

ARKANSAS PUBLIC SERVICE COMMISSION

2011 JAN 11 P 1:38

FILED

IN THE MATTER OF THE APPLICATION OF)
 PLAINS AND EASTERN CLEAN LINE LLC FOR)
 A CERTIFICATE OF PUBLIC CONVENIENCE)
 AND NECESSITY TO CONSTRUCT, OWN AND)
 OPERATE AS AN ELECTRIC TRANSMISSION)
 PUBLIC UTILITY IN THE STATE OF ARKANSAS)

DOCKET NO. 10-041-U
 ORDER NO. 9

ORDER

On May 13, 2010, Plains and Eastern Clean Line LLC (Clean Line) filed in the above-styled Docket an Application for approval of a Certificate of Public Convenience and Necessity (CCN Application) seeking authority of this Commission to operate as a public utility in the State of Arkansas. Clean Line's CCN Application states it "does not seek authorization to begin construction of a transmission line, which authorization Clean Line will seek pursuant to a separate application." CCN Application at 1.

By Order No. 6 entered in this Docket on August 24, 2010, the Commission established a procedural schedule to consider Clean Line's CCN Application. Per Order No. 6, the evidentiary hearing on Clean Line's CCN Application was held on Tuesday, December 7, 2010.

The Parties' Filings

According to its CCN Application, Clean Line "is a limited liability company organized under the laws of Arkansas, with its principal business address located at 1001 McKinney Street, Suite 725, Houston, Texas 77002." CCN Application at 1 ¶ 1. In addition, "[t]he mission of Clean Line Energy Partners is

to connect the best renewable resources in the country with regions that have an increasing demand for renewable energy.” *Id.* at 2 ¶ 3. Noting the policy framework in favor of renewable power production and transmission in which its CCN is sought, Clean Line states its “exclusive focus on the development and operation of transmission lines aids its ability to propose and execute projects that best serve the need for increased access to renewable energy. Clean Line has no competitive interest in existing generation or retail operations and is therefore well-suited to facilitating transmission solutions that provide consumers with affordable access to clean energy.” *Id.* at 7 ¶ 12.

Clean Line states, at some point, it plans to construct two high voltage direct current (HVDC) transmission lines that will traverse the state of Arkansas and the “development and construction of [its HVDC transmission lines] is estimated to require approximately \$3.5 billion. Clean Line does not plan to seek cost recovery through the electric rates paid by consumers in Arkansas and throughout the region, nor does a mechanism exist to provide for the cost recovery of a transmission line that traverses multiple regional planning systems.” *Id.* at 11 ¶ 20. Clean Line’s CCN Application also includes information regarding key personnel managing its business, the qualifications of each person and the financial and other aspects of its current business plan. *Id.* at 12 ¶ 23.

Clean Line’s CCN Application concludes that the “[p]ublic convenience and necessity will require the construction or operation of additional transmission lines in the state of Arkansas. The public interest will be served by Clean Line’s plan to deliver electricity generated from renewable resources to the

southern United States, including Arkansas, because it will stimulate economic development, promote wider choice and competition in wholesale generation, and reduce pollution.” *Id.* at 15-16 ¶ 30.

Regarding the legal framework surrounding certification of a transmission-only public utility, Clean Line argues it meets the Arkansas statutory definition of a public utility because it “will transmit electricity within the state of Arkansas.” Clean Line’s Initial Brief at 2 (September 21, 2010). Clean Line notes this Commission “has also recognized that a reliable and efficient electric transmission system is necessary to transfer electrical power within Arkansas and regionally ... [and] in order to appropriately plan for the expansion of, and upgrades to, the electric transmission system, utility planners and regulators must make decisions well in advance of the need for additional transmission. ” *Id.* at 3. Stating the “shortage of transmission has begun to limit renewable energy growth []” and “[a]dditional transmission infrastructure is critical to the nation’s ability to fully exploit its wind resources and meet the ever increasing energy demands in an environmentally responsible manner []” (*Id.* at 5), Clean Line states it can “bridge this gap” with its construction of “two high-voltage, direct current transmission lines that will connect up to 7,000 MW of wind energy from western Oklahoma and the surrounding region with areas of demand for renewable energy in the Tennessee Valley Authority service territory, Arkansas and the southeastern United States.” *Id.* at 6 (footnote omitted).

Relying on statutory construction principles, Clean Line claims that the Commission’s certification of the Southwest Power Pool Regional Transmission

Organization (SPP RTO) in Docket No. 04-137-U turned on the fact that transmission facilities in Arkansas “supply a public service.” Clean Line believes, given its “proposed facilities are transmission facilities located in Arkansas, they, too, will ‘supply a public service.’” *Id.* at 8. Similarly, Clean Line notes Arkansas law defines a public utility as a corporation “owning or operating in this state equipment or facilities for...transmitting...power to or for the public for compensation...” *Id.* (Citing Ark. Code Ann. § 23-1-101(9)(A)(i)). According to Clean Line, in “*Arkansas Charcoal Company v. Arkansas Public Service Commission*, the Court stated, ‘It is not the number of customers served which is determinative of public utility status, but rather whether a person or company holds itself out to serve all who wish to avail themselves of the service.’” *Id.* at 8-9. Finally, Clean Line notes the Oklahoma Corporation Commission (Cause No. PUD 200700298) recently has approved a similarly-situated company (ITC Great Plains) as a certificated transmission-only utility in its state.

As part of its CCN Application, Clean Line requested that the Commission approve exemptions from certain public utility statutes. In support of its requested statutory exemptions (CCN Application at 15 ¶ 29), Clean Line indicates its rates will be regulated by the Federal Energy Regulatory Commission (FERC), making Ark. Code Ann. §§ 23-3-114, 23-4-101 through 110, and 23-4-401 through 421 all inapplicable as they relate to this Commission’s ratemaking authority. Clean Line’s Initial Brief at 10. Because Clean Line will not contract with end users of electricity in Arkansas, Clean Line suggests Ark. Code Ann. § 23-4-201 through 208, regarding customer relations, are inapplicable as well.

Notably, in Reply to Staff's and the AG's filings discussed more fully below, Clean Line has agreed not to seek the right of eminent domain at this time and that the only statutory waivers it will seek are those related to FERC's jurisdiction over setting its customers' rates, claiming this Commission does not have wholesale ratemaking authority. Clean Line's Reply Brief at 5 (November 9, 2010).

The General Staff of the Arkansas Public Service Commission (Staff) did not file any evidentiary testimony, but Staff's Prehearing Brief filed on October 19, 2010, notes Clean Line's CCN Application presents a case of first impression as Clean Line "will be a merchant transmission-only provider and may or may not provide service at wholesale in Arkansas." Staff's Prehearing Brief at 1. Staff also cites to *Arkansas Charcoal Company v. Arkansas Public Service Commission*, 299 Ark. 359, 773 S.W.2d 427 (1989) noting the Commission's regulation has been limited, traditionally, to those companies providing services at retail or which are intrastate. *Id.* at 3. Because Clean Line will be regulated by FERC and provide wholesale transmission service and it is unclear whether Clean Line will actually interconnect with the transmission system in Arkansas or have any wholesale sales in Arkansas, Staff believes Clean Line "is not offering jurisdictional utility service and would not be a public utility subject to this Commission's jurisdiction." *Id.*

Staff notes the SPP RTO's Application considered in Docket No. 04-137-U—and relied on as analogous by Clean Line—is different because it "operates facilities constructed and owned by jurisdictional public utilities in Arkansas

whose transmission costs are included in rates charged to captive ratepayers in Arkansas by those jurisdictional utilities. SPP was also specifically not granted the power of eminent domain.” *Id.* Thus, Staff argues, the certification of SPP has no applicability in this case.

Staff also states Clean Line “has offered no evidence that the public convenience and necessity require the operation of Clean Line as a merchant transmission provider.” *Id.* at 4. Citing additional differences between Clean Line and the SPP RTO, Staff notes “to issue a CCN to Clean Line, it appears that the Commission would have to look beyond whether the public convenience and necessity require the operation of Clean Line’s transmission facilities in Arkansas and consider broader public policy goals.” *Id.* at 5. Staff does comment that, if the Commission finds Clean Line is a public utility, its requested statutory exemptions should be granted, except Ark. Code Ann. § 23-4-102, relating to the Commission’s authority to petition a federal commission relating to interstate rates, charges, classifications, and other actions.

The only other party to this Docket is the Consumer Utilities Rate Advocacy Division of the Arkansas Attorney General’s Office (AG). The AG filed a prehearing legal brief and supporting testimony on October 19, 2010. In its Brief at 3, the AG questions what “business Clean Line can conduct as a public utility with no equipment, facilities, customer or source of power, or specific plan to acquire them...” The AG states directly that Clean Line “does not meet the legal definition of a public utility” (at 3) because Clean Line lacks the “readiness to service an indefinite public or a portion of the public.” *Id.* (Citing *Arkansas*

Charcoal Company v. Arkansas Public Service Commission, 773 S.W.2d 427, 430 (Ark. 1989)). Also distinguishing the SPP RTO case from this one, the AG notes that SPP was “ready to act as a new public electric utility, and it only required Commission approval in the form of a CCN to operate the facilities. When SPP commenced operation of the facilities, it commenced transaction of the business of a public utility, which in turn made it a public utility as defined by statute.” *Id.* at 4.

Stating that although Clean Line “will not meet the statutory definition of (*sic*) Public Utility now, there is no reason not (*sic*) believe they will do so in the future. Because Clean Line has acknowledged that there will be a future [Certificate of Environmental Compatibility and Public Need (CECPN)] proceeding, the AG suggests that the Commission defer a ruling on Clean Line’s CCN request and decide when it rules on Clean Line’s CECPN application. Then, the Commission can grant or deny authorization to build and operate the facilities at the same time.” *Id.* at 4-5. Citing to the Supreme Court’s recent decision in *Hempstead County Hunting Club, Inc. v. Ark. Pub. Serv. Comm’n*, 2010 Ark. 221, ___ S.W.3d ___ (2010), the AG suggests that case is another reason combining Clean Line’s request for a CCN with any subsequent proceedings for a CECPN makes sense to avoid re-litigation at a later date of some of the same issues. *Id.* at 6. Finally, the AG suggests Clean Line’s requested statutory exemptions are “overbroad” and recommends an explicit prohibition on Clean Line exercising the power of eminent domain. *Id.* at 7-8.

Commission's Jurisdiction

A public utility is defined in the state of Arkansas by Ark. Code Ann. § 23-1-101, which states in relevant part:

(9) (A) "Public utility" includes persons and corporations, or their lessees, trustees, and receivers, owning or operating in this state equipment or facilities for:

(i) Producing, generating, transmitting, delivering, or furnishing gas, electricity, steam, or another agent for the production of light, heat, or power to or for the public for compensation; ...

Although the need for the Commission to certificate a company as a public utility is not directly addressed, in order to construct public utility facilities in Arkansas, Ark. Code Ann. § 23-3-201(a) states:

New construction or operation of any equipment or facilities for supplying a public service or the extension of a public service shall not be undertaken without first obtaining from the Arkansas Public Service Commission a certificate that public convenience and necessity require or will require the construction or operation.

In addition, the Commission has the power to grant or deny a CCN Application pursuant to Ark. Code Ann. § 23-3-205, which states:

The commission shall have the power, after hearing, unless waived by the parties, to issue the certificate as prayed for, to refuse to issue the certificate, or to issue it for the construction or operation of a portion only of the contemplated facility or extension thereof, or for the partial exercise only of the right or privilege and may attach to the exercise of the rights granted by the certificate such terms and conditions in harmony with this act as in its judgment the public convenience and necessity may require.

Finally, the Commission has certification jurisdiction for CECPNs— at least one of which Clean Line acknowledges will be necessary if it is

certificated as a public utility—pursuant to Ark. Code Ann. § 23-18-501(a),
which states:

No person shall commence to construct a major utility facility in the state, except those exempted as provided in subsection (c) of this section and §§ 23-18-504(a) and 23-18-508, without first having obtained a certificate of environmental compatibility and public need, hereafter called a “certificate”, issued with respect to the facility by the Arkansas Public Service Commission. The replacement or expansion of an existing transmission facility with a similar facility in substantially the same location or the rebuilding, upgrading, modernizing, or reconstruction for the purposes of increasing capacity shall not constitute construction of a major utility facility if no increase in width of right-of-way is required.

Commission’s Findings & Conclusion

The issues presented by this case are twofold: (1) whether Clean Line fits the statutory definition of an Arkansas “public utility” and is entitled to a CCN to provide public utility service in the state; and (2) if so, whether Clean Line is entitled to exemption from certain public utility statutes. For the reasons stated more fully below, the Commission finds that Clean Line does not meet the statutory definition of a public utility at this time. The Commission’s ruling on the first issue moots the necessity of ruling on the second.

As an initial matter, the Commission wholly supports the development of transmission infrastructure in the state of Arkansas as well as the development of opportunities to use and transmit renewable power for the benefit of Arkansas utilities and their ratepayers. In addition, the Commission notes with appreciation the extensiveness of Clean Line’s presentation of the policy considerations supporting its CCN Application. Clean Line’s efforts are laudable and its work is to be commended.

The difficulty the Commission now faces is that the law governing public utilities was not drafted to comprehend changes in the utility industry such as this one—where a non-utility, private enterprise endeavors to fill a void in the transmission of renewable power that is much needed but for which the Commission is unable to afford any regulatory oversight. The Commission’s denial of Clean Line’s CCN Application is without prejudice and if, and when, Clean Line can provide additional information with more concrete plans satisfying the Commission’s concerns as expressed herein, the Commission is willing to revisit this matter in a new docket at that time.

The Commission is a creature of the General Assembly, and it performs a legislative function in regulating all public utilities. *Bryant v. Arkansas Pub. Serv. Comm’n*, 46 Ark. App. 88, 877 S.W.2d 594 (1994); *Sw. Bell Tel. Co. v. Ark. Pub. Serv. Comm’n*, 267 Ark. 550, 593 S.W.2d 434 (1980). The Commission’s statutory mandate extends to and includes “all matters pertaining to the regulation and operation of all ... electric lighting companies and other companies furnishing gas or electricity for light, heat, or power purposes.” Ark. Code Ann. § 23-2-302.

The Commission’s decision in this case turns on the statutory definition of a “public utility” found in Ark. Code Ann. § 23-1-101(9)(a) cited above. Although Clean Line’s presentation of its case was strong on policy considerations and certainly Clean Line worked hard to analogize its case to that of the SPP RTO, the Commission’s authority cannot exceed that which is delegated to it by the Arkansas General Assembly. The “public utility” definition requires “owning or

operating in this state equipment or facilities for...transmitting...power to or for the public for compensation.” Ark. Code Ann. § 23-1-101(9)(A).

The Parties’ legal filings and opening arguments at the December 7 hearing discussed to varying degrees what each of these key phrases means, but the Commission is not convinced the totality of the evidence satisfies this statutory threshold. Recognizing, as Clean Line pointed out, there is some circularity involved in the fact that Clean Line cannot own or operate regulated major utility facilities pursuant to Arkansas law in this state without first being declared a public utility, in isolation, this portion of the statute is not determinative of Clean Line’s utility status. However, read in tandem with the facts that the transmission of the power must also be “to or for the public for compensation” when Clean Line, to date, has no contracts for public utility service with any utility, including Arkansas utilities, and there also can be no transmission of power at this time, the Commission is not prepared to approve Clean Line’s CCN Application.

In sum, the Commission is not opposed to independent transmission construction and, in fact, strongly supports the improvement of the transmission system in this state as a means to lower energy costs for Arkansas ratepayers. As the Parties all acknowledge, the issue of certification of a transmission-only public utility is one of first impression in this State. Thus, the Commission’s decision is based on that fact that it cannot grant public utility status to Clean Line based on the information about its current business plan and present lack of plans to serve customers in Arkansas. Without pre-judging any future plans

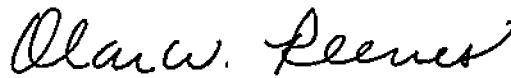
Clean Line may have or may bring before the Commission, the Commission denies Clean Line's requested CCN.

BY ORDER OF THE COMMISSION,

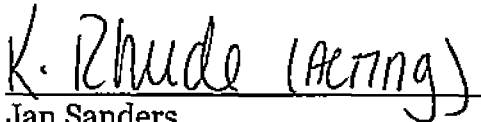
This 11th day of January, 2011.



Colette D. Honorable, Chairman



Olan W. Reeves, Commissioner



Jan Sanders
Secretary of the Commission

I hereby certify that this order, issued by the Arkansas Public Service Commission, has been served on all parties of record on this date by the following method:

U.S. mail with postage prepaid using the mailing address of each party as indicated in the official docket file, or
 Electronic mail using the email address of each party as indicated in the official docket file.