BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Grain Belt Express Clean Line LLC for a 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

GRAIN BELT EXPRESS CLEAN LINE LLC'S
OPPOSITION TO MISSOURI LANDOWNERS ALLIANCE'S
MOTION TO COMPEL ANSWERS TO DATA REQUESTS INVOLVING "JOINT PROSECUTION AND DEFENSE AGREEMENT"

Grain Belt Express Clean Line LLC ("Grain Belt Express" or "Company"), by and through counsel, respectfully states the following in Opposition to Missouri Landowners Alliance's ("MLA") Motion to Compel Answers to Data Requests Involving "Joint Prosecution and Defense Agreement" ("MLA Motion"):

I. OVERVIEW

1. The Missouri Joint Municipal Electric Utility Commission ("MJMEUC") and Grain Belt Express entered into a Joint Prosecution and Defense Agreement ("JDA") which recognizes the common interest that both MJMEUC and Grain Belt Express have in the regulatory approval of the Company's Application before the Missouri Public Service Commission ("Commission") for a certificate of convenience and necessity ("CCN") for the Grain Belt Express Project ("Project"). The JDA makes explicit the common interest the two parties share under Missouri's well-recognized common interest doctrine.

2. During the course of discovery in this proceeding, MLA promulgated discovery on MJMEUC and Grain Belt Express regarding the Transmission Service Agreement ("TSA") between those two parties and the benefits of that TSA. MJMEUC and Grain Belt Express

produced responsive documents that are not covered by the common interest privilege and that are relevant to this proceeding.

3. Nevertheless, on January 30, 2017 MLA filed its Motion seeking to compel redline negotiation drafts of the TSA, as well as essentially all communications between MJMEUC and Grain Belt Express regarding the TSA and its benefits. In short, MLA asks this Commission to fully disregard the parties' common interest as evidenced by their JDA Attached to MLA's Motion as Exhibit 1 are the data requests and responses at issue here.

4. Because MLA's Motion demands materials protected by the JDA and Missouri's common interest doctrine, which extends the attorney-client privilege and the attorney work product doctrine to entities working together towards the same legal outcome, it must be denied.

5. So too are MLA's requests irrelevant to this case. The executed TSA between MJMEUC and Grain Belt Express is the only legally relevant document. Any prior negotiation draft is without probative value to any of the five Tartan factors in this case and are obviously not legally binding on any party. MLA fails to offer a single compelling reason why it believes redline negotiation drafts of the TSA or related communications are relevant in this case. MLA's wildly broad discovery, which amounts to nothing more than a fishing expedition in irrelevant waters, should be denied.[1] It simply is not reasonably calculated to lead to the discovery of admissible evidence in this proceeding and should be not be entertained.

II. THE COMPANY AND MJMEUC PROPERLY OBJECTED ON THE BASIS OF THE COMMON INTEREST DOCTRINE

6. MLA does not dispute that MJMEUC and Grain Belt Express have and may withhold privileged documents and communications pursuant to the common interest doctrine. MLA only disputes whether these parties' invocation of the common interest doctrine covers the materials

[1] This motion to compel is similar in its irrelevance and breadth to MLA's recently withdrawn motion to compel responses of a non-party investor to Clean Line Energy Partners LLC.

at issue in MLA's Motion. As readily established here, the common interest doctrine is applicable to the materials at issue.

7. The common interest doctrine may exist in either a litigated or non-litigated matter, and it "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. Jiang v. Porter, No. 4:15-CV-1008 (CEJ), 2016 WL 3476710, at *2 (E.D. Mo. June 27, 2016). Parties may invoke the common interest doctrine where privileged information was exchanged "in the course of formulating a common legal strategy" and "in furtherance of the shared legal interest." Id. (quotation omitted).

8. Generally, the party claiming the common interest doctrine must establish (1) that the underlying privilege (such as attorney-client or work product) protects the communication at issue; (2) that the parties disclosed the communication to one another at a time when they shared a common interest; (3) that the parties shared the communication in confidence and in furtherance of that common interest; and (4) that the parties have not waived the privilege. Lipton Realty, Inc. v. St. Louis Housing Authority, 705 S.W.2d 565 (Mo. Ct. App. 1986).

9. The attorney-client privilege exists any time a client seeks legal advice from her legal representative. State ex rel. Rogers v. Cohen, 262 S.W.3d 648, 654 (Mo. 2008). Similarly, the attorney work product protection begins to exist as soon as "preparation for possible litigation" commences. Id. at 650. Attorney work product includes "tangible work product" "such as written statements, briefs, and attorney memoranda" and "intangible work product (consisting of an attorney's mental impressions, conclusions, opinions, and legal theories)." State ex rel. Atchison, Topeka and Santa Fe Ry. Co. v. O'Malley, 898 S.W.2d 550, 551 (Mo. en banc 1995).

10. The common interest doctrine is clearly applicable to MJMEUC's and Grain Belt Express' communications and drafts exchanged in the course of negotiations regarding the TSA. Grain Belt Express has a legal interest in obtaining a CCN for its Project in Missouri. MJMEUC, tasked by the Missouri Legislature to obtain sufficient and economical electrical power supply, energy management, and transmission services for the benefit of member municipal utilities, shares this legal interest. This shared legal interest pre-dates the execution of either the JDA or TSA. Without this Commission's regulatory approval, neither Grain Belt Express nor MJMEUC will be able to perform under the TSA because the Project will not be built, and MJMEUC and its members won't be able to realize the significant benefits that will come from an executed TSA with Grain Belt Express.

11. In other words, Grain Belt Express and MJMEUC exchanged the information MLA seeks in furtherance of their shared legal interest in obtaining regulatory approval of the Project such that they may realize the benefits of the TSA. This mutuality of legal interests is so strong that MJMEUC and Grain Belt Express logically made the understanding explicit in the JDA, which is a common practice in Missouri.

12. Perhaps because the common interest between Grain Belt Express and MJMEUC is so clear, MLA makes a feeble attempt to limit the timeframe during which the doctrine applies. MLA correctly states that in order for the common interest doctrine to apply "the relation of attorney and client must have actually existed between the parties at the time that the communication was made or the advice given." See MLA Motion at 4 (quoting State ex rel. Great American Insurance Company v. Smith, 574 S.W.2d 379, 386 (Mo. banc 1978). Yet, from this, MLA incorrectly extrapolates:

> Therefore, regardless of how this Commission rules regarding the applicability of *Lipton Realty* in general to this case, it is axiomatic

> that anything in the communications between GBE and MJMEUC, or between counsel for either entity and a party on the other side, which preceded those parties' June 1, 2016 execution of the Joint Prosecution and Defense Agreement is necessarily not protected by any such privilege and is discoverable by the MLA.

See MLA Motion at 5.

13. MLA's suggestion that the common legal interest of MJMEUC and Grain Belt Express could not have existed until the execution of the JDA by the parties lacks any support in fact or law. See MLA Motion at 5. Yet MLA does not stop there. In a weak attempt to distinguish the Lipton Realty case, MLA conjures whole cloth an argument that the mutuality of interest between MJMEUC and Grain Belt Express "was created simply to avoid discovery into important aspects of the TSA." See MLA Motion at 5.

14. This shows a fundamental misunderstanding of the common interest doctrine, which, at its very core, extends the privilege which already exists between an attorney and client to communications with certain third-parties with common legal interests. The relevant questions, therefore, are (1) whether there was an attorney-client relationship between the Company and its lawyers, and MJMEUC and its lawyers, at the time of negotiations of the TSA; and (2) whether a common interest existed between MJMEUC and Grain Belt Express at the time of the negotiations of the TSA. The answer to both questions is yes.

15. MJMEUC and Grain Belt Express have been represented by, sought advice from, and exchanged information with their respective attorneys, and exchanged that information and materials with each other, since the Commission's decision in the Company's 2014 CCN case. During this legally motivated -- and protected -- relationship, various employees and representatives of both parties (including attorneys) met, discussed and reviewed shared information, and prepared materials during TSA negotiations that directly included and stemmed

from attorney-client communications and attorney work product. As a result, the parties' attorneys prepared and circulated prior versions of the TSA. The parties' exchanges, in furtherance of their shared legal interest, are clearly protected by the attorney-client privilege and/or the attorney work product doctrines, and in turn protected by the common interest doctrine. Indeed, these circumstances are why such doctrines have existed in Missouri for decades.

16. The overarching goal of both Grain Belt Express and MJMEUC is that the Project obtains regulatory approval so that the Project can proceed and MJMEUC and its members can benefit from the low cost, renewable energy through the TSA it executed with Grain Belt Express. It is for this reason that the execution of the JDA does not trigger the common interest doctrine; rather, the parties' common interest pre-dates the final agreement.

17. The common legal interest between MJMEUC and Grain Belt Express in this regulatory litigation was not an afterthought designed to eschew discovery, but stems from the Company's 2014 CCN case in which it discerned that the Missouri regulatory environment demanded a Missouri costumer to approve the Project. See Report and Order at ¶22, In The Matter of the Application of Grain Belt Express Clean Line LLC, Case No. EA-2014-0207 (July 1, 2015). This regulatory demand for a Missouri customer has been cited by the opposition to the Project. See Shaw Rebuttal at 5: 21-22. Because the attorney-client privilege and/or work product doctrine protects the negotiation and communication material MLA seeks, because Grain Belt Express and MJMEUC exchanged that material at a time when they shared a common interest in obtaining regulatory approval for the Project, and because they shared their negotiation documents and communications in confidence and in furtherance of that common interest and have not waived the privilege, the materials MLA seeks is plainly protected.

III. MLA'S DISCOVERY REQUEST IS IRRELEVANT TO THIS PROCEEDING

18. Grain Belt Express produced the actual TSA between the parties, among other related material. Yet MLA unreasonably demands, without justification or legal support, discovery of every underlying negotiation leading up to the TSA itself. MLA is not entitled to "Monday-morning quarterback" the formation of the TSA, and it has failed to tie any such post-hoc analysis to the Commission's five Tartan factors. Because MLA's requests are not reasonably calculated to lead to the discovery of admissible evidence, it did not and cannot show their relevance.

19. The Commission has stated that it will apply five criteria to CCN applications: (1) there must be a need for the service the applicant proposes to provide; (2) the proposed service must be in the public interest; (3) the applicant's proposal must be economically feasible; (4) the applicant must have the financial ability to provide the service; and (5) the applicant must be qualified to provide the proposed service. See Order Granting Certificate of Convenience and Necessity at 2, In re Entergy Arkansas, Inc., Case No. EA-2012-0321 (July 11, 2012).

20. Commission Rule 4 CSR 240-2.090(1) states that discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court. Under Missouri Rule of Civil Procedure 56.01(b), parties may obtain discovery regarding "any matter, not privileged, that is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition and location of any books, documents or other tangible things, and the identity and location of persons having knowledge of any discoverable matter."

21. In other words, parties may inquire only into a matter that is reasonably calculated to lead to the discovery of admissible evidence. State ex. rel. Martel v. Gallagher, 797 S.W.2d 730 (Mo. App. E.D. 1990). In this case, the only relevant evidence relates to the five criteria that the

Commission will examine when ruling upon the Company' Application. Therefore, all discovery requests must relate to those five criteria.

22. Nevertheless, MLA asks this Commission, without justification or legal support, to allow a dragnet discovery based on nothing but the hope of finding a document that it believes could help undercut the Company, the Project, or the TSA. This fishing expedition is based solely in speculation. MLA has not explained why original terms that were either excluded from or changed during the course of the TSA negotiation would have any relevance whatsoever. Quite simply, they do not. MLA's Motion to Compel should be denied.

23. As a final note, the Commission should honor the JDA between MJMEUC and Grain Belt Express for the same reason that its own rules make settlement negotiations confidential -- to do otherwise would discourage frank and forthright communication between entities seeking to do business in Missouri. Removing the protections afforded by the JDA is just not good policy.

WHEREFORE, Grain Belt Express respectfully requests that the Commission deny MLA's Motion to Compel Answers to Data Requests Involving "Joint Prosecution and Defense Agreement."

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 parties of record in this case on this 9th day of February 2017.

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