BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Grain Belt Express Clean Line LLC for Approval of its Acquisition by Invenergy Transmission LLC	)))	No. EM-2019-0150

PUBLIC VERSION

** Indicates confidential information has been removed **

INITIAL POST-HEARING BRIEF OF THE MISSOURI LANDOWNERS ALLIANCE, SHOW ME CONCERNED LANDOWNERS, AND JOSEPH AND ROSE KRONER

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Section 1. Introduction. Three issues were listed by the parties for resolution in this case by the Commission. If the Commission determines it has jurisdiction to approve the sale, as addressed in the first issue, the second issue essentially is whether the Commission should find that the sale is not detrimental to the public interest.

In their Statement of Position, the Missouri Landowners Alliance (MLA), Show Me Concerned Landowners, and Joseph and Rose Kroner (collectively referred to as the "Landowners") proposed under issue 2 that the Commission should find the sale is detrimental to the public interest.[1]

Upon reconsideration, the Landowners are taking no position on this second issue. They also have taken no position on issue number 3.[2] Accordingly, the only issue being briefed herein by the Landowners is issue number 1. The question there is whether the Commission has the jurisdiction and statutory authority under Section 393.190 RSMo to approve the sale of Grain Belt Express Clean Line LLC ("Grain Belt") to Invenergy Transmission LLC ("Invenergy").

Section 2. The Commission lacks the jurisdiction and statutory authority to approve the sale of Grain Belt to Invenergy because Grain Belt is not an electrical corporation.

Grain Belt and Invenergy (the "Joint Applicants") have asked the Commission to approve the sale of Grain Belt to Invenergy under authority of Section 393.190 RSMo.[3] As it applies to this particular issue, that statute essentially says that no "electrical corporation" may be sold or transferred without having first secured the Commission's approval of that transaction.

[1] Statement of Position, p. 7 et seq.
[2] Id. at 8.
[3] Joint Application For Transaction Approval and Motion For Expedited Treatment, p. 1, filed February 1, 2019.

Accordingly, if Grain Belt is not an electrical corporation, the Commission has no authority under this statute (or any other statute cited by any of the parties) to approve the proposed sale. And if the Commission is not authorized by statute to approve the sale, then it does not have subject matter jurisdiction over the sale of Grain Belt.[4]

The Landowners have two related lines of argument for why Grain Belt is not an "electrical corporation." The first is based on case law; the second is based on the statutory definition of an electrical corporation.

(1) Arguments based on case law.

For years the courts in Missouri have found that in order to qualify as an "electrical corporation", the facility in question must not only qualify as such under the applicable statutory definitions, but it also must be devoted to the "public use." Under Missouri case law, the Grain Belt project fails to meet this test.

One component of the Landowner's argument is that Grain Belt will not be selling any transmission service to retail customers in Missouri.[5] Instead, it will sell the capacity on its line both to wind generators on the Kansas end of the line, and to load-serving entities (e.g., Ameren or municipal systems) which will take delivery at the converter stations in Missouri and Illinois.[6] So the project will provide only wholesale electric transmission service in Missouri – as opposed to retail service.

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[4] *Overman v. Southwestern Bell Telephone Co.,* 706 S.W.2d 244, 252 (Mo. App. 1986) (finding that "Our Supreme Court has consistently adhered to the rule or principle that the Public Service Commission is a body of limited jurisdiction and has only such powers as are conferred upon it by statute…."); *State ex rel. Smithco Transport Co. v. Pub. Serv' Comm',* 307 S.W.2d 361, 374 (Mo. App. 1957 (stating that the Commission is a creature of statute, and its jurisdiction is controlled by statute.); *State ex rel. Utility Consumers Council of MO v. Pub. Serv. Comm'n,* 585 S.W.2d 41, 54 (Mo banc 1979) (noting that the PSC's jurisdiction is set by statutes enacted by the legislature).

[5] Direct Testimony of Mr. Michael Skelly in Case EA-2016-0358, p. 24 lines 15-18 at Exh. 8, Schedule JK-3, p. 2. *See also* Grain Belt's Application in that case, at p. 29, par. 76, at Exh. 8, Sch. JK-4, p. 4.

[6] *See, e.g.,* Direct Testimony of Mr. Michael Skelly in Case EA-2016-0358, p. 24 lines 10-14 at Exh. 8, Schedule JK-3, p. 2.

In addition, Grain Belt's rates will be subject to regulation by the FERC, which has granted Grain Belt the authority to set its rates through bilateral negotiations with potential customers, for up to 100% of the line's capacity.[7] Thus the line will never be subject to rate regulation by this or any other state commission.

In its Application to this Commission for the CCN, Grain Belt confirmed that its "services will be provided to the wholesale energy market at freely negotiated rates."[8]

As an example of how the negotiation process can work, when the projected in-service date of the line began to slip, MJMEUC approached Grain Belt about a reduction in the rates they had negotiated earlier. As a result of further negotiations between the two parties, MJMEUC received a 30% reduction in its second 100 MW of capacity.[9]

And as would be expected when a utility is allowed to negotiate different rates with different customers, the rates for those customers are bound to differ. As Mr. Zadlo explained, under FERC regulation, two somewhat similar, nearly identical customers, could end up with two different rates as a result of the negotiating process.[10]

One reason for the disparities lies in the very process used to select the customers with whom Invenergy will choose to negotiate. As Mr. Zadlo explained:

> And first you have an open season, you see which individuals will -- are willing to pay. And then you … chose the best – the offers – the best offers that you receive and try to negotiate a rate with them.[11]

In other words, Invenergy will begin its negotiations with the highest bidders, and work its way down. So again, rate disparities in such a process are inevitable.

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[7] Before the line begins operation, Invenergy would be required to file an open access tariff with the FERC which would affect its terms of service. However, even after that tariff is filed, Invenergy would continue to have the authority to sell any unsold capacity at that point through the negotiated rate process. Thus 100 % of the capacity charges are subject to negotiation. Tr. 107 line 15 – Tr. 108 line 13.
[8] Application p. 18 par. 47 at Exh. 8, Sch. JK-4, p. 3.
[9] Tr. Vol. 24, December 19, 2018, p. 2115 line 1 – p. 2116, line 19, at Exh. 8, Sch. JK-6, p. 2.
[10] Tr. Vol. 22, page 2038 line 222 – page 2039 line 9, at Exhibit 15C, Sch. 2.
[11] Exh. 15C, Sch. 2, Tr. 2041 lines 7-11.

In addition, in its application to the FERC Grain Belt noted that the criteria used in its selection of potential customers would include the amount of capacity and the minimum term of service for which the customer would be willing to sign.[12] On its face, these criteria provide inherent advantages to larger customers over smaller customers, without regard to the actual cost of serving each category.

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_____[13] _____

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Similarly, as Mr. Zadlo testified in this case, the rate to be paid by MJMEUC is so low that it does not even cover Grain Belt's cost of providing the service. And so logically, as he testified, the rate for the remaining 250 or so MW into Missouri will be set at a high enough level to enable Invenergy to cover its costs of providing that service. (Tr. 105 lines 6-22). In other words, among Missouri customers of the Grain Belt line there will be relative winners and there will be relative losers.

And it is highly unlikely that the difference in rates, even for Grain Belt's two existing customers, is based on a difference in the cost of providing service to them. According to Mr. Detweiler, the only cost of service analyses performed by Grain Belt

[12] Application from Grain Belt to the FERC, p. 18, cited by Mr. Skelly at Exh. 100, p. 24 f.n. 7 in EA-2016-0358, shown at Exh. 8, Sch. JK-3, p. 2.
[13] The charges to MJMEUC and Realgy are shown at Exhibit 14C, in the Supplemental Responses to data request items G37 and G39.
[14] See the MJMEUC and "normal" rates at Exhibit 15C, Tr. 852 lines 15-20; and Tr. 853 line 18 – Tr. 854 line 3.

for MJMEUC and Realgy were "internal and informal", and they did not bother to retain any specific documents of such analyses.[15] Such is the nature of negotiated rate-making.

The Landowners are not attacking the legality or rationality of the FERC rate-making guidelines applied to merchant transmission lines. The point, instead, is that the process of negotiating individual rates for individual customers, without regard to the cost of providing the service, is totally at odds with the statutory procedures mandated for setting rates for electrical corporations in Missouri.

Based on the foregoing, the following facts are beyond dispute. First, the Grain Belt line will not be selling its services to retail customers in Missouri. Second, Grain Belt has the authority to sell 100% of its capacity at rates which are to be negotiated individually between the buyer and Grain Belt/Invenergy. Third, as the natural outcome of establishing rates through bilateral negotiation, different customers will pay different rates for capacity on the line – even for service from the same beginning and end points, and to customers in substantially the same circumstances. Based on these facts, case law in Missouri tells us that the Grain Belt project is not an "electrical utility" in the sense that term is used in the CCN statute, Section 393.170.

The first case to address this matter was issued just 5 years after passage of the Public Service Commission Act in 1913: *State ex rel. M. O. Danciger & Co. v. Pub. Serv. Comm'n of Mo.,* 205 S.W. 36 (Mo. 1918).[16] The defendant in that case, Danciger, was a close affiliate of a brewing company in Weston, MO, which had installed electric

[15] Exhibit 12, responses to items G44 and G46.
[16] As to the date of the passage of the Public Service Commission Act, see *Danciger* at 39.

generation to light its facilities and to operate a large part of the machinery used in its brewing process.[17]

The brewery found that it had excess capacity from its generating facilities, and through its affiliate Danciger began selling electricity to customers within a three block radius of the brewery. Eventually, Danciger was selling electricity at varying rates to the town of Weston; to between 20 and 30 other businesses; and to some 10 individual residences.[18]

Defendant Danciger later discontinued service to several of its customers, who filed a complaint with the Public Service Commission. The Commission found that by reason of its operations, Danciger was a regulated public utility, and ordered that the service be restored.[19]

On appeal, the state Supreme Court reversed that decision. The key issue was whether the company in question was or was not an "electrical corporation", as that term is defined in what is now Section 386.020(15).[20]

In perhaps the key finding by the Supreme Court, it ruled that although the statutory definition of an "electrical corporation" includes no specific reference to public use, or to the necessity that the sale of the electricity be to the public, "it is apparent that the words 'for public use' are to be understood and to be read therein."[21]

The question, then, was what constitutes the supply of electricity to the public, for "public use", thereby qualifying the entity as an "electrical corporation." In answering that question, the Court began with an obvious but very critical point: a company either

[17] *Danciger* at 37.
[18] Id. at *37-38*.
[19] Id. at 39-40.
[20] The current version of that statute is essentially unchanged from that at issue in *Danciger*, Id. at 39.
[21] Id. at 40.

is or is not a public utility. There is no middle ground. If it is a public utility, then it is subject to the entire purview and regulation of the Commission, including the obligation to provide service to all residences and businesses within its service territory.[22]

So if Grain Belt is correct that it is an "electrical corporation" under the definitional provision of Section 386.020(15), and under the CCN statute (Section 393.170), then it must necessarily be subject to all Missouri statutes which apply to electrical corporations. For instance, Section 393.130.2 states as follows:

> No … electrical corporation … shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for … electricity … except as authorized in this chapter, than it charges demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

Thus if Grain Belt is indeed an "electrical corporation", its negotiation of different rates for similarly situated customers would certainly be contrary to the mandates of this statute, and no doubt others as well.

The court concluded that Danciger's business did not make it a "public utility", because state regulation of private property can be had only pursuant to the police power. And that power is bottomed on and wholly dependent upon the devotion of private property to a public use. Because there (as here) the property was not devoted to a public use, the entity could not be subject to any form of regulation by the Commission.[23] Or as the Court stated, "there is in this case no explicit professing of public service, or

[22] Id.
[23] Id. at 40.

undertaking to furnish lights or power to the whole public, or even to all persons in that restricted portion thereof who reside within three blocks of the Company's plant….[24]

The Court went on to find that its decision on this issue was supported by a majority of appellate court decisions from other states which had addressed the issue.[25] It then punctuated its ruling by relying upon this passage from what it called an "excellent work on Public Service Corporations":[26]

> That the business of supplying gas is public in character is now universally recognized, provided that the company supplying is committed to supplying gas to the community in general. But the case can be imagined of an institution with a generating plant for its own supply, which might even supply one neighbor, without being obliged to sell to all others. In the same way the business of supplying electrical energy has generally been recognized as public in character. There are, however, several cases where the company supplying electricity has not professed to sell to the public indiscriminately at regular rates, but has from the beginning adopted the policy of entering into special contracts upon its own terms; such companies are plainly engaged in private business. (emphasis added)

This last sentence precisely describes the proposed operation of the Grain Belt line. According to the Missouri Supreme Court, Grain Belt is therefore not an electrical corporation.

The Landowners recognize that Grain Belt is allowed by the FERC to establish rates in a manner contrary to Missouri law. So setting rates through bi-lateral negotiation, under FERC authority, is in no way unlawful or improper. It simply means that Grain Belt will not be subject to certain statutes and Commission regulations otherwise applicable to electrical corporations. This in turn means that Grain Belt will not be subject to the entire purview and regulation of the Commission. That being the

[24] Id.
[25] Id.
[26] Id. at 41.

case, according to *Danciger*, Grain Belt does not qualify as an electrical corporation under Missouri law.

A second case on point is *State ex rel. Buchanan County Power Transmission v. Baker,* 9 S.W.2d 589 (Mo. banc 1928). There, the relator operated a single transmission line between a generation source and the purchaser of the electricity: the St. Joseph Railway Light, Heat and Power Co. The fundamental issue was which state taxing authority had the right to tax the transmission line, which in turn depended upon whether or not the line was a "public utility."[27]

One of the taxing authorities argued that while the line did not serve the public individually, "it is certainly an important link in the distribution of electric energy to the people of St. Joseph, Missouri."

But relying extensively upon *Danciger,* the court found as follows: "the mere purchase, transmission and sale of electric energy, a commercial product, without more, contains no implication of public service. On the showing made it must be held that relator is not a public utility."[28]

The service being provided there was closely akin to what Grain Belt is proposing here: the mere transmission of electric energy from a generator to a wholesale customer.

Another case on point is *Palmer v. City of Liberal,* 64 S.W.2d 265 (Mo. 1933). There, a generating company (the Cardin Company) supplied electricity to the city of Liberal, and the city in turn sold the power to its individual citizens. The Court ruled that under these circumstances the generating facility was not an electrical corporation which required a CCN from the Commission. As the Court stated: "The Cardin Company does

[27] Id. at 591.
[28] Id. at 592.

not propose to deal with the public, but only to furnish the city of Liberal with electric current. It is not dealing with the public and it would not be necessary for the Public Service Commission to give a certificate of convenience and necessity before it can start operating in this State."[29]

Similarly, while Grain Belt might be selling some of its capacity to MJMEUC, which in turn sells to its member utilities, which in turn sell to the end-use customers, Grain Belt itself "is not dealing with the public." Accordingly, as in *Palmer,* Grain Belt is not authorized by Missouri law to obtain a CCN from the Commission.

While the above three cases are not of recent vintage, they certainly have not been overruled or criticized on the basic principles underlying those decisions. In fact, a 2009 decision from the Western District stated that "The statutory provisions on which *Danciger* relied remain largely unchanged today, and more recent decisions continue to cite and follow *Danciger's* holding…."[30] Those who criticize these decisions as "ancient" are ignoring the basic rationale of stare decisis.

In a more recent case, the issue was whether the Southwestern Bell Yellow Pages itself constituted a public utility.[31] Relying in part on *Danciger,* the crucial factor the court relied upon in determining that the Yellow Pages was <u>not</u> a public utility was that it used "private contracts" to publish its advertising, thereby removing it from the realm of public utility status.[32]

The 8th Circuit of the U.S. Court of Appeals has also weighed in decisively on the side of the Landowners. In *City of St. Louis v. Mississippi River Fuel Corp.,* 97 F.2d 726

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[29] <u>Id.</u> at 268.
[30] *Hurrican Deck Holding v. Pub. Serv. Comm.,* 289 S.W.3d 260, 264 (Mo. App. 2009).
[31] *Khulusi v. Southwestern Bell Yellow Pages, Inc.,* 916 S.W.2d 227 (Mo. App. 1995).
[32] As summarized in *Osage Water Co. v. Miller County Water Authority,* 950 S.W.2d 569, 574 (Mo App. 1997)

(8th Cir. 1938), the utility (Mississippi River) sold natural gas in St. Louis to one wholesale customer, Laclede Gas, and to 14 industrial customers at retail.[33] The retail sales were all "by special contracts, entered into after negotiations with the customer."[34] The question for decision was whether the utility's operations were "for public use", within the meaning of the *Dancigar* case.

Quoting extensively from that decision, the 8th Circuit held that the utility's operations in St. Louis were not for public use. Among the findings and conclusions made by the 8th Circuit in reaching that decision were the following:

> We conclude that under Missouri law the term "for public use" as used in the ordinance under consideration, means the sale of gas to the public generally and indiscriminately, and not to particular persons upon special contract. This construction of the phrase is the one generally understood and applied.[35]
>
> To constitute a public use all persons must have an equal right to the use, and it must be in common, upon the same terms, however few the number who avail themselves of it.[36] (internal quotations marks omitted.)
>
> The sale to the Laclede Company alone is not sufficient to transform what is otherwise a private business into a public business any more than would the sale of a locomotive to a railroad company make the seller a common carrier.[37]

Under this same logic, Grain Belt's wholesale contract with MJMEUC does not turn its business into one "of public use."

Perhaps the closest decision on point here is from Illinois. That case involved the question of whether the Rock Island Clean Line (a sister line of Grain Belt) was or was not a "public utility" under Illinois law. *Illinois Landowners Alliance v. Illinois Comm.*

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[33] Id. at 728.
[34] Id.
[35] Id. at 730
[36] Id.
[37] Id.

Comm'n, 60 N.E.3d 150 2016).[38] In finding that the proposed line was not a public utility, the Court held that "A private company that provides public utility services according to its own terms and conditions does not meet the statutory definition of a public utility."[39]

Furthermore, the court found that in order to qualify as a public utility, the entity must offer its assets for public use without discrimination. But as the court concluded, the Rock Island line "is not for public use without discrimination."[40]

Finally, in reaching its decision, the Illinois appellate court relied in part on an earlier case which had found that the Mississippi River Fuel company did not qualify as a public utility in Illinois. That company sold natural gas through individual contracts with 23 private industrial retail customers, as well as to 2 public utilities which resold the gas to its retail customers. In relying on the *Mississippi River Fuel* case, the Court noted the following: the company's contracts were not based on fixed rates, and instead varied as to terms and conditions; and that the company's act of selling gas to a limited group of customers could not be characterized as "public use."[41]

Based upon these decisions, and given in particular that Grain Belt will be charging different rates to different customers under special individual contracts, that company cannot possibly qualify as an electrical corporation under Missouri law.

(2) Arguments based on statutory interpretation. In addition to case law, the Landowners contend that Grain Belt also fails to meet the statutory definition of an

[38] This case was subsequently transferred to the Illinois Supreme Court which agreed, on the basis of a second theory embraced by the Appellate Court, that the Rock Island line was not a "public utility". *Illinois Landowners Alliance v. Illinois Comm. Comm.*, 90 N.E.3d 448 (2017). The Illinois Supreme Court did not find it necessary at that time to address the question of whether the proposed line served a public use. Id. at 463, par. 51.
[39] Id. at 60 N.E.3d 159.
[40] Id.
[41] Id.

electrical corporation, as set forth in Section 386.020(14) and (15). In particular, they contend that Grain Belt does not presently own any asset which qualifies as "electric plant." If that is the case, then Grain Belt cannot qualify as an electrical corporation.

In its Report and Order on Remand in EA-2016-0358, issued March 20, 2019, the Commission found that Grain Belt did qualify as an electrical corporation on the basis of its cash holdings and its 39 easements with landowners. (Id. pp. 37-38).

The Landowners contend, first, that cash is not the type of asset which the General Assembly intended to include within the definition of "electric plant."

Electric plant, as defined in Section 386.020(14), specifically includes real estate, fixtures, personal property, conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used for transmission of electricity. Clearly, the list is intended to include assets which will become a part of the facility itself. Cash, of course, will not become a part of the physical project, and thus does not fit within the type of assets which are listed as "electric plant."

Although not precisely on point, this argument is a close cousin of a maximum used in statutory construction termed "inclusio unius est exclusio alterius": the inclusion of one is the exclusion of the other. [42] The term essentially means that when a particular item is included in a list, it is assumed that other similar items were meant to be excluded.[43]

Here, cash is not of the same nature as the other items listed within the definition of electric plant. Therefore, one may logically assume that it was not meant to be included.

[42] *City of Kansas City v. Bibbs,* 548 S.W.2d 264, 266 (Mo. App. 1977).
[43] *Holland v. Florida,* 560 U.S. 631, 648 (2010).

And the inclusion of cash or money within the definition of electric plant would lead to some strange results, no doubt beyond what the General Assembly had in mind when defining electric plant. For instance, under the Joint Applicant' definition of electric plant, $10 in a checking account which will go toward the purchase of a small back-up generator for one's home would in and of itself constitute "electric plant" under Section 386.020(14). To argue that the person owning that $10 is now the owner of electric plant, without anything further, certainly does not square with the common assumption about the meaning of electric plant.

And based upon the Joint Applicants' logic, if the person using that $10 for the back-up generator agreed to sell emergency power to his or her neighbor for say a share of the cost of the fuel, that individual would instantly become an "electrical corporation" under the terms of subsection (15) of that statute. This in turn would make that unsuspecting person subject to all of the Commission reporting requirements applicable to other electrical corporations. In addition, the new one-person electrical corporation would seemingly be subject to all other statutes not even in the Public Service Commission laws which make reference to public utilities – such as those dealing with tax assessments.

As to the 39 easements, the Landowners contend they do not constitute electric plant for two reasons. First, by definition, Grain Belt does not "own" the property on which it has an easement. *Southern Star Central Gas Pipeline v. Murray*, 190 S.W.3d 423, 430 (Mo. App. 2006) (stating that "As a general rule a party holding an easement with a right to use the land for a particular purpose does not hold title to the property

affected by that easement. An easement, strictly speaking, does not carry any title to the land over which it is exercised.") (Internal quotation marks and citation omitted).

Therefore, the only issue is whether Grain Belt "controls" the real estate on which it has those easements. The standard form easement agreement used by Grain Belt generally gives it the right to build and repair the proposed transmission line, including support structures, on the property for which it has the easement. Specifically, "The Easement will be used for the transmission of electric energy, whether existing now or in the future, in order to deliver electrical energy and for all communication purposes related to delivering electrical energy." (See par. 2.b of the standard easement agreement used by Grain Belt at Schedule DKL-4 to the direct testimony of Deann Lanz, EA-2016-0358, included at Exhibit 10).

So Grain Belt has no control over the property on which it has an easement until it actually begins to construct the proposed transmission line in Missouri. It obviously has not done so at this point, and thus the easement agreement used by Grain Belt gives it no present control over how the property may be used by the landowner. Therefore, the 39 easements cannot help to qualify Grain Belt as an Electrical Corporation until, at best, it actually begins construction of the proposed line.

In fact, theoretically there is nothing in the easement which would prohibit the landowner from building a new home on the middle of the easement, because at this point the structure would not interfere with Grain Belt's use of the easement.[44]

In addition, the easements in question do not include the provisions which the Commission required to be included in landowner easements in its Report and Order on Remand in EA-2016-0388, under the provisions for "conditions". (See Report and

[44] See paragraph 4 of the easement, at Exhibit 10.

Order, p. 52, items 8 and 9; testimony of Mr. Detweiler, Tr. 52; and standard form easement at Exhibit 10). Mr. Detweiler testified that the Agricultural Protocol will be incorporated into future easements going forward, but made no mention of attempting to rectify the defect in the 39 existing easements. (Tr. 77).

Therefore, those 39 easements are not presently in compliance with the mandate of the Commission's Report and Order, and thus are not enforceable by Grain Belt against anyone signing such an easement. Those easements are meaningless documents, and as such cannot constitute electric plant.

Although not even mentioned in the Commissions final Order, Grain Belt also argued in the CCN case that the consents it had from two county commissions pursuant to Section 229.100 amount to "franchises". And franchises, they insist, fall within the definition of "electric plant."[45] In making this argument, Grain Belt has totally reversed its position on the meaning and effect of the county consents.

In a proceeding in the circuit court of Caldwell County, Grain Belt had this to say about the relationship between county consents and franchises: "Grain Belt Express denies that 'franchise' is an accurate or proper description for the authority that a county may grant under Section 229.100 …."[46] Grain Belt later made the identical claim in a proceeding in the circuit court of Monroe County.[47]

And it its brief to the Commission in EA-2016-0358, Grain Belt reiterated its position that the statute dealing with county commission consents is <u>not</u> a "franchise statute." [48]

[45] Grain Belt's Initial Post-Hearing Brief on Remand, EFIS 735, p. 11.
[46] Exh. 15C Sch. 5, page 5; Exh. 16, item 5.
[47] Exh. 15C Sch. 6, page 5; Exh. 16, item 6.
[48] Exh. 15C Sch. 9, p. 20, first full par.

Later, the same issue was raised in an appeal of the 2016 CCN case at the Eastern District of the Missouri Court of Appeals. The MLA argued in that case that the county consents did amount to franchises. Grain Belt responded that the MLA's position "is at odds with historical understanding and application of the term 'franchise' in the CCN statute, which is understood to be PSC (not local) permission to provide utility service to a specific area.[49] The MLA's position was further dismissed by Grain Belt as a "flawed interpretation of "franchise'"[50] Presumably, Grain Belt no longer views that position as flawed.

In any event, the decision from the Court of Appeals was transferred to the state Supreme Court. The MLA's primary point on that appeal was that the county consents granted under Section 229.100 did constitute franchises, and thus under the CCN statute those franchises were prerequisites to the issuance of a CCN.[51]

If the Supreme Court had agreed that the county consents were indeed franchises, it would have had little choice under the CCN statute (Section 393.170.2) but to rule in the MLA's favor. The fact that it did not do so clearly indicates that it rejected the MLA's initial position on this issue.[52] In other words, the court must have found by implication that the county consents do not amount to franchises. This logic is in accord with the general rule that "what is contemplated in an opinion by necessary implication is equivalent to that which is clearly and expressly stated."[53]

[49] Exh. 15C Sch. 7, pp. 7-8; Exh. 16, item 7.
[50] Id.
[51] Exh. 15C Sch. 8, Argument I; Exh. 16, item 8.
[52] *Grain Belt Express Clean Line, LLC v. Pub. Serv. Comm'n,* 555 S.W.3d 469 (2018).
[53] *Frost v. Liberty Mutual Ins. Co.,* 813 S.W.2d 302, 305 (Mo banc 1991).

Accordingly, based on the Supreme Court's decision, and Grain Belt's own declarations on the issue, the Landowners respectfully submit that the county consents do not constitute franchises, and thus do not qualify as electric plant.[54]

Finally, Grain Belt argued in the CCN case that its option to purchase the land for the Ralls County converter station also qualified as electric plant.[55] However, Grain Belt has since allowed that option to expire without being exercised. (Tr. 57)

With reference to all of Grain Belt's arguments concerning its status as a public utility, Grain Belt itself has clearly recognized throughout the 2014 and 2016 CCN proceedings that it really was not an electrical corporation or a public utility. This contention is based on the fact that a number of Commission rules require that such entities file certain reports and other information with the Commission on a regular basis.

For example, as mandated by Section 393.140(6) RSMo, Commission Rule 4 CSR 240-10.145[56] requires every "electric utility" to file an "annual report" with the Commission.[57] There are no exceptions in that rule for electrical corporations which are not yet operational. By its very terms, it applies to <u>all</u> entities which meet the definition of an electrical corporation. (See rule itself at 240-10.145).

Grain Belt's own financial statements include information which, according to Staff witness Ms. Dietrich, would normally appear in an electric utility's annual report to

[54] The MLA now has no choice but to agree with the implicit holding by the Supreme Court that the county consents do not constitute franchises.
[55] Grain Belt's Initial Post-Hearing Brief on Remand, EFIS 735, p. 10
[56] This rule has since been renumbered as 240-10.145. See GBE's response to Show Me data requests G1 at fourth page of Exhibit 9.
[57] "Electric utility", as used in Chapter 3, means "an electrical corporation as defined in section 386.020(15) RSMo." See 4 CSR 240-3.010(10).

the Commission.[58] However, over the past 5 years or so Grain Belt did not once file an Annual Report.[59]

Similarly, Rule 4 CSR 240-3.175(1) states that each electric utility (i.e., each electrical corporation) must file a detailed depreciation study with the Commission Staff and the Office of Public Counsel. Again, there is no exception to this rule for utilities which are not yet operational. It applies by its terms to all electrical corporations. But again, Grain Belt never submitted such a study.[60]

The data requests at Exhibit 9 inquired about Grain Belt's compliance with other reporting rules of the Commission as well. In general, the response from Grain Belt was similar to its response to the two data requests already discussed above: that the referenced rules do not apply to Grain Belt, and that the information was therefore not filed.[61] And Grain Belt concedes it did not receive a waiver, variance or exemption for any of these reporting requirements.[62]

So by now saying that the rules applicable to electrical corporations do not apply to Grain Belt, despite any language in the rules to support that contention, Grain Belt implicitly concedes that it was not an electrical corporation as that term is used in the CCN statute.[63] And if Grain Belt was not an electrical corporation at the time the Commission issued its Report and Order on March 20, 2019, the Landowners respectfully contend that the Commission had no authority to grant the CCN to Grain Belt.

[58] Tr. 133 line 21 – Tr. 134 line 17.
[59] See Grain Belt's response to data request G1 at fourth page of Exhibit 9.
[60] Id. at response to data request G9.
[61] See Grain Belt's responses to the data requests, beginning at the fourth page of Exhibit 9; and Tr. 49 line 23 – Tr. 50, line 3.
[62] Exhibit 9, response to data request G28.
[63] Section 393.170.

Perhaps the strongest support for the Landowners' position on the jurisdictional issue in this case (EM-2019-0150) again comes from Grain Belt itself. In the 2016 CCN proceedings, the MLA proposed a condition to the CCN which involved Commission approval for any subsequent sale of Grain Belt.[64]

Grain Belt summarily dismissed the MLA's proposal. Although Section 393.190 specifically applies to the sale of assets by an "electrical corporation", Grain Belt's position was emphatic and unambiguous: "there is also no basis for this Commission to approve the sale of assets under Section 393.190 for a company like Grain Belt Express which will provide wholesale transmission service by means of an interstate transmission line pursuant to market-based rates overseen by FERC."[65]

With this statement, Grain Belt has expressly conceded the point being made here by the Landowners: that the Commission has no authority under Section 393.190 to approve the proposed sale.

Section 3. Even if Grain Belt is an electrical corporation, the Commission still lacks the jurisdiction and statutory authority to approve the sale under Section 393.190 because the sale does not transfer any assets of Grain Belt which are "necessary or useful in the performance of its duties to the public."

As it is relevant to the point at issue, Section 393.190.1 reads as follows:

> No … electrical corporation … shall hereafter sell … or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public … without having first secured from the commission an order authorizing it so to do. (emphasis added)

Here, Grain Belt is not presently providing any service at all to the public. Therefore, by definition, it has no assets which currently are "necessary or useful in the

[64] MLA's Initial Post-Hearing Brief, EFIS 537, p. 82; also noted in Grain Belt's Brief at Exh. 15C, Schedule 3, p. 43.
[65] Reply Brief of Grain Belt, p. 43, included at Exhibit 15C, Schedule 3, p. 43.

performance of its duties to the public." Accordingly, the proposed sale of Grain Belt to Invenergy does not fall within the Commission's jurisdiction or statutory authority under Section 393.190.

Mr. Zadlo confirmed the obvious, when he testified in this case that none of Grain Belt's assets are necessary or useful in currently supplying electric service to the public. Instead, those assets are intended to provide service sometime in the future.[66]

As the Court of Appeals has said, Commission approval under Section 393.190 must be obtained "before a utility can sell assets that are necessary or useful in the performance of its duties to the public…."[67] Since there are no such assets in this case, no such approval is needed or authorized.

As the Court went on to note, "The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility."[68] Accordingly, the purpose of Section 393.190 cannot be effectuated where there is no service which would be continued after the sale.

Support for this position is also found in *State ex rel. Martigney Creek Sewer Co. v. Pub. Serv. Comm'n,* 537 S.W.2d 388, 399 (Mo banc 1976), where the court stated as follows: "The sale, transfer, or disposition of a sewer utility's franchise, works, or system … used or useful in the performance of its duties to the public is subject to control by the PSC (sec. 393.190) …." By implication, the sale of a utility's system <u>not</u> used or useful in the performance of its duties to the public is not subject to control by the PSC.

Similarly, in *Spire Missouri, Inc. v. Pub. Serv. Comm'n,* No. SD35549, (Mo. App. March 15, 2019), slip op. p. 27, f.n. 9, the Court stated as follows: "Utilities are

[66] Tr. 100 line 2 – Tr. 101 line 1,
[67] *State of Missouri ex rel. Fee Fee Trunk Sewer, Inc. v. Litz,* 596 S.W.2d 466, 468 (Mo. App. 1980)
[68] <u>Id.</u>

required to obtain PSC approval for the sale of assets that are necessary to the provision of the service they provide." (emphasis added, but emphasis was added by the Court to the comparable language in the actual statute. Slip Op. p. 21) Again, it follows that no such consent is authorized by the statute for the sale of facilities not used in providing service to the public.

Furthermore, if the statute obligates the Commission to authorize the sale or transfer of assets not currently used by a utility in the performance of its duties to the public, the result would be unmanageable. It would mean, for example, that every time a regulated utility wished to sell or even donate any individual piece of obsolete equipment, the utility would be obligated to apply to the Commission for permission to do so. That certainly cannot be what the General Assembly contemplated here.

Nor do there appear to be any cases where the Commission has approved such a sale in the past. Accordingly, if the Joint Application here is granted, it would apparently be the first and only time the Commission has approved the sale of assets which are not even used in providing service to the public.

The bottom line is that there is no statute in Missouri which authorizes the Commission to approve the sale of utility facilities which are not necessary or useful in the performance of a utility's duties to the public. Accordingly, on this ground alone the Joint Application must be dismissed for lack of jurisdiction and statutory authority on the part of the Commission to approve the proposed sale.

Section 4. The Landowners jurisdictional arguments under Section 2 above do not constitute an impermissible collateral attack on the Commission's Report and Order on Remand in EA-2016-0358.

In their Position Statements, Staff and MJMEUC claim that the Landowners' arguments regarding the lack of Commission jurisdiction in this case constitute an improper collateral attack on the Commission's Report and Order in the CCN case, number EA-2016-0358. They contend, therefore, that the jurisdictional issue should not even be addressed in this case.[69]

Before discussing the merits of that argument, the Landowners would first note that the "collateral attack" allegation is totally unrelated to the Landowners' argument in Section 3 above, where they contend that the proposed sale would not transfer any assets of Grain Belt which are "necessary or useful in the performance of its duties to the public." That particular issue was not even remotely addressed by the Commission in the CCN case, and thus the Landowners argument in Section 3 cannot possibly constitute a collateral attack on that order. At best, the argument from MJMEUC and Staff on this matter would go to the issues raised by the Landowners' in Section 2 above. Thus if the Commission accepts the Landowners' argument in Section 3, everything else is moot.

For the reasons discussed below, the Landowners' contend that their arguments in Section 2 do not constitute an impermissible collateral attack on the Commission findings in EA-2016-0358 that Grain Belt was an electrical corporation, thereby giving the Commission the statutory authority to grant the CCN.

First, it is established law that the lack of subject matter jurisdiction may be challenged at any time, even on an appeal.[70] So it makes little sense to argue that the

[69] MJMEUC Position Statement, p. 2; Staff's Position Statement, p. 1. In a related argument, the Joint Applicants contend that "This issue has already been decided by the Commission in the CCN proceeding and need not be re-litigated in the present case." Position Statement of Joint Applicants, p. 5.
[70] *McCraken v. Wal-Mart Stores*, 298 S.W.3d 473, 476 (Mo banc 2009) (stating that "Lack of subject matter jurisdiction is not subject to waiver; it can be raised at any time, even on appeal.")

Landowners may not raise the jurisdictional issue in this case before the Commission, but could do so if the issue here is taken up on appeal.

Second, it is also settled law that the Commission is not bound by its own prior decisions.[71] The logical and perhaps only means for a party to ask the Commission to reexamine an earlier position is to question that ruling in a subsequent case. That is exactly what the Landowners are doing here: asking the Commission to reconsider its findings in the CCN case to the effect that Grain Belt was an electrical corporation before the CCN was issued.

Moreover, the Landowners respectfully suggest that they have produced additional evidence in this case which was not considered in the CCN case. Specifically, that Grain Belt in effect conceded it was not an electrical corporation by failing over the years to file information required to be filed with the Commission by such corporations; and the fact that the 39 easements relied upon by the Commission in the CCN case are no longer valid or enforceable.

Finally, the Landowners' position on this issue is strongly supported by a case from the Western District, *Stopaquila.org. v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005) . That case was somewhat complicated, involving a number of different issues. But as it relates to the matter at hand, the facts are fairly straight-forward. In 2004, Aquila began construction of an electric generating plant and substation in an area within its certified service territory, but without securing a CCN for that specific project.[72] Opponents of the line sought an injunction in circuit court to stop construction, and that

[71] *State ex rel. MO Gas Energy v. PSC,* 186 S.W.3d 376, 390 (Mo. App. 2005).
[72] Id. at 28.

court ruled in their favor on the ground, *inter alia*, that Aquila was required to secure a CCN for generating plants even within its certified service area.[73]

After filing an appeal of that decision, Aquila filed an Application with the Commission, asking that the Commission rule that Aquila did not need a CCN for a new plant within its service territory, or alternatively, to grant a CCN for the new project.[74]

On April 7, 2005, the Commission issued an order confirming that Aquila had the right, even without an additional CCN, to build a new generating facility within its service territory.[75] Accordingly, the Commission found that a new CCN was unnecessary, and thus was not issued.

On appeal to the Western District, Aquila raised a number of arguments as to why the case against it should be dismissed. One such argument was based on a 1980 Commission decision which held (albeit in dicta) that a CCN was not necessary where the generating facility was to be built within the utility's existing service territory. *Union Electric Co.*, 24 Mo. P.S.C. (N.S.) at 79 (1980). Based upon this decision, the practice for the next 25 years was for utilities to build generating plants within their service territories without further need of Commission approval.[76]

Based on this *Union Electric* decision, as well as the Commission's decision from April 7, 2005 confirming that ruling, Aquila argued that the opponents' case amounted to a collateral attack upon the various Commission decisions finding that a CCN was not needed for a new generating project built within the utility's service territory.[77]

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[73] Id.
[74] Id. at 27.
[75] Id.
[76] Id. at 37.
[77] Id. at 39.

But the Court was having no part of Aquila's argument about a "collateral attack" on prior Commission orders. Instead, the Court held as follows:

> By ruling that existing CCNs, which simply recognize Aquila's general authority to build power plants in its territory, the Commission has effectively sidestepped the requirements of Section 393.170.1 [the CCN statute.] The Commission asserts in its April 7 order that all of its previous orders and certificates are conclusive and free from collateral attack. The courts, however, have stated that limiting the authority granted under Commission orders does not constitute a collateral attack on those orders. Such limitation in no way questions the validity of the original order. Interpretation of an order necessarily acknowledges its validity and does not constitute a collateral attack.[78] (internal quotation marks and paragraph indentation omitted.)

Similarly, in this case the Landowners are not questioning the actual validity of the decision in the CCN case. That would be done, if at all, in a different forum. Instead, they are seeking here to dissuade the Commission from once again "sidestepping" the statutory requirements of Section 393.170.

Accordingly, the arguments raised in Section 2 above do not amount to an impermissible collateral attack on the Commission's CCN order. The Landowners are simply asking that the jurisdictional issue there be reconsidered and reinterpreted in this case, in light of the arguments made herein.

Section 5. Conclusion**.** For the reasons set forth above, the Landowners respectfully contend that the Commission lacks subject matter jurisdiction and the statutory authority to approve the joint application for the sale of Grain Belt to Invenergy. That joint application must therefore be dismissed or denied.

[78] Id. at 39.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by electronic mail upon counsel for all parties this 6th day of May, 2019.

/s/ Paul A. Agathen
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