From:	Clayton Eubanks
To:	Plainsandeastern
Subject:	OAG Comments on Plains & Eastern Clean Line
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Attachments:	Oklahoma Attorney Generals Office comments on Plains & Eastern Clean Line -Section 1222 -Part 2 Application.pdf

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Attached please find comments from the Oklahoma Attorney General's Office on the Plains & eastern Clean Line Project.

Thank you for the opportunity to comment.

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OFFICE OF ATTORNEY GENERAL
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Office of Electricity Delivery and Energy Reliability (OE-20),
1222 Program,
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Re: Comments from the Oklahoma Attorney General's Office on Plains and Eastern Clean Line Project

On April 28, 2015 the U.S. Department of Energy ("DOE") published a Notice of Availability in the Federal Register and opened a comment period accepting comments on whether the proposed Plains and Eastern Clean Line project meets the statutory criteria listed in Section 1222 of the Energy Policy Act of 2005, as well as all factors included in DOE's 2010 Request for Proposals. DOE has characterized this opportunity to comment as part of conducting its due diligence on non-NEPA factors such as the project's technical and financial feasibility and whether the project is in the public interest. DOE states that it will make all required statutory findings and will consider all criteria listed in 42 U.S.C. § 16421 *et seq.* (Section 1222 of the Energy Policy Act of 2005 "EPAct") as well as all factors included in DOE's 2010 Request for Proposals.

The Clean Line proposal is made pursuant to 42 U.S.C. § 16421(b) for new facilities. The proposed Plains & Eastern Clean Line project (the proposed project) would include an overhead +/- 600 kV direct current electric transmission system and associated facilities with the capacity to deliver approximately 3,500 MW primarily from renewable energy generation facilities in the Oklahoma Panhandle region to load-service entities in the Mid-South and Southeast via an interconnection with the Tennessee Valley Authority. However, the "renewable energy generation facilities in the Oklahoma Panhandle region" do not exist, and Clean Line does not have firm contracts with "load-service entities." As more fully discussed below, the Clean Line project is not technically or financially feasible and is not in the public interest. Additionally, the project does not meet the statutory requirements of Section 1222 and should not be approved.

1. Appendix 2-B to Clean Line's Part 2 Application is comprised of form letters from different wind developers. A close reading of these letters reveals the same statements repeated from letter to letter, an indication that Clean Line prepared the letters for the wind developers to produce on their letter head. One statement that appears repeatedly is that "Wind developers have to settle for less windy project sites that have adequate transmission capacity. Moreover, these less windy areas see significant wind development, leading to congestion on the AC

transmission grid system and eventually causing increases in curtailment."

These letters admit and demonstrate that project sites can be developed in Tennessee and elsewhere near the source of the alleged load-service entities thereby negating the need for the Clean Line project. DOE should use its authority pursuant to 42 U.S.C. § 16421(a) to upgrade existing transmission facilities if it determines there really is congestion that is likely to lead to curtailment in the load-service region rather than unnecessarily expending over a billion dollars to build an unnecessary DC transmission line from Oklahoma to Tennessee which will disrupt thousands of acres of land.

2. Clean Line's Part 2 Application states at page 2-2 that it received responses from 29 "projects" to its Request for Information. However, Clean Line does not appear to have firm contracts to purchase any power from the proposed project. Clean Line cites a letter from TVA to support its allegations that there is a need for the project. However, TVA's letter states that "The recent promulgation of the draft regulations implementing the Clean Air Act Section 1111(d) rule will add even greater complexity. One path for TVA to deal with this complexity is by having options to draw from as we refine our resource planning and selection. Clean Line represents this type of optionality, and options are valuable to TVA."

Despite this statement, TVA has not committed a single dollar to purchasing power from the Clean Line project. "Optionality" and "draft regulations" are hardly a basis for concluding that TVA needs or will purchase power from the Clean Line project.

Clean Line states at page 2-6 that "The project can also meet the needs of other utilities in the Mid-South and Southeast." Clean Line goes on to state "Clean Line will explore additional opportunities for Southwestern and its customers to participate further in the Project. Again, Clean Line fails to name even one customer that has done anything more than "express interest in the Project's transmission capacity."

Clean Line's actions at FERC demonstrate that the Company is not being completely transparent in its statements that it will explore additional opportunities for Southwestern and its customers to participate in the project. On May 30, 2014, Plains and Eastern filed a request with FERC for authorization to sell transmission rights on the Project at negotiated rates and for waiver of certain Commission regulations. Plains and Eastern also proposed to allocate up to 100 percent of the Project's initial capacity to one or more transmission customers through their solicitation and capacity allocation process. This proposal is clearly contrary to Clean Line's statements about its commitment to explore additional opportunities for Southwestern and its customers to participate further in the Project.

On August 14, 2014, FERC issued an order[1] granting Clean Line's request for waiver of certain FERC regulations and allowing Clean Line to allocate up to 100 percent of the Project's capacity to one customer, "with the potential result that a single customer, including an affiliate, may be awarded up to 100 percent of the transmission capacity." Based on the FERC order, Clean Line could exclude all Southwestern customers from use of the proposed transmission line and not allow SPP or MISO to control the transmission line.

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[1] 148 FERC ¶61,122, Docket No. ER14-2070-000 ORDER CONDITIONALLY AUTHORIZING PROPOSAL AND GRANTING WAIVERS

3. As demonstrated in comment 2 above, Clean Line has not been consistent in the statements it has made to DOE, FERC or state regulatory agencies. There are numerous material and substantial incorrect, misleading and/or inconsistent statements and omissions in Clean Line's Application materials. DOE should reject Clean Line's proposal based on these conflicting, misleading, incorrect and incomplete statements. In the alternative, DOE should at a minimum perform an independent review and comparison of all statements made by Clean Line to DOE, FERC, the Oklahoma Corporation Commission, the Arkansas Public Service Commission, the U.S. EPA, SPP, MISO, and all other state and federal agencies, transmission organizations and other entities to whom Clean Line submitted statements and information related to the Plains and Eastern Clean Line Project.

a. Clean Line misstated a relevant fact in Appendix C of its Part 2 Application wherein it was stated that Clean Line received a "Certificate of Convenience and Necessity (issued October 28, 2011, by Order of OCC, Order #590530" from the Oklahoma Corporation Commission ("OCC"). The OCC does not issue certificates of convenience and necessity to electric utilities and did not issue such a certificate to Clean Line. In fact OCC Order #590530 specifically states in the Conclusions of Law section of the Order (*see* Page 12) the following: (8.) Although OCC supervises, regulates and controls utilities generally and issues certificates of convenience and necessity for ***telecommunications utilities*** specifically (*emphasis added*), the Commission does not issue certificates, licenses or permits to any entity to serve as an electricity-related utility in the State of Oklahoma. Okla. Const. Art. 9 §§ 17 and 34; and 17 Okla. Stat. §§ 131-133 and 151-157.

b. In the Part 2 Application, Clean Line submitted to DOE Appendix C titled "Potential Federal and State Permits and Consultation Required for the Project. Pursuant to 42 U.S.C. § 16421(d).Clean Line's proposed project must comply with state and federal laws related to the siting of energy facilities At page 5-2 of Clean Line's Part 2 Application, Clean Line states that it will obtain all applicable regulatory and other governmental permits, approvals or authorizations necessary to construct, operate and maintain the Project, and will comply with all applicable federal, state and local laws and regulations related to the construction, operation and maintenance of the Project.

i. On May 13, 2010, Plains and Eastern Clean Line LLC submitted an application to the Arkansas Public Service Commission for approval of a Certificate of Public Convenience and Necessity to operate as a public utility in the state of Arkansas. This application was for the portion of Clean Line's Project that is the subject of DOE review. The final order issued in the Arkansas case states at page 4: "Finally, Clean Line notes the Oklahoma Corporation Commission (Cause No. PUD 200700298) recently has approved a similarly-situated company (ITC Great Plains) as a certificated transmission-only utility in its state." (emphasis added)

As stated in paragraph 3(a) above, the OCC does not issue certificates to electric utilities. The OCC did not issue a certificate to ITC Great Plains. The OCC did grant transmission only utility status to ITC Great Plains, just as it did to Clean Line, however, it did not issue a certificate. This is another example of Clean Line making incorrect statements in one jurisdiction about what occurred in another jurisdiction.

The final order in the Arkansas case cited state statutory provisions that require Clean Line to obtain from the Arkansas Public Service Commission a certificate that public convenience and necessity require or will require the construction or operation, prior to construction or operation of equipment or facilities for supplying a public service. The Commission's Findings & Conclusion determined the issues presented in the case were (1) whether Clean Line fits the statutory definition of an Arkansas "public utility" and is entitled to a CCN to provide public utility service in the state; and (2) if so, whether Clean Line is entitled to exemption from certain public utility statutes. The Commission found that Clean Line did not meet the statutory definition of a public utility. That finding means that Clean Line does not have the necessary authority to construct the portion of the Project that traverses the state of Arkansas and does not have all applicable federal, state and local permits to complete the Project. Clean Line's Part 2 Application therefore does not comply with state and federal laws related to the siting of energy facilities as required by 42 U.S.C. § 16421(d) and should not be approved by DOE.

c. Clean Line stated in its application in OCC Cause No. 201000075 that it would provide access to its lines to SPP and Oklahoma customers. In paragraph number 29, page 17 of Clean Line's OCC application in Cause No. 201000075, Clean Line states: "In accordance with FERC regulations, some portion of the Project's capacity will be available to other entities, including Oklahoma utilities." However, with regard to Clean Line's May 30, 2014 request for waiver of FERC regulations, Clean Line asked to be allowed to sell 100 percent of the transmission capacity to a single customer, which could be an affiliate of Clean Line. According to Clean Line's Part 2 Application, no capacity will be available to any entities in Oklahoma, and clearly will not be available to Oklahoma utilities.

d. Clean Line stated in paragraph number 22, page 15 of its application in Cause No. 201000075 that "The development and construction of the Plains & Eastern Clean Line is estimated to cost approximately $3.5 billion." However, Clean Line's Part 2 Application, Appendix 6-D, "Breakdown of Total Project Cost" demonstrates that the project will have a total cost of less than $2.5 billion. A discrepancy of over $1 billion is remarkable and taken alone is reason for DOE to suspend the approval process pending investigation into the discrepancy in the numbers used to support the Part 2 Application.

4. Eminent Domain

The April 28, 2015 Notice of Application issued by the U.S. Department of Energy states in relevant part:
Pursuant to section 1222 of the Energy Policy Act of 2005 (EPAct) (42 U.S.C. 16421), the Secretary of Energy, acting through the Southwestern Power Administration (Southwestern) or the Western Area Power Administration (Western), has the authority to design, develop, construct, operate, maintain, or own, or participate with other entities in designing, developing, constructing, operating, maintaining, or owning two types of projects: (a) Electric power transmission facilities and related facilities needed to upgrade existing transmission facilities owned by Southwestern or Western (42 U.S.C. 16421(a)), or (b) new electric power transmission facilities and related facilities located within any State in which Southwestern or Western operates (42 U.S.C. 16421(b)). In carrying out either type of section 1222 project (Project), the

Secretary may accept and use funds contributed by another entity for the purpose of executing the Project (42 U.S.C. 16421(c)).

The federal statutory authority for DOE and SWPA to participate in a project pursuant to 42 U.S.C. 16421(a) or (b) is limited by the provisions of 42 U.S.C. 16421(d) which preserves state law relating to the siting of energy facilities.

Clean Line's Proposal includes "Appendix 4-A Proposed Participation Agreement Term Sheet for the Plains and Eastern Clean Line" (hereinafter, "Appendix 4-A"). Appendix 4-A states at page 4:

Transfer of ROW Acquisition Responsibilities from Clean Line to Southwestern
In the event that Clean Line is unable to finalize an easement agreement for a parcel in Oklahoma and Arkansas due to title issues, inability to locate certain parties despite reasonable diligence, inability of a public or government entity to legally enter into a voluntary easement conveyance, or exhaustion of all reasonable negotiations, Southwestern will assume responsibility for and undertake further right-of-way acquisition efforts for such parcel.
When right-of-way acquisition efforts for a parcel are assumed by Southwestern, Clean Line will provide Southwestern with a complete landowner package, including a summary of all interactions, meetings and activity notes. Clean Line will also provide copies of all correspondence, maps, easement documents, vesting and other title documents, appraisals, landowner comments or mark-ups to easement documents, etc.

Southwestern Responsibility for Easement Acquisition

Southwestern will complete easement acquisition on any parcels for which it has assumed responsibility.

Appendix 4-A, page 5 states in part:

"Facilities" means (i) the HVDC transmission line (including all structures, wires and related components) and the AC lines interconnecting the converter stations to the existing AC system (the "HVDC Transmission Line Facilities"), (ii) the HVDC converter stations and related facilities (the "Converter Station Facilities"), and (iii) the AC collection system, which will consist of alternating current transmission lines and related facilities that connect the wind generation to the Project's western converter station in Oklahoma (the "AC Collection System").

Appendix 4-A, page 6 states in part:

Facilities Ownership:

"Clean Line will own all Facilities located in Oklahoma and Tennessee. Southwestern will own all Facilities located in Arkansas.

Therefore, Appendix 4-A states that in the event that property owners in Oklahoma do not voluntarily transfer property to Clean Line to complete the proposed Project, Southwestern will

take the property by eminent domain and then Clean Line will own all the "Facilities" located on that property. The taking of private property by Southwestern will be for a private use, which is the Facility owned by Clean Line.

Clean Line stated in its first Proposal submitted to the DOE that it anticipates that 10% of the total amount of land needed for the project would need to be taken by using federal eminent domain.[i] Clean Line also stated in that same Proposal that it planned to contribute approximately $14.133 million to Southwestern (Southwestern Power Authority or "SWPA") to cover the costs of acquiring property through the use of federal eminent domain authority and an environmental assessment.[ii]

In addition to thirteen 2-mile wide corridors for the AC collection system, the project will require an estimated 13,700 acres of Oklahoma land. Using Clean Line's estimate that approximately 10% of the total amount of land needed would be acquired by federal eminent domain, approximately 1,400 acres of Oklahoma land will be taken against the will of Oklahoma property owners. DOE should not approve and/or partner with a private company that is seeking to exercise a Federal Agencies right of eminent domain to take land from Oklahoma citizens. If Clean Line wishes to exercise eminent domain in Oklahoma, it should be forced to seek that ability according to the Oklahoma Constitution and Oklahoma law, just like every other utility in Oklahoma.[2] It is important to note that OCC Order #590530 contains a Limitation of Order provision that specifically states that "This Order does not confer the power of eminent domain on the Applicant, Clean Line and the Commission disclaims any intent to do so."

As stated earlier, according to Clean Line's Part 2 Application, no capacity will be available to any entities in Oklahoma, and will not be available to Oklahoma utilities. The citizens of

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[2] In Oklahoma Gas and Electric Company v. Beecher, 256 P.3d 1008 (2010), the Court found that OG&E's statutory right to condemn property is found at 27 O.S.2001 § 7, which grants corporations that furnish light, heat, or power, by electricity or gas, the same power of eminent domain as is granted to railroads. Pub. Serv. Co. v. Willis, 2007 OK CIV APP 18, ¶¶ 10–11, 155 P.3d 845, 848 (approved for publication by the Oklahoma Supreme Court). Railroads are authorized to exercise the power of eminent domain by 66 O.S.2001 §§ 51 through 66. However, that procedure is subject to Sections 23 and 24 of Article II of the Oklahoma Constitution, providing that private property may only be taken by condemnation for a public use.[4] Section 24 provides that the question of whether a taking is for a public use is a judicial question. The Court in the OG&E case cited the "primary beneficiary" test set forth in Board of County Commissioners v. Lowery, 2006 OK 31, 136 P.3d 639. In defining the "primary beneficiary" test in Lowery, the Oklahoma Supreme Court noted that the U.S. Supreme Court, in Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), had held that a city may condemn private property for the public purpose of economic development without violating the Fifth Amendment's Takings Clause prohibiting the taking of private property for public use without just compensation. Lowery, 2006 OK 31 at ¶ 15, 136 P.3d at 649. However, the Lowery Court distinguished Kelo by noting that Connecticut law authorized the use of eminent domain as part of an economic development project whereas Oklahoma law did not. Id. at ¶ 18, 136 P.3d at 650. More importantly, the Court noted that Sections 23 and 24 of Article II of the Oklahoma Constitution limits condemnations to public purposes, and Section 23 specifically prohibits the taking of property "for private use." Id. at ¶ 20, 136 P.3d at 652. The Court stated that it construed this latter prohibition narrowly, and concluded that Sections 23 and 24 give greater protection to private property than the Constitution of the United States. Id. at ¶ 19, 136 P.3d at 651. Lowery held that economic development alone, in the absence of blight removal, did not constitute a public purpose. The Lowery Court emphasized the importance of meeting "the needs and interests" of state citizens in Oklahoma eminent domain cases and found that the citizens of Oklahoma were the "primary intended beneficiaries" of the OG&E transmission line.

Oklahoma will clearly not be the "primary intended beneficiaries" of the Clean Line Project. (see footnote 2). Clean Line should be required to make its case in an Oklahoma Court that it should possess the right of eminent domain pursuant to established Oklahoma law.

5. Additional Comments

The June 10, 2010 Request for Proposals published at 75 FR 32940-01 states in relevant part:

[T]he Secretary requests that any entity interested in providing contributed funds for upgraded or new transmission facilities under section 1222 submit a Project Proposal that, at a minimum, contains all of the following:

1. The name and a general description of the entity submitting the Project Proposal;
2. A Project description which provides:

c. (For Proposals for Projects for non-DOE entities to participate with Southwestern or Western in designing, developing, constructing, operating, maintaining, or owning a new electric power transmission facility and related facilities located within any State in which Southwestern or Western operates) A statement, supported by the best available data, demonstrating how the proposed Project meets all of the following five eligibility criteria:

i. The proposed Project must be either:

(A) Located in an area designated under section 216(a) of the Federal Power Act (16 U.S.C. 824p(a) and will reduce congestion of electric transmission in interstate commerce; or

(B) Necessary to accommodate an actual or projected increase in demand for electric transmission capacity;

Comment: The Clean Line Project does not meet the requirement of 2(c)(i)(A), it is not in an area designated under section 216(a) of the Federal Power Act.

Comment: The Clean Line Project does not meet the requirement of 2(c)(i)(B), as it is not necessary to accommodate an actual or projected increase in demand for electric transmission capacity. The Part 2 Application has only provided vague, noncommittal statements of support by alleged wind developers. No concrete evidence has been provided to show an actual increase in demand for electric transmission capacity. The projected increase in demand for electric transmission is not based on any contracts by suppliers or users of electricity, only vague, noncommittal statements have been provided.

ii. The proposed Project must be consistent with both:

(A) Transmission needs identified, in a transmission expansion plan or otherwise, by the appropriate Transmission Organization (as defined in the Federal Power Act, 16 U.S.C. 791a et seq.) if any, or approved regional reliability organization; and

(B) Efficient and reliable operation of the transmission grid;

Comment: The Clean Line Project is not consistent with transmission needs identified in the 2015 SPP Transmission Expansion Plan Report and therefore does not meet the requirements of 2(c)(ii)(A).

iii. The proposed Project will be operated in conformance with prudent utility practice;

Comment: The Clean Line Project will not allow equal access to all customers in the state of Oklahoma; in fact it will not provide access to any utility customers in the state of Oklahoma. Prudent utility practice in Oklahoma is that public utilities provide service to all customers within their territory that request the service. By design, Clean Line's Project cannot provide any electricity to any customers in the state of Oklahoma.

iv. The proposed Project will be operated by, or in conformance with the rules of, the appropriate Transmission Organization, if any; or if such an organization does not exist, regional reliability organization;

Comment: Clean Line submitted comments opposing both the SPP and the MISO FERC Order 1000 submittals. Clean Line also objected to SPP and MISO being able to determine which wind turbines/wind farms get access to the Project, insisting on Clean Line not having to wait in line like all other public utilities to gain access to the collection system in Oklahoma. Clean Line has insisted that the collection network that is governed by SPP in Oklahoma should defer to Clean Line's access because it is a merchant transmission line.

v. The proposed Project 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;

Comment: SPP has provided an expansion plan to meet the needs of utility customers within SPP's region. That expansion plan included an entire section on interregional coordination, interregional planning, interregional requirements of FERC Order 1000, ITP Seams Coordination Enhancements and Eastern Interconnection Planning Collaborative. The proposed project is duplicative of the proposals in the 2015 SPP Transmission Expansion Plan Report.

Clean Line's Proposed Project does not meet the eligibility and statutory requirements of Section 1222 of the Energy Policy Act of 2005 and as set forth in the June 10, 2010 Request for Proposals published at 75 FR 32940-01. As a result, DOE should not participate in the proposed project under the Section 1222 Program.

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[i] July 2010 Plains & Eastern Clean Line Proposal, page 15 of 53:" Consistent with the experience of Clean Line's management on other large transmission projects, Clean Line expects that no more than 10% of the right of way would be acquired through condemnation proceedings."

[ii] Clean Line proposes to supply contributed funds to Southwestern for those costs that must be incurred by Southwestern and otherwise cannot be paid for directly by Clean Line. As a result, Clean Line proposes to contribute approximately $14.133 million to Southwestern for purposes of

advancing the Project. To date, Clean Line has had initial conversations with Southwestern but is pleased to further discuss the requirements for contributed funds.

Clean Line anticipates that these contributed funds will cover two categories of costs: (1) the costs for Southwestern to acquire any necessary property rights that cannot be acquired except through the use of federal eminent domain authority, and (2) Southwestern's administrative and development costs relating to the line, such as NEPA-related costs.