

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 ESTABLISH
REQUESTED PROCEDURAL SCHEDULE**

(Issued January 11, 2016)

I. Procedural History

On November 30, 2015, Rock Island Clean Line LLC (Clean Line) filed a “Motion to Establish Procedural Schedule.” Clean Line asks the Board to adopt a schedule with “a single proceeding in two phases.” (Motion at p. 1.) The first phase would consider issues related to the project as a whole, including the necessity of the project to serve a public use, the relationship of the project to an overall plan of transmitting electricity in the public interest, the route of the project, and whether Clean Line is eligible to use the power of eminent domain generally. The question of whether to grant the power of eminent domain would wait for the second phase; only eligibility would be determined in the first phase. Parcel-specific eminent domain issues would also be considered in the second phase.

Clean Line acknowledges that its proposal is similar to its prior motions for bifurcation, or separate hearings, in this matter, but argues that this motion includes

important changes to its proposal and addresses certain concerns previously expressed by the Board. These changes (1) provide clarity to all parties about which issues will be addressed in which phase, (2) promote administrative efficiency and the convenience of the public and the parties, and (3) assure that affected landowners receive fair compensation. The changes will also increase voluntary easement acquisition and reduce condemnation rates.

Clean Line's motion includes a proposed procedural schedule that would, among other things, set an intervention deadline of August 25, 2016, with the phase one hearing starting on December 5, 2016. The start of the phase two hearing would depend upon how long it takes for the Board to issue a phase one decision and, if that decision is favorable to Clean Line, how long it takes Clean Line to negotiate additional easements and prepare the Exhibit E documents for parcels where voluntary negotiations are not successful within a reasonable time frame.

Clean Line argues it has provided the clearest delineation yet of which issues will be decided in which phase of the proceedings; generally speaking, Clean Line says that matters that concern the project as a whole and its general viability will be decided in the first phase, while parcel-specific issues will be decided in the second. Clean Line says the legal and factual issues associated with each phase are fundamentally distinct. This separation will promote administrative efficiency and the convenience of the public and the parties because "a large majority of the intervenors will likely wish to participate solely in the first phase of the proceeding," according to the company. Clean Line says that "a majority of the filings made to date have been

made by individuals or entities that are not landowners along Clean Line's proposed route" and it is likely that those persons will be interested only in the first phase of the hearing. (Motion at pp. 12.) Landowners, however, are free to participate in both phases if they wish to.

Clean Line says that a number of landowners wish to know the Board's decision about the project in general before they will negotiate an easement. Clean Line notes that in the case of *In Re: Dakota Access Pipeline LLC*, Docket No. HLP-2014-0001, a group of affected landowners felt so strongly about wanting to have more information before negotiating an easement that they commenced an action in District Court, seeking a determination of whether the pipeline developer in that docket is eligible to request and exercise the power of eminent domain.¹ Clean Line says this demonstrates that some landowners would prefer that certain threshold issues be decided early in the process, before time and resources are invested in easement negotiations.

In the Board's second order on bifurcation (issued December 8, 2014), the Board expressed some concern that a bifurcated proceeding could have an adverse impact on the negotiating position of affected landowners because a company in Clean Line's position might be less willing to negotiate for private easements after the first hearing, if it is determined that the company may be permitted to exercise the power of eminent domain. In this motion, Clean Line attempts to address that

¹ *Richard R. Lamb Rev. Trust, et al., v. Iowa Utilities Board*, Iowa District Court for Cherokee County, Case No. CVCV024420.

concern by expressing its commitment that if the Board decides favorably for Clean Line in the first phase of the proceeding, Clean Line will not decrease its offers to landowners. (Clean Line's offers consist of an easement payment equal to 90 percent of the fair market fee value of the land subject to the easement, plus an upfront or annual payment (landowner's choice) for each support structure located on the property, plus payment for crop and other damages.) Clean Line recommends the Board make this commitment a condition in the first phase order.

Clean Line argues that the proposed two-phase procedural schedule would likely reduce the need to use eminent domain in connection with the proposed line because the company will have more time to negotiate voluntary easements before any eminent domain proceedings are initiated and because landowners may be more willing to sign an easement after the first phase is completed.

Finally, Clean Line says that the proposed procedures are consistent with the transmission line approval process in other states. Clean Line says that the issues of public interest and the route were separated from eminent domain issues in the Illinois proceedings involving this very project. Clean Line also says that similar separation of issues takes place in Oklahoma, Kansas, Indiana, and Tennessee.

On December 11, 2015, the Office of Consumer Advocate (OCA), a division of the Iowa Department of Justice, filed a response to the motion. OCA remains concerned that bifurcation could confuse interested parties and asks the Board to consider the issues raised in OCA's responses to the earlier motions to bifurcate. OCA adds that if the Board decides to grant the motion, the Board must ensure that

the public receives sufficient notice and guidance to enable all interested persons to know and understand the issues to be considered in each phase.

On December 14, 2015, the Iowa Environmental Council (IEC) filed a letter in support of Clean Line's motion, saying that the IEC is only interested in the issues identified for phase one of the proceeding and would have no interest in any phase two proceedings, so the separation would be efficient and convenient for the IEC. Also on December 14, 2015, Wind on the Wires filed a similar statement in support of the motion. Wind on the Wires says that it has intervened in transmission siting cases in Illinois and Minnesota where a two-phase process was used, dividing the issues in the manner proposed by Clean Lines.

On December 15, 2015, the Laborers' International Union of North American (LIUNA) filed a letter in support of the motion. LIUNA says that in the recent Dakota Access pipeline permit proceeding it had no interest in parcel-specific issues but needed to provide counsel to be available through the entire hearing. This was unnecessarily burdensome to LIUNA. Moreover, Dakota Access was required to prepare eminent domain exhibits for a number of parcels that later became subject to voluntary easements, an unnecessary expense for the petitions. LIUNA argues that a division of the proceeding into two phases will be more efficient.

On December 10, 2015, the Preservation of Rural Iowa Alliance (Alliance) filed a resistance to Clean Line's motion. The Alliance says that Clean Line's motion for procedural schedule is really a third motion to bifurcate these proceedings, a motion the Board has already denied twice. The Alliance says that bifurcation represents a

threat to the due process rights of landowners, a threat that Clean Line has not addressed in its motion. Separating route determination issues from the parcel-specific eminent domain issues could require re-litigation of part or all of an approved route during the second phase of the proceeding; if a landowner is denied the opportunity to challenge the route during the second phase, the landowner could be denied a full and fair opportunity to contest the issues, according to the Alliance.

The Alliance also says that bifurcation continues to present a very real possibility of confusion about which issues are to be litigated in either phase, but even if the issues to be decided in each phase could be made clear, bifurcation would still require that affected landowners attend multiple hearings in order to adequately protect their rights. This would represent a significant inconvenience and expense for those landowners and would not be administratively efficient.

On December 21, 2015, Clean Line filed a reply to the responses to its motion. Clean Line says that the facts and circumstances have changed since its earlier procedural motions were filed and the additional clarity and commitments Clean Line offers make it appropriate to grant the motion for a two-phase procedural schedule. Clean Line says that in hindsight it appears its original motion to bifurcate was filed prematurely, before the franchise petitions were filed and the preferred route had been established. This made it possible that some potentially interested parties had not been identified and therefore would not have received adequate notice of the filing. Further, Clean Line says, its subsequent request to consider the eminent domain in a separate proceeding may have failed to provide sufficient clarity on some

issues. Also, both motions were filed prior to the Board's recent experience with the Dakota Access pipeline permit proceeding, where some landowners tried to go directly to court to obtain a ruling on the question of whether the project could be granted the power of eminent domain, saying their negotiating position was adversely affected by the lack of that information.

Clean Line says that with a clear delineation of the issues to be decided in each phase, all parties will have a meaningful opportunity to present their case, which is all that is necessary to provided due process, citing *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 145 (Iowa 2013) and other authorities. Clean Line also says that it is logical to expect that if Clean Line receives a favorable ruling in the first phase of the proceedings, some of the landowners who have declined to sign voluntary easements will be willing to sign at that time, reducing the number of parcels that must be subject to eminent domain proceedings. This expectation is also supported by testimony in the Dakota Access pipeline case, where a witness for the petitioner testified that some landowners did not want to have an easement on their property for a project that had not been approved, but they would be willing to negotiate a voluntary easement following approval. He estimated that about 10 percent of the landowners were in that position.

Some objectors have noted that Clean Line has "only" obtained approximately 15 percent of the easements needed for the project; Clean Line responds that its easement acquisition efforts have accomplished the company's limited goals at this stage. Clean Line says it has used only a handful of representatives over an active

period of less than one year in an effort to (a) allow landowners to see Clean Line's easement agreement, compensation package, and general acquisition process and (b) show a good faith effort to acquire an initial amount of right-of-way. Clean Line says it "has not yet attempted to acquire the bulk of the easements needed for the Project and would attempt to do so following the first phase of the proposed procedural schedule." (Reply at pp. 7-8.)

Clean Line says that one significant benefit of its project is that it is not a typical cost-allocated utility transmission project that must be paid for by utility customers. Instead, Clean Line's proposed transmission line would be funded by the participants. Clean Line says that if this merchant business model is not supported, then the cost of new transmission (to enable development of more wind energy) will be paid, at least in part, by Iowa electric customers, and that cost could run into the billions of dollars. Clean Line says this public benefit is sufficient to justify the procedural flexibility it is seeking.

Finally, Clean Line says that the procedural schedule it is seeking is the same as is commonly used for projects involving municipal and state agencies in Iowa. Those entities use a process in which the agency approves a project before it proceeds to condemnation, matching the two phases Clean Line is proposing.

II. Legal Standards

The Board has the authority to consider the issues in a case in phases in appropriate cases; Iowa Code § 474.3 grants the agency discretion in the manner of

its proceedings (“the utilities board may in all cases conduct its proceedings, when not otherwise prescribed by law, in such manner as will best conduce to the proper dispatch of business and the attainment of justice”). The Board’s rules expressly contemplate severance of any portions of a contested case “for good cause,” see 199 Iowa Admin. Code 7.14(2). (Strictly speaking, that rule does not apply to electric transmission line franchise proceedings, pursuant to 199 Iowa Admin. Code 7.1(3), but in the past the Board has considered the requirements of its general rules of practice and procedure when considering related issues in electric transmission line franchise proceedings.)

The question before the Board is whether the two-phase procedural schedule requested by Clean Line “will best conduce to the proper dispatch of business and the attainment of justice” (§ 474.3) or, stated differently, whether good cause has been shown to separate the issues in the manner requested. As the Board has noted in previous orders, the Board has adopted several considerations for determining whether to bifurcate a case for separate hearings on separate issues. They include the preservation of constitutional rights, administrative economy, the likelihood of inconsistent results, the possibility of confusion, and the convenience of the parties.

III. Analysis

The Board will deny the motion to establish a two-phase procedural schedule. While Clean Line has addressed some of the concerns identified in the Board’s

previous orders, it has not established that separate hearings would be the best way to proceed in this matter.

1. Preservation of constitutional rights

The first consideration is the preservation of constitutional rights. The primary question here has been whether the due process rights of affected landowners would be adversely affected by separate hearings. The concern expressed in the earlier orders involves the ability to clearly define, and give notice of, the issues to be considered at each hearing, so that all parties have a full and fair opportunity to present their case. The Board was concerned that in the absence of a clear notice of which issues would be addressed at each hearing, some affected landowners could be denied the full and fair opportunity to present their cases.

Clean Line has attempted to address this concern with a detailed list of the issues to be decided in each phase of the proceeding. Clean Line's description of the proposed separation of issues is better than before; as described on pages 5 and 6 of the motion, the second hearing would involve determination of the following issues:

- a. Has Clean Line made a good faith effort to negotiate voluntary easements;
- b. Are the easement rights requested necessary and reasonable;
- c. Is the easement area necessary for a public use;
- d. Has Clean Line properly identified all the necessary parties;
- e. Are the legal descriptions correct; and

- f. Are there any parcel-specific siting concerns or construction-related issues that need to be addressed?

It appears that notices could be prepared based upon this language that would be sufficient to satisfy the applicable legal requirements and give all interested persons adequate notice of which issues would be considered at which time. Accordingly, the Board finds that setting a procedural schedule with two phases, divided as proposed by Clean Line, would not necessarily impair the constitutional rights of any party because adequate notice could be given.

2. Clarity vs. the possibility of confusion

As noted above, it appears that the issues for each hearing have been defined with sufficient specificity that clear notice could be given to all interested persons. This factor does not weigh against the use of separate phases in the manner proposed by Clean Line.

3. Administrative efficiency and the convenience of the parties

These two factors can be considered together. Clean Line's arguments regarding administrative efficiency and convenience come down to one major point: Dividing the matter into two phases will mean Clean Line will be required to prepare fewer condemnation exhibits because, Clean Line asserts, more landowners will sign voluntary easements if the project receives a favorable ruling in phase one of the proceeding, making it unnecessary to prepare the Exhibit E papers for phase two for those parcels.

While the phased approach would be more efficient for Clean Line, it is not more efficient or convenient for the affected landowners, who would be required to attend two separate hearings in order to be heard on all of the issues, with an unavoidable overlap in some of the evidence and argument that would be presented. The Board has described this problem in the earlier orders rejecting bifurcation, with examples of evidence that would be relevant at both hearings (and would therefore, it appears, have to be presented twice). This would be both inefficient and inconvenient for the affected landowners, who would bear the cost of hiring counsel and attending a hearing twice.

The Board is aware of the supporting filings from Wind on the Wires, IEC, and others, indicating that they prefer a two-phase process that would allow them to participate only with respect to the issues they are interested in, such as the relationship of the proposed line to an overall plan of transmitting electricity in the public interest, without having to expend resources attending the hearing when the issues are focused on specific parcels or other eminent domain issues. However, it is always possible for any party to leave the hearing at times when the scheduled witnesses are not testifying to matters of interest to that party; the Board does not require attendance by most parties. Thus, the potential for increased convenience for these parties from having separate hearings does not offset the certainty of increased inconvenience for the affected landowners.

The Board finds that the considerations of administrative efficiency and convenience do not support establishment of a procedural schedule with two

separate phases in the manner proposed by Clean Line. The efficiencies and benefits accrue primarily to Clean Line and its supporters, which the inefficiencies and inconveniences fall to the affected landowners. There is no basis in this record to justify such an inequitable result.

4. Other considerations

In earlier orders, the Board has expressed concern that bifurcation of the hearing could have an adverse effect on the bargaining position of the affected landowners because Clean Line might decrease its offerings for voluntary easements if, after the first hearing, Clean Line receives a favorable ruling on the issue of whether it is eligible for the power of eminent domain. Here, Clean Line's new commitment to continue using the same mechanism for calculating voluntary easement offers even if it is determined that Clean Line is eligible to exercise the power of eminent domain goes some way toward alleviating one of the Board's earlier concern.

Clean Line argues that its proposed procedure is similar to the procedure used for siting electric transmission lines in other states and is also similar to the eminent domain process used by other entities in Iowa, such as other state agencies and municipalities. These comparisons do not persuade the Board that bifurcation in the proposed manner is appropriate under the statutes and procedures that apply to Board proceedings under Iowa Code chapter 478.

First, the Board has not undertaken a detailed review of the procedures in other states, which presumably make sense in the context of their particular statutory

schemes. The Board's concern is with following and implementing Iowa law. Here, Iowa Code § 474.3 charges the Board with the duty to "conduct its proceedings, when not otherwise prescribed by law, in such manner as will best conduce to the proper dispatch of business and the attainment of justice." That duty requires consideration of efficiency, convenience, and fairness; those factors do not weigh in favor of bifurcation.

Second, with respect to the condemnation procedures used by other Iowa agencies and municipalities, Clean Line says that they "utilize a process in which the agency approves a project before it proceeds to condemnation," or, in other words, a two-step process. (Clean Line Reply at p. 11.) This does not support bifurcation of the proceedings before the Board; just like those other agencies, the Board is engaged in a process in which it must decide whether to approve a proposed project before that project can proceed to condemnation. What Clean Line proposes is, in comparison, a three-step process. The Board would first determine whether to approve the proposed line, then determine whether to grant the power of eminent domain, and then Clean Line would be permitted to proceed to condemnation. The situations are not parallel; Clean Line proposes to add an additional step to the process.

5. Conclusion

Consideration of these four factors does not support splitting this hearing in the manner proposed by Clean Line. Splitting the hearing would improve the convenience of only a few parties, at most, while detrimentally affecting the

convenience and efficiency of many others, particularly the affected landowners. The Board will deny the motion to establish a procedural schedule with two separate, or bifurcated, phases.

This does not mean the Board is opposed to setting a procedural schedule in this matter. If Clean Line desires a schedule that includes a single hearing to address all issues, it can file an appropriate motion.

IT IS THEREFORE ORDERED:

The “Motion to Establish Procedural Schedule” filed by Rock Island Clean Line LLC on November 30, 2015, is denied.

UTILITIES BOARD

/s/ Geri D. Huser

/s/ Elizabeth S. Jacobs

ATTEST:

/s/ Trisha M. Quijano
Executive Secretary, Designee

/s/ Nick Wagner

Dated at Des Moines, Iowa, this 11th day of January 2016.