

Nos. 121302, 121304, 121305 & 121308 Consolidated

121302

IN THE SUPREME COURT OF ILLINOIS

05/02/2017

Supreme Court Clerk

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

MOTION OF COMMONWEALTH EDISON COMPANY TO DISMISS APPEAL AND VACATE LEAVE TO APPEAL AS IMPROVIDENTLY GRANTED

Pursuant to Ill. Sup. Ct. R. 361(h), Commonwealth Edison Company (“ComEd”) files this motion to bring to the Court’s attention recent factual developments concerning the Rock Island Clean Line electric transmission project (“the Project”) that warrant dismissal of the appeal and vacatur of leave to appeal as improvidently granted. In light of these factual developments, the case no longer presents an appropriate vehicle to address the question of law that the Court agreed to review. This motion is supported by the attached affidavit of Steven T. Naumann, P.E. (“Naumann Aff.”) (attached as Ex. A).

FACTUAL BACKGROUND

1. As the Court knows, this case presents the legal question of whether Rock Island Clean Line (“Rock Island”) can claim to be a “public utility” eligible to receive a Certificate of Public Convenience and Necessity (“CPCN”) for the Project from the Illinois Commerce Commission (“Commission”). The answer to that question depends

upon the legal standard for what constitutes a “public utility” and the application of that standard to the undisputed evidentiary record regarding the Project, including its size, the firmness of Rock Island’s commitment (or lack thereof) to build the Project, and the apportionment of the Project’s capacity among various types of customers.

2. The Appellate Court held that Rock Island was not a “public utility” for two reasons, both of which depend upon the existing evidentiary record. First, the Court held that the Project would not be “for public use,” because Rock Island did not intend to “serve the public and treat all persons alike, without discrimination.” A-14 (Appellate Court Op. ¶ 40).¹ Instead, Rock Island planned to prioritize users with whom it had entered into privately negotiated contracts or who had won an auction for service. A-15-16 (Appellate Court Op. ¶ 46). Second, it was speculative whether Rock Island would actually commit property “to be used for or in connection with” the transmission of electricity. 220 ILCS 5/3-105. Rock Island “admitted that the project was in the planning stages and that it would only pursue construction if the company determined that it would be profitable in light of future market developments and financial support.” A-14 (Appellate Court Op. ¶ 43).

3. Recent factual developments, however, mean that this case no longer presents an appropriate vehicle for this Court to pass upon the meaning of the statutory term “public utility” in this case. That is because Rock Island apparently no longer intends to build the Project that the Commission certified and that Rock Island presented in the evidentiary record before the Commission and the Court.

¹ A-__ refers to the Commission’s Separate Appendix. “Order” refers to the November 25, 2014 Commission Order under review, set forth at A-18-244.

4. Rock Island obtained its CPCN from the Commission on the basis of its representation to the Commission that the Project would be capable of delivering 3,500 megawatts (“MW”) of power to the Collins Substation owned by ComEd in Grundy County, Illinois, allowing it deliver 15 million MWh of energy each year. A-32 (Order at 11) (recounting Rock Island’s assertion that “the Project will provide 3,500 MW of transmission capacity,” allowing delivery of “over 15 million MWh of electricity annually”).

5. The Project’s 3,500 MW capacity was integral to Rock Island’s arguments, as well as the Commission’s conclusion, that the Project was “least-cost,” as required for a CPCN to issue under 220 ILCS 5/8-406(b)(1). For example, Rock Island calculated the costs of the Project based on a 3,500 MW capacity. A-68-69 (Order at 47-48); A-71 (Order at 50). The Commission expressly relied on the proposed size of the Project in concluding that Rock Island satisfied the “least-cost” prerequisite. A-138 (Order at 117) (premising approval on the “large amounts of electricity” that Rock Island proposed to transmit).

6. The Project’s 3,500 MW capacity—allowing delivery of 15 million MWh of energy each year—was also the basis for Rock Island’s evidence, accepted by the Commission, that the Project would reduce costs for Illinois consumers by allowing new wind farms to transmit their electricity, thereby “promot[ing] the development of an effectively competitive electricity market that operates efficiently,” as also required for a CPCN to issue under 220 ILCS 5/8-406(b)(1). *See* A-50 (Order at 29) (“[T]he transmission line will enable over 4,000 MW of high capacity factor wind farms to be constructed in the Resource Area and will deliver their output of low cost renewable

energy to northeast Illinois.”). Rock Island likewise asserted in its Petition for Leave to Appeal to this Court that its project would deliver 15 million MWh of electricity annually. *See* Rock Island Pet. at 4, 15; *see generally* Naumann Aff. ¶¶ 4-6.

7. In its filings before the Commission, Rock Island supported its application for a CPCN with a showing that it had secured three interconnection queue positions with PJM Interconnection, L.L.C. (“PJM”), allowing the interconnection of a total of 3,500 MW of capacity. A-74 (Order at 53); Naumann Aff. ¶ 8. By way of explanation, PJM, which manages the regional transmission system, uses a formal queue system to assign rights to connect the system. This ensures that the system is capable of accepting additional delivery of electric power. Naumann Aff. ¶ 7. Entities may not interconnect with the system unless and until PJM determines the interconnection to be compatible with the existing system and with other projects higher in the queue, following a detailed interconnection study. *Id.* PJM posts queue positions publicly on its website. *Id.*

8. Since ComEd filed its brief, it has discovered that sometime prior to April 10, 2017, Rock Island directed PJM to reduce the amount of energy it could deliver under one of its three queue positions. Naumann Aff. ¶ 9. In addition, on April 10, 2017, Rock Island withdrew its two remaining queue positions in their entirety. Naumann Aff. ¶ 10. As a result, Rock Island today holds queue positions that will allow it to deliver only 1,600 MW of electricity – less than half the amount contemplated by the Commission’s Order. Naumann Aff. ¶ 11. As Mr. Naumann explains, “The significant reductions in transmission deliveries are incompatible with the project as described and certificated by the Commission. Those reductions are also inconsistent with the assumptions used in the calculations of the claimed project benefits.” Naumann Aff. ¶ 13.

9. Rock Island has not explained publicly the rationale for its surrender of the queue positions. Indeed, in its Reply Brief filed on April 26, 2017—*after* it withdrew its queue positions—Rock Island still represented to this Court that “the Rock Island Project[] [will] ... transmit the electricity from multiple wind farms totaling over 4,000 MW capacity, and deliver over 15 million MWhs per year...” Rock Island Reply Br. 21; *id.* at 16. Although Rock Island could theoretically seek additional queue positions that would again allow it to deliver the full 3,500 MW, no such requests for additional interconnection positions have been made to date. Moreover, if Rock Island did make such a request, its new positions would be placed in last priority in the PJM queue and would require new interconnection studies. Naumann Aff. ¶ 12.

ARGUMENT

10. ComEd brings these facts to the Court’s attention because ComEd believes they warrant dismissal of the appeal and vacatur of leave to appeal as improvidently granted. The Court is being asked to assess whether Rock Island is a “public utility” against the backdrop of a factual record that no longer describes the Project. Rock Island could not proceed under its existing CPCN, even if it prevails in its appeal to this Court. To the extent Rock Island does not intend to proceed with the Project at all, this Court does not “render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided.” *In re Barbara H.*, 183 Ill. 2d 482, 491 (1998). To the extent that Rock Island now wants to build a line with only a 1,600 MW capacity, that is not the project certified or analyzed by the Commission. If Rock Island still claims to be a “public utility” and seeks a CPCN on that basis, the Commission would need to issue a new or amended CPCN, based on a new evidentiary

record regarding whether the revised project meets the requirements of 220 ILCS 5/8-406(b)(1). *See* A-140 (Order at 119) (stating that “[t]he Commission’s decision regarding whether to grant Rock Island its requested CPCN is based upon the testimony presented in this case.”). That new evidentiary record could bear on Rock Island’s status, particularly to the extent its new petition bears on the two reasons the Appellate Court gave for its refusal to treat Rock Island as a “public utility.” The new project parameters may impact the degree to which it can claim that the Project is “for public use.” A-14 (Appellate Court Op. ¶ 40). Rock Island’s change in plans also may affect whether it can claim to own property to be “used for or in connection with” the transmission of electricity. A-13 (Appellate Court Op. ¶ 39).

11. Moreover, it is speculative whether Rock Island could even make the necessary showing to satisfy the other requirements for a CPCN given the new parameters of its project. It thus might be completely unnecessary to reach the question of Rock Island’s status as a “public utility” in connection with that more limited project.

12. Accordingly, this case no longer presents an appropriate vehicle to decide the legal issue presented to this Court. The Court should dismiss the appeal and vacate its Order allowing leave to appeal as improvidently granted. The Appellate Court’s mandate may then issue in the ordinary course.

CONCLUSION

WHEREFORE, for the foregoing reasons, the consolidated appeals should be dismissed, the Court’s Order allowing leave to appeal should be vacated as improvidently granted, and the Appellate Court’s mandate should be allowed to issue.

Dated: May 2, 2017

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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EXHIBIT A

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AFFIDAVIT OF STEVEN T. NAUMANN, P.E.

I, Steven T. Naumann, being duly sworn, state:

1. I am Vice President, Transmission and NERC Policy at Exelon Business Services Company. I provide advice and guidance concerning the regulation of transmission system planning, design, operation, and the rates, terms, and conditions of transmission service to the Exelon Corporation utilities, including Commonwealth Edison Company (“ComEd”), who own electric transmission systems.

2. Actions recently taken by or on behalf of Rock Island Clean Line (“Rock Island”) make it practically impossible for Rock Island to construct and operate the proposed high-voltage DC line as certified by the Illinois Commerce Commission (“Commission” or “ICC”) in the proceedings below. This Affidavit identifies those actions and explains why they make construction and operation of the project as certified impossible.

3. I have almost forty years of experience in transmission planning, reliability, security, and regulation. My experience focuses on transmissions systems now operated by

the PJM Interconnection L.L.C. (“PJM”), the federally-regulated Regional Transmission Organization overseeing northern Illinois and all or part of thirteen other jurisdictions.¹ I am licensed in Illinois as a Professional Engineer and hold both a Bachelor of Science degree and Master of Engineering degree in Electric Power Engineering from Rensselaer Polytechnic Institute in New York. I also hold a J.D. from Chicago-Kent College of Law and am a member of the Illinois bar, although I do not actively practice law in my current position. *See* ComEd Ex. 1.01 (C-2381 – 2392) (detailed curriculum vitae).

4. In ICC Docket No. 12-0560, Rock Island sought a Certificate of Public Convenience and Necessity (“CPCN”) for a high-voltage direct current transmission line and associated facilities capable of delivering 3,500 MW of wind energy from Iowa to ComEd’s Collins Substation, a major regional electric transmission hub. *Illinois Landowners Alliance, NFP v. Illinois Commerce Comm’n*, 2016 IL App (3d) 150099 at ¶ 8, A-5; ICC Order at 11 (C-8488, A-31); Rock Island Pet. at ¶¶ 6, 15, 36 (C-9, 18, 39); Rock Island Ex. 1.0 at 6:166-7:170 (C-171 – 72); 13:356-357 (C-178); Rock Island Ex. 10.0 at 11 n.11 (C-1178); 29:610-612 (C-1196). With the capability to deliver 3,500 MW of electricity, Rock Island calculated that the project could deliver a total of approximately 15 million megawatt-hours (MWh) of electricity to Collins substation each year. *Illinois Landowners Alliance* at ¶ 8 (A-5); ICC Order at 11 (C-8488, A-31); Rock Island Pet. at ¶¶ 15, 36 (C-18, 39); Rock Island Ex. 1.0 at 7:170-171 (C-171); 27:646-649 (C-192); Rock Island Ex. 10.0 at 4:89-90 (C-1171); 19:392-395 (C-1186); 29:610-612 (C-1196).

¹ As explained in ComEd’s brief to this Court, PJM is regulated by the Federal Energy Regulatory Commission, and is responsible for planning and operating the high-voltage electric transmission system in parts of thirteen states and the District of Columbia, including northern Illinois. *See also* ComEd Ex. 1.0 2nd REV at 16:323-324 (C-5711) (discussing PJM’s queues and planning process).

5. The Commission granted Rock Island a CPCN, subject to certain conditions, to construct the project as Rock Island proposed. ICC Order at 222 (C-8699, A-242) (granting certificate); at 119 (C-8596, A-139), 131 (C-8608, A-151), 151 (C-8628, A-171), 201-03 (C-8678 – 80, A-221 – 23) (describing conditions on the certificate).

6. Rock Island and other Appellants continue to state, in documents through and including briefs filed with this Court on April 26, that the project can deliver 3,500 MW of energy totaling over 15 million MWh annually. Rock Island Reply Br. at 21; IBEW Reply Br. at 14. Rock Island's witnesses also testified before the Commission about claimed Net Present Value Savings to Illinois based on that 3,500 MW capacity and the resulting ability to delivery approximately 15 million MWh per year of wind-generated energy into Collins substation. Rock Island Exhibit 4.0 at 26:500-501 (Table 5) (C-335). An ICC Staff witness also testified before the Commission regarding the relative costs and benefits of the Rock Island project based on the ability of the project to deliver 15 million MWhs of electricity to the Collins substation. ICC Order at 115 (C-8592, A-135).

7. The ability of the regional transmission system to accept electric power deliveries is limited. For this operational reason and to ensure fairness, rights to interconnect new facilities with the existing transmission system are managed by PJM using a formal and organized queue system. In order to assure that fairness and to inform all interested parties of available interconnection options, those queue positions are publicly posted by PJM on its website.² Parties may not interconnect with the regional transmission system unless and until

² See <http://pjm.com/planning/merchant-transmission/trans-queue-active.aspx>. The URL contained in the Reply Brief of Rock Island is incorrect and does not function. See Rock Island Reply Br. at 21.

their proposed interconnection is studied and determined to be compatible with the system taking into account projects higher up in the queue.

8. For its project to deliver energy as described, Rock Island sought and obtained three “positions” in the PJM Interconnection Queue. Rock Island Ex. 2.0 at 7:134-135 (C-232). These queue positions were labeled as S57, S58, and U3-026. *Id.*; ICC Order at 53 (C-8530, A-73). In particular:

- a. Queue position S57 allowed Rock Island to deliver 1,500 MW of electricity to Collins substation. Rock Island Ex. 2.3 (C-266).
- b. Queue position S58 allowed Rock Island to deliver an additional 2,000 MW of electricity to Collins substation. *Id.*
- c. Queue position U3-026 did not enlarge the total amount of electricity Rock Island could deliver, but changed the portion of that total that could also be used to meet other regulatory requirements.

Taken together, these queue positions would have allowed Rock Island to interconnect with and deliver to the ComEd system at Collins a total of 3,500 MW. ICC Order at 53 (C-8530, A-73).

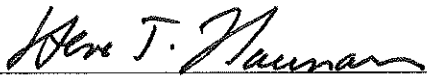
9. At some time prior to April 10, 2017, Rock Island directed PJM to reduce the amount of energy it could deliver under its S58 queue position from 2,000 MW to 1,600 MW. The reduced 1,600 MW delivery capability now authorized by queue position S58 is publicly shown on the PJM website. *See* Attachment 1 to this Affidavit.

10. Thereafter, on April 10, 2017, queue positions S57 and U3-026 were withdrawn (*see* Attachment 2) in their entirety. This action reduced the total amount of energy that Rock Island could deliver by an additional 1,500 MW.

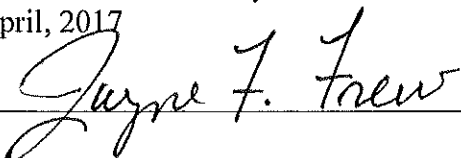
11. The cumulative effect of the withdrawal of queue positions S57 and U3-026 and the reduction in the size of the deliveries permitted under queue position S58 means that Rock Island now has a right to deliver to the Collins substation only 1,600 MW of electricity, a sum inconsistent with the project described to, and certified by, the Commission. Using the same factors that Rock Island used to determine that its project as proposed could deliver approximately 15 million MWh of energy, Rock Island can deliver less than 7 million MWh of energy per year using the remaining rights it has not surrendered or limited.

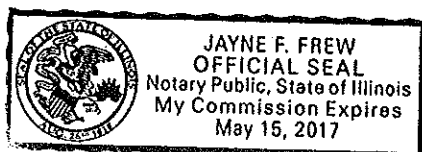
12. Following its withdrawal of queue positions S57 and U3-026, Rock Island would need to attempt to acquire new queue positions should it ever desire to deliver 3,500 MW to Collins. That, however, would put Rock Island at the "back of the line" in priority and would require a full re-evaluation of its interconnection request. As of the date of this Affidavit, no such request for new interconnection positions has been made.

13. The significant reductions in transmission deliveries are incompatible with the project as described and certificated by the Commission. Those reductions are also inconsistent with the assumptions used in the calculations of the claimed project benefits.


 Steven T. Naumann

Subscribed and sworn to
 before me this 28th day of
 April, 2017


 Jayne F. Frew



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[PROPOSED] ORDER

This cause coming to be heard on Commonwealth Edison Company's Motion to Dismiss Appeal and to Vacate Leave for Appeal as Improvidently Granted, due notice having been given and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that Commonwealth Edison Company's Motion to Dismiss is ALLOWED / DENIED.

Entered: _____, 2017

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