Nos. 121302, 121304, 121305, & 121308 (Cons.)

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF *AMICUS CURIAE* OF PEOPLE OF THE STATE OF ILLINOIS *EX REL.* LISA MADIGAN, ATTORNEY GENERAL OF ILLINOIS, IN SUPPORT OF RESPONDENTS-APPELLANTS

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POINTS AND AUTHORITIES

INTEREST OF THE AMICI CURIAE

The People of the State of Illinois have a great interest in the provision of affordable, renewable energy to the residents of this State, an interest that is directly implicated by the decision of the appellate court in this case. In the Attorney General Act, the Illinois General Assembly found that the public's interest in "adequate, safe, reliable, [and] cost-effective electric" services "requires effective public representation by the Attorney General" to protect the public's rights and interests in the provision of "all elements of electric" service. 15 ILCS 205/6.5(a) (2014). The Attorney General's representation of the public interest is necessary "to ensure that the benefits of competition in the provision of electric . . . services to all consumers are attained." *Id.* And this Court has held that "the Attorney General has an obligation to represent the interests of the People so as to ensure a healthful environment for all the citizens of the State." *People v. NL Indus.*, 152 Ill. 2d 82, 103 (1992).

These twin public interests that the Attorney General is required to represent are at the heart of this case. Rock Island Clean Line (Rock Island) sought a certificate of public convenience and necessity from the Illinois Commerce Commission to construct and manage an electrical transmission line designed to carry electricity primarily generated by wind from those generators who contract with Rock Island for capacity on the transmission line. Rock Island's transmission service thus would not only bring additional electricity into the regional market to compete with other electricity, but

would bring in electricity that was generated in an environmentally sound manner.

The appellate court's decision, *Illinois Landowners Alliance, NFP v. Illinois Commerce Commission*, 2016 IL App (3d) 150099, stands at odds with those interests. Because the court took a narrow view of which entities may qualify as "public utilities" to be eligible to obtain a certificate of public convenience and necessity, the court's decision may have the effect of decreasing competition in the provision of electric services and impeding increased use of renewable energy. With the obligations to represent the public interest in the provision of electric service to ensure that the benefits of competition are attained by the consumers and to represent the public interest in renewable energy—which in turn helps create a healthful environment—the People urge this Court to reject the appellate court's unnecessarily narrow interpretation of the Public Utilities Act.

ARGUMENT

I. The provisions of the Public Utilities Act should be construed to give effect to its purposes and objectives.

At its core, this case involves the interplay between § 3-105 (defining "public utility") and § 8-406 (setting forth the requirements for a certificate of public convenience and necessity) of the Public Utilities Act. The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Bueker v. Madison Cty.*, 2016 IL 120024, ¶ 13. The most

reliable indicator of that intent is the language of the statute, which is to be afforded its plain and ordinary meaning. *Id.* The statute must be viewed as a whole. *In re M.M.*, 2016 IL 119932, ¶ 16. Each word, clause, and sentence is to receive "reasonable construction" so that no term is rendered superfluous. *1010 Lake Shore Ass'n v. Deutsche Bank Nat'l Trust Co.*, 2015 IL 118372, ¶ 21. No term in a statute should be read in isolation. *Williams v. Staples*, 208 Ill. 2d 480, 487 (2004). The court "presumes that the legislature did not intend absurdity, inconvenience, or injustice." *Valfer v. Evanston Nw. Healthcare*, 2016 IL 119220, ¶ 22.

In determining the intent of the legislature, the court "may properly consider not only the language of the statute, but also the reason and necessity for the law, the evils sought to be remedied, and the purpose to be achieved." *In re Detention of Lieberman*, 201 Ill. 2d 300, 308 (2002); *see also In re M.M.*, 2016 IL 119932, ¶ 16. As such, consideration of the statute's objectives and the consequences of construing the statute one way or another are proper considerations in determining legislative intent. *Detention of Lieberman*, 201 Ill. 2d at 308 (citing *Fumarolo v. Chi. Bd. of Educ.*, 142 Ill. 2d 54, 96 (1990)). The court should "afford the statutory language the fullest, rather than narrowest, possible meaning to which it is susceptible." *Id.* (citing *Lake Cty. Bd. of Review v. Prop. Tax Appeal Bd.*, 119 Ill. 2d 419, 423 (1988)). A statute should thus be construed "'in the most beneficial way which [its] language will permit so as to prevent hardship or injustice, and to oppose prejudice to public

interests.'" *Id.* at 309 (quoting *Mulligan v. Joliet Reg'l Port Dist.*, 123 Ill. 2d 303, 313 (1988)).

This Court has explained that the purpose of the Public Utilities Act "is 'to assure the provision of efficient and adequate utility service to the public at a reasonable cost.'" *Ill. Power Co. v. Ill. Commerce Comm'n*, 111 Ill. 2d 505, 512 (1986) (quoting *Seafarers Union v. Commerce Comm'n*, 45 Ill. 2d 527, 535 (1970)). Therefore, the Act should be interpreted in a manner that permits the Commission to assure efficient services to consumers. *See id.*

II. Rock Island should be not excluded from applying for a certificate of public convenience and necessity by virtue of the fact that it is not an incumbent utility.

The appellate court's decision is inconsistent with these principles of statutory construction. The appellate court held that only a public utility that already owns property or operates in the State is eligible for a certificate of public convenience and necessity. *Ill. Landowners Alliance*, 2016 IL App (3d) 150099, ¶¶ 41-43. The court's decision effectively prevents an entity that is not currently operating from obtaining a certificate. But, as explained below, that construction does not afford the statute the fullest meaning to which it is susceptible, does not construe the statute in the most beneficial way to serve the public interest, and does not permit the Commission to ensure that the objective of the statute to provide for the most efficient service to Illinois residents is met.

The Commission found that Rock Island was entitled to a certificate of public convenience and necessity. *See id.* at ¶ 27. In reaching this decision, the Commission found that the transmission line Rock Island proposed will promote the development of an effectively competitive electricity market. *See id.* Under § 8-406(a), "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" certifying that the public convenience and necessity "require the transaction of such business." 220 ILCS 5/8-406(a) (2014). Additionally, a certificate of public convenience and necessity is required for a "public utility" to "begin the construction of any new plant, equipment, property or facility." 220 ILCS 5/8-406(b) (2014). Thus, § 8-406 requires that a public utility obtain a certificate from the Commission before transacting business or constructing facilities in Illinois. The Act defines "public utility" as every entity "that owns, operates, or manages within this State, directly or indirectly, for public use, any plant, equipment or property used for or in connection with" the transmission of electricity. 220 ILCS 5/3-105(a)(1) (2014).

These provisions of the Public Utilities Act should be construed together in light of the statutory purpose, recognized by this Court, to "assure the provision of efficient and adequate utility service to the public at a reasonable cost." *Ill. Power Co.*, 111 Ill. 2d at 512 (internal quotation marks omitted).

And that overall purpose flows directly from the statute's language, where the General Assembly found that "the health, welfare and prosperity" of Illinois's citizens require the provision of "adequate, efficient, reliable, environmentally safe and least-cost" public utility services. 220 ILCS 5/1-102 (2014). As such, the definition of a "public utility" eligible for a certificate should not be constrained by an overly rigid application of the term to allow only incumbent firms to obtain a certificate. Instead, eligibility should extend to an entity that will become a "public utility" if the certificate is granted and it begins operations as permitted by the certificate.

The appellate court, however, found that to be entitled to a certificate, a company must already be operating as a public utility. Reading these provisions as the appellate court did to permit the issuance of a certificate of public convenience and necessity only to a company that already owns, operates, or manages facilities or equipment in Illinois limits certificate eligibility to incumbent entities. *See Ill. Landowners Alliance*, 2016 IL App (3d) 150099, ¶ 43. That construction of the statute would limit competition and in turn unduly hamper the Commission's ability to assure the provision of efficient and adequate utility service at a reasonable cost. Accordingly, that interpretation is not the fullest meaning to which the Act is susceptible. *See Detention of Lieberman*, 201 Ill. 2d at 308.

In fact, this Court has recognized the General Assembly's intention to make the electricity market more competitive when it enacted the Rate Relief

Law of 1997 (which is part of the Public Utilities Act) to partially deregulate that market. *See Zahn v. N. Am. Power & Gas, LLC*, 2016 IL 120526, ¶ 4 (explaining General Assembly "enacted the Rate Relief Law as part of an effort to partially deregulate our state's electricity market and make it more competitive"). That underscores the General Assembly's intention to favor competition while still ensuring that utility service is adequate, efficient, and reliable. And the Federal Energy Regulatory Commission (FERC) has sought to foster competition in the generation and transmission sectors of the electricity system. *See, e.g.*, FERC Order No. 1000, 76 Fed. Reg. 49,842 (2011) (removing transmission incumbents' right of first refusal policies).

The appellate court's decision, however, undermines the important legislative aim in competition by reading § 3-105 and § 8-406 in a manner that restricts it. The decision serves as a *de facto* limitation on the type of firms that can build long transmission lines in or through Illinois, so there will be fewer companies able to propose those projects. As there becomes an increasing need to replace existing transmission lines and to build new ones, having fewer firms competing to fill those needs means that customers may not receive as much cost reduction as they otherwise would. This unfortunate and unjust result should be corrected by the Court.

A limitation on competition is also concerning from an innovation perspective. Rock Island's project is a non-traditional type of transmission line (direct current as opposed to alternating current) designed by a non-

incumbent entity to efficiently transport low-cost, renewable electricity over long distances. The project will result in a significant amount of new renewable energy generators being built, which in turn would lessen the need for Illinois and surrounding States to rely on other forms of generation that emit air pollution and cause other types of environmental damage. It is less likely that projects such as Rock Island's will be proposed if the appellate court's reasoning persists.

Furthermore, the greater supply of a product that exists to satisfy a particular demand, the lower prices will be. Electricity prices are locational in nature. *See, e.g., FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768-69 (2016) (discussing concept of "locational marginal price"). New transmission lines, such as what Rock Island proposes, deliver more power to load centers like Northern Illinois and have price-suppressing effects given stable or declining demand for electricity.

In addition to electricity itself, there is also demand in Illinois and other States for what are known as renewable energy credits or certificates (RECs). A REC is created for each megawatt hour of renewable energy produced and represents the positive environmental attributes of that energy. *See* 20 ILCS 3855/1-10 (eff. June 1, 2017) (defining "renewable energy credit" as "a tradable credit that represents the environmental attributes of one megawatt hour of energy produced from a renewable energy resource"). Buying RECs ensures that renewable energy is operating somewhere on the grid. Illinois

uses RECs as a method of complying with its renewable portfolio standards, which requires a certain percentage of electricity consumption to come from resources such as wind or solar. *See* 20 ILCS 3855/1-75(c) (eff. June 1, 2017) (setting forth Illinois's "renewable portfolio standard" and specifying the amount of each public utility's total supply to be generated from "cost-effective renewable energy resources"). A greater supply of RECs, such as those made available by the Rock Island project, will tend to reduce prices for consumers in the same way as an increased supply in electricity. The appellate court's decision, however, restricts the ability of non-incumbent firms to propose transmission projects and to introduce an increased supply of both electricity and RECs.

Moreover, the Public Utilities Act expresses the General Assembly's intent that utility services should be "environmentally safe." 220 ILCS 5/1-102 (2014). This is exemplified by the provision of the Public Utilities Act specifying that the Commission shall approve an energy procurement plan only if the Commission determines, among other things, that the plan will ensure "environmentally sustainable electric service." 220 ILCS 5/16-111.5(d)(4) (2014). And this public policy is further manifested in the renewable energy portfolio requirements, discussed above. But the appellate court's construction of the statute runs contrary to the statutory purpose favoring clean energy because, as described, it makes it less likely that projects such as Rock Island's will be proposed.

Therefore, the provisions of the Public Utilities Act should not be read together to mean that only an incumbent "public utility" can apply for a certificate of public convenience and necessity. Such a reading is a major impediment to new entities entering the markets and disserves both the purposes of the Public Utilities and public policy favoring clean energy in Illinois.

III. Rock Island satisfied the "public use" criterion.

The appellate court's interpretation of "public use" was too narrow. The court held that a "public utility" must "offer its assets for public use without discrimination." *Ill. Landowners Alliance*, 2016 IL App (3d) 150099, ¶ 41. Rock Island failed this part of the "public utility" test, according to the appellate court, because there is no guarantee that an Illinois wind generator will purchase capacity on Rock Island's transmission line. *Id.* at ¶ 46.

The Public Utilities Act does not define "public use." Therefore, the General Assembly left it to the Commission in the first instance to determine whether services would meet the public-use requirement. Under the Act, that determination was entitled to deference. *See* 220 ILCS 5/10-201(d), (e)(iv)(A) (2014). The appellate court failed to give the Commission any deference on this issue, and therefore its decision should be reversed.

The appellate court's focus on which generators would purchase capacity on Rock Island's line was misplaced. Over a century ago, this Court held, in the public utilities regulation context, that "public use" means "of or

belonging to the people at large, open to all the people to the extent that its capacity may admit of public use." *State Public Utils. Comm'n v. Bethany Mut. Tel. Ass'n*, 270 Ill. 183, 185 (1915). This use "must concern the public as distinguished from an individual or any particular number of individuals" but that use "need not extend to the whole public or any political subdivision." *Id.* As such, the use may be "confined to a particular district and still be public." *Id.* at 186. Accordingly, to "constitute a public use all persons must have an equal right to the use . . . upon the same terms" and the service "must not be confined to specified, privileged persons." *Id.* at 185.

Here, Rock Island will offer 25% of the capacity of its transmission line through a bidding process approved by FERC. *See Ill. Landowners Alliance*, 2016 IL App (3d) 150099, ¶¶ 14, 46. Illinois generators are able to bid on that capacity. While, as the appellate court pointed out, there is no guarantee that an Illinois generator will submit a winning bid, *id.* at ¶ 46, that is beside the point. What matters is that Illinois generators are not discriminated against in the bidding for use of the transmission line.

The appellate court also only briefly addressed the use of the energy transmitted along the line. According to the court, "the project does not designate any part of the renewable energy transmitted along the proposed line for public use in Illinois." *Id.* But this imposes an incorrect standard on Rock Island and misunderstands the nature of energy consumption in the national electricity grid. As made clear in *Bethany Mutual Telephone*

Association, it is not necessary that the public avail themselves of a service for it to be a public use. Instead, the important point is that public has a right to use the service. 270 Ill. at 185-86. In this case, the Illinois public will be able to use the energy delivered by the Rock Island line. Utilities, alternative retail electric suppliers, municipalities, and power cooperatives in Illinois and elsewhere will have the opportunity to buy power from Rock Island's generators for their end users, which would include Illinois residents. Also, Rock Island will deliver a large amount of new electricity supply to Illinois. That will help reduce wholesale electricity prices in the region, benefitting Illinois customers.

In reaching its decision, the appellate court relied on *Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill. 2d 509 (1953). *See Ill. Landowners Alliance*, 2016 IL App (3d), ¶¶ 45-46. In *Mississippi River Fuel*, the court considered whether Mississippi River Fuel Corporation was a public utility within the meaning of the Public Utilities Act. The company operated a natural gas pipeline and sold natural gas to about two dozen industries under individual contracts and to Illinois Power Company and Union Electric Company for resale to the general public. 1 Ill. 2d at 512. The company refused requests for sale of natural gas by other industries. *Id.* at 512-13. The court found that the company was not a public utility because, in part, it did not provide its natural gas services for public use. *Id.* at 516-19. The court relied on the fact that the company "has consistently and with great care

confined its industrial gas 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.

Rock Island, however, is different because it will offer electricity transmission services generally through the nondiscriminatory, open bidding on the remaining capacity of its transmission line. Therefore, Rock Island is more closely analogous to the pipeline at issue in *Iowa RCO Association v. Illinois Commerce Commission*, 86 Ill. App. 3d 1116 (4th Dist. 1980). In that case, Northern Pipe Line Company sought to construct an oil pipeline from Illinois to its refinery in Minnesota. *Id.* at 1117. The plaintiff claimed that Northern was not a public utility, but the court disagreed. While Northern intended to build the pipeline to transport oil for its affiliated companies, it was also required to offer its excess capacity to nonaffiliated users on a nondiscriminatory basis. *Id.* at 1118-19. This was a "sufficient showing" that the pipeline "would be for a public use." *Id.* at 1119.

Similarly here, Rock Island will offer a quarter of its capacity to generators other than its anchor customers on a nondiscriminatory basis. That is sufficient to show that the transmission line would be for a public use. Additionally, the electricity that is transmitted by generators through Rock Island's line will supply the regional wholesale electricity market, from which the Illinois public ultimately obtains electricity as end-users.

In sum, the appellate court's interpretation of the Public Utilities Act is inconsistent with the statutory purposes of providing affordable utility services in an environmentally safe manner. The court's interpretation will have the effect of diminishing the supply of renewable energy and will hamper innovation. For these reasons, the appellate court's interpretation of the statute should not be followed by this Court.

CONCLUSION

For these reasons, the People of the State of Illinois *ex rel.* Lisa Madigan, Attorney General of Illinois, respectfully request that this Court reverse the appellate court's judgment.

Dated: February 1, 2017

Respectfully submitted,

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SUPREME COURT RULE 341(c)
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 15 pages.

Brett E. Legner
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 (2014) that the foregoing Brief *Amicus Curiae* of People of the State of Illinois *ex rel.* Lisa Madigan, Attorney General of Illinois in Support of Appellants was served via electronic mail directed to each person named below at the email address indicated on February 1, 2017.

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