

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Landowners Alliance, and)
Eastern Missouri Landowners Alliance)
d/b/a Show Me Concerned Landowners,)
and John G. Hobbs)

Complainants,)

Case No. EC-2021-0059

V.)

Grain Belt Express LLC and)
Invenergy Transmission LLC,)

Respondents)

RESPONDENTS' REPLY BRIEF

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ATTORNEYS FOR RESPONDENTS

October 30, 2020

Grain Belt Express LLC (“Grain Belt”) and Invenergy Transmission LLC (together with Grain Belt, the “Respondents”), pursuant to the October 5, 2020 Order partially Granting Motion to Suspend Deadlines and Establish Briefing Schedule, hereby file their Reply Brief. In support of this brief, Respondents state the following:

I. BACKGROUND

1. The full procedural history of this complaint is well-documented in the parties’ initial briefs filed on October 23, 2020, so it will not be restated here.

2. Complainants allege violations of two conditions ordered by the Commission in the CCN case: (1) “if the design and engineering of the Project is materially different from how the Project is presented in Grain Belt Express Clean Line LLC’s Application, Grain Belt Express Clean Line LLC must file an updated application with the Commission for further review and determination”¹; and (2) “Grain Belt will not install transmission facilities on easement property in Missouri² until it has obtained commitments for funds in an amount equal to or greater than the total cost to build the entirety of this multi-state transmission Project.”³

3. On October 5, 2020, the Commission issued its Order Partially Granting Motion to Suspend Deadlines and Establish Briefing Schedule. The Order stated that “the parties’ briefs

¹ Report and Order on Remand, p. 52, ¶ 6, Case No. EA-2016-0358 (hereinafter “CCN Order”).

² The Formal Complaint paraphrases the actual condition by stating that “Grain Belt could not begin construction in Missouri until it has obtained commitments for funding of the entire multi-state Project.”

³ Section I.1., Exhibit 206 in the CCN case, which were ordered and adopted in the CCN Order at page 51, ¶ 2.

shall be limited to whether a Complaint that Grain Belt published a plan not authorized by its current CCN states a cause of action for the invalidation of its CCN.”⁴

4. For the reasons discussed in Respondents’ and Staff’s Initial Briefs, and as further supplemented below, Complainants have not and cannot state a cause of action for invalidation of Grain Belt’s CCN. Complainants are not entitled to their requested relief, and the complaint should be dismissed.

II. RESPONSE TO STAFF’S INITIAL BRIEF

5. Respondents concur with Staff’s conclusion that:

Grain Belt’s issuing of a press release detailing proposed changes to its current transmission project, and its commitment to seek regulatory approval for those proposed changes from the Commission as needed, does not constitute a cause of action that would lead to the invalidation of its CCN.⁵

III. RESPONSE TO COMPLAINANTS’ INITIAL BRIEF

6. Complainants attempt three arguments: (1) that Grain Belt is free to abandon the project for which it has been granted a CCN, and if it has been abandoned, then the CCN becomes a “meaningless nullity”⁶; (2) that Grain Belt must choose between the project for which it was granted a CCN and a new transmission project, and “the key issue in this proceeding is to determine the intent of the Respondents in making that decision”⁷; and, interwoven with the second argument, (3) because “Respondents actual intent with respect to abandoning the original project is a question of fact,” the determination of factual questions is not appropriate on a motion to dismiss.⁸

⁴ October 5, 2020 Order at p. 3, Ordering paragraph 4.

⁵ Staff’s Initial Brief at p. 6.

⁶ MLA Initial Brief at 4; 9.

⁷ Id. at 5.

⁸ Id. at 10.

7. These specious efforts to create “questions of fact” out of whole cloth serve no purpose other than to highlight the frivolous nature of Complainants’ claims.

8. Complainants’ first argument, that if the CCN has been abandoned by Grain Belt, the CCN becomes a “meaningless nullity,” has no basis in either law or fact. Complainants cite to no law, rule, Order, or court decision that lends credence to this supposition. Moreover, Complainants’ assertion is contrary to the factual evidence. As the parties agreed in joint stipulation (d), as contained in the September 9, 2020 Joint Motion to suspend Deadlines and Establish a Briefing Schedule, “Grain Belt has begun acquiring easement rights along the certificated route.” Further, as noted in Respondents’ initial brief,⁹ communications with landowners state that development activities continue ahead with full steam.¹⁰ If indeed Grain Belt had abandoned its CCN, which it most certainly has not, the continued acquisition of easements and other development activities would be counterproductive.

9. Complainants’ second argument is similarly unpersuasive and ineffective. Complainants contend that “Given that Grain Belt must make a choice between the two projects, the key issue in this proceeding is to determine the intent of the Respondents in making that decision.”¹¹ There is no logic behind the Complainants’ claim that Respondents must “make a choice” at this time. Simply stated, there is only one project. The route, the towers, the conductors, and the easement requirements are the same under either conception of the project, so no “choice” must be made at this stage of development. Complainants cannot create both a fictional narrative and the standard by which it should be evaluated.

⁹ Respondents’ Initial Brief at 10.

¹⁰ *See*, September 2020 Landowner Update Letter, Exhibit A to Joint Motion to Suspend Deadlines and Establish a Briefing Schedule, “...as the proposed changes do not affect the approved route, project development activities are proceeding based on existing regulatory approvals.”

¹¹ MLA Brief at 5.

10. Complainants' final argument, that "[r]espondents actual intent with respect to abandoning the original project is a question of fact," is merely a feeble endeavor to manufacture a question of fact to avoid an unfavorable ruling on a motion to dismiss for failure to state a claim. Complainants cite to Missouri law in support of its assertion, quoting a Southern District holding that finds "the parties' intention to effectuate a merger is a question of fact."¹² Respondents have no quarrel with the Southern District's holding in a case involving mortgage mergers that has no relevance here. Similarly immaterial is Complainants' citation to intent as controlling where an ambiguity exists in a maintenance agreement pertaining to a legal marital separation.¹³

11. None of the arguments put forth by Complainants address the appropriate issue here. The legal issue the parties were directed to address is concise and clear: whether a Complaint that Grain Belt published a plan not authorized by its current CCN states a cause of action for the invalidation of its CCN. Notwithstanding the fact that neither the mortgage merger doctrine nor maintenance agreements lie within the Commission's province, Respondents' intent is not at issue in this complaint.

12. Section 386.390 RSMo. authorizes the Commission to hear a complaint that "sets forth any act or thing done or omitted to be done by" a public utility to determine whether there has been a violation of "any provision of law subject to the [C]ommission's authority, of any rule promulgated by the [C]ommission, of any utility tariff, or of any order or decision of the [C]ommission." [emphasis supplied.]

¹² MLA Initial Brief at 10, citing *Savannah Place, Ltd. v. Heidelberg*, 122 S.W.3d 74, 84 (Mo.App. 2003).

¹³ MLA Initial Brief at 10, citing *Boden v. Boden*, 229 S.W.3d 169, 173 (Mo.App.2007.)

13. As Complainants have made no claim or complaint that any omission of Grain Belt is in violation of any Commission Order, rule or other provision of law, the complaint must entail an act or action by a public utility to be a proper complaint within the purview of Section 386.390 RSMo. The Grain Belt act or action subject to scrutiny in this complaint is “publish”—not “abandon,”¹⁴ not “intent,”¹⁵ not “plan,”¹⁶ not “change”¹⁷ and not “choice.”¹⁸

14. Grain Belt’s publishing of a plan not authorized by its current CCN does not result in the violation of any Commission law, rule, or the CCN Order. If and when the contemplated changes result in Project design and engineering that is materially different from that approved in the CCN case, Respondents have publicly announced their intent to seek regulatory approvals from both the Missouri and Kansas Commissions for any contemplated changes to the Project,¹⁹ as they are required to do in accordance with the conditions in the CCN Order. Indeed, Complainants completely ignore the fact noted in Respondents’ initial brief that, if the design and engineering is ultimately materially different, that circumstance triggers a filing requirement **not** an invalidation of the CCN. In fact, the CCN may only be invalidated by action of the Commission pursuant to Section 386.490.2 RSMo.

15. A complaint is not to be dismissed for failure to state a claim unless it appears that the complainant can prove no set of facts in support of its claim which would entitle it to relief.²⁰

¹⁴ MLA Initial Brief at 3; 4; 9; 10.

¹⁵ Id. at 4; 5; 6; 8; 9; 10.

¹⁶ Id. at 5; 8.

¹⁷ Id. at 1; 4; 8; 9.

¹⁸ Id. at 5; 8.

¹⁹ August 25, 2020 Press Release, p. 1 (Exhibit 1 to the Formal Complaint).

²⁰ *Ray v. Dunn*, 753 S.W.2d 652, 654, (Mo.App.S.D. 1988) (quoting *Maples v. Porath*, 638 S.W.2d 337, 338 (Mo.App.1982)); *American Drilling v. City of Springfield*, 614 S.W.2d 266, 271[2–4] (Mo.App.1981).

Complainants can prove no set of facts that result in invalidation of the CCN. Accordingly, Complainants have failed to state a cause of action for invalidation of Respondents' CCN, and are therefore not entitled to their requested relief.

WHEREFORE, Respondents respectfully request that the Commission accept this Reply Brief, dismiss the complaint for failure to state a claim, and for any such further relief as the Commission may deem just and appropriate.

Respectfully submitted,

/s/ Anne E. Callenbach

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all parties of record by email or U.S. mail, postage prepaid, this 30th day of October, 2020.

/s/ Anne E. Callenbach
Attorney for Respondents