BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity Authorizing it to Construct, Own, Operate, Control, Manage, and Maintain a High Voltage, Direct Current Transmission Line and an Associated Converter Station Providing an interconnection on the Maywood-Montgomery 345 kV Transmission Line	)	Case No. EA-2016-0358

SHOW ME CONCERNED LANDOWNERS'
REPLY POST-HEARING BRIEF

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SHOW ME CONCERNED LANDOWNERS'
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INTRODUCTION

Grain Belt Express is a merchant transmission company and is proposing to build a participant-funded transmission line. Grain Belt Express has a customer: the Missouri Joint Municipal Electric Utility Commission ("MJMEUC"). And MJMEUC says it wanted and got a very good deal from Grain Belt Express. How good was the deal, you ask? Very good, MJMEUC replies. Mr. Grotzinger of MJMEUC says, it's a "rare cost saving opportunity."[1] Mr. Lawlor for Grain Belt Express says, it has "extraordinary economic benefits."[2] They cannot tell you the terms of the deal. That is confidential, and to do so would breach a Joint Defense Agreement they have with each other in making the deal.

It was a hard sell. Mr. Grotzinger and MJMEUC did not originally want the deal, believing it to be an unnecessary duplication of facilities.[3] But Grain Belt Express wore them down. Now MJMEUC likes the deal so much it has been working hard to get its members to sign on to the deal. And now they want the Missouri Public Service Commission ("Commission") to help Grain Belt Express make sure the deal gets done.

Now Infinity Wind Power is part of the deal. During the pendency of the case, they cut a deal with MJMEUC to sell them wind power on the Grain Belt Express project. As all three parties to the deal, Grain Belt Express, MJMEUC, and Infinity Wind Power, state, this is a good deal. And what is better, all deals are voluntary. It will result

[1] Ex. 476, MJMEUC witness Grotzinger rebuttal testimony, p. 4.
[2] Ex. 116, GBX witness Lawlor direct testimony, p. 9.
[3] Mr. Grotzinger observed in an email, "they are clearly looking for support after losing vote. What they don't get is that the Missouri munis are already engaged in wind and other renewables. They don't really add value for Missouri since most get value on east and skips Missouri. They are not willing to share that value of transmission on east (I asked). Not that it would justify commitment, but that is academic since they are not willing to include. They are not fixing transmission issues, only trying to bypass responsibility and leave others with the cost of underlying transmission system." Tr. Vol. 16, pp. 1044-1045.

in the free market at work. Infinity Wind Power expresses its view: "It is also reasonable for the Commission to recognize there are FERC policies in place governing participant-funded projects ensuring that the market will determine the appropriate value of the transmission service, thereby placing the economic risk of such projects on voluntary customers and investors, not captive ratepayers."[4]

But that is not entirely true. If the Commission grants this CCN, one party will be denied the right of engaging the free market: the Missouri landowner. They will be subjected to the economic coercion of the state power of eminent domain to take their property for the benefit of all these happy voluntary market participants. These voluntary parties will not bear the risk of dealing with truly free landowners. Grain Belt Express may simply condemn the land if the price gets too high.

Grain Belt Express, MJMEUC and Infinity Wind Power should not have it both ways. If they want to conduct a truly voluntary business, then let them do so. But make it a truly voluntary transaction for all participants, including the Missouri landowners. Preserve the landowners' liberty. Assure them what the other parties to the transaction have, the right to negotiate without the coercion of the state eminent domain authority. Only then will the true price of the project, including the true price of the land, be reflected in the project.

It is a telling consideration that the riskiest part of the transaction is the regulatory approvals.[5] Investors and customers are standing on the sidelines until the regulatory approvals are obtained. They want to know that Grain Belt Express will have the regulatory approvals, the right to condemn land, before they invest or commit to the

[4] Initial Post-Hearing Brief of Infinity Wind Power, pp. 12, 13.
[5] Tr. Vol. 10, p. 269.

project.[6] But that is not how the free market works. In a free market, investors invest, understanding that all parties to the transaction can deal freely, not after some of the parties have been constrained in their right to freely negotiate.

Grain Belt Express cited Commissioner Coleman's Concurring Opinion in *In re Ameren Trans. Co. of Illinois*, Report and Order at 37, No. EA-2015-0146 (Apr. 27, 2016). Commissioner Coleman wrote in her concurring opinion: "In an ideal world, we could find a compromise that would meet the needs of all, instead of leaning towards what benefits the majority. Unfortunately, that is not the world in which we currently live." Id., Concurring Opin. of Comm'er Coleman. Fortunately, unlike the *Ameren Trans. Co. of Illinois* case, in this case we can have an ideal free world. We can find a compromise that will meet the needs of all. This transaction is voluntary for Grain Belt Express, it is voluntary for MJMEUC, it is voluntary for Infinity Wind Power. It should be voluntary for the landowner. Assure that the project remains voluntary for the landowners and deny the application.

ARGUMENT

A. Public Service

A merchant transmission project, such as the one Grain Belt Express, MJMEUC and Infinity Wind Power are pursuing, is not the business that this Commission was intended to foster. Despite what MJMEUC claims, Show Me Concerned Landowners ("Show Me") does dispute the fact that Grain Belt Express is an "electrical corporation" and a "public utility." The case is clear; the facts are clear. There is no dispute. Grain

[6] Tr. Vol. 14, p. 935.

Belt Express champions that it has a participant-funded business model. It will not devote its facilities to the public use.

The Missouri Supreme Court set out the characteristics of an "electrical corporation" in the case of *State ex rel. M. O. Danciger & Co. v. Public Service Commission*, 275 Mo. 483, 205 S.W. 36; 18 A.L.R. 754 (Mo. 1918). The key to the Court was that there must be a public use. By way of explanation, the Court cited Mr. Wyman, in his work on Public Service Corporations, saying:

> There are, however, several cases where the company supplying electricity has not professed to **sell to the public indiscriminately** at **regular rates**, but has from the beginning adopted the policy of entering into **special contracts** upon its own terms; such companies are plainly engaged in private business.[7] (emphasis added)

To be an "electrical corporation," service must be granted indiscriminately at rates that are "regular." Neither can be said for the MJMEUC TSA or the "open solicitation" process.

All the parties to the MJMEUC deal agreed in their initial briefs that Grain Belt Express is not an electrical corporation or a public utility as defined in *Danciger*.

- [MJMEUC] "The customers of a participant-funded transmission line such as Grain Belt are voluntary customers who choose to ship energy on the line, and thus don't require the Commission's protection as would captive rate-paying customers of a traditional utility."[8]

- [Grain Belt Express] "In fact, Grain Belt Express' sole business is providing wholesale electric transmission service, not retail electric service, across new, discrete transmission facilities."[9]

- [Infinity Wind Power] "It is also reasonable for the Commission to recognize there are FERC policies in place governing participant-funded projects ensuring that the market will determine the appropriate value of the transmission service,

[7] 205 S.W. at 41.
[8] Missouri Joint Municipal Electric Utility Commission's Initial Post-Hearing Brief, p. 8.
[9] Initial Post-Hearing Brief of Applicant Grain Belt Express Clean Line LLC, p. 16.

thereby placing the economic risk of such projects on voluntary customers and investors, not captive ratepayers."[10]

Clearly, this is not public service as *Danciger* requires. Grain Belt Express may pursue transmission service agreements with customers using a bidding process or "open solicitation" pursuant to a FERC order in Docket No. ER14-409. So far, Grain Belt Express has had three open windows to their one "open solicitation,"[11] and yet they only have one TSA, the one with MJMEUC. It is hard to tell how the "open solicitation" has worked. The FERC application says Grain Belt Express will do one thing but the MJMEUC deal was not handled as the FERC application describes.[12] It is unclear how the MJMEUC TSA was negotiated pursuant to that FERC Order. Everything is shrouded in secrecy, not open and transparent, even as the FERC Order requires. But negotiations progressed as Grain Belt Express wanted them to progress.[13]

The service is very limited. Grain Belt Express does have 500 MW of transmission service to sell in Missouri. That amount has been diminished by MJMEUC's sweet heart deal.[14] Grain Belt Express claims that this amount of capability will be contracted out through an open solicitation.[15] But once that capability is contracted for, there is no more. Grain Belt Express does not intend to offer its service to

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[10] Initial Post-Hearing Brief of Infinity Wind Power, pp. 12, 13.
[11] Tr. Vol. 14, p. 776.
[12] **"Q. Also at the bottom of that page 15 [of the FERC Application] you state that, "Preliminary meetings will be publicly noticed on the applicant's website," is that correct?**
A. Correct.
Q. Now did you notice, publicly notice, the meeting between MJMEUC and Clean Line?
A. We didn't, but I will say that's not a meeting that's covered by this commitment here.
Q. So is this agreement, this TSA with MJMEUC, a result of the open solicitation?
A. I would say yes, it's a result of their request for service. MJMEUC requests for service through the open solicitation.
Q. Yet, you did not notice the meeting publicly?
A. That's correct, we did not notice meetings for individual negotiation of this agreement, the agreement with MJMEUC." Cross examination of Grain Belt Express witness Berry. Tr. Vol. 14, pp. 782, 783.
[13] Tr. Vol. 11 (HC), p. 302.
[14] Tr. Vol. 14, p. 944.
[15] Tr. Vol. 14, p. 776.

the public and does not intend to build additional facilities to serve the public.[16] The bidding process is under Grain Belt Express' control and judgment. This is not a public service as described in *Danciger*.

Staff claims the open solicitation is an offering of electric transmission service to the public without discrimination, and, therefore, Grain Belt Express is a public utility.[17] Show Me finds it hard to understand Staff's positon, as did a recent Illinois Court of Appeals opinion. In *Illinois Landowners Alliance v. Illinois Commerce Commission*, the Third District found that Rock Island Clean Line, a project virtually identical to the Grain Belt Express, was not a public utility. The facts are virtually identical to this case and the reasoning is virtually identical to *Danciger*.

> Similarly, Rock Island's plan does not devote assets for public use in Illinois without discrimination. The anchor tenants, who will use a majority of Rock Island's transmission capacity, are wind generators in the resource area of northwest Iowa, South Dakota, Nebraska, and Minnesota. According to Rock Island, 75% of the project's capacity will be sold to generators in the resource area, who will then use the transmission line to deliver their product to the PJM grid. PJM will then distribute the renewable energy electricity to members of its multistate regional transmission organization. The remaining 25% will be sold to those seeking transmission services through an "open season" bidding process approved by the FERC. The FERC order approving the sale of excess capacity does not mandate that an Illinois wind generator or other renewable energy generator participate in the bidding process. But if it did, there is no way to know whether an Illinois energy generator will submit a successful bid. Moreover, the project does not designate any part of the renewable energy transmitted along the proposed line for public use in Illinois. Thus, it fails to satisfy the statute's public use requirement.

A copy of the Court's opinion is attached hereto as Attachment A. An open solicitation is simply not comparable to an indiscriminate offer of service to all comers. The right to bid is not comparable to the right to receive service.

[16] Initial Post-Hearing Brief of Applicant Grain Belt Express Clean Line LLC, p. 16.
[17] Staff's Initial Brief, pp. 3, 4.

B. Public Convenience and Necessity

Much has been written about the public convenience and necessity. Grain Belt Express wants to put the public interest in terms of the state's interest, such as tax collections and economic development, with some minimal advantages in lower production cost and improved reliability. Much of the remainder of Grain Belt Express' discussion of public interest is of its attempts to ameliorate the burdens placed on landowners by its proposed project.[18] (But minimizing a burden on the public interests does not constitute a public benefit.) Infinity Wind Power does much the same, focusing on the benefit MJMEUC can enjoy and the additional tax revenues and economic activity the state can enjoy.

MJMEUC has gone so far as to define the "public interest" in terms of "MJMEUC's public." MJMEUC cites to the Commission's *Report and Order* in the prior Grain Belt Express case, Case No. EA-2014-0207, and the language that observes "[i]ndividual rights are subservient to the rights of the public." This line of argumentation is premised on the Commission's citation of a case in that *Report and Order*, *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956). MJMEUC concludes that, "the public [MJMEUC] represents must indeed be of concern to the Commission in assessing the public interest for the Grain Belt Express project." One can only assume that MJMEUC wants all other publics to give way to its public in this case. It wants its public to receive a benefit at the expense of the landowner public.[19]

[18] Initial Post-Hearing Brief of Applicant Grain Belt Express Clean Line LLC, p. 32 et seq.
[19] Missouri Joint Municipal Electric Utility Commission's Initial Post-Hearing Brief, p. 11.

MJMEUC is wrong as discussed in Show Me's Initial Post-Hearing Brief. And Grain Belt Express and Infinity Wind Power are wrong in their assessment of the public interest. The *Mo. Pac. Freight Transport* case does not stand for the proposition MJMEUC or the Commission say it does. The Supreme Court opinion,[20] rendered after transfer from the Kansas City Court of Appeals, speaks precisely to this case and, therefore, deserves to be quoted at length. This Commission must protect not MJMEUC's public; it must not protect the state interest; it must protect the existing investments in the state.

The facts of the *Mo. Pac. Freight Transport* case are relatively simple. Missouri Pacific Freight Transport Company had, from a corporate parent, a certificate of public convenience and necessity to provide railroad service as well as several narrowly defined motor vehicle freight certificates to transfer freight from railroad depo to railroad depo. The Court described the application as follows:

> In relator's instant application, . . . , it is sought to have the authority (formerly granted to the Railroad) modified, enlarged or broadened, as stated, so as to permit relator to pick up, transport between points or towns, and deliver freight in its over-the-road motor equipment directly from and to its customers, thereby entirely abandoning the use of Railroad's depot facilities insofar as motor-carried freight is concerned.[21]

It also described the finding of the Commission:

> [I]f relator should be granted the authority requested, it would have an adverse financial effect on motor carriers of freight presently authorized to serve the areas. The Commission denied the application as to all towns named therein (except as to Houstonia and Hughesville) on the ground that relator failed to prove public convenience and necessity.[22]

[20] *State ex rel. Missouri Pac. Freight Transport Co. v. Public Service Commission*, 295 S.W.2d 128 (Mo., 1956).
[21] 295 S.W.2d at 131.
[22] *Id.*

The Court gave its observation in summary, which presumably contains the language the Commission and MJMEUC relied on.

> The Commission has the responsibility of determining the public's need for common-carrier service sought and of considering a new, enlarged, extended or additional, and duplication of service would adversely affect presently authorized carrier service with resultant deterioration of efficiency in adequately supplying the transportation needs of the public. In the determination of these matters, the **rights of an applicant**, with respect to the issuance of a certificate of convenience and necessity, **are considered subservient to the public interest and convenience**.[23] [emphasis added]

The Commission must notice that the rights of the applicant are subservient to the public interest and convenience and not the other way around. The Court went on to describe what the needs of the public are at length.

> Now Commission's regulatory powers and duties have been delegated to and enjoined upon it by the legislature in harmony and with the time-tested theory of regulatory law. [citations omitted] In a case decided in 1929 after the enactment of the Motor Bus Regulation Act of 1927, supra, this court, quoting Pond on Public Utilities, 3d Ed., Sec. 731, said, "The very purpose of regulation by state agencies is to secure **uniformity of operating conditions among similar utilities** and to **save the economic waste that follows unregulated and useless duplication** of service, which destroys itself and fails to furnish permanent satisfactory service at fair rates and cripples the existing necessary systems, commits waste and impairs the public service." [citations omitted] See now Pond on Public Utilities, Vol. 3, 4th Ed., Sec. 775, pp. 1552 et seq., where additionally it is said the policy of regulation upon which our present commission plan is based is at once the reason and the justification for the holding of our courts that the regulation of an existing system of transportation, which is properly serving a given field, is to be **preferred to competition** among several **independent** systems. 'The prime object and real purpose of commission control is to secure adequate sustained service for the public at the least possible cost, and to protect and conserve investments already made for this purpose. Experience has demonstrated beyond any question that **competition among natural monopolies is wasteful economically and results finally in insufficient and unsatisfactory service and extravagant rates**. * * * Anything which tends to cripple seriously or destroy an established system of transportation that is necessary to a community is not a convenience and necessity for the public and its introduction would be a handicap rather than a help ultimately in such a field.'[24] [emphasis added]

[23] 295 S.W.2d at 132.
[24] 295 S.W.2d at 133.

See also *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147 (Mo. App.W.D., 1980).

In this case, the public interest is every interest but the interest of Grain Belt Express, MJMEUC, and Infinity Wind Power. It is every interest except the interest of the state. The public interest is the interest of the investors that have already made investments in the existing transmission grid and in the RTO construct the Commission has fostered in the state over the past decade or so. The public interest is the interest of the landowners who have made investments and will make future investments in their land. The public interest is to avoid economic waste to these preexisting investments. These preexisting rights are the interests cloaked with a constitutional protection of property. Merchant opportunities enhanced by the Commission's CCN authority are not vested with the same rights. It is the Commission's function to protect these investments that would be threatened by this duplicative transmission system. The Commission should reject the Application.

C. Economic Feasibility

Show Me addressed the economic feasibility of the project in its Initial Post-Hearing Brief. In that brief Show Me showed that the Grain Belt Express' economic feasibility analysis of its project is deeply flawed.

Grain Belt Express' discussion in its Initial Post-Hearing Brief perpetuates its flawed analysis. The Initial Brief claims that Mr. Berry's analysis shows that the "first mover" rate causes the levelized cost of service to drop significantly. It goes on to

explain its flawed analysis by describing additional dubious adjustments, including the cost of carbon dioxide emissions and questionable assumptions for natural gas prices.[25]

Show Me's witness Justis showed Mr. Berry's analysis to be deeply flawed. Grain Belt Express' diatribe against Mr. Justis' testimony in its Initial Post-Hearing Brief does not change the facts. Grain Belt Express' Initial Brief produces a lot of heat but no light on the issue of economic feasibility. And Infinity Wind's Initial Brief simply mischaracterizes Mr. Justis' testimony. Grain Belt Express' pseudo angst regarding Mr. Justis' Exhibit 420 (HC) would have this Commission believe that the Commission's hearing process works differently than it does. The Levelized Cost of Energy analysis ("LCOE") conducted by Mr. Justis, of necessity, is an analysis that must be refined and updated as information comes to light. While Mr. Justis has been willing to adjust his analysis in response to new information from Grain Belt Express, Grain Belt Express has not adjusted Mr. Berry's analysis even in response to the Commission's *Report and Order* in Case No. EA-2014-0207, as Show Me will discuss below.

Grain Belt Express has had years to make its analysis right and has not. Mr. Justis had a few months to prepare his analysis. On some of the issues Mr. Justis addressed in his LCOE, he was not aware of Grain Belt Express' information until the Grain Belt Express filed its surrebuttal testimony, such as with the adjustment to the cost of the converter station. Mr. Proctor, on whose testimony the Commission based its *Report and Order* in Case No. EA-2014-0207, adjusted his LCOE during the hearing.[26] Mr. Justis, in a good faith attempt to produce the best results he could from Mr. Berry's surrebuttal testimony for the Commission, made his changes in a more formal way, via changes to

[25] Initial Post-Hearing Brief of Applicant Grain Belt Express Clean Line LLC, pp. 38, 39.
[26] Case No. EA-2014-0207, Tr. Vol. 15 (HC), p. 1362.

his study and testimony. The Commission should not give into Grain Belt Express' attempt to obfuscate the impact of the few tweaks that Mr. Justis made to his testimony. The Commission should remain focused on the purpose of the LCOE as it so declared it in Case No. EA-2014-0207, as Mr. Justis did.

The problem is that Brain Belt Express refuses to recognize the material differences between its biased analysis and the way the Commission recognizes the analysis should be done. Regarding the LCOE, the Commission found that,

> Levelized cost analysis provides a way to compare investment alternatives that have differing investment costs, expenses, and asset lives. In regulated utility analysis, levelized costs represent the per-year revenue requirement to cover the return of and on investment as well as annual expenses over the life of the asset. It is an appropriate method to use in comparing resources that run at 100% of their capacity, which are sometimes called base-loaded generation resources.[27]

Mr. Berry states in his surrebuttal testimony that even to this day he disagrees with the Commission's adoption of the Proctor approach in the last case.[28] Mr. Justis did not disagree with the Commission's approach and followed it. Grain Belt Express' quibbles do not overcome their basic refusal to recognize the way the utility industry conducts a LCOE.

Grain Belt Express quibbles with Mr. Justis' use of EIA data for the cost of wind energy and operating and maintenance expenses.[29] Grain Belt Express picks and chooses data from various sources, picking data that is favorable to the Grain Belt Express project. As Mr. Justis explained, EIA data is reliable, but more importantly, it is

[27] *Report and Order*, Case No. EA-2014-0207, p. 14.
[28] Ex. 105, GBE witness Berry surrebuttal testimony, p. 10.
[29] Initial Post-Hearing Brief of Applicant Grain Belt Express Clean Line LLC, pp. 43.

consistent.[30] Inasmuch as consistency is the hallmark of the LCOE comparison, as discussed by the Commission, Mr. Justis' data is preferable.[31]

The Grain Belt Express data is not reliable. The Lawrence Berkley National Laboratory Report explicitly recognized that the installed project cost figure of $1,690/kW quoted by Grain Belt Express was perhaps skewed to the low side stating, "Although the EIA's capacity-weighted average cost for 2013 is higher than that derived from our sample (which is perhaps skewed to the low side by one sizable project in a year when little capacity was built), it is nevertheless aligned with the declining cost trend from 2009 to 2015."[32] And the phantom investment number of approximately $1,554/kW on Mr. Langley's Schedule ML-3 has no verifiable way of assessing the validity of the number.[33] Schedule ML-3 is a promotional piece designed for public relations purposes, not regular utility analysis.

Grain Belt Express disagrees with the Commission's and Mr. Justis' use of the capacity cost adder to compare alternative resource options.[34] As the Commission found in the last case, it is appropriate to compare resources that run at 100% of their capacity. Mr. Justis conservatively used Mr. Berry's capacity credit figure of 19.5%.[35] He could have used the lower 15% capacity credit figure, based on the capacity factor for wind generation adopted by MISO.[36] That would have increased the capacity cost adder from

[30] Tr. Vol. 18, p. 1625.
[31] Id.
[32] Ex. 876, Infinity Wind Power witness Langley surrebuttal Schedule ML-2, p. 54.
[33] The quoted cost figure is not to be found on Schedule ML-3.
[34] Infinity Wind Power also disagrees with the Commission in arguing that Mr. Justis should have eliminated the entire capacity cost adder from his LCOE. Mr. Justis agreed that if you back out the capacity cost adder western Kansas wind delivered via Grain Belt Express would be the most economical. But then the LCOE would be meaningless.
[35] Tr. Vol. 18, p. 804.
[36] Tr. Vol. 18, pp. 1618, 1619.

80.5% to 85% and would have shown the Grain Belt Express project to be even less economically feasible than it already is.[37]

Grain Belt Express once again disagrees with the Commission's use of the capacity cost adder to compare alternative resources by observing that MISO has 6,000 MW of excess capacity, claiming that the 80.5% cost adder is not relevant when there is excess capacity on the MISO system.[38] Again, Grain Belt Express confuses the discussion. The LCOE is a generic method for comparing on an equal footing alternative long term investments with different cost components. As such, it takes a long view and does not consider temporary circumstances. Considering temporary circumstances would distort the balance in the LCOE process necessary to achieve a true cost comparison. Grain Belt Express attempts to confuse the issue by limiting the analysis to a moment in time. Unhappy with the outcome of the right analysis, Grain Belt Express and Infinity Wind Power attempt to eliminate the key component of the analysis, the capacity cost comparison.

Grain Belt Express has shown a tendency to embellish their position with the public and with other commissions.[39] They represented that this Commission would approve its application in Case No. EA-2014-0207. It is embellishing its position in its presentation of the numbers in this case as it did in Case No. EA-2014-0207. This is not a showing of economic feasibility; it is speculation.

Likely the biggest flaw in Grain Belt Express' analysis is its fixation on the first mover rate. The project remains to be built, and its feasibility depends on the rate it must charge going forward to make the project compensatory for its investors. With that being

[37] Id.
[38] Initial Post-Hearing Brief of Applicant Grain Belt Express Clean Line LLC, p. 45.
[39] Tr. Vol. 15 (HC), p. 888.

the case, its feasibility depends on its normal rate, not its first mover rate. Considering the fact that its normal rate is significantly higher than its first mover rate, the project's normal rate is a real problem for the project's economic feasibility.[40]

There continues to be a confusion bordering on a contradiction in this Tartan factor. One perspective is to take it off the table.[41] Another is to make it the lynch-pin.[42] It cannot be both meaningless and the most critical factor. The reason that the economic feasibility is becoming a confusion is because the Commission is moving where it should not go. The merchant transmission service provider or participant-funded model may fend for itself and may succeed or fail on Grain Belt Express' own decisions. The only question for the Commission then is whether the merchant has the financial wherewithal to fulfill the task. But the Commission has no authority to simply evaluate the financial wherewithal of a merchant business. That evaluation is made in the free market with success or failure being based on the value of the service to the market. If the project succeeds or fails, the Commission's economic decisions should have no impact on the actual success or failure. And it will have no impact on ratepayers ability to receive service. MJMEUC will still be able to obtain service, as its integrated resource plan shows.[43] The question that remains is will the state allow this merchant to distort the marketplace by granting Grain Belt Express the right to force a participant in the economy, the landowner, to concede its right to negotiate what he or she believes to be a fair price for his or her land.

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[40] Tr. Vol. 15 (HC), p. 803. This sentence is less precise than it could be. It is less precise to avoid any possible risk of revealing HC information.
[41] Tr. Vol. 10, p. 104.
[42] Initial Post-Hearing Brief of Applicant Grain Belt Express Clean Line LLC, p. 39.
[43] Ex. 406 (HC); Tr. Vol. 17 (HC), p. 1021 et seq.

CONCLUSION

The Commission should deny this application for a certificate of public convenience and necessity. The Commission has no business being involved in a merchant business for a service that is participant-funded. The Commission should not authorize a duplicate system of transmission that will infringe and detract from utility services already in place by this Commission's mandate. The Commission should recognize the economic risk this project poses and the harm it will do to the existing resources of the state.

WHEREFORE, Show Me Concerned Landowners requests the Commission reject the application of Grain Belt Express.

Respectfully submitted,

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Filed: April 24, 2017

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by electronic mail upon counsel for all parties this 24th day of April, 2017.

/s/ *David C. Linton*

Illinois Official Reports

Appellate Court

Illinois Landowners Alliance, NFP v. Illinois Commerce Comm'n,
2016 IL App (3d) 150099

Appellate Court Caption

ILLINOIS LANDOWNERS ALLIANCE, NFP, Petitioner, v. THE ILLINOIS COMMERCE COMMISSION; COMMONWEALTH EDISON COMPANY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL UNIONS 51, 9, 145 AND 196; ILLINOIS AGRICULTURAL ASSOCIATION, a/k/a Illinois Farm Bureau; WIND ON THE WIRES; ENVIRONMENTAL LAW AND POLICY CENTER; NATURAL RESOURCES DEFENSE COUNCIL; BUILDING OWNERS AND MANAGERS ASSOCIATION OF CHICAGO; DYNEGY MIDWEST GENERATION, LLC; DYNEGY KENDALL ENERGY, LLC; AMEREN TRANSMISSION COMPANY OF ILLINOIS; MIDWEST GENERATION, LLC; JOHN L. CANTLIN; and JOSEPH H. CANTLIN, Respondents.—ILLINOIS AGRICULTURAL ASSOCIATION, a/k/a Illinois Farm Bureau, Petitioner, v. THE ILLINOIS COMMERCE COMMISSION; ROCK ISLAND CLEAN LINE, LLC; COMMONWEALTH EDISON COMPANY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL UNIONS 51, 9, 145 AND 196; ILLINOIS LANDOWNERS ALLIANCE, NFP; WIND ON THE WIRES; ENVIRONMENTAL LAW AND POLICY CENTER; NATURAL RESOURCES DEFENSE COUNCIL; BUILDING OWNERS AND MANAGERS ASSOCIATION OF CHICAGO; DYNEGY MIDWEST GENERATION, LLC; DYNEGY KENDALL ENERGY, LLC; AMEREN TRANSMISSION COMPANY OF ILLINOIS; MIDWEST GENERATION, LLC; JOHN L. CANTLIN; JOSEPH H. CANTLIN; TIMOTHY B. CANTLIN; FRIESLAND FARMS, LLC; LARRY GERDES; STEVEN GERDES; JASON D. JAMES; JAMES BEDEKER; SALLY BEDEKER; and FIRST MIDWEST BANK TRUST #6243, Respondents.—COMMONWEALTH EDISON COMPANY, Petitioner, v. THE ILLINOIS COMMERCE COMMISSION; ROCK ISLAND CLEAN LINE, LLC; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL UNIONS 51, 9, 145 AND 196; ILLINOIS AGRICULTURAL ASSOCIATION, a/k/a Illinois Farm Bureau;

Attachment A

WIND ON THE WIRES; ENVIRONMENTAL LAW AND POLICY CENTER; NATURAL RESOURCES DEFENSE COUNCIL; BUILDING OWNERS AND MANAGERS ASSOCIATION OF CHICAGO; DYNEGY MIDWEST GENERATION, LLC; DYNEGY KENDALL ENERGY, LLC; AMEREN TRANSMISSION COMPANY OF ILLINOIS; MIDWEST GENERATION, LLC; ILLINOIS LANDOWNERS ALLIANCE, NFP; JOHN L. CANTLIN; JOSEPH H. CANTLIN; TIMOTHY B. CANTLIN; FRIESLAND FARMS, LLC; LARRY GERDES; STEVEN GERDES; JASON D. JAMES; JAMES BEDEKER; SALLY BEDEKER; And FIRST MIDWEST BANK TRUST #6243, Respondents.

District & No.	Third District Docket Nos. 3-15-0099, 3-15-0103, 3-15-0104 cons.
Filed	August 10, 2016
Decision Under Review	Petitions for review of order of Illinois Commerce Commission, No. 12-0560.
Judgment	Reversed; cause remanded.
Counsel on Appeal	William M. Shay, of Shay Phillips, Ltd., of Peoria, for petitioner Illinois Landowners Alliance, NFP. Claire A. Manning and Charles Y. Davis, both of Brown, Hay & Stephens, LLP, of Springfield, for petitioner Illinois Agricultural Association. E. Glenn Rippie (argued) and Carmen L. Fosco, both of Rooney Rippie & Ratnaswamy LLP, Thomas S. O'Neill, of Commonwealth Edison Company, and Richard G. Bernet and Clark M. Stalker, all of Chicago, for Commonwealth Edison Company. James E. Weging and Matthew L. Harvey (argued), both of Office of General Counsel, for respondent Illinois Commerce Commission.

Rochelle G. Skolnick, of Schuchat, Cook & Werner, of St. Louis, Missouri, for respondent International Brotherhood of Electrical Workers.

Sean R. Brady, of Wheaton, for respondent Wind on the Wires.

Owen E. MacBride (argued) and Diana Z. Bowman, both of Schiff Hardin LLP, of Chicago, for respondent Rock Island Clean Line, LLC.

Panel JUSTICE LYTTON delivered the judgment of the court, with opinion. Justices Carter and Wright concurred in the judgment and opinion.

OPINION

¶ 1 Illinois Landowners Alliance, NFP (ILA), Illinois Agricultural Association also known as Illinois Farm Bureau (IAA), and Commonwealth Edison Company (Com Ed) petition this court for review of an order of the Illinois Commerce Commission (Commission) allowing Rock Island Clean Line, LLC (Rock Island) to operate as a public utility under the Public Utilities Act (Act) (220 ILCS 5/1-101 *et seq.* (West 2012)) and granting the company a certificate of public convenience and necessity to construct, operate, and maintain a high voltage electric transmission line across several counties in Illinois. On appeal, petitioners argue that (1) the application should have been dismissed as a matter of law because Rock Island is not a public utility and (2) the Commission's findings in favor of a certificate of public convenience and necessity (CPCN) were not supported by substantial evidence. We reverse the Commission's order granting the certificate and remand for further proceedings.

¶ 2 BACKGROUND

¶ 3 Rock Island is a subsidiary of Clean Line Energy Partners LLC (Clean Line), a transmission energy development company, with its principal offices in Houston, Texas. In addition to Rock Island, Clean Line owns four other companies that are developing long-distance transmission projects across the northern states. Clean Line is owned in part by Grid America Holdings, Inc., which is owned by National Grid USA, a business that owns and operates more than 8600 miles of high voltage transmission facilities in the United States.

¶ 4 Rock Island was formed to construct and manage an electric transmission line project that would run from O'Brien County in northwest Iowa to Grundy County in northeast Illinois. The primary purpose of the project is to connect wind generation facilities in northwest Iowa, South Dakota, Nebraska, and Minnesota with electricity markets on the PJM Interconnection grid. PJM is a regional transmission organization that coordinates the movement of wholesale electricity to markets in Illinois, Indiana, Michigan, Ohio, Kentucky, the District of Columbia, and eight other states in the northeast.

¶ 5 The proposed line would span 379 miles through Iowa to the Mississippi River, crossing the river in Princeton, Iowa, and entering Illinois near Cordova, Illinois. It would then extend approximately 121 miles in Illinois to a Com Ed substation in Grundy County (Collins substation).

¶ 6 In preparation for the project, Rock Island filed an application with the Commission for a certificate of public convenience and necessity under section 8-406 of the Act (220 ILCS 5/8-406(a), (b) (West 2012)) authorizing it to operate as a transmission-only public utility in Illinois and to construct, operate, and maintain an electric transmission line for wind energy. In its application, Rock Island stated that the development of additional transmission infrastructure is critical to our nation's ability to utilize its wind resources to meet the demand for electricity from renewable sources. Rock Island further claimed that although wind energy generates an alternating electrical current (AC), it is more cost effective to transmit the energy using a direct current (DC) transmission line.

¶ 7 According to the proposed plan, the Rock Island project would construct a high voltage direct current (HVDC) electric transmission line from Iowa to Illinois. The line would convert AC wind energy to DC electricity at a converter station in O'Brien County, Iowa. From there, the high voltage current would travel 500 miles to a DC-to-AC converter station in Grundy County, Illinois. The proposal stated that Rock Island would then run an AC transmission line a few miles to the Collins substation, where the electricity would be delivered into the PJM grid. The application set forth a proposed route for the line but did not seek the right of eminent domain.

¶ 8 Rock Island stated that the project has a capacity of 3500 megawatts and is able to connect up to 4000 megawatts of generating capacity in the resource area in Iowa to northern Illinois. At that rate, it will deliver 15 million megawatt-hours of electricity annually, enough to power 1.4 million homes.

¶ 9 Rock Island's application and supporting materials outlined a plan for raising the capital necessary to finance construction at an unspecified future date on a "project financing basis." Rock Island emphasized that it was a "merchant developer"—not a traditional utility with cost-based rates—and claimed that Illinois residents would not pay for the line through rate assessments. It does not plan to seek cost recovery through the electric rates paid by consumers in Illinois. Instead, it indicated that its rates will be regulated by the Federal Energy Regulatory Commission (FERC) and that the project will pay for itself through the revenues it receives from anticipated purchase agreements with wind generators. Rock Island stated that it plans to enter into long-term financing agreements with one or more wind generators, or "anchor tenants," in the resource area (northwest Iowa) and then attract lenders using the anchor tenant agreements as collateral. The financing plan included in the application did not identify any current anchor tenants or lenders.

¶ 10 Numerous parties sought and were granted leave to intervene, including ILA, IAA, Com Ed, local unions of the International Brotherhood of Electrical Workers, Wind on the Wires, and various private landowners. Commission staff members also participated in the application process by presenting evaluations, reports, and recommendations to the Commission.

¶ 11 Initially, IAA and ILA filed motions to dismiss, arguing that Rock Island was not a public utility under section 3-105 of the Act because it did not own infrastructure for electric transmission in Illinois. The intervenors argued that only a public utility may obtain a section

8-406(a) certificate to transact business and only a public utility may obtain a section 8-406(b) certificate to construct facilities. They maintained that because Rock Island was not a public utility, it could not be granted a certificate of public convenience and necessity under the Act.

¶ 12 The Commission's administrative law judge (ALJ) denied both motions. The ALJ ruled that the application process under section 8-406 of the Act is not limited to entities that are already certified public utilities and concluded that Rock Island could apply for public utility status and seek certification to construct and manage a transmission facility at the same time.

¶ 13 At the evidentiary hearing on the application, witnesses for Rock Island testified that its objective in constructing the project is to provide a direct transmission link for wind generating plants that will be built in the Iowa resource area and to transport that output to electricity markets in Illinois. According to Rock Island, the demand for electricity from renewable resources in Illinois and surrounding states will remain high for years to come due to state renewable portfolio standards requirements imposed by recent legislation. These state-imposed mandates require utilities to replace energy generated by fossil fuels with renewable energy, and at least 75% of that renewable energy must come from wind power.

¶ 14 David Berry, vice president of strategy and finance for Clean Line, characterized the proposed transmission line as a "merchant project" because Rock Island is assuming the market risk of the project. Rock Island does not have a process to recover its costs from ratepayers and therefore must sell capacity through negotiated contracts. Berry testified that the FERC approved Rock Island's proposal to presubscribe up to 75% of its transmission capacity to anchor tenants and sell the remaining 25% of the line's capacity to other generators. Rock Island would market its excess capacity using a bidding process, otherwise known as "open season" bidding, in which Rock Island would offer services to other wind generator customers along the line. According to Berry's testimony, the FERC order requires Rock Island to provide standardized generator interconnection service to any generator that requests to connect through the bidding process, subject to an open access transmission tariff administered by PJM.

¶ 15 Berry further testified that developers will not invest capital in the construction of additional wind generation facilities in the resource area without reasonable assurance of adequate transmission capacity and infrastructure to deliver the energy to population centers such as northern Illinois. He stated that while it is theoretically possible to move power from the resource area to northern Illinois using existing 345-kilovolt lines, it would entail substantially higher losses as compared to using the proposed HVDC transmission lines.

¶ 16 Rock Island admitted that the wind generators used in its energy and financial simulation models are based on predictions and do not yet exist. Currently, Rock Island does not have any transmission customers; the only way it could serve a customer is by building the project.

¶ 17 Rock Island witnesses further testified that the project will cost approximately $1.8 billion to construct, operate, and maintain. As of December 2013, shareholders had committed approximately $95 million of equity to Clean Line, with approximately $21.6 million specifically invested in the Rock Island project. Rock Island currently possesses an option to purchase real property in Grundy County, Illinois, upon which it intends to construct a converter station next to the Collins substation.

¶ 18 On cross-examination, Michael Skelly, the president of Rock Island and Clean Line, testified that on the date the application was filed, Rock Island did not own, control, operate, or

manage any transmission plants, equipment, or property in Illinois. He also stated that as of the date of his testimony, Rock Island still did not own property in Illinois.

¶ 19 Paul Marshall, an ILA board member, testified that ILA is a not-for-profit entity composed of approximately 300 members who own or have an interest in land impacted by the path of the transmission line. According to his testimony, roughly 100,000 acres of land fall on or along the proposed project route.

¶ 20 Dr. Jeffrey Gray, a federal electricity regulation and policies expert, performed an economic analysis for ILA. He testified that Rock Island "might be able to demonstrate need if it could show that the project is adequately subscribed." He noted that, until then, the demand or need for the project is "speculative." Gray explained that the electric industry has a structured wholesale marketing system that uses regional transmission organizations like PJM to collect the electricity generated in a region and distribute it to consumers, particularly those in need of renewable energy credits. In this case, Rock Island would use the transmission line to "ship" renewable energy created by the wind generators to the PJM grid. Gray noted that the Rock Island project is not currently included in the PJM regional transmission plan because none of the project's capacity has been contracted and no potential generators have obtained rights to buy service on the line.

¶ 21 Gray further testified that the impact of the project is unknown because Rock Island has not addressed the costs of negative land use impacts and has assumed traits and characteristics about connecting generators that cannot be substantiated because the generators have yet to be built. He opined that the financial aspects of the project leave open the possibility of switching the project from "merchant" status to "cost-allocation" status and allocating future transmission costs of unknown amounts to Illinois electricity customers.

¶ 22 Steven Naumann, another ILA expert, testified that the impact of the project on competition was unknown because the project was not sufficiently developed and had too many uncertain factors. He noted that while Rock Island stated that it has no current plans to request that the project be cost-allocated, the company does not explicitly rule out making such a future request.

¶ 23 Commission staff economist, Richard Zuraski, noted that a competitive electricity market already exists in Illinois and stated in his report that the proposed project was unnecessary. He further noted that the determination of whether the proposed project would promote the development of an effectively competitive electricity market was "subject to considerable uncertainty." Zuraski opined that Rock Island failed to demonstrate that the purported benefits of the project would outweigh its costs. He reported that, based on his model analysis, the economic benefit to Illinois electricity consumers was also subject to "considerable uncertainty." Zuraski stated that he was concerned that if the project failed to be successful in the competitive market, Rock Island would look to the Commission to get the project "back on its feet," a request that could end up costing ratepayers more money. He opined that, based on the project's financial uncertainty, it was an overstatement to say that there was no risk to Illinois ratepayers. Zuraski's concerns led Commission staff to conclude that Rock Island had not met its burden to show that the proposed project would promote development of an effectively competitive market that operates efficiently, is equitable to all customers, and is the least cost means of satisfying the objectives.

¶ 24 The staff report also noted that if and when the project becomes subject to a FERC open access transmission tariff requiring the provision of nondiscriminatory open access, the

project's limited capacity will still prevent Rock Island from providing access to all eligible customers. Staff concluded that Rock Island "is asking the Commission to *** grant it a CPCN so it looks like a 'public utility' for purposes of condemning private property to build its line, while at the same time it plans to offer only a token percentage of that line's capacity for 'public use.' "

¶ 25 In an attempt to address the financial concerns raised in its report, the Commission staff suggested several conditions, including that Rock Island "will not install transmission facilities *** on easement property until such time as Rock Island has obtained commitments for funds in a total amount equal to or greater than the total project cost."

¶ 26 The Commission issued a 242-page order granting Rock Island a certificate of public convenience and necessity to transact business as a transmission public utility and to construct, operate, and maintain the proposed transmission line over the preferred route described in the application. In its order, the Commission agreed with the ALJ's determination that Rock Island met the qualifications of a public utility and satisfied the public use requirement under section 3-105(a) of the Act. The Commission stated that, based on the information in the record, it seemed likely that the line would be used primarily, if not entirely, for delivery of wind energy from O'Brien County, Iowa, to the Collins substation in Illinois and that it was "reasonable to assume" potential users would include transmission customers who purchased capacity for delivery of electricity to northern Illinois.

¶ 27 The Commission also determined that the proposed project would promote public convenience and necessity under the Act. The Commission found that although Rock Island failed to demonstrate that the project was necessary to provide adequate, reliable, and efficient service to customers, it had presented sufficient evidence to demonstrate that the proposed line "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." See 220 ILCS 5/8-406(b)(1) (West 2012).

¶ 28 In reaching its decision, the Commission noted that Rock Island's financial resources were insufficient to finance the project's construction but concluded that Rock Island could satisfy the financing requirement based on financing conditions proposed by Commission Staff. In accordance with those conditions, the order required Rock Island to submit documents to the Staff demonstrating that it had obtained the necessary financial commitments and to file compliance documents with the Commission before beginning construction on easement properties.

¶ 29 ILA, IAA, and Com Ed filed applications for rehearing, and the Commission denied their requests. All three parties filed separate petitions with this court, challenging the Commission's decision. We consolidated their petitions for review.

¶ 30 ANALYSIS

¶ 31 Petitioners challenge the Commission's order on two grounds: (1) that the Commission lacked authority to grant a certificate of public convenience and necessity because Rock Island is not a public utility and (2) that the findings of the Commission are not supported by substantial evidence. Our resolution of the first issue is dispositive.

¶ 32 I. Standard of Review

¶ 33 On appeal, a reviewing court must reverse the Commission's decision if it finds that (1) the findings of the Commission are not supported by substantial evidence, (2) the Commission lacked jurisdiction to enter the order or decision, (3) the order or decision is in violation of the state or federal constitution or laws, or (4) the proceedings violated the appellant's constitutional rights. 220 ILCS 5/10-201(e)(iv) (West 2012).

¶ 34 The standard of review of the Commission's findings of fact is deferential. Orders of the Commission are deemed *prima facie* reasonable, and the Commission's findings of fact are deemed *prima facie* true. 220 ILCS 5/10-201(d) (West 2012). The Commission's findings of fact may only be overturned if they are against the manifest weight of the evidence. *Apple Canyon Lake Property Owners' Ass'n v. Illinois Commerce Comm'n*, 2013 IL App (3d) 100832, ¶ 57.

¶ 35 The Commission's interpretation of statutory standards is also entitled to deference; however, reviewing courts are not bound by its interpretation of law. *Citizens Utility Board v. Illinois Commerce Comm'n*, 166 Ill. 2d 111, 121 (1995). The Commission's interpretation of a statute is reviewed *de novo*. *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 398 Ill. App. 3d 510, 522 (2009). Where governing statutory language is clear and unambiguous, it must be applied as written, and there is no need to resort to extrinsic aids. *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 362 Ill. App. 3d 652, 657 (2005). Courts will not defer to an agency's construction where the statute is clear because "an interpretation placed upon a statute by an administrative official cannot alter its plain language." *Burlington Northern, Inc. v. Department of Revenue*, 32 Ill. App. 3d 166, 174 (1975).

¶ 36 II. The Commission's Authority to Grant a CPCN

¶ 37 The Illinois Commerce Commission was statutorily created to exercise general supervision over all Illinois public utilities in accordance with the provisions of the Public Utilities Act. 220 ILCS 5/4-101 (West 2012). Under the Act, a public utility must obtain a certificate of public convenience and necessity from the Commission before transacting any business or constructing a high-voltage transmission line. 220 ILCS 5/8-406(a), (b) (West 2012). The Commission derives its authority to supervise public utilities and issue certificates of public convenience and necessity solely from the statute creating it and may not, by its own interpretation, extend its jurisdiction. *Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 60 (2010). The Commission's jurisdiction must be found, if at all, in its power to regulate public utilities. *Peoples Energy Corp. v. Illinois Commerce Comm'n*, 142 Ill. App. 3d 917, 924 (1986).

¶ 38 A. *Public Utility Status*

¶ 39 Public utility status is determined by operation of section 3-105 of the Act and conferred by order of the Commission authorizing the utility to transact business and construct and manage utility services. See 220 ILCS 5/3-105(a), 8-406(a), (b) (West 2012). Section 3-105 of the Act defines a "public utility" as any company that:

> "owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in:

(1) the production, storage, [or] transmission *** of heat, cold, power, electricity, water, or light ***[.]" 220 ILCS 5/3-105(a)(1) (West 2012).

¶ 40 An applicant does not satisfy the statutory qualifications of a public utility simply because it sells something ordinarily sold by a public utility, such as heat, power, water, or electricity. *Mississippi River Fuel Corp. v. Illinois Commerce Comm'n*, 1 Ill. 2d 509, 516 (1953). A public utility also must provide its product or service "for public use," carrying with it the duty of the producer or manufacturer to serve the public and treat all persons alike, without discrimination. *Id.* "The use must concern the public as distinguished from an individual or any particular number of individuals, but the use and enjoyment of the utility need not extend to the whole public or political subdivision." *Palmyra Telephone Co. v. Modesto Telephone Co.*, 336 Ill. 158, 164 (1929). A private company that provides public utility services according to its own terms and conditions does not meet the statutory definition of a public utility. See *Highland Dairy Farms Co. v. Helvetia Milk Condensing Co.*, 308 Ill. 294, 301 (1923) (company that constructed water plants and furnished water to select members of the community "according to [its] own wishes" was not a public utility).

¶ 41 According to these principles, there are essentially two prongs to attaining public utility status: (1) a company must own, control, operate, or manage utility assets, directly or indirectly, within the State; and (2) it must offer those assets for public use without discrimination. See *Mississippi River Fuel Corp.*, 1 Ill. 2d at 516-19. Based on its application and the evidence presented to the Commission, Rock Island failed to meet both requirements.

¶ 42 1. Assets Within the State

¶ 43 Rock Island does not own, control, operate, or manage assets within the State. In testimony before the Commission, 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. Rock Island currently does not own any transmission assets in Illinois, nor does it have any agreements for service with renewable energy generators in this state. While the potential may exist for generators to purchase service on the line, no Illinois generators have agreed to use the proposed line.

¶ 44 2. Public Use Without Discrimination

¶ 45 In addition, the proposed transmission line is not for public use without discrimination. In *Mississippi River Fuel Corp.*, a fuel supply company, Mississippi River Fuel, sold natural gas in Illinois through individual fuel contracts with 23 private industrial retail customers. It also sold natural gas to Illinois Power and Light Company and Union Electric Power Company for resale to the general public. *Mississippi River Fuel Corp.*, 1 Ill. 2d at 512. Although Mississippi had facilities and customers in Illinois, our supreme court affirmed the circuit court's conclusion that it was not a public utility because Mississippi River Fuel did not devote its services to "public use." *Id.* at 513. In reaching its decision, the court noted that Mississippi River Fuel's contracts with industrial retail customers were not based on fixed rates, that they varied as to terms and conditions, and that they were only offered to select customers. The court found that the interest of the general public was in obtaining an adequate supply of gas at reasonable prices from the public utility to which the company supplied natural gas for resale, not Mississippi River Fuel. *Id.* at 518-19. It concluded that, under such circumstances, the

company's act of selling gas to a limited group of industrial customers could not be characterized as "public use." *Id.* at 519.

¶ 46 Similarly, Rock Island's plan does not devote assets for public use in Illinois without discrimination. The anchor tenants, who will use a majority of Rock Island's transmission capacity, are wind generators in the resource area of northwest Iowa, South Dakota, Nebraska, and Minnesota. According to Rock Island, 75% of the project's capacity will be sold to generators in the resource area, who will then use the transmission line to deliver their product to the PJM grid. PJM will then distribute the renewable energy electricity to members of its multistate regional transmission organization. The remaining 25% will be sold to those seeking transmission services through an "open season" bidding process approved by the FERC. The FERC order approving the sale of excess capacity does not mandate that an Illinois wind generator or other renewable energy generator participate in the bidding process. But if it did, there is no way to know whether an Illinois energy generator will submit a successful bid. Moreover, the project does not designate any part of the renewable energy transmitted along the proposed line for public use in Illinois. Thus, it fails to satisfy the statute's public use requirement.

¶ 47 Based on its application and supporting documentation, Rock Island has not attained public utility status within the meaning of the Act. Because Rock Island is not a public utility, the Commission lacked authority to issue a certificate of public convenience and necessity under section 8-406(b) of the Act. See *Peoples Energy Corp.*, 142 Ill. App. 3d at 924.

¶ 48 B. *Public Utility Status as Applied to Section 8-406*

¶ 49 In reaching our conclusion, we acknowledge the Commission's position that public utility status is not a prerequisite to seeking a certificate of public convenience and necessity under sections 8-406(a) and (b). The Act does not require an applicant to be a public utility before it seeks certification under the appropriate provisions. A plain reading of the statute shows that an applicant may seek public utility status while, at the same time, applying for a certificate of public convenience and necessity to transact business and construct facilities. See 220 ILCS 5/8-406(a), (b) (West 2012). In this case, the issue is whether jurisdiction was properly conferred based on the Commission's decision that Rock Island was a public utility. We conclude that it was not.

¶ 50 III. The Commission's Findings

¶ 51 The petitioners also claim that the Commission's decision should be reversed because its findings are not supported by substantial evidence. We need not address this issue in light of our determination that the Commission lacked authority to issue a certificate of public convenience and necessity.

¶ 52 CONCLUSION

¶ 53 We reverse the order of the Illinois Commerce Commission, granting a certificate of public convenience and necessity, and remand the cause to the Commission with directions to enter an order consistent with this decision.

¶ 54 Reversed; cause remanded.