UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

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.

Civil Action No. 3:16CV207-JLH

This case assigned to District Judge Holmes and to Magistrate Judge Volpe

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 Department of Energy's statutory authorities, (iii) the sufficiency and rationale of the 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 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 Department of Energy ("DOE") published a Record of Decision and Secretarial Determination evidencing 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, 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

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[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.

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, Faulkner, 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 DOE approved the Project. Plaintiffs challenge (i) whether DOE exceeded its statutory authority under Section 1222, (ii) whether DOE acted arbitrarily and capriciously in that (a) DOE gave undue consideration to non-statutory, policy considerations and (b) the evidence does not support DOE's determination that the Project satisfied Section 1222's criteria, and (iii) whether DOE applied Section 1222 in a way that violated Plaintiffs' due process rights by issuing the Record of Decision and Secretarial

Determination approving the Project and entering the Participation Agreement when many of DOE's final Project evaluations and approvals have yet to occur (*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 to Notice to Proceed). Exh. D, pp. 65, 67, 71, and 74.

7. In sum, the Federal Defendants 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 same Federal Defendants' 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 Defendants' actions are unlawful, (ii) set aside Defendants' actions as arbitrary, capricious, and otherwise not in accordance with the law, and (iii) enjoin the Defendants from any further activities in furtherance 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 route. 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 route. 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 1000' Corridor and the subsequent construction, operation, and maintenance of the Project's facilities is having and will continue to have on property value, continued use of property as working lands, 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. Defendants' 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 Defendants exceeded their statutory authority and acted arbitrarily and capriciously in determining to approve and participate in the Project. Moreover, Defendants 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.

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 authorized the Project, and it will participate in the Project by utilizing the federal government's power of eminent domain to acquire real property 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 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.

JURISDICTION AND VENUE

16. 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.

17. 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).

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

19. 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

20. The federal government traditionally has not been directly involved in the siting and approval of the construction of electric transmission line projects. The states have assumed and exercised "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 Federal Energy Regulatory Commision'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 reflects this traditional regulatory framework 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

21. 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"). This certificate of convenience and necessity is commonly referred to as a CCN. The Arkansas General Assembly amended the CCN

Act in 2015 to exclude its applicability to certain types of electric transmission lines. Ark. Code Ann. § 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.

22. Since 1973, a separate, specific 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 independent jurisdiction granted to the APSC by 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).

23. 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).

24. 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 reasonably alternate location; (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.

25. The Arkansas Major Utility Act allows the opportunity for public involvement in the approval 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.

26. The Arkansas Major Utility Act also details specific opportunities for persons affected by a proposed major utility facility to participate in the applicant's certification proceedings as an officially recognized party to the proceeding and 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.

27. 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).

28. Upon the APSC's approval and grant of a CECPN, the Arkansas Major Utility Act expressly authorizes the applicant to utilize, where necessary, the 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).

29. 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

30. 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).

31. Among these provisions, the EPAct approved new, limited opportunities for DOE's participation in otherwise private electric energy transmission facility developments. 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 (*codified at* 42 U.S.C. § 16421) (emphasis added).

32. 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).

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[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.

33. 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.

34. 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.

35. 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."

36. 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).

37. 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

38. 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.

39. 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, ¶¶ 22-29 above, describing the CECPN and the Arkansas Major Utility Act.

40. On or around January 11, 2011, after conducting a hearing on PECL's CCN Application, the APSC issued an order denying PECL'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 (Jan. 11, 2011), at p. 11, attached hereto and incorporated herein as EXHIBIT G (the "Initial APSC Decision").

41. 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 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).

42. The APSC 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.

43. 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).

44. 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 Pope County, 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 Federal Energy Regulatory 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.

45. Clean Line has represented to DOE that Clean Line 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

46. 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).

47. In addition to Section 1222's statutory factors outlined in ¶ 32 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. *See*, *Id.* at 32941 (emphasis added).

48. On or around July 6, 2010—while Clean Line's CCN application was 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 (emphasis added). DOE did not provide Plaintiffs, Plaintiffs' members or any other member of the public with notice and opportunity to comment on, or object to Clean Line's Part I Application until April 2015.

49. Over a year later, on or around August 17, 2011—about eight months after the Initial APSC Decision denying PECL's CCN certificate—Clean Line submitted an update to its Part I Application in an effort 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

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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, *Updated 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").

did not provide Plaintiffs, Plaintiffs' members or any other member of the public with notice and opportunity comment on, or object to Clean Line's Updated Part I Application until April 2015.

50. 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 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 whether the Project satisfied 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.

51. 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 the 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 several other alternative route links. DOE did not include a preferred action or identify any preferred alternative for locating the Project in the DEIS.

52. 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

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

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]

53. 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 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.

54. 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 DOE's review of the Section 1222 criteria and the factors identified within the RFP.

55. 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 the Clean Line's proposed 1,000' Corridor as DOE's preferred route.

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

DOE's Record of Decision Pursuant to Section 1222

56. 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").

57. 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, Faulkner, Van Buren, Cleburne, White, Jackson, Poinsett, Cross, and Mississippi Counties, Arkansas. *See* Exh. E.

58. 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: (i) 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. 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.

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[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. Clean Line is solely responsible for obtaining any necessary financing and funding for the development, design, engineering, construction, ownership, operations, maintenance and management relating to the Project. Exh. D, § 13.5, p. 121. This obligation includes all funding for DOE'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.

60. 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 of DOE's responsibilities under the Participation Agreement. Exh. C, pp. 16-17.

61. Although DOE has issued its "final" approval of the Project, as evidenced by the Record of Decision and the Secretarial Determination , DOE's and SWPA's further involvement in the Project, including DOE exercising its 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 are milestones Clean Line must meet to ensure the Project's viability. The conditions precedent include requirements that 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, and that the Project is therefore necessary and viable, will all occur without public notice, without public review, and without any opportunity for Plaintiffs, Plaintiffs' members or the general public to be heard.

62. 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 operates in practical terms as DOE's *initial* decision to possibly participate in the Project.

63. DOE applied Section 1222 so that DOE's examination and DOE's true decision to participate in the Project will occur in private with the satisfaction of various conditions precedent in the Participation Agreement—a contract between DOE and Clean Line—not in public as a part of a process in which Plaintiffs, Plaintiffs' members and the public will have the opportunity to be heard. As applied by DOE, in the DOE's first-ever action under Section 1222, the decision on whether Clean Line has satisfied the various elements of the four conditions precedent in the Participation Agreement shifted the substance of DOE's decision and, therefore, DOE acted arbitrarily and capriciously in issuing its Record of Decision and Secretarial Determination.

64. DOE executed the Participation Agreement, which creates a "Coordination Committee," which "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.

65. 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 object 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 fact that Plaintiffs' members own land located within the 1,000' Corridor has caused Plaintiffs' members to suffer injury to the full use and enjoyment of their properties, such as the delay and scrutiny on bank loans and the loss of potential purchasers.

66. 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 of 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.

67. Furthermore, based on information and belief the Defendants' further, (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 opportunity to be heard.

68. Based on information and belief, Defendants recently approved the initial Project Routing and ROW Plan and identified the specific Project Real Estate Rights within the larger 1,000' Corridor. DOE's action in applying Section 1222 to allow DOE 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 the public's 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)

69. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 68.

70. DOE has 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").

71. Section 1222's limited authorization permits DOE and SWPA to make determinations regarding the federal government's "participation in" privately developed projects, but it 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).

72. In this case, the Arkansas Major Utility Act clearly provides siting or permitting authority and 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 do not obligate or otherwise require that DOE, SWPA, or Clean Line comply with the Arkansas' laws relating to the siting of electric energy facilities.

73. Instead, DOE and SWPA independently approved the construction and operation of the Project, and completely ignored, disregarded, and usurped existing Arkansas' siting laws 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.

74. Accordingly, DOE's decision 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
Compliance with the Utility Facility Environmental and Economic Protection Act
(CECPN for the construction and operation of electric transmission facilities)

75. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 68.

76. 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 CECPN contain several findings satisfying several substantive requirements. *See* Ark. Code Ann. § 23-18-511. The Arkansas Major Utility Act also guarantees basic 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.

77. Although the Participation Agreement is unclear as to which Clean Line entity will construct and/or operate the Project in Arkansas, each Clean Line entity is a "person" pursuant to 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).

78. 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).

79. The Decision Documents do not obligate or require that DOE, SWPA, or Clean Line apply for and receive a CECPN and otherwise comply with the Arkansas' laws relating to the siting of electric energy facilities. To date, neither 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 has 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.

80. 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 that 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).

81. As evidenced by Clean Line's recent letter to the Federal Energy Regulatory Commission, which is as attached as Exhibit H, the Project now "*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 Pope County, Arkansas converter station will likely provide power to customers in Arkansas, the APSC would find that the Clean Line entity that operates the Project in Arkansas meets the

definition of "public utility" and would require the Clean Line entity to apply for and obtain a CECPN under the Arkansas Major Utility Act.

82. In addition Clean Line represented to DOE in the Participation Agreement that the only required approval for the Project is DOE's decision under Section 1222. Exh. D, § 12.1(v)(i), p. 118 and Exh. D, Schedule 16 (stating the only required approval is "Section 1222 Decision").

83. Accordingly, Plaintiffs seek a declaration that Defendants must comply, or ensure compliance, with necessary 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. Ark. Code Ann. §§ 23-18-501 *et seq.*.

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)

84. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs I through 68.

85. Section 1222 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, DOE's definition of Project Facilities does not include real property or real property interests.

86. 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.

87. 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 American will hold title to any and all acquired interests in real property. Exh. D, §§ 3.3, pp. 55-56.

88. Accordingly, DOE's decision to utilize the federal government's power of eminent domain to acquire and own real property 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.

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

89. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 68.

90. 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)).

91. 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.

92. Section 1222 requires that prior to the Secretary approving a proposed project he or she 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.

93. 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.

94. 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.

95. Accordingly, because DOE failed to document a constraint or demand for additional transmission capacity sufficient to render this Project "necessary," 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.

96. Section 1222 also demands that prior to approving the DOE's participation in a proposed project, the Secretary must 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).

97. DOE's analysis and explanation fails because DOE relied on assumptions and documentation that are insufficient to demonstrate that the Project is consistent with an actual, existing transmission need identified by an appropriate Transmission Organization and that does not represent best available data.

98. As explained by 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.

99. 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, MISO's most recent transmission expansion plan ("MTEP15") is also void of any identified transmission need that is consistent with the Project.

100. DOE disregards the 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, the DOE relies on speculative projections of need to support is decision to approve the Project under Section 1222.

101. DOE's reasoning and its explanation rely most heavily on SPP's *Integrated Transmission Plan 20-year Assessment Report* ("SPP Report"). However, DOE's reliance on the SPP Report and its reasoning is misplaced and unsupportable because the relevant portions of the SPP Report *assume* future, *hypothetical* scenarios regarding regulatory policies, incentives, and demand growth that may or may not come to fruition. For example, the SPP Report assumes 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 20% renewable energy standard in the eastern service territories identified by SPP, and therefore no real transmission need.

102. DOE's reliance on the 2008 *Joint Coordinated System Plan* (JCSP) and the 2010 *Eastern Interconnection Planning Collaborative* (EIPC) are 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 criticism from participating Transmission Organizations, these reports cannot 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").

103. 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, DOE relied on hypothetical data tied to a future scenario grounded in assumed regulatory policies, incentives, and service demands that do not exist. For at least these and other reasons, DOE's decision 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.

104. 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).

105. However, Defendants' Request for Proposals, issued in 2010, also included new 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 Clean Line's Part II Application, DOE acknowledged that in order to be responsive to the Request for Proposals, project applicants had to demonstrate how the proposal would satisfy the additional renewable energy criteria. *See* 80 Fed. Reg. 23521.

106. Ultimately, the DOE's evaluation of 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, all relied on the Project's limited ability to facilitate the delivery of 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.

107. DOE's singular policy focus on the development and delivery of renewable wind-generated electricity to the exclusion of other resource types inappropriately limited to 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—not facilitate the growth of renewable wind-energy.

108. In making its determination that the Project satisfied both statutory and non-statutory criteria, DOE relied almost exclusively on factors and considerations which Congress

did not intend or authorize DOE to consider under Section 1222. These extra-statutory policy considerations were determinative to DOE's decision and directly affected DOE's analysis and consideration of the 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

109. Plaintiffs hereby reallege and incorporate each and every allegation in paragraphs 1 through 68.

110. 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.

111. 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.

112. For at least the following reasons DOE's designation of the 1,000' Corridor and DOE's participation in and implementation of the Project violates the precepts of fundamental fairness and erroneously deprives 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.

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

114. 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 title to Plaintiffs' members' property interests and impinged on the full use and enjoyment of their property rights. 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.

115. 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).

116. Using this framework, it is clear that Plaintiffs' affected members are being erroneously deprived of their interests in their real property because of grossly insufficient procedural safeguards. The interests involved include the constitutional 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 in participate in siting decisions).

117. The risk of erroneous deprivation is high because DOE approved the 1,000' Corridor, but DOE and its partners may or *may not* utilize the area and will, at most, utilize only some as of yet unknown 200' corridor; yet, the future title and property value of relevant properties are already being questioned by potential lenders and potential buyers. Finally, the

probable value of providing additional safeguards is immense and is also entirely consistent with existing federal and state governmental interests and procedures in 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) .

118. Because DOE's designation 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, as provided for in other state and federal siting regimes, the DOE's designation of the 1,000' Corridor violates Plaintiffs' members' rights to due process.

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

119. The Plaintiffs and their affected members are not parties to the Participation Agreement. The Defendants' 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); 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); establish the conditions precedent to the use of federal eminent

domain (Exh. D, § 6.3, pp. 71-74); require sub-easements and other property interests in favor of the government (Exh. D, § 3.2(b)–(c), p. 54); establish or limit contract rights concerning those property interests (Exh. D, §§ 3.2–3.3, pp 55-56).

120. In each instance, the Defendants' decisions and their 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.

121. Because the Participation Agreement will impinge and abrogate the rights of Plaintiffs, the federal Defendants implementation of the Participation Agreement to the injury of Plaintiffs' members' existing property rights violates the requirements of due process.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Court:

1. Declare that DOE's and SWPA's March 25th, 2016, determination to approve the Project and directing the Defendants' participation in 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 DOE's and SWPA's March 25th, 2016, determination to approve the Project and directing the Defendants' 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 and SWPA's March 25th, 2016, determination to approve the Project and directing the Defendants' participation in the Project is contrary to constitutional

right to due process and violates Section 1222 of the Energy Policy Act of 2005, the APA, and the United States Constitution.

4. Declare that DOE's 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.

5. Declare that Defendants must comply, or ensure compliance, with 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, Ark. Code Ann. §§ 23-18-501 *et seq.*.

6. Set aside and remand the DOE's March 25th, 2016, determination to approve the Project and order DOE to withdraw its determination and approval of the Project until such time as the Project is in compliance with the siting requirements of the Arkansas Major Utility 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 is otherwise in compliance with the law.

7. Preliminarily and permanently enjoin DOE from initiating, authorizing, permitting, or otherwise participating in any activities in furtherance of the Project unless and until the Defendants comply with the requirements of the Arkansas Major Utility Act, Section 1222 of the Energy Policy Act of 2005, the United States Constitution, and the APA.

8. 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

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

Respectfully submitted this 15th day of August, 2016.

Respectfully,

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