

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of Grain Belt)
Express Clean Line LLC for Certificate of)
Convenience and Necessity Authorizing it to)
Construct, Own, Operate, Control, Manage and)
Maintain a High Voltage, Direct Current)
Transmission Line and an Associated)
Converter Station Providing an Interconnection)
on the Maywood-Montgomery 345 kV)
transmission line)

Case No. EA-2016-0358

**OPPOSITION TO MOTION TO COMPEL OF MISSOURI LANDOWNERS ALLIANCE
AND MOTION FOR PROTECTIVE ORDER OF GRAIN BELT EXPRESS CLEAN
LINE LLC**

Grain Belt Express Clean Line LLC (“Grain Belt Express” or the “Company”), pursuant to 4 CSR 240-2.135, Missouri Rule of Civil Procedure 56.01(c), and the December 11, 2018 Order Directing Filing Regarding Motion to Compel, opposes the Motion to Compel of the Missouri Landowners Alliance (“MLA”) and respectfully requests that a protective order be issued that grants additional “Highly Confidential” protection for certain highly sensitive competitive market data and information as well as proprietary transactional data that is outside the scope of this proceeding.

Grain Belt Express respectfully requests that the Commission deny MLA’s Motion to Compel and grant the motion for protective order discussed herein. This request applies to certain information contained in Schedules KZ-3 and KZ-4, redacted versions of which were attached to the Supplemental Direct Testimony of Kris Zadlo, Senior Vice President of Invenergy LLC, as well as financial statements and investor information for Invenergy Investment Company LLC and its affiliates, including Invenergy Transmission LLC (collectively, “Invenergy”). As explained below, this information contains highly sensitive competitive market data and other financial information as well as proprietary transactional data that is outside the scope of this proceeding.

In support of this filing, the Company states the following:

a. Schedules KZ-3 and KZ-4

1. In light of the pending acquisition of Grain Belt Express by Invenergy Transmission LLC, public redacted versions of the Membership Interest Purchase Agreement (“MIPA”) and the Development Management Agreement (“DMA”) were attached as Schedules KZ-3 and KZ-4 to the Supplemental Direct Testimony of Kris Zadlo that was filed with the Commission on November 12, 2018.

2. The Staff of the Commission (“Staff”) and MLA served data requests seeking production of unredacted versions of Schedules KZ-3 and KZ-4. *See* Staff Data Request 84 (Nov. 15, 2018); MLA Request G.90, 3d Set of General Data Requests (Nov. 13, 2018).

3. On December 5, 2018, Grain Belt Express and Invenergy provided significantly less redacted versions of Schedules KZ-3 and KZ-4 to MLA and to Staff. On December 6, 2018, counsel for MLA indicated that such provision was unsatisfactory and again requested unredacted Schedules KZ-3 and KZ-4. On December 7, 2018, pursuant to 4 CSR 240-2.090(8)(A), counsel for Invenergy and MLA, along with Invenergy representatives, conferred by telephone in an attempt to resolve these issues. On December 10, 2018, pursuant to 4 CSR 240-2.090(8)(B), counsel for Grain Belt Express, Invenergy and MLA, along with Invenergy representatives, participated in a telephone conference with presiding officer Judge Bushmann in another effort to resolve these issues.

4. On the evening of December 10, 2018, Invenergy counsel corresponded with counsel for MLA, Paul Agathen, offering in-camera review at either Mr. Agathen’s home office or the St. Louis office of Polsinelli PC, of the unredacted Schedules KZ-3 and KZ-4, the audited balance sheet and income statement for year ended 2017 of Invenergy Investment Company

LLC, and the most recent quarterly balance sheet and income statement (Q3 2018) of Invenergy Investment Company LLC, which is more expanded financial information than what MLA requested. Late in the evening of December 10, 2018, counsel for MLA responded by stating that in-camera review of the expanded financial information was unreasonable. On December 11, 2018, MLA filed a Motion to Compel.

Opposition to Motion to Compel

5. Parties may obtain discovery regarding any matter, not privileged, that is relevant to a pending action or reasonably calculated to lead to the discovery of admissible evidence.¹ Missouri's courts have indicated that there are two aspects to relevance — logical relevance and legal relevance.² Logical relevance simply means that the questioned evidence tends to make the existence of a material fact more or less probable.³

6. In deciding whether a party should be allowed to discover certain information, the court, or administrative agency, must weigh “the probative value of the evidence against the dangers to the opposing party of unfair prejudice, confusion of the issues, undue delay, waste of time, cumulativeness, or violations of confidentiality. Evidence is legally relevant if its probative value outweighs its prejudicial effect.”⁴ Here, the probative value of what MLA seeks

¹ Mo. Sup. Ct. Rule 56.01(b)(1). Commission Rule 4 CSR 240-2.090(1) provides that discovery in matters before the Commission may be obtained by the same means and under the same conditions as in civil actions in the circuit court.

² *State v. Kennedy*, 107 SW 3d 306, 311 (Mo. App. W.D. 2003). That two-part relevance test is used to analyze the appropriateness of an administrative investigative subpoena in *Jackson v. Mills*, 142 SW 3d 237 Mo. App. W.D. 2004).

³ *State v. Kennedy*, at 311.

⁴ *Jackson v. Mills*, 142 SW 3d 237, 240 (Mo.App. W.D. 2004).

has negligible value beyond what has already been offered, while the potential harm to Invenenergy is enormous.

7. The prejudicial effect of disclosure of the unredacted versions of Schedules KZ-3 and KZ-4 is great, as these documents represent a privately negotiated transaction between two non-publicly held companies which contain numerous confidential provisions. The less redacted versions of these documents, as provided to MLA and Staff, reveal the mechanics of the transaction, permitting the viewing party to understand how Invenenergy intends to own the Grain Belt Express Project (“Project”) and advance the Project without disclosing highly-sensitive commercial terms between the two parties. The Company submits that the commercial terms that warrant additional protections have a *de minimis* bearing on the economics of the Project, and therefore are not relevant to MLA’s interest in this remand proceeding, which is to ensure that Invenenergy has the financial ability and resources to pursue and complete the Project. Obtaining electronic copies of the negotiated commercial terms will not provide MLA with any greater ability to assess the financial condition of Invenenergy. Viewing this information in-camera in the St. Louis office of Polsinelli PC or in Mr. Agathen’s home office is more than sufficient to satisfy MLA’s interest.

8. Crucially, KZ-3 and KZ-4 apply to the entirety of the Project. As the Commission is aware, the Project as currently contemplated originates in Ford County, Kansas, and will proceed through Missouri and Illinois to a terminus near the Illinois-Indiana border. Disclosure of the commercial terms of these documents would reveal sensitive information applicable to any portion of the entire Project, including information relating to portions of the Project not located within Missouri, and thereby will impact the Company’s competitive advantage with respect to portions of the Project in other states.

9. Disclosure of this information beyond in-camera review will also jeopardize any future negotiations Invenergy may have with respect to other contemplated projects by revealing to competitors strenuously negotiated payments between the two parties, as well as additional information, that could be relied upon by others to greatly hinder Invenergy's leverage in future contract negotiations.

10. For the above reasons, the Company opposes MLA's Motion to Compel and requests that it be denied, such that MLA will only have access to the unredacted versions of KZ-3 and KZ-4 in-camera and subject to the Protective Order provisions requested below.

Request for Protective Order

11. Missouri Supreme Court Rule 56.01(c) states that protective orders may be issued "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Invenergy requests that the "HC" versions of Schedules KZ-3 and KZ-4 be viewed in-camera, which is the same manner in which MPSC Staff was provided access to unredacted versions of Schedules KZ-3 and KZ-4. As reported by Staff, this manner of viewing Schedules KZ-3 and KZ-4 is more than sufficient to provide a complete recommendation in this case. See Revised Staff Supp. Rebuttal Report at 6-10.

12. With the exceptions noted below, the "HC" versions of Schedules KZ-3 and KZ-4 would include the provisions that were not included in the redacted public versions. These provisions require "HC" protection as they reveal the business strategies and mechanisms used by the Company, Invenergy, and their respective affiliates - all privately held entities - to pursue and consummate transactions in the highly competitive energy industry. However, the "HC"

versions will not include Schedules 4.6.3, 4.11.1 and 4.16, which contain information with the names or other identifying information regarding property owners who have signed easements or other agreements with the Company for the Project, and other material which MLA has agreed not to pursue. See MLA Motion to Compel at 4.

b. Financial Statements and Investor Information

13. The MLA has also served data requests seeking the production of Invenergy Investment Company LLC's most recent annual income statement and balance sheet, and its most recent quarterly financial reports. See MLA Requests AH.6, AH.7 (Nov. 15, 2018). Although MLA's data requests are vague, Mr. Agathen has indicated an interest in seeing all of the notes that are included in a full auditors' report.

Opposition to Motion to Compel

14. Invenergy and its affiliates are privately held companies, and its financial information is highly proprietary. The information sought by MLA cannot be found in any other public document, and disclosure of Invenergy's financial information beyond the previously offered in-camera review would reveal private and proprietary financial, investment, and transactional data completely unrelated to Invenergy Transmission LLC and the Project—data that MLA does not require in order to assess whether Invenergy has the financial integrity to complete the Project. Invenergy has provided to Staff, on a confidential basis and in response to Staff DR 75, Invenergy Investment Company LLC's 2017 audited consolidated balance sheet, income statement, and cash flow statement, as well as the September 30, 2018 quarterly income statement and balance sheet. In addition, Invenergy provided the full Independent Auditors' Report with notes for the years ended December 31, 2017 and 2016 for in-camera review by Staff.

15. The financials provided to Staff demonstrate that Invenergy has more than sufficient cash and cash equivalents available to fund the Company's project development efforts. As Staff noted in its Revised Supp. Rebuttal Report, Invenergy's cash balance as of December 31, 2017 was approximately six times greater than that of Clean Line Energy Partners, LLC ("Clean Line") as of the same date. Additionally, the book value of Invenergy's equity is twenty times greater than Clean Line's equity. Therefore, Invenergy's financial statements support Grain Belt witness Berry's Supplemental Direct that indicates Invenergy's financial resources are stronger than Clean Line's. See Staff's Revised Supp. Rebuttal Report at 7. MLA did not challenge the financial resources of Clean Line in the first phase of this proceeding, so it is hard to fathom the probative value that MLA will derive from an unrestricted review of the full scope of Invenergy's financial statements.

16. To the extent MLA desires to confirm Staff's findings in its Revised Supp. Rebuttal Report, the offer made by Invenergy on December 10, 2018 (as discussed above in Paragraph 4), is more than sufficient. That offer provides MLA the opportunity to review the relevant financial information in-camera, in the convenience of Mr. Agathen's home office. The MLA certainly does not need access to the Independent Auditors' Report—which contains negotiated financing and commercial terms of development projects that are not related to this proceeding, as well as proprietary and sensitive risk management valuations—in order to evaluate the financial capability of Invenergy. If this information became public, it could be used to harm Invenergy's competitive position in the market, as counterparties could use this information as leverage in future negotiations, causing severe and irreversible harm to Invenergy. This harm far outweighs the probative value of the information to MLA.

17. Accordingly, MLA's Motion to Compel should be denied, such that MLA will only be permitted in-camera review of the most recent annual balance sheet and income statement for Invenergy Investment Company LLC without notes, as well as the most recent quarterly statements, subject to the Protective Order provisions requested below.

Motion for Protective Order

18. As noted above, Missouri Supreme Court Rule 56.01(c) states that protective orders may be issued "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."

19. Invenergy is willing to provide MLA with in-camera access to the annual balance sheet and income statement for Invenergy Investment LLC without notes, as well as the most recent quarterly statements on an "HC" basis, conditioned on MLA fully complying with 4 CSR 240.2.135(6), (7), and (13) as discussed further below.

20. MLA makes unsupported claims that in-camera review of the financial information is insufficient and unreasonably time consuming. These claims are not persuasive because (1) the offer was made to bring the subject documents to MLA counsel's home office; (2) Staff was able to complete its review in a relatively short period of time; and (3) the relevant information is extremely limited and there is no reason MLA's counsel needs to copy the entire documents in longhand.

21. Currently, it appears three individual members of landowner groups represented by Mr. Agathen have signed "Non-Disclosure Agreements" and filed them in this case. However, these "Agreements" do not satisfy the requirements of 4 CSR 240.2.135(6) and (7),

which limits access to confidential information to attorneys “a party and to employees of a party who are working as subject-matter experts ... or ... persons designated by a party as an outside expert in that case.” None of the parties signing “Non-Disclosure Agreements” are designated as subject-matter experts and Grain Belt Express has not been notified of the “job classification” of any of the individuals, as required by 4 CSR 240.135(6)(B). Grain Belt Express and Invenergy are gravely and rightfully concerned about the release of highly sensitive information to individuals beyond attorneys and subject matter experts in this case.

c. Application of Commission Rules

22. Commission rules require a party who wishes to have an employee or outside expert review confidential information to identify that person to the disclosing party by name, title and job classification before disclosure. 4 CSR 240.135(B). The person to whom the information is to be disclosed shall also comply with the certification requirements of Section 7 of the Rule. Section 13 of the Rule specifically sets forth the obligations assumed by anyone who views “HC” or more rigorously protected information. It states that anyone allowed “access to information under this rule shall keep the information secure and may neither use nor disclose such information for any purpose other than preparation for and conduct of the proceeding for which the information was provided.” See 4 CSR 240-2.135(13).

23. Invenergy presumes that any person who is given access to “HC” documents or who inspects the protected documents will respect these conditions and abide by the restrictions set by the Commission. If any breach of these obligations occurs, the Company and Invenergy will take immediate steps to enforce these obligations and seek all available remedies, including sanctions and penalties for any unauthorized disclosure.

WHEREFORE, Grain Belt Express Clean Line LLC respectfully requests that the Commission enter a Protective Order consistent with the foregoing proposals to safeguard the information contained in Schedules KZ-3 and KZ-4, and the financial statements of the privately-held Invenergy companies, and that MLA's Motion to Compel be denied.

/s/ Karl Zobrist

Karl Zobrist MBN 28325
Jacqueline Whipple MBN 65270
Dentons US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
(816) 460-2400
(816) 531-7545 (fax)
karl.zobrist@dentons.com
jacqueline.whipple@dentons.com

Frank A. Caro, Jr. MBN 42094
Anne E. Callenbach MBN 56028
Andrew O. Schulte MBN 62194
Polsinelli PC
900 W. 48th Place, Suite 900
Kansas City, MO 64112
(816) 572-4754
fcaro@polsinelli.com
callenbach@polsinelli.com
aschulte@polsinelli.com

Attorneys for Grain Belt Express Clean Line LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all counsel of record in this case on December 12, 2018.

/s/ Karl Zobrist
Attorney for Grain Belt Express Clean Line LLC