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 OF GRAIN BELT EXPRESS TO
SHOW ME CONCERNED LANDOWNERS' AND MISSOURI LANDOWNERS ALLIANCE'S MOTIONS TO STRIKE AND IN THE ALTERNATIVE
TO DELAY SURREBUTTAL TESTIMONY AND HEARING DATES

Grain Belt Express Clean Line LLC ("Grain Belt Express" or "Company") states the following in opposition to Show Me Concerned Landowners' ("Show Me") Motion to Strike and in the Alternative to Delay Surrebuttal Testimony and Hearing Dates ("Show Me Motion") and in opposition to Missouri Landowners Alliance's ("MLA" and collectively, with Show Me, "Intervenors") Response in Support of Show Me's Motion to Strike Testimony of MJMEUC ("MLA Motion"):

I. The MJMEUC Testimony Is Proper Rebuttal

1. Intervenor Show Me moved on January 27, 2017 to strike the rebuttal testimony of Missouri Joint Municipal Utility Commission ("MJMEUC") witnesses Duncan Kincheloe and John Grotzinger (the "MJMEUC Testimony"). Show Me argues that the testimony of these MJMUEC witnesses is improper rebuttal designed to supplement the Company's case-in-chief and circumvent the procedural schedule. See Show Me Motion at ¶¶ 6-8.

2. Also on January 27, 2017, Intervenor MLA filed its Motion, which "seeks the same relief requested by Show Me, and on the same general grounds." See MLA Motion at 1.

3. Intervenors argue that rebuttal testimony can include "only testimony that constitutes a rejection, disagreement, or proposed alternative to the direct case." See Show Me Motion at ¶3; MLA Motion at 4. This is not what the rule provides.

4. Section 2.130(7)(C) states: "Where only the moving party files direct testimony, rebuttal testimony shall include all testimony which explains why a party rejects, disagrees or proposes an alternative to the moving party's direct case …." It does not prohibit or prevent an intervening party from stating why it supports or otherwise agrees with portions of the moving party's direct testimony. What the rule does require is that any party wishing to file testimony that "rejects, disagrees or proposes an alternative" to the applicant's direct testimony must file such testimony in rebuttal.

5. The distinction is made clear in the next subparagraph, which provides that surrebuttal testimony "shall be limited to material which is responsive to matters raised in another party's rebuttal testimony." See 4 CSR 240-2.130(7)(D) (emphasis added). It is significant that the Commission chose to limit surrebuttal to testimony responsive to rebuttal, but chose not to limit rebuttal testimony.

6. Neither Intervenor cites any Commission order that struck the rebuttal testimony of an intervenor supportive of an applicant. This is because there are no such orders.

7. Instead, the Commission has interpreted the scope of testimony broadly. Analyzing the appropriateness of surrebuttal testimony, which under its rules is more limited than rebuttal testimony, the Commission has addressed a motion to strike testimony that the movant argued was "really direct and rebuttal testimony that was improperly offered as surrebuttal testimony." See Order Regarding MGE's Motion to Strike the Surrebuttal Testimony of John A. Tuck at 1, In Re Missouri Gas Energy, Case No. GR-2004-0209 (July 22, 2004). The

Commission rejected this argument, finding that testimony generally responsive is sufficient to meet the more limiting parameters for surrebuttal. Id. at 2-3. The Commission further found that its rule on surrebuttal testimony "does not require that the other party's rebuttal testimony must have criticized the previous [direct] testimony." Id. at 3. See also Order Regarding Motions to Strike Testimony, In Re Southwestern Bell Tel. Co., Case No. TT-2002-472 (Sept. 17, 2002) (finding that its rule on surrebuttal testimony "does not require that surrebuttal testimony dispute some aspect of rebuttal testimony" and the fact that testimony "expresses agreement with that testimony does not make his surrebuttal improper").

8. The Commission's broad discretion to determine the scope of rebuttal testimony is consistent with Missouri law. In Missouri, "rebuttal testimony is not necessarily inadmissible simply because it is cumulative of the State's evidence in chief or because it would have been better procedure to offer it as part of the State's evidence in chief instead of rebuttal." State v. Arnold, 859 S.W.2d 280, 282 (Mo. App. E.D. 1993) (finding no error in admitting rebuttal testimony even if the witness had been available to testify during the State's case-in-chief). Other state commissions agree. See, e.g., Order at 8, In the Matter of the Joint Application of Kansas Pipeline Partnership and Kansas Natural Partnership for an Order Authorizing Their Combination, Docket No. 190,362-U (Nov. 2, 1994) (in which the Kansas Corporation Commission stated that rebuttal testimony "includes not only testimony which contradicts the witnesses on the opposite side, but also corroborates previous testimony").

9. In any event, the MJMJEUC Testimony is specifically responsive to Grain Belt Express' Application and Direct Testimony, both of which deal extensively with the MJMEUC Transmission Service Agreement ("TSA"). See Application of Grain Belt Express Clean Line LLC For a Certificate of Convenience and Necessity at ¶¶4, 5, 24, 25, 55; Skelly Direct at 5:5-

10, 8:7-10 and 16, 13-14:12-4, 16:16, 23:23, 31:15-18; Berry Direct at 3:1-4, 7:16-23, 10:12-13, 28:13-15, 31:17-18, 34:11-20, 42:14-15, 44:20; Lawlor Direct at 2-4. In fact, both MJMEUC witnesses make explicit note of the direct testimony to which their testimony is responsive. See Kincheloe Rebuttal at 1:17-19; Grotzinger Rebuttal at 2:6-8. Notably, neither Show Me nor MLA point to any specific language in the MJMEUC Testimony that is non-responsive to the Application or Direct Testimony filed by Grain Belt Express.

10. In all likelihood, MJMEUC could have offered the rebuttal testimony at issue here during the surrebuttal round, but MJMEUC offered it in rebuttal in a good faith effort to give the parties to this case ample opportunity to understand and respond to its arrangement with Grain Belt Express and the benefits of that arrangement to Missouri citizens. If MJMEUC had chosen to withhold its testimony until surrebuttal it would have been entirely consistent with and analogous to MISO's supportive surrebuttal testimony in the recent ATXI case seeking a Certificate of Convenience and Necessity ("CCN") for the Mark Twain transmission project. See In the Matter of the Application of Ameren Transmission Company of Illinois for Other Relief or, in the Alternative, a Certificate of Public Convenience and Necessity, Case No. EA-2015-0146. Because MJMEUC did not do so, all parties are afforded the opportunity to respond to the testimony of Kincheloe and Grotzinger.

II. MJMEUC Is Not A "Co-Applicant" As Intervenors Claim

11. In support of their motions, Show Me and MLA make an anemic attempt to define MJMEUC, an unregulated municipal joint action energy agency formed under the Joint Municipal Utility Commission Act, as a co-applicant in this CCN proceeding. They do so without citing to any law or order, which is unsurprising given the absurdity of their claim. Their claim would transform a supportive intervenor into a co-applicant in contravention of

decades of Commission precedent in CCN cases. It would render the procedural schedule that Show Me and MLA helped craft pointless. Finally, it would have the Commission exercise its procedural authority based upon an argument at odds with the Commission's statutory authority.

12. The Company submitted its Application pursuant to the Commission's rules that set forth the filing requirements for applicants requesting relief under the Commission's statutory authority. See 4 CSR 240-2.060 and 4 CSR 240-3.105(1)(B). Nowhere in these rules does the Commission call for joinder of parties supporting the applicant or its application. Id. Indeed, the Commission's rules prescribing its rules of evidence, to which Show Me cites, contemplate proceedings before the Commission in which only the moving party files direct testimony (such as in a CCN case) and in which all parties file direct testimony (such as in a rate case). See 4 CSR 240-2.130(7)(B) and (C); Show Me Motion at ¶3. Show Me and MLA's position would prevent an intervenor, in a case where only the moving party files direct testimony, from filing any testimony supportive of an applicant or its application. This cannot be what the Commission or Missouri Legislature intended.

13. What's more, Show Me and MLA were aware of the position MJMEUC would take in this case as late as September 13, 2016 when it filed its application to intervene, which was granted on September 27, 2016. In its application to intervene, MJMEUC made clear that it "supports the CCN application of [Grain Belt Express] and requests the Commission approve such application. See MJMEUC Application to Intervene at ¶5 (Sept. 13, 2016). It further disclosed that is has "entered into a transmission service agreement to utilize the proposed HVDC transmission line to deliver power to MJMEUC members. Such interest is not currently represented in the proceedings." Id. at ¶4.

14. With this knowledge, Intervenors could have urged a different procedural schedule to account for the filing of supportive testimony. Yet they did not. Both MJMEUC and Intervenors were parties to the procedural discussions, and did not object to Staff's filing of the Proposed Procedural Schedules and Procedures, which laid out the alternative proposals of Grain Belt Express and MLA. See Proposed Procedural Schedules and Procedures (Oct. 5, 2016). To the contrary, at no point did Show Me or MLA make any request that if MJMEUC were to file testimony, it must file its testimony as supplemental direct testimony or earlier than the standard rebuttal deadline. When the Commission issued its Order Setting Procedural Schedule on October 19, 2016, no party offered any objections or moved to modify that order. Show Me and MLA's claims that they are now blindsided and unprepared for the filing of the MJMEUC Testimony is completely at odds with their substantial participation in this case to-date. They should not be rewarded with a delay when they were full parties to, and fully accepted, the procedures set in this case.

15. So too is Intervenors' co-applicant theory incongruent with the language of Section 393.170.1, which provides that "No…electric corporation…shall begin construction of…electric plant…without first having obtained the permission and approval of the commission." MJMEUC is not an "electric corporation" as defined under Section 386.020(15), but rather is a joint municipal utility commission organized under Section 393.700 *et. seq.* The Commission does not have general equitable powers and would be without statutory authority to treat MJMEUC as a co-applicant in this proceeding. Show Me acknowledges that "[t]he General [Assembly] has not granted the Commission jurisdiction over MJMEUC or the municipal utilities it represents. MJMEUC and its members are self-regulated." See Show Me Motion at ¶9. "As the Public Service Commission is purely a creature of statute, its powers are limited to

those conferred by statute, either expressly, or by clear implication, as necessary to carry out the powers specifically granted." Utilicorp United Inc. v. Platte-Clay Elec. Co-op., Inc., 799 S.W.2d 108 (Mo. App. W.D. 1990); see also, PSC v. Oneok, Inc., 318 S.W.3d 134, 137 (Mo. App. W.D. 2010). Show Me and MLA's entreaty to have MJMEUC treated as "co-applicant" asks the Commission to exercise its procedural authority in a way that is entirely inconsistent with Missouri law.

16. There is no statutory basis for MJMEUC to be considered a joint applicant, and it would have been at odds with MJMEUC's unregulated status for it to have joined in the Company's Application or Direct Testimony. While MJMEUC expects to gain benefits from the Grain Belt Express Project, its position in this case is limited to its contract with Grain Belt Express. Intervenors' attempt to bootstrap MJMEUC into a half pregnant, "essentially co-applicant," status is illogical and does not comport with MJMEUC's status under Missouri law or MJMEUC's position in this case.

17. Show Me and MLA's reliance on the Joint Defense Agreement ("JDA") and the TSA between Grain Belt Express and MJMEUC are equally misguided. Pointing to the JDA, Show Me concludes that because MJMEUC and Grain Belt Express "have asserted this mutuality of interest in the joint prosecution of this case repeatedly in response to data requests . . . they are executing their strategy together." See Show Me Motion at ¶6. This is not the case. Instead, the common interest set forth in this JDA, and invoked in response to certain data requests, merely "expands the coverage of" both the attorney-client privilege and the attorney work product doctrine where "two or more clients with a common interest . . . are represented by separate lawyers and they agree to exchange information concerning the matter." Jiang v. Porter, No. 4:15-CV-1008 (CEJ), 2016 WL 3476710, at *2 (E.D. Mo. June 27, 2016) (internal quotation

and alteration omitted). The existence of a JDA between MJMEUC and Grain Belt Express does not alter in any respect the definitions and requirements of 4 CSR 240-2.060, 4 CSR 240-3.105(1)(B), or 4 CSR 240-2.130(B), nor does that document transform MJMEUC into a co-applicant in this proceeding.

18. So too is MLA's statement that, because Section 5.3 of the TSA provides for cooperation between the parties in obtaining government approvals, "MJMEUC was legally obligated, if asked, to join with Grain Belt in filing direct testimony supporting that Application," without any basis or foundation in fact or law. See MLA Motion at 2. TSA Section 5.3 does contemplate a party making a "filing in support of another Party's application" but it does not legally obligate the type or timing of any filing. Further, such "cooperation clauses" are standard contractual terms for transactions relying upon regulatory approval before consummation. Neither the JDA nor the TSA, which are common business documents, support Intervenors' allegation of a clever scheme by MJMEUC and Grain Belt Express to circumvent the procedural schedule and blindside other intervenors. See Show Me Motion at ¶¶ 7, 11; MLA Motion at 2, 4, 6. Show Me and MLA's self-serving posturing has no basis in fact or law.

III. Any Delay Is Unreasonable, Unnecessary, and Injures Grain Belt Express

19. The delay urged by Intervenors offends Grain Belt Express's due process right to a just and speedy determination on its Application. See Mo. R. Civ. Pro. 41.03. Such delay also is entirely unwarranted. As noted previously, both Show Me and MLA had notice of MJMEUC's position in support of Grain Belt Express as late as September 13, 2016, yet took no action to limit MJMEUC's testimony nor alter the procedural schedule that was discussed by the parties and set thereafter. Furthermore, Show Me and MLA had actual notice of MJMEUC's position and relevant documents far earlier than September 2016.

20. Nevertheless, both Show Me and MLA complain that the MJMEUC Testimony has created such a burden on them that -- unless the Commission strikes that testimony -- a four month delay is required. Their attempt to re-litigate the procedural schedule in this case should be soundly rejected. Indeed, the notion that the two rebuttal testimonies of MJMEUC justify any delay does not square with the reality or history of this case.

21. Show Me and MLA were privy to the entirety of Grain Belt Express' case, including the MJMEUC TSA, on June 30, 2016 when Grain Belt Express initially filed its Application and Direct Testimony. The Commission ultimately rejected this filing, finding that despite the Company not doing any business or having any assets in Missouri it was a "regulated entity" and was required to file a 60-day notice under the ethics rules.[1] Pursuant to that Order, Grain Belt Express re-filed its Application and Direct Testimony with only minor changes on August 30, 2016.

22. MJMEUC filed its application to intervene on September 13, 2016 and was granted intervention by the Commission on September 27, 2016. On September 28, 2016 Show Me and MLA participated in a procedural conference held in Jefferson City, Missouri with other parties. On October 5, 2016 Staff filed its Proposed Procedural Schedule, which contained the proposals of MLA and the Company, both of whom proposed deadlines for surrebuttal testimony one month following the filing of rebuttal testimony, among other procedural dates. Ten days passed after the filing of Staff's proposed procedural schedule with no objection from MLA, Show Me, or any other party. On October 19, 2016 the Commission issued its "Order Setting Procedural Schedule and Other Procedural Requirements," establishing a procedural schedule that accommodated the parties' proposals, setting the filing of rebuttal testimony on January 24,

[1] See Order Denying Waiver and Directing the Secretary to Reject Application (July 12, 2016). The Company briefly notes that the 60-notice requirement for CCN applications has not recently been uniformly applied. See e.g., Case Nos. GA-2017-0016 and WA-2017-0181.

2017 and the filing of surrebuttal on February 21, 2017. Again, no party objected to this procedural schedule.

23. For Show Me and MLA to now complain that they have insufficient time to respond to the rebuttal testimony of a fellow intervenor – whose position they were aware of prior to the procedural schedule – is fallacious. Intervenors' complaint that they "are faced with responding within one month to eight other witnesses who supported the Grain Belt position" was recognizable on October 5, 2016 when Staff filed its Proposed Procedural Schedule. See MLA Motion at 5; Show Me Motion at ¶8. Yet, neither Show Me nor MLA objected to that proposed procedural schedule, filed on behalf of all parties, nor did they object to the ultimate procedural schedule set by the Commission. It is unjust and undue to afford relief to Intervenors – to the detriment of Grain Belt Express – for sitting on their hands.

24. The procedural history of this case belies the notion that Show Me and MLA have been unduly burdened, prejudiced, or surprised by the rebuttal testimony of MJMEUC witnesses. So too do the actions of Intervenors. Show Me and MLA have conducted extensive discovery on Grain Belt Express and MJMEUC. As of January 26, 2017, MLA propounded 63 data requests on MJMEUC and 81 general data requests on Grain Belt Express. This does not include data requests to individual witnesses. So too did MLA file a motion to compel in an attempt to have the Commission disregard the JDA between MJMEUC and Grain Belt Express. MLA and Show Me have had ample opportunity to engage in discovery with MJMEUC and the Company regarding MJMEUC's position in this case.

25. Not only is any delay completely unnecessary, but it unreasonably burdens Grain Belt Express, which made its initial filing over 7 months ago and its largely identical accepted filing over 5 months ago. Show Me and MLA have had ample notice of MJMEUC's position,

ample opportunity to object to the procedural schedule which they bargained for and helped craft, ample opportunity to propound discovery, and now ample opportunity to respond accordingly in surrebuttal testimony. Any delay due to these bogus cries of surprise is unwarranted. There is no basis, either factual or legal, to support Show Me's or MLA's motions to strike the testimony of Mr. Kincheloe or Mr. Grotzinger, nor any basis to delay this proceeding. Intervenors' attempt to obstruct and hinder this proceeding should be denied.

WHEREFORE, Grain Belt Express requests that the motions to strike the rebuttal testimony of Mr. Kincheloe and Mr. Grotzinger, and the alternative requests to delay surrebuttal testimony and hearing dates, by Show Me Concerned Landowners and the Missouri Landowners Alliance be denied.

Respectfully submitted,

/s/ Karl Zobrist

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all counsel of record in this case on this 6th day of February 2017.

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