

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  ROCK ISLAND CLEAN LINE LLC	DOCKET NOS. E-22123, E-22124, E-22125, E-22126, E-22127, E-22128, E-22129, E-22130, E-22131, E-22132, E-22133, E-22134, E-22135, E-22136, E-22137, AND E-22138
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**ORDER DENYING MOTION TO BIFURCATE AND  
GRANTING PETITION TO INTERVENE**

(Issued November 26, 2013)

**PROCEDURAL HISTORY**

On October 15, 2013, Rock Island Clean Line LLC (Clean Line) filed with the Utilities Board (Board) multiple motions to bifurcate certain proceedings in connection with an electric transmission line that Clean Line proposes to construct. Specifically, Clean Line proposes to construct a high-voltage direct current electric transmission line across 16 counties in Iowa. Pursuant to Iowa Code chapter 478, Clean Line must have a franchise from the Board prior to commencing construction of the proposed line. A separate franchise is issued for each county. Accordingly, Clean Line filed 16 separate motions, one for each county.

Clean Line is in the process of holding public informational meetings in each of the affected counties; such meetings are a condition precedent to filing a petition for a franchise, see Iowa Code § 478.2(2). Because the meetings have not yet been held in all 16 counties, Clean Line cannot file its petitions for franchise yet.

On October 25, 2013, the Preservation of Rural Iowa Alliance (Alliance) filed a petition to intervene in this matter.<sup>1</sup> The Alliance filed a resistance to Clean Line's motion to bifurcate on October 29, 2013.

Also on October 29, 2013, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a resistance to the motion to bifurcate.

On November 8, 2013, Clean Line filed a reply to the resistances and a response to the Alliance's motion to intervene.

On November 13, 2013, the Alliance filed a correction to its petition to intervene.

In this order, the Board will grant the Alliance's petition to intervene and deny Clean Line's motion to bifurcate because these matters need to be addressed prior to the filing of the petition for franchise. Other Board actions, such as formally docketing the petitions, will be done at the stage of the proceedings when they normally take place.

### **THE PETITION TO INTERVENE**

In its petition to intervene, the Alliance states that it is an unincorporated nonprofit association organized and operating pursuant to Iowa Code chapter 501B and § 501(c)(6) of the Internal Revenue Code. (The Alliance subsequently corrected its petition by stating that it is a non-profit corporation incorporated on July 30, 2013, pursuant to Iowa Code chapter 504.) The Alliance states that each of its members is

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<sup>1</sup> Technically, the Alliance filed 16 resistances, one in each docket. For the reader's ease, the remainder of this order will be written as if only one docket is involved. Reference to the 16 separate dockets will only be made if it is significant.

a person with a legal interest in real property in Iowa who is opposed to or concerned about Clean Line's proposed transmission line. The Alliance does not represent the discrete legal interests of each member; rather, the Alliance represents the mutual interests of its members with respect to the application of the standards of Iowa Code chapter 478 to the proposed project.

In its response to the Alliance's petition to intervene, Clean Line states it does not object to limited intervention by the Alliance; Clean Line "reserves the right to request specific limitations be placed on [the Alliance's] participation depending upon the participation of other parties who may have the same interest as the Alliance." (Response, p. 2.) Clean Line states that such limitations may include prohibiting the Alliance from submitting evidence in the form of direct testimony or exhibits or from conducting cross-examination. Clean Line asserts that limiting the Alliance's participation to briefing legal arguments should "satisfy the Alliance's goal" (*id.*), but Clean Line apparently does not request that any such limitation be imposed at this time.

The Board will grant the Alliance's petition to intervene. Further, the Board will not at this time place any limits on the Alliance's participation in this proceeding. The Board understands that the Alliance is intervening on behalf of its members so that they may pool their resources in order to represent their mutual interests in a more cost-effective manner while reserving their individual interests for separate representation if appropriate. Consolidated representation of numerous parties with some mutual interests can be an efficient approach with benefits for the Board and

the other parties. Such consolidation, by itself, offers no reason to restrict the Alliance's participation in this proceeding. If matters develop in some manner that may justify imposing limitations on the participation of the Alliance (or any other party, for that matter), the question can be raised and considered at that time, but unless and until such limitations are imposed, the Alliance may participate in this matter with the full rights of any party to a proceeding before the Board, including discovery, submission of testimony, full participation at any hearings, and briefing.

### **THE MOTION TO BIFURCATE**

#### **A. Clean Line's Motion**

Clean Line requests that the Board bifurcate this proceeding into two discrete phases. The first would be addressed to the issue of whether the requested franchises should be issued to Clean Line and, if so, determining the precise terms, conditions, and restrictions applicable to the franchises. The location and route of the proposed line would also be addressed in this phase. The second phase, which will only be necessary if the Board decides to issue the franchises, would be addressed to the question of whether Clean Line should be granted the power of eminent domain with respect to any of the parcels of land that would be crossed by the transmission line.

Clean Line notes that the Board's rules permit bifurcation in contested case proceedings. Specifically, 199 IAC 7.14(2) allows the Board or presiding officer to

“order any contested case or portions thereof severed for good cause.”<sup>2</sup> Clean Line asserts that bifurcation will allow for the most efficient administration of this matter without resulting in any prejudice to any person who might become a party.

Clean Line notes that the Board has considered the franchise issue and the eminent domain issue separately in at least one case, In Re: Ames Municipal Electric System, Docket Nos. E-21988, et al., comparing the Board’s “Order Granting Franchises,” issued March 27, 2012, with the “Order Granting Request for Eminent Domain Authority,” issued August 14, 2013. Clean Line asserts the case demonstrates that the issues associated with granting a franchise may be considered separately from the issues associated with granting the power of eminent domain.

Clean Line also cites various federal court cases involving bifurcation of issues and emphasizing that the primary considerations for determining whether to bifurcate are the preservation of the rights of the parties, clarity, judicial economy, the possibility of inconsistent results, and the possibility for confusion.

Clean Line asserts that the findings required to be made with respect to issuance of a franchise are distinct from the findings required in connection with the grant of eminent domain authority. Specifically, in order to grant a franchise, the Board must find that (a) the proposed line is necessary to serve a public use and (b) the proposed line is reasonably related to an overall plan for transmitting electricity in the public interest. (Iowa Code § 478.4.) In order to grant an entity eminent domain

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<sup>2</sup> As Clean Line notes, this rule does not apply to electric transmission line hearings under chapter 478 and 199 IAC chapter 11. It is, however, demonstrative of the Board’s ability to sever cases or issues when appropriate.

authority, Clean Line says, the Board must find that the specific property over which the entity is seeking that authority is necessary for the public use for which the franchise was granted. (Motion, pp. 8-9.) Clean Line cites two Board decisions as recognizing the distinction: Corn Belt Power Coop, 1992 W.L. 465959 (Iowa U.B.), and Mt. Pleasant Municipal Utilities, 199 P.U.R.4<sup>th</sup> 357 (Iowa U.B. 1998). Clean Line summarizes the relevant analysis from these orders as follows: “To grant a franchise, the Board must find that the transmission line is needed to serve the public use in some way; to grant eminent domain, the Board must determine that the precise property in question is necessary to carry out the public use for which the franchise was granted.” (Motion, p. 10.)

Clean Line argues that bifurcation of this proceeding will promote more efficient use of the Board’s resources because bifurcation will bring clarity and efficiency to the process by separating the issue of the necessity of the overall project from the issues associated with determining the necessity of condemning an easement across a specific parcel. Clean Line also asserts that bifurcation will give the company additional time to try to negotiate voluntary easements, which should reduce the number of parcels for which it will have to request the power of eminent domain. That could shorten the eminent domain phase of this case.

Clean Line says that bifurcation will benefit Clean Line by allowing it to avoid expending resources to acquire easements and to prepare eminent domain documents until after it has obtained the franchises. According to the motion, the proposed line would extend about 375 miles in Iowa, crossing an estimated 1,247

parcels and requiring easements from 2,295 individuals or entities. Clean Line asserts it is not reasonable to require it to “spend tens of millions of dollars of at-risk capital on right-of-way prior to obtaining approval of the franchise” or to require Clean Line to prepare an Exhibit E at the time it files its franchise petitions. (Motion, pp. 3-4.) An Exhibit E must include certain specific information for each property for which the power of eminent domain is sought, pursuant to 199 IAC 11.2(1)"e."

Finally, Clean Line says that bifurcation will preserve the due process rights of all potential parties to this proceeding. Clean Line notes that pursuant to Board rules applicable to franchise proceedings, all landowners of record and parties in possession of land that would be affected by the proposed line and over which easements have not been obtained will be served with notice of the filing of the petition for franchise. In addition, all citizens of each affected county will be notified of the filing of the petition by published notice. This gives all interested persons notice of the opportunity to file objections and be heard on the necessity of the franchise. Clean Line notes that these notices could include language delineating the two separate proceedings to be held in this matter.

Should a hearing on the issue of whether to grant Clean Line the power of eminent domain then be necessary, Iowa Code § 478.6 and 199 IAC 11.5(3) require another notice to all landowners of record and parties in possession of land over which a voluntary easement has not been obtained, along with an additional published notice. Clean Line says that if this matter is bifurcated and two hearings are held, the landowners and parties in possession would receive two of these

hearing notices, one regarding the issues associated with the franchise and another regarding the issues associated with the power of eminent domain. Clean Line asserts that in this way these persons would receive greater notice in the bifurcated proceeding than they receive in a more typical franchise proceeding.

**B. Consumer Advocate's Resistance**

Consumer Advocate resists the motion to bifurcate, arguing that both of Clean Line's proposed phases require consideration of the same general standard, that is, whether the proposed project is "necessary to serve a public use" or "necessary for public use." (Iowa Code §§ 478.4, 478.6, and 478.15.) Consumer Advocate says the Board's past practice has been to decide the franchise and eminent domain issues in a single proceeding and "this past practice is an implicit recognition of the overlapping factual and policy matters binding both decisions." (Resistance, p. 2.) Consumer Advocate also doubts that there would be any administrative efficiencies associated with bifurcation, as splitting the hearing would only affect the timing and place of taking evidence; it would not reduce the volume or variety of that evidence. Moreover, it would require two hearings instead of one.

**C. The Alliance's Resistance**

The Alliance argues that an order granting bifurcation prior to the filing of the petition would deprive stakeholders who have not yet become parties to this proceeding of their due process rights. The Alliance acknowledges that the Board possesses the statutory authority to bifurcate the hearing, but says the motion to bifurcate is premature because the deadline for intervention has not yet passed and

prospective parties cannot be required to respond to the motion at this time. The Alliance argues that the franchise issues and the eminent domain issues involve overlapping factual and policy matters, such that bifurcation in the manner proposed by Clean Line will never be appropriate in this matter. More specifically, the Alliance says that if the Board were to grant the motion to bifurcate and grant a franchise to Clean Line before Clean Line has approached each landowner for a voluntary easement, then Clean Line would have an improper advantage in any subsequent negotiations, as Clean Line would be able to truthfully assert that the Board has already approved the route of the line, perhaps implying that the project is a *fait accompli*.

Finally, the Alliance argues that Clean Line has failed to provide a rational basis for determining which franchise proceedings will justify the extraordinary relief of bifurcation. Clean Line offers the size of the project, the importance of harnessing wind energy, the cost of purchasing easements, and the unregulated nature of the petitioner as factors justifying bifurcation of this matter. The Alliance questions how the Board will consider those factors in future cases to determine whether bifurcation is appropriate. The Alliance submits that Clean Line has failed to show a legally sufficient, fair, and reasonable basis for the special procedural treatment it seeks.

#### **D. Clean Line's Reply**

In its reply to Consumer Advocate's resistance, Clean Line argues that the question of whether a franchise should be issued and the question of whether the power of eminent domain should be granted are separate analyses, even if they both

include some consideration of “necessity.” Clean Line argues that the issue of whether to grant a franchise must be decided before the issue of eminent domain can properly be considered and “the fact that one finding is contingent upon the other evidences the findings’ inherent distinctiveness.” (Resistance, p. 2.)

In response to the Alliance, Clean Line quotes from certain Alliance statements indicating that the Alliance’s strategy in this proceeding is to force Clean Line to prepare condemnation paperwork for a large number of policies because doing so will be “a lot of work” and “the more parcels upon which [Clean Line] has to do all this work, the less likely this project is to succeed.” (Resistance, p. 3.) Clean Line asserts that the Alliance’s true purpose in resisting the motion to bifurcate is not one of protecting due process rights; instead, it is about forcing Clean Line to waste time and resources with the hope that Clean Line will abandon the project.

With respect to the Alliance’s argument that the motion to bifurcate has been filed prematurely, Clean Line says that if it had to wait until after it filed its petition to file the motion, then it would be denied the benefits of the motion, presumably because Clean Line would be required to prepare the condemnation documents associated with Exhibit E to the petition.

Clean Line denies that granting the motion to bifurcate would deprive any stakeholders of due process, saying instead that those rights would be better served by bifurcation, with two hearings in which they could participate, each of which would be focused on distinct issues:

The initial hearing would determine whether the proposed line is necessary to serve a public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest. The hearing may also address the terms, conditions, and restrictions of the Franchise, or modifications as to line location and route. The second hearing would address whether a specific eminent domain request is appropriate and necessary for the public use (i.e., necessary for the construction of the line).

(Reply, p. 4.) Clean Line says that the two notices of hearing would ensure that all stakeholders are aware of the issues to be determined in each hearing and their right to participate in one or both.

#### **E. Board Analysis**

The Board will deny the motion to bifurcate. The parties all agree that the Board has the authority to sever, or bifurcate, the issues in a proceeding for good cause shown. The question is whether Clean Line has shown good cause for granting its motion.

Clean Line has cited certain federal court cases for a list of considerations that may be useful when determining whether good cause for bifurcation has been shown. Those considerations include the preservation of constitutional rights, clarity, judicial economy (here, administrative economy), the likelihood of inconsistent results, and the possibility of confusion. *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1042 (8<sup>th</sup> Cir. 1983). To that list, the Board will add consideration of the convenience of the parties, as a proceeding that preserves constitutional rights while increasing the convenience of the parties should be

preferred over an alternative that also preserves those rights, but only at the cost of causing inconvenience.

### **1. Preservation of Constitutional Rights**

Looking first at the constitutional rights of the stakeholders, the Alliance asserts that Clean Line's motion represents a threat to the due process rights of potential future intervenors, who do not currently have the opportunity to resist the motion. Clean Line responds that if it is required to file its petition in order to establish an intervention deadline so that it can then file its motion to bifurcate, the underlying purpose of bifurcation will be defeated.

It would be possible for the Board to rule on the motion for bifurcation now and then take it up again, if necessary, to consider some new evidence or argument presented by a future party whose intervention has not been filed at this time, but is filed prior to the intervention deadline. Accordingly, the Board concludes it is not too early to consider Clean Line's motion, since any potential due process issues associated with a ruling at this time could be adequately addressed in the future, if necessary.

However, the Board is concerned about the potential effect of bifurcation (as proposed by Clean Line) on the due process rights of landowners and other stakeholders, regardless of whether they have intervened at this time. Clean Line proposes that the first hearing in a bifurcated proceeding would determine whether a franchise should be issued and "may also address the terms, conditions, and restrictions of the Franchise, or modifications to line location and route." (Reply, p.

4.) If the Board were to decide, after the first hearing, to grant a franchise for a line along a specified route, it is not at all clear what issues would remain for the second hearing. Once the route is specified, then the affected parcels have been determined and any landowners or other interested persons who object to the route of the line across their property would be denied a full and fair opportunity to contest the matter if the route could not be re-litigated. Or, in the alternative, it would be necessary to permit re-litigation of part or all of the approved route. That would be counter to the considerations of administrative efficiency and the convenience of the parties. Thus, Clean Line's proposed bifurcation either presents a threat to the due process rights of various stakeholders or it is inconsistent with administrative efficiency and convenience. Either way, the proposal is inconsistent with at least some of the federal court considerations identified by Clean Line.

## **2. Clarity and the Possibility of Confusion**

Two other considerations, clarity and the possibility of confusion, appear to be two sides of the same coin and will therefore be considered together. Clean Line asserts that if the motion to bifurcate is granted and adequate hearing notices are sent to the stakeholders, then the stakeholders will benefit by being informed of the precise scope of each hearing, presumably so that they can determine when and where it may be worthwhile to participate. The idea, it appears, is that if the stakeholders are clearly informed of the issues to be addressed in the first hearing, then they can justifiably be prevented from re-litigating those issues in the second hearing.

The Board will assume that it would be possible to draft hearing notices that are so clear and informative as to provide a basis for denying any re-litigation of issues at the second hearing. Even so, the result would be inconsistent with the convenience of those stakeholders, who would almost certainly have to participate in both hearings in order to contest all of the issues in which they might have an interest. Clarity is not improved by requiring two hearings where one is normally sufficient.

### **3. Administrative Efficiency**

Clean Line asserts that bifurcation may advance the interests of administrative efficiency, as the additional time prior to the eminent domain phase of the proceeding may allow Clean Line to voluntarily negotiate and acquire easements from more landowners. (Motion, p. 12.) However, as Clean Line has also noted, the Alliance has advised its members not to sign voluntary easements; it seems unrealistic to expect that more time will result in significantly more voluntary easements. At the very least, there is no firm basis for a finding that bifurcation would improve administrative efficiency; it is just as likely to have an adverse effect. This consideration does not support granting the motion to bifurcate.

### **4. Likelihood of Producing Inconsistent Results**

The consideration of whether bifurcation is likely to produce inconsistent results has not been addressed by the parties. The Board assumes it should not be an issue so long as the same entity (the Board or its administrative law judge) presides at each hearing.

## **5. Convenience of the Parties**

The final consideration on the Board's list is the convenience of the parties. As shown above, bifurcation would be inconvenient for the affected landowners and other parties, as they would either be required to participate in two hearings where a single hearing is normally adequate or they would have to run the risk of being denied the ability to re-litigate issues in the second hearing that were decided in the first hearing. Against this inconvenience, Clean Line identifies two benefits from bifurcation: First, it could delay negotiating and purchasing voluntary easements until after the franchise decision has been made, and second, it would be able to delay the preparation of Exhibit E to the petition (the condemnation documents for each parcel for which eminent domain authority is sought) for the same amount of time. Clean Line asserts the cost of acquiring right-of-way prior to obtaining approval of the franchise would be "tens of millions of dollars...." (Motion, p. 4.) However, the Board's existing rules and practices make it unlikely that the cost would be so high.

Normally, utilities that seek a franchise from the Board do not purchase actual easements while the franchise petition is pending; instead, they prefer to negotiate and purchase easement options that can be exercised if and when the franchise is granted. The Board understands that easement options may cost about 10 percent of the negotiated price of the easement, although it may be more or less. This process benefits the utility by reducing the number of condemnation parcels (and potential objectors) while keeping the up-front cost of right-of-way acquisition lower.

Clean Line's concern about having to negotiate and purchase easements in a non-bifurcated proceeding is at least partially addressed by this common practice.

As far as Exhibit E is concerned, Board rule 199 IAC 11.2(1)"e" allows the petitioner to delay preparation and filing of the exhibit while the franchise petition is being reviewed by Board staff. Specifically, the rule only requires that the exhibit be in its final form at some time prior to when the notice of franchise petition is issued. This allows the petitioner to avoid the expense of preparing a complete Exhibit E for filing with the petition; that would be a waste of time and resources in most cases, since it is contemplated that the petitioner will continue to negotiate voluntary easement options while the petition is being processed, reducing the number of parcels for which eminent domain authority must be requested.

Thus, each of Clean Line's concerns is at least partially alleviated by the Board's rules and practices and it appears Clean Line will experience no inconvenience at all if a franchise is granted with the power of eminent domain after a single hearing.

## **6. Conclusion**

Based upon a consideration of all of the relevant factors, the Board finds that Clean Line has not shown good cause for bifurcation of this matter to separate the eminent domain issues from the rest of the issues in this proceeding. Any inconvenience to Clean Line from denial of bifurcation is relatively insignificant when compared to the significant and unavoidable inconvenience to all other stakeholders if the proceeding were bifurcated. The motion for bifurcation will be denied.

**ORDERING CLAUSES**

**IT IS THEREFORE ORDERED:**

1. The "Motion to Bifurcate" filed by Rock Island Clean Line LLC on October 15, 2013, is denied.
2. The "Petition to Intervene" filed by the Preservation of Rural Iowa Alliance on October 25, 2013, is granted.

**UTILITIES BOARD**

/s/ Elizabeth S. Jacobs

/s/ Nick Wagner

ATTEST:

/s/ Joan Conrad  
Executive Secretary

Dated at Des Moines, Iowa, this 26<sup>th</sup> day of November 2013.