UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

DOWNWIND, LLC and GOLDEN BRIDGE, LLC Plaintiffs, v. UNITED STATES DEPARTMENT OF ENERGY; ERNEST MONIZ, in his official capacity as Secretary of the United States Department of Energy; SOUTHWESTERN POWER ADMINISTRATION; SCOTT CARPENTER, in his official capacity as Administrator of the Southwestern Power Administration Defendants, PLAINS AND EASTERN CLEAN LINE HOLDINGS, LLC Intervenor.	)	Civil Action No. 3:16-cv-00207-DPM

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This case and controversy seeks declaratory judgments and injunctive relief regarding (i) procedural and substantive due process rights, (ii) the scope and limitations of the Secretary of Energy and Department of Energy's statutory authorities, (iii) the sufficiency and rationale of the Secretary of Energy and Department of Energy's evaluations and determinations, and (iv) the proposed use of federal eminent domain to benefit a private party, all of which arise from the Secretary of Energy and Department of Energy's first-ever exercise of the authority granted by Section 1222 of the Energy Policy Act of 2005, which is codified as 42 U.S.C. § 16421 ("Section 1222").

2. Acting pursuant to Section 1222, the U.S. Department of Energy ("DOE") published a Record of Decision and Secretarial Determination documenting the Secretary of Energy ("Secretary") and DOE's decision to enter a Participation Agreement for the direct benefit of PLAINS AND EASTERN CLEAN LINE HOLDINGS LLC ("Holdings"), ARKANSAS CLEAN LINE LLC ("ACL"), PLAINS AND EASTERN CLEAN LINE OKLAHOMA LLC ("PECL OK"), OKLAHOMA LAND ACQUISITION COMPANY LLC ("OLA"), and "solely to the extent that any of the provisions . . . apply to the Clean Line Parties[1] (as opposed to the Clean Line Entities, Holdings, or any of the Project Subsidiaries), PLAINS AND EASTERN CLEAN LINE LLC ("PECL")," and the indirect benefit of Clean Line Energy Partners ("CLEP"), which owns Holdings (collectively, Holdings, ACL, PECL OK, OLA, PECL, and CLEP are referred to herein as "Clean Line"). A copy of the Record of Decision is attached as EXHIBIT A; a copy of the Secretarial Determination is attached as EXHIBIT B; a copy of the Department of Energy's Summary of Findings is attached as EXHIBIT C; and, a copy of the executed Participation Agreement is attached as EXHIBIT D.

3. The Participation Agreement establishes the ongoing terms and conditions pursuant to which DOE will participate in a portion of Clean Line's proposed Plains & Eastern Clean Line Transmission Line Project that will comprise "approximately 705 miles of ±600 kV overhead, [high voltage, direct current] electric transmission facilities running from western Oklahoma to the eastern state-line of Arkansas near the Mississippi River and related facilities,

[1] The Participation Agreement defines "Clean Line Party" as "Holdings and each of its Subsidiaries (*including* PECL and any PECL Subsidiary)", "Clean Line Entity" as "Holdings and each of its Subsidiaries (*other than* PECL and any PECL Subsidiary)", and "Project Subsidiary" as "(a) any Subsidiary of Holdings that owns any Property or other rights relating to the Project, including each of ACL, PECL OK and OLA and (b) any Subsidiary of Holdings that, directly or indirectly, owns any Equity Interests of any such Subsidiary; *provided that the term "Project Subsidiary" shall not include PECL or any PECL Subsidiary.*" Exh. D, pp. 18, 17, and 44 (emphasis added). DOE and Clean Line have specifically exempted PECL from the definitions of Clean Line Entity and Project Subsidiary. In addition, because Clean Line Party and Clean Line Entity refer to multiple entities, it is impossible to discern which exact entity is responsible for the various obligations pursuant to the Participation Agreement.

including a converter station in Arkansas" (the "Project"). See, Exh. A, pp. 1 and 2 (page number references are to Bates page numbers within each separate Exhibit); Exhibit D, p. 8. DOE projects that the Project will transmit 3,500 mega-watts (MW) of renewable, wind-generated electricity from the Oklahoma pan-handle region to the Tennessee Valley Authority and southeastern United States. The Project will also include an offload station for approximately 500 MW of electricity within Arkansas, presumably for service to customers within the State of Arkansas. Exh. A, p. 2.

4. DOE approved "the single 1,000-foot-wide route alternative defined by Clean Line to connect the converter station in the Oklahoma Panhandle to the converter station in western Tennessee" within which Clean Line may site the Project. See, Exh. A, p. 3, fn. 3. An illustration of the path of the 1,000' Corridor is attached hereto as EXHIBIT E. The 1,000' Corridor will run west to east, transecting the entire state of Arkansas and will impact and directly affect real property interests, working agricultural operations, and working lands in the following Arkansas counties: Crawford, Franklin, Johnson, Pope, Conway, Van Buren, Cleburne, White, Jackson, Poinsett, Cross, and Mississippi.

5. DOE stated, "The final location of the transmission line [200' right-of-way] *could be anywhere within this 1,000-foot-wide corridor* and would be determined following the issuance of this [Record of Decision] *based on the completion of final engineering design, federal and state related construction permits and authorizations*, [right-of-way] acquisition activities, and the incorporation of all measures identified in the [mitigation action plan]." See, Exh. A, pp. 2–3 (emphasis added).

6. Plaintiffs question the process by which the Secretary and DOE approved the Project. Specifically, Plaintiffs challenge (i) whether the Secretary and DOE exceeded the

statutory authority under Section 1222, (ii) whether the Secretary and DOE acted arbitrarily and capriciously in that (a) the Secretary and DOE gave undue consideration to non-statutory, policy considerations and (b) the evidence does not support the Secretary and DOE's determination that the Project satisfied Section 1222's criteria, and (iii) whether the Secretary, DOE and Intervenor improperly and illegally circumvented Arkansas' authorities, policies and procedures regarding the siting, construction, operation, and regulation of electric energy transmission facilities, and (iv) whether the Secretary, DOE and/or the Intervenor applied Section 1222 in a way that violated Plaintiffs' due process rights by finalizing the 1,000' Corridor and entering the Participation Agreement when many of DOE's and Intervenor's final Project evaluations and conditions have not occurred (*see, e.g.*, Participation Agreement, § 6.1—Conditions Precedent to Effective Date; § 6.2—Conditions Precedent to Voluntary Land Acquisitions; § 6.3—Conditions Precedent to Acquisitions by Condemnation; and § 6.4—Conditions Precedent to Notice to Proceed). Exh. D, pp. 65, 67, 71, and 74.

7. In sum, the Secretary and DOE approved the construction and operation of one of the nation's largest electric transmission lines (in terms of capacity, length, and physical size) to span the entire width of the State of Arkansas, without seeking required state-level review and approval, and without adequate opportunity for affected person to participate in the decision-making process. In this stunning example of federal overreach, the Secretary and DOE also propose to participate in the Project by exercising the federal government's power of eminent domain, where necessary, to condemn private properties. Accordingly, Plaintiffs seek relief from this Court and request that it (i) declare the Secretary and DOE's actions are unlawful, (ii) set aside the Secretary and DOE's actions as arbitrary, capricious, and otherwise not in

accordance with the law, and (iii) enjoin the Federal Defendants and the Intervenor, from any further activities in furtherance or support of the Project.

PARTIES

8. Plaintiff DOWNWIND, LLC ("Downwind") is organized under the laws of the State of Arkansas. Downwind was organized to promote the protection of working agricultural operations and private property rights by uniting disparate interests and coordinating the efforts to avoid and mitigate the impacts from the Project. Downwind's members include residents of Jackson, Poinsett, Cross, and Mississippi Counties, in Arkansas, and include many landowners and agricultural operations within or adjacent to the Project's 1,000' Corridor. Downwind has advanced its purposes by, among other things, submitting public comments, providing Congressional testimony in support of new legislation, and diligently working at the local, state, and federal levels to protect the interests of its members and the public. Downwind's principal office is at 404 W. South Street, Harrisburg, Arkansas 72432.

9. Plaintiff GOLDEN BRIDGE, LLC ("Golden Bridge") is organized under the laws of the State of Arkansas. Golden Bridge was organized to promote, protect, and advocate for the working agricultural interests, property rights, and the natural landscapes of Arkansas that the Project would impact. Golden Bridge lists members in Crawford, Franklin, Johnson, Pope, Conway, Faulkner, Van Buren, Cleburne, and White Counties, in Arkansas, and membership includes many residents, landowners and working-land operations directly within or adjacent to the Project's 1,000' Corridor. Golden Bridge and its many individual members have worked tirelessly to inform and educate landowners, community leaders, and elected officials regarding the Project's impacts and the federal government's role in the Project. Individually and collectively, Golden Bridge members have organized petitions, shared information, attended

public hearings, submitted public comments, and traveled the State of Arkansas to meet, inform and advocate for the public's interests. Golden Bridge's principal office is located at 4300 Rogers Ave., Suite 20-148, Fort Smith, Arkansas 72903.

10. Members of each of the Plaintiff organizations reside in and/or own businesses and property in the area directly within and adjacent to the Project's 1000' Corridor. These individual members are deeply concerned about the impact that the designation of the 1,000' Corridor and the subsequent construction, operation, and maintenance of the Project's facilities is having and will continue to have on property value, land use, and their businesses and livelihoods. These individuals also regularly use the areas surrounding the proposed Project for recreational opportunities such as, hunting, fishing, hiking and other outdoor activities.

11. The Secretary and DOE's decision to authorize and participate in the Project without providing adequate procedural safeguards causes direct injury to Plaintiffs' members' use of their property and to the economic, recreational, aesthetic, and conservation value they derive from their property. The Secretary and DOE exceeded their statutory authority and acted arbitrarily and capriciously in determining to approve and participate in the Project. Moreover, the Secretary DOE deprived Plaintiffs and their members of their right to fully participate in the process of reviewing and permitting the construction and operation of the Project and Project facilities, all of which will directly and detrimentally affect the members of the Plaintiff organizations. These injuries are concrete and imminent and they are fairly traceable to the Federal Defendants' failed review and the Federal Defendants' arbitrary, capricious and overreaching decision to approve the Project pursuant to Section 1222 of the Energy Policy Act of 2005.

12. Defendant UNITED STATES DEPARTMENT OF ENERGY ("DOE") is a federal agency with its principal office at 1000 Independence Ave., SW, Washington, D.C. 20585. DOE requested, received, reviewed, and the Project, and also proposes to participate in the Project by utilizing the federal government's power of eminent domain to acquire real property interests in Arkansas and by owning Project facilities in the State of Arkansas.

13. Defendant ERNEST MONIZ is Secretary of the DOE and has oversight authority over all of the actions taken by DOE. Secretary Moniz issued the Secretarial Determination that declared the Project satisfied Section 1222 and directed DOE to participate in the Project. Secretary Moniz is sued in his official capacity. His address is 1000 Independence Ave., SW, Washington, D.C. 20585.

14. Defendant SOUTHWESTERN POWER ADMINISTRATION ("SWPA" or "Southwestern") is a federal power marketing administration within the DOE and maintains its principal office at One West 3rd Street, Tulsa, Oklahoma 74103-3502. SWPA consulted with DOE during its review of the Project. SWPA will act on DOE's behalf in overseeing and carrying out certain aspects of the Project.

15. Defendant SCOTT CARPENTER is the Administrator of SWPA and maintains oversight authority over the actions taken by SWPA. Administrator Carpenter is sued in his official capacity. His address is One West 3rd Street, Tulsa, Oklahoma, 74103-3502.

16. Collectively, DOE, Secretary Moniz, SWPA, and Administrator Carpenter are referred to as "Federal Defendants."

17. Intervenor PLAINS AND EASTERN CLEAN LINE HOLDINGS LLC ("Intervenor" or "Holdings"), is a wholly owned subsidiary of Clean Line Energy Partners LLC.

Clean Line Energy Partners LLC and its affiliates (as referenced in paragraph 2, "Clean Line") are developing the Project.

JURISDICTION AND VENUE

18. This action arises under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, Section 1222 of the Energy Policy Act of 2005, 42 U.S.C. § 16421, the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, the Arkansas Utility Facility Environmental and Economic Protection Act, Ark. Code Ann. §§ 23-18-501, *et seq.*, and the United States Constitution.

19. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States), 5 U.S.C. §§ 701-706 (judicial review of agency action), and 28 U.S.C. § 1367 (supplemental jurisdiction).

20. This Court may issue declaratory, injunctive, and further relief pursuant to 28 U.S.C. §§ 2201-2202.

21. Venue lies in the Eastern District of Arkansas because Defendant SWPA is an agency of the United States and maintains an office in Jonesboro, Arkansas; Plaintiff Downwind maintains its principal office in this district; and, a substantial part of the events or omissions giving rise to the claims occurred in this judicial district. 28 U.S.C. § 1391(e).

EXISTING FEDERAL AND STATE STATUTORY FRAMEWORK FOR SITING AND APPROVING ELECTRIC TRANSMISSION LINE PROJECTS

22. Traditionally, the federal government is not directly involved in the siting and approval of the construction and operation of electric transmission line projects. The states assume and exercise nearly "all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities." *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009) (limiting the Federal Energy Regulatory Commission's ability under

Section 1221 of the Energy Policy Act of 2005 to approve permits previously denied by state authorities); *see also*, Adam Vann, Cong. Research Serv., R40657, *The Federal Government's Role in Electric Transmission Facility Siting* 1 (2010) (noting that state officials are "well positioned to weigh the factors that go into siting decisions, including environmental and scenery concerns, zoning issues, development plans, and safety issues."). Section 1222 continues the traditional regulatory framework of state primacy over electric transmission lines by expressly providing that, "Nothing in this section affects any requirement of . . . any Federal or State law relating to the siting of energy facilities." 42 U.S.C. § 16421(d)(2).

Arkansas's Statutory Siting Requirements for Electric Energy Transmission Facilities

23. The Arkansas General Assembly delegated to the Arkansas Public Service Commission (the "APSC") the State of Arkansas's authority to regulate and permit the construction and operation of electric transmission facilities within Arkansas. Ark. Code Ann. §§ 23-3-201, *et seq.* and 23-18-501, *et seq*. In general, Arkansas statute provides that "[n]ew construction or operation of equipment or facilities for supplying a public service or the extension of a public service shall not be undertaken without first obtaining from the [APSC] a certificate that public convenience and necessity requires or will require the construction or operation." Ark. Code Ann. § 23-3-201(a) (the "CCN Act"). The certificate of convenience and necessity is commonly referred to as a CCN. The Arkansas General Assembly amended the CCN Act in 2011 and 2015 to exclude its applicability to certain types of electric transmission lines. *See e.g.*, Ark. Code Ann. §§ 23-3-201(b)(4) and 23-3-205(b). However, the CCN Act is not the only source of electric transmission line siting-related jurisdiction the Arkansas General Assembly granted to the APSC.

24. Since 1973, a separate Arkansas statute—the Arkansas Utility Facility Environmental and Economic Protection Act (the "Arkansas Major Utility Act")—has granted the APSC jurisdiction to regulate any proposed utility construction and/or operation that includes a "major utility facility." Ark. Code Ann. §§ 23-18-501, *et seq.* The CCN Act recognizes the primary jurisdiction of the Arkansas Major Utility Act when it states, "This section does not require a certificate of public convenience and necessity for . . . the construction or operation of a major utility facility as defined in the Utility Facility Environmental and Economic Protection Act, § 23-18-501 *et seq*." Ark. Code Ann. § 23-3-201(b)(4).

25. The Arkansas Major Utility Act states, "A person shall not begin construction of a major utility facility in the state without first obtaining a certificate of environmental compatibility and public need for the major utility facility from the [APSC]." Ark. Code Ann. § 23-18-510(a)(1). This certificate is commonly referred to as a CECPN. The Arkansas Major Utility Act defines *person* as "an individual, group, firm, partnership, corporation, cooperative association, municipality, government subdivision, government agency, local government, or other organization." Ark. Code Ann. §§ 23-18-503(12). The Arkansas Major Utility Act defines *major utility facility* to include "an electric transmission line and associated facilities including substations: (i) [a] design voltage of one hundred kilovolts (100kV) or more and extending a distance of more than ten (10) miles; or (ii) [a] design voltage of one hundred seventy kilovolts (170kV) or more and extending a distance of more than one (1) mile." Ark. Code Ann. § 23-18-503(6)(B).

26. Pursuant to the Arkansas Major Utility Act, applicants for a CECPN must submit to the APSC a formal, verified application containing general and specific information, such as but not limited to: (1) general description of the location and type of facility; (2) general

description of any reasonable alternate location or locations for the facility; (3) statement of the need and reasons for the construction of the facility, including any previous action determining the need for additional energy supply or transmission resources; (4) a statement of the cost and method of financing; (5) analysis of the projected economic or financial impact on the local community; (6) analysis of the estimated effects on energy costs; and (7) an environmental impact statement. *See* Ark. Code Ann. § 23-18-511; *see also* APSC Rules of Practice and Procedure, Rule 6.06.

27. The Arkansas Major Utility Act provides for public involvement in the review of an applicant's CECPN application by requiring that the APSC set and conduct a public hearing on each application for the construction and operation of a major utility facility. *See* Ark. Code Ann. § 23-18-516.

28. The Arkansas Major Utility Act also details specific opportunities for persons affected by a proposed major utility facility to directly participate in the applicant's certification proceedings as an officially recognized party to the proceeding, and it provides for a full hearing on the record that includes the presentation of evidence and testimony, and appropriate cross-examination. Ark. Code Ann. §§ 23-18-517 and -518.

29. The Arkansas Major Utility Act's statutory requirements effectuate the Arkansas General Assembly's stated intent that the affected public should receive an adequate opportunity to "participate in a timely fashion in decisions regarding the *location, financing, construction, and operation* of major utility facilities," and that the proceedings shall "be open to individuals, groups interested in energy and resource conservation and the protection of the environment, state and regional agencies, local governments, and other public bodies." Ark. Code Ann. §§ 23-18-502(d)(emphasis added).

30. Upon the APSC's approval and grant of a CECPN, the Arkansas Major Utility Act expressly authorizes the applicant to utilize, where necessary, the state's power of eminent domain to acquire land needed to construct, operate, maintain, and obtain reasonable access to the major utility facility. Ark. Code Ann. § 23-18-528(2).

31. Finally, the Arkansas Major Utility Act also provides an explicit right for aggrieved parties to apply to the APSC for a rehearing and, where appropriate, to petition for judicial review of the APSC's final decision to issue a CECPN to an applicant. Ark. Code Ann. § 23-15-524.

Federal Participation under Section 1222 of the Energy Policy Act of 2005

32. The Energy Policy Act of 2005 ("EPAct"), which includes Section 1222, is a comprehensive energy statute that includes a specific title for electricity modernization and several specific provisions to modernize electric energy transmission infrastructure. *See, generally*, Energy Policy Act of 2005, Pub. L. No. 109-58, Title X, 119 Stat. 941-985 (2005); Section 1221, 16 U.S.C. 824*p* (Siting of Interstate Electric Transmission Facilities); Section 1222, 42 U.S.C. § 16421 (Third Party Finance); Section 1223, 42 U.S.C. § 16422 (Advanced Transmission Technologies); Section 1224, 42 U.S.C. § 16423 (Advanced Power System Technology Incentive Program).

33. Among these provisions, the EPAct approved new, limited opportunities for DOE's participation in otherwise private electric energy transmission facility development. Specifically, Section 1222 of the EPAct authorized the Secretary of Energy, acting through the Western Area Power Administration ("WAPA") or Defendant SWPA, to accept third-party contributed funds in order to "*participate with other entities in designing, developing, constructing, operating, maintaining, or owning* a new electric power transmission facility and related facilities located within any State in which WAPA or SWPA operates, *if*" certain

specifically listed statutory criteria are satisfied. Pub. L. No. 109-58, § 1222, 119 Stat. 952; 42 U.S.C. § 16421 (emphasis added).

34. To participate with a private entity under Section 1222 of the EPAct, the Secretary must first consult with WAPA or SWPA to determine that the proposed project:

> (1) (A) is located in an area designated under section 216(a) of the Federal Power Act and will reduce congestion of electric transmission in interstate commerce; or
> (B) is necessary to accommodate an actual or projected increase in demand for electric transmission capacity;
>
> (2) is consistent with--
> (A) transmission needs identified, in a transmission expansion plan or otherwise, by the appropriate Transmission Organization (as defined in the Federal Power Act)[2] if any, or approved regional reliability organization; and
> (B) efficient and reliable operation of the transmission grid;
>
> (3) will be operated in conformance with prudent utility practice;
>
> (4) will be operated by, or in conformance with the rules of, the appropriate (A) Transmission Organization, if any, or (B) if such organization does not exist, regional reliability organization; and
>
> (5) will not duplicate the functions of existing transmission facilities or proposed facilities which are the subject of ongoing or approved siting and related permitting proceedings.

42 U.S.C. § 16421(b).

35. While Section 1222 authorizes DOE's participation with other entities in privately developed electric energy transmission facilities, Section 1222 does not authorize the Secretary to independently site, or otherwise permit and approve, the construction and operation of any project or any related project facilities.

[2] Transmission Organization is defined by the Federal Power Act to mean "a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the [Federal Energy Regulatory] Commission for the operation of transmission facilities. 16 U.S.C. § 796.

36. Section 1222 does not expressly authorize federal acquisition of real property interests. Moreover, Section 1222 does not expressly authorize DOE to exercise the federal government's power of eminent domain to acquire real property or any interest in real property.

37. The Secretary's determination pursuant to subsection (b) of Section 1222 must "be based on findings by the Secretary *using the best available data*." 42 U.S.C. § 16421(f) (emphasis added). Neither the EPAct nor Section 1222 defines "best available data."

38. Finally, Section 1222 clearly and unambiguously states, "Nothing in this section affects *any* requirement of *any Federal or State law relating to the siting of energy facilities*." 42 U.S.C. § 16421(d)(2) (emphasis added).

39. By its express terms, Section 1222 does not obviate any requirement under the Arkansas Major Utility Act relating to the State of Arkansas's jurisdiction to regulate the siting of any electric transmission facility to which the Arkansas Major Utility Act or any other Arkansas law applies.

PROCEDURAL BACKGROUND AND DEVELOPMENT OF CLEAN LINE'S PROJECT

Clean Line has Attempted to Avoid Complying with Arkansas's Siting and Permitting Law

40. On or around May 13, 2010, PECL filed an application ("Clean Line's CCN Application") with the APSC for a CCN "to operate as an electric transmission public utility in the state of Arkansas to the extent that it will be developing, constructing or operating electric transmission facilities in Arkansas." *See, 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, Application, p. 1. (May 13, 2010), attached hereto and incorporated herein as EXHIBIT F.

41. Clean Line's CCN Application did not seek authorization to begin construction of a transmission line. However, PECL admitted that PECL would pursue any necessary authorizations in a separate application. Exh. F, p. 1. Further, PECL admitted that PECL "will not be authorized to begin construction of the transmission line until it obtains a [CECPN] pursuant to the [Arkansas Major Utility Act]." Exh. F, pp. 11–12. *See*, ¶¶ 24-31 above, describing the CECPN and the Arkansas Major Utility Act.

42. On or around January 11, 2011, after conducting a hearing on Clean Line's CCN Application, the APSC issued an order denying Clean Line's CCN Application without prejudice because the APSC could not—at that time—determine whether PECL met Arkansas's definition of public utility. *See, 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, at p. 11 (Jan. 11, 2011), attached hereto and incorporated herein as EXHIBIT G (the "Initial APSC Decision").

43. The Initial APSC Decision did not declare that in connection with the Project, PECL or any other Clean Line entity would never have an obligation to comply with the Arkansas Major Utility Act. The Initial APSC Decision did not decide that the APSC did not have jurisdiction to regulate the permitting, construction, or operation of Clean Line's Project. Instead, the Initial APSC Decision simply noted that Clean Line's CCN Application proposed a transmission-only project in Arkansas, and "[a]s [APSC Staff, Clean Line, and the Arkansas Attorney General] 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." Exh. G, p.11 (emphasis added).

44. The APSC explicitly acknowledged that the Initial APSC Decision was without prejudice and stated that Clean Line could reapply when it could "provide additional information with more concrete plans satisfying the Commission's concerns." Exh. G, p. 10. The APSC stated, "Without pre-judging any future plans Clean Line may have or may bring before the [APSC], the [APSC] denies Clean Line's requested CCN." Exh. G, pp. 11-12.

45. While APSC's denial turned on the statutory definition of "public utility," the Initial APSC Decision recognized that the APSC "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 [the Arkansas Major Utility Act] . . . ." Exh. G, pp. 1, 8–9 (emphasis added).

46. Since the Initial APSC Decision, Clean Line has revised its business plan for the Project and now, as Clean Line disclosed on July 19, 2016 to the Federal Energy Regulatory Commission, the Project "*will* include an intermediate converter station in Pope County, Arkansas that will have the capacity to deliver up to 500MW of power." *See*, Letter to Federal Energy Regulatory Commission ("FERC" or "Commission") dated July 19, 2016, attached as EXHIBIT H (emphasis added). The possibility of the Arkansas converter station has been included in the Project at least since May 22, 2014. Exh. H, p. 3. Although Clean Line committed to the Commission that Clean Line will "continue to publicize the availability of service to the Arkansas converter station," Clean Line has failed to comply with the Arkansas Major Utility Act or any other Arkansas law. Exh. H, p. 3.

47. Clean Line represented to DOE that it will comply with Arkansas law. Section 2.3(a) of the Participation Agreement states, "Holdings and/or any Clean Line Entity designated

or nominated by Holdings, collectively, own 100% of the Electrical Capacity and have the right to market, use, and sell transmission services relating to such Electrical Capacity . . . .” Exh. D, p. 53. Section 2.3(b) of the Participation Agreement states, “All transmission and related services provided by the Clean Line Entities using any of the project facilities shall be provided in accordance with Applicable Laws and Prudent Utility Practices.” Exh. D, p.53. However, despite (i) PECL’s acknowledgement to the APSC in 2011 that the Project will require a CECPN and (ii) Holdings’ statements to the DOE in Sections 2.3(a) and (b) of the Participation Agreement, no Clean Line-related entity has applied to the APSC for a CECPN to permit the construction and operation of the Project’s electric energy transmission facilities pursuant to the Arkansas Major Utility Act.

Clean Line and DOE Applied Section 1222 to Avoid Arkansas Law

48. While Clean Line’s CCN Application was pending before the APSC, on June 10, 2010, DOE published a Request for Project Proposals for entities interested in providing contributed funds under Section 1222 of the EPAct to facilitate SWPA’s or WAPA’s participation in the construction of new transmission lines in states where those entities operate. *See* 75 Fed. Reg. 32940 (Jun. 10, 2010).

49. In addition to Section 1222’s statutory factors outlined in ¶ 34 above, DOE’s request also declared that its evaluation of proposals would consider additional, non-statutory factors, including: (1) whether a project is in the public interest; (2) *whether the project will facilitate the reliable delivery of power generated by renewable resources*; (3) the benefits and impacts of the project in each state it traverses, including economic and environmental factors; (4) the technical viability of the project, considering engineering, electrical, and geographic factors; and (5) the financial viability of the Project. *Id.* at 32941 (emphasis added).

50. On or around July 6, 2010—while Clean Line's CCN application was still pending before the APSC—Clean Line submitted to DOE an application and proposal for the Project pursuant to Section 1222.[3] Clean Line's original proposal sought to provide DOE with contributed funds for the purpose of securing DOE's participation in the *siting*, development, construction, operation, maintenance, and ownership of two overhead high-voltage, direct current transmission lines capable of moving more than 7,000 MW of power from renewable energy projects in western Oklahoma, southwestern Kansas and the Texas Panhandle to the service area of the Tennessee Valley Authority ("TVA") and the southeastern United States. *See generally*, Clean Line's Part I Application, p. 5; *see also*, Exh. C, p. 5. DOE did not provide Plaintiffs, Plaintiffs' members, or any other member of the public with any notice and opportunity to comment on Clean Line's Part I Application until April 2015.

51. Over a year later, on or around August 17, 2011—about eight months after the Initial APSC Decision denying Clean Line's CCN Application—Clean Line submitted an update to its Part I Application to better support how the Project is necessary to accommodate the increase in demand for transmission capacity and how the Project is consistent with needs identified in transmission plans or otherwise by appropriate transmission organization.[4] DOE did not provide Plaintiffs, Plaintiffs' members, or any other member of the public with notice and opportunity comment on Clean Line's Updated Part I Application until April 2015.

52. After another year of consideration by DOE, on or around September 12, 2012, DOE and Clean Line entered into an *Advanced Funding and Development Agreement* to proceed

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[3] *See generally*, Plains & Eastern Clean Line, *Project Proposal for New or Upgraded Transmission Line Projects Under Section 1222 of the Energy Policy Act of 2005* (Jul. 2010) (hereinafter referred to as the "Part I Application").

[4] *See generally*, Plains & Eastern clean Line, *Update to Plains & Eastern Clean Line Proposal for New or Upgraded Transmission Line Projects Under Section 1222 of the Energy Policy Act of 2005* (Aug. 2011) (hereinafter referred to as the "Updated Part I Application").

with environmental analysis under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, though DOE stated that it had not made any final determination concerning the Project's satisfaction any of the requirements of Section 1222(b).[5] DOE still did not provide for any public review, comment, or objection to either the Part I Application or the Updated Part I Application.

53. Three months later—nearly two and a half years after Clean Line filed its Part I Application—on December 21, 2012, DOE issued a Notice of Intent to Draft an Environmental Impact Statement on behalf of DOE and SWPA. *See* 77 Fed. Reg. 75623 (Dec. 21, 2012). Nearly two years later and four years after Clean Line filed its Part I Application, following an initial scoping period and evaluation, DOE published a Draft Environmental Impact Statement ("DEIS"). *See* 79 Fed. Reg. 75132 (Dec. 17, 2014). The DEIS evaluated impacts associated with Clean Line's proposed route and other alternative route links. DOE did not include a preferred action or identify any preferred alternative for locating the Project.

54. In or around January 2015, Clean Line published a final update to its Section 1222 application, wherein it officially downsized its Project proposal to one 600± kV overhead line and, for the first time, expressed the clear "inten[t] to build [an] Arkansas converter station in parallel with the other Project facilities."[6]

55. Almost five years after Clean Line filed its Part I Application with DOE, on April 28, 2015, DOE gave notice and made available to the public Clean Line's application to DOE for that agency's potential participation in the Project. *See* 80 Fed. Reg. 23520 (Apr. 28, 2015). In providing notice of the application, DOE stated that it was conducting "due diligence on other

[5] *See* Advance Funding and Development Agreement Plains and Eastern Clean Line Transmission Line Project at 6–7 (Sept. 20, 2012).

[6] *See* Clean Line Energy Partners, Plains & Eastern Clean Line, *1222 Program - Part 2 Application: Information Requested for Proposed Plains & Eastern Clean Line Project* at 1-1 (Jan. 2016) (hereinafter referred to as the "Part II Application").

factors related to the statutory criteria," which would include "making all required statutory findings and will consider all criteria listed in section 1222 of the EPAct, as well as all factors included in DOE's 2010 RFP." *Id.* 23521–23522. Accordingly, the notice sought specific comments on "whether the proposed Project meets the statutory criteria and the factors identified within the 2010 RFP." *Id.* at 23522.

56. The opportunity to submit written comments on the Part II Application, though extended for an additional thirty days, reflects the *entirety* of the general public's and directly affected persons' *only* opportunity to participate in the specific Section 1222 review process, which had been ongoing for the last five years. DOE provided no opportunity for: intervention, presentation of evidence, cross-examination, hearing, appeal, or any other "on the record activities" concerning the review of Section 1222 criteria and the factors identified within the 2010 RFP.

57. On November 13, 2015, DOE published the notice of availability for the Final Environmental Impact Statement ("FEIS"). *See* 80 Fed. Reg. 70192 (Nov. 13, 2015). The FEIS included DOE's preference to participate in the Project and its selection of Clean Line's proposed 1,000' Corridor as DOE's preferred route.

DOE's Record of Decision Pursuant to Section 1222

58. On March 25, 2016, DOE published: (i) a Record of Decision ("Record of Decision")[7] concluding the NEPA process; (ii) the Secretarial Determination declaring that the Project satisfied statutory criteria and directing DOE's participation in the Project; (iii) a Summary of Findings in support of the DOE's decision; and, (iv) the Participation Agreement (collectively, the "Decision Documents").

[7] The Record of Decision was officially published in the Federal Register on March 31, 2016. *See* 81 Fed. Reg. 18602 (Mar. 31, 2016), Exhibit A hereto.

59. The Record of Decision confirmed DOE's selection of Clean Line's proposed route—the 1,000' Corridor generally identified in Exhibit E—in which the eventual right-of-way necessary to support the Project's electric energy facilities will be located. Exh. A, p. 2. The 1,000' Corridor crosses the entire State of Arkansas and directly impacts property interests in Crawford, Franklin, Johnson, Pope, Conway, Van Buren, Cleburne, White, Jackson, Poinsett, Cross, and Mississippi Counties, Arkansas. *See* Exh. E.

60. Under the terms and conditions of the Participation Agreement, DOE will own 100% of the Project facilities in Arkansas. Exh. D, § 2.2(a), p. 52. PECL OK—a Clean Line affiliate—will own 100% of the Project's facilities in Oklahoma. Exh. D, § 2.2(b), p. 52. Holdings and/or any Clean Line Entity designated or nominated by Holdings, collectively, will "own 100% of the electrical capacity along with the right to market, use, and sell transmission services" relating to the Project's electric transmission capacity. Exh. D, § 2.3, p. 53.

61. Clean Line maintains sole-responsibility for the management of all aspects of the Project, the administration of all Project contracts, and the performance of all Project work, such that Clean Line will perform "all development, design, engineering, construction, operation, maintenance and management activities" for the Project. Exh. D, § 4.1, p. 57.

62. Clean Line is solely responsible for obtaining any necessary financing and all funding for the development, design, engineering, construction, ownership, operation, maintenance and management relating to the Project. Exh. D, § 13.5, p. 121. This obligation includes all funding for all of DOE's and SWPA's actions and activities. Exh. D, § 11.1, p. 100. Clean Line also bears all risks associated with the Project. Exh. D, § 4.1, p. 57; § 11.8, p. 107.

63. The Participation Agreement limits DOE's primary responsibilities to: (i) ownership of 100% of the Project Facilities in the State of Arkansas (Exh. D, § 2.2(a), p. 52); (ii)

acquisition of real estate rights (Exh. D, § 3.3, p. 55); and (iii) issuance of the Notice to Proceed (Exh. D, § 6.4, p. 74). Based upon information and belief, SWPA may carry out some or all of DOE's responsibilities under the Participation Agreement. Exh. C, pp. 16-17.

64. Although DOE issued its "final" approval of the Project, as evidenced by the Record of Decision and the Secretarial Determination, DOE and SWPA's further involvement in the Project, including any exercise of the power of eminent domain on behalf of Clean Line, is contingent upon Clean Line's satisfaction of four sets of Conditions Precedent. Exh. D, Article VI, pp. 65-77. The conditions precedent represent milestones Clean Line must meet to assure DOE of the Project's need and the Project's financial and technical viability. Plaintiffs, Plaintiffs' members, and other interested persons are not parties to the Participation Agreement, thus DOE's determination that the Conditions Precedent are satisfied, will occur without public notice, without public review, and without any opportunity for Plaintiffs, Plaintiffs' members, or the general public to appear and be heard.

65. DOE could have applied Section 1222's statutory requirements in a way that allowed sufficient participation by Plaintiffs and the general public. However, instead of being a typical agency siting decision of which Plaintiffs and the public had adequate notice and in which Plaintiffs and the public had the opportunity to intervene and participate, DOE applied Section 1222 so that after five years of non-public consideration of Clean Line's 1222 application (and 45-days of public review), DOE's "final" decision rubberstamps the Project while the determinations of the technical and financial viability of the Project will continue to occur in private.

66. DOE executed the Participation Agreement, which creates a "Coordination Committee" that "shall be composed of two (2) representatives from Holdings and two (2)

representatives from DOE." Exh. D, § 5.1, p. 63. One of Holdings' representatives is the chair of the Coordination Committee. Exh. D, § 5.1(b), p. 64. Unless Clean Line has defaulted, the Coordination Committee requires a representative of both Holding and DOE to have a quorum. Exh. D, § 5.1(c), p. 64. The Coordination Committee can only make "public announcements relating to DOE's involvement in the Project" if such public disclosure is approved by "one (1) representative of *each* of Holdings and DOE on the Coordination Committee." Exh. D, § 5.1(e)(i), p. 64. Thus, Holdings can prohibit DOE from even notifying the public of DOE's involvement in the Project, much less allowing the public an opportunity to be involved in any decision-making process, including the final routing decision.

67. As DOE described in the Record of Decision, DOE has accepted Clean Line's 1,000' Corridor. Exh. A, p. 2. However, DOE recognizes that within the 1,000' Corridor, the actual transmission line will exist within a 200' right of way. Exh. A, pp. 2-3. Neither Plaintiffs nor any member of the public had the opportunity to intervene and object on the record concerning the actual need and statutory basis for the blanket designation of the 1,000' Corridor. Based on information and belief, the 1,000' Corridor has caused Plaintiffs' members to suffer injury to the full use and enjoyment of their properties, such as delay and scrutiny on bank loans and the loss of potential purchasers.

68. Moreover, pursuant to the Participation Agreement, rather than a public process during which the eventual 200' right of way will be sited within the 1,000' Corridor, the Coordination Committee will control and approve the "Project Routing and ROW Plan," which is a plan "prepared by Holdings, and acceptable to the Coordination Committee, specifying the planned routing corridor for the Project Facilities [and] identifying all Project Real Estate Rights." Exh. D, § 1.1, p. 46. The Project Real Estate Rights are the specific real estate rights

"necessary for the Project, including access roads and temporary areas to be used for construction and maintenance activities in respect of the Project." Exh. D, § 1.1, p. 43. Neither Plaintiffs nor the public will have any notice or opportunity to object to the Project Routing and ROW Plan. Additionally, the Coordination Committee can modify and amend the Project Routing and ROW plan at any time, without any public notice or opportunity to be heard. Exh. D, § 3.5, p. 57.

69. Furthermore, based on information and belief, DOE's (i) recognition of the Commencement Date (the date on which the conditions precedent have all been satisfied), and (ii) the issuance of the Notice to Proceed, will also occur without public notice, public review, or any opportunity to be heard.

70. Based on information and belief, DOE and Intervenor recently approved the initial Project Routing and ROW Plan and identified the specific Project Real Estate Rights within the larger 1,000' Corridor. DOE and Intervenor's implementation of Section 1222 to allow DOE and Intervenor to approve the Routing and ROW Plan without any public notice or opportunity to be heard is an arbitrary and capricious action that violated Plaintiffs' and impacted persons' due process rights.

FIRST CAUSE OF ACTION
Violation of the Administrative Procedure Act and Section 1222 of the EPAct
(In excess of statutory jurisdiction, authority, or limitations, or short of statutory right)

71. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 70.

72. DOE previously recognized that it holds no independent statutory authority, express or implied, to site or otherwise permit the construction and operation of electric energy transmission facilities that will be constructed, operated, and maintained by a private developer.

See e.g., *Cal. Wilderness Coalition v. United States DOE*, 631 F.3d 1072, 1099 (9th Cir. 2011) (noting DOE's position that it "has no authority to site electric transmission facilities").

73. Section 1222's limited authorizations permit DOE and SWPA to make determinations regarding the federal government's "participation in" privately developed projects, but Section 1222 does not authorize DOE or SWPA to independently site, or permit, the construction and operation of privately developed electric energy transmission facilities. In fact, Section 1222 clearly and unambiguously defers to the requirements of "any Federal or State law relating to the siting of electric energy facilities." 42 U.S.C. § 16421(d)(2).

74. In this case, the Arkansas Major Utility Act clearly provides relevant siting or permitting authority and it enumerates several substantive and procedural requirements relating to the siting of electric energy facilities. *See* Ark. Code Ann. §§ 23-18-501 *et seq.* Yet, DOE's Decision Documents completely ignore and disregard Arkansas' laws relating to the siting of electric energy facilities.

75. Instead, the Secretary and DOE independently approved the construction and operation of the Project by authorizing Clean Line to proceed with the development, construction, and operation of the Project absent full compliance with all requirements of all Arkansas' laws relating the siting of electric energy facilities and without the necessary approval of the appropriate Arkansas siting authorities.

76. Accordingly, DOE's decision to independently approve the construction and operation of the Project exceeds the statutory authority and statutory limitations that are clearly and unambiguously defined by Section 1222 and, therefore, DOE's decision is in excess of statutory jurisdiction, authority, and limitations. 7 U.S.C. § 706(2)(C).

SECOND CAUSE OF ACTION
Applicability and Compliance with the Utility Facility Environmental and Economic Protection Act
(CECPN for the construction and operation of electric transmission facilities)

77. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 70.

78. The Arkansas Major Utility Act demands that "a person shall not begin construction of a major utility facility in the state without first obtaining a certificate of environmental compatibility and public need for the major utility facility from the [APSC]." Ark. Code Ann. § 23-18-510. The Arkansas Major Utility Act further requires that applications for a CECPN contain findings satisfying several substantive requirements. *See* Ark. Code Ann. § 23-18-511. Finally, the Arkansas Major Utility Act also provides basic substantive and procedural rights to ensure persons directly affected by a major utility facility have adequate opportunity to intervene and "participate in a timely fashion in the decisions regarding the location, financing, construction, and operation" of the facility. Ark. Code Ann. § 23-18-502(d); *see also*, Ark. Code Ann. §§ 23-18-517, -518, -524.

79. Although the Participation Agreement is unclear as to which Clean Line entity will construct and/or operate the Project in Arkansas, each and all of DOE, SWPA, and the Clean Line entities are a "person" pursuant to the definitions of the Arkansas Major Utility Act because each entity is "an individual, group, firm, partnership, corporation, cooperative association, municipality, government subdivision, government agency, local government, or other organization." Ark. Code Ann. §§ 23-18-503(12).

80. The Project is a "major utility facility" pursuant to the Arkansas Major Utility Act in that the Project will include "an electric transmission line and associated facilities including substations: (i) [a] design voltage of one hundred kilovolts (100kV) or more and extending a

distance of more than ten (10) miles; or (ii) [a] design voltage of one hundred seventy kilovolts (170kV) or more and extending a distance of more than one (1) mile." Ark. Code Ann. § 23-18-503(6)(B).

81. The Decision Documents argue that DOE and SWPA are not obligated to apply for and receive a CECPN and/or otherwise comply with Arkansas' laws relating to the siting of electric energy facilities. *See* Exh. C, pp. 24-25. The same Decision Documents are silent on Clean Line's obligation to apply for and receive a CECPN and/or otherwise comply with Arkansas' laws relating the siting of electric energy facilities. To date, DOE, SWPA, nor Clean Line have applied for and received a CECPN from the APSC for the Project's facilities in Arkansas. In fact, Clean Line represented to DOE as follows:

> By Order No. 9 issued by the APSC on January 11, 2011, in Docket No. 10-041-AU (the "APSC 2011 Order"), the APSC denied PECL's application for authority to operate as a public utility in the State of Arkansas. The APSC 2011 Order is final and is no longer subject to rehearing before the APSC.

Exh. D, § 12.1(t)(ii)(A), p. 118.

82. Clean Line's representation in Section 12.1(t)(ii)(A) of the Participation Agreement implies that the APSC considered the full scope of the Project and decided that the final Project did not meet Arkansas's definition of "public utility." Clean Line, however, omitted from its representation to DOE that the APSC, in "Order No. 9," denied PECL's earlier permit application because 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*." Exh. G, p. 11 (emphasis added).

83. As evidenced by Clean Line's recent letter to the Federal Energy Regulatory Commission, which is as attached as Exhibit H, the Project "*will* include an intermediate converter station in Pope County, Arkansas that will have the capacity to deliver up to 500MW

of power." Exh. H, p. 3 (emphasis added) (noting further that "potential customers have been on notice that [Clean Line] contemplates offering service *to Arkansas* for up to 500 MW"). Because the Arkansas converter station will likely provide for power to customers in Arkansas, the APSC would likely find that the DOE, SWPA and/or the Clean Line entity that constructs and operates the Project in Arkansas meets the definition of "public utility" and would likely require the appropriate entity to apply for and obtain a CECPN under the Arkansas Major Utility Act.

84. Despite its revised business plans, Clean Line further represented to DOE in the Participation Agreement that the only required approval for the Project is the Secretary and DOE's decision under Section 1222. *See* Exh. D, § 12.1(v)(i), p. 118 *and* Exh. D, Schedule 16 (stating the only required approval is "Section 1222 Decision").

85. Accordingly, Plaintiffs seek a declaration that: (i) Section 1222 does not preempt or obviate the applications, certifications, and approvals required for the construction and operation of a major utility facility in Arkansas pursuant to the Utility Facility Environmental and Economic Protection Act, (ii) Federal Defendants' participation in the Project pursuant to Section 1222 does not preempt or obviate the applications, certifications, and approvals required for the construction and operation of a major utility facility in Arkansas pursuant to the Utility Facility Environmental and Economic Protection Act, and (iii) that Federal Defendants and/or Intervenor must comply with the applications, certifications, and approvals required for the construction and operation of a major utility facility in Arkansas pursuant to the Utility Facility Environmental and Economic Protection Act.

THIRD CAUSE OF ACTION
Violation of the Administrative Procedure Act Section 1222 of the EPAct
(In excess of statutory jurisdiction, authority, or limitations, or short of statutory right)

86. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs I through 70.

87. Section 1222 specifically authorizes the Secretary to "participate with other entities in designing, developing, constructing, operating, maintaining, or owning, a new electric power transmission *facility and related facilities.*" 42 U.S.C. § 16421(b) (emphasis added). As defined by DOE and Clean Line in the Participation Agreement, the "Project Facilities" include "all transmission lines (including all structures and wires and related components running from the Converter Station Facility to the Arkansas Connection Point and the AC transmission lines interconnecting the Converter Station Facility to the transmission system under the operational control of [SPP] and the intermediate Converter Station to the transmission system under the control of [MISO]" together with "the Converter Station Facility, the AC Collection System the Intermediate Converter Station and related facilities." Exh. D, pp. 8-9. Notably, the definition of Project Facilities does not include real property or real property interests.

88. Section 1222 does not expressly authorize DOE or SWPA to own real property interests. Furthermore, Section 1222 does not expressly authorize DOE or SWPA to utilize the federal government's power of eminent domain to acquire real property interests.

89. Nevertheless, the Participation Agreement purportedly authorizes DOE to acquire real property through both voluntary acquisition methods and, where necessary, by exercising federal eminent domain authority. The Participation Agreement further states that the United States of America will hold title to any and all acquired interests in real property. Exh. D, § 3.3, pp. 55-56.

90. Accordingly, DOE's decision to utilize the federal government's power of eminent domain to acquire and own real property interest in support of the Project is contrary to the plain language of the Section 1222 and is otherwise in excess of statutory jurisdiction, authority, and limitations. 7 U.S.C. § 706(2)(C)

FOURTH CAUSE OF ACTION
Violation of the Administrative Procedure Act
(Arbitrary, capricious, an abuse of discretion, and otherwise not in accordance law)

91. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 70.

92. An agency decision is "arbitrary and capricious if: the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Lion Oil Co. v. EPA*, 792 F.3d 978, 982 (8th Cir. 2015) (*citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

93. The Secretary and DOE's decision is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law for at least each of the following reasons:

(i) The Project is not necessary to accommodate an actual or projected increase in demand for transmission capacity.

94. Section 1222 requires that prior to approving DOE's participation in a proposed project, the Secretary must first determine that a proposed project is *necessary* to accommodate an actual or projected increase in demand for electric transmission capacity. *See* 42 U.S.C. § 16421(b)(1)(B) (emphasis added). Although the term "necessary" is not defined by statute, the accepted meaning of the word is "indispensable" or "absolutely needed." Webster's New Collegiate Dictionary (8th Ed.) 1973.

95. DOE explained that the Project *may* help accommodate additional demand for transmission capacity that comes *solely* from renewable wind-generation sources. *See e.g.*, Exh. C, p. 25, n. 113 (citing information submitted with Clean Line's Part II Application). However, DOE does not explain or reasonably support its determination that the Project is "necessary" or "absolutely needed" to accommodate an actual or projected increase in demand for electric transmission capacity. In fact, DOE acknowledges that key evidence that the Project is *necessary* to accommodate an actual or projected increase in demand "did not analyze [transmission] constraints between Oklahoma and the Southeast region," which represents the purported service route for this Project. Exh. C, p. 29.

96. Additionally, DOE does not rely on or cite to *any* publically available request or subscription for the purchase of capacity or electricity supply from the demand side or load serving end of the Project—namely, TVA and the Southeast United States. At best, the TVA, the Project's largest potential customer, has expressed tepid interest by noting that the Project "could provide benefit to TVA." Exh. C, p. 26.

97. Accordingly, because DOE failed to document a constraint or demand for additional transmission capacity sufficient to label this Project as "necessary," the Secretary and DOE's decision is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

(ii) The Project is not consistent with a transmission need identified by a relevant Transmission Organization.

98. Section 1222 also demands that prior to approving DOE's participation in a proposed project, the Secretary must also determine that the proposed project is "consistent with transmission needs identified, in a transmission expansion plan or otherwise, by the appropriate

Transmission Organization." 42 U.S.C. § 16421(b)(2). The Secretary's decision must be based on the "best available data." *Id.* § 16421(g).

99. Here, the Secretary and DOE's analysis and explanation fails because the Secretary and DOE relied on assumptions and documentation that are (i) insufficient to demonstrate that the Project is consistent with a transmission need identified by an appropriate Transmission Organization and (ii) do not represent best available data.

100. As noted in footnote 2, Transmission Organization means "a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the [Federal Energy Regulatory] Commission for the operation of transmission facilities." 16 U.S.C. § 796.

101. According to DOE, transmission organizations assess transmission needs by analyzing economic and reliability related problems that have arisen or may arise because of inadequate transmission facilities and public policy needs. Exh. C, p. 33. A transmission organization's assessment generally considers transmission needs over short-, medium-, and long-term horizons. The identified needs are formalized in a transmission expansion plan. Exh. C, p. 33.

102. The Southwest Power Pool ("SPP") is a relevant transmission organization operating in the area where the Project's projected generation capacity will be situated. SPP recently published its most current transmission expansion plan, which identified "all transmission projects in SPP for the 20-year planning horizon." Southwestern Power Pool, 2016 SPP Transmission Expansion Plan Report, at 6 (Jan. 5, 2016) (hereinafter "2016 STEP Report"). The 2016 STEP Report did not identify *any* transmission need in the 20-year planning horizon that is consistent with the Project. Similarly, the Midcontinent Independent System Operator

("MISO"), which is the transmission organization servicing the area where the Project's proposed Arkansas converter station will be located, maintains a 2015 transmission expansion plan ("MTEP15") that is also void of any identified transmission need that is consistent with the Project.

103. DOE disregards the plain fact that *no* transmission expansion plan prepared and finalized by a relevant Transmission Organization—*e.g.* SPP and MISO—identified a transmission need satisfied by or consistent with this Project. Instead, DOE relies on speculative projections of need to support the Secretary's decision to approve the Project under Section 1222.

104. DOE's reasoning and its explanation rely most heavily on SPP's *Integrated Transmission Plan 20-year Assessment Report* ("SPP Report"). The reliance on the SPP Report and its reasoning is misplaced and unsupportable because the relevant portions of the SPP Report *assume hypothetical* scenarios regarding future regulatory policies, incentives, and demand growth that may or may not come to fruition. For example, portions of the SPP Report relied on by DOE, assume a future scenario that necessitates increased transmission capacity to accommodate demands for *imported*, renewable wind-energy from SPP to eastern service territories and load centers because of a 20% renewable energy standard in those eastern service territories. SPP Report, pp.17–18. Though SPP projects growth in wind-generated capacity under this scenario, the SPP Report's speculation of an increased demand for that capacity, and therefore demand for new transmission, is wholly premised on the eastern service territories' *need* for renewable energy import. SPP Report, p. 66 ("Policy need and their corresponding transmission solutions were developed based on the curtailment of renewable energy that has been installed to meet a Renewable Energy Standard (RES) policy target or mandate in each

future."). There is currently no relevant 20% renewable energy standard in the eastern service territories identified by SPP and, therefore, no real transmission need.

105. DOE's reliance on the 2008 *Joint Coordinated System Plan* (JCSP) and the *Eastern Interconnection Planning Collaborative* (EIPC) is equally insufficient to constitute the "best available data." Similar to the SPP Report, these documents rely on assumed renewable energy standards and hypothetical scenarios that do not exist. Furthermore, whether by express disclaimer or because of criticism from participating Transmission Organizations, these reports should not be reasonably relied on for planning purposes. *See e.g.*, Letter from Gordon van Welie, President and CEO of ISO New England, Inc. and Stephen G. Whitley, President and CEO of New York Independent System Operator, to the Joint Coordinated System Planning Initiative (Feb. 4, 2009) (stating "the 2008 JCSP cannot be viewed as a 'plan' to be relied upon for decision-making purposes"); *see also,* Eastern Interconnection Planning Collaborative, Phase 2 Report: Interregional Transmission Development and Analysis for Three Stakeholder Selected Scenarios and Gas-Electric System Interface Study at1-6 (July 2, 2015) ("The information and studies discussed in this report are intended to provide general information to policy-makers and stakeholders *but are not* a specific plan of action *and are not* intended to be used by any state electric facility approval or siting processes.")(emphasis added).

106. The Secretary and DOE disregarded existing transmission expansion plans and therefore failed to consider the best available data, as required by law, in ensuring the Project was consistent with transmission needs identified by SPP, MISO, or any other relevant Transmission Organization. Instead, the Secretary and DOE relied on presumptive needs tied to hypothetical scenarios grounded in assumed regulatory policies, incentives, and service demands that do not exist. For at least these and other reasons, the Secretary and DOE's decision is not

based upon the best available data and, consequently, it is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

(iii) DOE's evaluation of the Project relied on factors and policy considerations which Congress did not authorize DOE to consider under Section 1222.

107. Section 1222 enumerates a list of statutory factors that are determinative for the purposes of the Secretary's involvement. 42 U.S.C. § 16421(b).

108. However, Federal Defendants' Request for Proposals, issued in 2010, also included additional criteria and determinative factors concerning a proposed project's ability to facilitate the reliable delivery of renewable energy. *See* 75 Fed. Reg. 32940. When publishing the availability of Clean Line's Part II Application, DOE further acknowledged that in order to be responsive to the Request for Proposals, project applicants had to demonstrate how the proposal would satisfy the additional, non-statutory requirement for renewable energy. *See* 80 Fed. Reg. 23521.

109. Ultimately, even the Secretary and DOE's evaluation of the statutory factors, including (i) whether the project was "necessary to accommodate an actual or projected increase in demand for electric transmission capacity," (ii) whether the project was "consistent with the transmission needs identified by the appropriate Transmission Organization," and (iii) whether the Project was in the public interest, was impacted by and relied on the Project's purported ability to satisfy potential demand for capacity from renewable, wind-generator sources to the exclusion of other energy resources and to the exclusion of any actual or projected transmission need.

110. DOE's singular policy focus on non-statutory considerations, such as the development and delivery of renewable wind-generated electricity to the exclusion of other resource types, inappropriately limited the scope of Section 1222, created an artificial appearance

of demand for capacity and transmission need, and undermined Section 1222's purpose and intent to facilitate "necessary" transmission infrastructure.

111. In making its determination that the Project satisfied both statutory and non-statutory criteria, the Secretary and DOE relied almost exclusively on factors and considerations which Congress did not intend or authorize the Secretary and DOE to consider under Section 1222. These extra-statutory policy considerations were determinative to the Secretary and DOE's decision and even affected the analysis and consideration of proper criteria. Accordingly, DOE's decision is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

FIFTH CAUSE OF ACTION

Violation of the Administrative Procedure Act and the 5th Amendment Right to Due Process

112. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 70.

113. The APA provides that the court shall hold unlawful and set aside agency action, findings, and conclusions found to be contrary to constitutional right, power, privilege, or immunity. 5 U.S.C. § 706(2)(B). On issues involving the Constitution, courts need not defer to federal agency findings, conclusions, or rulings.

114. The due process clause of the Fifth Amendment to the Constitution forbids government practices and policies that violate precepts of fundamental fairness, and it expressly prohibits the deprivation of life, liberty, or property without due process of law.

115. For at least the following reasons DOE's designation of the 1,000' Corridor and DOE and Intervenor's implementation of the Project violate the precepts of fundamental fairness and erroneously deprive Plaintiffs' affected members of the right to due process:

(i) Federal Defendant's approval and designation of the 1,000' Corridor for the potential construction and operation of the Project improperly impinges on property rights without proper Due Process.

116. On or around March 25, 2016, DOE approved the 1,000' Corridor for the potential construction and operation of the Project. *See*, Exh. A.

117. DOE's designation of the 1,000' Corridor without identifying where the Project will be specifically located within the 1,000' Corridor or *when or whether* the Project will be constructed and operated has clouded the title of Plaintiffs' members' property interests and impinged on the full use and enjoyment of their property. DOE's failure to afford affected citizens an opportunity intervene as a party and to be heard on the record regarding the need for the 1,000' Corridor is a failure to ensure that these individuals received all the process due under the Fifth Amendment's Due Process Clause.

118. In determining the sufficiency of procedure, the Supreme Court articulated a three-factor test: (i) determining the property interest that will be affected by the official action; (ii) the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (iii) the federal government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See Matthews v. Eldridge*, 425 U.S. 319 at 335 (1976).

119. Using this framework, it is clear that Plaintiffs' affected members are being erroneously deprived of their interests in real property because of grossly insufficient procedural safeguards. The interests involved include the right to the full use and enjoyment of real property and the statutory right to participate in transmission siting decisions. Ark. Const., Art II, § 22 ("The right of property is before and higher than any constitutional sanction."); *see also*, Ark.

Code Ann. § 23-15-517, 518, -524 (providing a right to intervene and participate in siting decisions).

120. The risk of erroneous deprivation is high because DOE approved the 1,000' Corridor, but DOE and Clean Line may or *may not* utilize the area and will, at most, utilize only some as of yet unknown 200' corridor. Meanwhile, title and property value are already being questioned by potential lenders and potential buyers.

121. Finally, the probable value of providing additional safeguards is immense and is entirely consistent with the federal and state procedures utilized in numerous other similar permitting scenarios. *See*, *e.g.*, Section 1221 of the EPAct (*codified* at 16 U.S.C. § 824*p*) and 18 C.F.R. § 50.10 (providing interested persons with the right of intervention and party status in FERC back-stop siting decisions for electric energy facilities like the Project); *see also* 15 U.S.C. § 717*n*(e) (providing intervention and party status to persons impacted by the FERC's siting decisions for natural gas pipelines); and Ark. Code Ann. §§ 23-18-502, -517, -518, -524 (expressing and implementing the Arkansas General Assembly's intent that affected persons be statutorily authorized to participate in decisions regarding the location, financing, construction, and operation of major utility facilities).

122. Because DOE's designation of the 1,000' Corridor, pursuant to NEPA and Section 1222, improperly impinges and abrogates the Plaintiffs' members' rights to the full use and enjoyment of real property without the procedural safeguards of intervention and full party status, a hearing on the record, and rights of appeal, DOE's designation of the 1,000' Corridor violates Plaintiffs' members' rights to due process.

(ii) DOE and Intervenor's consideration and implementation of the Project through the Participation Agreement improperly impinges on Plaintiffs' members rights to procedural due process.

123. The Plaintiffs and their affected members are not parties to the Participation Agreement. DOE's contract with Clean Line provides, among other items, the authorization for federal actors *or a select committee of federal and private actors* to take actions, make determinations, and issue approvals that: (i) identify the rights-of-way necessary for the Project (Exh. D, § 3.1, p, 54); (ii) that designate when real estate interests are subject to voluntary acquisition and when real estate interests are subject to acquisition by condemnation (Exh. D, §§ 3.3, 6.2–6.4, pp. 55-56, 67–74); (iii) establish the conditions precedent to the use of federal eminent domain (Exh. D, § 6.3, pp. 71-74); (iv) require sub-easements and other property interests in favor of the government (Exh. D, § 3.2(b)–(c), p. 54); (v) establish or limit contract rights concerning property interests (Exh. D, §§ 3.2–3.3, pp 55-56), (vi) determine the technical and financial viability of the Project (Exh. D, § 6.4, pp. 74-77); and (vii) allow Intervenor to carry out certain of the Federal Defendants' statutory functions and responsibilities (Exh. D, Schedules 1 and 17).

124. In each instance, DOE and Intervenor's decisions and actions will likely have direct and substantial impacts on Plaintiffs' members' property interests, and in each instance the determination, approval, or restriction will take place without notice, without opportunity to appear and be heard, and without sufficient procedures to ensure Plaintiffs' members are not erroneously deprived of their property rights and interests.

125. For example, but for the procedure utilized by DOE and Intervenor to consider and approve DOE's participation in the Project, Plaintiffs and Plaintiffs' members would have been afforded the opportunity to investigate, review and challenge the veracity and sufficiency of

Intervenor's representations, warranties and plans regarding every aspect of the Project, including the technical and financial viability.

126. DOE and Intervenor's consideration and implementation of the Project through the Participation Agreement will impinge and abrogate the rights of Plaintiffs to the injury of Plaintiffs' members' property interests and, therefore, violates the principals of fundamental fairness and the requirements of due process.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

1. Declare that the Secretary and DOE's March 25th, 2016 determination to independently approve the construction and operation of the Project is in excess of statutory jurisdiction, authority, and limitation, and violates Section 1222 of the Energy Policy Act of 2005 and the APA.

2. Declare that the Secretary and DOE's March 25th, 2016 determination approving the Project and directing the DOE and SWPA's participation in the Project is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, and violates Section 1222 of the Energy Policy Act of 2005 and the APA.

3. Declare that DOE's March 25th, 2016 determination to approve the 1,000' Corridor, pursuant to National Environmental Policy Act and Section 1222 of the Energy Policy Act of 2005, violates Plaintiffs' members' right to due process under the United States Constitution and the APA.

4. Declare that DOE and Intervenor's consideration and implementation of the Project pursuant to the Participation Agreement is contrary to the constitutional right to due process and, therefore, violates the APA and the United States Constitution.

5. Declare that DOE and SWPA's proposed use of federal eminent domain authority in furtherance of the Project is in excess of statutory authority, contrary to constitutional right, power, and privilege, and violates Section 1222 of the Energy Policy Act of 2005, the APA, and the United States Constitution.

6. Declare that: (i) Section 1222 of the Energy Policy Act of 2005 does not preempt or otherwise obviate the applications, certifications, and approvals required for the construction and operation of a major utility facility in Arkansas pursuant to the Utility Facility Environmental and Economic Protection Act, (ii) Defendants' participation in the Project under Section 1222 does not preempt or obviate the applications, certifications, and approvals required for the construction and operation of a major utility facility in Arkansas pursuant to the Utility Facility Environmental and Economic Protection Act, and (iii) Federal Defendants and/or Intervenor must comply with the necessary applications, certifications, and other approvals for the construction and operation of a major utility facility in Arkansas pursuant to the Utility Facility Environmental and Economic Protection Act.

7. Set aside and remand the Secretary and DOE's March 25th, 2016 determination to approve and participate in the Project until such time as the Federal Defendants and/or Intervenor comply with each and all of the siting requirements of the Arkansas Utility Facility Environmental and Economic Protection Act, the statutory requirements of Section 1222 of the Energy Policy Act of 2005, the procedural due process requirements of the United States Constitution, the APA, and are otherwise in compliance with the law.

8. Preliminarily and permanently enjoin Federal Defendants and Intervenor from initiating, authorizing, permitting, or otherwise participating in any activities in furtherance of the Project unless and until the Federal Defendants and/or Intervenor comply with each and all of

the requirements of the Arkansas Utility Facility Environmental and Economic Protection Act, Section 1222 of the Energy Policy Act of 2005, the United States Constitution, the APA, and are otherwise in compliance with the law.

9. Award Plaintiffs their reasonable attorneys' fees and costs and expenses incurred in connection with the litigation of this action pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, or as otherwise provided by law; and

10. Grant Plaintiffs such additional relief as the Court deems just and proper.

Respectfully submitted this 5th day of December, 2016.

Respectfully,

/s/ *Jordan P. Wimpy*
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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2016, the foregoing was filed electronically with the Clerk of the Court using the CM/ECF system which will serve notice to all attorneys of record.

/s/ *Jordan P. Wimpy*
Jordan P. Wimpy