Island also references *Grain Belt* to allege a conflict and to heighten the importance of this Court's review. No decision has issued from the Appellate Court in *Grain Belt*, so there is no conflict. Also, *Grain Belt* can be decided on other grounds (which the appellants there have urged) that are inapplicable to the case here.

McCabe, joined by Commissioner Miguel del Valle, filed a Dissenting Opinion to the Final Order of the case, stating:

> 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.
> (R.V38, C09315).

By both Rock Island's affirmative statements and as a matter of law, Rock Island does not have property or utility assets which meet the statutory threshold definition of "public utility."

VIII. No "chicken-egg" dilemma exists. Rock Island does not have utility assets and has not pledged to obtain assets.

Rock Island and other Petitioners claim that the Third District's decision requires Rock Island to purchase public utility infrastructure to become a public utility, before seeking a CPCN in order to do so, which creates a "chicken-egg" dilemma. There is no dilemma. The Third District Opinion hits the nail on the head regarding the most significant problem with the Project when it identifies that Rock Island does not own, control, operate, or manage assets within the state, nor does it pledge to do so. As identified by the Third District, Rock Island admitted that the Project was in the planning stages and that it would only pursue construction if the company determined that it would be profitable in light of future undefined market developments and financial support. Appellate Court Opinion, ¶ 43. To be clear, by Rock Island's own admission, the proposed Project may never be built. R.V40, RP286.

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. Rock Island attempts to confuse the issue by stating that a "chicken-egg" dilemma exists, but the significant problem is that Rock Island has no transmission assets, does not commit to purchase any utility assets, complete the Project, or continue forward depending upon an undefined business analysis in the future. Rock Island argues that it is impossible for it to obtain utility assets for public use without Commission approval, but this is simply untrue. Private electric lines are frequently built without Commission involvement in Illinois. They are constructed utilizing privately and voluntarily negotiated easements with landowners. 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.

Rock Island does not own assets to be used now or in the future, and it refuses to commit to do so. Consequently, it cannot hold itself out as serving the public, and it becomes more and more apparent that Rock Island's argument constitutes an attempt to create confusion regarding a clearly worded statute where none exists. The Third District's Opinion should be upheld.

IX. The Project is not for a "public use."

One of the threshold statutory requirements for an entity to be categorized as a "public utility" in Illinois is that it 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).

There is nothing in the portion of the Petitioners' PLAs addressing the "public use" issue that merits this Court's exercise of its judicial discretion to grant the PLAs. No conflict exists between the Third District's analysis and treatment of the public use issue in its Opinion and that of any other Illinois appellate court opinion or any prior opinion of this Court. No need exists for this Court's exercise of its supervisory authority. It is acknowledged that Rock Island's proposed Project, if it were to be built, would be large and costly, but that does not render it important from a legal or public policy standpoint. The Project is not needed for reliability purposes or to relieve transmission congestion. In addition, nothing in the record shows that wind energy projects will not be developed in northwest Iowa and surrounding area if the Project is not constructed.

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 a landmark case 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." *Miss. River Fuel Corp. v. Ill. Commerce Comm'n*, 1 Ill. 2d 509, 519 (1953). 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. The Order states that Rock Island "would be required to offer its service to all customers in a non-discriminatory manner," subject to an open access transmission tariff. Order at 27; R. V33, C-08269. In its PLA, Rock Island places great emphasis on this transmission service offer requirement, but the 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 HVDC nature of the line forecloses any generator to feed electricity into the line other than at the line's point of beginning. 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. These physical constraints due to Rock Island's 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. R. V06, C01388-01389.

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. V06, C01389. 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.

In its PLA, Rock Island makes much of its stated intention to hold itself out to serve the public. 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. 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" could plausibly find a purchase of capacity or service on the transmission line to be 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 certificates of public convenience and necessity, 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, C-05287. Rock Island is under no duty to develop the Project, being obligated neither to the Commission nor to any other party. Rock Island

may either voluntarily or involuntarily not proceed with the Project, as it refused to commit to constructing and operating the Project. In essence, the Commission provided Rock Island a regulator-granted option. The record is replete with the considerable significant obstacles that stand in the way of Rock Island ever exercising that option and constructing the Project.

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 ILA and 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. 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 is far from certain to exist even if all regulatory approvals were to be acquired. That factor is certainly highly relevant if not determinative as to whether Rock Island and the Project qualify for certification under Illinois law.

X. The Court's decision does not violate the Commerce Clause.

Rock Island claims that the Third District Opinion violates the dormant commerce clause by requiring a proposed transmission line into or across Illinois to set aside some capacity for Illinois generators or other customers and conflicts with federal requirements

for non-discriminatory, open access interstate transmission service. Both claims are baseless. Rock Island chose not to participate in a regional transmission planning process and obtain approval of its Project on the basis of public need. Instead, Rock Island took the calculated risk to seek approval as an Illinois public utility and now complains that the Third District Opinion impermissibly burdens interstate transmission projects. The Third District Opinion does not conflict with federal law or implicate the dormant commerce clause. This case is nothing more than Rock Island's failure to meet the requirements of a public utility under Illinois law.

The Federal Power Act expressly respects the authority of states in public utility regulation. 16 U.S.C. § 824(a). FERC recognizes the states' rights 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 P. 107, P. 156.

Contrary to Rock Island's assertions, the Third District Opinion in no way burdens interstate commerce. The Opinion does not prohibit Rock Island from conducting business and building its line in the state of Illinois. Rock Island is free to enter into the state, purchase land, acquire easements (through negotiation) and build its line as it deems best, all without a CPCN. The Opinion only prevents applicants like Rock Island, with no customers and nothing more than a business plan, to obtain public utility status (and condemnation authority). Rock Island cites *ICC v. FERC*, 721 F.3d 766, 776 (7th Cir. 2013) to support its argument that, under the Third District Opinion, Illinois customers must receive preferential access in order for a transmission line to be

constructed in Illinois. 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 PLA do not support the contention that the Third District Opinion violates the dormant commerce clause. The Opinion does not impermissibly discriminate against out of state renewable energy by requiring a utility to use only in-state renewable energy resources to comply with a renewable portfolio standard as in *ICC v. FERC.*

In *General Motors Corp. v. Tracy,* 519 U.S. 2780 (1997), the Supreme 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. Here, Rock Island's merchant project business model is significantly dissimilar to the traditional public utility business model. It 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.

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 analyzed the dormant commerce clause test which applies when a state law is non-discriminatory on its face but nevertheless encroaches on interstate commerce. There, the court applied a balancing test: "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 emphasized

the State's legitimate purpose to protect the citizens' right to own property without the threat of a taking thereof for a private purpose. The Court held that the burden on commerce, if any exists, by protecting the freedom from unnecessary and non-orderly intrusions on private property is not excessive. The Court 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." *Id.* at 952. 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 CPCN from the Commission.

XI. Conclusion

For the foregoing reasons, the Farm Bureau and ILA respectfully request that this Court deny the Petitions for Leave to Appeal.

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

By: _____
One of Its Attorneys

BROWN, HAY & STEPHENS, LLP
Claire A. Manning (Reg. No. 3124724)
Charles Y. Davis (Reg. No. 6286010)
205 South Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705
(217) 544-8491
Fax: (217) 544-9609
cmanning@bhslaw.com
cdavis@bhslaw.com

ILLINOIS LANDOWNERS ALLIANCE, NFP, Respondent-Appellant

By: _____
One of Its Attorneys

SHAY PHILLIPS, LTD.
William M. Shay
Registration No. 3122123
456 Fulton St., Ste. 255
Peoria, IL 61602
(309) 494-6155
wshay@shay-law.com

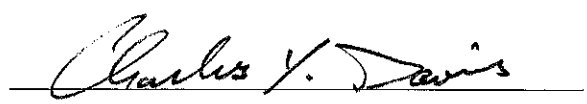
No. 121304

IN THE SUPREME COURT OF ILLINOIS

ILLINOIS LANDOWNERS ALLIANCE, NFP, ILLINOIS AGRICULTURAL ASSOCIATION a/k/a ILLINOIS FARM BUREAU, and COMMONWEALTH EDISON CO., Respondents-Appellants, vs. ILLINOIS COMMERCE COMMISSION, ROCK ISLAND CLEAN LINE LLC, *et al.* Petitioners-Appellees.	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 answer 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(c) certificate of compliance, the proof of service, and those matters to be appended to the brief under Rule 342(a), is 6,722 words.



BROWN, HAY & STEPHENS, LLP
Claire A. Manning (Reg. No. 3124724)
Charles Y. Davis (Reg. No. 6286010)
205 South Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705
(217) 544-8491
Fax: (217) 544-9609
cmanning@bhslaw.com
cdavis@bhslaw.com

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon:

Owen E. MacBride
Diana Z. Bowman
Schiff Hardin LLP
233 S. Wacker Dr., Ste. 6600
Chicago, IL 60606
omacbride@schiffhardin.com
dbowman@schiffhardin.com

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

E. Glenn Rippie
Carmen L. Fosco
Rooney Rippie & Ratnaswamy LLP
350 W. Hubbard St., Ste. 600
Chicago, IL 60654
glenn.rippie@r3law.com
carmen.fosco@r3law.com

Matthew L. Harvey
James E. Weging
Special Assistant Attorneys General
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle St., Ste. C-800
Chicago, IL 60601
mharvey@icc.illinois.gov
jweging@icc.illinois.gov

Sean R. Brady
Wind on the Wires
P.O. Box 4072
Wheaton, IL 60189
sbrady@windonthewires.org

Rochelle G. Skolnick
Schuchat, Cook & Werner
1221 Locust St., 2nd Flr.
St. Louis, MO 63103
rgs@schuchatcw.com

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

Justin Vickers
Environmental Law & Policy Center
35 E. Wacker Drive, Suite 1600
Chicago, IL 60601
jvickers@elpc.org

via electronic transmission on this 14th day of October, 2016.