STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ROCK ISLAND CLEAN LINE LLC	:	
	:	
Petition for an Order granting Rock Island Clean Line LLC a	:	
Certificate of Public Convenience and Necessity pursuant to	:	No. 12-0560
Section 8-406 of the Public Utilities Act as a Transmission	:	
Public Utility and to construct, operate and maintain an	:	
electric transmission line and authorizing and directing Rock	:	
Island pursuant to Section 8-503 of the Public Utilities Act	:	
to construct an electric transmission line.	:	

INITIAL BRIEF OF COMMONWEALTH EDISON COMPANY

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ROCK ISLAND CLEAN LINE LLC	:	
	:	
Petition for an Order granting Rock Island Clean Line LLC a Certificate of Public Convenience and Necessity pursuant to Section 8-406 of the Public Utilities Act as a Transmission Public Utility and to construct, operate and maintain an electric transmission line and authorizing and directing Rock Island pursuant to Section 8-503 of the Public Utilities Act to construct an electric transmission line.	:	No. 12-0560

INITIAL POST-HEARING BRIEF OF
COMMONWEALTH EDISON COMPANY

Commonwealth Edison Company ("ComEd"), under the Rules of Practice of the Illinois Commerce Commission (the "Commission" or "ICC") and the scheduling Orders of the Administrative Law Judge, submits this Initial Brief.

I. INTRODUCTION

Petitioner Rock Island Clean Line LLC ("RI") presents a DC line concept appealingly packaged as pro-market and pro-renewable energy. Ambitiously labeled the "Project," it is currently more akin to a business plan. It is incompletely designed, funded, and studied. Its success depends on highly speculative future developments and conditions, and RI does not begin to have the funds to construct it. This proposal does not qualify RI as an Illinois utility. Nor is such a plan entitled to a Certificate of Public Convenience and Necessity ("CPCN"), the state's final regulatory approval for a major utility asset proven to meet a public need at least cost. Given its many uncertainties and the lack of commitment that RI will actually build it, there is also no basis for the Commission to grant RI an order under Section 8-503 of the Public Utilities Act ("PUA") declaring the Project "necessary" and "directing" its construction. Based on the record, the Commission must dismiss the Petition in its entirety without prejudice.

ComEd's opposition in this matter is not rooted in opposition to transmission development, merchant transmission, or renewable energy development. To the contrary, ComEd supports competitive energy, has consistently worked with new generators, including wind generators, and has supported their interconnection. ComEd has also proposed and constructed numerous transmission system expansions and upgrades to serve generators, reduce congestion, and increase transfer capability between ComEd's transmission system and others.[1]

The risks and costs of proceeding with a speculative and indefinite project like this are real, significant, and of concern to ComEd. The approval by the Commission of a project of this scope and size that may never operate as requested creates market uncertainty and sends confusing messages, including to developers of potential Illinois-based generation. The Commission, its Staff, existing utilities, and other parties also have limited resources to assess major transmission projects. Those resources should not be diverted by the need to review – at significant time and expense – unfunded and uncommitted plans that remain in flux even during the Commission proceeding. That RI's plans are aimed at serving hypothetical customers and generators that do not exist makes that concern all the greater.

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[1] A non-exclusive list of ICC and FERC docketed efforts includes, *e.g., Commonwealth Edison Co.*, ICC Docket No. 98-0508 (1999) (increased transfer capacity); *Commonwealth Edison Co.*, ER99-4366-000 (Interconnecting competitive generation); *Commonwealth Edison Co.*, ICC Docket No. 98-0745 (1999) (interconnecting competitive generation); *Commonwealth Edison Co.*, ER00-729-000 (interconnecting competitive generation); *Commonwealth Edison Co.*, ICC Docket No. 00-0386 (2000) (interconnecting competitive generation); *Commonwealth Edison Co. and Corn Belt Energy Corp.*, ICC Docket No. 02-0359 (2002) (adjusting service territories to facilitate wind generator); *Commonwealth Edison Co.*, ER04-393-000 (2004) (interconnecting wind generation); *Commonwealth Edison Co.*, ER04-393-001 (2004) (interconnecting wind generation); *Commonwealth Edison Co.*, ICC Docket No. 04-0615 (2008) (expanded interconnection with MISO); *Commonwealth Edison Co.*, ICC Docket No. 05-0188 (Interim Order, 2005; Final Order, 2006) (major transmission reinforcement); *Commonwealth Edison Co.*, ICC Docket No. 07-0441 (2008) (service to gas pipeline); *Commonwealth Edison Co.*, ICC Docket No. 10-0385 (2011) (major transmission reinforcement; permits retirement of coal generation); *American Transmission Co.*, ICC Docket No. 11-0661 (2012) (ComEd cooperated with ATC on expanded interface with MISO); *Commonwealth Edison Co.*, ICC Docket No. 11-0692 (2012) (major transmission reinforcement).

And, where, as here, the developer has already filed and withdrawn one prior Commission petition seeking premature approval to operate as a utility,[2] has chosen not to participate in the PJM and MISO Regional Transmission Organizations' public transmission expansion planning process, and pushes for Certification in advance of completing the interconnection process, the concern is even more acute. Finally, from a policy perspective, the Commission should not create new utilities out of shell companies and venture far down the road toward authorizing private developers' use of eminent domain over a wide swath of land absent, at a minimum, certainty, proof, and commitment. Entertaining speculative and premature requests for Certification confuses the markets and legally and politically complicates the approval and, when necessary, use of eminent domain by urgently needed public utility projects.

A. Heart of the Case

The Petitioner, RI, is a single-purpose thinly-capitalized private venture entity. RI, its siblings, and its parent, Clean Line Energy Partners ("Clean Line"), have proposed similar DC transmission concepts in several states, all with only limited capital, but all seeking regulatory green lights.[3] In fact, this Petition is RI's second attempt to gain Commission approval advancing one such speculative plan, an approximately $2 billion 500-mile transmission link between unspecified and as-yet-unbuilt generation in western Iowa and the transmission system near Chicago. While RI may hope that regulatory approval will help stimulate financial and energy market interest in the concept, it has no customers signed up and no generators producing energy to deliver. Tellingly, RI also makes no commitment to build the project, having pointed

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[2] *Rock Island Clean Line LLC*, ICC Docket No. 10-0579, was initiated by a Petition filed by RI on October 6, 2010. After Staff moved to dismiss the Petition as, among other things, premature, the docket was dismissed pursuant to RI's Motion of August 27, 2012.

[3] *See* ComEd CX Ex. 5. The financial resources of Clean Line or its subsidiaries are not devoted to any particular effort. ComEd CX Ex. 4, 8(d).

to no reliability deficiency or other essential need for the Project. Unless the Project ultimately pans out in the financial and energy markets and becomes demonstrably profitable, RI will build nothing and serve no customers -- even if its Petition is granted in full.

RI's Petition seeks unprecedented relief. RI asks to be immediately declared an Illinois public utility. But, an entity like RI that has no customers, actual or subscribed, and does not commit to owning and operating utility assets, is no utility. The Commission should also consider that becoming an Illinois utility also confers important rights, not the least of which is the ability to obtain authority under Section 8-509 of the PUA to take private property involuntarily by eminent domain. But, utilities also bear serious obligations including a commitment to provide service to the public. Public utility status, and its associated rights, can be conferred only on entities that can and do shoulder those burdens. RI cannot and does not.

RI also asks the Commission for a CPCN for its Project. To meet that burden requires not just a theoretically attractive project, but evidence proving:

> (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). RI has not and cannot meet that burden. It cannot prove that the market will support the Project, that generators will be built to use it, or that those generators will bear

the necessary costs. The Project is "a Field of Dreams,"[4] and while RI may hope that "if we build it, they will come," that is not what the law requires.

RI also has little relevant experience and acknowledges that it cannot currently finance the Project. And, in critical respects, RI's plan itself remains incompletely designed and assessed, speculative, and in flux. Because of these doubts, and its admitted absence of capital, even RI will not commit to the Project. RI's response that all concerns will be resolved with time, even could it be proven, does not warrant certification of the Project now. The purpose of certification is not to stir up interest and boost the fortunes of a private transmission venture. The statute requires that a CPCN be issued for construction and operation of assets proven to be necessary and cost-effective by a public utility proven to be qualified to finance, construct and maintain such assets. Yet, after six rounds of pre-filed testimony and exhibits (and RI's are voluminous), months of extensive discovery, and five days of evidentiary hearings, critical risks, uncertainties, and failures of proof remain unanswered.

- **RI will not commit to construct the Project, even if its Petition is granted in full.** RI states that unless it can attract customers willing to subscribe to at least 60% of its capacity and to shoulder the majority of its costs, it will likely let the Project die. And RI will not commit to build the Project even if customers do subscribe at that level. RI essentially asks the Commission to certify an option. Berry Add'l Sup. Dir., RI Ex. 10.13, 4:106-10; Berry Reb., RI Ex. 10.14 REV, 28:681-89; Berry, Tr. 1049:24 – 1050:5; Naumann Dir., ComEd Ex. 1.0 2nd REV., 10:193-6 and fn. 8.[5]

[4] Zuraski, Tr. 759:9-16.

[5] Citations to the transcripts are to corrected transcripts, where applicable.

- **No entity has committed to become a customer of RI or the Project.** No generator has subscribed or agreed to subscribe. And while RI alludes to potential load customers, they do not become transmission customers of RI by buying energy (or RECs) from suppliers and RI's economic studies assume generators can bring their energy to market. No generator anywhere, wind or otherwise, has committed to use the Project and there is no proof that any entity will ever demand or contract for service using the Project. Galli, Tr. 753:1-3; Berry, Tr. 1061:2-19.

- **The Project is promoted and studied as a means to deliver 100% wind energy from new generators to Illinois and points eastward.** McDermott, Tr. 122:17-21. **Those wind generators, however, do not exist and there is no proof that they will.** Loomis, Tr. 559:6-16. Moreover, RI's tariff on file with the Federal Energy Regulatory Commission ("FERC") does not permit it to favor wind generators and the nature and source of any energy that may ever flow on the line is unknown. McDermott, Tr. 125:24 – 126: 24; *Rock Island Clean Line LLC*, 139 FERC ¶ 61,142 at P 31 (2012).

- **RI cannot demonstrate that the Project cost can be recovered as it proposes.** Given that the Project has no subscribers, the entities that RI says will pay for the Project do not now exist. Although studied and promoted as a merchant project, **RI will not commit that it will not later try to charge Illinois customers for the costs of the Project's construction and operation.** Skelly, Tr. 277:6-10. RI maintains those rights, and its proposed limiting condition is dangerously incomplete and untested. Naumann Reb., ComEd Ex. 4.0 REV, 26:503 – 28:554.

The Project itself also suffers from serious design, engineering, and operational incompleteness and deficiencies.

- **RI promotes and studies the Project as delivering 3,500 MW of energy to Illinois.** Petition, ¶ 15; McDermott, Tr. 166:14-16 (RI studies assume the line is "fully utilized"). **RI, however, must rely on currently undeveloped operating procedures in order for the line to reliably operate at above 1,192 MW** (or even less if the as yet uncompleted second System Impact Study does not grant RI that much) without risking catastrophic system failures. The alternative is hundreds of millions of dollars of additional network upgrades that RI has not budgeted for, or committed to build. Naumann Reb., ComEd Ex. 4.0 REV., 5:90-100, 9:172-174, 13:254-259; Naumann, Tr. 964:16 – 965:1; Naumann Dir., ComEd Ex. 1.0 2nd Rev., 11:226-228.

- **RI's essential operating procedures have not yet been defined, developed, tested, finally approved by PJM Interconnection, L.L.C. ("PJM"), or reviewed by FERC.** Naumann Reb., ComEd Ex. 4.0 REV., 8:161–163; 9:172-174; 14:285-287; 15:300-302; 15:305 - 16:315. **The only testimony from witnesses with PJM or ComEd region operating or planning experience says they are risky at best, fanciful at worst.** Naumann Reb. Ex. 4.0 REV., 9:177-10:187, 11:218-225, 12:239-244.

- **RI has no interconnection agreement with PJM or Midcontinent Independent System Operator, Inc. ("MISO"). The Interconnection Studies are not complete. And, the final terms of the interconnections at either end of the DC line remain in flux.** Naumann Dir., ComEd Ex. 1.0 2nd. Rev., 27:532 - 28:541, 29:565-31:609.

Those terms include the scope and cost of network upgrades and critical operating limitations. Nor has RI considered the requirements that may be imposed on potential generator-users of the Project, including the very network upgrades RI has fought to avoid. Naumann, Tr. 965: 9-20.

- **There is no clear eastern interconnection design.** Tapping ComEd's existing lines is not possible, and RI currently does not have a site for a substation or the massive 345-765 kV transformers they require. Naumann Dir., ComEd Ex. 1.0 2nd Rev., 33:647 - 34:662; Naumann Reb., ComEd Ex. 4.0 REV., 23:452 - 25:484. Instead of building three 345 kV lines between its own converter station and ComEd's Collins station, RI for the first time in surrebuttal proposed a single ~7-mile 765 kV line. Galli Sur., RI Ex. 2.15, 41:899-902. No design details for this belated proposal appear in the record, and substituting it for the multiple 345 kV lines would create a single contingency failure point for the entire Project.

- **The Project addresses no deficiency or inadequacy in the transmission system.** While RI claims that the Project can produce ancillary reliability benefits, RI did not submit the Project to the regional planning process, has not identified any deficiency or inadequacy which the Project addresses, and there is no evidence that the Project is the best or least cost means of achieving any such benefit. Naumann Dir., ComEd Ex. 1.0 2nd Revised, 6:118-20; *see also*, Naumann Dir., ComEd Ex. 1.0 2nd Revised, 47:901-901; Berry Reb., RI Ex. 10.14 REV, 57:1377 – 58:1388.

Finally, RI's own corporate structure and capitalization raises concerns, especially in view of the PUA's requirements that RI *currently* be capable "of efficiently managing and

supervising the construction process" and be "capable of financing the proposed construction." 220 ILCS 5/8-406(b)(2) and (3).

- **RI is not capable of financing the Project.** It is a thinly capitalized shell entity. Even its parent, Clean Line, is a lightly capitalized private venture vehicle that also lacks the capital or lending power required. Lapson Reb., ComEd Ex. 5.0, 2:20-24. 6:103-107, 9:172-173; Berry Tr. 1057:15-19; Skelly, Tr. 1060:21 - 1061:1. **The full resources of the entire Clean Line family amount to less than 2% of the required capital.** Berry, Tr. 1059:24 - 1060:7; ComEd Cross Ex.2.
- **RI has no relevant experience constructing major cross-country transmission lines, and no experience with DC transmission.** Rashid, Tr. 713:1-4; Skelly, Tr. 1060:21 - 1061:1. RI is not an operating company; its employees are developers and promoters, not experienced transmission operators and engineers. None of the Clean Line companies have ever built a transmission line. Skelly, Tr. 234:7-12. RI investor National Grid is a major transmission operator and has relevant experience. But, like so much concerning this Project, National Grid has committed to nothing beyond a speculative initial investment. Wallack, Tr. 805:11-19; Wynter, Tr. 332:20-23; ComEd CX Exs. 9, 11.

And, lastly, serious questions exist about the timing of RI's Petition and its request for relief while the Project remains so uncertain and speculative.

- **RI offers no credible explanation why the ICC must approve this line now or why it must be declared a utility years before it could offer any service.** The regulatory process in Iowa, where the majority of the Project is located, is just underway and RI's initial efforts to expedite by severing land acquisition from

franchise issues failed.[6] Given RI's commitment that it will not begin construction until the entire Project can be completed and Iowa approval granted (Skelly, Tr. 234:13-23), there is no reason to act before the Project is fully engineered and evaluated and until the required customer and market support actually materializes.

- **RI's request for a finding that the Project must be built and for an order under Section 8-503 directing RI to construct the Project is irreconcilably inconsistent with its own refusal to commit to build the Project.**
- RI offers no credible explanation why it requests a Section 8-503 order now. Yet, with a Section 8-503 order in hand, all that will stand between landowners and condemnation for this private merchant project is a finding of impasse – which appears to already exist.

B. Recommended Action

RI has failed to carry its burden of proving that it qualifies as a utility, that its proposed Project should be certified, or that the Commission should issue a Section 8-503 order directing construction of the Project. The Commission has never issued a CPCN for a project, let alone to establish a new public utility, under circumstances like these. Nor has the Commission ever approved an order under Section 8-503, functionally placing Illinois landowners on the brink of condemnation proceedings, for a project that the proponent of which has not even committed to build. The Commission should, therefore, dismiss the Petition in its entirety. If, in the future, RI's plans become complete, fully vetted, and supported by actual customers and the market, and if RI acquires the financial and technical capability to build and operate a DC line project of this

[6] *Rock Island Clean Line LLC*, Docket Nos. E-22123 – E-22183, Order Denying Motion to Bifurcate (Nov. 26, 2013) . RI does not expect an Iowa decision until 2015, and there is "not a statutory clock associated with the Iowa process." Skelly, Tr. 235:8-16.

magnitude, there is no reason RI should not present that proposal to the Commission at that time, along with evidence of those essential facts.

II. RULINGS ON MOTIONS TO DISMISS

A. ILA and IAA Motions to Dismiss (Ruling of March 18, 2013)

The Illinois Landowners' Alliance ("ILA") and Illinois Agriculture Association a/k/a the Illinois Farm Bureau ("IAA") filed a Motion to Dismiss (together, "Motions to Dismiss") RI's Petition,[7] arguing RI failed to allege facts warranting the relief sought. ComEd supported those Motions only insofar as they requested dismissal of RI's request for an order under Section 8-503.[8] ComEd continues to adhere to this position. As a matter of Illinois law, RI need not already be a public utility to seek a CPCN, but RI cannot properly seek an order under Section 8-503 for a project that is speculative and that RI will not commit to build. Deciding the remaining questions requires, in ComEd's view, a review of the facts and an assessment of whether they satisfy the plain language of Section 8-406.

That can now be done. Evidence has now been submitted by all parties, admitted and subjected to cross-examination at a full hearing, and the record marked "heard and taken." At this stage, RI's Petition as a whole should be denied not in response to a Motion and because of inadequate allegations, but because RI's evidence does not satisfy the legal requirements.

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[7] *See* Motion to Dismiss of the Illinois Agricultural Assn. (Feb. 7, 2013); Motion to Dismiss [of the ILA] (Feb. 7, 2013).

[8] *See* Response of Commonwealth Edison Co. to the Motions to Dismiss by the Illinois Landowners Alliance and the Illinois Agricultural Association (Feb. 21, 2013).

B. ILA's Renewed Motion to Compel the Commission to Consult with the Illinois Department of Natural Resources (Ruling of Dec. 4, 2013)

ComEd expresses no position on this Motion. The obligation of consultation, if it applies to a CPCN application of this nature, is a minimal burden. The Commission should determine as part of its decision whether any required consultation has occurred.

III. PUBLIC UTILITIES ACT § 8-406(a) – REQUEST FOR CERTIFICATE AS A PUBLIC UTILITY

RI seeks a CPCN under Section 8-406(a) allowing it to operate as a transmission-only public utility in Illinois. Petition, ¶ 48. Section 8-406(a) provides in relevant part:

> No public utility ... not possessing a certificate of public convenience and necessity from the Illinois Commerce Commission ... 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). The PUA's definition of a "public utility," in turn, requires not only that a utility "own[], control[], operate[] or manage[]" transmission assets, but that it do so "for public use." 220 ILCS 5/3-105.

The fact that providing a service or product normally provided by a public utility does not make an entity a public utility unless it holds itself out to provide that service or product to the public at large was established in the Illinois Supreme Court's seminal opinion in *Mississippi River Fuel Corp. v. Illinois Commerce Comm'n*, 1 Ill. 2d 509 (1953) ("*Mississippi River*"). Mississippi River Fuel Corp. ("Mississippi River Fuel") was a fuel company that sold natural gas in Illinois at retail directly to 23 industrial customers as well as to a power company and an electric company for resale to the general public, all through individual contracts for terms of two years or less. *Id.* at 512. The Illinois Supreme Court affirmed the circuit court's conclusion that Mississippi River Fuel was *not* a public utility subject to regulation under the PUA because the record failed to support the conclusion that Mississippi River Fuel devoted its property to

"public use." *Id.* at 515-16. Neither the fact that other customers in theory could have approached the company for a contract, nor that the ultimate customers of the power and electric companies included the public, was sufficient to make Mississippi River Fuel a utility. Nor was the fact that it undeniably owned and operated gas delivery assets in Illinois.

Here the evidence shows that RI is not a public utility. First, RI has no Illinois customers and has not provided evidence sufficient to establish who its customers will be or that RI will ever have Illinois customers. *E.g.*, Skelly, Tr. 233:2-6; Galli, Tr. 753:1-3, 754:6-7. An entity without Illinois customers is not an Illinois public utility. Moreover, RI cannot even hold itself out as able to provide utility service to the Illinois public because the Project is indefinite and uncertain, and RI has refused to commit to build it.

A. RI Has Not Committed to Owning and Operating Transmission Assets in Illinois

To be a utility, RI must establish that it has or will have Illinois customers and that it does or will own, control, operate, and manage, within this State and for public use, facilities used in the transmission of electricity, before issuance of a CPCN. 220 ILCS 5/3-105. [9]

RI does not currently possess any of the above defined traits of a public utility. During the evidentiary hearings, multiple RI witnesses confirmed that RI could not serve as a public utility. RI witness Mr. Skelly admitted that RI had no assets in Illinois that could be used to sell, transmit, or deliver electricity. Skelly, Tr. 233:7-12. Section 3-105 of the Act clearly mandates that a public utility currently "owns, controls, operates or manages ... for public use, any plant, equipment or property used or to be used for ... the transmission ... of ... electricity." 220 ILCS

[9] This is no Catch 22. The law does not require that RI must already be functioning as a public utility at the time that it petitions the Commission for a Section 8-406(a) CPCN because the Act does not place a limitation on who may seek a CPCN. But, that does not mean parties can seek to be declared public utilities that are not prepared to meet the requirement of being a public utility if their Petition it granted.

5/3-105. RI's failure to have any Illinois transmission assets is not simply a product of not having yet received a CPCN. The failure is more fundamental.

RI has made no commitment to ever own, control, operate or manage Illinois transmission assets. Mr. Skelly testified that, even after obtaining a CPCN, if RI came to believe that "the project wasn't worth investing in any further, then we would abandon it." Skelly Tr. 286:14-16. That risk is no small thing given, as discussed further below, that RI has no construction financing and that the pool of generators it hopes to serve does not exist. Indeed, RI's CFO Mr. Berry confirmed that RI will not begin to build any of the Project until and unless it has all required financing. Berry Add'l Sup. Dir., RI Ex. 10.13, 4:106-10. His testimony also confirms that RI cannot offer service to customers as RI will not commit to build the Project, even in the event that the Commission issues a CPCN and a Section 8-503 order directing the construction of the Project. Berry, Tr. 1049:24 - 1050:5.

RI cannot, in short, prove that it will own or control transmission assets in Illinois, even if its Petition is granted. That is fatal to its application to be deemed a public utility.

B. RI Has Not Proven that it Will Offer or Provide Service to the Illinois Public

RI proposes to build a merchant transmission line that can, in theory, deliver 3,500 MW of power from renewable energy generators located in northwestern Iowa and nearby areas in Nebraska, South Dakota and Minnesota (the "Resource Area") to load and population centers east of the Mississippi River. Petition, ¶ 6. RI proposes to recover the costs of the Project from the generators who subscribe to, and contract for transmission service over, the Project – the hoped for wind energy producers in the Resource Area. *Id.*, ¶ 18.

While RI claims that customer could also include competitive retail suppliers or retail purchasers (*id.* ¶ 17), RI CFO Mr. Berry, challenging Mr. Zuraski's assumption that retail users

could pay for the line, testified: "Rock Island presents a different circumstance due its participant funding. Mr. Zuraski's model should instead treat Rock Island's transmission charge as paid by wind generators because they, not ratepayers in general, are likely to be Rock Island's transmission customers." Berry Reb., RI Ex. 10.14 REV, 50:1217 – 51:1222. The economic studies which RI relies on to claim market benefits assume that the RI customer-subscribers who pay for the line will be out of state generators. *Id.*; McDermott, Tr. 121:21 – 122:16; *see* Loomis, Tr. 562:22-24, 563:16 – 564:16 (describing how the generator customers will pay for the line). RI's CEO likewise confirmed that the line's subscriber customers are expected to be wind or renewable energy generators in the "Resource Area," not in Illinois. Skelly, Tr. 271:14-23.

While RI also claims that "customers" may be utilities, RESs, or retail purchasers, those "customers" are purchasers of energy, not RI subscribers or transmission customers. A retail user – or utility or other wholesale reseller, for that matter – does not become a transmission customer of a transmission line owner/operator simply because the power they consume (or resell) has previously flowed over the owner/operators' line. Buyers of energy transmitted on the line need not be customers of RI, or take service from RI, any more than load serving entities currently operating in ComEd's zone must be transmission customers of every generator lead or transmission facility over which the power they consume has flowed. What is more, as Staff witness Mr. Zuraski points out, Illinois customers have no incentive to become customers of RI, since they can simply acquire RECs rather than the renewable energy itself. Zuraski Dir., Staff Ex. 3.0, 10:193 – 11:205. Even a buyer of actual wind energy can purchase from the market, or a specific generator, without becoming a customer of RI and undertaking to pay RI for the cost

of the line. RI has also failed to prove that the Project will ever serve any Illinois customer, even if it did get off the ground.

While the Commission has recognized transmission-only public utilities in the past, in each instance it was assured of the existence of an Illinois customer. In *Interstate Power and Light Company and ITC Midwest LLC*, ICC Docket No. 07-0246 (Nov. 28, 2007) at 1, the Commission noted the existence of an Illinois transmission service customer - Jo-Carroll Energy Inc. Similarly, in *American Transmission Company L.L.C. and ATC Management Inc.*, ICC Docket No. 01-0142 (Jan. 23, 2003) at 5, the Commission in granting the CPCN found that "Petitioners' transmission lines are transmitting power within Illinois to serve Illinois customers ...."

Of course, RI's failures of proof are not limited to its inability to show that it will have even one Illinois customer. As noted above, RI cannot show that it will have any customers. RI filed its Petition well over a year ago, on October 10, 2012. That Petition followed on the heels of RI's first claim that it was entitled to be a public utility (Docket No. 10-0579) which RI filed in 2010 and later voluntarily dismissed. In the more than three years since RI first claimed to qualify as a utility, it has not acquired a single customer. Skelly, Tr. 233:2-5; Galli Tr. 753:1-3. Indeed, at the present time, RI still does not have any binding agreement with any customer, generator or load, whether in Illinois or Iowa. Berry, Tr. 1061:4-19. RI has not even started soliciting customers. Galli, Tr. 754:6-7.

But, even if some customers eventually sign up, RI is, at best, a Mississippi River Fuel in the making. Just as Mississippi River Fuel sold natural gas in Illinois to 23 retail industrial customers, under individual contracts, and also to reselling utilities (*Mississippi River*, 1 Ill. 2d at 512), if the RI Project was completed, RI's actual Illinois customers – if there are any – would be

under contract and would be a limited number of resellers or large users. As the Illinois Supreme Court ruled, an entity providing such service is not a public utility because it has "confined its sales to specific and selected customers, and has done no act by which it has given the reasonable impression that it was holding itself out to serve gas to the public, or to any class of the public, generally." *Id.* at 518.

C. The Project is Indefinite and Rife with Uncertainty

RI may argue that it is likely to build the Project and that it is likely to acquire customers and likely to offer service to the public. While ComEd submits that the evidence shows that RI has proven no such thing, such likelihood – even it was proven – would not warrant certifying RI as a utility now. Illinois' law does not define a public utility in terms of predictions, probabilities, and aspirations. To gain the benefits of being a utility ***now***, RI must prove that it qualifies ***now***.

Instructive here is the Arkansas Public Service Commission's decision in *Application of Plains and Eastern Clean Line LLC for A Certificate of Public Convenience and Necessity,* Ark. Pub. Svc. Comm'n Docket No. 10-041-U, Order No.9 (Jan. 11, 2011)[10] ("*Arkansas Order*"). There, the Arkansas Public Service Commission found as a matter of fact that evidence like that before the Commission here did not prove that the Clean Line applicant there met the definitional requirement that the power it transmitted must be "to or for the public for compensation."[11] While it did not find that the Clean Line project would or could never qualify

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[10] Available at http://www.apscservices.info/pdf/10/10-041-u_41_1.pdf. This decision was also cited by the ILA and the IAA a/k/a the Illinois Farm Bureau ("Farm Bureau") to support their Motions to Dismiss. As ComEd noted in its response, the *Arkansas Order* went to a failure of proof rather than a pleading deficiency – limiting its applicability to a motion to dismiss but makings its findings relevant in this post-hearing assessment of the facts and the law. *See Response of Commonwealth Edison Company to the Motions To Dismiss by the Illinois Landowners Alliance and The Illinois Agricultural Association,* (Feb. 21, 2013).

[11] Section 3-105 of the PUA requires a public utility's product or service to be provided "for public use." See 220 ILCS 5/3-105.

as a utility, it found correctly that the failure to bring forth evidence of its current capability meant that it did not then qualify as a utility. The Arkansas Commission stated:

> The Parties' legal filings and opening arguments ... discussed to varying degrees what each of these key phrases means, but the Commission is not convinced the totality of the evidence satisfies this statutory threshold. Recognizing, as Clean Line pointed out, there is some circularity involved in the fact that Clean Line cannot own or operate regulated major utility facilities pursuant to Arkansas law in this state without first being declared a public utility, in isolation, this portion of the statute is not determinative of Clean Line's utility status. However, read in tandem with the facts that the transmission of the power must also be 'to or for the public for compensation' when Clean Line, to date, has no contracts for public utility service with any utility, including Arkansas utilities, and there also can be no transmission of power at this time, the Commission is not prepared to approve Clean Line's CCN Application.

Arkansas Order at 11 (emphasis added). The *Arkansas Order* further identified the key deficiency before it to be the information regarding Clean Line's current business plan and its present lack of plans to serve customers in Arkansas, and denied the certificate without prejudice to presenting more detailed and compliant business plans in the future:

> As the Parties all acknowledge, the issue of certification of a transmission-only public utility is one of first impression in this State. Thus, the Commission's decision is based on that [*sic*] fact that it cannot grant public utility status to Clean Line based on the information about its current business plan and present lack of plans to serve customers in Arkansas. Without pre-judging any future plans Clean Line may have or may bring before the Commission, the Commission denies Clean Line's requested CCN.

Id. at 11-12.

This same rationale is applicable here. RI has an uncertain and highly speculative business plan. What we know now is that RI has no customers. RI's favored and most likely customers are generators located in Iowa, if any, and any customers that it could obtain in Illinois would be served under individually negotiated arrangements. As unlikely as this is to ever constitute service to the public under *Mississippi River*, it is clear that RI has not carried its burden of proof now. The Commission cannot declare it to be a public utility on this record.

IV. PUBLIC UTILITIES ACT § 8-406(B) – REQUEST FOR CERTIFICATE FOR THE ROCK ISLAND PROJECT

A. Statutory Prerequisites for Public Convenience and Necessity

RI seeks an order granting it a "Certificate of Public Convenience and Necessity ... to construct, operate and maintain the Rock Island Project in Illinois and to operate a public utility business in connection therewith, pursuant to [Section] 8-406(b) of the PUA." Petition, p. 1 and ¶ 8). Section 8-406(b) of the PUA establishes the elements that must be proven for a public utility to obtain a CPCN to construct a new transmission line. It provides, in pertinent part:

> (b) No public utility shall begin the construction of any new plant, equipment, property or facility ... unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction. 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) (emphasis added).

The showings necessary for a finding that a proposed construction will promote the public convenience and necessity are plainly worded to require present affirmative showings – not future possibilities that have not yet occurred. While the PUA, like any statute, must be interpreted to effectuate the Illinois General Assembly's intent (*Barnett v. Zion Park Dist.*, 171 Ill. 2d 378, 388 (1996)), the best evidence of that intent is the plain and ordinary meaning of the

PUA's language itself. *People v. Fink*, 91 Ill. 2d 237, 240 (1982); *Illinois Wood Energy Partners, L.P. v. County of Cook*, 281 Ill. App. 3d 841, 850 (1st Dist. 1995). Under Illinois law, administrative agencies "'must construe the statute as written and may not, under the guise of construction, supply omissions, remedy defects, annex new provisions, add exceptions, limitations, or conditions, or otherwise change the law so as to depart from the plain meaning of the language employed in the statute.'" *Divane v. Smith*, 332 Ill. App. 3d 548, 553 (1st Dist. 2002) *quoting In re Tax Deed*, 311 Ill. App. 3d at 444; *see also Harrisonville Telephone Co. v. Ill. Commerce Comm'n*, 212 Ill. 2d 237, 251 (2004) ("Where the language of a statute is clear, we may not read into it exceptions that the legislature did not express.").

Arguments that RI is a "new type of entity" that the PUA did not anticipate and that should be entitled to leeway, or that other states' Commissions, operating under other statutes, have granted RI or its sister companies relief similar to what RI seeks here, are no replacement for the missing evidence demonstrating that RI is now entitled to a CPCN under Illinois law. Merchant or not, RI must meet the requirements of Illinois law in order to receive an Illinois CPCN. As described in more detail below, RI has failed to make the required statutory showings.

1. RI Has Not Demonstrated that the Project "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."

Section 8-406(b)(1) establishes that a transmission project may qualify for a CPCN if it is demonstrated "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 ...." 220 ILCS 5/8-406(b)(1). In this regard, the Petition stated:

> The Rock Island Project will be able to connect over 4,000 MW of wind turbine capacity in the wind-rich Resource Area and to deliver up to 3,500 MW of this power to Illinois, to meet the demand for electricity from renewable resources and the demand for electricity generally in Illinois. The Project will have the capability to deliver approximately 15 million megawatt-hours ("MWh") of electricity per year from the Resource Area to Illinois. By providing over 4,000 MW of capacity with access to the Illinois wholesale power markets, the Rock Island Project will increase available capacity and energy in the wholesale power markets and, ultimately, in the retail power markets in Illinois.

Petition, ¶ 15. The evidence did not develop as the petition alleged. RI's evidence purporting to establish that the line will benefit the competitive market is the testimony of RI witness Dr. McDermott. Dr. McDermott "evaluate[d] whether the proposed construction of the Rock Island Project will satisfy the statutory criterion in §8-406 that the Project will 'promote the development of an effectively competitive electricity market that operates efficiently [and] is equitable to all customers...'" RI Ex. 4.0 REV., 2:25-9.

Dr. McDermott claims that his analysis shows that "that the Project will allow lower cost generation to enter the Illinois market, which will create competitive downward pressure on prices in the wholesale market." *Id.* at 2:36-8. He further claims that the Project "promotes an effectively competitive electricity market by increasing the size of the supply side of the market competing to serve load in Illinois and opening the Illinois market to lower cost generation resources." *Id.* at 2:38-40. The record developed in this case fails to support the findings necessary to grant a CPCN pursuant to Section 8-406(b)(1) because the Project is far too indefinite and speculative to support such findings, and the analyses conducted by Dr. McDermott and others are based on unsupported and flawed assumptions regarding generation type, deliverability, costs, and benefits.

a. <u>The Project is Too Indefinite and Aspirational</u>

The Project is, at this stage, little more than a concept. To function, the Project must have transmission service subscribers, i.e., generators or load customers, accounting for a

majority of the line's capacity. To be financed and built, the Project must have transmission customers willing to guarantee or support, for project finance purposes, "sufficient capital to cover the total Project cost." Berry Add'l Supp. Dir., RI Ex. 10.13, 4:106-110. The Project, however, has attracted no customers. Wallack, Tr. 820:3-5; McDermott Tr. 122:22 – 123:5. And, it has attracted no committed lenders and investors to finance construction of the Project in the first place. Skelly, Tr. 273:16 – 274:6.

Customers are not all that is required. To deliver power in the quantities and types modeled – largely wind – new generation must be developed, constructed, and interconnected. The generation projects are not built and the Production Tax Credit recently expired. *See* Galli, Tr. 759:17-21 (no binding commitments to build generation in place); American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 407, 126 Stat. 2313, 2340 (2013). The risks are sufficiently great that Staff insisted upon a condition that major construction activity not *start* until full financing is procured. RI still has not determined how the line will be connected to the ComEd-owned transmission facilities at its eastern end. Galli Sur., RI Ex. 2.15, 41:888-95.

Furthermore, to be built in Illinois, the Iowa portion of the Project must be first approved by the Iowa Utilities Board. Skelly, Tr. 234:13-23. The Iowa process is in its infancy. The first filing was not made until July, 2013. *See Rock Island Clean Line LLC*, Docket Nos. E-22123 – E-22183. According to RI's CEO, the related franchise petition was not even filed at the time of the hearing. Skelly, Tr. 234:24 – 235:3. Moreover, RI does not expect an Iowa decision until 2015, and there is "not a statutory clock associated with the Iowa process." Skelly, Tr. 235:8-16.

On top of that, RI cannot afford to build the Project. As noted above, RI has no construction financing, and if RI, its siblings, and Clean Line spent their last dollar, they would have less than 2% of the funds required. Berry, Tr. 1060:21 – 1061:1. But, they will not do

that, because the evidence also shows that RI will not commit to fund and build Project. How can the Commission legitimately find that a project will result in market efficiencies when the market has not yet embraced the line and its own developer will not commit to build it? An analysis of such an uncertain and indefinite proposal cannot justify certification.

b. The Project is Based on Assumptions Regarding Generation Type, Deliverability, Costs, and Benefits that are Unrealistic, Speculative, and/or Otherwise Flawed

i. Not 100% Wind Generation

The RI witness who studied the Project's economics and claims that it promotes the market expressly "assumes that a hundred percent of the generation that will provide the power that will flow on the line is wind." McDermott, Tr. 122:17-21. Other RI witnesses also confirmed that the input data for their analyses are based on an hourly energy profile "equivalent to 100% wind." Galli, Tr. 757:14 – 758:8. [12]

However, it is clear that RI cannot assure 100% wind, and cannot even tilt the playing field toward wind. RI is prohibited from limiting the line to carrying only wind and FERC flatly denied RI's request to give wind generation a preference. *Rock Island Clean Line LLC*, 139 FERC ¶ 61,142 at P 31. RI witness Dr. Galli acknowledged that RI must serve any generator that seeks to inter-connect, no matter how non-renewable:

> Q. However, isn't it true that the project is not permitted to prefer wind energy?
>
> A. That is true. We asked for preference wind in our negotiated rate abilities filed with FERC and FERC denied that.

[12] RI witness Moland testified on rebuttal about PROMOD runs assuming 50% gas (Moland Reb., RI Ex. 3.5, 1), but the Loomis and McDermott studies do not use this "sensitivity" or render any opinion on how that case fit into their overall economic analysis. Moreover, no one studied any other case, including where no generation fully utilizes the line or where other forms of generation are included. Nor did Mr. Moland consider or evaluate why it is, on balance, least cost to deliver gas-fired power 500 miles to Illinois as opposed to simply building it here. Mr. Zuraski noted the need to analyze a similar question concerning the location of the wind generators. *See* Zuraski Dir., Staff Ex. 3.0, 17:326 – 28.

Q. And didn't FERC not only deny it but say that you must treat all comers regardless of the type of generation equivalently?

A. That is correct.

Q. So wind, combined cycle gas, coal, nuclear, or for that matter if somebody wants to build another DC line to points west power flowing out of the output of that, that it doesn't matter, you have to treat it all the same.

A. Yes, we have -- well, I think we refer to analogies; you have to be unduly discriminate. Or indiscriminate.

Galli, Tr. 758:4-20.

The record shows that neither the Commission nor any party can know today which type of generators will become subscribers of the line, if any ever do. The 100% wind assumption and the wind-based hourly energy profile used to develop RI's economic analyses are not supported by the record. As a result, the conclusions from such analyses cannot be relied upon to demonstrate compliance with the requirements for a CPCN.

ii. Delivery Quality and Limitations

RI's economic analyses also fail to take into account the delivery limitations that will result from the "to be determined" operating guides that PJM has indicated will be necessary to ensure system reliability. Rather, RI assumes that the line is able to provide full delivery of all energy reflected in the applicable hourly energy profiles used to conduct the economic analyses. As explained by ComEd witness Mr. Naumann, the analyses of benefits presented by RI's witnesses are incomplete and based on a speculative assumption about the Project's ability to deliver power. Naumann Reb., ComEd Ex. 4.0 REV, 18:364 – 19:369.

RI assumes the Project will permit the delivery and injection into the Illinois market, on a regular basis, of far more than the 1,192 MW of firm transmission capacity that would be available to RI under both of its queue positions. Naumann Dir., ComEd Ex. 1.0 2nd REV., 28:552-53; Naumann Reb., ComEd Ex. 4.0 REV, 18: fn. 28 (assuming delivery of approximately

15 Million MWh of wind generation per year). To arrive at this assumption, RI posits that "operating guides" (a series of actions including generator redispatch that must be able to be completed within 30 minutes in case of a triggering event) will be able to relieve limitations on the import of power into Illinois so that far more that 1,192 MW can be delivered on a regular basis over the proposed line. While we know there will be operational guides, those guides are yet to be determined and RI's assumption that they will have no effect on deliverability is premature, speculative, and not supported by the record.

iii. Excluded Costs

The economic analysis undertaken by RI witness Dr. McDermott further assumes that the cost of building and maintaining the line are completely paid by subscribing generators and therefore do not have to be netted against projected Illinois benefits. McDermott Tr. 122:9-16. In other words, RI's studies presume that Illinois customers pay none of the costs of the Project, but that those costs are borne by out of state generators – presumably wind.[13] These economic assumptions underpinning RI's arguments are not valid. The assumption that those generators will fund the $2 billion Project without any ultimate cost to Illinois consumers is simply not credible.

It is clear that in an efficient market, costs such as those that RI would impose on generators will be passed through in the market clearing price paid by load, even load that are not customers of the line. As Mr. Zuraski observes, "[t]o be a financial success, the costs of the Project and the costs of those wind farms utilizing the Project must be recovered." Zuraski Reb., Staff Ex. 6.0, 6:145-46. The generators will not "eat" them, but will pass them on "in the same

[13] ComEd notes that this assumption is contrary to RI's assumptions with respect to its qualification as a public utility. There, RI assumes that they will have Illinois transmission service customers – who would obviously be paying for the cost of building and operating the line. RI cannot have it both ways.

way that sale tax, even though nominally ... [o]n the seller, it eventually finds its way to the customers through the workings of the market." Zuraski, Tr. 681:6-9. RI's economic analysis ignores this inevitable reality.

On top of the $2 billion cost of the line itself, RI's analysis also ignores the costs that the hypothetical generators will have to pay to interconnect ***to*** RI's facilities. Dr. McDermott acknowledges that RI'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 ...." McDermott, Tr. 133:8-12.

Because RI's "witnesses focuse[d] only on certain alleged benefits of the project, RI[] has not compared the benefits to the project's expected costs" and has failed to demonstrate that the Project's benefits outweigh its costs. Zuraski Dir., Staff Ex. 3.0, 11:213-17. Although the generators will have to recover their costs, in RI's economic analyses, the Project's costs (construction, land acquisition, fees) are not treated as a cost at all, but as benefits. This upside-down treatment is based on the premise that those costs are also expenditures that stimulate Illinois economic activity but are paid by parties external to the Illinois market. McDermott, Tr. 122:9-16. Apart from the fact that it ignores how markets work and that the generators – if they are to be built – must bill customers for their costs, under this "Project for Free" assumption, the statutory least cost standard is turned on its head. Low cost projects are at a disadvantage and the $2 billion cost of the Project need never be recognized. Both that assumption, and the conclusions that rely on it, are illogical and unsustainable.

Lastly, RI persists in excluding from its economic studies network upgrades originally assigned to RI that will cost hundreds of millions of dollars because of the retool facilities study. Galli Reb., RI Ex. 2.11 REV, 12:258-260. The better evidence is that the hundreds of millions of

additional dollars of network upgrades that were originally identified by PJM and attributed to RI have not simply disappeared, but will be required if generators want to actually inject, on a consistent basis, levels of energy like that assumed in RI's economic models. Naumann Reb. Ex. 4.0, 3:58-59; Naumann, Tr. 965:7-20. The evidence shows that the injection of more than the anticipated 1,192 MW of energy, firm or not, poses a very real risk to system stability that must be mitigated. Naumann Reb., ComEd Ex. 4.0 REV, 8:153-9:174. RI believes that an as yet incomplete and untested PJM / MISO "operating guide" can safely address this problem on a permanent basis. Galli Reb., RI Ex. 2.11 REV, 24:509-511. On this key point, the testimony is in sharp dispute: RI's claim is made solely by Dr. Galli, an RI "developer" who has no experience operationally in PJM, let alone ComEd's transmission zone, and whose institutional interest is developing the Project. Dr. Galli advises the Commission not to worry. ComEd offers the testimony of Mr. Naumann, who has decades of experience, including in operations and security coordination in PJM and Illinois, in particular, and whose institutional interest is the protection of the system. Mr. Naumann points out – and RI witnesses admit, as they must – that the consequences of error are potentially catastrophic. Naumann Reb. Ex. 4.0 REV, 9:177-10:187, 11:218-225, 12:239-244.

iv. Other Questionable Assumptions

RI also asks the Commission to assume that -- notwithstanding RI's claim that it will connect over 4,000 MW of new wind turbine capacity in the Resource Area and deliver up to 3,500 MW of this power to Illinois -- there would be "no changes to investment decisions by other investors for projects coming online in the 2016-2020 period as a result of the Project, and likewise units that are close to closing do not accelerate their retirement plans in these years as a result of the Project." McDermott Dir., RI Ex. 4.0 REV, 21:431-34. It is irrational to assume that 4,000 MW of new wind turbine capacity will come online all at once at the same time.

Second, it is even more questionable to assert that no other projects will be impacted by the very large increase in capacity and delivery that RI asserts will occur. Such an assumption is neither reasonable nor rational, and the costs or loss of benefits to Illinois resulting from the impact of this project on other projects are not reasonably reflected in RI's economic studies. Naumann Reb. Ex. 4.0 REV, 36:694-697.

2. The Project is Not Necessary to Provide Adequate, Reliable, and Efficient Service to Customers

RI has emphasized throughout this Docket that its project is a market venture that will be built *if the market supports its construction*, not a project that must be built to satisfy any planning or operational standard. *See* Berry Add'l Sup. Dir., RI Ex. 10.13, 4:106-10. Indeed, RI makes clear that unless it contracts with transmission service customers, "the project will not go forward." Skelly Dir., RI Ex. 1.0, 32:768-771. At the same time, RI does not clearly eschew seeking a CPCN under the "necessary to provide adequate, reliable, and efficient service" provision of the Act. Its Petition invokes this portion of Section 8-406. *See* Petition, ¶ 21. However, no deficiency in the reliability of the transmission system is alleged in the Petition and the references to reliability are simply generic statements that transmission reinforcement is desirable (Petition, ¶34).

RI has not shown that the Project is required to provide adequate, reliable, and efficient service to customers. RI acknowledges that it did not submit the Project to be reviewed and prioritized on the basis of any public need by PJM and stakeholders. Berry Reb., RI Ex. 10.14, 57:1377 – 58:1387. That Regional Transmission Expansion Plan ("RTEP") process, under federal law, is charged with the review of transmission projects that "enable the transmission needs in the PJM Region to be met on a reliable, economic and environmentally acceptable basis." PJM Operating Agreement, Sch. 6, ¶ 1.1.

Indeed, the Project is not required to overcome any overloaded circuit, instance of instability, low voltage, or other system condition. Naumann Dir., ComEd Ex. 1.0 2nd REV, 6:118-23, 47:901-903. Nor does RI claim that it is. Dr. Galli, RI's technical witness confirmed that fact unambiguously:

> Q. And in your testimony you're not testifying that the electric system in Illinois is not reliable, correct?
>
> A. That is correct.
>
> Q. You're not testifying that the proposed addition of the Rock Island Clean Line is required to make the Illinois system more reliable, correct?
>
> A. That is correct.
>
> Q. And it remains to be correct that Rock Island has not provided independent studies from PJM or MISO demonstrating need for this project in this proceeding, is that correct?
>
> A. That is correct.

Galli, Tr. 749:20 – 750:8.

The testimony of RI concerning "loss of load" risk, apart from its serious flaws,[14] neither claims there is any elevated risk of loss of load without the Project and the additional generation, nor explains why the existing RTEP process would not be the appropriate means to identify the best and least cost means of remedying any such deficiency, if one were to actually exist. Nor does RI present any study or other evidence showing that the Project is the least cost means of providing additional reliability or security. Naumann Dir., ComEd Ex. 1.0 2nd REV, 39:744-49. RI's witnesses do not even address that subject, and RI's economic witness Dr. McDermott confirmed that he studied no other transmission line. McDermott, Tr. 120:18-22.

[14] *See* Naumann Dir., ComEd Ex. 1.0 2nd REV, 41:787 – 43:831; Naumann Reb., ComEd Ex. 4.0 REV, 35:685 – 36: 697.

Rather, in both its Petition and testimony, the vast majority of what RI claims as adequacy, reliability, or efficiency benefits are unrelated claims about how the Project will promote access to wind energy or allegedly reduce its costs. There is, however, no evidence that customers, absent the Project, will be unable to access adequate generation or the types of generation and/or RECs required to satisfy the Illinois RPS. Naumann Cross Reb., ComEd Ex. 3.0, 6:103-113. And, for the same reasons discussed in Section IV.A.1.a above, the Project is simply too indefinite and uncertain to reliably support any claim of increased access to any particular generator or type of supply.[15]

3. RI Has Not Proven that It Is Capable of Efficiently Managing and Supervising the Construction Process

RI alleges that it "is capable of efficiently managing and supervising the construction process for the Rock Island Project and has taken sufficient action to ensure adequate and efficient construction and supervision of construction." Petition at ¶ 50; see also *Id.* at ¶ 48. However, RI admits that neither it nor Clean Line has ever constructed a single transmission line. Berry, Tr. 1125:10-16. As discussed above and in Section IV.A.4, RI is a shell company with no assets and a very limited number of construction management personnel that would need to be supplemented to actually construct the project. RI's corporate parent, Clean Line, is similarly situated as a start-up development company with five transmission projects under similar stages of development. RI contends it will use third party firms to provide much of the needed

[15] There no precedent of which ComEd is aware for finding the delivery system inadequate, inefficient, or unreliable because it does not economically favor a supposedly preferred source of generation. Nor is there any corresponding requirement imposed on delivery utilities to provide preferential access to a particular source of generation. To the contrary, that conduct is prohibited, even for RI. *Rock Island Clean Line LLC*, 139 FERC ¶ 61,142 at P 31 (2012). Moreover, interpreting the adequacy, efficiency, and reliability provision of Section 8-406(b)(1) to encompass concerns about the market competitiveness of certain forms of generation creates needless duplication between the clauses of Section 8-406(b)(1) and, at its logical conclusion, swallows the second clause up in the first.

construction management expertise, but the reality is that no construction or construction management contract has been entered into at this time. Adam, Tr. 854:11-21.

ComEd concurs with Staff that RI has not provided evidence establishing that it has the capability to efficiently manage and supervise the construction of the proposed project for various reasons including:

- RI has not established that it will be able to hire the highly experienced employees that it acknowledges will be needed to oversee construction of the project;
- The lack of experience of the individuals that have been hired with respect to major transmission line projects in general and transmission line construction management and supervision in particular; and
- RI has no experience constructing even a single transmission line.

Rashid Dir., Staff Ex. 1.0, 15:327-44; Rashid Reb; Staff Ex. 7.0, 6:122 – 8:169.

4. RI Is Not Capable of Financing the Proposed Construction

As discussed above, Section 8-406(b) of the PUA requires the Commission to make findings regarding the applicant's present ability to finance the project:

> The Commission shall determine that proposed construction will promote the public convenience and necessity only if the utility demonstrates: ... (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 plain language of this provision requires separate showings that: (i) the utility is capable of financing the proposed construction; and (ii) the utility is able to finance the construction without adverse financial consequences for the utility or its customers. *See N. Moraine Wastewater Reclamation Dist. v. Ill. Commerce Comm'n & Rockwell Utils.*, 392 Ill. App. 3d 542, 551 (2d Dist. 2009) (Quoting testimony separately assessing capability to finance the operation and maintenance of the facilities in question and utility's ability to fund

construction of new facilities without adverse financial consequences for the utility or its customers.).

RI alleges that it and Clean Line "are capable of financing the construction of the Rock Island Project without significant adverse financial consequences to Rock Island and its customers." Petition, ¶ 53. The record, however, proves that RI has no assets or loan or equity commitments capable of financing the $2 billion cost of the Project. While RI has obtained venture investments from Clean Line, those investments are only intended to finance exploration development (as opposed to construction) of the Project as well as the menu of other DC line concepts Clean Line entities are advancing around the country. Berry, Tr. 1057:12-19. The bottom line is that all of RI's and Clean Line's assets and commitments together amount to **less than 2%** of the total estimated costs to build the Project. *Id.* at 1060:13 – 1061:1. This meager showing is far from sufficient to meet the statutory requirement, and stands in stark contrast to evidence of actual revenues and assets of the utility or its committed backer found sufficient to establish financial capability in *Moraine Wastewater Reclamation,* 392 Ill. App. 3d at 568-69 (Citing evidence of actual revenues, assets, and equity presently available to operate, maintain, and construct additional facilities.).

RI may point to its willingness to accept a condition that it will not install transmission facilities for the Project on easement property until such time as it has obtained commitments for funds in an amount equal to or greater than the total project cost. Berry Add'l Supp. Dir., RI Ex. 10.I3, 2:34 – 3:95. Whatever else can be said of this unprecedented condition, it does not demonstrate that RI has any present capability to finance the Project, as the law requires. RI may also claim that it likely can, and should be presumed to be able to, secure financing in the future. Should RI make that claim, ComEd will respond on the facts, as the record shows otherwise. The

evidence shows that claim to be speculative, even if RI had generators and customers and a means to recover the Project's costs.[16] "[A]ll evidence highlights the fact that [RI] is a shell company, a developer with no material current financial ability. Testimony regarding the financial capability of [RI]'s parent Clean Line or the financial strength of investors in Clean Line fails to demonstrate that Clean Line or its investors and backers have any commitment to provide funds to [RI]." Lapson Reb., ComEd Ex. 5.0, 15:306-10.

But, even if RI's claim that it could access financing in the future were somehow substantiated and putting aside the uncertainties and current lack of any customers to shoulder the Project's costs, a future prediction cannot satisfy the statutory requirement that RI prove that it is capable, at the time of certification, of financing the Project. There is no doubt on this record that RI is not and, therefore, RI fails to satisfy this critical element for receiving a CPCN.

B. Route of the Project / Land Acquisition

1. Proposed Route

ComEd takes no position on RI's proposed route. ComEd, however, notes that RI has not provided the detailed level of evidence and route descriptions historically required by the Commission in CPCN cases, particularly for the 765 kV line that they belatedly and alternatively proposed for the first time in Dr. Galli's surrebuttal. *See* Section IV.B.1 below.

2. Proposed Easement Widths

ComEd takes no position on RI's proposed easement widths.

3. Easement Acquisition and Landowner Compensation

ComEd notes that should RI be granted an order authorizing and directing the construction of the Project under Section 8-503, it will have only the relatively minimal

[16] *See generally* Lapson Dir., ComEd Ex. 2.0; Lapson Reb., ComEd Ex. 5.0.

additional burden of showing that it is at an impasse with a single landowner before having the right to take private property along the entire route for its "merchant" project. 220 ILCS 5/8-509; 83 Ill. Admin. Code 330. In effect, that impasse already exists. Marshall, Tr. 630:8-21. Legally, RI cannot properly be granted an order under Section 8-503 for the reasons stated in Section V, *infra*.

C. Design and Construction of the Project

1. Proposed Structures and Other Components

ComEd notes that the Petition does not request authority to construct, operate and maintain a 765 kV AC line, whether on single-circuit poles or any other structures. In his surrebuttal testimony, RI witness Dr. Galli mentions such a concept for the first time. Galli Sur., RI Ex. 2.15, 42:916-18. Presentation in surrebuttal of a new type of line – operating at a different voltage, with a different capacity – is far too late. *Northern Moraine Wastewater Dist.*, 392 Ill. App. 3d at 575-76. Moreover, even this belated testimony includes absolutely no detail about the line or the structures on which it will be built, detail that the Commission has historically required. There is no cross-section diagram, analysis of right-of-way requirements, or specification of right-of-way utilization. There is no project-specific cost estimate of the 765 kV line, or the required transformation and substation equipment. The Commission has never authorized a 765 kV line – or any major project – based on such little information.

2. Landowner Concerns about Impacts of Construction of the Project

ComEd expresses no position on this subject in this Docket.

V. RI'S REQUEST FOR AN ORDER AUTHORIZING AND DIRECTING CONSTRUCTION UNDER 8-503

Section 8-503 of the PUA specifies that when the Commission finds, "after a hearing" that additions "are necessary and ought reasonably be made" or new facilities are "necessary and

should be erected, to ... promote the development of an effectively competitive electricity market, or in any other way to secure adequate service or facilities," ... "the Commission shall make and serve an order authorizing or directing that such additions ... be made ... or such structure or structures be erected at the location, in the manner and within the time specified in the order ...." 220 ILCS 5/8-503. The Commission has historically issued Section 8-503 orders to established public utilities to make additions or extensions to existing facilities, to safeguard plant, equipment, or health of utility employees, and when there has been a showing of public use and necessity. *See, e.g., Brotherhood of Railroad Trainmen v. Elgin, J & E Ry. Co.*, 382 Ill. 55 (1943); *Gernand v. Illinois Commerce Comm'n*, 286 Ill. App. 3d 934 (4th Dist. 1997); *Illinois Power Co. v. Lynn*, 50 Ill. App. 3d 77 (4th Dist. 1977). To date, the Commission has not issued a Section 8-503 order to a start-up private venture company desiring to build a speculative $2-billion merchant transmission project.

Assuming for the sake of argument RI established under Section 8-406(b) of the PUA that public convenience and necessity require the Project, RI would be free to proceed with construction of the Project. RI's purpose in seeking an order from the Commission under Section 8-503 is clearly two-fold. First, RI would like an order directing it to build the Project as a "necessary" addition to the interstate transmission system. Second, RI seeks an order under Section 8-503 to use as leverage in negotiations with private landowners whose land RI will need to acquire for the Project. Should its voluntary negotiations with the landowners fail, RI will use its 8-503 order as the legal precursor for exercising the power of eminent domain to involuntarily acquire the property rights necessary for the speculative Project.

A. Because The Evidentiary Record Shows That The Project Does Not Satisfy The Requirements Of Section 8-406(a)-(b), There Certainly Is No Basis For The Commission To Take The Extraordinary Step Of Ordering The Project's Construction Under Section 8-503.

RI's request for an order under Section 8-503 is both premature and inconsistent with RI's own testimony and the contingent nature of RI's commitment to build the Project. Indeed, on this evidentiary record, it would be highly unusual, if not unprecedented, for the Commission to issue an order directing the construction of an interstate bulk power transmission line premised on a public need to promote the development of an effectively competitive electricity market or to secure adequate service or facilities when, as discussed above, there are more questions than answers. The uncertainties include the Project's design, operation, and financing; and the regulatory review process in other jurisdictions is lagging several months, perhaps longer, behind Illinois. Yet, that is precisely what RI wants this Commission to do.

As noted, the FERC-jurisdictional interconnection planning process has not been completed. McDermott, Tr. 154:17 – 155:3. The Project has not been fully vetted under the PJM RTEP process as one that is justified by a public need, be it reliability or market efficiency. As previously discussed, RI's economic analyses are based on flawed assumptions and do not satisfy RI's evidentiary burden with respect to the Project's purported market benefits. A transmission facility like the Project is defined by its interaction with the rest of the electric system. That interaction controls not only how it operates, but its economics and, to a great extent, what the facility will actually entail. At present, the studies that will determine how RI will interconnect with PJM, how it will interact with MISO, and how it will have to limit its operations to make that interconnection functionally possible are uncertain and incomplete. *Id.*

Also incomplete, and lagging several months behind the instant proceeding, is the regulatory review proceeding in Iowa, where the proposed Project originates and traverses some

379 miles across that state. Indeed, RI President, Michael Skelly, acknowledged that the Iowa proceeding likely will not be concluded until early-2015. Skelly, Tr. 235:8-13. Depending on the outcome of the Illinois and Iowa regulatory proceedings, Clean Line may decide to abandon or postpone the Project and focus its limited financial resources on one of the four other transmission projects currently under development. Skelly, Tr. 269:12-23.

In addition, RI today does not know what generators (if any) it will serve or what their operating and fuel characteristics will be. Moreover, the conditions under which the Project and those generators will have to operate and coordinate are not known. And we still do not know at this late date how much it will cost to alleviate or avoid these operating restrictions, let alone who will bear the costs. Indeed, RI's executives candidly testified that whether the Project can or will be constructed is a fluid situation, subject to several conditions. Skelly, Tr. 270:8 – 273:9. For example, RI's CFO, Mr. Berry, testified that "permanent installation of facilities cannot and will not commence unless and until the need for the Project is actually established through the market test of transmission customers contracting for sufficient service on the transmission line to support and justify financings that raise sufficient capital to cover the total Project cost." Berry Add'l Supp. Dir., RI Ex. 10.13, 4:107-110. That has not occurred and whether it ever will occur is unknown. RI admitted that it currently has no binding capacity contracts with shippers (Berry, Tr. 1061:2-19, 1117:8 - 1118:3) and has further stated that "[i]t is unlikely that the Project would be built with only 60% of the capacity contracted." Naumann Dir., ComEd Ex. 1.0 2nd REV., 10:193-6 and fn. 8; Berry Add'l Supp. Dir., RI Ex. 10.13, 4:106-10; Berry Tr. 1120:15-23. These frank statements contradict RI's claims that the Project is a transmission addition essential to meet a public need that the Commission should unconditionally order RI to construct. Answers to these critical open questions are months, if not

years away, but in any event will be forthcoming well after the Commission rules in this Docket. The Commission should not set a new and dangerous precedent by approving this incomplete, speculative, private venture and directing its construction.

B. RI's Primary Objective in Seeking an Order Under Section 8-503 Is To Facilitate Its Ability To Acquire Eminent Domain Authority And Initiate Condemnation Lawsuits To Obtain The Property Interests It Requires.

The fact that RI admits that it will not construct the line in Illinois until it obtains regulatory approval in Iowa, raises hundreds of millions of dollars, and subscribes at least 60% of the capacity, suggests that its primary motivation in obtaining a Commission order under Section 8-503 is to use it as leverage in negotiations with private landowners whose land RI will need to build upon. Failing those voluntary negotiations, RI will have in hand a Section 8-503 order to use as the legal basis for pursuing condemnation actions against unwilling landowners. RI recognizes that negotiating easement transactions with several dozen landowners could be time consuming and acrimonious, and having a Section 8-503 order in hand will strengthen its negotiating position with landowners and add credibility to RI's claim that it can acquire the necessary property one way or the other. Skelly, Tr. 142:11 – 143:19. Similarly, when voluntary negotiations with landowners reach an impasse, having a Section 8-503 order will streamline RI's ability to obtain eminent domain authority and pursue condemnation actions to acquire the property interests that the Project requires. In light of the record in this case, filled as it is with various contingencies that will delay or even prevent construction of the Project, the Commission should not take the extraordinary, precedent-setting step of arming RI with an order that will permanently impact private property rights, whether used as leverage in easement negotiations or as the legal predicate to allowing RI to take private property in condemnation proceedings.

C. The Commission Should Deny RI's Premature Request For An Order Under Section 8-503, Particularly When Such An Order Would Have Such A Permanent And Potentially Damaging Impact on ComEd, Illinois Transmission Customers, And Private Landowners.

As a merchant facility that has not been demonstrated to have a public need under the applicable regional planning standards, whose design, operation, and financing remain in flux, and whose support from its management and potential generators to pay for its billion-dollar costs has ranged from lukewarm to cold, RI's request for an order under Section 8-503 should be rejected at this time. Because no party in this proceeding, not even RI, can be sure that the Project will be built or, if so, with which conditions attached, RI has no reasonable basis to expect the Commission to set new precedent and issue an order unconditionally directing that the Project be built. The Commission simply cannot order a project to be built at the urging of a private developer that will not commit to building it, and who cannot make a compelling case today that building it is necessary to provide adequate, reliable, and efficient service or to promote an effectively competitive electricity market. Rather than endorse what amounts to a premature, highly-contingent gamble, the Commission should instead follow its precedent and defer its ultimate rulings on the merits of RI's requests until the company comes forward with the complete evidentiary basis that would provide the necessary framework for fully and fairly evaluating the Project.

VI. RI'S ACCOUNTING-RELATED REQUESTS

ComEd expresses no position on this subject in this Docket.

VII. CONCLUSION / REQUEST FOR RELIEF

The Commission has always treated its responsibility under Section 8-406 seriously and required applicants to prove each of the requirements established by the PUA, whether they seek utility status or approval of a utility transmission project. The record shows RI has fallen far

short of those standards. The Commission should not certify as a public utility a self-professed merchant developer that has no Illinois customers, that cannot hold itself out as able to serve Illinois customers, and that cannot commit to ever investing in, constructing, and operating utility assets in Illinois. The Commission should not certify a proposed transmission facility that is speculative and premature, and lacks essential substance and detail concerning its design, operation, and cost. Nor should the Commission enter an order directing such a merchant developer to build a transmission project as necessary, where the developer refuses to participate in the applicable priority-setting regional planning process and will not even commit to build the Project.

The Commission should therefore deny RI's request for CPCNs without prejudice to RI's ability to resubmit its Petition when (1) the material uncertainties surrounding the Project have been resolved, and (2) it unconditionally commits to build the Project and to maintain the Project as a merchant transmission line. ComEd supports efficient competition and the construction and operation of transmission resources in the public interest, but those laudable goals do not permit disregard of the law and facts in the hope that the outcome will be pro-competitive or will support renewable energy. Based on the record as it exists today, including the significant operational and financial uncertainties and risks, the Commission should not issue a CPCN to RI, and certainly should not order that the Project be constructed.

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Respectfully submitted,

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