STATE OF IOWA
DEPARTMENT OF COMMERCE
BEFORE THE IOWA UTILITIES BOARD

IN RE:	) DOCKETS NO. E-22123, E-22124,) E-22125, E-22126, E-22127, E-22128,) E-22129, E-22130, E-22131, E-22132,
ROCK ISLAND CLEAN LINE LLC	) E-22133, E-22134, E-22135, E-22136,) E-22137, E22138

RESISTANCE TO MOTION TO BIRFURCATE

COMES NOW the Preservation of Rural Iowa Alliance ("Alliance") and in Its Resistance to the Rock Island Clean Line LLC ("Clean Line") Motion to Bifurcate, states as follows:

1. The Alliance does not resist Clean Line's assertions that, at the proper point in a chapter 478 Franchise Petition proceeding, the Board or Presiding Officers are authorized, after having met all procedural and substantive requirements for doing so, to order any contested case or portion thereof severed for good cause. Alliance reserves its rights without waiver, to further object at that time on any overlapping factual and policy matters that may be binding in both decisions. 199 I.C. 7.14(2); IUB Gen. Counsel Letter of 3/2/11 to the Iowa State Senate.

2. However, the hearing on the anticipated Clean Line Petition, cannot be bifurcated at this time because Clean Line's Motion to Bifurcate is clearly premature.

3. The Alliance resists and objects to Clean Line's Motion to Bifurcate before any Petition was filed for a franchise grant. An Order to bifurcate granted before the anticipated Petition would deprive the due process rights of stakeholders who still have, under the earliest deadlines provided by Chapter 478, until early February to still become Parties to this proceeding and to object to this Motion. To grant this Motion would require an extreme departure from IUB's past practices. Alliance urges the Motion be denied.

4. The Alliance also requests oral argument on Clean Line's Motion to Bifurcate.

ARGUMENT

I. The IUB Does Possess the Power to Bifurcate a Hearing.

The IUB does possess statutory authority to bifurcate the hearing on a chapter 478 Franchise Petition once the Petition has been filed, assuming the order to bifurcate meets the procedural and substantive requirements established by the Administrative Procedures Act. I.C. 474.3 (2013 Code) and 199 I.A.C. 7.14(2). Alliance, however, asserts bifurcation is not appropriate for the reasons set forth herein. Alliance reserves its rights without waiver, to further object at the appropriate time, as to any overlapping factual and policy matters that may be binding in both decisions making bifurcation wholly inappropriate.

II. The Hearing should not be bifurcated in the anticipated Clean Line case.

The Alliance disagrees with Clean Line's assertion that the franchise issue and the eminent domain issue in the anticipated Chapter 478 proceeding involve substantially different questions and will not involve overlapping proof. As admitted by Clean Line in its Motion, "around 85 Objections have been filed." Motion, II. para. 5 at p. 3. As Clean line recognizes, only six (6) of sixteen (16) county informational meetings had been conducted as of this October 15, 2013 Motion to Bifurcate. If the ten (10) remaining County informational meetings result arithmetically in as many Objections as the first six (6) meetings, Clean Line would face some 226 Objections to its Petition by the statutory deadlines for filing Objections. Clearly, the *scope* of objections (all of which are not yet even filed) to the Clean Line project might be considered by the Board relevant to its required finding of Public Use.[1]

III. This Motion is, in any case, Premature.

A. A Chapter 478 Franchise Petition is, once the Petition is filed, a Contested Case.

> "Contested case" means proceeding including but not restricted to ratemaking, price fixing, and licensing in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing. I.C. 17A.2.5 (2013 Code).

[1] Please note with interest the introduction of companion bills SSB 1143 and HSB 157 in the 2011 Session of the 84th General Assembly, two bills lobbied affirmatively by Clean Line to statutorily empower the Iowa Utilities Board to bifurcate the hearing in a chapter 478 franchise proceeding, substantially the same result sought by Clean Line in this Motion. Seems curious that a law change was needed in 2011 (which was not passed), but now Clean Line asserts similar rights without these changes in the law and without all the parties affected yet involved.

B. Clean Line concedes in its Motion that the proceeding on its franchise petition will be a contested case. For example:

- *"Iowa Code 478.4 (2013) provides that a hearing must be held in an electric franchise proceeding if objections are filed or when a petition involves the taking of property by eminent domain."* Motion at II. Para. 4, p. 2.
- *"As of the filing of this Motion around 85 objections have been filed. It is reasonable to assume that a hearing on the franchise petitions will be required."* Id. at Para. 5, p.3.
- *"In fact, 199 IAC 7.14(2) specifically allows bifurcation in **contested case** proceedings."* Id. at IV. Para. 13, p.6 (emph. added).

C. A Motion offered in a contested case is part of the record of a contested case:

> The record in a contested case shall include: a. All pleadings, **motions** and intermediate rulings. I.C. 17A.12.5.a. (2013 Code) (emph. added).

D. All Parties in a contested case are entitled to an opportunity to respond and present evidence on all issues involved.

> Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved and to be represented by counsel at their own expense. I.C. 17A.12.4. (2013 Code)

Accord: IUB General Counsel letter to Senator Swati Dandekar, March 2, 2011.[2]

E. This right to due process in a chapter 478 Franchise Petition proceeding must include the right of Parties to Notice of a Motion offered during the proceeding. This includes this Motion to Bifurcate.

> 'The fundamental requisite of due process of law is the opportunity to be heard.' Nelson v. Adams USA, Inc., 529 U.S. 460, 466, 120 S. Ct. 1579, 1584, 146 L. Ed. 2d 530 (2000) (quoting Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914)).

The reasoning of the U.S. Supreme Court case is relevant: A prospective party cannot fairly be required to answer an amended pleading not yet permitted, framed, and served. Nelson

[2] "It is my conclusion that the Board already has the authority to regulate the course of its hearings in any manner that is necessary or appropriate to the discharge of its duties, so long as the resulting agency action is consistent with the law, including but not limited to the requirement in Iowa Code 17A.12(4) that **all parties must be afforded an opportunity to respond and present evidence on all issues involved**." (emph. added)

v. Adams USA, Inc., 529 U.S. 460, 467, 120 S. Ct. 1579, 1585, 146 L. Ed. 2d 530 (2000)(Sole shareholder of company-plaintiff in unsuccessful patent infringement case not liable for costs and attorney fees pursuant to amended pleading because he was not a party to the action when the Motion to Amend was filed). In Nelson, the costs and attorney fees had been assessed by the court against Nelson's company. The successful defendant was afraid the company would be unable to pay, so it moved to amend the Petition to add the company's sole shareholder, Nelson, as a party. Nelson had not been a party prior to the District Court's ruling on Adams' motion to amend. The Supreme Court observed that the clock on an added party's time to respond does not start running until the new pleading naming that party is served, just as the clock on an original party's time to respond does not start running until the original pleading is served. The Court stated: *"Beyond doubt, however, a prospective party cannot fairly be required to answer an amended pleading not yet permitted, framed, and served."* Nelson v. Adams USA, Inc., 529 U.S. 460, 467, 120 S. Ct. 1579, 1584-85, 146 L. Ed. 2d 530 (2000).

Just as the clock on Nelson did not start running until he was served notice of the relevant pleading, the clock on the potential parties to the Clean Line Franchise contested case will not run on its potential parties until the deadlines set forth in Chapter 478. Those deadlines have not yet arrived because Clean Line's chapter 478 Petition has not been filed.

F. The Board's own procedural rules require that a Party filing a Motion in any proceeding must contemporaneously serve the document on all other parties.

> "A party or other person filing a notice, **motion,** pleading, or other paper document in any proceeding shall contemporaneously serve the document on all other parties." 199 I.A.C. 7.4(6) (emphasis added).

IV. An Order to Bifurcate granted before the anticipated Petition would deprive the Due Process rights to resist this Motion of stakeholders who still have, under the earliest deadlines provided by Chapter 478, until early February to still become Parties to this proceeding.

Many potential parties to this anticipated Ch. 478 Franchise Petition contested case have not yet been provided their statutory opportunity to identify themselves. There are at least two classes of potential parties to the anticipated Clean Lines Franchise Petition:

a. **Objectors:** These include "any person, company, city or corporation whose rights may be affected".... by the line proposed. I.C. 478.5 (2013 Code). These

parties are statutorily granted the right to file an Objection to the Franchise Petition up to twenty (20) days after the 478.5 published notice.

1. The I.C. 478.5 notice cannot be published until after the Petition itself is filed. I.C. 478.5 (2013 Code).

2. The Petition cannot be filed until 30 days after the last county informational meeting. I.C. 478.2.2 (2013 Code).

3. The last county informational meeting in the Clean Line matter won't be completed until at least Thursday, December 5. IUB **Filing ID:** 2583950, Clean Line's Notice of Informational Meeting in Scott County. Clean Line's Petition for Franchise therefore could not be filed until January 4, 2014 at the earliest.

4. Notice must be published in a newspaper located in each county for 2 consecutive weeks after Clean Line's Petition is filed with the IUB. 199 I.A.C. 11.5(2).

5. Assuming hypothetically that the 478.5 Notice publication requirements is fully completed by January 18; potential Objectors have until Feb. 7 at the earliest, to file their written Objections.

6. How could those potential future parties to this anticipated Contested Case have been given Notice of Clean Lines' October 15 Motion to Bifurcate? They aren't even Parties yet. See Attachment A, Rock Island Clean Line LLC list of Parties Served and Objectors Served, Dockets E-22123 thru E-22129 incorporated herein by this reference. That list of October 15 Parties served with notice of this Motion does not list a single party served notice of the County Informational Meeting in Clean Line's most recent 10 E-Dockets. Stakeholders in this Clean Line proceeding still have months, to become Parties to the Clean Line proceeding.

b. **Intervenors:** Requests to Intervene can be filed up to 20 days after the Order setting the procedural schedule in an IUB contested case. 199 I.A.C. 7.13(1).

1. That deadline has not yet arrived in this case.
2. Other obvious stakeholders have an interest in the Clean Lines Motion: Most notably those other transmission line owners who regularly file Chapter 478 Petitions for Franchise with the Board.[3]
3. But none of those stakeholders received Notice of Clean Lines' motion. Their deadline for intervening in the Clean Line Petition has not yet arrived.
4. Indeed, the Alliance is exactly one such entity. The Alliance was not a Party to any IUB proceeding as of October 15. It had not filed a Petition to Intervene. The Alliance received no legal notice of the October 15 Motion to Bifurcate. Instead, it received a courtesy telephone call from Clean Line informing it of the Motion to Bifurcate.

Without a doubt this Motion is premature. The IUB must decline to grant this Motion, until all potential parties entitled to Notice of the Motion have been identified pursuant to the

[3] MidAmerican Energy, ITC, CIPCO, NIPCO, Corn Belt, Dairyland Power, et. al. are all obvious stakeholders in the procedural issue here. Might they also be eligible for the special treatment requested by Clean Lines? None received notice of Clean Line's Motion.

timetable spelled out by Iowa Code, chapter 478. After which, careful consideration should be made as to substantially similar questions and overlapping proof issues with all parties having the opportunity to file objections.

VI. The Board will be required to find in a manner sustainable by the District Court upon review, that its Order granting the Motion rests at least upon a Rational Basis or perhaps even a higher standard since eminent domain is involved. [4]

Depriving potential future parties of Notice and an Opportunity to be heard on the Motion constitutes a significant negative impact on their private rights. Reserving its right to all arguments contained within I.C. 17A.19.10, Intervenor would suggest that the private rights to participate in the present Motion of those landowners in Franklin, Butler, Grundy, Black Hawk, Buchanan, Benton, Linn, Jones, Cedar and Scott Counties who have yet to attend an Informational Meeting on this Project, together with the interests of all other potential Objectors and Intervenors, all of whom have at a minimum three more months to become Parties in this anticipated Franchise Petition would suffer a negative impact, i.e. lack of Notice and opportunity to be heard on the subject Motion, grossly disproportionate to any benefit accruing to the public interest from the granting of the Motion.

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[4] When rights of eminent domain are involved, Landowner rights are a fundamental right whose derogation requires a higher standard than rational basis. The 14th Amendment to the United States Constitution requires due process in a taking of property. *Aplin v. Clinton Cnty., 256 Iowa 1059, 1062, 129 N.W.2d 726, 727 (1964)(County statutorily authorized to condemn land for bridge and approach).* "The right of trial by jury shall remain inviolate; but the general assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but *no person shall be deprived of life, liberty, or property, without due process of law.* "Iowa Const. Art. I, § 9 (emph. added). Further, statutes delegating the power of eminent domain are strictly construed and restricted to their expression and intention. *Iowa State Highway Comm'n v. Hipp, 259 Iowa 1082, 1088, 147 N.W.2d 195, 198 (1966)*(Iowa State Highway Commission staff lacked statutory authority to enter right to enter upon the Wright County farms owned or occupied by defendants for the purpose of making surveys and investigations in contemplation of condemnation for highway purposes.) *citing Aplin v. Clinton County, 256 Iowa 1059, 1061, 129 N.W.2d 726, 727.* Affirmed: *City of Des Moines v. Geller Glass & Upholstery, Inc., 319 N.W.2d 239 (Iowa 1982)*(Condemnor City precluded from leasing and renting property until date it made the required payments under order finding lessee entitled to condemnation damages).

An affirmative IUB ruling on the necessity of the Franchise before being approached with a voluntary easement request will prejudice each landowner negotiation thereafter to Clean Line's advantage. Clean Line will be able to truthfully assert to each landowner that the Iowa Utilities Board has already approved the transmission line. Clean Line itself implies if not admits this improper advantage at page 5 of its Motion, to-wit:

> "*Clean Lines would likely (if only one hearing) be forced to seek eminent domain authority to many more parcels at the outset of this proceeding that it would if bifurcation of the issues is granted.*" (parenthetical added) Motion at II. Para. 11., p. 5

The Iowa Utility Board must, in deciding its response to the Motion, ask itself "Why?" Why is Clean Line so confident that if this Order is granted, it will be required to seek eminent domain authority to fewer parcels? Rhetorically, could it be anticipation of the empowerment provided by a Utilities Board order already granting the Franchise? The disadvantage to private rights resulting from a Bifurcation granted now will clearly be grossly disproportionate to any benefit accruing to the public interest from the granting of the Motion. Clean Line's Motion must be denied.

The Motion in question highlights the need for legally sufficient identification and deliberation by the Board of the factors required by I.C. 17A.19; specifically whether the requested Order to Bifurcate is consistent with the IUB's rules. Alliance submits that it would be inconsistent with the Board's prior practice and precedent and the negative impact on the private rights affected is grossly disproportionate to the benefits accruing from the Order requested.

Furthermore, to avoid a finding of arbitrariness or capriciousness, the Board's Order must be founded upon a rational basis. Clean Lines attempted offer of a rational basis, e.g., scope or size of the project; wind energy; costs; and regulated vs. unregulated basis, all fall short of the standards to order the extraordinary relief requested. If scope is the rational basis, how big must

a Chapter 478 transmission line be to merit this special bifurcated treatment? Is the dividing line based on:

- Length? 100 miles? 200 miles of new transmission right-of-way?
- Or number of easements required? 500 easements? 1,000 easements?
- What rational basis for the dividing line?

If the special wind energy nature of the project is the rational basis, then how is that factor to be measured? And how certain is the Board of the permanence of its finding on this factor?

If the rational basis is cost, what cost?

- $10,000,000?
- $50,000,000?
- $100,000,000? And why?

If the regulated or unregulated nature of the petitioner is the rational basis; then which type of petitioner would and would not, be entitled to the special treatment?

- An integrated public utility like MidAmerican Energy?
- A partially regulated public utility like a cooperative?
- Or only a merchant line company like Clean Line?

The Alliance submits that all the arguments fall far short under a 17A.19 judicial type review, and are not a legally sufficient fair and rational basis for this special procedural treatment requested by Clean Line.

VII. CONCLUSION.

The Alliance requests that the Board deny Clean Line's Motion to Bifurcate for the reasons set forth above and requests oral argument on Clean Line's Motion to Bifurcate.

Respectfully submitted,

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131028 Resistance

ROCK ISLAND CLEAN LINE LLC

Docket No. E-22123, E-22124, E-22125, E-22126, E-22127, E-22128, E-22129

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