STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Rock Island Clean Line LLC	**)**	
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Petition for an Order granting Rock Island Clean Line LLC a Certificate of Public Convenience and Necessity pursuant to Section 8-406 of the Public Utilities Act as a Transmission Public Utility and to Construct, Operate and Maintain an Electric Transmission Line and Authorizing and Directing Rock Island Clean Line Pursuant to Section 8-503 of the Public Utilities Act to Construct an Electric Transmission Line.	**)**	**Docket No. 12-0560**

REPY BRIEF ON EXCEPTIONS OF ILLINOIS LANDOWNERS ALLIANCE

Illinois Landowners Alliance

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September 18, 2014

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REPLY BRIEF ON EXCEPTIONS OF ILLINOIS LANDOWNERS ALLIANCE

Pursuant to Section 10-111 of the Illinois Public Utilities Act ("Act") (220 ILCS 5/10-111), Section 200.830 of the Rules of Practice (83 Ill. Admin. Code §200.830) of the Illinois Commerce Commission ("Commission"), and the Ruling of the Administrative Law Judge ("ALJ") entered August 26, 2014, the Illinois Landowners Alliance ("ILA"), through its attorneys, Shay Phillips, Ltd., files its Reply Brief on Exceptions, in reply to Briefs on Exceptions to the Proposed Order of the ALJ ("ALJPO") filed by other parties in this proceeding.

I. SECTION 8-503

Rock Island Clean Line LLC ("Rock Island") requests that the portion of the ALJPO denying Rock Island authority under §8-503 of the Public Utilities Act ("PUA") be changed to grant such authority. Rock Island BOE, at 3-12. The ALJPO was correct in denying Rock Island such authority. Rock Island emphasizes that it seeks an order authorizing, but not directing, it to construct its proposed electric transmission line project ("Project"). *Id.*, at 12, fn 11. Rock Island rightfully may not be directed to build the Project due to the many

contingencies and additional significant steps remaining before Rock Island can, among other things, obtain capacity commitments from customers and go to the market for financing. A §8-503 order is not appropriate here because the Project is not sufficiently far enough along in development to merit such authority. While the statutory language permits the Commission to authorize or direct that "the structures be erected," this section clearly contemplates that the utility will erect the structures that are the subject of the petition for authority. Section 8-503 requires that the Commission find that the new structures "are necessary" (not "could become necessary" if the many contingencies are satisfied and desired subsequent events occur), and that the structures "should be erected" (not "may be erected" or sometime in the future reach a stage where they should be erected). One of Rock Island's own lead witnesses admitted in his testimony that the Project in its present state is not needed, and that it will only be needed if and when transmission customers contract for enough service to support the raising of sufficient financial capital to cover the Project's costs.[1] The Project does not meet the statutory requirement of being "necessary" and that it "should be erected," and, therefore, does not legally qualify for a grant of authority under §8-503. The Commission may not relax the plain statutory requirements, whether for policy or other reasons, and grant approval for something that is beyond its statutory authority to approve. 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. Ill. Commerce*

[1] Rock Island Ex. 10.13, at 4, ll. 106-110 (Berry Add'l Supplemental Direct testimony); ALJPO, at 16; ILA BOE, at 4.

Comm'n, 352 Ill. 104, 106 (1933). The Commission may not, on its own, extend its jurisdiction beyond what its enabling statute provides. *Sheffler v. Commonwealth Edison Co.*, 399 Ill.App.3d 51 (1st Dist. 2010). What negative impacts a denial of §8-503 authority may have on Rock Island, or other parties to these proceedings, do not come into consideration if Rock Island has not otherwise satisfied its burden and met the statutory standard. Business need for §8-503 authority as part of this proceeding may not override a failure to establish a legal right to such authority under the language of the statute. Likewise, alleged delay or additional expense in possible relitigation cannot excuse Rock Island's duty. As demonstrated above, Rock Island has not satisfied its statutory burden, and, consequently, the Commission may not to grant §8-503 authority. For these and the other reasons in the record and briefs, despite the arguments of Rock Island and of the Project's other proponents to the contrary,[2] Rock Island may not, and should not, be granted authority under §8-503 as part of the order in this proceeding.

II. SECTION 8-406

A. Reliability. Rock Island contends it is entitled to a Certificate of Public Convenience and Necessity under §8-406(b)(1) on the basis that it is necessary to provide adequate, reliable and efficient service. Rock Island BOE, at 12-20. Rock Island has failed to establish that the Project is needed for reliability purposes, as both ComEd and the Commission Staff demonstrated. *See, e.g.*, ComEd Initial brief, at 30-32; ComEd Reply Brief, at 21-23; Staff Initial Brief, at 20-29.

[2] *See* BOEs of Environmental Intervenors; IBEW, at 4-8; and Wind on the Wires, at 5-7.

B. Financing Capability. Rock Island asks that the Order be revised to include more discussion on the "capable of financing" criterion under §8-406(b). Rock Island BOE, at 29-30, and offers additional language in its Appendix to its BOE. Rock Island BOE, Appendix, at 30-31. The suggested additional language consists mainly of eight factors Rock Island lists as factors on which the "Commission relies principally" to support a conclusion that Rock Island has met its statutory burden of demonstrating 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).

Rock Island correctly observes that the ALJPO relies heavily ("focuses almost entirely") on the financing condition that the Commission Staff proposed. Rock Island BOE, at 29. Rock Island's suggested added language, however, helps to demonstrate why Rock Island has failed to satisfy its burden of demonstrating financing capability. The eight listed factors can be summarized as follows: Rock Island plans to use a commonly-used project financing approach with a single purpose entity owning the Project and raising the funds; ample evidence of the need for the Project and cost advantage of wind generation facilities exist, such that sufficient transmission contracts with creditworthy customers will be entered into to support the project financing; capital markets have shown an appetite for financing projects like this; investors like projects with steady cash flows and attractive risk profiles like this one; significant institutional investors are actively investing in transmission projects;

and Management of Rock Island and Clean Line is experienced in energy infrastructure project financing.

This list of factors adds nothing to the evidence that Rock Island must present, and which it failed to do. Rock Island remains a new entity, with a parent, Clean Line Energy Partners, which also is new, with initial development funding from a few individuals, and more recently, an established utility in the Northeast. Rock Island is struggling to continue to operate, with additional needed development capital allocated from Clean Line's Board of Directors (Rock Island is one of five separate Clean Line project entities), and Clean Line must continue to attract development capital from its small investor base to fund its operations and allocate it among its five project subsidiaries. Neither Clean Line nor Rock Island has developed or financed any type of project. Rock Island has a plan to build a project for which multi-billion dollars of new wind energy projects must be approved, financed, developed, and built also utilizing project financing supported by substantial power purchase agreements with off-take customers executed to support the financing. Rock Island will need Iowa regulatory approval in order to move ahead, and will need (just for the Eastern terminus) complicated interconnection studies and agreements to be completed, with costs and technical and operating requirements and constraints that are still unknown. Rock Island's senior management members also have responsibility for other Clean Line projects. [3]

[3] *See, e.g.,* ILA Initial Brief, at 30-34; Farm Bureau Initial Brief, at 13-16; ComEd Initial Brief, at 32-35; ILA Reply Brief, at 5-13; Farm Bureau Reply Brief, at 3-4; ComEd Reply Brief, at 15-20, 24-27; ILA BOE, at 6-11.

Whether or not it is in this Country's and this State's public interest to increase the supply of renewable energy, the Petitioner in this proceeding, and this Project, do not fit within, or satisfy, the Illinois statutory legal requirements that apply. It is bad law and bad policy to allow the tail (Staff's financing condition) to wag the dog (regulatory approval). Not only is it premature to withhold §8-503 approval, it is also premature to grant a CPCN to Rock Island approving the Project with its many contingencies and conditions, and authorizing Rock Island to operate as a public utility, under §8-406. The Illinois public, the Commission Trial and Non-Trial Staff, the many members of the ILA, the Farm Bureau representatives, and other parties and interested persons have endured many months, with significant expenditures of time and money, so that Rock Island and this Project was allowed to be presented to and considered by this Commission. Real harm has been experienced as a result, including the impacts resulting from the uncertainties as to whether this Project would go forward, and the chilling effect the pendency of the Project may have been having on other more useful and certain projects, sponsored by creditworthy utilities or other entities. The Rock Island Project can only be categorized as speculative. As such, these types of entities sponsoring these types of projects, with so much remaining to be done and with so many remaining opportunities for the Project to fall off the rails, should not be encouraged.

Furthermore, regardless of the policy considerations, the PUA, in particular Sections 3-105, 8-406 and 8-503, is not structured and worded in a way that permits approval based on the evidence presented. This Commission is

not allowed to read more into the PUA than what its language states or permits. *Ill.-Ind. Cable Television Ass'n, supra; Sheffler, supra.* It is the legislature's job, not this Commission's, to expand the reach of the PUA to permit approval of projects like this one, if the legislature deems it wise and appropriate to do so. *See Divane v. Smith,* 332 Ill.App.3d 548, 553, 774 N.E.2d 361, 364-365 (1st Dist. 2002). As the *Divane* court stated, "The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature," *citing People ex rel Ryan v. McFalls*, 313 Ill.App.3d 223, 226, 728 N.E.2d 1152 (3d Dist. 2000). The *Divane* court continued, stating, "The first step in doing so [ascertaining the intent of the legislature] requires an examination of the language of the statute in which we give the words their plain meaning and construe them in context," *citing In re Tax Deed*, 311 Ill.App.3d 440, 4443, 723 N.E.2d 1186 (5th Dist. 2000). *Id.* Rock Island's interpolations, plans and promises are no substitute that it demonstrate, in accordance with the language of §8-406, that the Project is "necessary to provide adequate, reliable, and efficient service to its customers;" that the Project "will promote the development of an effectively competitive electricity market;" that Rock Island "is capable of efficiently managing and supervising the construction process;" and that Rock Island "is capable of financing the proposed construction." It is not legally sufficient to allow the substitution of promises, plans, and conditions for the statutory requirements according to their plain meaning. It does not matter how lengthy Rock Island's testimony and briefs have been, and how many times Rock Island has repeated its statements and arguments. Neither the evidence, Rock Island's arguments, not policy

considerations overcome the failure of Rock Island to demonstrate, as the statute requires, what §8-406 requires it to demonstrate in order to qualify for a CPCN to construct the Project or to transact public utility business in this State.

III. Landowner Concerns About Impacts of Construction

The ALJPO, appropriately, addressed landowner concerns regarding the impacts of construction by imposing relatively modest conditions on Rock Island's construction activities. ALJPO, pp. 196-199. However, Rock Island spent twenty pages of its Brief on Exceptions trying to water-down these protections. RI Brief on Exceptions, pp. 32-52. It is disconcerting that Rock Island, a novice transmission line builder whose agricultural compaction witness was wholly unqualified, repeatedly misconstrues the text of the AIMA, which no landowner was able to provide input on, to minimize the protections the ALJPO provides to landowners.

Further, the AIMA, on its face, only applies to those who negotiate easements. *See,* Agricultural Impact Mitigation Agreement, p. 2 (defining landowner as those individuals that Rock Island is seeking an easement). While, at this time, the ALJPO denied Rock Island's hoped for §503 Order, there is no guaranty that, in the future, Rock Island will not seek eminent domain authority. Accordingly, the terms of the AIMA may, arguably, not apply to those landowners Rock Island cannot strike a bargain with. Further, the AIMA only applies to "agricultural land," which is limited by definition. *Id.,* at pp. 1-2. Thus, there may be situations where Rock Island could argue the AIMA isn't applicable, for example, non-managed woodlands having commercially viable trees.

Rock Island fails to recall that it has never built anything, let alone a high-voltage, direct current, transmission line across 121 miles of Illinois' farmland. ALJPO, p. 3. Rock Island is not capable of building the Project, it must point to its contractors for any experience. The problem is, no one knows who the contractor will be, if the line is even built. ALJPO, p. 197. Accordingly the conditions that the ALJPO places upon Rock Island are eminently reasonable.

A. Ed Simpson Property Concerns. The ALJPO, p. 188, orders Rock Island to avoid or minimize tree-clearing activities. Rock Island wants the condition wholly removed from the Order and for the Commission to instead use the AIMA language. That language says nothing about clearing and only speaks to compensation. Rock Island's exception should not be well-taken.

Rock Island further complains that erosion control language, requiring compliance with IEPA management practices, should be removed as duplicative of the AIMA, or that the ALJPO be modified to state that Rock Island will "follow the IEPA's best management practices for erosion control." These aren't duplicative conditions as Rock Island suggests, the AIMA calls for Rock Island to follow the recommendations of "county Soil and Water Conservation District(s)," not county boards. Rock Island's argument fails to hold water, and the exception to the ALJPO should be ignored.

Rock Island also tries to minimize the language of the ALJPO which requires it to conduct assessments, arguably "along the approved route," which is not, necessarily, limited to Mr. Simpson's property. Rock Island's language adjustment doesn't simply "clean house," but rather limits this language to just Ed

Simpson's property. It is respectfully submitted that the language should be left alone, and should govern Rock Island's activities throughout the entirety of the approved route.

B. Curtis Jacobs Property Concerns. Rock Island next takes issue with certain conditions placed upon their operations on the property of Mr. Jacobs. As above, Rock Island is simply trying to water-down protections that the ALJPO afforded landowners confronted with a first-time transmission line builder.

Rock Island first tries to sell this Commission on the idea that the AIMA language concerning pole placement's interference with cropland is the same as pole placement's impact on aerial application. However, Rock Island has not carefully read the very AIMA it touts. Insofar as cropland is defined by the actual ground (AIMA, p. 2), not activities above it, impacts to "cropland" are not the same as impacts to "aerial spraying." Indeed, nothing in § 3 of the AIMA even mentions aerial application.

Rock Island further minimizes the protections concerning negotiations for pole placement. Again, Curtis Jacobs has no reason to believe, at this time, that Rock Island has any idea what it is doing. Certainly, the ALJPO doesn't inspire confidence when it notes that the merchant nature of the project complicates issues, and there are many unknowns. ALJPO, p. 127. Additionally, the ALJPO's reliance on third-party contractors, when no one knows who Rock Island will actually hire to build the Project (if it is even built) is troubling. As such, deference should be provided to landowners, and they should be

especially protected against this novice company intruding upon their land. Rock Island's proposed language adjustments should be denied.

C. Conditions regarding soil compaction. Rock Island next tries to avoid language concerning remediation of compacted soils. As the ALJPO recognizes, Rock Island's compaction witness is not a farmer, has no education in agriculture, and only has a bachelors of arts degree in political science. ALJPO, p. 194. Mr. Detweiler's testimony, and the fact that Rock Island touted him as their compaction witness, inspires no confidence in ILA members.

As Rock Island's Brief on Exceptions points out, on page 45, the ALJPO states that "if the landowner believes some depth other than 18 inches is appropriate, Rock Island will work with the landowner to effectuate the landowner's recommendation. Rock Island wants this condition removed from the ALJPO. It is inappropriate to do so. ILA witnesses have testified that 18 inches may not be an appropriate decompaction depth – it may be too shallow or too deep. The AIMA does not speak to modifications on the same. This condition is the only binding protection the landowners have for remediating their soils. The proposed adjustment to remove the condition should be denied.

Rock Island further tries to avoid having to negotiate with landowners directly regarding soil compaction. In attempting to avoid the condition that "Rock Island shall discuss the mitigation measures. . . " it suggest that the AIMA already requires them to do so. This is incorrect. The AIMA, § A, calls for negotiations with representatives of Rock Island. The ALJPO already recognizes this issue, addressing it elsewhere on page 197 of the ALJPO ("[I]f the landowner

wants to communicate directly with Rock Island instead of just with contractors, Rock Island shall do so.") Accordingly it is inappropriate to wholly remove the condition. Additionally, Rock Island's "modified" language directly references the AIMA, which doesn't provide for deeper or shallower ripping. Rock Island's attempt to attenuate protections for landowners should be denied. Both exceptions on this point should be refused.

In its final attempt to evade protections for landowners relating to compaction, Rock Island takes issue with the ALJPO language allowing landowners to "self-perform decompaction activities . . . or retain a contractor, the reasonable cost of which shall be paid by Rock Island." ALJPO, p. 197 (emphasis added). Rock Island, again, references the AIMA when trying to sap the strength from this protection. Nowhere in the AIMA is Rock Island mandated, by the use of the word shall, to pay the "reasonable cost" of anything. The AIMA only states that Rock Island "may negotiate with Landowners." AIMA, § B. Rock Island is, again, misconstruing the AIMA to weaken protections for landowners. The attempted removal of this condition should be denied.

D. Conditions Regarding Drainage Tile. As before, Rock Island attempts to mitigate the ALJPO's protections for landowners, this time concerning drainage tile. It first takes issue with the condition on page 197 of the ALJPO that requires it to – by reference to page 181 of the ALJPO – visit local soil and water conservation districts, consult other documents showing locations of drainage tile, consult with contractors who installed tiles, and meet landowners and walk fields. Considering Rock Island's lack of experience in working in

agricultural areas, its failure to name a construction management team, its failure to name a contractor, and a host of other unknowns, it is perfectly appropriate for this Commission to delineate what needs to be done to protect landowners' drainage tile. Unsurprisingly, considering it cannot commit to anything – even building the project, Rock Island doesn't want to be told what to do.

Rock Island attempts to point to the AIMA, which only requires it to "inquire" of landowners. Rock Island's suggestion that the issue is "addressed by Section 5 of the AIMA" is ludicrous. This inquiry is only one portion of a single step the steps that the ALJPO mandates. Further, Rock Island's proposed language adjustment only protects landowners during "construction," not during maintenance or repair operations. If the language is to be modified, at all, it should include these mitigation measures *any time* that Rock Island brings equipment onto the landowner's property.

The ALJPO also commits to protect landowners by requiring Rock Island to abide by the AIMA commitments "for a reasonable period of time." ALJPO, p. 198. Rock Island wants this condition removed, as it allegedly mirrors § 5 of the AIMA. This is not the case. This condition somewhat mitigates concerns of ILA members who worry that drainage tile damage may not be evident for months, or years. Nothing in the AIMA protects landowners who do not, and cannot, know of damage for several crop cycles, due to drought or otherwise. Thus, Rock Island's misreading of the AIMA would deprive the landowners of a reasonable protection. The deletion of the condition should not occur.

Finally, Rock Island attempts to obtain additional rights with regards to relocation of transmission line poles when they intercept drainage tile. ALJPO, p. 198. The ALJPO requires any relocation to be within the right of way. The AIMA does not. Rock Island's assertion that they are duplicative is incorrect. The condition should remain in the ALJPO.

E. Condition relating to aerial application. Rock Island, finally, criticizes the requirement that it negotiate to place poles in such locations, so as to minimize impacts to aerial spraying. This issue was addressed in the concerns of Mr. Jacobs above, which pointed out that Rock Island's reliance on the AIMA is misguided. Section 3 of that document protects the ground, not the activities above it. Rock Island further wishes to condition the language in such a way that it can "consider impacts . . . on neighboring parcels and consider[] other routing criteria. . . ." Rock Island has attempted to place sufficient exceptions on the condition that it, effectively, can do anything it wants and find an exception for it. The ALJPO's language was appropriate and protected landowners who are being saddled with the burden of a transmission line, built by novices, that is not for the public use. The language should not be modified.

WHEREFORE, the Illinois Landowners Alliance respectfully requests that the Commission modify the ALJPO consistent with its Exceptions, its Initial Brief on Exceptions, and this Reply Brief on Exceptions.

Dated: September 18, 2014

Respectfully submitted,
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By its Counsel

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