No. 3-15-0099

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD APPELLATE DISTRICT

ILLINOIS LANDOWNERS ALLIANCE NFP, Petitioner-Appellant, v. ILLINOIS COMMERCE COMMISSION, COMMONWEALTH EDISON COMPANY, LOCALS 51, 9, 145, AND 196, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ILLINOIS AGRICULTURAL ASSOCIATION a/k/a ILLINOIS FARM BUREAU, WIND ON THE WIRES, THE ENVIROMENTAL LAW & POLICY CENTER, NATIONAL RESOURCES DEFENSE COUNCIL, BUILDING OWNERS AND MANAGERS ASSOCIATION OF CHICAGO, DYNEGY MIDWEST GENERATION, LLC, DYNEGY KENDALL ENERGY, LLC, AMERENT TRANSMISSION COMPANY OF ILLINIOS, MIDWEST GENERATION, LLC, JOHN L. CANTLIN, JOSEPH H. CANTLIN, Respondents-Appellees	)	Petition for Review of Orders of the Illinois Commerce Commission in its Docket No. 12-0560

BRIEF AND ARGUMENT OF PETITIONER-APPELLANT

William M. Shay
Shay Phillips, Ltd.
456 Fulton Street
Suite 255
Peoria, Illinois 61602
(309) 494-6155
One of Plaintiff-Appellant's Attorneys

ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

NATURE OF CASE

This case arose from the request for regulatory approval for the Illinois portion of a proposed, new electric transmission line. The major issues in the case pertain to the nature, and lack of experience, of the entity requesting approval for the line, how the entity plans to finance the project, and the relatively limited review of the project by

regional transmission organizations charged with overseeing and managing the regional transmission grid in the region where the line would be located. The applicant is not an established public utility. Rather, it is a new, single purpose entity formed specifically to attempt to gain governmental approval for and to develop this single transmission line project, which would be located in both Illinois and Iowa. The entity requesting approval – Rock Island Clean Line LLC ("Rock Island") – (Rock Island's styled its request for approval as a Petition ("Rock Island Petition")) from the Illinois Commerce Commission ("Commission" or "Illinois Commission") has little or no other business properties or operations, has no customers, is not a subsidiary of a public utility or electric transmission owner, and has only an insignificant amount of capital and financial resources. Rock Island as an entity stands in contrast in many significant respects to established public utilities such as Commonwealth Edison Company ("ComEd") and Ameren Illinois, both of whom either directly or through affiliates own and operate significant amounts of electric transmission properties.

The project Rock Island seeks to develop features a high voltage direct current ("HVDC") electric transmission line. The proposed line would extend from a location in northwest Iowa, then proceed eastwardly to the Iowa-Illinois border, crossing the Mississippi River, and continuing to the east until it would terminate at or near a substation owned by ComEd in Grundy County, Illinois. Rock Island's business strategy, beyond designing the project, has been and is to obtain the necessary regulatory approvals to site and build the project from the Iowa Utilities Board and the Illinois Commission; to obtain authority from the Federal Energy Regulatory Commission for matters pertaining to capacity allocation and pricing; to solicit interest from wind energy

developers to build wind farms near and build interconnections with the line where it begins in northwest Iowa; to solicit interest from those wind developers, as well as other parties, to reserve and pay for capacity on the line; and to solicit interest from project lenders and other capital providers to finance the project. Unlike traditional public utilities, Rock Island would have no existing or built in customers, either retail or wholesale, from whom it could recover revenues via regulated rates. Rock Island presently intends that its only source of revenue would be payments from parties that voluntarily subscribe to or contract with Rock Island for capacity on the line to transmit power through it.

Rock Island applied for approval under the Illinois Public Utilities Act to construct the Illinois portion of the line and related facilities (the "Project") and for approval of the particular route. The Staff of the Commission, through subject matter witnesses and counsel, participated as a party, and several other persons and entities intervened.

Appellant Illinois Landowners Alliance, NFP ("ILA") was an intervenor and active participant, in opposition to the Project, in the administrative proceedings before the Commission. The 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 Project. The ILA is one of three parties appealing the order of the Commission granting in part the relief Rock Island requested.

JURISDICTIONAL STATEMENT

The order of the Commission ("Order") was served on November 25, 2014. The Commission served an order denying ILA's Application for Rehearing ("Rehearing

Order") on January 15, 2015. Denial of the Application for Rehearing gave the ILA the right to appeal the Commission's Order. *See* 220 ILCS 5/10-113(a); 83 ILL. ADMIN. CODE §200.880. ILA filed its Petition for Review on February 17, 2015, within 35 days after the Commission's refusal of the ILA's Application for Rehearing, thereby conferring subject matter jurisdiction with the Appellate Court. *See* 220 ILCS 5/10-201(a); 83 ILL. ADMIN. CODE §200.890. Because most if not all of the proposed transmission line, i.e., the subject matter of the proceeding, would be located within the geographic boundaries of the Third District Appellate Court, lodging this appeal in said judicial district is proper. *See* 220 ILCS 5/10-201(a).

ISSUES PRESENTED FOR REVIEW

1. Whether ILA's motion to dismiss Rock Island's application to the Commission, due to Rock Island not having public utility status, should have been granted.
2. Whether Rock Island, lacking the status of a public utility, is ineligible for a certificate of public convenience and necessity ("CPCN") to transact business in Illinois.
3. Whether Rock Island has failed to meet the statutory requirements for, and should not have been granted, a CPCN to transact business or construct the Project, based on Rock Island's failure to satisfy its burden of showing that it meets all of the following factors:
    a. Rock Island's transaction of business in Illinois, and the Project, are necessary;
    b. The Project is least cost;

c. Rock Island is capable of managing and supervising the construction process;

d. Rock Island is capable of financing the proposed construction.

4. Whether the Commission in its order improperly relies upon the financing condition as a cure for Rock Island's and the Project's deficiencies.

5. Whether other risks associated with Rock Island and the Project should have caused the Commission to decline to grant Rock Island a CPCN:

a. The risk that the Project will be converted into one with regulated rate recovery with the Order not imposing sufficient Commission control over such conversion.

b. The risk that, due to its speculative nature in the hands of Rock Island, the Project will be sold to another, unidentified entity after regulatory approvals and before financing and construction.

6. Whether Rock Island's proposed routing for the transmission line is based on a flawed study and is inadequate, thereby serving as a separate basis for denying Rock Island a CPCN.

STATUTES INVOLVED

Illinois Public Utilities Act (the "Act")

Sec. 3-105. Public utility.

> (a) "Public utility" means and includes, except where otherwise expressly provided in this Section, 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;

(2) the disposal of sewerage; or

(3) the conveyance of oil or gas by pipe line.

….

220 ILCS 5/3-105

Sec. 8-406. Certificate of public convenience and necessity.

(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.

220 ILCS 5/8-406.

Section 10-201

…

(c) No new or additional evidence may be introduced in any proceeding upon appeal from a rule, regulation, order or decision of the Commission, issued or confirmed after a hearing, but the appeal shall be heard on the record of the Commission as certified by it. The findings and conclusions of the Commission on questions of fact shall be held prima facie to be true and as found by the Commission; rules, regulations, orders or decisions of the Commission shall be held to be prima facie reasonable, and the burden of proof upon all issues raised by the appeal shall be upon the person or corporation appealing from such rules, regulations, orders or decisions.

(e) Powers and duties of Reviewing Court:

….

(ii) If it appears that the Commission failed to receive evidence properly proffered, on a hearing or a rehearing, or an application therefor, the court shall remand the case, in whole or in part, to the Commission with instructions to receive the testimony so proffered and rejected, and to enter a new order based upon the evidence theretofore taken, and such new evidence as it is directed to receive, unless it shall appear that such new evidence would not be controlling, in which case the court shall so find in its order. If the court remands only part of the Commission's rule, regulation, order or decision, it shall determine without delay the lawfulness and reasonableness of any independent portions of the rule, regulation, order or decision subject to appeal.

(iii) If the court determines that the Commission's rule, regulation, order or decision does not contain findings or analysis sufficient to allow an informed judicial review thereof, the court shall remand the rule, regulation, order or decision, in whole or in part, with instructions to the Commission to make the necessary findings or analysis.

(iv) The court shall reverse a Commission rule, regulation, order or decision, in whole or in part, if it finds that:

A. The findings of the Commission are not supported by substantial evidence based on the entire record of evidence

presented to or before the Commission for and against such rule, regulation, order or decision; or

B. The rule, regulation, order or decision is without the jurisdiction of the Commission; or

C. The rule, regulation, order or decision is in violation of the State or federal constitution or laws; or

D. The proceedings or manner by which the Commission considered and decided its rule, regulation, order or decision were in violation of the State or federal constitution or laws, to the prejudice of the appellant.

(v) The court may affirm or reverse the rule, regulation, order or decision of the Commission in whole or in part, or to remand the decision in whole or in part where a hearing has been held before the Commission, and to state the questions requiring further hearings or proceedings and to give such other instructions as may be proper.

….

220 ILCS 5/10-201.

STATEMENT OF FACTS

The following facts are from the portions of the Commission's Order entered in the administrative proceeding below labeled Procedural History and Description of Rock Island and the Project. Order, pp. 1-4; C-8478-81, A-00041-44.

Rock Island requested an order granting it a CPCN, pursuant to Section 8-406 of the Act, authorizing it to operate as a transmission public utility in the State of Illinois and to construct, operate and maintain the Project; and authorizing and directing it, pursuant to Section 8-503 of the Act, to construct the proposed line. Rock Island also sought certain other relief not relevant to this appeal.

In additional to the ILA, petitions for leave to intervene were filed by several individuals and organizations including ComEd; Locals 51, 9, 145, and 196, International

Brotherhood of Electrical Workers, AFL-CIO ("IBEW"); the Illinois Agricultural Association a/k/a Illinois Farm Bureau ("IAA" or "Farm Bureau"); Wind on the Wires ("WOW"); the Environmental Law & Policy Center ("ELPC") and the National Resources Defense Council ("NRDC"), also collectively referred to "Environmental Intervenors" or "EI"); the Building Owners and Managers Association of Chicago ("BOMA"); John L. Cantlin; Joseph H. Cantlin; Timothy B. Cantlin; Jason D. James; James Bedeker, Sally Bedeker and First Midwest Bank Trust #6243 ("Bedeker Intervenors"); and Friesland Farms LLC, Larry Gerdes and Steven Gerdes ("Gerdes Intervenors"). The Staff of the Commission, which is not required to seek leave to intervene in a docketed proceeding, participated as a party. Of the intervenors, the ILA, the IAA and ComEd actively participated in opposition to the Rock Island Petition. WOW, Environmental Intervenors and IBEW supported the Rock Island Petition.

The ILA and IAA each filed a Motion to Dismiss the Rock Island Petition. With respect to Rock Island's request for relief under Section 8-406, the Motions to Dismiss were denied in a written ruling.

The proceedings at the Commission were held in accordance with the Act and the Commission's Rules of Practice. 83 ILL. ADMIN. CODE Part 200. Pursuant to due notice, a prehearing conference, status hearings and evidentiary hearings were held in this matter before an Administrative Law Judge at the Commission's offices in Springfield, Illinois. Public Forums were held on September 18 and October 28, 2013, and were well attended. Numerous landowners and others expressed their objections to the proposed transmission line.

Numerous witnesses on behalf of Rock Island, the Staff, and intervenors provided prepared written testimony and exhibits, and were subject to cross-examination at the evidentiary hearings. Rock Island, the Staff, and several of the intervenors filed briefs as to motions and as to the merits of the Rock Island Petition following the hearings. The ALJ issued a proposed order, and those who wished filed briefs on exceptions pertaining to the proposed order. The ALJ also made numerous other rulings on various issues and matters that arose during the proceeding.

Rock Island is a Delaware limited liability company with principal offices in Houston, Texas. Rock Island is a wholly owned subsidiary of Rock Island Wind Line, LLC, a Delaware limited liability company, which is in turn a wholly owned subsidiary of Clean Line Energy Partners LLC ("Clean Line"), also a Delaware limited liability company. The owners of Clean Line are GridAmerica Holdings Inc., Clean Line Investor Corp., Michael Zilkha, and Clean Line Investment LLC. GridAmerica Holdings Inc. is a subsidiary of National Grid USA.

The proposed transmission line would be 500 miles long and would originate at a converter station in O'Brien County, Iowa, would traverse Iowa for 379 miles, cross the Mississippi River near Princeton, Iowa, and then enter Illinois south of Cordova, Illinois. From there, the proposed line would extend for approximately 121 miles in Illinois to the Collins Substation owned by ComEd and located in Grundy County.

The primary purpose of the 500-mile line is connect unidentified, unbuilt wind generation facilities in northwest Iowa and nearby areas in South Dakota, Nebraska, and Minnesota ("Resource Area") with electricity markets in northeast Illinois and elsewhere in the grid of the P.J.M. Interconnection, LLC ("PJM"), a regional transmission authority.

Except for a short segment at its eastern terminus, the transmission line would be a direct current ("DC") at a high voltage ("HVDC") line. The energy generated in wind farms is in alternating current ("AC") form. To transmit this energy over a HVDC transmission line, the energy must be converted to DC form. The DC portion of the proposed transmission line would originate from an AC-to-DC converter station at O'Brien County in Iowa and terminate at a DC-to-AC converter station located approximately four miles north of the Collins Substation in Grundy County. From the converter station, a four-mile AC segment, consisting of two parallel 345 kilovolt ("kV") AC lines, would connect to ComEd's existing 765 kV AC transmission system at or near the Collins substation. The DC transmission line's nominal voltage will be ± 600 kV direct current. It is described as the first DC transmission line proposed in Illinois.

Rock Island characterized the line as a "merchant project." As such, Rock Island asserted that it will recover its costs of construction and operation solely through the revenues it receives from the specific transmission customers that purchase capacity and take transmission service on the Project. The Federal Energy Regulatory Commission ("FERC") approved Rock Island's proposal to pre-subscribe "up to" 75 percent of transmission capacity to anchor customers. The FERC also approved Rock Island's request to sell the remaining 25 percent of the capacity using an open season auction.

Paul Marshall, an ILA Board member and one of ILA's witnesses in the proceeding at the Commission, described the ILA in his direct testimony. ILA Ex. 1.0; C-5603. The ILA is a not-for-profit entity formed for the purpose of attempting to prevent the Rock Island Project from being constructed across prime farmland ("some of the best farm land in America"). ILA's members total about 300 including people who own land

directly impacted by the line as a result of land or home ownership, or both, in or along the proposed path of the line. ILA members own or lease over 100,000 acres of land. ILA's opposition to the line is based largely on the failure to understand or agree with the justification Rock Island has offered for the line, and on the start-up, private equity backed nature of Rock Island, an entity without any track record of electric transmission development, ownership, or operation.

ARGUMENT

I. ILA's motion to dismiss Rock Island's application to the Commission, due to Rock Island not having public utility status, should have been granted.

The scope of the Commission's authority is a question of law involving statutory interpretation, which the court on appeal is to review *de novo*. *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2014 IL APP (1st) 130544, ¶ 16; *citing City of Chicago v. Illinois Commerce Comm'n*, 294 Ill.App.3d 129, 134-35, 689 N.E.2d 241 (1st Dist., 1997).

Both the ILA and the Illinois Agricultural Association ("IAA") filed Motions to Dismiss the Rock Island Petition ("Motion to Dismiss") on the basis that, because Rock Island is not a public utility under Illinois law, it is not eligible for the grant of a CPCN under Section 8-406 of the Illinois Public Utilities Act (the "Act"). 220 ILCS 5/8-406. Following responses from Rock Island, ComEd, IBEW and Wind on the Wires, and replies filed by the ILA and IAA, the Administrative Law Judge presiding over the proceeding at the Commission ("ALJ") issued a Ruling on March 18, 2013, C-01897, A-00035, in which he denied the Motions as to Rock Island's request for relief under

Section 8-406. In its Order, the Commission confirmed the ALJ's denial. Order, p. 8; C-8485, A-00048.

It is uncontroverted that at the time it filed the Rock Island Petition, Rock Island was not a public utility as defined by Section 3-105 of the Act. 220 ILCS 5/3-105. Both sections of the Act that permit a party to apply for a CPCN to (1) transact business, or to (2) construct facilities are conditioned upon the applicant having public utility status. Section 8-406(a) states in relevant part, "No public utility … shall transact any business …." Similarly, Section 8-406(b) states, "No public utility shall begin the construction …." Rock Island has identified no other statutory provision by which it may attain public utility status in Illinois. In granting Rock Island public utility status, the Commission exceeded its statutory authority under the Act. The scope of the Commission's authority is a question of law, which the court on appeal is to review *de novo*. *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2014 IL APP (1st) 130544, ¶ 16; *citing City of Chicago v. Illinois Commerce Comm'n*, 294 Ill.App.3d 129, 134-35, 689 N.E.2d 241 (1st Dist., 1997). The issue is one of statutory interpretation. In interpreting a statute, the court's primary objective is to ascertain and give effect to the intent of the legislature as shown by the plain and ordinary meaning of the statutory language. *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2014 IL APP (1st) 130544, ¶ 16. An administrative agency's interpretation of an ambiguous statute is to be given substantial deference. *Id*. Here, however, the statute is not ambiguous. Under the "plain and ordinary meaning" of the language of Section 8-406, the Commission may consider requests for a CPCN to conduct business or to construct only if the request is submitted by a public utility. The statutory language in question may not be found to be ambiguous merely

because the parties may disagree as to its meaning. *REACT v. Illinois Commerce Comm'n,* 2015 IL App (2d) 140202, ¶ 45; *citing Kaider v. Hamos,* 2012 IL App (1st) 111109, ¶ 11, 975 N.E.2d 667 (1st Dist. 2012). Additionally, it is no answer to say that the language as so interpreted is unreasonable or illogical. That fact, even if true, may not be utilized to stray from the "plain and ordinary meaning" of the words the legislature used. It isn't as if it would have been difficult to word the statute differently if that was the legislature's intent. Either or both of subsections 8-406(a) and 8-406(b) could easily have been worded to state, "No person shall" or "No entity shall;" but they did not. Worded in either of these two ways, the meaning the Commission ascribed in its Order would have been correct. But, instead, the statute states, in both instances (8-406(a) and (b)), that "no public utility shall…." Given that the Legislature chose the particular words that it did, which have remained intact for many years, rather than one of the above-quoted alternatives, the legislature can only have intended that initiation of requests under Section 8-406 of the Act are restricted to entities that are public utilities at the time of the request. It makes no difference whether, in hindsight or under today's more modern circumstances, the legislature's intention at that time was unreasonable. On that note, ILA believes it is not necessarily illogical or unreasonable to limit applicants for CPCNs under the Act to public utilities, given that public utilities carry a substantial responsibility to provide essential utility services to the public and thus are required to operate in a manner consistent with the public interest. If a different result is deemed to be more in step and consistent with the utility industry as it exists today, then proponents of such different result should take their cause up with the legislature, which is uniquely qualified to consider the various public policy and other factors relevant to the issue.

Here, while Rock Island was an entity, it was not a public utility as of the date of the Rock Island Petition. As a result, the Commission may not entertain its application for a CPCN under Section 8-406. The Commission's decision to the contrary was erroneous as a matter of law and should be reversed.

II. Rock Island, lacking the status of a public utility, is statutorily ineligible for a certificate of public convenience and necessity ("CPCN") to transact business in Illinois.

Due to the issue being one of statutory interpretation, the Court should review this issue *de novo*. *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2014 IL APP (1st) 130544, ¶ 16; *citing City of Chicago v. Illinois Commerce Comm'n*, 294 Ill.App.3d 129, 134-35, 689 N.E.2d 241 (1st Dist., 1997).

In order to be granted utility regulatory authority to construct the Project, Rock Island must show that it is entitled to a CPCN to transact business in Illinois pursuant to Section 8-406(a) of the Act, and that the public convenience and necessity require the Project's construction pursuant to Section 8-406(b). These statutory provisions state:

> Sec. 8-406. Certificate of public convenience and necessity.
>
> (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.

220 ILCS 5/8-406(a).

> (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.

220 ILCS 5/8-406(b).

The definition of "public utility" is contained in Section 3-105 of the PUA. This section provides in relevant part, "'Public Utility' means and includes … every … limited liability company … 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 … the … transmission … of … electricity."

Rock Island is not eligible to receive a CPCN to transact public utility business in Illinois. For reasons similar to those for which the ILA's Motion to Dismiss should have been granted, Rock's Island's request for a CPCN should have been rejected, as Rock Island is not an Illinois public utility. Because Rock Island is not a public utility, it is not eligible for, and the Commission lacks statutory authority to grant it, a CPCN under Section 8-406.

III. Rock Island has failed to meet the statutory requirements for, and should not have been granted, a CPCN to transact business or construct the Project, based on Rock Island's failure to satisfy its burden of showing that it meets all of the following factors:

- **Rock Island's transaction of business in Illinois, and the Project, are necessary;**
- **The Project is least cost;**
- **Rock Island is capable of managing and supervising the construction process;**
- **Rock Island is capable of financing the proposed construction.**

This issue involves both findings of fact, which on review are subject to the substantial evidence standard under Section 10-201 (e) of the Act, 220 ILCS 5/10-201(e), and statutory interpretation, which the Court should review *de novo* as a matter of law. *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2014 IL APP (1st) 130544, ¶ 16; *citing City of Chicago v. Illinois Commerce Comm'n*, 294 Ill.App.3d 129, 134-35, 689 N.E.2d 241 (1st Dist., 1997). As a threshold matter, it should be noted that the Section 8-406(b)(1) requirement is but one of three threshold requirements that the utility has the burden of proving ("only if the utility demonstrates") in order to be considered for a CPCN; the requirements are not alternatives but instead all must be satisfied, all constituting elements of the public convenience and necessity which the utility project must promote. To explain further, by the use of "or" it is evident that the two standards contained in Section 8-406(b)(1) are alternative standards, such that (b)(1) may be satisfied by a showing of reliability-related need or the promotion of electricity market competition. Once one of those alternative showings has been met, however, the remaining two requirements for a CPCN under Section 8-406 must also be met. The first additional requirement (Section 8-406(b)(2)) requires a finding as to the utility's capability to manage and supervise the construction; and the other requirement (Section 8-406(b)(3)) is that the utility demonstrate its ability to finance the construction without significant adverse financial consequences.

III.A. Neither Rock Island's transaction of business in Illinois nor the Project is necessary.

This issue involves findings of fact, which on review are subject to the substantial evidence standard under Section 10-201 (e) of the Act. 220 ILCS 5/10-201(e).

Even assuming Rock Island is eligible to apply for a CPCN (ILA contends it is not), the public convenience and necessity do not require Rock Island to conduct the business it proposes to conduct. The law in this State pertaining to the grant of a CPCN has been long-established. The Commission may issue a CPCN only if it finds that the proposed service is necessary for public convenience and necessity. *New Landing Utility v. Illinois Commerce Comm'n*, 58 Ill.App.3d 868, 374 N.E.2d 6 (2d Dist. 1977). The Commission must specifically find that public convenience and necessity require the proposed service. *Eagle Bus Lines v. Illinois Commerce Comm'n*, 3 Ill.2d 66, 119 N.E.2d 915 (1954). The convenience of and advantages to the promoters of a service are not alone sufficient to justify the grant of a CPCN. *Wabash, C & W Ry. Co. v. Commerce Comm'n ex rel. Jefferson Southwestern R.R. Co.*, 309 Ill. 412, 141 N.E. 212 (1923). Even if here Rock Island's proposed business would meet the public convenience and necessity standard if it were to be conducted, the Project is so speculative that it cannot be said to meet the public convenience and necessity standard and does not merit a CPCN.

Rock Island clearly has not met its burden to show that the Project qualifies for a CPCN under the reliability alternative of Section 8-406 (b)(1), because the preponderance of the evidence shows, and the Commission so found, Order, p. 116; C-8591, A-00154, that the Project is not needed for reliability. The Commission's finding on this issue is

supported by substantial evidence, which is the appropriate standard of review. 220 ILCS 5/10-201(e)(iv)(A)

Rock Island and its Project also failed the alternative test under Section 8-406(b)(1), the promotion of electricity market competition test. The Commission's factual findings in support of its determination that the Project will promote competition sufficiently to satisfy this competition-related alternative test, Order, pp. 116-121; C-8591-96, A-00154-159, are not supported by substantial evidence.

For its evidence on this so-called promote competition test, the ILA presented the testimony of Jeffery Gray, an expert with respect to federal electricity regulation and the policies and operations of regional transmission organizations ("RTOs") including the Midcontinent Independent System Operator, Inc. ("MISO") and PJM Interconnection, L.L.C. ("PJM"). Dr. Gray has an undergraduate degree in Industrial Engineering, and MBA, a law degree and Ph.D. His doctoral dissertation in 2004 examined the U.S. electricity industry restructuring with an emphasis on regional transmission organizations. His professional work experience includes positions with a Washington, D.C law firm and the public utility Alliant Energy in Wisconsin. Dr. Gray has had his own legal and consulting practice since 2011, emphasizing regulatory law and economics in the utility and energy industries. ILA Ex. 7.0, ll. 5-14; C-2275. Dr. Gray testified that, based on his review of the Rock Island Petition and testimony, and his knowledge and understanding of the requirements for a CPCN under the Act, that Rock Island has not satisfied the requirements and that its Petition should be denied. ILA Ex. 7.0; C-2275-88.

With the advent of RTOs, including MISO and PJM, and policies and orders of the FERC, the role of transmission-owning public utilities and state regulatory

commissions has changed as those roles pertain to electric transmission planning, markets, and operations. As Dr. Gray testified, MISO has a process for determining the need for high-voltage transmission projects within MISO's multi-state operations; and its process produces an annual MISO Transmission Expansion Plan ("MTEP"). PJM has a similar process for the area of its multi-state operations, producing its Regional Transmission Expansion Plan ("RTEP"). ILA Ex. 7.0, pp. 3–4, ll. 62–71; C-2277-78.

Dr. Gray explained in further detail that MISO administers wholesale electricity markets and coordinates transmission planning within a multi-state region that includes most of Illinois. The MTEP process includes a broad array of interested stakeholders that provide input into a comprehensive process that identifies essential transmission projects, which go before the MISO Board of Directors for approval. The objective of this process is to:

1. Ensure the reliability of the transmission system over the planning horizon;
2. Provide market efficiency and other economic benefits;
3. Facilitate public policy objectives, such as renewable portfolio standards ("RPS"); and
4. Address other issues and objectives that the stakeholder process helps identify.

The development of the MTEP includes several steps, with multiple stages of review and refinement as the process proceeds. ILA Ex. 7.0, p. 4, ll. 72–88; C-2278.

As Dr. Gray testified, MISO's MTEP process identifies and evaluates transmission projects designed to provide value in excess of cost under many future policy and economic conditions. Such projects, which will provide regional public policy,

economic, and/or reliability benefits spread across MISO's footprint, become designated as Multi Value Projects ("MVPs"). As an example, Dr. Gray described MISO's 2011 MTEP, in which MISO's Board identified 17 high-voltage transmission projects, which became integrated into MISO's subsequent 2012 MTEP planning model. According to the 2012 MTEP, these 17 MVPs promise the delivery of 41,000,000 MWh of renewable energy each year. ILA Ex. 7.0, p. 5, ll. 89–101; C-2279; ILA Ex. 7.1, ll. 81-95; C-4554-55.

Dr. Gray further explained that the area where Rock Island expects wind generation to be developed to connect to the Project, the Resource Area, is located in the MISO footprint. The Project would operate as an unusually long lead line connecting such generators to the PJM alternating current transmission system operated by PJM. ILA Ex. 7.1, ll. 96–102; C-4555. Consequently, the Project would not contribute to the high voltage transmission expansion of the MISO transmission network. ILA Ex. 7.1, ll. 102–104; C-4555. As a result, the range of benefits provided by transmission projects selected as MISO MVPs would not apply to or be provided by the Rock Island Project. ILA Ex. 7.1, ll. 109–113; C-4555-56.

Dr. Gray noted that, even though the Project was not a product of the MISO MTEP process, Rock Island had expected that the Project would be reflected in the MISO MTEP for 2012, but that it was not; that a MISO planning appendix had identified it as conceptual. ILA Ex. 7.0, pp. 5-6, ll. 102-109; C-2279-80. It should be noted that projects such as the one Rock Island is proposing, in contrast to most new electric transmission projects, are not vetted by an RTO such as MISO and not identified as needed by the MTEP process are nevertheless reflected in an MTEP data base so that the Project's

impact can be considered as the MTEP process identifies other transmission projects. *See* Rock Island Ex. 2.0, ll. 231–236; C-236. *See also* Rock Island Ex. 2.11 (Revised), ll. 843–853; C-5483, for corresponding treatment by PJM.

Dr. Gray also described the corresponding structure and processes for PJM. PJM administers wholesale electricity markets and coordinates transmission planning for the PJM region, which, while including the ComEd service territory, mainly encompasses eastern states. The PJM RTEP process is similar to MISO's MTEP process, considering the effects of system trends such as long-term electricity load growth, generator retirements, and patterns of generation development, demand response, and energy efficiency. ILA Ex. 7.0, p. 6, ll. 110–119; C-2280. PJM has not evaluated, and will not evaluate, through its RTEP process whether the Rock Island Project is needed. ILA Ex. 7.2, p. 1, fn 3; C-4797.

Just as the Rock Island Project was not included in the MISO MTEP, Dr. Gray pointed out that it also was not included in PJM's RTEP for 2012, despite Rock Island's expectations that it would be included (even though not a project resulting from the PJM RTEP process); and it was not apparent to Rock Island why it was excluded. ILA Ex. 7.0, pp. 6–7, ll. 120–129; C-2280-81. Dr. Gray observed that PJM likely declined to include the Rock Island Project in its RTEP, which other industry stakeholders rely upon, because it was at such an early, still conceptual, stage, without any subscribers (customers), which Rock Island readily acknowledges. As Rock Island witness David Berry testified, "none of the Project's capacity has been contracted at this time. No potential customers have obtained any rights to buy service in the future." Rock Island Ex. 10.13, p. 5, ll. 160–161; C-1381. Mr. Berry acknowledged that customers remained

lacking as of the last day of the hearings in the proceedings before the Commission - December 13, 2013. See Tr., p. 1117, ll. 13–24, p. 1118, ll. 1–3 ("There are [n]o such contracts."). Even Rock Island witness Rudolph Wynter of National Grid (a recent major new investor in Rock Island's parent company) understood and admitted that the Rock Island Project is "at the initial stage of its development." Rock Island Ex. 12.0, p. 9, l. 202; C-5287; *see also* p. 9, ll. 206-209; C-5287; Tr., p. 372, ll. 3–24, and p. 373, ll. 1–3.

Dr. Gray responded to Rock Island's argument that, because the Project is part of a merchant project, Rock Island is not intending to have customers at this stage of the Project's development. In Dr. Gray's view, this argument highlights a significant weakness in Rock Island's business model, by which Rock Island is able to circumvent the regional planning processes normally utilized for new interstate electric transmission projects. As Dr. Gray correctly noted, regardless of Rock Island's business model, under which customers and capacity contracts are deferred until sometime later in the Project's development life, the PUA Section 8-406 requirements still apply and must be satisfied in order for a CPCN to be granted. ILA Ex. 7.2, ll. 30–43; C-4799. Moreover, as Dr. Gray pointed out, the need to be shown is "customer" need, not needs of the public in general. ILA Ex. 7.2, ll. 44–50; C-4799-800.

Dr. Gray specifically examined whether Rock Island and the Project satisfied the alternative, promote competition alternative of Section 8-406(b)(1), which states, "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." He concluded that, as he understands the

intent and meaning of this provision, the Rock Island Project also fails the promote competition alternative of the Section 8-406(b)(1) test.

In Dr. Gray's view, Rock Island failed to satisfy this second promote competition alternative requirement for the following reasons:

1. The significant negative land-use impacts and externalities that Rock Island and the Project would impose on the Illinois public for the primary benefit of the Eastern PJM states to meet their RPS goals. It is noted that Eastern PJM states are all or parts of Delaware, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and the District of Columbia. ILA Ex. 7.0, ll. 112–115; C-2280.

2. In the absence of actual subscribers, or customers, Rock Island's assumed traits and characteristics about generators that could potentially connect to the Project cannot be substantiated.

3. Rock Island has reserved the right to seek to switch the project from merchant status and have allocated to Illinois electricity consumers, future transmission costs, of unknown amounts.

4. Rock Island is unwilling adequately to protect the Illinois public from the risks of failure of the Project.

ILA Ex. 7.0, ll. 191–204; C-2283-84.

5. Rock Island's modeling of temporary reductions in locational marginal prices does not demonstrate that the Project will promote the development of an effectively competitive electricity market in Illinois.

ILA Ex. 7.2, ll. 127 – 131; C-4804.

Dr. Gray expanded on each of the foregoing reasons. He referred to the testimonies of the other ILA witnesses as to the first reason, land-use impacts. ILA Ex. 7.0, ll. 205–212; C-2284.

To expand upon his second reason, he first noted Rock Island witness Berry's use of eight hypothetical wind farms, with assumed locations and operating capacity factors; from which he derived hypothetical production data and provided to Rock Island witness Moland to use in his PROMOD simulation results. Rock Island witness Dr. McDermott then took those PROMOD results to develop his economic analysis. Dr. McDermott's analysis may have been sterling, but a well-constructed house built on a foundation of sand will have no value. As Dr. Gray testified, because (i) we do not know the operating or other characteristics of any wind farms that may materialize; and (ii) the FERC refused to grant Rock Island's request to prohibit non-renewable energy generators from connecting to and using the Project, any analysis based on Mr. Berry's hypotheticals lacks validity. ILA Ex. 7.0, ll. 229–238; C-2285-86.

As to the third reason above, Dr. Gray noted Rock Island witness and President Michael Skelly, in his direct testimony, left open the possibility of seeking cost recovery for the Project through the regional cost allocation process. Such a change in the way the Project is financed would result in Project costs being allocated to load-serving entities, such as ComEd, and their customers. As Dr. Gray pointed out, a transmission project designed as a cost recovery or cost allocation project would normally go through the RTO planning process, e.g., MISO MTEP or PJM RTEP, and be subjected to a broad group of stakeholders and enhanced scrutiny. A post-development cost-allocation request

would lack the discipline, openness and scrutiny it should. ILA Ex. 7.0, ll. 239–259; C-2286.

The subject of the possible re-classification of the Project to one whereby Rock Island (or whatever entity may own the project at that point) is able to recover project costs through tariffed rates rather than through negotiated contracts with willing subscribers was the subject of much further testimony during the proceedings before the Commission, with Rock Island offering to place certain conditions on its ability to seek cost-recovery treatment. Rock Island's final word on the matter was presented through the surrebuttal testimony of Rock Island witness Berry wherein he, speaking for Rock Island, further modified the condition under which Rock Island could re-structure the Project as a cost-recovery project rather than one by which revenues would depend upon voluntary Rock Island - subscriber negotiations.

> Prior to recovering any Project costs from Illinois retail ratepayers through PJM or MISO regional cost allocation, Rock Island will obtain the permission of the Illinois Commerce Commission in a new proceeding initiated by Rock Island. For the purposes of the prior sentence, any system upgrades set forth in an interconnection agreement with PJM or MISO and the costs of which are allocated to Rock Island will be considered "Project costs." For the avoidance of doubt, the phrase "recovering any Project costs from Illinois retail ratepayers through PJM or MISO regional cost allocation" includes the recovery of costs though PJM and MISO transmission service charges that are paid by retail electric suppliers in respect of their electric load served in Illinois. (italics removed).

Rock Island Ex. 10.26, ll. 486–497; C-5242-43.

Staff witness Richard Zuraski, who still had concerns in his rebuttal testimony about the possibility of cost allocation treatment for the Project, Staff Ex. 6.0, ll. 116–119; C-4756, acknowledged during cross-examination that Rock Island was attempting to retain the right, once having been granted the CPCN it is seeking, to come back to the

Commission and seek recovery of Project costs from Illinois ratepayers through transmission service charges that would be imposed on Illinois retail electric suppliers. Tr., p. 687, ll. 7–14. Rock Island's assurance that, if it decides to switch the Project to a rate-recovery model, it would come back to the Commission for permission to have its Project costs imposed on Illinois retail ratepayers through regional cost allocation, may have had some surface appeal but the assurance was superficial. Many unknown factors surrounding such a process remain. Mr. Zuraski acknowledged that certain questions remain unanswered by Mr. Berry, Rock Island's spokesperson on the matter. Mr. Berry failed to indicate, for example, (i) what section of the PUA might govern such a proceeding; (ii) what showing Rock Island would be required to make; (iii) what standard the Commission would apply in making a decision; or (iv) what time period within which the Commission would need to make its decision. Tr., p. 687, ll. 15–24, p. 688, ll. 1–7. Mr. Zuraski, who has undergraduate and graduate degrees in Economics, stated that he could not think of a reason Rock Island or successor owner would seek a change to cost allocation unless it was under financial distress, meaning it was not making an adequate rate of return on investment, or possibly was losing money. Tr. at 689:8–14. The Order's handling of this issue leaves Illinois utility ratepayers short and at significant risk of having a portion of the Project's costs involuntarily imposed upon them.

Dr. Gray additionally expanded upon his fourth reason that the Project failed the promote competition alternative test of Section 8-406(b)(1) of the Act, Rock Island's stated refusal adequately to protect the Illinois public from the risks of failure of the Project. Dr. Gray analogized the Project in this regard to a wind energy project, which typically has a decommissioning plan including an escrow fund or other financial security

to help cover decommissioning costs and land reclamation costs in the event the project fails and is no longer used. ILA Ex. 7.0, ll. 275–280; C-2287. As Rock Island pointed out, it is uncommon for electric transmission line developers to have to post financial security to protect against the possible decommissioning of the project. The Project, however, is not comparable to other transmission projects in that, (a) it is not designed to have regulated rate recovery protection, and (b) it will be housed in and owned by a single purpose legal entity. In these two important aspects, then this Project more closely resembles a wind energy project as far as risk of abandonment without deconstruction/decommissioning is concerned, and financial security is therefore a reasonable requirement to impose on the Project owner.

Dr. Gray's fifth reason as to why Rock Island has not met its burden under the promote competition alternative test of Section 8-406(b)(1) was that the modeling of temporary reductions in locational marginal pricing fails to establish that the Project will promote electricity market competition in Illinois. Dr. Gray noted that many changes have taken place in the Illinois electricity market to enhance competition in the six years since the legislature added the promote competition alternative test to Section 8-406(b)(1). *See* Rock Island Ex. 10.14 (Revised), ll. 577–578; C-4622. Dr. Gray pointed out that short-term price reductions do not necessarily have a material impact on the pricing variability that exists in electricity wholesale markets. Rock Island's modeled temporary price reductions do not, in Dr. Gray's view, equate to the transparency, low entry and exit barriers, low transaction costs, low externalities, and the absence of market power that are characteristic of effectively competitive electricity markets. ILA Ex. 7.2, ll. 112–141; C-4803-04.

Additionally, the BOMA, which had intervened in support of Rock Island's request, supported the Project only insofar as it "is market-based and does not increase costs to BOMA/Chicago members." BOMA Ex. 1.0, p. 3, ll. 46–51; C-2548. BOMA also conditions its support to the extent it increases reliability. *Id.*, ll. 63–65; C-2548.

III.B. The Project is not least cost.

Part of the required showings Rock Island must make is that the Project is the "least cost means of satisfying those objectives." 220 ILCS 5/8-406(b)(1), with "those objectives" pertaining to the promote competition alternative test. Rock Island provided insufficient evidence to carry its burden on this factor. Its witness Dr. McDermott, for example, acknowledged that Rock Island's "economic analysis does not incorporate the cost that wind generators would have to incur to interconnect to [the] western interconnection point of the line…." Tr., p. 133, ll. 8-12. Commission Staff witness Zuraski testified that Rock Island has not compared the Project's expected benefits to its projected costs and has failed to demonstrate that the Project's benefits outweigh its costs. Staff Ex. 3.0, p. 11, ll. 213-217; C-2094. Rock Island also failed to include in its cost analysis certain transmission network upgrades needed to interconnect the Project to the regional transmission grid, the costs for which are assigned to Rock Island and that will cost many millions, perhaps hundreds of millions, of dollars. Rock Island Ex. 2.11 (Revised), p. 12, ll. 258-260; C-5456.

III.C. Rock Island is not capable of managing and supervising the construction process.

The Commission found that that Rock Island has demonstrated its capability to manage and supervise the construction of the Project. Order, pp. 132-133; C-8607-08, A-00170-171. The Order acknowledges that "many positions are unfilled," and then accepts

Rock Island's explanation as to why. Regardless of the financial prudence of building and showing to the Commission an adequate staff, the fact remains that Rock Island is not presently capable of managing and supervising the construction. As a result, Rock Island has failed to meet the statutory requirement.

The Commission also disregarded the Commission Staff's position on this issue. Staff's position, as evidenced in its prepared testimony and testimony during the hearings, was that based upon Rock Island's complete lack of experience with this kind of project, Rock Island did not demonstrate that it is able to manage the construction of the propose line. Tr., p. 703, l. 24, p. 704, ll. 1–4. Staff witness Rashid testified that he has never seen a Commission CPCN proceeding for a transmission project involving an applicant that has never built a transmission line. Tr., p. 713, ll. 8–10. A plan to become capable does not equate to or satisfy the statutory requirement: "[T]he 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." 220 ILCS 5/8-406(b)(2). Because of the wide-ranging and critical impact any additions to the interconnected electric grid will have, it is essential that this capability requirement be demonstrated by the applicant for a CPCN when it is seeking the CPCN, and not a promise that it will be satisfied at some future date.

III.D. Rock Island is not capable of financing the proposed construction.

Section 8-406(b)(3) imposes the added requirement that the utility 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). In addressing this issue, the Commission in its order stated, "One of the requirements in

Section 8-406(b) is that the utility demonstrate that it is 'capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers.'" Order, p. 152; C-8627, A-00190. The Commission stated it agrees with Staff that the second (underscored) half of the clause may not be ignored. *Id*. Because Rock Island has no customers, the Commission accuses the ILA, as well as ComEd and the IAA, of ignoring the "without significant adverse financial consequences for the utility or its customers" portion of this provision in contending Rock Island attempted showing of financing capability is deficient. *Id*. One logical (or illogical) result of this finding is that any new entrant, such as Rock Island, that has no customers will automatically satisfy this financing capability requirement, in that there are no customers to be harmed. Because such an interpretation leads to an absurd result, it may not be adopted. The Commission may or may not have adopted such logic. It does appear, however, that the Commission's position, and conclusion, is that, unless any adverse financial consequences to customers would ensue, then this financing capability requirement will not be found to disqualify the CPCN applicant. Such an interpretation is faulty in that it is illogical and results from a misreading of the statute. The logical, and correct, interpretation is that the utility must show, first, it is capable of financing the proposed construction and, second, that it can do so without harm to customers. It makes no sense to interpret the statutory provision to mean that, even (i) if the utility comes up short it demonstrating its capability of financing the construction, but (ii) that it is not shown that the utility's lack of demonstrated capability will not harm its customers, then (iii) the utility has met its burden and established financial capability.

Here, the record shows clearly that Rock Island has no present capability to finance the Project. It has very ambitious plans to do so, but plans which the ILA contends are unrealistic. ComEd expert witness Ellen Lapson offered testimony demonstrating that Rock Island is unable to show the requisite financial capability to satisfy its statutory burden. ComEd Ex. 2.0; C-2397-414; ComEd Ex. 5.0; C-4854-71. ILA witness Paul Marshall indicated that the ILA has concerns with Rock Island's financials, and whether or not the line would actually be built. Tr., p. 588, ll. 21–24, p. 589, ll.1–2. In fact, the record shows that in Dr. Marshall's experience as a banker and farm manager, a hypothetical company with a similar profile as Rock Island, i.e., approximately one percent equity, one percent or less collateral, no contractually committed source of equity, no contractually committed customers, and no contractually committed revenue stream, Tr. p. 597, ll. 1–13, would be unlikely to be financed, Tr., p. 600, ll. 9–13 (break in transcript due to objections).

It became more apparent during the cross-examination of Rock Island witnesses just how precarious Rock Island's financial condition is, both from the standpoint of its own continued survival during the development of the many projects currently in the portfolio of Rock Island's parent, Clean Line Energy Partners, and the seemingly insurmountable hurdles Rock Island must clear in order to accomplish the project financing it requires in order to construct its Project.

Clean Line Energy Partners ("Clean Line") has five separate transmission projects in early stages of development, with projected project costs as noted:

1. Plains and Eastern Clean Line – 700 miles, 3 states, $2 billion
2. Rock Island Clean Line - 500 miles, 2 states (incl. Illinois), $2 billion

3. Centennial West Clean Line – 900 miles, 3 states, $2.5 billion

4. Grain Belt Express – 750 miles, 4 states (incl. Illinois), $2 billion

5. Western Spirit Clean Line – 200 miles, 1 state, $350-$400 million

Rock Island Petition; C-1-48; Rock Island Ex. 1.1REV; C-5850; Tr., p. 269, ll. 192-196.

As can be seen from the above list of projects, Clean Line is facing the daunting task of raising financing not just for the Project Rock Island is proposing, but over $8 billion for all of its projects. *See* Tr., p. 1107, ll. 1–20. At the hearings before the Commission, certain confidential cross-examination exhibits were introduced showing development expenses incurred by Clean Line to date, and projected additional development expenses through 2015. *See, e.g.*, ILA Group Cross Ex. 1 CONFIDENTIAL; C-245-52 PROPRIETARY. Beyond the 2015 projected year, as Mr. Skelly testified, Clean Line will need to continue to spend additional monies on development. Tr., p. 211, ll. 21–24, p. 212, ll. 1–5 ("It's a certainty"). Clean Line's Board of Directors determines how available development capital is allocated among its subsidiaries and projects. Tr., p. 215, ll. 19–24, p. 216, ll. 1–7; ComEd Cross Ex. 10 PUBLIC; C-6035. Consequently, Rock Island does not control its own capital sourcing or spending, as those decisions are made at the parent company level; and Rock Island therefore has to compete with other Clean Line project entities for capital.

The record shows that Clean Line has $15 million left in committed development capital, that amount coming from National Grid. ComEd Cross Ex. 4 PUBLIC; C-6022-23; Tr., p. 1110, ll. 4–17. Based on its capital available both on-hand and committed, at present rates of development spending, Mr. Berry testified at hearing that Clean Line will need to find additional capital during 2014 in order to continue to fund its projects. Tr., p.

1111, ll. 16–24 ("Based on these projections, and assuming the board allocates capital consistently with these projections, we would need to raise additional capital from our investors or other sources sometime in 2014."). It is clear from the record that Clean Line will be required to continue raising development funding through 2015 and beyond. ILA Initial Brief, p. 32; C-6436.

It is apparent that Clean Line and its project entities, including Rock Island, are in a significantly precarious financial condition. Based on the facts in the record, as referenced above, not only has Rock Island not shown it is capable of financing its Project, it cannot even be reasonably concluded that Rock Island is capable of financing its continuing development activities before it reaches the construction financing stage. Even the near term financial hurdles to allow Clean Line and Rock Island to survive their pre-project financing development phase appear to be dangerously high.

Mr. Berry explained how Clean Line plans to finance the actual construction of its projects ($8 billion plus) once they reach a financeable stage. *See* Tr., pp. 1087–1101. He stated that, for the Rock Island Project, in order to obtain binding debt financing (60-80% of total cost; Tr., p. 1089, ll. 5–12) commitments for the construction, investors would require signed capacity contracts with anchor tenants assuring a revenue stream that Rock Island would pledge to secure repayment. *See* Tr., p. 1093, ll. 11–21. The capacity contracts would be signed, according to Mr. Berry, before any generators had constructed any generation in the Resource Area. The generator customers of Rock Island, which become the shippers, will be expected to make binding minimum revenue commitments to Rock Island, both before the Project starts construction and before the generating project starts construction, but the revenue commitments would not be contingent on

either (transmission line or generating facility) being built. Mr. Berry claimed that is a risk that the shipper will take. Tr., p. 1096, ll. 12–24, p. 1097, ll. 1–24, p. 1098, ll. 1–19. In order to finance the Rock Island Project in this manner, Rock Island would need signed capacity commitments, with corresponding revenue assurances, from generators representing about 4,000 MW of capacity. At an estimated cost of $1.5 million/MW, generators in aggregate would be committing to the development of generation in the Resource Area at a total cost of $6 billion. Tr., p. 1098, ll. 22–24, p. 1099, ll. 1–24, p. 1100, ll. 1–24, p. 1101, ll. 1–3.

The scenario that Mr. Berry described, which was not explained in detail in Rock Island's direct, rebuttal, or surrebuttal testimony, can only be said to constitute a significantly risky undertaking for the generator-subscribers. Rock Island's direct case, in insufficiently describing this set of extremely large amounts of financings, was deficient. Applying Mr. Berry's explanation, the generators will need to find ways to finance their $6 billion of new generation, thereby injecting yet another significant contingency and element of risk. In summary, therefore, Rock Island faces the dual financial challenge of finding sufficient development capital to continue on its quest, and then, assuming it is able to do that, to find financing providers and subscribing generators at levels sufficient to permit the actual construction of the Project. No other conclusion may reasonably be reached but that Rock Island has not satisfied its burden of demonstrating under PUA 8-406(b)(3) that it is capable of financing the proposed construction.

IV. The Commission in its order improperly relies upon the financing condition as a cure for Rock Island's and the Project's deficiencies.

The Commission interpreted the Act in a way that permits it to apply and rely upon Rock Island's agreed-to financing condition as a cure for what are otherwise

deficiencies in the demonstrations Rock Island must make. As such, the Commission misapplied and went beyond the scope of its statutory authority. The scope of the Commission's authority is a question of law involving statutory interpretation, which the court on appeal is to review *de novo*. *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2014 IL APP (1st) 130544, ¶ 16; *citing City of Chicago v. Illinois Commerce Comm'n*, 294 Ill.App.3d 129, 134-35, 689 N.E.2d 241 (1st Dist., 1997).

The record fails to support a finding that Rock Island has satisfied its burden with respect to any of the three statutory requirements imposed by Section 8-406(b) – (i) the so-called promote competition alternative test in Section 8-406(b)(1); (ii) the management capability requirement in Section 8-406(b)(2); and the financing capability requirement in Section 8-406(b)(3). As the Order describes, the Staff finance witness recommended imposing a financing condition on Rock Island, which Rock Island accepted, and which begins, "Rock Island will not install transmission facilities for the Rock Island Clean Line Project 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." Order, p. 153; C-8628, A-00191. The remaining terms of the financing condition are then recited. The Commission relied on this financing condition to conclude that Rock Island has demonstrated, as required under Section 8-406(b)(3), its capability to finance the Project. Order, pp. 153-154; C-8628-29, A-00191-192. Reliance on the financing condition, however, is not restricted to the financing capability requirement. The Order also expressly places reliance on the financing condition in order to justify the conclusions that the Project meets the public convenience and necessity standard by satisfying the promote competition alternative test of Section 8-406(b)(1), Order, pp. 119-

121; C-8595-97, A-00158-160, and that Rock Island is capable of managing and supervising the construction under Section 8-406(b)(2), Order, pp. 132-133; C-8607-08, A-00170-171. Consequently, by relying on the financing condition to support its findings and conclusions as to three of the central statutory requirements and burdens that Rock Island must satisfy, the Commission elevated the financing condition to a status, and supporting basis for a grant of a CPCN, certainly beyond what the Staff intended and beyond what is reasonable and appropriate and what the statute allows. In effect, the Commission has abdicated a portion of its review and approval duties to presently unknown potential Project financiers. This overreliance on the financing condition was in error and renders the Order granting Rock Island a CPCN invalid.

V. Other risks associated with Rock Island and the Project should have caused the Commission to decline to grant Rock Island a CPCN:

A. The risk that the Project will be converted into one with regulated rate recovery with the Order not imposing sufficient Commission control over such conversion.

B. The risk that, due to its speculative nature in the hands of Rock Island, the Project will be sold to another, unidentified entity after regulatory approvals and before financing and construction.

V.A. The risk that the Project will be converted into one with regulated rate recovery with the Order not imposing sufficient Commission control over such conversion.

The Order recites another condition to the Commission's approval of the Project, one which it intends to alleviate a major concern Staff witness Zuraski and other parties expressed, i.e., that Rock Island may seek at some future date to convert the Project from merchant status to one by which Rock Island could recover its costs from ratepayers

through regulatory approval. This condition, which Rock Island proposed when the issue arose during the proceeding, provides:

> Prior to recovering any Project costs from Illinois retail ratepayers through PJM or MISO regional cost allocation, Rock Island will obtain the permission of the Illinois Commerce Commission in a new proceeding initiated by Rock Island. For the purposes of the prior sentence, any system upgrades set forth in an interconnection agreement with PJM or MISO and the costs of which are allocated to Rock Island will be considered "Project costs." For the avoidance of doubt, the phrase "recovering any Project costs from Illinois retail ratepayers through PJM or MISO regional cost allocation" includes the recovery of costs though PJM and MISO transmission service charges that are paid by retail electric suppliers in respect of their electric load served in Illinois.

Order, p. 120; C-8596, A-00159.

The foregoing condition presumes that Rock Island and this Commission will control triggering and implementing the Project's conversion from merchant to rate recovery status. Such presumption is, as ComEd pointed out, dangerous and uncertain, at least in part due to the interplay of federal and state regulation over cost recovery and allocation. *See* Naumann Reb., ComEd Ex. 4.0REV, p. 26, ll. 503–528, 554; C-5775-76, 5777; ComEd Initial Brief, p. 8; C-6466. Perhaps in recognition of this uncertainty, during the Commissions deliberations in the course of issuing its Order, Commission Chairman Scott announced one of the edits to the Proposed Order: "The edits make clear that if Rock Island is short of funds for the project and goes to FERC to recover the remainder of the cost of construction from ratepayers, that their certificate is no longer valid and that they will need to come back to the Commission for additional authority on that basis." Tr., p. 9, ll. 8-14 (Nov. 25, 2014). A removal or retraction of the CPCN is a tool that would appear to protect the Commission (and the Illinois public) in its desire to prevent a re-structuring of the Project from a merchant to a rate-based, cost recovery,

project without the Commission's approval. The Chairman's stated edit, however, does not appear to have made its way into the Order. The relevant portion of the Order states:

> Thus, in accordance with this commitment, the Commission finds that prior to recovering any Project costs from Illinois retail ratepayers through PJM or MISO regional cost allocation, Rock Island shall seek and obtain the permission of this Commission in a proceeding initiated or sought by Rock Island. Absent such approval, Rock Island shall not be entitled or permitted to recover any such costs from Illinois retail ratepayers through PJM or MISO regional cost allocation.

Order, p. 121; C-8596, A-00159.

A removal of Rock Island's CPCN, as the Chairman's stated edit provided, would appear to have given the Commission a more powerful tool and greater assuredness that the FERC could not impose regulated cost allocation and recovery over the State of Illinois' objection. As the Project proponent, it should have been incumbent upon Rock Island to provide more information about, and comfort to, the parties and the Commission that the Commission can legally, actually control the conversion of the Project's status from merchant to rate-regulated.

V.B. The risk that, due to its speculative nature in the hands of Rock Island, the Project will be sold to another, unidentified entity after regulatory approvals and before financing and construction.

As described *supra*, pp. 31-36, as well as in ILA's Reply Brief, ILA Reply Brief, pp. 6-9; C-6895-98, and in ILA's Initial Brief on Exceptions, ILA Initial Brief On Exceptions, pp. 8-10; C-7984-86, filed in the Commission proceeding, Rock Island's stated financing of the Project, in combination with the financing (similarly, on a project financing basis) of the wind energy projects in Northwest Iowa, make it appear highly doubtful that the Project is financeable via project financing. Under such circumstances, Rock Island's logical alternative to getting the Project financed would be to sell it to

another entity that has sufficient financial resources and capability to finance the Project. If that were to occur, then Rock Island, in hindsight, would have merely been the development entity for the ultimate Project financier and owner, one which the Commission does not know and which it may or may not approve.

VI. Rock Island's proposed routing for the transmission line is based on a flawed study and is inadequate, thereby serving as a separate basis for denying Rock Island a CPCN.

This issue involves findings of fact, which on review are subject to the substantial evidence standard under Section 10-201(e) of the Act. 220 ILCS 5/10-201(e).

The ILA has not been an advocate for any particular routing for the proposed project. Its position is that the record indicates that Rock Island has engaged in a flawed, incomplete, and already out of date routing study, in its attempt to fragment forests and spoil prime farmland rather than parallel existing infrastructure.

Perhaps the primary reason for the inadequacy of the routing rests with leadership of the routing team. Tr., p. 414, l. 16. The leader of Rock Island's routing team lacked qualifications for such an undertaking. First, his formal education is not related to the task to which he was assigned. Tr., p. 413, ll. 11–14. All of his experience prior to being hired by Clean Line was in public policy, policy advisement, outreach, and communications. Tr., p. 413, ll. 15–22. It is only once he got a job working for a company proposing to build a two-state HVDC transmission line did he begin to gain any experience in "infrastructure development." Tr., p. 413, ll. 22–24. Such lack of experience in a relevant industry position in the private sector, and lack of supervisory experience, helps explain why the study is flawed, incomplete, and already out of date.

Rock Island's routing study began several years ago, in March of 2010. Tr., p. 393, ll. 7–12. The testimony of Matthew Koch, Rock Island's expert witness with respect to routing, shows that the most recent visual inspection relied upon by the routing study took place in March 2012. Rock Island Ex. 8.3, ll. 409–411; C-5870. The routing study has not been amended to include any information learned of or discovered since September 2012. Tr., p. 393, l. 43, p. 394, ll. 1–3, 8. That fact, given that construction will not be proceeding until 2017, seven years after the routing study began, and over four years from when Rock Island ceased gathering and considering new information, renders the study outdated. Tr., 395, ll. 1–4.

Such large temporal gaps between studies and execution upon the study are troubling for obvious reasons. Within just a little over a year, Rock Island routing study personnel have already admittedly missed a home, other distribution lines, a commercial development near Morris, and a private airport. Rock Island Ex. 8.3, ll. 411–419; C-5870-71; Tr., p. 395, ll. 14–15, 21–22; Tr., p. 396, ll. 1, 5–7. Further, the study does not consider the location of possible wind turbines for a wind farm in the vicinity of the Project, despite Rock Island's knowledge of the same. Rock Island Ex. 8.10, ll. 65–67; C-5188; Rock Island Ex. 7.35, ll. 533–538; C-5177. Even if the routing study were adequate now, which it is not, it certainly will not be when it is four to seven years old. The particularly large gap in time between study and construction for this Project is attributable to Rock Island's fledging status and its attempt to force through this Commission its CPCN application prematurely, when so many steps remain to be accomplished, after the date of the Commission's approval for which it applied.

Additionally, Rock Island's routing study relied upon a principle that any residential structure counts as a full sensitivity, whether occupied, not occupied, already impacted by existing infrastructure, or in a non-impacted location. Tr., p. 400, ll. 11–24, p. 401, ll. 2-8. In fact, when considering a railroad, the Rock Island Railroad, a benefit of that corridor was that it was "made up of land already impacted to some degree." Rock Island Ex. 8.2, p. 23; C-987. Additionally, Rock Island's position is clear that homes that are already impacted – at least visually – are to be given less weight. Rock Island Ex. 8.3REV, ll. 665–666; C-5882. However, when dismissing some admittedly attractive routing options, Rock Island fails to heed its own sensitivity and opportunity factors.

Railroads are defined as a routing opportunity by Rock Island, meaning that it is advantageous to route a transmission line near and parallel to them. Rock Island Ex. 8.2, p. 16; C-980. Additionally, the so-called Rock Island Railroad right of way was initially identified as a beneficial corridor for the development of this Project. Rock Island Ex. 8.2, p. 23; C-987. However, the Rock Island Railroad opportunity was dismissed early on without proper analysis and consideration. Tr., p. 398, ll. 15–18. Despite Rock Island's earlier admission that the opportunity was attractive due to the already impacted nature of the route, Rock Island claimed that this early dismissal was due to development of population centers along the railroad. Rock Island Ex. 8.2, p. 31; C-995. Further, the limited study of the Rock Island Railroad opportunity did not include a detailed quantitative analysis of bypassing any population centers along that route. Tr., p. 399, ll. 10–15. In fact, Rock Island's witness was unable to provide any information as to distance of homes to the railroad line. Tr., p. 399, ll. 17–21. Accordingly, this potentially attractive corridor and routing option was dismissed early, and not adequately

studied, despite following a major opportunity for the majority of the length of the route. Instead, Rock Island chose to proceed across miles of prime farmland, land that has to date been unimpacted.

Fundamentally, the results of Rock Island's routing study depend largely upon the point at which it starts at the western edge of Illinois and enters this State, i.e., the location of the Mississippi River crossing. In fact, identification of the Mississippi River crossing was part of the first step in the development process. Rock Island Ex. 8.2, p. 11; C-975. The river crossing analysis was completed in January 2011. *Id*. However, Rock Island's consultation with the Illinois Department of Natural Resources did not begin until 2011, after the crossing was chosen. Rock Island Ex. 8.8, p. 1; C-4359 ("Clean Line Energy submitted an initial corridor alignment to IDNR in 2011"). Consultation with the IDNR was not concluded until November 8, 2013. Rock Island Ex. 8.10, ll. 86–87; C-5189. The IDNR suggested that the crossing Rock Island move the crossing further south due to mussel concentrations and forest fragmentation, with the latter concern never being resolved. Rock Island Ex. 8.8, p. 1; C-4359; Tr., p. 397, ll. 9–12, 23–24; Tr. p. 398, ll. 1–7. In fact, the suggestion to move the line further south would have placed the line at a location already identified as an opportunity. Tr., p. 397, ll. 13–18. The record shows that Rock Island had solidified the Mississippi River crossing well before discussing the issue with the IDNR. This brings into question the integrity of the process where an interested party's consultation with a government agency regarding a foundational, primary, piece of a routing study, where that piece was set prior to the consultation. And for the adequacy of the routing study, it calls into question how a routing study that is entirely dependent on a river crossing can be adequate and valid

when the crossing point was determined prior to needed input from the governmental agency that is expert in and responsible for such matters.

Additionally, Rock Island's routing study does not consider impacts to federal Conservation Reserve Program ("CRP") property. Indeed, Rock Island does not know the extent to which the proposed route will impact CRP property. Rock Island claims that the location of such land is confidential and that it "cannot determine" the extent of these lands. Rock Island Ex. 8.3, ll. 172–175; C-4324. Rock Island's attempts to contact landowners to determine the location of CPR land were inadequate. Tr., p. 402, ll. 3–6; Tr. p. 449, ll. 6–9; Tr. p. 630, ll. 5–7. However, even when it became aware of CRP land, Rock Island did not contact any Farm Service Administration personnel about the matter. Tr., p. 401, ll. 9–22. Thus, Rock Island's routing study is further flawed by its own failures to gain important input data.

The Commission Staff raised no objection to the Project's proposed routing. Staff Ex. 1.0, ll. 319–326; C-2074. This lack of opposition, however, is based solely upon Staff's review of the routing study provided by Rock Island. Tr., p. 701, ll. 10-11. Staff did not undertake any independent investigation, or look into possible routing along existing infrastructure near Interstate 80 or the Rock Island Railroad right of way. Tr., p. 702, ll. 10–11. Additionally, despite the IDNR's concerns about forest fragmentation at the Mississippi River crossing, Staff did not consult with the IDNR, or take any other steps, to determine whether or not this route was appropriate. Accordingly, the record indicates that Staff's non-opposition should not be construed as an endorsement of or active support for the proposed route, or the routing study.

Overall, the record indicates that the routing study is flawed by Rock Island's failure to seek out or consider appropriate input data, its failure to follow its own routing criteria, the fact it is already outdated, and will only become further outdated, and otherwise. Accordingly, the record lacks substantial evidence to support the routing study and the approved route for the Project.

CONCLUSON

For the foregoing reasons, the Illinois landowners Alliance, NFP, respectfully requests that this Honorable Court dismiss the Rock Island Petition for the reasons stated in the ILA's Motion to Dismiss. Alternatively, the ILA respectfully requests that the Court reverse the Illinois Commerce Commission's Order granting Rock Island a certificate of public convenience and necessity under Section 8-406 of the Illinois Public Utilities Act as a result of the Commission exceeding its statutory authority, as well as a result of certain factual findings not being supported by substantial evidence, all as described in this Brief.

William M. Shay
Shay Phillips, Ltd.
456 Fulton Street
Suite 255
Peoria, Illinois 61602
(309) 494-6155
One of Plaintiff-Appellant's Attorneys

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 44 pages.