STATE OF IOWA
DEPARTMENT OF COMMERCE
BEFORE THE IOWA UTILITIES BOARD

IN RE:	:	**DOCKET NO. 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**
ROCK ISLAND CLEAN LINE LLC	:	
	:	**MOTION TO CONSIDER EMINENT DOMAIN ISSUE IN SEPARATE HEARING**

Rock Island Clean Line LLC ("Clean Line"), by and through the undersigned counsel, hereby requests that the Iowa Utilities Board ("Board") make a procedural determination to consider the grant of eminent domain authority in a separate hearing or proceeding following the issuance of the requested electric transmission line franchise (if such franchise is granted). Clean Line recognizes that it is asking the Board to reconsider its Order Denying Motion to Bifurcate ("Order") issued November 26, 2013; however, the Board's Order specifically provides that the Board can reconsider its ruling at a later date to weigh new information. As will be shown, facts and circumstances have changed substantially since the Board entered its Order, and a substantial amount of new information is available to present to the Board, which supports the grant of Clean Line's Motion. Furthermore, as the Rock Island Clean Line project ("the Project") has progressed, Clean Line also is now in a better position to provide additional reasoning justifying the grant of its Motion. In support of its Motion, Clean Line provides the following discussion and information.

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I. Introduction

1. The demand for low-cost renewable energy continues to grow throughout the Midwest and around the country. Driven by broad public support for clean and domestically produced energy, improvements in technology that lower wind power prices, coal plant retirements, and environmental regulations, wind energy is playing an expanding role in our nation's energy supply mix. Iowa hosts some of the strongest wind energy resources in the country and has been at the national forefront in harvesting its wind resource. The investments in Iowa wind energy have brought Iowans thousands of well-paying jobs, lower prices for power, millions of dollars in local and state tax revenues, and environmental benefits in cleaner air and water as a result of displaced, dirtier fossil fuel generation.

2. Iowa's standing as a leader in wind energy generation is not by accident. In addition to its abundant wind resource, Iowa's geographic proximity to load centers, business-friendly economic environment, farm-to-market philosophy, and renewable energy polices have made it a premiere location for wind energy development. Indeed, Iowa's State Legislature and Governor have made it a stated policy objective to promote (i) investment in development of renewable energy generation and (ii) infrastructure that will transfer clean energy in Iowa to markets around the country that lack Iowa's strong wind resource. Iowa Code Chapter 476.41 reflects this goal in providing that "it is the policy of this state to encourage the development of alternate energy production facilities…" Iowa Code 476.53A furthermore states that "it is also the intent of the general assembly to encourage…the development of transmission capacity to export wind power generated in Iowa."

3. There remains an abundance of untapped wind energy potential in Iowa, enough to power many millions more homes throughout the Midwest and Mid-Atlantic United States. There also remains a strong demand in local communities, and in the state more broadly, to realize the

benefits of Iowa's wind resource. Iowa utilities have done a commendable job of expanding the Iowa electric grid to accommodate additional wind generation to supply Iowa and neighboring states. However, unless major, new investments in transmission infrastructure are made, the growth of the Iowa wind industry will stagnate. Without such infrastructure investment, Iowa will not unlock the true potential of its wind resource as it has its other natural resources, such as its native fertile soil for commodity crops like corn and soybeans. Wind energy manufacturing jobs will be lost and communities with fantastic wind resources will not see the millions of dollars in revenue from new wind farms that could pay for schools, hospitals and other community resources.

4. Clean Line proposes to make this needed new investment in Iowa without asking Iowa consumers to pay the costs. Specifically, Clean Line proposes to build the Project, an approximately 500 mile direct current transmission line from northwest Iowa to Illinois that fulfills Iowa's policy objective of bringing renewable energy to market. The Project will enable more than 3,500 MW of new wind generation to be constructed and allow Iowa-based wind energy producers to access the PJM market in Illinois and states farther east. The new Iowa wind projects that will be enabled by the Project will result in billions of dollars of investment in Iowa, higher tax revenues for rural Iowa counties, and hundreds of permanent high-skilled jobs for Iowans. Producers who want to access power markets in Illinois and points east will pay to use the Project. With this participant funded or "shipper funded" business model, Clean Line's costs will not be placed in Iowa rate bases and will not create a cost for Iowa consumers. Rather, the shippers of electricity will fund the costs of constructing and operating the approximately $2 billion Project.

5. Clean Line has achieved major project development milestones and has done so entirely with at-risk investment, meaning it is not recovering its costs from the rate base in Iowa or elsewhere. The route for the line in both states has been developed, preliminary engineering has been completed, and numerous interconnection studies have been performed which show the

Project can reliably interconnect to the grid. Clean Line has received approval from the Federal Energy Regulatory Commission to negotiate rates for the Project with potential customers. The Illinois Commerce Commission ("ICC") issued Clean Line a Certificate of Convenience and Necessity to construct, operate and maintain the Project in Illinois along the route proposed by Rock Island. The ICC determined that the Project will be operated for the public use and designated Clean Line as a transmission public utility in the state of Illinois. Clean Line has also secured all required license agreements from the Illinois Department of Natural Resources for all crossings of that Agency's lands. In accomplishing these milestones, Clean Line has made a major financial investment developing the Project, entirely at-risk (see Exhibit Part A of the confidential Affidavit being submitted with this Motion).

6. Pursuant to Iowa Code Chapter 478 and Iowa Administrative Code Chapter 11, Clean Line has filed with the Board Petitions for Franchise that, if granted, will allow it to construct and operate the Project. As a condition precedent, pursuant to Iowa Code § 478.2(2), public informational meetings were held in O'Brien, Clay, Palo Alto, Kossuth, Hancock and Wright Counties on August 20-22, 2013 and in Franklin, Butler, Grundy, Black Hawk, Buchanan, Benton, Linn, Jones, Cedar, and Scott Counties during the weeks of November 18, 2013, December 2, 2013 and December 9, 2013. Clean Line held a second public informational meeting in O'Brien County on December 13, 2013 to provide information regarding a revision to the original preferred route location in that County. Following completion of the public informational meetings, Clean Line was authorized to commence easement negotiations in the specific counties that were the subject of the informational meetings.[1]

7. Clean Line has put forward an innovative landowner compensation package consisting of an easement payment of 90% of the fair market value of the land within the easement

[1] Pursuant to Iowa Code 478.2(4) (2013) a person seeking a franchise shall not negotiate or purchase any easements or other interests in land prior to the informational meeting required by Iowa Code 478.2(2) (2013).

area (even though the landowner can continue to farm virtually all of the easement area), plus a structure payment (annual, with an inflation escalator; or one-time, at the landowner's option), plus crop damages. Clean Line has now secured over 200 easement agreements in Iowa. Clean Line is firmly committed to minimizing eminent domain as much as reasonably possible, and has undertaken significant outreach activities (as discussed in Clean Line's Franchise applications in Exhibit D) to support that commitment.

8. As further described in this Motion, the Iowa regulatory approval process for an important infrastructure project like the Project, which uses a shipper funded business model and connects different regions of the country, will require a different regulatory paradigm from that typically utilized for transmission line franchise cases in Iowa. In order to support the commercial requirements of the Project and projects like it, and in furtherance of using eminent domain only as a last resort, the Board's determination on whether to approve the Project should be made separate from and prior to its eminent domain determination. Such a procedure is clearly allowed under the existing statutes[2] and is also commonly utilized in most other states throughout the country, including in Illinois, where the recent ICC order explicitly provides authorization to construct and operate the Project along a preferred route but also explicitly requires Clean Line to return with a new application for eminent domain, should any use of eminent domain be necessary. The Board's approval of this Motion will ensure Iowa realizes all of the public benefits of expanding its wind energy generation to meet the growing market demand, while still safeguarding the public.

9. Following an overview of the procedural history of this issue, this Motion will discuss the following in more detail: first, Clean Line's need for separating the proceedings; second, the benefits to Iowa landowners of separating the proceedings; third, important circumstances that have changed since the filing of Clean Line's prior motion; fourth, a discussion of the Board's legal

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2 Iowa Code 474.3 under the heading "Proceedings" and 199 I.A.C. 7.14(2) under the heading "Severance".

authority to separate the proceedings; fifth, a discussion of due process concerns and why they are no longer warranted; sixth, a detailed description (lacking from Clean Line's prior motion) of precisely which issues would be determined in the first proceeding and the which issues would be determined in second proceeding; seventh, further discussion of convenience to the parties; and eighth, discussion of maximizing administrative efficiency.

II. Procedural History

10. Clean Line filed its original Motion to Bifurcate on October 15, 2013 ("Original Pleading"), prior to the completion of the foregoing described informational meetings. The Preservation of Rural Iowa Alliance (the "Alliance") filed its Petition to Intervene on October 25, 2013. The Office of Consumer Advocate filed its Resistance to Motion to Bifurcate on October 28, 2013. The Alliance filed its Resistance to Motion to Bifurcate on October 29, 2013. Clean Line filed its Reply to Resistances to Motion to Bifurcate on November 8, 2013. The Board issued its Order Denying Motion to Bifurcate and Granting Petition to Intervene ("Order") on November 26, 2013. On November 6, 2014, Clean Line filed its Iowa Code 478 Petitions for Franchise ("Petition") in each of the 16 Counties through which the proposed transmission line is routed.

III. Clean Line's Need for Consideration of Eminent Domain in Separate Proceeding

11. Clean Line's Petition seeks franchise approval to construct and operate the Iowa portion of the Project, consisting of approximately 370 miles of a transmission line and associated facilities. Clean Line has been actively negotiating voluntary easements from landowners on selected portions of the transmission line's route throughout the state. Clean Line has made substantial progress, acquiring over 200 of the approximately 1,500 easements required, or more than 12.5% of the easements needed for the Project in Iowa. Clean Line has undertaken efforts to communicate with landowners, demonstrate its plan for right-of-way acquisition, highlight its unique and market-leading landowner compensation package, and demonstrate its good faith efforts

to abide by a typical Iowa process of acquiring a portion of the right-of-way prior to receipt of a franchise. Inclusive of both easement payments to landowners and transaction costs (the costs of having land agents in the field and other related costs), Clean Line's expenditures have been very significant. These costs are provided in Exhibit Part B of the confidential Affidavit being submitted with this Motion. Such costs have been incurred at-risk, meaning Clean Line does not have the ability or intent to pass on the costs to Iowa consumers. Such costs have also been incurred *before* the Board has issued a franchise that authorizes Clean Line to proceed with the Project.

12. When securing these voluntary easements, Clean Line has used an "option-like" payment structure, paying a portion (20%) of the easement compensation up-front, with the remainder of payments (the balance of the easement payments, the structure payments, and crop damages payments) due at later dates. In Exhibit Part B of the confidential Affidavit submitted with this Motion, Clean Line provides an estimate of the very significant total costs associated with acquiring all required easements, inclusive of all transaction costs (in this estimate, Clean Line conservatively assumes some increased efficiency as the Project progresses).

13. Additionally, if the proceedings are not separated, Clean Line would be required, prior to the Board's approval of the Project, to pay the extensive costs associated with preparing and filing information about the parcels of property for which Clean Line has not yet acquired easements, including extensive and expensive site-specific engineering and surveying work that must precede the preparation of such a filing. Under 199 Iowa Administrative Code 11.2(1)(e), Clean Line must prepare and file an exhibit, called "Exhibit E," for each parcel in final form before the Board can issue its Iowa Code 478.5 notice. The Board rules for Exhibit E require a legal description of the property (which necessitates on-site surveying); a legal description of the desired easement; a description of the easement rights being sought; a map drawn to scale that specifies the location of property boundaries, the location of the transmission line centerline, as well as the

location of proposed structures or supports that will be located on the property; and a title search for each such property to show the names and addresses of all persons with an ownership interest as well as all tenants. No two parcels of land are identical and each property requires unique resources, varying expertise and staff time. The requirement for providing specific structure locations is particularly burdensome and costly because it necessitates geotechnical surveys (soil boring samples), flying the route for LiDAR data, and the pole spotting engineering determination. Pole spotting typically involves work on neighboring parcels as well, which, if a significant number of parcels are involved, could effectively require pole spotting engineering determinations for the entire Iowa route. Each Exhibit E must also show any existing buildings within 100 feet of the proposed line, and any other features pertinent to the location of the line and its supporting structures. The costs associated with the preparation of Exhibit E's are set forth in Exhibit Part B of the confidential Affidavit being submitted with this Motion. As the Affidavit shows, these costs are substantial and, under the one-proceeding construct currently practiced by the Board, would have to be expended by Clean Line *prior* to any decision by the Board regarding the Project.

14. In its Order, the Board correctly recognized that while the franchise petition is pending, utilities seeking a franchise do not usually provide full payments for the easements but rather only an initial smaller payment, with the balance due prior to construction only if and when the franchise is approved. (See Order p. 15). As indicated above, this is also the case with Clean Line. However, the Board's discussion in its Order of Clean Line's foreseeable cost estimation to acquire easement options was based on incomplete information provided by Clean Line as to such costs. The Board assumed at the time that the initial easement payments would be about 10% of the negotiated price of the easement (See Order p.15). In fact, Clean Line initiated its earliest easement acquisition efforts for the Project at the 10% level but determined that 20% was a necessary minimum and therefore raised the initial compensation to the higher level. The Board's assessment

of Clean Line's incurred costs also did not consider the very significant administrative (or transaction) costs associated with employing land agents in the field. Administrative costs associated with acquiring the easements are estimated by Clean Line to be approximately 9% of final total easement acquisition costs. These administrative costs include title work, land agent labor rates and overhead, legal expenses, and document preparation fees, among other items. The Board must consider that such administrative costs are inherently front-loaded, *i.e.,* assuming that administrative costs are approximately 9% of final total easement acquisition costs, and that the 20% option payments are approximately 18% of final total easement acquisition costs (when factoring in all other costs), then the initial cost of acquiring all required easements is approximately 27% of final total easement costs (9% plus 18%). Thus, expenditure of 27% of the easement costs would potentially be required prior to approval of the Project. The Board's conclusion in its Order that Clean Line would only need to expend 10% of land costs at this time was thus understated. Given the scale of the Rock Island project, the difference between 10% and 27% is substantial.

15. In its Order, the Board also addressed the issue of Clean Line's costs associated with the preparation of Exhibit E. The Board stated:

> 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. (Page 16).

In this Motion, Clean Line asks the Board to consider three additional factors when evaluating the costs of the potential preparation of Exhibit E's, namely (a) effect of timing of costs incurred; (b) prospect for easement commitments; and (c) cost estimation accuracy.

a) First, the Board should consider the timing in which Exhibit E preparation costs are incurred. Clean Line's investors are focused on the question of the cost to develop the Project to the point where it is fully permitted. Although the Board's process in a consolidated hearing does allow, as indicated by the Board in its prior Order, for the delay of Exhibit E costs until later in the proceeding, all of these costs must be incurred *before* the Board's approval of the Project. Thus, that delay is not meaningful because the one-hearing process currently practiced in Iowa still would require substantial sums to be expended by Clean Line *prior to any decision* by the Board on the Project. Clean Line's time, money and risk could be entirely for naught.

b) Second, the Board should evaluate the cost estimation with an updated and more accurate picture of anticipated expenses for acquiring easement rights. The Board assumed in its prior Order that acquiring substantially all of the easement rights required prior to the approval of the Project is a feasible alternative to the expenditure of costs associated with the preparation of Exhibit E's. This assumption has two deficiencies, which are based on the lack of information available at the time of the original filing.

    i. The first flaw in that assumption, as shown above, is that the Board clearly did not have sufficient information available to make an accurate estimation of the costs of acquiring those easements. As reflected elsewhere, the actual costs are projected to be much higher, and it is unreasonable to require Clean Line to incur these substantial costs prior to receipt of a franchise, which authorizes Clean Line to proceed with the Project.

ii. The second flaw in that assumption, as shown in more detail in the balance of this Motion, is that sizeable percentages of landowners have indicated to Clean Line that they do not wish to sign easements at this time. Many landowners have indicated that, although they are not themselves opposed to the Project, they would like to wait until after the Board approves the Project to sign an easement. Other landowners have indicated that they are simply opposed to the Project because they do not believe it is needed (following an approval of the Project by the Board, Clean Line believes many of these landowners will likely be more willing to negotiate, as is typical in other franchise cases where the purpose of the project is not a heavily contested issue). In any event, the result is the same, which is that Clean Line cannot secure voluntary easements from certain landowners prior to an approval of the Project, which in turn would require (in a consolidated single proceeding) Clean Line to seek eminent domain authority for more parcels than otherwise would be necessary if the Franchise was granted first.

c) Third, the Board's analysis will benefit from a more in depth understanding of the total cost of Exhibit E preparation. Given Clean Line did not provide extensive Exhibit E information, the Board may simply have significantly underestimated the full extent of costs that could be associated with Exhibit E preparation and applications for a 370 mile project like the Project. The scope of work involved in this exercise is substantial, and details thereof are described in paragraph 13 above. Again, to this point Clean Line has provided cost information in Exhibit Part B of the confidential Affidavit being submitted with this Motion.

16. Clean Line's total investment in the Project to date, inclusive of all routing, regulatory, engineering, easement acquisition, outreach, and other costs, has been very significant, as demonstrated in Exhibit Part A of the confidential Affidavit being submitted with this Motion. As argued previously, the cost of proceeding with the Franchise as a single proceeding, rather than in two proceedings as requested in this Motion, would materially increase the total anticipated cost of developing the Project to the point where it is fully permitted through the state regulatory processes. In fact, and as demonstrated in Exhibit Part B of the confidential Affidavit being submitted with this Motion, Clean Line estimates that the pre-approval right-of-way acquisition costs to complete the Iowa franchise process under a single-proceeding construct would require Clean Line to *approximately double* its investment in the Project to date. Achieving fully permitted status is considered to be a major milestone towards the completion of the Project by Clean Line and its owners, and is of critical importance to the wind developers who are potential customers of Clean Line as they assess their own investments. Clean Line Energy Partners LLC is currently developing similar projects in Kansas, Missouri, Illinois, Indiana, Oklahoma, Arkansas, Tennessee, New Mexico, Arizona, and California, and has not encountered land costs of this magnitude to be required by any other state prior to that state's approval of a project. In fact, Clean Line's request for delaying the expenditure until a state approval is determined is not unprecedented, but rather is the norm in most jurisdictions (for instance, Illinois, as described in Paragraph 8 of this Motion).

17. In case any clarification is needed, if the Board does separate the proceedings, Clean Line firmly expects to continue to expend considerable resources negotiating easements during the conduct of the first proceeding and until the second proceeding, working to address the concerns of landowners and objectors. Clean Line would not, however, make a comprehensive effort to acquire <u>all</u> required easements until after the Board's approval of the Project in the first proceeding.

IV. Benefits to Landowners and the General Public of Separate Proceedings

18. A significant number of landowners along the proposed route would also benefit from separation of the issues. As will also be noted in the "Important Circumstances Have Significantly Changed Since the Filing of Clean Line's Original Pleading" section of this Motion, Clean Line has communicated with numerous landowners since the Original Pleading who have indicated to Clean Line that they do not wish to sign easements until the Board has determined whether it will issue a transmission line franchise. This preference of landowners is significant and should be considered.

19. As stated previously, Clean Line only wishes to use eminent domain as a last resort. Under a single hearing process, the Board rules require Clean Line to submit an Exhibit E for all parcels for which Clean Line believes it might need eminent domain prior to the commencement of the proceeding. With a single proceeding, therefore, Clean Line would need to submit an Exhibit E application for such parcels that are owned by landowners who wish to wait for approval by the Board of the Project to negotiate an easement, as Clean Line would not have certainty that in all cases voluntary negotiations would in fact be successful due to any number of potential issues (changes of ownership, parcel specific issues not yet identified, etc.). With a single proceeding, therefore, Clean Line would need to resort to requesting eminent domain for more parcels than otherwise would be necessary. Due to the requirements of a preparation of Exhibit E materials (geotechnical borings and other surveys), this larger set of landowners and tenants would additionally be inconvenienced by those activities prior to Project approval, with the potential to unnecessarily exacerbate ill-will in the development of the Project. In addition to the negative consequences to Clean Line, therefore, a failure to separate the issues also has detrimental consequences on landowners and tenants.

20. The Board should be fully cognizant that the ramifications of its decision on this motion will extend beyond Clean Line, impacting other transmission sector market participants, and therefore ultimately the general public. Iowa's ratepayers benefit from a regulatory framework that supports shipper-funded projects. If an alternative transmission infrastructure were constructed in Iowa—for example, an alternating current line or other cost-allocated direct current line—the costs might be allocated regionally or on an interregional basis. In contrast, Iowa's ratepayers will not be allocated any of the costs of the Project. Utilization by the Board of a two hearing process for the Project, which supports business models with at-risk investments, is therefore in the best interests of the Iowa general public as ratepayers, as it increases the likelihood that Iowa ratepayers can avoid cost-allocation to them of significant transmission system upgrade costs.

21. Iowa has a policy goal to "encourage the development of alternate energy production facilities" and to encourage "the development of transmission capacity to export wind power." See Iowa Code Chapter 476.41 and 476.53A. Because PJM, unlike MISO, lacks a method for region-wide cost-allocation for transmission projects intended to increase the supply of renewable energy, opportunities for shipper-funded projects supporting renewable generation must be made sufficiently available in order to motivate rather than deter the massive investment needed to realize Iowa's stated objective and to allow the state to benefit from the economic development and direct investment of billions of dollars that the Project can generate. Consideration of the Project in a two hearing process benefits the general public of Iowa by facilitating these statutory goals.

V. Important Facts and Circumstances Have Changed Significantly Since the Filing of Clean Line's Original Pleading

22. While the issues underlying Clean Line's Original Pleading remain the same, a number of key facts and circumstances have evolved since that time and now merit a fresh review. These changed facts and circumstances indicate that the due process concern about Clean Line's

initial request is now obviated. Further, Clean Line's concerns about the impracticality and infeasibility of the conventional franchise petition process for the Project are now more apparent as a result of Clean Line's easement negotiations with landowners and review of objections that have been filed. These changes in circumstances will be explained in this section.

a) The Timing of the Filing of this Motion Has Changed – Due Process Concerns are No Longer Warranted

23. Because this Motion is being filed *after* the filing of Clean Line's Petition for Franchise, the due process concerns raised about the timing of Clean Line's Original Pleading no longer apply. The Alliance's Resistance to Clean Line's Original Pleading objected to the timing of the Original Pleading, arguing that potential parties to the proceeding would be deprived of notice if the Original Pleading was granted at that time. This concern is now resolved. Clean Line voluntarily mailed notice of Clean Line's Petition for Franchise to all landowners along the Project's proposed route. Furthermore, this Motion will be served on all parties and objectors to this case, and Clean Line is voluntarily mailing notice of this Motion to all landowners along the Project's proposed route. Thus, all affected landowners, and all other parties in this case, have been notified of the Petition for Franchise and the request made herein, and have an opportunity to respond to this Motion and participate in the franchise proceeding. The sequence of filing this Motion after the Petitions have been filed allows all potential parties the opportunity to evaluate whether they have an interest and the opportunity to intervene to represent their bona fide interests.

24. In addition to the above, Clean Line has now completed a total of 17 public informational meetings covering each affected Iowa county as required by Iowa Code 478.2. Therefore, landowners in each of the 16 counties have benefitted from public informational meetings where the proposed line and preferred route were explained. For each of the public informational meetings, Clean Line published a notice in the local newspapers in advance to encourage any and all potentially interested persons to attend the meetings and ask questions.

Additionally, before each public informational meeting, Clean Line sent notices of the meeting to each and every landowner located along the proposed line in that county. In addition to meeting the statutory notification requirements, Clean Line has, on its own initiative, created opportunities to engage the public and potential stakeholders. Clean Line's field staff have held 14 office hour sessions across the Project area to explain the Project and provide members of the public the opportunity to ask questions. Moreover, Clean Line has presented information about the proposed scope and location of the Project before community organizations, local municipal and county government boards, and the state legislature of Iowa. Clean Line also maintains an online resource for members of the public to review and learn more detailed information.

b) Clean Line has Now Acquired Numerous Easements and Can Provide Greater Detail on Easement Costs

25. The number of easement agreements that have been signed and the amount of capital expended by Clean Line on right-of-way acquisition activities has increased substantially since the Original Pleading. At time of the Original Pleading in October 2013, only a handful of easements had yet been negotiated and signed. However, on the date of this Motion, in Iowa, Clean Line has acquired over 200 easements. Therefore, Clean Line now better understands the costs of acquiring the required easements to allow for construction of the Project. These costs are set forth in Exhibit Part B of the confidential Affidavit being submitted with this Motion. As shown in the Affidavit, these easement costs, which have been expended by Clean Line entirely at risk and *prior* to the Board's consideration of the Project, comprise a significant proportion of aggregate Project costs.

c) The Number and Nature of Objections Have Changed, Resulting in Greater Efficiency in Separating the Proceedings

26. The number of objections has increased since Clean Line's prior motion, and the concerns of these objectors are now better understood. An important characteristic associated with the many new objectors is that a significant percentage of them are not landowners. As of the end

of October 2014, to the best of Clean Line's knowledge, approximately one-half of the objections that have been filed are from landowners from whom easements would be desired. Non-landowner objectors, ostensibly and from the text of the objections they filed, believe that the negative impacts and inconveniences of the Project outweigh the benefits and need of the Project. If so, and if they are ultimately deemed to be parties to the case, objectors who are not landowners would have no need, in a two hearing process, to participate in a second hearing concerning eminent domain. In a traditional single-hearing process, however, any such parties would be required to participate in the entire, combined proceeding.

27. Of the objectors who are landowners, many of these indicate on their objection notices that their cause of objection relates to the general need for the Project. Very few of the landowner objectors propose an alternative route on their objection notice. Many of the objections that have been filed, however, worded in various fashions, are based on the concern that the Project is serving regional needs (rather than exclusively serving Iowa electric consumers) or are based on a misunderstanding of the benefits of the shipper-funded business model ("no eminent domain for private gain"). The interstate nature of the Project and the shipper-funded business model both significantly distinguish this Project from other recent electric transmission projects in Iowa. The processing of this case would therefore be cleaner and simpler if the Board would speak to those issues clearly as a preliminary matter with a determination on the approval of the Project. Under a two-hearing process, if the Project is not approved, the impacted landowners avoid the intrusion they would have incurred for the surveying and other work necessary to prepare the Exhibit E documents and if the Project is approved, the landowners have not suffered the loss of any rights and these landowners would then continue to be able to negotiate various terms in their easement agreement after the approval of the Project.

28. Finally, Clean Line notes that it is likely that the Alliance and other objectors will resist this argument that the objectors are "convenienced" by a two hearing process. However, the Alliance has indicated on numerous occasions that their goal is to create an unworkable and expensive process for the case. Their tactical arguments should be understood and considered by the Board as such. For example, the Alliance described the work required to describe each eminent domain parcel in a newsletter from October 20, 2013 and stated that "the more parcels upon which RICL [Clean Line] has to do all this work, the less likely this project is to succeed." Similarly, the attorneys representing the Alliance wrote an article for the Alliance members dated October 13, 2013, wherein they encouraged landowners to wait to sign easements until Clean Line has eminent domain (condemnation) authority. In explaining why, the articles states that "It will make RICL's [Clean Line] row very much harder to hoe. How? Because for every individual easement that RICL has not obtained voluntarily when it petitions the IUB, RICL must do an incredible amount of expensive work."

d) Numerous Landowners have Indicated that They would Prefer to Sign Easements Following a Board Decision on the Project

29. Since the Original Pleading, Clean Line has communicated with numerous landowners who have indicated to Clean Line that they do not wish to sign easements until the Board has determined that it will issue a transmission line franchise. This landowner preference is significant and should be considered. As described above, in a traditional single hearing process, the preference of these landowners to wait for the Board's approval of the Project prior to signing easement agreements would lead to the number of parcels for which an Exhibit E application would be required to be more than would otherwise be necessary. This would create inconveniences for landowners that would be avoided in the two-hearing process requested by Clean Line in this Motion.

e) The Number of Letters of Support for the Project has Increased Significantly Since the Original Pleading

30. The number of support letters has also increased dramatically. As of the filing of this Motion, the total number of support letters has climbed to over 1700. These individuals support the need for the Project and would have no interest in any potential eminent domain proceedings. The interests of these individuals were not considered previously.

VI. The Board Has Statutory Authority and Good Cause to Separate the Proceedings

31. The Board has statutory authority to separate the issues pursuant to Iowa Code 474.3 under the heading "Proceedings" and 199 I.A.C. 7.14(2) under the heading "Severance". Specifically, the Board has broad discretion to separate the issues as "[t]he 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." Iowa Code 474.3; and [t]he board or presiding officer may order any contested case or portions thereof severed for *good cause*." (Emphasis added). The Board's Order distinctly recognized its authority to sever, or bifurcate, issues in a proceeding for good cause. (See Order p. 11). The Alliance also agreed that the Board had the authority to split the proceedings.

32. The Eighth Circuit Court of Appeals offers guidance to district courts in exercising discretion in a bifurcation determination. In its interpretation of Federal Rule of Civil Procedure 42(b) "Separate Trials"[3] the Eighth Circuit has repeatedly held that the following factors must be considered to support a severance: "preservation of constitutional rights, clarity, judicial economy, the likelihood of inconsistent results and the possibility for confusion". See O'Dell v. Hercules, Inc., 904 F.2d 1194, 1202 (8th Cir. 1990) citing Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil, 704 F.2d 1038, 1042 (8th Cir. 1983)). The Board noted and considered these factors in its

[3] **F.R.C.P. 42(b)** Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, cross-claims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

analysis. (See Order p. 5). Because the circumstances have changed substantially since the filing of Clean Line's Original Pleading as described above, and because Clean Line is now in a better position to provide additional reasoning, there exists new material evidence for the Board's consideration. Clean Line can further demonstrate good cause exists for severance of the issues using these factors as stated below.

VII. Stakeholders' Constitutional Rights will be Preserved

33. The Board's initial determination to deny Clean Line's Original Pleading indicated that the Order does not preclude the Board from reconsidering the bifurcation matter if raised again at a later time. The Board's Order contemplated a renewed request for bifurcation and provided that the issue may be raised again to consider new evidence or an argument presented by a future intervenor. (See Order p. 12).

34. The Board noted the due process concerns identified by the Alliance and concluded that separation of the issues would hinder the due process rights of stakeholders at that time and was not consistent with at least some of the federal court considerations cited in Clean Line's Motion. (See Order p. 13). As previously discussed, at the time of the Original Pleading, the Franchise Petitions had not been filed and the route had not been specifically identified across all 16 Counties. However, at the time of this Motion, each landowner along the proposed route has now been notified of the informational meeting and the Franchise Petition, and will receive notice of filing of this Motion. Further, this Motion will be served on all parties and objectors to this case. Ample opportunity has been or will be provided for any interested person to come forward and be represented, both in the franchise case and in the consideration of this Motion; each such stakeholder, thus, now has a "full and fair" opportunity to contest the proceedings. Therefore, the due process concerns raised by the Alliance and the Board with respect to Clean Line's Original Pleading are now moot; in the instant case, stakeholders' due process rights would not be

diminished by separating the proceedings. Additionally, Clean Line will not be granted the right of eminent domain until all prerequisites have been met, including notice and hearing, and therefore any constitutional rights will be protected.

VIII. Separating the Proceedings would Maintain Clarity and Avoid the Possibility of Confusion

35. The Board's Order raised a concern regarding clarity and potential for confusion and stated that clarity is not improved by separating the proceedings. (See Order p. 14). Upon review of the Order, Clean Line believes that its filing did not adequately describe the content of the two proceedings; in this Motion, Clean Line will more clearly describe what would be considered in each of the two proceedings. The issues can be delineated clearly and will not be confused under a two hearing scenario. In the first proceeding, if the appropriate evidence is presented, the Board would approve the Project and the proposed route. Iowa Code 478.4 requires the franchise approval process to determine (i) if the proposed transmission line is necessary to serve a public use and (ii) whether the proposed line represents a reasonable relationship to an overall plan of transmitting electricity in the public interest. Iowa Code §478.4 (2013). In the second proceeding, the Board would determine whether the easement rights requested by Clean Line are necessary and reasonable. Iowa Code §478.6 (2013). Although both proceedings would involve a determination of need, the two determinations are distinct and separate. The first involves a determination of the need for the transmission line, while the second involves a determination of need for specific easement rights. The two proceedings as contemplated by Clean Line (with accompanying hearings) are now described in greater detail.

a) Proceeding One: The Franchise Process

36. The first hearing will be held to determine the following issues delineated in Iowa Code §478.3 and §478.4:

a. Is the line necessary to serve a public use;

b. Does the line represent a reasonable relationship to an overall plan of transmitting electricity in the public interest;

A showing of:

i. the relationship of the proposed project to present and future economic development of the area;
ii. the relationship of the proposed project to comprehensive electric utility planning;
iii. the relationship of the proposed project to the needs of the public presently served and future projections based on population trends;
iv. the relationship of the proposed project to the existing electric utility system and parallel existing utility routes;
v. the relationship of the proposed project to any other power system planned for the future;
vi. the possible use of alternative routes and methods of supply;
vii. the relationship of the proposed project to the present and future land use and zoning ordinances; and,
viii. the inconvenience or undue injury which may result to property owners as a result of the proposed project.

Clean Line's Petitions for Franchise have been filed and the details of its Project have been made public. While not required by law, Clean Line also provided a notice of the Franchise filings to all landowners along the proposed route. Any potentially interested party can review the requested terms and conditions applicable to the franchise and with clarity and certainty make an individual evaluation of the potential impacts of the requested location and route of the line. It is contemplated that parties will have an opportunity to present prepared testimony and cross-examine witnesses as permitted by the individual(s) presiding over the hearing. The process will be similar to the normal franchise hearing process when eminent domain is not at issue.

b) Proceeding Two: Eminent Domain

37. The second hearing will be held to determine whether Clean Line has shown a need for the right of eminent domain. The inquiries for an eminent domain determination are distinguishable from the factors for consideration in granting a franchise. Under Iowa Code 478 and the eminent domain statutes, the Board makes this determination through evaluation of the following issues:

a. Has the Petitioner made a good faith effort to negotiate for the acquisition of the required easements;
b. Are the easement rights required by the Petitioner necessary and reasonable, consistent with the purpose and requirements of the project;
c. Is the easement area itself necessary for public use – i.e. is it consistent with the route previously approved and therefore necessary for the project;
d. Has the Petitioner properly identified all the parties who have an interest in the eminent domain parcel and provided the required notice;
e. Is the eminent domain parcel and the easement properly described.

38. As described above, therefore, the issues that the Board is required to consider for approval of a franchise would not be the same issues that the Board is required to consider in an eminent domain proceeding. Clean Line contemplates that prepared testimony and cross-examination of witnesses would occur as with the first phase or proceeding; but the scope of the issues would be limited to the narrow list of issues described above in Paragraph 37.

39. As previously noted in the "Important Facts and Circumstances Have Changed Significantly Since the Filing of Clean Line's Original Pleading" section, the separate proceedings would be consistent with due process. The due process concerns presented by the Alliance interveners and recognized by the Board hinged on the sequence and timing of the filing of the Original Pleading in relation to the filing of Clean Line's Franchise Petition. As that Franchise Petition has now been filed, the due process concern is now obviated.

IX. Convenience of the Parties

40. The Board expressed concern in its Order about convenience to stakeholders *and* convenience to Clean Line. The new evidence and circumstances show that separation of the proceedings would in fact be *more convenient* to stakeholders and that a denial of this Motion would be substantially *inconvenient* to Clean Line.

41. The convenience created by a separation of the proceedings extends far beyond the convenience to Clean Line identified in the Board's Order. Separating the issues would benefit stakeholders beyond Clean Line. First, a large subset of objectors—non-landowner objectors—

would be "convenienced" by a separation of the proceedings. Non-landowner objectors who may become parties would not need to participate in any part of the eminent domain proceedings and would be "convenienced" by having separated proceedings. That is, this type of party would have the option to participate only in the first hearing focused on project need and would not need to participate in the second hearing focused solely on eminent domain. The number of non-landowner objectors is significant and to date is at around half of the current objectors. Furthermore, eliminating some of the non-landowner objectors from the eminent domain proceeding would provide convenience to Clean Line, the Board, and all other parties involved in the second hearing, including landowner objectors, as the case administration would be more manageable and efficient.

42. Non-landowner supporters of the Project, such as business and labor organizations, individuals, and various environmental or trade associations who may intervene based on benefits of the Project to Iowa would also be "convenienced" by a separation of the hearings. Such supporters would have the option of only participating in the proceeding focused on the necessity of the Project and would benefit from not having to participate in a proceeding that combines franchise issues with eminent domain issues.

43. Further, as has been previously discussed, many landowners have indicated to Clean Line that they do not wish to sign easements until the Board has approved the Project. This group of potential parties would benefit from separation of the issues as discussed in the section "Benefits to Landowners and the General Public of a Separation of the Issues."

44. If the proceedings are separated into two hearings, for landowner convenience, Clean Line would offer that the second proceeding determining eminent domain not be consolidated but rather divided into individual determination hearings for each county. The potential for these individual determination hearings would be of major convenience to any landowners involved.

45. The convenience to Clean Line resulting from the separation of the issues was fully addressed in the above section "Clean Line's Need for Consideration of Eminent Domain in a Separate Proceeding."

46. As has been shown, Clean Line, non-landowner objectors, non-landowner supporters, landowners who desire a decision prior to negotiation of the easement, and any landowners for whom eminent domain proceedings are necessary would all benefit from separation of the proceedings. A very large group of stakeholders would only need to participate in one prong of the separated hearings; the separation of the issues would obviate the need for their participation in a cumulative, inefficient proceeding, which would enhance convenience to all stakeholders.

47. In assessing the balance of conveniences and possible accommodations afforded to the various parties, the quantifiable and demonstrable costs that would be absorbed by Clean Line should be equally weighed. Because the Project would not be subject to rate recovery, it is not reasonable for the Board to expect Clean Line or other similar developers to absorb the upfront costs of exhausting efforts to acquire each required easement and preparing each Exhibit E prior to the Board issuing its Iowa Code 478.5 notice. If this Motion is rejected, the Board places a significant chilling effect on participant-funded transmission projects, contrary to Iowa's policy goal to "encourage the development of alternate energy production facilities" and to encourage "the development of transmission capacity to export wind power." See Iowa Code Chapter 476.41 and 476.53A.

X. Administrative Efficiency

48. In this Motion, under the "Benefits to Landowners and the General Public of Separate Proceedings" and "Convenience to the Parties," Clean Line has explained that a significant number of landowners are now known to prefer to wait until after a Board decision to sign easement agreements with Clean Line. Due to this landowner preference, Clean Line has also explained that

it would be required to submit more Exhibit E applications in a traditional single hearing process than would otherwise be necessary in a two hearing process—which would be directly counter to administrative efficiency. Also as discussed previously, a significantly larger number of parties would need to be involved in the case during the consideration of Exhibit E if the case is not divided into two proceedings, even further undercutting administrative efficiency.

49. The Board, in its Order (page 14), stated: "[as]…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." Clean Line clarifies today that it is not time *per se* that would lead to more easement agreements and reduced need for Exhibit E materials, but the Board's decision itself, as many landowners have requested this ordering of events (Clean Line notes that many of the landowners desiring a decision on the Project prior to easement negotiations are not members of the Alliance and do not share the views of the Alliance; rather, they are simply respectful of their neighbors' opinions or are deferential to the Board when faced with a project that is significantly different—because it serves regional needs and because of its shipper-funded business model—than other recent electric transmission projects in Iowa).

50. Supporters of Clean Line's transmission line that are not landowners, such as business and trade associations, environmental groups, labor representatives, and other individuals would not need to participate in the second proceeding as easements are not being negotiated with these interested parties. Administrative efficiency is improved if these parties do not need to participate in the eminent domain/Exhibit E portion of this case.

51. Objectors to the Project that are not landowners, if they are parties to the case, would also not have cause to participate in the second hearing if the Motion is granted. Administrative efficiency is also improved if this group does not need to participate in the eminent domain/Exhibit E portion of the case.

52. Clean Line's case can be differentiated from other recent Iowa electric transmission franchise cases by the Project's shipper-funded business model and by the Project's service of regional needs. It is reasonable for the Board to expect a robust dialogue on these issues by the participants in the case, and to expect numerous questions regarding the most appropriate route. The Board should recognize that these differences are significant and decide whether to approve the Project and the route prior to consideration of eminent domain for specific parcels.

XI. Conclusion

53. Based on the many new significant facts and considerations that have occurred or developed since Clean Line's Original Pleading, Clean Line has shown good cause for its Motion to Consider the Eminent Domain Issue in a Separate Hearing. The expansive scope and size of the Project make it unreasonable to expect Clean Line to incur enormous amounts of capital, on easement acquisition when the Project is not yet approved by the Board. Separation of the issues at this juncture preserves the constitutional rights of landowners by providing adequate notice of the proceedings; it affords stakeholders and interested parties greater convenience in their participation; and it promotes the most efficient administration of the cases. The Board should grant Clean Line's Motion because doing so will effectively protect the interests of the parties involved and offers the most practical and reasonable regulatory paradigm to consider innovative, shipper-funded infrastructure projects like the Rock Island Clean Line.

WHEREFORE, Clean Line respectfully moves the Board to enter an order separating the Chapter 478 proceeding into two phases, the first addressing the franchise issue and the second addressing the eminent domain issues, to the extent that eminent domain authority is ultimately sought by Clean Line.

Respectfully submitted

SULLIVAN & WARD, P.C.

_____/s/_____

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ATTORNEYS FOR ROCK ISLAND CLEAN LINE LLC

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of the rules of the Iowa utilities board.

Dated at West Des Moines, Iowa this 8th day of December, 2014.

By

_____/s/_____

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