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

JOINT APPLICATION FOR REHEARING OF
THE EASTERN MISSOURI LANDOWNERS ALLIANCE
DBA SHOW ME CONCERNED LANDOWNERS,
AND CHRISTINA REICHERT

Come now the Eastern Missouri Landowners Alliance D/B/A Show Me Concerned Landowners ("Show Me"), and Christina Reichert (together, the "Applicants"), pursuant to Section 386.500 RSMo and 4 CSR 240-2.160, and for the reasons set forth below respectfully contend that the Commission's Report and Order on Remand, which was issued in this proceeding on March 20, 2019 ("Report and Order"), was unjust, unreasonable, and unlawful. Accordingly, they respectfully apply for rehearing of that Report and Order on the grounds set forth below.

1. Grain Belt Express Clean Line LLC ("Grain Belt") is seeking a Certificate of Convenience and Necessity ("CCN") from the Commission pursuant to Section 393.170. That statute provides in relevant part that no "electrical corporation" shall begin construction of an "electric plant" without first obtaining the permission of the Commission.

Subsection (15) of Section 386.020 defines an electrical corporation as follows:

> "Electrical corporation" includes every corporation, company, association, joint stock company or association, partnership and person, their lessees,

> trustees or receivers appointed by any court whatsoever … owning, operating, controlling or managing any electric plant ….

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And subsection (14) of that same statute defines "electric plant" to include certain specified property "operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power;"

Regardless of the statutory definition of an "electrical corporation", Missouri case law holds that in order to be considered an electrical corporation or a public utility under the jurisdiction of the Commission, the entity must serve or otherwise hold itself out to indiscriminately provide electric service to the general public. *See, e.g., State ex rel. M. O. Danciger & Company v. Pub. Serv. Comm'n,* 205 S.W. 36, 40-42 (Mo. 1918) ("*Danciger")*; *Palmer v. City of Liberal,* 64 S.W.2d 265, 268 (Mo. 1933). Grain Belt does not propose to indiscriminately provide electric service to the general public. For example, it will not be selling capacity on its line to any residential customers, or to any commercial customers such as Wal-Mart. Accordingly, under Missouri case law it fails to qualify as an "electrical corporation". *See also Illinois Landowners Alliance v. Illinois Commerce Commission,* 60 N.E.3d 150, 158-160 (App. Ct. of IL, Third District, 2016).[1]

Moreover, if Grain Belt were to be deemed an electrical corporation under the CCN statute (Section 393.170) then it must necessarily be an electrical corporation under all of the other provisions in the Public Service Commission law as well. *Danciger at 40.* For example, it would be subject to the statutes which grant rate-making authority to the

[1] On transfer of this case, the Illinois Supreme Court ruled against Clean Line for a different reason, and thus found there was no need to reach the issue of whether the line also failed the "public use" requirement relied upon in part by the Illinois appellate court. *Illinois Landowners Alliance v. Illinois Commerce Comm'n,* 90 N.E.3d 448, 463 (IL 2017).

Commission over electrical utilities. But since Grain Belt agrees that its rates would be regulated by the FERC, it is inherently conceding that it is not an electrical corporation subject to the jurisdiction of the Commission under the CCN statute.

2. In addition to the rationale of *Danciger*, Grain Belt is not an electrical corporation falling within the jurisdiction of the Commission for a second reason as well.

As indicated above, an electrical corporation is defined by statute as an entity "owning, operating, controlling or managing any electric plant…." The operative verbs there are all in the present tense, so Grain Belt must have met those requirements before the CCN was issued, not at some later point in time. And there is no credible evidence in the record that Grain Belt does presently own, operate, control or manage any real estate or other property falling within the definition of electric plant.

The Commission found that Grain Belt "has cash on hand" (Order, par. 48), which the Commission then relies upon (in part) to justify its finding that Grain Belt meets the statutory definition of an electrical corporation. (Report and Order, p. 37-38). In support of its finding that Grain Belt has cash on hand, the Commission relied on a statement made by Mr. Berry in cross-examination to the effect that they had cash on hand, but not enough to get through the development phase. (Report and Order par. 48 and f.n. 68, citing the cross-examination of Mr. Berry at Tr. 1921-22).

However, it is clear from Mr. Berry's statement at the cited pages of the transcript, that he was responding there to a follow-up question in which he was referring to cash held by Clean Line, not Grain Belt. (Tr. 1913 line 14 – 1914 line 14). According, there is no evidence in the record which would justify a finding that Grain Belt itself (the

entity seeking the CCN) had cash at any point during these proceedings. The Commission's finding to the contrary was therefore unreasonable.

In addition, the Applicants contend that the General Assembly could not possibly have meant that cash alone could qualify an entity as an "electrical corporation." If it could, then any individual with $25 in a checking account and a vague plan for future construction of say a small wind turbine could qualify as an "electrical corporation."

Finally, on this point, cash simply does not fit the type of asset enumerated in Section 386.020(14) when defining electric plant. Cash, unlike the other assets listed, is at best "intangible" property, which of itself will not be a component part of the proposed transmission line.

In finding that Grain Belt does qualify as an electrical corporation, the Commission also cited the fact that Grain Belt has 39 easements from landowners. (Report and Order, p. 37). However, these easements do not mean that Grain Belt presently "owns" or "controls" any "real estate", 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 "controlled" the real estate on which it had an easement at the time the Commission granted the CCN. The standard form easement agreement used by Grain Belt generally gave it the right to build and

repair the proposed transmission line, including support structures, on the property for which it had 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, EFIS 39).

So Grain Belt clearly had no control over the property on which it had an easement until, at the earliest, it had the right to use the easements for building the proposed line. Until that point, the easement agreement used by Grain Belt gave it no control over how the property could be used by the landowner. Therefore, the 39 easements could not have qualified Grain Belt as an Electrical Corporation until sometime after it was granted the CCN by the Commission.

Second, the 39 easements in question do not include the provisions which the Commission required to be included in landowner easements in its Report and Order, under the provisions for "conditions". (See Report and Order, p. 52, items 8 and 9; and see standard form easement which had been used by Grain Belt in securing those 39 easements, at Schedule DKL-4 to Direct Testimony of Deann Lanz, EFIS 39).[2] Therefore, the easements which Grain Belt held prior to the time the Report and Order was issued do not comply with the Commission's requirements for landowner easements. Accordingly, those easements give Grain Belt no right to build the line on the property covered by the 39 easements in question. At this point, they are a mere nullity.

[2] For example, the Missouri Landowners Protocol essentially states that the property subject to the easement may be used for any purpose so long as it does not interfere with the operation of the transmission line. Page 5 of Schedule DKL-1 to testimony of Deanne Lanz, supra. And notably, this provision does not state that Grain Belt is given any right to manage or control the property in question.

For the above reasons, it was unlawful and unreasonable for the Commission to find that those 39 existing easements constitute "electric plant", qualifying Grain Belt as an electrical corporation.

Based on language substantially similar to Missouri's subsections (14) and (15) of Section 386.020, the Illinois Supreme Court held that a sister line of Grain Belt did not qualify as a "public utility" essentially because it did not (in the present tense) own, control, operate or manage any electric plant. *Illinois Landowners Alliance, NFP v. Illinois Commerce Commission*, 90 N.E.3d 448, ¶s 37-42 (IL 2017). There is no substantive ground for distinguishing that case from the Grain Belt situation here.

4. Because Grain Belt is not now and never has been an "electrical corporation" in Missouri, as discussed above, the Commission did not have jurisdiction to grant Grain Belt a CCN under Section 393.170. Lacking any jurisdiction over the subject matter of the Application, and any statutory authority to grant the CCN to Grain Belt, the Report and Order was unlawful and unreasonable.

5. A condition precedent to the sale of Grain Belt Express to Invenergy Transmission LLC is that this Commission approves that sale at some point prior to closing. (Supplemental Direct Testimony of Kris Zadlo, Exh. 145, pp. 3-4) However, because Grain Belt is not an electrical corporation (as discussed above), the Commission will lack the jurisdiction to approve that sale under the applicable statute: Section 393.190 RSMo.

Because this condition for the sale of Grain Belt to Invenergy cannot lawfully be satisfied, all decisions regarding the grant of the CCN to Grain Belt should have been made without reference to or reliance upon the future sale of the Grain Belt project to

Invenergy and/or Invenergy Transmission. By inherently assuming that the sale would be closed at some later point, and thereby relying on the resources of Invenergy to complete the project, the grant of the CCN to Grain Belt was unlawful and unreasonable.

6. In its Report and Order, the Commission rejected Show Me's motion to submit a post-hearing affidavit showing that Grain Belt had failed to exercise its option to purchase the land for the Ralls County Converter Station. (Report and Order, pp. 49-50). The rationale for that ruling was that information relating to the expiration of the option was already in the record prior to submission of Show Me's Motion, and that Show Me therefore had every opportunity to make arguments and present further evidence related to this option agreement at the remand hearings held on December 18-19, 2019.[3]

This conclusion is unjust and unreasonable. The option did not expire until January 29, 2019, or more than a month after the hearings on remand.[4] Therefore, any argument at those hearings on Show Me's part that the option might not be exercised would no doubt have been rejected or ignored on the ground that it was pure speculation – which indeed it would have been. Even the reply briefs were not submitted until January 9, 2019. Accordingly, while the record in this case was still open, Show Me could not logically and in good faith have raised the issue that the option would not or might not be exercised. That was a matter totally within Grain Belt's control. Show Me did all that it could under the circumstances, by notifying the Commission as soon as practicable that the option had expired.

[3] Report and Order p. 50. In support of this conclusion the Report and Order at page 50, footnote 180, cites Exh. 116, Schedule MOL-14 of Mr. Lawlor's surrebuttal testimony. Actually, that exhibit and Schedule were submitted in the earlier CCN case, No. EA-2014-0207, EFIS 241.

[4] See Motion of Show Me to offer additional exhibit, EFIS 755, Exh. 1 and Exh. 2, the latter of which was the document relied upon by the Commission in its Report and Order at page 50, f.n. 180, as discussed in footnote 3 hereto.

WHEREFORE, for the reasons set forth above, Show Me and Christina Reichert respectfully request that the Commission make and enter its order granting rehearing of its Report and Order of March 20, 2019 with respect to each of the grounds set forth in this Application.

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 14th day of April, 2017.

/s/ Paul A. Agathen
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