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

ORDER DENYING MOTION TO CONSIDER EMINENT DOMAIN ISSUE IN A SEPARATE HEARING

(Issued February 13, 2015)

PROCEDURAL HISTORY

A. The Motion to Separate the Hearing

On December 8, 2014, Rock Island Clean Line LLC (Clean Line) filed with the Utilities Board (Board) a motion to consider certain issues associated with eminent domain in a separate hearing that would be scheduled after the initial hearing in this matter. Clean Line recognizes that it was asking the Board to reconsider its "Order Denying Motion to Bifurcate" issued in these dockets on November 26, 2013, but that order specifically provides that the Board can reconsider its ruling at a later date if new information is available. Clean Line asserts that the facts and circumstances have changed substantially since that order was issued and the new situation supports granting Clean Line's motion to hold a separate hearing to consider certain eminent domain issues.

Specifically, Clean Line is asking the Board to hold two separate hearings in these dockets. The first would be to decide whether two statutory standards have been satisfied: (a) whether the line is "necessary to serve a public use" and (b) whether the line "represents a reasonable relationship to an overall plan of transmitting electricity in the public interest." Clean Line says that the second determination includes a determination of the route of the proposed line.

The second hearing would be to determine issues related to the exercise of the power of eminent domain: (a) whether Clean Line has made a good faith effort to acquire easements voluntarily; (b) whether the specific easement rights requested are necessary and reasonable; (c) whether the easement area requested is necessary given the previously-approved route; (d) whether proper notice has been provided to all parties; and (e) whether the easement area has been properly described. (Clean Line "Reply to Responses to Motion to Consider Eminent Domain Issue in a Separate Hearing" at p. 9, n. 1; hereinafter the "Reply.") Presumably, this means the second hearing would be focused on an examination of the details of the exercise of eminent domain on each parcel of affected property; the overall question of whether Clean Line should have the power of eminent domain would have been determined in the first hearing. Clean Line does not explicitly make that distinction, but it appears to be the logical conclusion from Clean Line's statements.

Clean Line says the following facts and circumstances have changed since the Board ruled on the original motion to bifurcate:

1. Clean Line's franchise petitions have been filed and all required public informational meetings have been held, so landowners now have the required information about the project.

2. Clean Line has acquired over 200 easements (out of approximately 1,500 required) and can now provide additional detail regarding easement acquisition costs.

3. The number of objectors and supporters has increased significantly, making separate proceedings even more efficient.

4. Clean Line has notified all potentially affected landowners and all persons on the service lists of the various dockets of its motion for a separate hearing, so there are no due process issues associated with the motion.

(Motion at pp. 16-18; Reply at p. 2.) In particular, Clean Line argues that if the issues are not separated for hearing in the manner proposed, then prior to the single hearing Clean Line will have to survey all parcels for which it has not been able to negotiate an easement; prepare legal descriptions for those parcels and legal descriptions of the desired easement and easement rights, along with a map of each such parcel; identify the location of each proposed structure on each parcel; and identify all persons with an ownership interest in each parcel, along with any tenants.

Clean Line submits this process would require the expenditure of significant funds by Clean Line and would also require significant intrusions on the landowners and tenants, all of which will have been unnecessary if the Board decides to deny Clean Line's petitions for franchises. (Motion at p. 22.)

Clean Line argues that separating this proceeding into two hearings will benefit landowners in other ways, as well. Clean Line says that it has communicated with "numerous" landowners who indicate they do not want to negotiate or sign an easement until the Board has determined whether it will issue franchises to Clean Line. (Motion at p. 14.) Without separate hearings, these landowners (and tenants) will have to be inconvenienced with geotechnical borings and other surveys before the hearing, which may never be necessary if the hearing is bifurcated. (Id.)

Clean Line argues that separate hearings are also justified for policy reasons. It characterizes its project as shipper-funded with at-risk investments and says that a single hearing proceeding will increase its upfront costs, making this alternative business model less attractive, even though it may be a more favorable model for electric utility ratepayers. (Motion at p. 15.) Clean Line says that Iowa's policy goals of encouraging the development of alternate energy production facilities and the transmission capacity to allow for the export of wind power (see Iowa Code §§ 476.41 and 476.53A) will be advanced by encouraging investment in shipper-funded projects. (Id.)

Finally, Clean Line argues that separate hearings will preserve the constitutional rights of landowners, who will have a full and fair opportunity to litigate all issues, and will promote the convenience of the parties. For example, to the extent that objectors who are not owners of property along the route want to intervene and challenge or support the need for the line, they will be able to do so without having to participate in an extended hearing that addresses parcel-specific eminent domain issues that they are not interested in. (Motion at p. 24-5.) Clean Line also says that if the proceeding is separated into two hearings, the second hearing may be divided into individual hearings in each county, so affected landowners could more easily attend and each hearing would presumably be shorter. (Id.)

B. Doorley Response

On January 6, 2015, Mr. James Doorley filed a response to Clean Line's motion in Docket No. E-22131. Mr. Doorley argues that the franchise process should not be changed just to allow Clean Line to save money. Mr. Doorley argues that Clean Line's real motivation is that it only has 200 easements out of the 1500 needed for the project and it wants to improve its negotiating position (by having an established route and the power of eminent domain). Mr. Doorley also takes issue with Clean Line's proposed route and on January 12, 2015, Mr. Doorley filed some

maps intended to show alternative routes that Clean Line could use, running along highways, railroads, or existing transmission lines.

C. The Alliance Resistance

On January 8, 2015, the Preservation of Rural Iowa Alliance (Alliance) filed a resistance to Clean Line's motion. The Alliance argues that the essential facts and circumstances of this case have not changed since the Board denied Clean Line's original motion to bifurcate, saying the proposed line is still controversial and over 85 percent of the affected landowners have not signed voluntary easements. (Resistance at p. 2.) The Alliance argues that a bifurcated proceeding would either adversely affect the due process rights of many landowners (by determining issues in the first hearing that the landowners would be prohibited from re-litigating at the second hearing) or it would be administratively inefficient (if the landowners were permitted to re-litigate issues at the second hearing).

The Alliance points out that if the hearing is bifurcated and the Board issues the franchises and determines the route following the first hearing, Clean Line's negotiating leverage over the landowners would be "prejudicially powerful." (Resistance at p. 3.) Clean Line would be able to truthfully tell the landowners that the project has been approved and the route finalized, leaving only the issues of the specific terms and cost of the easements to be negotiated. Litigating those issues at a second Board hearing and before a county compensation commission would be

unreasonably expensive for many landowners, so their bargaining position would be weakened. The Alliance argues that stacking the cards against Iowa landowners in this manner would be inconsistent with basic notions of fair play. (Resistance at p. 4.)

The Alliance argues that its members would be inconvenienced by bifurcation, as hundreds of interested persons are likely to attend the Board's hearing and it would be more convenient for them to attend only one hearing, rather than two. (Id.) The Alliance asserts the convenience of Iowa landowners should outweigh Clean Line's preference for deferring the costs of the project. The Alliance does not deny that it has a goal of making the project into an expensive project for Clean Line, as the Alliance is opposed to the project. (Resistance at pp. 4-5.)

Finally, the Alliance questions Clean Line's claim that "numerous" or "many" landowners have indicated they do not want to sign easements until after the Board has decided whether to issue a franchise. The Alliance questions whether those landowners are really numerous and also disputes the presumption that those landowners will sign easements after the Board issues its decision; instead, the Alliance asserts, these landowners may have no desire to ever sign an easement with Clean Line. (Resistance, p. 6.)

D. Consumer Advocate Response

Also on January 8, 2015, the Office of Consumer Advocate, a division of the Department of Justice (OCA), filed a response to Clean Line's motion. OCA remains concerned that bifurcation could confuse interested parties. OCA says that if the Board cannot be reasonably positive that the interested public will have sufficient notice and clear guidance regarding a bifurcated hearing (and precisely which issues are to be addressed at each hearing), then Clean Line's motion should be denied.

E. Response of Wind on the Wires

Wind on the Wires (WOW) also filed a response to Clean Line's motion on January 8, 2015, along with a petition to intervene. WOW supports Clean Line's motion, arguing separate hearings will be more efficient and more convenient. WOW says it would be more efficient because WOW does not have an interest in the eminent domain issues involving specific parcels and separation would allow WOW to participate only in the part of the case it is interested in. WOW believes other stakeholders would also benefit from this efficiency.

WOW says the Board's procedures must recognize that the process must be efficient for transmission developers or else potentially-beneficial projects may never be pursued. Finally, WOW says that it has participated in transmission line siting proceedings in other states where the relevant agency has bifurcated proceedings in the requested manner, delaying the grant of eminent domain until after the project

has been approved and the transmission owner has had an opportunity to engage in good faith negotiations for voluntary easements.

F. Koch Response

On January 12, 2015, Mr. Gordon Koch filed an objection in Docket No. E-22132 expressing disagreement with various statements in Clean Line's motion. Mr. Koch says that the motion for separate hearings continues to present due process concerns, that Clean Line has not acquired "numerous" easements, that many landowners will not sign easements even after a Board decision on the project, and that letters of support for the project are irrelevant to the question of whether Clean Line should be permitted to condemn an easement on his property.

G. Clean Line's Reply

On January 20, 2015, Clean Line filed its reply to the various responses. Clean Line argues that a bifurcated proceeding will result in more informed negotiations for easements, as the parties will know that the proposed line has been approved as meeting the statutory standards. (Reply, p. 4.) Clean Line also says that the total cost and pace of obtaining voluntary easements to date has been "approximately commensurate with its budget expectations." (Reply, p. 6.)

Clean Line says that at the first hearing all parties would be able to address the issues of whether the proposed project is necessary to serve a public use and whether it represents a reasonable relationship to an overall plan of transmitting

electricity in the public interest. At the second hearing evidence would be offered about the use of eminent domain on specific parcels. Clean Line submits that many parties will be interested in the issues at the first hearing, but fewer will be interested in the issues at the second, making it important to conduct the first hearing in the most efficient manner possible. Clean Line submits that any inconvenience to parties who have to attend both hearings would be less than the overall convenience to all parties resulting from "the superior administrative efficiency of the two hearing process presented in the Motion." (Reply at pp. 9-11.)

Clean Line says that "many" landowners have indicated that they would prefer not to negotiate an easement until after the Board has made a determination concerning the franchise petitions and the route, but Clean Line declines to identify those landowners or say exactly how many of them there are, citing the confidentiality of individual landowner negotiations. (Reply at p. 12.)

In response to OCA's concerns about the Board's ability to adequately notify the parties and explain the scope of each hearing to all interested persons, Clean Line provides possible language for the mailed and published notices for both the first and second hearings. (Reply, Exhibits A, A-1, B, and B-1.)

LEGAL STANDARDS

All parties agree that the Board has the authority to bifurcate the hearing. The question that remains is whether Clean Line has shown good cause for granting its motion.

The Federal courts have developed a list of considerations that is useful when deciding whether to bifurcate a case for separate hearings on separate issues. They include the preservation of constitutional rights, clarity, judicial economy (or 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 (8th Cir. 1983). In its prior order denying Clean Line's motion to bifurcate, the Board considered those factors plus the convenience of the parties.

DISCUSSSION

A. Comparison of Detriments and Benefits

The benefits of bifurcation fall primarily to Clean Line and, to a lesser extent, to the non-landowner objectors and supporters. Clean Line would benefit from the fact that its costs associated with any potential condemnation would be delayed and from an improved negotiating position with respect to landowners (if the franchises are granted after the first hearing). Clean Line would also benefit from having spent less on a failed project if the franchises are denied.

Meanwhile, objectors and supporters who are not owners of land that would be affected by the proposed line (to the extent they intervene and become parties) would receive some benefit from being able to present their views on the public interest and routing questions without having to attend the hearing addressing the more specific eminent domain issues.

Owners of land that would be affected by the proposed line would be detrimentally affected by bifurcation. If they want to contest the public interest and routing questions and the parcel-specific easement issues, they would have to attend two hearings rather than one. Moreover, it appears that their negotiating position would be adversely affected after the first hearing; if Clean Line has its franchises and the route has been determined, then the landowners' only remaining negotiating points would be the expense to Clean Line of having to go through condemnation proceedings and the general preference for negotiated easements. Realistically, these detriments of bifurcation outweigh any benefits the landowners may receive from delaying the surveys until after a first hearing has been held.

B. Bifurcation Considerations

In response to Clean Line's first motion for bifurcation, the Board analyzed the bifurcation considerations used by the federal courts and decided to deny the motion. The Board's reasoning on each consideration is summarized below, along with

analysis of any new facts or circumstances associated with the second motion to separate the issues.

1. Preservation of Constitutional Rights

The Board expressed concern about the potential effect of bifurcation on the due process rights of landowners and other stakeholders. The Board reasoned that if, after the first hearing, the Board decided to grant a franchise for a specific route, any affected landowners who did not participate in the first hearing (for whatever reason) would be denied a full and fair opportunity to contest the question of the chosen route. Or, in the alternative, it would be necessary to allow those landowners to re-litigate all or part of the approved route, which would be a waste of resources and present the possibility of inconsistent findings. The Board concluded that bifurcation either presented a significant threat to the due process rights of various stakeholders or would be administratively inefficient and inconvenient.

Clean Line asserts that all interested persons can be clearly notified of the issues that will be considered at each hearing, thereby allowing each stakeholder to participate in every stage of the hearing that involves issues that each stakeholder is interested in. Yet the fact remains that even after two separate motions to bifurcate, it is not entirely clear which issues Clean Line proposes to litigate in which hearing. For example, in Clean Line's motion for separate hearings, it says the first hearing will be to determine if the proposed line is necessary to serve a public use and to

determine the route of the line while the second hearing "would determine whether the easement rights requested by Clean Line are necessary and reasonable." (Motion at p. 22). One page later Clean Line says the "second hearing will be held to determine whether Clean Line has shown a need for the right of eminent domain." These are not identical issues; the first appears to be a parcel-by-parcel examination of the easement rights Clean Line proposes to condemn, while the second appears to be the much broader question of whether Clean Line should have the power of eminent domain at all.

Moreover, it may be impossible to draw a clear demarcation between the issues of (a) the route of the overall line and (b) the use of eminent domain. Landowners often seek to challenge the overall route of a proposed line and the specifics of the manner in which the line may cross their individual parcels. In doing so, they may need to present a single set of facts and arguments that are addressed to both challenges. For example, a landowner with forested property along the proposed route might argue that the whole line should be constructed on less-forested property, in order to avoid taking down as many trees, but the landowner would also very likely want to argue about the extent of any tree clearing that will be permitted if the proposed route is not changed. Thus, the same facts and circumstances would be relevant to both issues, the overall route and the parcel-specific easement rights that might be condemned. Similar problems arise with

potential real estate development property, or wetlands, or other properties; many of these fact situations present issues that do not lend themselves to clear bifurcation.

It appears that bifurcating the hearing may cause some affected landowners to be denied the full and fair opportunity to present their cases. At the very least, bifurcation continues to represent a significant threat to the constitutional rights of those landowners.

2. Clarity and the Possibility of Confusion

These factors are closely linked to the preceding factor, because the only way to preserve the constitutional rights of all parties would be through clear notices that prevented any significant possibility of confusion. As described above, multiple pleadings have not produced a clear understanding of the proposed split of the issues between the two hearings. This makes it is difficult to believe that hearing notices will provide a clearer demarcation. The Board is not persuaded that separate hearings can be consistent with this criterion.

3. Administrative Efficiency

In its first motion for bifurcation, Clean Line asserted that the additional time prior to the easement phase of the proceeding might allow it to acquire more voluntary easements, such that fewer individual parcels would have to be addressed at hearing, resulting in greater efficiency. However, Clean Line also admitted that the

Alliance has advised its members not to sign easements, so the Board found it unlikely that more time would result in significantly more voluntary easements.

Now, Clean Line argues that an unknown number of landowners have expressed a preference to wait until after a Board decision on the franchises to sign easement agreements. This means that if all issues are addressed in a single hearing, Clean Line will have to prepare more Exhibit E (condemnation) applications than it will under the two-hearing process. For this reason, Clean Line argues, administrative efficiency would be advanced by the two-hearing approach.

The Alliance notes that Clean Line has not identified these landowners who will not sign until after a Board decision on the franchises and questions whether they are really as numerous as Clean Line suggests. The Alliance also says that it is possible these landowners will not sign a voluntary easement even after a Board decision on the franchise, in which case there will be no impact on the amount of Exhibit E paperwork.

In its reply, Clean Line says that it treats individual landowner negotiations as confidential, so it will not identify the landowners who have expressed a preference for waiting. Clean Line reiterates that its records “clearly indicate that many landowners would prefer not to execute easements or engage in negotiations until the Board has made a determination concerning the grant of the Franchises, and the

approval of the route." (Reply at p. 12.) Clean Line does not offer any indication of the number of such landowners, other than "many."

It appears Clean Line could have provided the number of these landowners without violating the confidentiality of the individual negotiations. In the absence of a substantiated number, it is difficult to accept that this group represents a significant part of the overall number of easements Clean Line needs to acquire. Moreover, as the Alliance points out, there is no guarantee that these landowners will actually sign voluntary easements if the franchises are granted. In all, this argument for increased administrative efficiency is speculative at best, and outweighed by the inefficiencies associated with having two hearings to decide issues that are normally decided in a single hearing.

4. Convenience of the Parties

This appears to be the critical factor in this decision. Splitting the hearing as Clean Line suggests would be convenient for Clean Line, as it would allow the company to delay preparation of the Exhibit E documents and may ultimately require fewer such documents. The split hearing would also mean that survey work on the affected parcels would never have to be done if the franchises are denied, which is a savings to Clean Line and a potential benefit to the affected landowners.

However, the Alliance says that its members value a single hearing and the resulting efficiencies (only having to attend one hearing; lack of confusion over which

issues can be addressed at which time; and potentially better negotiating position) more than the potential avoidance of survey work. They argue that it would be more inconvenient for the landowners and other parties to participate in two hearings and this should outweigh any consideration of Clean Line's convenience and costs.

The Board agrees. Clean Line has not demonstrated that the convenience of all of the parties will be improved by bifurcation. It has, at best, shown that Clean Line's convenience (and costs) would be benefited, but at the same time landowner interests would be detrimentally affected.

5. Conclusion

Consideration of these four factors does not support splitting this hearing. The constitutional due process concerns alone are sufficient to justify denial of the motion. Even if it is assumed that those concerns could be addressed by clear notices, splitting the hearing would still improve the convenience of a few parties while detrimentally affecting the convenience of many others, particularly the affected landowners. The Board will deny the motion to consider eminent domain issues in a separate proceeding.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Motion to Consider Eminent Domain Issue in a Separate Hearing" filed on December 8, 2014, is denied.

UTILITIES BOARD

/s/ Elizabeth S. Jacobs

/s/ Nick Wagner

ATTEST:

/s/ Joan Conrad
Executive Secretary

Dated at Des Moines, Iowa, this 13TH day of February 2015.