Nos. 3-15-0099, 3-15-0103, 3-15-0104 (consolidated)

IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

ILLINOIS LANDOWNERS ALLIANCE, NFP., *et al.*,	)	Petitions for Review of Order of the Illinois Commerce Commission
Petitioner-Appellant,	)	
v.	)	ICC Docket No. 12-0560
ILLINOIS COMMERCE COMMISSION, et al.,	)	
Respondents-Appellees.	)	

BRIEF OF PETITIONER-APPELLANT COMMONWEALTH EDISON COMPANY

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

On November 25, 2014, the Illinois Commerce Commission (the "ICC" or "Commission") issued a final Order (the "Order") granting Rock Island Clean Line LLC ("Rock Island") a Certificate of Public Convenience and Necessity ("Certificate" or "CPCN") to act as an Illinois public utility and approved the Illinois portion of Rock Island's plan for a $1.833 billion, 500-mile electric transmission line from northwest Iowa to the existing electric grid southwest of Chicago (the "Project"). R.V34-35, C-08475-C-08700. To lawfully receive a Certificate to act as a public utility and then to build a new transmission line, an applicant must meet express statutory definitions and prerequisites set forth in the Public Utilities Act ("the Act") and the Illinois Administrative Procedure Act (the "IAPA"). *See* 220 ILCS 5/3-105, A-00456-00457; 220 ILCS 5/8-406(a), (b); 5 ILCS 100/10-35, A-00458. The Commission cannot ignore or modify those statutes, or issue a Certificate when their requirements are not met. The Order, however, disregards the provisions of the Act both defining an Illinois public utility and requiring that an applicant like Rock Island seeking approval for a project have the capability to finance its construction. Those are legal errors, and are reviewed *de novo*. The pertinent facts are not in dispute.

Rock Island is not an Illinois Public Utility. A public utility is an entity that "owns, controls, operates, or manages, within this State," including by franchise, enumerated types of assets "for public use." 220 ILCS 5/3-105, A-00456-00457; *Mississippi River Fuel Corp. v. Ill. Commerce Comm'n*, 1 Ill. 2d 509, 516 (1953). The Order, however, ignores the requirements of the Act and the controlling case law that a utility have assets, customers, and a commitment to "public use." 220 ILCS 5/3-105, A-00456-00457 The undisputed facts are that Rock Island has no customers, and no one

has agreed to ever become its customer. R.V38, RP-233:2-6, A-00789; R.V41, RP-347:2-4, A-00887; R.V44, RP-753:1-3, A-00940; R.V47, RP-1061:2-19, A-01010. It also has no utility assets. The renewable generators it aspires to serve do not now even exist; they are hypothetical projections. R.V38, RP-235:17-24, A-00791. Even with Commission approval, Rock Island will not commit to building or operating the Project itself, its only potential utility asset. R.V39, RP-272:20 – RP-273:2, A-00828-A-00829; R.V38, RP-232:4 – RP-233:12, A-00788-A-00789; R.V47, RP-1049:24 – RP-1050:5, A-00998-A-00999. The Order also fails to correctly apply the requirement that a public utility serve the public *generally*.

The Order also legally errs in granting Rock Island a Certificate for its Project by failing to apply the threshold financing requirement of Section 8-406(b)(3) of the Act. 220 ILCS 5/8-406(b)(3), A-00458. The Act requires an applicant to prove that it is "capable of financing the proposed construction without significant adverse financial consequences" to itself or its customers. *Id.* Rock Island, however, lacks that capability – it has scant capital and no construction financing. R.V47, RP-1057:12 – RP-1058:7, A-01006-A-01007; RP-1060:21 – RP-1061:1, A-01009-A-01010; R.V50, C-00253. The Commission nonetheless grants Rock Island a Certificate by reading the requirement of present financial capability out of the law, instead ordering that its staff conduct an extra-statutory review of any hypothetical future financing that Rock Island may obtain. R.V.35, C-08627-C-08628, A-00316-A-00317.

In sum, the Commission's task is to apply the statutory requirements faithfully, and as plainly written, and not to create new exceptions in an effort to "strike an appropriate balance" between the law and Rock Island's goals. R.V35, C-08628.

Neither Rock Island's professed desire to support wind energy nor its unusual merchant "business model" justify the Order's willingness to stray from the unambiguous and decades-old legal requirements. *See* R.V34, C-08504, A-00193; R.V35, C-08591, C-08607, C-08628, A-00280, A-00296, A-00317. The Order must be reversed.

ISSUES PRESENTED FOR REVIEW[1]

1. Did the Commission legally err by certifying Rock Island to act as an Illinois public utility when it (a) does not serve or obligate itself to serve the Illinois public; and (b) does not own, control, operate, or manage, or commit to own, control operate or manage, any Illinois utility asset?

2. Did the Commission legally err by awarding Rock Island a Certificate to construct the Project when Rock Island lacked the capability to finance the Project's construction?

3. Did the Commission legally err by delegating to its staff the function of evaluating any future financing that Rock Island might propose?

JURISDICTION

The Court has jurisdiction over this appeal under Illinois Supreme Court Rule 335 and Section 10-201(a) of the Act authorizing review of Commission orders by the Appellate Court. 220 ILCS 5/10-201(a), A-00463. The final Order under review is dated November 25, 2014. R.V34-35, C-08475-C-08700, A-00164-A-00389. On December 26, 2014, ComEd timely filed an application for rehearing of the Order, including on the issues ComEd raises on appeal, as required by 220 ILCS 5/10-113. R.V36, C-08852-

[1] This is a consolidated appeal and ComEd expects other appellants to raise other claims of error. ComEd takes no position on those claims. The legal errors ComEd identifies warrant reversal and ComEd believes would render other claims of error moot.

08863. The Commission denied ComEd's application for rehearing at its January 14, 2015 open meeting, and notice of that denial was served on ComEd on January 15, 2015. R.V36, C-08916-C-08920. On February 18, 2015, ComEd timely filed its Notice of Appeal with the Commission and its Petition for Review with this Court. R.V36, C-08993-C-09019, A-00390-A-00416.

STATUTES INVOLVED

Section 3-105(a) of the Act, 220 ILCS 5/3-105(a), A-00456, provides in pertinent part, that:

> "Public utility" means and includes … every corporation, company, limited liability company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever 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: (1) the production, storage, transmission, sale, delivery or furnishing of heat, cold, power, electricity, water, or light, except when used solely for communications purposes; ***.

Subsections (a) and (b) of Section 8-406 of the Act, respectively address the need for a company to have a certificate of public convenience and necessity to act as a utility and to construct new facilities. 220 ILCS 5/8-406(a), (b), A-00458. They provide in pertinent part:

> (a) 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.

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

The full text of these and other sections of the Act and of the IAPA cited herein are included in ComEd's Separate Appendix.[2] A-00001-A-01082.

STATEMENT OF FACTS

The following facts are relevant to the issues on appeal.

A. Rock Island and its Owners

Rock Island is a single-purpose Delaware limited liability company. R.V34, C-08480, A-00169; R.V1, C-00004, A-00004; R.V26, C-06293-06294. It is a wholly owned subsidiary of Rock Island Wind Line, LLC, a Delaware limited liability company, which is a wholly owned subsidiary of Clean Line Energy Partners LLC ("Clean Line"), also a Delaware limited liability company. R.V34, C-08480, A-00169; R.V5, C-

[2] "A__" refers to ComEd's Separate Appendix, filed with this brief.

01197:625-29. Rock Island was created by Clean Line as a vehicle for Clean Line's interest in the Project. R.V5, C-01197:625-29.

Rock Island owns no physical assets. R.V39, RP-232:4-11, RP-233:7-12, A-00788, A-00789. It operates, controls, and manages no utility facilities. *Id*. at RP-233:7-17, A-00789. It has no customers, and provides no utility service, in Illinois or anywhere. *E.g.*, R.V41, RP-347:2-4, A-00887. Rock Island is thinly capitalized, with only the financial resources required to pursue preliminary regulatory and development tasks. *See* R.V47, RP-1059:24 – RP-1061:1, A-01008-A-01010; R.V41, RP-337:14 – RP-339:21, A-00877-A-00879.

Rock Island's ultimate parent, Clean Line, was formed by several non-Illinois investors to propose several electric transmission concepts in a number of states. R.V38, RP-191:10 – RP-196:15, A-00747-A-00752. None of its proposals have been built. *Id*. Clean Line, like Rock Island, owns, operates, controls, or manages no utility facilities. R.V38, RP-233:7-12, A-00789; R.V38, RP-232, A-00788.

B. The Project

The Project envisions an approximately 500-mile ±600,000 volt direct current electric transmission line originating in O'Brien County in northwest Iowa, that would "'traverse Iowa' for 379 miles, cross the Mississippi River near Princeton, Iowa, and then enter Illinois south of Cordova," and then cross Illinois for approximately 121 miles to interconnect with existing ComEd electric transmission facilities in Grundy County. R.V34, C08480; R.V25, C-06192-C-06193. The Project also proposes AC-DC converter stations at each end of the line, and substantial new 345,000 volt AC facilities to connect with ComEd's existing transmission system in Illinois. R.V1, C-00005, ¶ 6. Operating

the Project would also require a number of changes and upgrades to the existing electric transmission system, the exact nature and cost of which remained in doubt at the time the Commission approved the Project. *See, e.g.*, R.V11, C-02572:223 – C-02574:254. The expected total cost of the Project exceeds $1.8 billion. *E.g.*, R.V41, RP-378:12-17, A-00918; R.V22, C-05258:844. Rock Island does not own the land required to build the Project. R.V38, RP-232:4-11, A-00788. Nor has the Project been approved (or disapproved) by Iowa. At the time the record was closed, the regulatory process in Iowa had just started. R38, RP-235:8-16, A-00790; R.V47, RP-1062:17-18, A-01011.

C. Rock Island's Requests to the Commission

Rock Island filed a Petition with the Commission on October 10, 2012 asking to be certified as an Illinois public utility in advance of the construction or operation of the Project. Rock Island also sought a Certificate for the Project. Finally, it sought a finding under Section 8-503 of the Act authorizing it to construct the line. 220 ILCS 5/8-503, A-00460. Although the Petition did not request eminent domain authority, the requested finding under Section 8-503 is the key regulatory prerequisite to involuntarily taking private property through eminent domain. R.V35, C-08691, A-00380.

Rock Island's Petition and supporting materials describes the Project's central purpose as creating a direct "point-to-point" connection to allow potential wind generators that Rock Island anticipates will be located near the Project's Iowa terminal to buy rights to ship power east for delivery in eastern Illinois to the regional energy markets. *E.g.*, R.V1, C-00005, ¶¶ 5, 6, A-00005; R.V39, RP-271:14-19, A-00827. Rock Island emphasized that it was a merchant developer, not a traditional utility with cost-based rates. *E.g.*, R.V6, C-01387:315-17. It claimed that Illinois residents would not pay

for the line through such rates, but that "it will recover its costs … solely through the revenues it receives" from these anticipated contract shippers. R.V34, C-08481, A-00170.[3]

D. Facts Concerning Rock Island's Utility Status

Rock Island has no customers and provides no utility service to anyone. R.V41, 347:2-7. No generators have agreed to ship power using the Project or to pay any portion of its costs. R.V38, RP-233:2-6, A-00789. The wind generators that Rock Island described as using the Project to deliver power to Illinois and points east do not exist. R.V39, RP-272:8-19, A-00828. They are Rock Island's predictions, and may never be built. R.V39, RP-272:8-19, A-00828; R.V44. RP-759:17-21, A-00946. Likewise, no consumer of electricity is, or has signed up to be, a Rock Island customer. R.V47, RP-1061:2-19, A-01010; R.V44, RP-753:1-3, A-00940. Rock Island did not claim, and the Order does not find, that the Project is needed to remedy any reliability deficiency or to otherwise address any deficiency in the utility service provided to any Illinois customer. R.V35, C-08591, A-00280.

Rock Island also cannot commit to provide utility service to any Illinois customer, at present or in the future. *See, e.g.*, R. V47, RP-1049:24, A-00998; R.V6, C-01380:106-10. The only way Rock Island could ever serve a customer is by building the Project, which Rock Island has not committed to do. *E.g.*, R.V19, C-04626:681-89. Rock Island

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[3] These hypothetical subscribers can be expected to include such costs in the price of the energy they would ship and then sell. *See* R.V44, RP-681:8-10. Also, Rock Island made no guarantee that customers will not subsequently foot the bill directly. Rock Island agreed to seek later Commission approval for any such direct charges, a condition whose future enforceability was contested, but is not a subject of this appeal. *See, e.g.*, R.V40, RP-276:22 – RP-277:9, A-00832-00833.

has also represented to the Federal Energy Regulatory Commission ("FERC") that it would be unable to expand the Project, even if such expansion would be necessary to meet Illinois' needs. *Rock Island Clean Line LLC*, 139 FERC ¶ 61,142, PP 22, 33 (2012), A-00489, A-00493.

While Rock Island relies on advance subscribers, it has also committed to FERC that, if the Project is ever built, 25% of its capacity will be sold through a competitive auction process. R.V34, C-08504, A-00193. This auction process includes no obligation to serve any Illinois customer, and there is no reason to expect that any Illinois customer would participate in or win rights in such an auction. R.V6, C-01384:227-43. FERC-regulated transmission capacity auctions are also not the realm of the public generally; participants are large, wholesale market participants such as generators, utilities, energy marketers and resellers who can make multi-million dollar bids for megawatt-sized lots of long-term capacity. R.V6, C-01389:365-67. Rock Island suggested to the Commission that the Project's target users are out-of-state generators seeking to ship power east. *See, e.g.*, R.V34, C-08480, A-00169. And, the Commission's staff economist concluded that Illinois participation was unlikely. R.V9, C-02093:193 – C-02094:205.

E. Facts Concerning Rock Island's Financial Capability

Rock Island lacks the ability to finance the proposed construction. It is thinly capitalized and cannot fund the construction from its own assets. R.V47, RP-1060:21 – RP-1061:1, A-01009-A-01010; R.V35, C-08609-08610, A-00298-A-00299. Rock Island conceded that it is without sufficient capital or financing commitments to even begin construction. R.V5, C-01203:756-67, A-01008-A-01009. Even if the financial resources

of Clean Line and all its subsidiaries are considered, they amount to less than two percent of the nearly $2 billion needed to construct the Project. R.V47, RP-1059:24 – RP-1060:7; RV50, C-00253. Clean Line's existing investors, including National Grid, have invested or committed only to finance Rock Island's initial development and permitting activities for its various transmission projects. *See* R.V44, RP-805:11; R.V41, RP-332:20-23, A-00872; R.V25, C-06024-C-06025. Whatever resources Clean Line does have will be allocated among at least four other transmission concepts Clean Line is now promoting and funding throughout the United States, not devoted exclusively to Rock Island. R.V40, RP-337:24 – RP-339:7, A-00600-A-00601

Instead, Rock Island's application and testimony focused on an indefinite "plan for raising the capital necessary to finance" construction of the Project at an unspecified future date, "on a project financing basis." R.V1, C-00031, ¶ 55. Rock Island stated that it hopes in the future to enter into long-term transmission service agreements with one or more "anchor tenants," and then attract a lender to rely on those revenues as collateral, in order to finance the construction cost. *Id.* Its financing plans identify no lender or additional equity investor, and no specific financing terms. R.V39, RP-273:24 – R.V40, RP-274:3.

In response to concerns raised by the Commission's staff that Rock Island might begin construction of the Project without first obtaining sufficient funding to complete it, *see* R.V9, C-02139; R.V6, C-01377:24-25, Rock Island agreed that it would "not install transmission facilities ... on easement property until such time as [Rock Island] has obtained commitments for funds in a total amount equal to or greater than the total project cost." R.V6, C-01378:34 – C-01379:94. That stipulation applies only to

construction "on easement property." *Id.* at C-01378:43-50. The stipulation also imposes no limitations on how Rock Island attempts to obtain the capital. Rock Island agreed to submit future documentation that it met this condition to the Commission's staff when and if Rock Island decided to "install transmission facilities[.]" *Id.* at C-01379:72-94.

F. The Commission's Final Order

The Commission's final Order certified Rock Island to act as a public utility immediately, before the Project was in operation and without imposing a condition that it ever be built. R.V34, C-08503-C-08505, A-00192-A-00194. The Order made no finding that Rock Island owned or committed to ever own, control, operate, or manage any utility property. *Id.* It acknowledged that Rock Island might unilaterally abandon the Project. R.V34, C-08499, A-00188. The Order also does not find that Rock Island has any customers, that any Illinois person or entity has agreed to be its customer, or that Rock Island has obligated itself to serve any expanded future needs. R.V34, C-08505-C-08506, C-08595-C-08596, A-00194-A-00195, A-00284-A-00285; C-08628, A-00317. Finally, to satisfy the "public use" requirement, the Commission relies on the promise to "auction" at least 25% of the capacity of the Project, if it was ever built. R.V34, C-08504-C-08505, A-00193-A-00194.

The Order further finds that Rock Island's financial resources are insufficient to finance the Project's construction. R.V35, C-08628, A-00317. However, it nonetheless concludes that Rock Island has satisfied the statutory requirement "that the utility is capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers." 220 ILCS 5/8-406(b)(3), A-00458; R.V35,

C-08628, A-00317. To do this, the Order imposes a condition barring some construction prior to obtaining such financing. R.V35, C-08628, A-00317. It also rejects the argument of ComEd and others that the plain language of the statute requires proof of a present capability to finance the Project. It justifies that decision by stating that the Commission could not "simply ignore the second half of [Section 8-406(b)(3)] in order to deem Rock Island deficient in satisfying this requirement" (R.V35, C-08627, A-00317), as if requiring proof that Rock Island is now capable of financing the Project diminished the "the second half" of the requirement that the financing not harm Rock Island or its customers, a position ComEd never advocated. R.V35, C-08620-C-08622, A-00309-A-00311. Also, although the statute does not mention "merchant developers" or establish any preference or different criteria applicable to merchants, the Order stated that it must not impose financial capability requirements "setting a precedent that would not allow them [merchants] to operate within their business model[.]" It concluded without reference to any statutory language that the Order's limited condition on construction will "strike an appropriate balance" (R.V35, C-08628, A-00317) and, therefore, held that Rock Island satisfied Section 8-406(b)(3) despite being incapable of financing the Project. Finally, instead of requiring Rock Island to file a petition to open a Commission proceeding where evidence concerning such financing would be presented and examined, the Order delegates the review and approval functions to the Commission's staff. R.V35, C-08628, A-00317.

ARGUMENT

I. STANDARD OF REVIEW

Section 5/10-201(e)(iv)(C) of the Act authorizes this Court to reverse the Commission's Order if it finds that its "rule, regulation, order or decision is in violation of the State or federal constitution or laws." 220 ILCS 5/10-201(e)(iv)(C), A-00464. *De novo* review applies to questions of law, including issues of statutory construction and the application of the law to undisputed facts. *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182, 235-36 (2005).

The Commission must base its decisions solely on the record before it. 220 ILCS 5/10-103; *Ameropan Oil Corp. v. Ill. Commerce Comm'n*, 298 Ill. App. 3d 341, 348 (1st Dist. 1998); *Allied Delivery Serv. v. Ill. Commerce Comm'n*, 93 Ill. App. 3d 656, 667 (1st Dist. 1981). It cannot rely on speculation, including about future events. *Folbert v. Dep't of Human Rights*, 303 Ill. App. 3d 13, 25 (1st Dist. 1999) ("A petitioner's discrimination charge consisting of mere speculation and conjecture does not constitute substantial evidence."). The Act also "obliges the Commission to provide 'findings or analysis sufficient to allow an informed judicial review,'" meaning that "the Commission must set forth more reasoning and analysis than would be accepted from a circuit court." *Citizens Util. Bd. v. Ill. Commerce Comm'n,* 291 Ill. App. 3d 300 at 304 (quoting 220 ILCS 5/10-201(e)(iii), A-00464).

Where governing statutory language is clear and unambiguous, it must be applied as written, and there is "no need to resort to other means of construction." *Veterans Assistance Comm'n of Grundy Cnty. v. County Bd.*, 2015 IL App (3d) 130969, ¶ 41. Deference is due only to an administrative interpretation of an ambiguous statute. *Ill. Consol. Tel. Co. v. Ill. Commerce Comm'n,* 95 Ill. 2d 142, 152 (1983). "Courts will not

defer to an agency's construction of a statute when the statute is clear and unambiguous because 'an interpretation placed upon a statute by an administrative official cannot alter its plain language.'" *Apple Canyon Lake Prop. Owners' Ass'n v. Ill. Commerce Comm'n*, 2013 IL App (3d) 100832, ¶ 21 (quoting *Burlington N., Inc. v. Dept. of Rev.*, 32 Ill. App. 3d 166, 174 (1975)). Administrative interpretations of even ambiguous statutes are entitled to less deference when they sharply depart from past practice. *Business & Professional People for Public Interest v. Ill. Commerce Comm'n*, 136 Ill. 2d 192, 228 (1989) (citing *Commonwealth Edison*, 180 Ill. App. 3d at 908; *Citizens Util. Bd. v. Ill. Commerce Comm'n*, 291 Ill. App. 3d 300 at 304) ("*BPI*").

II. THE ORDER ERRONEOUSLY CONCLUDES THAT ROCK ISLAND IS A PUBLIC UTILITY.

The statutory definition of a "public utility" under Illinois law has remained virtually the same since the start of the last century, and has consistently restricted "public utility" status – and the concomitant legal rights and obligations – to entities using plant, equipment, and facilities to provide certain specified services ***to the public***, and who obligate themselves to provide those services. Specifically, Section 3-105(a) of the Act defines "public utility" as:

> [E]very corporation, company, limited liability company, association … 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 … the production, storage, transmission, sale, delivery or furnishing of heat, cold, power, electricity, water, or light, except when used solely for communications purposes."

220 ILCS 5/3-105(a), A-00456 (emphasis added). An entity that meets the definition is a public utility; an entity that does not cannot be one. With exceptions (*e.g.*, grandfathered entities) not relevant here, a public utility must obtain a Certificate under Section 8-406

of the Act before transacting business as a utility or building new facilities. Section 8-406 of the Act provides that:

> (a) No **public utility** … shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.
>
> (b) No **public utility** shall begin the construction of any new plant, equipment, property or facility … 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(a), (b), A-00458 (emphasis added). But, the Commission cannot create a public utility by fiat.

The Commission's conclusion that Rock Island can be certified to act as a public utility (R.V34, C-08503-C-08505, A-00192-A-00194) is contrary to law and must be reversed. The facts are not in dispute:

- ✓ Rock Island has no transmission assets. It does not own, control, operate or manage – nor does it commit to own, control, operate, or manage – the plant, equipment, and facilities to transmit electricity.
- ✓ Rock Island has no utility service customers. No persons or entities within Illinois use or have agreed to use any facilities which Rock Island may ever own, control, operate, or manage for the transmission of electricity.
- ✓ Rock Island does not commit to ever having utility assets or customers.

The Order legally errs in holding that such an entity is, or can be, a utility. Indeed, even assuming, *arguendo,* that Rock Island will ***in the future*** have both transmission assets and customers, that does not make Rock Island a public utility now, and the speculative "facts" found by the Order do not show that these future customers will be Illinois customers or that their use of the hypothetical future transmission facilities would be a

"public" rather than a "private" use of those facilities. Moreover, the Commission's reliance on Rock Island's claims that it proposes a "merchant" project and commits to openly auction any excess capacity do not remedy these fundamental deficiencies.

A. The Order Unlawfully Concludes that Rock Island Is a Utility When It Owns, Controls, Operates, or Manages No Illinois Utility Asset.

To be a public electric utility, a company must establish that it does, or will upon allowance of its request, own, control, operate, or manage, within this State and for public use, facilities used in the transmission of electricity.[4] 220 ILCS 5/3-105. The Order acknowledges this statutory requirement and acknowledges that Rock Island's claim to be a utility was in dispute. R.V34, C-08499, C-08503, A-00188, A-00192.

The relevant facts, however, are undisputed. Rock Island does not now own, control, manage or operate transmission facilities in Illinois, or anywhere. The testimony of Rock Island's witnesses, including its CEO, confirms that fact. *See, e.g.*, R.V38, RP-233:7-12, A-00789. And, although the entire scope of Rock Island's request concerns the Project, Rock Island has steadfastly refused to commit to ever building or operating the Project. *See* R.V40, RP-286:14-16, A-00842; R.V47, RP-1049:24 – RP-1050:5, A-00995-A-00999; R.V6, C-01380:106-10; R.V19, C-04626:681-89; R.V23, C-05705:193-6 & fn.8. Rock Island will only pursue the Project if it decides that it will be profitable in view of future market developments and its ability to obtain sufficient financing. R.V6, C-01380:106-10; R.V19, C-04626:681-89; R. V23, C-05705:193-6 & fn.8. Rock Island's CEO confirmed that Rock Island would not commit to the Project, but that if

[4] The Commission found that an applicant need not already be functioning as a "public utility" when it submits its application, as that could place it in a "Catch 22." R.V34, C-08503, A-00192. That is not the issue here. Even *after* receiving a Certificate, Rock Island had no customers and no assets.

Rock Island decided "the project wasn't worth investing in any further, then we would abandon it." R.V40, RP-286:14-16, A-00842.

On these uncontested facts, the Order could not lawfully conclude that Rock Island is now a utility. The plain language of the statute requires that a public utility own, control, operate, or manage utility equipment and facilities, and Rock Island does not. The Order, however, makes no finding that Rock Island owns, controls, operates, or manages and utility asset, or ever will. It fails to even ***mention*** the question of whether Rock Island will ever actually own, control, operate, or manage qualifying facilities, whether the Certificate is granted or not. R.V34, C-08503-C-08505, A-00192-A-00194. Indeed, the Order actually prohibits Rock Island from completing the Project until and unless events not in Rock Island's or the Commission's control – such as securing financing – are met. R.V-35, C-08612-C-08613, C-08627-C-08628, A-00301-A-00302, A-00316-A-00317.

Administrative agencies "'must construe the statute as written and may not, under the guise of construction, supply omissions, remedy defects, annex new provisions, add exceptions, limitations, or conditions, or otherwise change the law so as to depart from the plain meaning of the language employed in the statute.'" *Divane v. Smith*, 332 Ill. App. 3d 548, 553 (1st Dist. 2002) (quoting *In re Tax Deed*, 311 Ill. App. 3d at 444); *see also Harrisonville Telephone Co. v. Ill. Commerce Comm'n*, 212 Ill. 2d 237, 251 (2004). Here, the Commission not only departed from the plain language of Sections 3-105 and 8-406 of the Act, but in its analysis and approval of Rock Island's request effectively strikes the Act's requirement that a utility own, control, operate, or manage utility

facilities. The Commission's Order is both legally erroneous and lacks findings and analysis required to allow judicial review.

B. The Order Unlawfully Concludes that Rock Island Is a Public Utility When It Has No Illinois Utility Service Customers.

To be a public utility, a company must have "plant, equipment or property **used or to be used** for" an enumerated utility purpose – in this case, the "transmission … of … electricity[.]" 220 ILCS 5/3-105, A-00456-A-00457. As with the requirement that a utility have assets, the statutory language requiring that those assets provide utility service to customers is plain. Yet, the Order makes no such finding. R.V34, C-08499, A-00188. Indeed, throughout the history of public utility regulation in Illinois, the Commission has never before found an entity to be a utility that has no current or committed customers.[5]

The facts, again, are not in dispute. Rock Island has no customers now, and does not commit to offer service to anyone after it is issued a Certificate to operate as a utility. *See* R.V38, RP-233:2-6, A-00789; R.V44, RP-753:1-3, RP-754:6-7, A-00940, A-00941. No person or entity has committed to ever become a customer of Rock Island or the Project. R.V44, RP-753:1-3, A-00940; R.V47, RP-1061:2-19, A-01010. While Rock Island vigorously claimed to propose a "clean line" that would serve wind generators and

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[5] So-called "transmission only" electric public utilities are no exception to the necessity for customers. In each instance where the Commission has previously approved a transmission-only public utility, it was assured of the existence of an Illinois customer. In *Interstate Power and Light Company and ITC Midwest LLC*, ICC Docket No. 07-0246 (Nov. 28, 2007) at 1, the Commission noted the existence of an Illinois transmission service customer – Jo-Carroll Energy Inc. Similarly, in *American Transmission Company L.L.C. and ATC Management Inc.*, ICC Docket No. 01-0142 (Jan. 23, 2003) at 5, the Commission in granting the Certificate found that "Petitioners' transmission lines are transmitting power within Illinois to serve Illinois customers[.]"

that the Project would be paid for largely or exclusively by those generators subscribing to use it, not a single generator anywhere, wind or otherwise, signed up to use the Project. R.V38, RP-233:2-6, A-00789. Rock Island's CFO testified:

> Q. At the present time Rock Island has no customers, does it?
>
> * * *
>
> A. No, we do not.
>
> Q. Do you have any other type of customer who has agreed to take transmission service of any kind using your facility?
>
> A. Not under binding agreement.
>
> Q. Do you have any other customer of any kind who has agreed to take transmission service solely on the contingency that the line actually is built?
>
> A. No potential customer has made a binding commitment of that nature.

R.V47, RP-1061:2-19, A-01010.

Indeed, the evidence was that the "Resource Area" generators the Project is designed to appeal to do not now exist. They are hypothetical future generators that Rock Island assumes will be built in Iowa and other non-Illinois "Resource Area" states – such hypothetical generators are not even included in current regional generation expansion plans. *See* R.V39, RP-272:8-19, A-00828; R.V44, RP-759:17-21, A-00946; R.V26, C-06462, C-06474.

Once again, the Order is completely silent on how Rock Island can meet this need. The Analysis and Conclusions in this section of the Order ignores this statutory requirement completely. R.V34, C-08503-C-08505, A-00192-A-00194. As with its conclusion regarding utility facilities, the Order is contrary to law and should be reversed.

C. The Order Unlawfully Concludes that Rock Island Is a Public Utility When Its Facilities Are Not for "Public Use".

A public utility must not only have qualifying assets and some customer, a public utility must dedicate its assets ***for public use***. That requirement has been an explicit part of what is now Section 3-105 since the early 1900's. Illinois courts have a uniform and correspondingly long history of requiring that a "public utility" offer service to the public at large, on equal terms, to enjoy the rights conferred by the Act. In *State Public Utilities Com. ex rel. Pike County Tel. Co. v. Noble*, 275 Ill. 121 (1916), the Illinois Supreme Court explained the "public use" component of the Act's "public utility" definition as follows:

> The purpose of this act was to bring under public control property which was being applied to public use, the owner of such property being required to submit to its control by the public to the extent of its interest as long as the public use is maintained. It is not essential to a public use that the benefits should be received by the whole public or even a large part of it. They must not be confined, however, to specified or privileged persons. A public use requires that all persons must have an equal right to the use and that it must be in common upon the same terms, however few the number who avail themselves of it; that it shall be open to all people to the extent that its capacity may admit of such use. The use must concern the public, as distinguished from an individual or any particular number of individuals. It may be confined to a particular district and still be public.

Id. at 124-25. Merely offering a service to some, or allowing persons to compete for the chance to get that service, is not enough. The Court upheld the determination that the telephone exchange there at issue was a public utility based on the stipulated facts that "[t]he service is open to anyone within the village of Perry, or in the adjacent territory outside of the village, who is willing to become a shareholder under the conditions and terms provided[.]" *Id*. at 125.

Similarly, in *Highland Dairy Farms Co. v. Helvetia Milk Condensing Co.*, 308 Ill. 294 (1923), the Illinois Supreme Court determined that the Commission and the circuit

court correctly held that appellees were not public utilities – even though they operated assets for a qualifying purpose and provided service using those assets – because their water plants were constructed for private use and the record failed to show that they held themselves out as an agency or business for supplying the public at large with water. *Id*. at 300-04. The Supreme Court explained the centrality of this "public use" requirement:

> Whenever any business or enterprise becomes so closely and intimately related to the public, or to any substantial part of a community, as to make the welfare of the public, or a substantial part thereof, dependent upon the proper conduct of such business, it becomes the subject of the exercise of the regulatory power of the State. When once determined to be a public utility under the statute the company must furnish all who apply, and the service it furnishes must be without discrimination and without delay.

Id. at 300-01. The Court specifically rejected the assertion that they were public utilities, even though they owned and operated assets and had Illinois customers because it was "clear from the evidence in the record that the appellees did not furnish all applicants with water who applied for service, without discrimination or delay; that they furnished the water that was furnished according to their own wishes, and not without discrimination and without delay." *Id*. at 301.

The "public use" requirement was reinforced further by the Supreme Court in the seminal *Mississippi River* case. In that case, Mississippi River Fuel Corp. ("Mississippi") sold natural gas in Illinois, through individual contracts, to 23 retail customers as well as to an electric company for subsequent resale by that company to the general public. *Mississippi River*, 1 Ill. 2d at 512. Despite Mississippi having gas customers and facilities in Illinois, the Supreme Court affirmed the trial court's conclusion that it was ***not*** an Illinois public utility because the facts did not show that Mississippi devoted its property to "public use." *Id.* at 515-16. The Supreme Court held that "the mere fact that the thing sold by a company is water or gas or electricity or telephone service, such as are

ordinarily sold by public utility companies, does not of itself render the seller a public utility." *Id*. It emphasized that being a "public utility implies a public use of an article, product or service, carrying with it the duty of the producer or manufacturer, or one attempting to furnish the service to serve the public and treat all persons alike, without discrimination." *Id*.

The Order does not apply the public use requirement of Section 3-105 of the Act as explained in *Pike County*, *Highland Dairy*, and *Mississippi River*, and the Commission could not have found that Rock Island met that standard. As explained above, Rock Island does not commit to build the Project at all, and it made no commitment to serve the Illinois public generally at all, let alone to treat them all alike. The hypothetical target customers – for which Rock Island would reserve up to 75% of the Project's capacity – are out of state "Resource Area" generators in Iowa, Minnesota, Nebraska and South Dakota. R.V34, C-08480, A-00169; R.V1, C-00014, ¶ 18, A-00014; R.V39, RP-271:14-23, A-00827; R.V27, C-06520. The Project's design makes it unable to receive power from generators along the way, including in Illinois. R.V21, C-05023:33 – C-05024:70; C-05024:79-90. The Commission's staff expert found that Rock Island is unlikely to serve any Illinois retail customers, utilities, or other suppliers. R.V9, C-02093:193 – C-02094:205. The Order does not and cannot find that: (1) Rock Island will or must serve the Illinois public generally, (2) serve Illinois customers under the same rates, terms and conditions; or (3) provide service to qualified customers who may wish to use the Project after the initial allocation.

The Order errs further in relying on the assertion that Rock Island may someday offer service pursuant to a FERC open access transmission tariff ("OATT") as "evidence"

that the Project will be available for public use under Illinois law. R.V34, C-08504-C-08505, A-00193-A-00194. The Order accepts Rock Island's claims that this means it "will not deny any eligible customer the opportunity to purchase transmission service; and will not unduly discriminate against any transmission customer in favor of another eligible customer," (R.V34, C-08504, A-00193) without evaluating those representations or comparing them with requirements of Illinois law. In fact, while Rock Island claims it "will not deny any eligible customer *the opportunity* to purchase transmission service," (R.V34, C-08503, A-00192 (emphasis added)), that *opportunity* cannot be exercised by the general public, Rock Island will set the criteria for selecting its 'anchor tenants'[6] and Rock Island that will set the evaluation criteria for customers bidding under the open season process.[7]

Unlike the requirements imposed on Illinois utilities such as ComEd and Ameren Illinois to serve all qualified customers, FERC has authorized Rock Island to allocate the Project's transmission capacity and to contract differing rates with them using "negotiated rate authority." *Rock Island Clean Line LLC*, 139 FERC ¶ 61,142 (2012), A-00482-A-00498. Unlike existing Illinois public utilities, Rock Island may privately negotiate transmission service agreements with (hypothetical) selected "anchor tenants" that can reserve as much as 75% of the Project's capacity. The remaining 25% would be subject to a competitive solicitation process, referred to as an "open season." An "open

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[6] *See* R.V6, C-01383:209-210 ("Rock Island will select the parties with whom it negotiates precedent agreements based on objective criteria" consistent with federal requirements.). Those criteria were not filed with FERC, and thus were not in the record or known to the Commission.

[7] *Id*. at C-01384:235-236 ("Rock Island will post detailed bidding guidelines, evaluation criteria, estimated rates, and proposed agreements on an internet website"). They, too, are absent.

season," however, does not ensure that the Project will serve *any* Illinois customers, let alone offer service to the Illinois public generally. There is no requirement that any Illinois customer participate, and certainly none may win.[8] But, even if an Illinois customer does win some capacity, that capacity will not be acquired in a manner in which all customers can obtain service. They will have won because they were willing to pay more or agree to more favorable non-price conditions than their competitors. But, as the Supreme Court held "When once determined to be a public utility under the [Illinois] statute the company must furnish to all who apply, and the service it furnishes must be without discrimination and without delay.'" *Mississippi River*, 1 Ill. 2d at 516.

In addition, Rock Island has disclaimed any responsibility to ever expand the Project, even if expansion would be needed to serve the public. Rock Island actually maintained that it would be *unable* to expand the Project even if the "open season" solicitation process garnered unexpected market interest. *See Rock Island Clean Line LLC*, 139 FERC ¶ 61,142, at PP 22, 33, A-00489, A-00493. And FERC expressly declined to impose any such requirement on Rock Island at present. *Id.* As a result, Rock Island is under no obligation to expand the Project either. Rock Island simply must provide a report to FERC justifying in more detail its reasons for not expanding the Project and for allocating capacity among open season participants. *Id*. P 33, A-00493. No explanation is owed Illinois.

In sum, the Commission did not determine whether Rock Island met the public use requirement under *Pike County, Highland Dairy, and Mississippi River* and, as a

[8] For example, even Rock Island stated that the demand for renewable energy from states east of Illinois is approximately five times greater than in Illinois. *See* R.V5, C-01185:364-370.

matter of law, the Order could not have found that Rock Island did. Instead, the Order (R.V34, C-08504, A-00193) candidly observes that "[a]s with most of the issues in this case, an assessment of the 'public use' issue is complicated by the many uncertainties associated with the 'merchant' nature of the proposed transmission line project," that observation does nothing to meet what the law requires. Labeling an aspirant public utility a "merchant" does not exempt it or its proposal from any legal requirements, or reduce those requirements. If there is any tension between Rock Island's "merchant" status and the requirements of the Act,[9] the Commission is not free to "strike an appropriate balance" between the law and Rock Island's desires. R.V34, C-08628, A-00317. It must apply the law to "merchants" and non-merchants alike.

III. THE ORDER ERRONEOUSLY CONCLUDES THAT THE PROJECT MEETS THE REQUIREMENTS FOR A CERTIFICATE.

Section 8-406(b)(3) of the Act requires a utility applicant to demonstrate that it is "capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers." 220 ILCS 5/8-406(b)(3), A-00458. The requirement is mandatory – a Certificate can be granted "only if" the applicant "demonstrates" it "is capable" of financing its proposed Project. The General Assembly's language is unambiguous, and the Order does not find otherwise. The language "must be given its plain and ordinary meaning." *Boaden v. Dep't of Law*

[9] Any claim that merchants cannot commit to have customers, own or commit to own assets, offer services to the public generally, and dedicate its assets to public use it itself unsubstantiated. Even if "merchant" projects may be prone to certain "uncertainties" at the early stages of their development, those uncertainties are matters of fact that can be remedied by, for example, obtaining investor, lender, and customer commitments. But, for these purposes, that claim is analyzed as if true, arguendo.

Enforcement, 171 Ill. 2d 230, 237 (1996) (citing *People v. Bole*, 155 Ill. 2d 188, 197 (1993)).

The facts are clear. On the record before the Commission, Rock Island is incapable of financing the construction of the proposed Project. About that, there is no doubt. It is a thinly capitalized entity, with financial capabilities that fall far short of the Project's more than $1.8 billion construction cost. *See, e.g.*, R.V47, RP-1057:12 – RP-1058:7, A-01006-A-01007; R.V10, C-02406:163-69. Rock Island's own witnesses also confirm that fact, repeatedly. For example, Rock Island's and Clean Line's Executive Vice President and Chief Financial Officer, David Berry, testified as follows:

> Q. As you sit here today, you have not raised the capital necessary to fund the development and construction of Clean Line's projects, have you?
>
> A. I'd agree that we have not raised the capital to fund the construction of the projects. We have raised development capital that is sufficient at this point in time to carry out the development of our project.
>
> Q. So the answer to my question that you have not raised the capital necessary to fund the development and construction is yes.
>
> A. My answer was my answer.
>
> Q. Okay. Have you raised the capital necessary to fund the construction of the Clean Line's projects – of the Clean Line projects?
>
> A. As I said, the answer is no.
>
> Q. And is it also true that you have not raised the capital necessary to fund the construction of the Rock Island project?
>
> A. That's correct.

R.V47, RP-1057:12 – RP-1058:7, A-01006-A-01007. He subsequently confirmed that, even if Rock Island received all the capital available under contract to Clean Line for all of Clean Line's ventures, Rock Island would still have less than 2% of the Project's cost. R.V47, RP-1060:21 – RP-1061:1, A-01009-A-01010. The Order's summary of Rock

Island's evidence and argument (R.V35, C-08608-C-08613, A-00297-A-00302) also makes clear that Rock Island claims no present capability to finance the Project.[10] So do the Commission's own findings, which acknowledge that Rock Island financial capability is presently unproven and requires a future submission. R.V35, C-08627-C-08628, A-00316-A-00317.

The fact that Rock Island is not capable of financing the construction of the Project should have ended the inquiry. Until such time as Rock Island has the financial capability required, it cannot legitimately receive a Certificate. The Order, however, attempts to avoid this conclusion by incorrectly parsing the requirement that an applicant "be capable of financing the construction *without significant adverse financial consequences for the utility or its customers*" as if the italicized phrase swallows up any requirement that the applicant be capable of financing the construction in the first place. R.V34, C-08627, A-00316. That is not, however, what the statute says. The General Assembly's language requires that an applicant "be capable of financing the construction" and that such financing must not significantly harm the utility or its customers. The *without harm* phrase modifies, rather than supplants, the prior language, limiting acceptable financing to that which does not harm the utility of its customers. The Commission cannot thus read the requirement that be applicant "be capable of financing the construction" out of the law. *See Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 422 (1997); *Kraft, Inc. v. Edgar*, 138 Ill. 2d 178, 189 (1990). The Commission cannot under the guise of statutory interpretation remove or reduce requirements imposed

[10] This section was taken from a draft proposed order submitted by Rock Island. *See* R.V29, C-07031-C-07042.

by the legislature. *E.g., Cement Masons Pension Fund, Local 803 v. William A. Randolph, Inc.*, 358 Ill. App. 3d 638, 645 (1st Dist. 2005).

The Order claims that requiring both would "ignore" the "second half of the clause." That is exactly backwards. To be sure, the Commission must give effect to *all* of the words of the statutory criterion, but that includes both requirement of financial capability and the requirement of no harm. Far from reading the statute as a whole, the Order reads the former requirement out of the statute.

The Order's condition, in any event, does not satisfy even its own misreading of the statute. The condition states that "Rock Island will not start construction of the Project on easement properties unless and until Rock Island has obtained sufficient firm commitments for debt and equity financing to fund the entire Project construction cost." R.V35, C-08611-C-08612, A-00300-A-00301. It permits Rock Island to start using its Certificate in all other respect *before* meeting this condition. It authorizes Rock Island to conduct pre-construction work (*e.g.*, surveys, soil borings, engineering and design), site preparation work, land acquisition, and procurement and "installation of equipment and facilities" on any non-easement property. *See* R.V35, C-08612 ¶ (i), C-8628, A-00301, A-00317. Rock Island is only required to demonstrate any financial capability when it is ready to "install transmission facilities" on easement property. R.V35, C-08612 ¶ (i), A-00301. Since the Order relies on this future condition to satisfy the financial capability requirement, it cannot at the same time permit Rock Island to behave like it has a certificate prior to meeting that condition. Yet, it does. Indeed, under the Order, if Rock Island never obtains satisfactory financing, it will have been authorized for years to perform acts that Section 8-406(b) expressly forbids.

In sum, the reliance on this future condition emphasizes Rock Island's current lack of financial capability. If Rock Island were capable of financing the Project's construction, the Commission could review that financing, assess its sufficiency, and determine if it risks significant harm, all based on the evidence. No future conditions or reviews are required. Indeed, relying on conditions and future submissions outside of the record to satisfy Section 8-406(b)(3) is unprecedented among the many certificates the Commission has issued to utilities in the past. Section 8-406(b) does not require that Rock Island "may be capable," or "will be capable," or "could be capable" of financing construction in the future; it requires that an applicant utility prove that it "is capable of financing the proposed construction[.]" 220 ILCS 5/8-406(b), A-00458.

IV. THE ORDER UNLAWFULLY DELEGATES THE COMMISSION'S RESPONSIBILITIES TO ITS STAFF AND AUTHORIZES DETERMINATIONS MADE WITHOUT EVIDENCE OR A RECORD.

Even if a condition applicable only to potential future financing could in theory satisfy the requirements of Section 8-406(b)(3) – and it cannot – the condition adopted by the Commission are unlawful. An applicant must prove it meets the criteria of Section 8-406(b)(3) with evidence, and any finding the Commission makes must be based on that evidence. Section 8-406(b) expressly requires that "[*t*]*he Commission* shall determine that proposed construction will promote the public convenience and necessity" and allows that finding "only if the utility demonstrates" that the criteria are met. 220 ILCS 5/8-406(b), A-00458 (emphasis added). Neither the Act nor the IAPA permits the Commission to delegate its adjudicatory responsibility. *Union Electric Co. v. Illinois Commerce Comm'n*, 77 Ill. 2d 364, 383 (1979).

The Order disregards that law. Since the required findings could not be made based on the current record, the Order directed that, if and when Rock Island ever gets financing, it must submit to the Commission's staff attested documents describing that financing, a "reconciliation" comparing the financing to the total Project cost, and a statement that "no construction has previously occurred on easement property." *See* R.V35, C-08612-C-08613, A-00301-A-00302. While this process is billed as "allow[ing] the Commission to verify [Rock Island's] compliance with [the] condition" (R.V35, C-08612, A-00301), it includes no Commission proceedings or Commission determination. And, it does not follow the requirements of the IAPA. 5 ILCS 100/10-35, A-00472. No evidence is submitted, or admitted under the rules of evidence. There is no hearing. There is no cross-examination. There is not even a judge.

Indeed, allowing staff – who functioned like a party in the proceeding below and supported Rock Island's petition – to be the judge of its application is contrary to the fundamental separation between advocacy/advisory and adjudicatory functions. As the Supreme Court has observed, "The Staff, or those employees of the Commission who engage in investigatory, prosecutorial, or advocacy functions, remains separate from the commissioners, hearing examiners and other members of the Commission who render decisions." *BPI*, 136 Ill. 2d 192, 202; 220 ILCS 5/10-103, A-00462.

Apart from its procedural failings, the staff review will not result in any lawful Commission finding. All of the Commission's findings must be supported by evidence in a record, especially in a contested case such as this. Section 10-103 of the Act requires that "any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case, which shall include only the transcript of testimony

and exhibits together with all papers and requests filed in the proceeding, including, in contested cases, the documents and information described in Section 10-35 of the Illinois Administrative Procedure Act." 220 ILCS 5/10-103, A-00462; 5 ILCS 100/10-35, A-00472. *See also BPI*, 136 Ill. 2d at 203 ("The hearing and rulemaking procedures of the Commission are governed by the Act and the [IAPA]"). Under this procedure, there is no record. There are no findings of fact, no proposed order, no final order, and no record on which such an order could be reviewed by a court. Instead, staff's review of this data is a replacement for a substantive finding under Section 8-406(b)(3) of the Act.

Describing what staff would do in the future review as a "compliance filing" changes nothing. That label does not alter the procedural requirements of the Act or the IAPA. In any event, even ministerial acts that the law calls on the Commission to undertake cannot be delegated. *Citizens Util. Bd. v. Ill. Commerce Comm'n*, 276 Ill. App. 3d 730, 735 (1st Dist. 1995).

Moreover, the condition adopted by the Commission does not allow the Commission to determine whether the financing the applicant may subsequently obtain will "significantly harm the utility or its customers." 220 ILCS 5/8-406(b)(3), A-00458. Since it is not now known what the financing will be, the mere fact that a condition will ensure the conditional existence of some form of financing says nothing about whether the terms of that financing are harmful to Rock Island or its customers.

In short, the Commission must make the determination of whether Rock Island has met Section 8-406(b)(3) based on evidence presented during proper administrative proceedings, and that decision and evidence must be part of an administrative record.

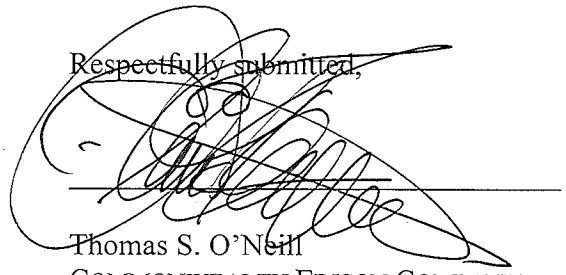
The condition adopted by the Order – aside from its substantive inadequacy – unlawfully abdicates its responsibilities and fails to respect administrative due process protections.

CONCLUSION

Rock Island is not an Illinois public utility, and it is not now entitled to a Certificate authorizing it to construct the Project as a utility. If those circumstances ever change, Rock Island is free to return to the Commission. But, on this record, the Order of the Commission is contrary to law and should be reversed.

Dated: May 4, 2015

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 32 pages.

Dated: May 4, 2015

Counsel for Petitioner-Appellant