

IN THE  
SUPREME COURT OF ILLINOIS

ILLINOIS LANDOWNERS	)	
ALLIANCE, NFP; ILLINOIS	)	On Appeal from the
AGRICULTURAL ASSOCIATION a/k/a	)	Appellate Court of
Illinois Farm Bureau; and	)	Illinois, Third District,
COMMONWEALTH EDISON COMPANY,	)	Nos. 3-15-0099,
Petitioners-Appellants,	)	3-15-0103 & 3-15-0104
v.	)	
ILLINOIS COMMERCE COMMISSION;	)	There Heard on Review
ROCK ISLAND CLEAN LINE LLC;	)	of the Order of the
INTERNATIONAL BROTHERHOOD OF	)	Illinois Commerce
ELECTRICAL WORKERS, AFL-CIO	)	Commission,
LOCAL UNIONS 51, 9, 145 & 196; WIND ON	)	ICC Docket No. 12-0560
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-Appellees.	)	

AMICUS BRIEF OF THE CITIZENS UTILITY BOARD IN SUPPORT OF  
APPELLANTS

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 March 16, 2017

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**POINTS AND AUTHORITIES**

<b>ARGUMENT</b> .....	1
<b>I. Background on, and Interest of, Amicus Curiae</b> .....	1
220 ILCS 10/5(d); (e) .....	1
<b>II. The Electric Transmission System</b> .....	1
142 FERC ¶ 61,038 (2013) .....	2
220 ILCS 5/16-109 .....	3
<b>III. The Third District’s Decision</b> .....	3
Nos. 3-15-0099, 3-15-0103 & 3-15-0104, 2016 IL App (3d) 150099 .....	3
<i>Rock Island Clean Line LLC</i> , ICC Docket 12-0560 (ICC 2014) .....	3
220 ILCS 5/16-101A .....	5
<b>IV. The Third District’s Decision Should Be Reversed to Correct Errors of Law and Policy</b> .....	5
139 FERC ¶ 61,142 (2012) .....	7

## **ARGUMENT**

### **I. Background on, and Interest of, Amicus Curiae**

The Citizens Utility Board (“CUB”) is a statewide organization charged with representing the interests of Illinois residential utility consumers. As such, CUB has the legal authority to act on behalf of such consumers in proceedings which affect their interests. 220 ILCS 10/5(d) and (e). CUB works to ensure safe, reliable, and affordable electric service, including supply from the interstate electric transmission system. Many of Illinois’ residential electric utility consumers receive electric service from load-serving entities (“LSEs”) that, in turn, receive electricity from portions of the interstate electric transmission grid operated by two regional transmission organizations (“RTOs”): PJM Interconnection, LLC (“PJM”) and the Midcontinent Independent System Operator, Inc. (“MISO”). Because Illinois ratepayers will be materially affected by the outcomes of decisions pertaining to the development of new electric transmission assets within the territories of PJM or MISO, CUB is interested in ensuring the efficient, competitive, and least-cost development of reliable new electric transmission assets that will serve consumers within Illinois. Specifically, CUB seeks to advocate for an electric system in Illinois that offers the cost-saving benefits of competition for consumers through the participation of as many suitable entities as possible.

### **II. The Electric Transmission System**

The landscape of the American electric system is in a state of flux. Coal and nuclear plant closures, the shale gas revolution, expansion of renewable energy resources, and adoption of smart meters are among the factors driving changes in how electricity is

generated, transmitted, distributed, and consumed. Illinois is no exception to the waves of change sweeping the nation, and is in fact in the throes of significant upheaval.

Increasing the quantity of electricity available to consumers in Illinois can potentially reduce the price paid for electricity in Illinois. One of the most efficient ways to increase the supply of electricity to a given area is to increase the capacity of the transmission system to deliver power from generators. This can provide physical avenues for least-cost electricity to reach the areas in which it is needed, such as cities, while diminishing power losses due to congestion. Generally speaking, because of physical limitations on how much electricity can be transmitted over a given line, the greater the degree of interconnection on the electric transmission grid, the higher the efficiency and lower the cost is of moving power from one location to another. In this way, the benefit of greater transmission capacity could be described as reducing transaction costs for consumers in obtaining needed electricity. Furthermore, additional transmission capacity allows a greater total quantity of electricity to be transmitted over the grid, further driving down prices paid by end-users via operation of supply and demand.

These “transmission sufficiency” concepts are consistent with general economic principles of facilitating efficient channels of free trade and have been explicitly endorsed as policy goals of the Federal Energy Regulatory Commission (“FERC”), which regulates the interstate electric transmission system. *See, e.g., Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects, Final Policy Statement*, 142 FERC ¶ 61,038 (2013). In Illinois, the General Assembly has similarly enacted a policy of promoting competition in transmission by

restructuring the electric industry—that is, separating generation, transmission, and distribution business operations to foster competition and improve prices and quality of service for consumers. *See Public Utilities Act, Electric Service Customer Choice and Rate Relief Law of 1997*, 220 ILCS 5/16-109.

### **III. The Third District’s Decision**

On appeal from a decision of the Illinois Commerce Commission (“ICC”) granting a certificate of public convenience and necessity (“CPCN”) to Rock Island Clean Line, LLC (“Clean Line”) for its proposed high-voltage direct current transmission line from northwest Iowa to an interconnection with PJM’s system in northeast Illinois, the Appellate Court of Illinois for the Third District found that the ICC erred in granting a CPCN because Clean Line did not meet the threshold standard of a “public utility” under the Public Utilities Act, 220 ILCS 5/1-101 *et seq.* (“Act”). Nos. 3-15-0099, 3-15-0103 & 3-15-0104, 2016 IL App (3d) 150099 at ¶ 49; *Rock Island Clean Line LLC*, ICC Docket 12-0560 (ICC 2014). The court found that, because Clean Line did not own or control any existing public utility assets in Illinois and would not offer its proposed assets for public use in Illinois without discrimination, it could not qualify as a public utility under the Act. Nos. 3-15-0099, 3-15-0103 & 3-15-0104, 2016 IL App (3d) 150099 at ¶ 43, 45. The latter finding was the result of the court’s observation that Clean Line could not ensure with absolute certainty that Illinois generators will interconnect with and move electricity on the proposed transmission line or that a portion of the electricity carried by the line would be designated for public use in Illinois. Nos. 3-15-0099, 3-15-0103 & 3-15-0104, 2016 IL App (3d) 150099 at ¶ 46. This conclusion should be rejected because it

entirely forecloses the opportunity for any non-incumbent project developer to expand the transmission system in Illinois and ignores the ICC's findings in granting a CPCN that Clean Line's interconnection in Illinois to the PJM system will in fact provide benefits to Illinois consumers—and without allocating any costs or shifting any financial risks to those consumers—regardless of the specific purchase arrangements that ultimately result for the transmission line.

As to the first prong of owning or operating extant public utility assets within Illinois to qualify as a public utility under the Act, the Third District creates an impossible situation for non-incumbent transmission developers to build projects in Illinois that contravenes state and federal law and frustrates delicate, deliberate regulatory regimes crafted through decades of iterative efforts. In terms of the “public use without discrimination” second prong, the court did not consider the inevitability that 25% of the electricity to be carried by the proposed Clean Line project would be sold onto PJM's transmission system, from which electricity is transmitted at wholesale to Illinois LSEs for retail sale to Illinois consumers. Though Clean Line may not be able to demonstrate the specific arrangement of power sales from the generator side of the proposed Clean Line project to Illinois LSEs on the other, at least not during the planning stages of the project, electricity from the project would inevitably enter the pool of power available in PJM. This would serve to increase the quantity and, in turn, decrease the price of electricity in the markets from which Illinois LSEs buy power for their customers, which is certainly a benefit to Illinois consumers. In Illinois, LSEs must directly “pass-through” the costs of purchasing electricity and may not charge a premium for the commodity, only a service charge for delivering it to the consumer.

Similarly, the court did not consider that a greater supply of electricity flowing into Illinois due to the Clean Line project would relieve congestion and permit larger flows of electricity on existing transmission lines serving Illinois LSEs—further improving the quantity and price of energy available to Illinois consumers and inuring further benefit to them. Lowered congestion and greater transmission capacity would also improve the reliability of the grid by strengthening its resiliency to infrastructure outages, another benefit to all Illinois consumers consistent with the requirement of providing a public use without discrimination.

In sum, the court apparently ignored the physical and operational realities of the interconnected, synchronous electric system where power flows instantaneously and continuously over the entire energized system as arranged by RTOs such as PJM, and is not in fact transported as a discrete unit from one generator to one LSE under the auspices of a merchant transmission line physically facilitating the transaction.

#### **IV. The Third District’s Decision Should Be Reversed to Correct Errors of Law and Policy**

The Illinois Supreme Court should reverse the decision of the Appellate Court of Illinois for the Third District to ensure that the principles of utility and energy law and regulation, as applied under the laws of Illinois, serve the purposes envisioned and enunciated by the General Assembly and the federal government. Two decades ago, the Illinois General Assembly explicitly recognized the fundamental policy finding that competition in the Illinois electric services markets “may create opportunities for new products and services for customers and lower costs for users of electricity.” 220 ILCS

5/16-101A. Similarly, when FERC promulgated new regulations regarding merchant transmission lines in 2013, it found that with its new protocols “such projects will increase, rather than impair, opportunities for customers in need of new transmission service.” 142 FERC ¶ 61,038, *supra*, at P 17. Consistent with this policy of promoting competition to help lower costs for consumers, the Supreme Court should clarify that merchant transmission projects may qualify as public utilities under the Act without owning or operating existing assets in Illinois and that projects that deliver electricity into organized markets which serve Illinois LSEs are in fact offering their transmission service for public use without discrimination to Illinois citizens. Doing so will protect the interests of Illinois consumers in lower electricity prices and improved quality of service attendant to necessary new transmission projects participating in interstate organized markets. In addition, even if granted a CPCN, the Clean Line project would still have to pass muster under the ICC’s numerous financial, engineering, safety, environmental, siting and other similar requirements in order to be built, thereby protecting the interests of consumers through subsequent phases of the project and before its final approval.

If the Third District’s reasoning remains in force, it will serve to foreclose “merchant,” or non-incumbent utility, transmission projects in Illinois. The requirement that an entity already own or operate public utility assets within Illinois creates a circularity problem for merchant transmission market entrants and entrenches incumbent utilities by vesting the ability to build new transmission assets solely with such established entities. This is not only counter to the purposes of the Illinois General Assembly in restructuring the energy industry within the state, but will also significantly

harm Illinois consumers by precluding competition in the transmission industry from new merchant transmission projects built in Illinois. Such new merchant projects and their enhancement of competition would otherwise exert a downward pressure on electricity and transmission costs for Illinois consumers, while also improving the quality of service provided by enhancing the resiliency and reliability of the grid. There are no financial risks to Illinois consumers that could be weighed against the possible benefits of the project. As FERC stated in approving Rock Island Clean Line's request to charge negotiated rates for transmission service on its planned project: "Rock Island meets the definition of a merchant transmission owner because it assumes all market risk associated with the Project and has no captive customers. Rock Island has agreed to bear all the risk that the Project will succeed or fail based on whether a market exists for its services." *Rock Island Clean Line LLC*, 139 FERC ¶ 61,142 (2012) (Order Conditionally Authorizing Proposals and Granting Waivers in Part).

In the alternative, insulating incumbent utilities—which typically do not bear the financial risks of project failure—from market forces could easily result in an increase in costs borne by ratepayers as congestion worsens on the portions of the grid serving Illinois. The market construct for wholesale energy sales used by PJM is called Locational Marginal Price ("LMP"); the LMP represents the value of energy where it is taken off the transmission system for subsequent retail sales by LSEs and pays generators that price, notwithstanding the generators' costs for producing the electricity. Since the LMP is in reference to an LSE's location, transmission service costs, which increase with congestion along the path from the generator to the LSE, are incorporated into the price paid by the LSE. Under the LMP model, in use for energy purchases across nearly the

entire state of Illinois, incumbent utilities may lack sufficient financial incentives to build new transmission assets that address congestion—this is because higher prices for energy and transmission services inevitably result from constrained supply into areas of high demand using the LMP model. Higher LMP prices are intended to signal the need for new entry of generation or transmission assets and simultaneously provide the financial basis for creating a new project that meets demand with an assured cash flow. Merchant transmission companies are squarely within the scope of market participants that the LMP model was created to attract when grid insufficiencies are present. Therefore, under the Third District’s reasoning that precludes merchant transmission projects, the LMP model would be perverted to increase revenues for transmission incumbents at the expense of consumers. These consumers have no ability to purchase electricity under any other market construct, and the Supreme Court should correct the Third District’s reasoning to ensure that deliberately designed organized markets may function properly to provide least-cost, reliable electric service to consumers.

For these reasons, the Citizens Utility Board urges the Illinois Supreme Court to reverse the decision of the appellate court.

Respectfully submitted,

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Dated: March 17, 2017

**ILL. S. CT. R. 341(c) CERTIFICATE OF COMPLIANCE**

I, the undersigned attorney, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the Rule 341(d) cover, 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 9 pages.

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