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Dr. Summerson,

This letter sets forth Southwestern Power Resources Association's (SPRA) comments and response to the Draft Environmental Impact Statement (DEIS) for the Clean Line Plains and Eastern Project (the Project). As outlined below, SPRA has identified many risks and/or liabilities associated with the Project. DOE and Clean Line need to develop a clear plan to mitigate these and any other risks or liabilities to both Southwestern Power Administration (Southwestern) and its customers.

SPRA is a voluntary, not-for-profit organization of rural electric cooperatives and public power systems in Arkansas, Kansas, Louisiana, Missouri, Oklahoma and Texas. These systems are customers of Southwestern, headquartered in Tulsa, Oklahoma, which markets hydroelectric power generated at 24 multi-purpose Army Corps of Engineers water projects in this region. SPRA members serve over 8,200,000 end-users in this six state region with clean, environmentally-friendly Federal hydropower. The Flood Control Act of 1944 (58 Stat. 887, 890; 16 U.S.C.A. 825s) is Southwestern's main authorizing legislation. Through Section 5 of this Act and a series of Executive Orders, Southwestern's Administrator is authorized to "transmit and dispose of ... power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles."

Southwestern is also authorized to draw up rate schedules for such power and energy, with the goal of recovering, with interest, the investment of the American people. These rates, which repay *all* of the costs of Southwestern, are paid by its customers. While Southwestern receives a small amount of appropriations every year from Congress, these appropriations plus all other expenses for itself and for the US Army Corps of Engineers' (Corps) costs for hydropower and a percentage of joint use expenses are included in the rates that the customers pay. The customers are ultimately the only funding stream for Southwestern. Therefore, the customers must be carefully insulated from any project utilizing Section 1222 of the EPAct 2005 (42 USC 16421), such as the current Project contemplated under the DEIS.

Section 1222 authorizes the Secretary of Energy, acting through and in consultation with the Administrator of Southwestern (provided the Secretary determines that certain statutory requirements have been met), to participate with other entities in designing, developing, constructing, operating, maintaining, or owning new electric power transmission facilities and related facilities located within any state in which Southwestern operates. Section 1222 sets forth the following criteria for evaluating a project:

1. Whether the Project is necessary to accommodate an actual or projected increase in demand for electric transmission capacity.
2. Whether the Project is consistent with transmission needs identified, in a transmission expansion plan or otherwise, by the appropriate Transmission Organization if any, or approved regional reliability organization.
3. Whether the Project is consistent with efficient and reliable operation of the transmission grid.
4. Whether the Project will be operated in conformance with prudent utility practice.
5. Whether the Project will be operated by, or in conformance with the rule of, the appropriate Transmission Organization, if any, or if such an organization does not exist, regional reliability organization.
6. Whether the Project will not duplicate the functions of existing transmission facilities or proposed facilities which are subject of ongoing or approved siting and related permitting proceedings.

In June, 2010, the DOE issued an RFP (75 Fed. Reg. 32,940) which listed the following additional criteria for evaluating a project under Section 1222:

1. Whether the Project would be in the public interest.
2. Whether the Project would 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.
5. The financial viability of the Project

According to the DEIS, the Project is defined as a 750 mile overhead  $\pm$  600kV High Voltage Direct Current (HVDC) electric transmission system and associated facilities with the capacity to deliver approximately 3,500MW primarily from renewable energy generation facilities in the Oklahoma and Texas Panhandle regions to load-serving entities in the Mid-South and Southeast United States via an interconnection with the Tennessee Valley Authority in Tennessee. Section 2.4.3.1 of the DEIS also describes a "DOE

Alternative” of an additional converter station in Arkansas which would be capable of interconnecting 500MW. Clean Line has obtained a certificate of public necessity to operate as a public utility in Oklahoma. To date, Clean Line has not obtained a public utility status in Arkansas. In January of 2015, the Tennessee Regulatory Authority (TRA) approved Clean Line’s application for a certificate of Public Convenience and Necessity. TRA also bestowed on Clean Line the authority to operate as a wholesale transmission-only public utility in Tennessee. In FERC Docket No. ER12-2150-000 (140 FERC 61,187) FERC describes the Project as a merchant transmission project as distinguished from a traditional public utility transmission project. The developers of a merchant transmission project assume all market risks and have no captive customers from whom to recover the costs of the Project.

Due to Arkansas’ refusal of Clean Line as a public utility, it is SPRA’s understanding that Southwestern will be required to own all of the land rights, as well as the facilities of this Project in that State. Additionally, it is SPRA’s understanding that when developing the Oklahoma portion of the Project, Clean Line will negotiate the purchase of land for easement purposes. Any tracts of land that cannot be purchased through negotiations Clean Line will ask Southwestern to acquire that property through the exercise of its eminent domain authority as an agency of the Federal government. When Southwestern does so, it will be required to own that portion of the facilities of the Project. The result will be a patchwork of title and facilities ownership where some of the land rights and facilities will belong to Clean Line and some will belong to Southwestern (The United States of America) throughout the State of Oklahoma.

SPRA’s foremost concern is that none of the costs or risks associated with the construction or implementation of the Project is passed to Southwestern or its customers. This Project is outside the scope and ordinary course of business of Southwestern as authorized under Section 5 of the Flood Control Act of 1944, which is the marketing of Federal hydropower. Southwestern’s customers should not have to pay for these costs. SPRA has identified several areas of potential risks or liabilities for this Project that are discussed below. Both Clean Line and the Department of Energy must formulate a mitigation plan to insulate both Southwestern and the customers against these risks and liabilities. This plan must clearly identify how all of these and any other costs will not be passed to Southwestern or its customers before any decision can be reached by the Secretary of Energy about whether to proceed with this Project under Section 1222.

Right of way acquisition for the Project is the first concern of SPRA. SPRA is concerned about the legal challenge to the right for the government to condemn land for this Project and about the hefty expenses associated with the actual acquisition of the land. Since it is SPRA’s understanding that Southwestern will own at least half of the land rights, the Department of Justice (DOJ) will have to act on behalf of Southwestern to use eminent domain to acquire these land rights if the courts have adjudicated that eminent domain can be used for Section 1222 projects. DOJ will more than likely be challenged on its right to condemn land for this Project. The Takings Clause of the Fifth Amendment of the Constitution sets forth two requirements that the Federal government must meet before it can take a citizen’s property. First the property must be taken for a public use and, second, just compensation must be paid. If Southwestern does exercise its condemnation authority, the “public use” element will be challenged. As previously discussed, under Section 5 of the Flood Control Act of 1944, Southwestern has a very narrow mission. Section 5 authorizes Southwestern to market and transmit hydroelectric power generated at Corps owned projects. Section 5 also authorizes Southwestern to construct and/or acquire **only** such transmission lines and related facilities that are necessary to market the hydroelectric power received from the Corps.

If Section 5 does not give Southwestern the right to exercise eminent domain for this Project, one must look to Section 1222 for this right. The law is not explicit about the use of eminent domain. Additionally, this Project is the first to contemplate using Section 1222, so there is no precedent to rely upon. Generally, one can look to previous uses of eminent domain for guidance. The most applicable case is Path 15, which Western Area Power Administration (Western) finished constructing in 2004. In that case, the Secretary of Energy directed Western to develop plans to upgrade Path 15, an 84 mile 500kV transmission line in the San Joaquin Valley. Congress authorized Western to upgrade the line and appropriated funds for its design and development. Western constructed the upgrade in partnership with Pacific Gas and Electric Company and Trans-Elect New Transmission Development. Western maintained a 10% share of the project, which is used for the benefit of Western's system. Western exercised its right of eminent domain and land owners challenged the authority to exercise eminent domain as well as the "public use" element.

The Ninth Circuit Court found numerous citations to laws and to statutes where Congress authorized Western to construct the project and wherein Congress appropriated funds for the project design and construction. Therefore the court held that Western had the necessary authority to take the property interests that were the subject of the hearing. Secondly, the court addressed the "public use" requirement. The court, quoting from the U.S. Supreme Court decision in *Kelo v. City of New London*, 545 U.S. 469, 477 (2005), stated "the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation." "It is only the taking's purpose, and not its mechanics that matters in determining public use," ID at 482 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 [1984]). Since the Path 15 project did not entail a private-to-private transfer and since Western retained a 10% share of the project, the court concluded that the Path 15 project satisfied the "public use" requirement (*United States v. 14.02 Acres of Land More or Less in Fresno County*, 530 F.3d 883, 9<sup>th</sup> Cir. 2008). However, unlike the Path 15 case, there is no explicit Congressional authorization for the Clean Line Project, nor have there been Congressional appropriations for it. Additionally, Southwestern will not own capacity of the line, but will own the land rights and the project facilities in all of Arkansas and portions of Oklahoma. This ownership will not benefit Southwestern's system for the delivery of Federal hydropower. As contemplated, there will be no private-to-private transfer of property. To prevent costly and lengthy litigation which can monopolize the resources of Southwestern, careful and deliberate legal analysis should be done to determine if the authority to condemn land exists in Section 1222, and if this Project will meet the "public use" requirement set out in the Fifth Amendment of the Constitution, and further defined in the cases set forth above.

If it is determined that the authority exists to condemn land for this Project, Clean Line and DOE must ensure that the customers of Southwestern and/or the taxpayers do not finance this acquisition. Clean Line must be required to reimburse Southwestern/DOJ for both the time spent acquiring this land, as well as for any payments that the government is ordered or required to pay as compensation for land rights.

If the Secretary of Energy approves the Project and land is acquired, there are new areas of risk and/or liability which must be addressed. First is the issue of third party claims for injury to persons or property. If during development or construction activities, or during the operation or maintenance of the Project, the activities of Clean Line or its contractors results in injury to either persons or property, Southwestern or its customers cannot be liable for any resulting claims. Additionally, if there is a third party claim for injury for any reason associated with the Project such as defective structures, faulty engineering, breach of contract for either facilities or power supply, or for any other reason, the



customers of Southwestern cannot finance these legal proceedings or awards. This will be particularly tricky because of the requirement that Southwestern own the land rights and the facilities of at least half of this Project. SPRA needs to see a clear and precise plan, through both contract language and mitigation measurements including but not limited to letters of credit and insurance policies, which fully shields Southwestern and its customers from this risk. Second, a clear plan needs to be in place to ensure that Clean Line pays for all legal expenses associated with any other activity of the Project, including property disputes. Additionally, Clean Line needs to pay for property taxes and any other taxes associated with this Project, even though Southwestern is expected to own large portions of it.

In addition to the concerns stated above, there are further issues with the Project during the construction phase which need to be addressed. According to the maps in the DEIS, the Project crosses or parallels many of Southwestern's transmission lines, as well as many lines of SPRA members/customers of Southwestern. All construction work for this Project must be done in such a manner as to ensure there is not damage to any of these neighboring facilities or lines. If such damage occurs, full compensation for facility repair as well as losses due to outages must be paid to the owner of the lines from Clean Line. During construction, Clean Line must be fully responsible for ensuring that its activities comply with all Federal, state, and local permitting requirements.

Of further concern, if the Project is not completed for any reason once construction has begun, whether due to bankruptcy of Clean Line; non-performance by any of the parties under contracts; cost overruns rendering the Project financially nonviable; equipment supply issues; or for any other reason, Southwestern and its customers cannot be required to complete the Project and/or provide service under the contracts. If the Project is in mid-construction and not completed, Clean Line and DOE need to have not only clear contractual language, but mitigation measures such as letters of credit and insurance policies to ensure that there are enough funds to decommission the Project without looking to the customers or the taxpayers for these funds. Particularly in the case of bankruptcy, these funds will not be available after the fact, so they must be set aside and accounted for before construction begins for the Project. Also to address the possibility of bankruptcy, a plan needs to be in place if the Project's financiers foreclose on the Project either during or after construction. Southwestern does not want to be left owning a noncontiguous transmission line from which it does not obtain any benefits. Due to the nature of this Project as a merchant line, as opposed to a traditional public utility transmission project, special attention must be paid to the situations where Clean Line becomes insolvent and Southwestern is left with facilities it cannot use and does not need.

If the Project completes construction, there are additional risks and/or liabilities identified by SPRA. Currently SPRA has seen no identification of who will operate and maintain this Project. This is a HVDC line, which is very different from the Alternating Current (AC) lines of much lower voltage that Southwestern currently owns, operates, and maintains. If Southwestern were to operate and maintain this line, substantial staff would have to be hired, and equipment would have to be purchased. Currently, Clean Lines pays for the time that Southwestern's staff dedicates to the Project. However, this still has a detrimental impact on the customers. Southwestern must currently use its existing resources which were employed to fulfill the core mission of the delivery of Federal hydropower to also work on this Project. The natural consequence is that less time can be dedicated to its core mission and serving its customers. Any costs, including the ongoing costs of staff time and the hiring of additional employees, must be paid by Clean Line. If another company is used for operations and maintenance, they must meet all standards required by Southwestern to ensure compliance with all applicable laws, regulations, and those standards set forth by the North American Electric Reliability Corporation (NERC). Regardless of who operates and maintains this Project, Clean Line must be strictly liable for all NERC

compliance and costs associated with compliance. This is including but not limited to registration, compliance for all NERC standards such as reporting and audits, and fines or mitigation measures which may be assessed as a penalty.

Furthermore, SPRA needs to see clear contractual language which ensures that both Southwestern and its customers are not held responsible for any loss of service or curtailments for Clean Line's customers. This Project traverses an area which is frequently known for both tornados and ice storms. Southwestern and SPRA members experience loss of service from time-to-time due to these natural disasters. If for any reason Clean Line faces this unfortunate circumstance, or their power is curtailed to their customers, Southwestern and its customers should not be required to fulfill any obligation of Clean Line.

Finally, SPRA would like to see the determination of the analyses, and the studies done on the Project under every criterion set forth in Section 1222 and 75 Fed. Reg. 32, 940 (both listed on page 2 of these comments). In particular, SPRA asks that DOE carefully study whether the Project is in the public interest and the technical and financial viability of the Project. Given the cost of the Project (projected at around **\$3.5 billion**), and the substantial risks which could flow to both Southwestern and its customers, these studies should be comprehensive and exhaustive. This is a mammoth Project, and SPRA asks that it is given the meticulous evaluation that a Project of this size requires.

In conclusion, the customers of Southwestern, represented here by SPRA have serious concerns about the risks and/or liabilities associated with this 750 mile, \$3.5 billion Project. We ask that each of the concerns mentioned above is thoroughly considered before any decision is made by the Secretary about moving forward with this Project. Additionally, SPRA asks that both DOE and Clean Line guarantee that none of the costs of this Project, either now or in the future, are passed to Southwestern or included in its rates to its customers. This includes but is not limited to costs for additional staffing, litigation costs, land acquisition costs, decommissioning expenses, or any other costs. Also, SPRA needs to see specific mitigation measures such as letters of credit and insurance policies in place before any shovel of dirt is turned on the Project. Thank you for the opportunity to comment on this DEIS and I look forward to working collaboratively with DOE in the future to ensure these concerns are addressed.

Sincerely,

A handwritten signature in black ink, appearing to read "Brett Bradford", with a stylized flourish extending from the end.

Brett Bradford  
President of SPRA