

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' INITIAL BRIEF

Anne E. Callenbach MBN 56028
Andrew O. Schulte MBN 62194
Polsinelli PC
900 W. 48th Place, Suite 900
Kansas City, MO 64112
Telephone: (816) 572-4760
Facsimile: (816) 817-6496
acallenbach@polsinelli.com
aoschulte@polsinelli.com

ATTORNEYS FOR RESPONDENTS

October 23, 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 Initial Brief. In support of this brief, Respondents state the following:

I. BACKGROUND

1. On September 2, 2020, Complainants filed a formal complaint against Respondents at the Missouri Public Service Commission (“Commission”), alleging that Respondents’ contemplated changes to the Grain Belt Express Project (the “Project”) invalidated the Certificate of Convenience and Necessity (“CCN”) granted to Respondent Grain Belt in Case No. EA-2016-0358 (the “CCN case”).

2. On September 3, 2020, the Commission issued a Notice of Formal Complaint and Order Directing Staff to File a Preliminary Report (“Notice Order”). The Notice Order directed Respondents to file a Response to the Complaint by October 3, 2020, and directed Commission Staff (“Staff”) to file its Preliminary Report on or before October 18, 2020.

3. On September 29, 2020, the Staff of the Commission, Complainants, and Respondents filed a Joint Motion to Suspend Deadlines and Establish a Briefing Schedule. The Joint Motion requested that the Commission: (1) suspend the October 3, 2020 date for Respondents to file an Answer or Response to the Complaint; (2) suspend the October 18, 2020 date for Staff to file its Preliminary Report on the Complaint; (3) issue an Order adopting the proposed briefing schedule discussed therein, and for any such further relief as the Commission may deem just and appropriate.

4. The Joint Motion included specific stipulations to govern the parties' respective briefs. Joint Movants agreed to the following stipulations:

- (a) Grain Belt issued a Press Release on August 25, 2020, which is attached to the Complaint as Exhibit 1;
- (b) On September 24 and 25, 2020, Grain Belt mailed a letter to Missouri landowners who were mailed form easement agreements but had not yet signed them. A copy of that letter is attached to this Joint Motion as Exhibit A;
- (c) Grain Belt has not yet sought Commission permission to make changes to the Project as it was approved in the CCN case. The Press Release states "Grain Belt Express will seek approvals to the extent necessary for expanded delivery to Kansas and Missouri as well as for beginning the first phase of Project construction prior to Illinois regulatory approval";
- (d) Grain Belt has begun acquiring easement rights along the certificated route but has not begun construction of the Project;
- (e) The sample landowner letter posted on Grain Belt's website states that Grain Belt is working to add broadband infrastructure along the route to support rural high-speed internet access. A copy of Grain Belt's sample landowner letter is attached as Exhibit B to this Joint Motion;
- (f) In their respective legal briefs, Joint Movants may cite to any portion of the record in the CCN case; and
- (g) Joint Movants agree that the issue in this Complaint is limited to whether Respondents' contemplated changes to the Project invalidate the CCN granted to Grain Belt in the CCN case.

5. On October 5, 2020, the Commission issued its Order Partially Granting Motion to Suspend Deadlines and Establish Briefing Schedule. The Order directed the parties to file simultaneous initial briefs on October 23, 2020, and simultaneous reply briefs on October 30, 2020. The Order also modified Stipulation (g) above by stating that "the parties' briefs 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."¹

¹ October 5, 2020 Order at p. 3, Ordering paragraph 4.

II. ARGUMENT

6. 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”²; and (2) “Grain Belt will not install transmission facilities on easement property in Missouri³ 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.”⁴

7. For the reasons set forth below, and even accepting all of Complainants’ factual allegations as true, Respondents are in violation of neither of these conditions, nor any other provision of the Report and Order on Remand in the CCN case (“CCN Order”). Accordingly, Complainants have failed to state a cause of action for invalidation of Respondents’ CCN, and are therefore not entitled to their requested relief.

A. MLA IS NOT THE THOUGHT POLICE: PROJECT DESIGN AND ENGINEERING IS NOT MATERIALLY DIFFERENT UNTIL IT ACTUALLY EXISTS

8. Respondents’ August 25, 2020 press release announced contemplated changes to the Grain Belt Express transmission Project to increase local clean energy access, accelerate

² Report and Order on Remand, p. 52, ¶ 6, Case No. EA-2016-0358 (hereinafter “CCN Order”).

³ 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.”

⁴ Section I.1., Exhibit 206 in the CCN case, which were ordered and adopted in the CCN Order at page 51, ¶ 2.

billions of dollars in economic investment in Kansas and Missouri, and result in up to \$7 billion in electricity cost savings in Kansas and Missouri by 2045.⁵

9. The press release also stated, “[b]uilding on the unanimous regulatory approvals from Kansas and Missouri in 2019, Grain Belt Express will seek approvals to the extent necessary for expanded delivery to Kansas and Missouri, as well as for beginning the first phase of Project construction prior to Illinois regulatory approval.”⁶

10. The condition on Respondents’ CCN clearly states that “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” (emphasis supplied). The maelstrom of criticism unleashed by MLA in response to the press release necessarily begs the question: when does the design of the Project become materially different?

11. Respondents construe the CCN condition to mean that Respondents cannot build a project that differs materially from what was in the application without presenting an updated application to the Commission for additional review and analysis. Currently, the Project design discussed in Respondents’ press release is fluid and conceptual, and is intentionally malleable to leave room for multiple assumptions and business scenarios still under consideration. At a subsequent juncture, somewhere along the continuum between conceptual ideas, placing orders for materials, and turning shovels of dirt, Respondents’ project design and engineering may be established enough to be considered “materially different” from those contained in the original application. At or before that time, if the design and engineering is materially different,

⁵ August 25, 2020 Press Release, p. 1 (Exhibit 1 to the Formal Complaint).

⁶ August 25, 2020 Press Release p. 1 (Exhibit 1 to the Formal Complaint).

Respondents would seek additional regulatory approval. Despite Complainants' allegations, now is not that time.

12. Further, contrary to Complainants' claims, if the design and engineering is materially different, it 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.⁷

13. MLA apparently has taken upon itself the role of Thought Police⁸, and interprets the condition as preventing even a mere conceptualization of a project that differs from what the Commission approved. Respondents submit that unless and until some sort of definitive actions are taken to transform the current ephemeral series of concepts noted in the press release into a project with definite form and substance, MLA's cry of foul is premature at best.

14. If mere thought or contemplation could form the basis of civil liability, our entire justice system would capsize in a sea of culpable parties. Indeed, Missouri law reveals no civil liability for thought, planning or contemplation. The Missouri Court of Appeals had occasion to opine on an analogous argument in which penalties were sought against pipeline companies for alleged violations of Section 393.190 RSMo.⁹

15. In *MoGas*, the Commission contended that MoGas owed penalties for its failure to obtain the Commission's approval to transfer, merge, or consolidate its operations in violation

⁷ "Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission..." Section 386.490.2 RSMo.

⁸ Orwell, George. *Nineteen Eighty-Four*. London: Secker and Warburg, 1949.

⁹ *State ex rel. Missouri Public Service Commission v. Missouri Gas Co.* 311 S.W.3d 368, 370-371 (Mo.App. W.D. 2010) (hereafter "MoGas").

of Section 393.190 RSMo. In affirming the circuit court’s decision that no statutory violation had occurred, the Court of Appeals stated:

*A review of the statute [393.190] does not reveal liability for taking a substantial step towards, attempting or even merely contemplating selling, assigning, transferring or any other conduct which is prohibited by the statute. Simply stated, the plain language of this statute does not prohibit entering into a contract to merge or to sell, but only the consummation of such transaction without [the Commission's] approval. A utility is not required to comply with a statute which does not apply to its conduct. As a result, its failure to comply creates no liability under the facts of this case.*¹⁰

* * * * *

*We find nothing in section 393.190 that requires a gas corporation to obtain an order from the Commission during the period in which the gas corporation may be contemplating or preparing to ‘sell, assign, lease, transfer, mortgage, or otherwise dispose of or encumber the whole or any part of its franchise, works or system’ or to ‘merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility[.]’ Section 393.190 merely says that, before a gas corporation can transfer, merge or consolidate its operations with any other corporation or public utility, the gas corporation must first secure an order from the Commission authorizing it to do so.*¹¹

16. Recognizing that *MoGas* addressed statutory interpretation, as opposed to a Commission Order, Respondents submit that the Court’s rationale is relevant and pertinent to the current Complaint. In contemplating and announcing the potential for changes in the Grain Belt Express Project, Respondents are not in violation of the condition that requires a new application when the design and engineering of the Project is materially different. Design and engineering cannot be materially different until the design and engineering of a specific plan actually exists.

17. In the press release that spawned this Complaint, Respondents publicly announced their intent to seek regulatory approvals from both the Missouri and Kansas

¹⁰ *Id.* at 370 (emphasis supplied).

¹¹ *Id.* at 370-71 (emphasis supplied).

Commissions for any contemplated changes to the Project.¹² This statement is an acknowledgement of Respondents' ongoing commitment to maintaining their compliance with all conditions the Commission placed upon their CCN. The announcement of potential modifications to the Project, with the recognition that any such modifications, if in fact brought to fruition, would require regulatory approval, does not state a cause of action for invalidation of Respondents' CCN. Moreover, Respondents' public announcement of contemplated changes to the Project was made, in part, in an effort at transparent communication of the numerous additional benefits anticipated to occur with potential changes to the Project. Vilifying communications of this nature will have an unwelcome chilling effect on transparency with the public and with regulatory authorities.

B. NO TRANSMISSION FACILITIES HAVE BEEN INSTALLED, AND RESPONDENTS HAVE NOT VIOLATED ANY CCN CONDITIONS

18. Complainants next allegation, that Respondents have violated the condition that states, "Grain Belt will not install transmission facilities on easement property in Missouri 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,"¹³ is just as easily dispatched. The specific terms of this condition provide the triggering event for a violation: the installation of transmission facilities on easement property in Missouri. Inasmuch as no transmission facilities have been installed, Respondents have not violated this condition.

C. MLA'S MISSTATEMENTS, CONJECTURE, AND HYPOTHESES REGARDING CONTEMPLATED CHANGES TO THE PROJECT DO NOT STATE A CAUSE OF ACTION FOR INVALIDATION OF GRAIN BELT'S CCN

¹² August 25, 2020 Press Release, p. 1 (Exhibit 1 to the Formal Complaint).

¹³ Section I.1., Exhibit 206 in the CCN case, which were ordered and adopted in the CCN Order at page 51, ¶ 2.

19. The answer to the Commission’s question—“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”—must be answered in the negative. Section 386.390 RSMo. authorizes the Commission to hear a complaint that sets forth an act or omission 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.”

20. In evaluating whether a petition states a claim for relief, the mere conclusions of the complainant are not admitted.¹⁴ The facts alleged, however, are taken to be true and the complainant is entitled to all favorable inferences fairly deducible therefrom. If such facts and such inferences, viewed most favorably from the complainant’s standpoint, show any ground for relief, the complaint should not be dismissed.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.¹⁶

21. Respondents do not dispute the factual statements set forth in the Complaint, as clarified by the Joint Stipulations set forth in the Joint Motion. Respondents do, however, take

¹⁴ *Ray v. Dunn*, 753 S.W.2d 652, 654 (Mo.App.S.D. 1988).

¹⁵ Respondents acknowledge that no Motion to Dismiss is yet pending in this proceeding. However, in light of the October 5, 2020 Order stating “the parties’ briefs 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, Respondents submit that the standard for evaluating motions to dismiss is appropriate here.

¹⁶ *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).

issue with the misstatements and conjecture woven throughout the Complaint, and Complainants' conclusory statements are not enough to sustain a cause of action.

22. Complainants state that “[i]nasmuch as Respondents have publically [sic] announced that they no longer plan to build the Project for which the CCN was granted, at this point Grain Belt does not have a valid CCN to build anything in Missouri.”¹⁷ Respondents have made no announcement of the sort. Respondents have merely announced that they are contemplating an alternative. Far from publicly announcing that Respondents no longer plan to build the Project for which they were granted a CCN, every action of Respondents reinforces the conclusion that development activities continue ahead with full steam.¹⁸ Accordingly, Complainants' assertion that Respondents no longer have a CCN (or eminent domain authority) does not follow.

23. Rather, Respondents' CCN remains intact, and Complainants can prove no set of facts that result in invalidation of the CCN. Even “accept[ing] all properly pleaded facts as true, giving the pleadings their broadest intendment, and ...constru[ing] all allegations favorably to the pleader ... ‘to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case,’”¹⁹ Complainants' assertions must fail.

24. In response to the statement in the press release that an increase in the Project's delivery capacity to Kansas and Missouri is contemplated, Complainants' hypothesize that “the drastic reduction in sales to the PJM system will obviously have a material impact on the

¹⁷ Complaint at ¶ 7.

¹⁸ 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.”

¹⁹ *Id.* (quoting *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. banc 1993)).

economic viability of the Project”²⁰ The potential increase to the Project’s delivery capacity in Missouri will only go forward if it is economically viable, at which point Respondents will make the required filing and the Commission and interested stakeholders will have an opportunity to review such economics and arrive at their own conclusions. It is at best premature to judge the economic viability in this proceeding, and, as with the rest of Complainants’ unfounded assertions, this issue is not yet ripe for Commission decision.

25. Complainants also make an argumentative and conclusory statement that Respondents’ mention of the potential for broadband expansion in rural communities necessarily “constitutes a material difference in the Project as approved in the CCN case.”²¹ This is likewise insufficient to sustain a cause of action. The CCN is completely silent on broadband expansion, and Complainants provide no basis for their bald assumption that the addition of broadband would materially change the Project. Regardless, broadband expansion has not yet materialized, so this allegation, like all of the others, is premature.

26. The Commission Order granting Respondents’ CCN specifically found that:

the evidence in the case demonstrated that the Grain Belt Project will create both short-term and long-term benefits to ratepayers and all the citizens of the state. In the Commission’s view, the broad economic, environmental, and other benefits of the Project to the entire state of Missouri outweigh the interests of the individual landowners.²²

An announcement of potential changes, without more, does not nullify the recognized benefits of the Project, or the Commission’s finding that the Project is in the public interest.

27. Respondents’ August 25, 2020 press release was simply an announcement that changes to the Project are under consideration. If and when the contemplated changes are more

²⁰ Complaint at ¶ 10.

²² CCN Order at p. 47.

certain and formalized, Respondents will seek Commission approval for these Project modifications, and such modifications will be supported by documentation, testimony, and other evidence for the Commission's consideration. Certainly, as they have made clear, the Respondents would not begin construction of a "materially different" Project without filing an updated application with the Commission.

28. Complainants have not, and cannot, prove that the announcement of potential changes results in a violation of any provision or condition of the Commission's CCN Order, or that such an announcement constitutes an "abandonment" of the CCN. Accordingly, Complainants have failed to establish a cause of action for invalidation of Respondents' CCN.

WHEREFORE, Respondents respectfully request that the Commission accept this Initial Brief and for any such further relief as the Commission may deem just and appropriate.

Respectfully submitted,

/s/ Anne E. Callenbach

Anne E. Callenbach MBN 56028

Andrew O. Schulte MBN 62194

Polsinelli PC

900 W. 48th Place, Suite 900

Kansas City, MO 64112

Telephone: (816) 572-4760

Facsimile: (816) 817-6496 Fax

acallenbach@polsinelli.com

aoschulte@polsinelli.com

ATTORNEYS FOR RESPONDENTS

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 23rd day of October, 2020.

/s/ Anne E. Callenbach
Attorney for Respondents