

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Landowners Alliance, and)
Eastern Missouri Landowners Alliance)
DBA Show Me Concerned Landowners, and)
John G. Hobbs,)
)
Complainants,)
)
V.)
)
Grain Belt Express LLC, and)
Invenergy Transmission LLC)
)
Respondents.)

Case No. EC-2021-0059

JOINT MOTION FOR CLARIFICATION AND SUSPENSION OF REQUIREMENT TO FILE
PROCEDURAL SCHEDULE

The Staff of the Missouri Public Service Commission (“Staff”), Missouri Landowners Alliance, Eastern Missouri Landowners Alliance, d/b/a Show-Me Concerned Landowners, and John G. Hobbs (together, “Complainants”), and Invenergy Transmission LLC (“Invenergy Transmission”), together with Grain Belt Express LLC (“Grain Belt” and together with Invenergy Transmission, the “Respondents”) (Staff, Complainants and Respondents collectively, the “Joint Movants”), hereby file this Joint Motion for Clarification and Suspension of Requirement to File Procedural Schedule. In support of this Joint Motion, Joint Movants state the following:

I. Background

1. On September 2, 2020, Complainants filed a Complaint with the Missouri Public Service Commission (the “Commission”) alleging that Respondents’ contemplated changes to the Grain Belt Express Project (the “Project”), as discussed in a website posting and press release, 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 29, 2020, Complainants, Respondents, and Staff filed a Joint Motion to Suspend Deadlines and Establish a Briefing Schedule (“Original Joint Motion and Stipulation”). The Original Joint Motion and Stipulation stated that the Parties agree that “the Complaint is limited to a legal question that can be resolved without Staff undertaking an investigation into the Complainants’ allegations and that would be more appropriately addressed through briefs...”¹ The Original Joint Motion and Stipulation identified the singular legal issue as “whether Respondents’ contemplated changes to the Project invalidate the CCN granted to Grain Belt in the CCN case.”²

3. The Commission partially granted the Joint Motion, establishing a briefing schedule on the question of “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.” On October 23, 2020, the Parties filed Initial Briefs on the question identified by the Commission and on October 30, 2020, the Parties filed Reply Briefs.

4. On December 16, 2020, the Commission issued an Order Directing Additional Briefing. The Order did not rule on whether the Complaint states a cause of action for the invalidation of Grain Belt’s CCN. Rather, the Order directed the Parties to file additional briefs addressing the following questions:

- (1) Does the Respondents’ conduct, as described in the pleadings and stipulation, violate the Report and Order on Remand issued in File No. EA-2016-0358?
- (2) Whether Respondents’ contemplated changes to the Project invalidate the CCN granted to Grain Belt by the Report and Order on Remand issued in File No. EA-2016-0358?

¹ Joint Motion to Suspend Current Deadlines and Establish a Briefing Schedule, ¶ 3.

² *Id.* at ¶ 5(g).

(3) Based upon the conduct, as described in the pleadings and stipulation, may the Commission revoke Respondent's CCN issued by the Report and Order on Remand issued in File No. EA-2016-03588?

5. On the same day as the Order Directing Additional Briefing, the Complainants propounded a set of nine data requests to Respondents. On December 17, 2020, the Complainants filed a Motion to Revise Procedural Schedule ("Complainants' Motion"), requesting suspension of the established briefing schedule until final resolution of the set of nine data requests, which Complainants attached to Complainants' Motion.

6. On December 18, 2020, the Commission issued an Order Shortening Response Deadline, and on December 22, 2020, Respondents filed their Response to Complainants' Motion to Revise Procedural Schedule. Thereafter, on December 23, 2020, the Commission issued its Order Cancelling Briefing Schedule and Directing Filing. The Commission determined that, based upon all of the pleadings filed in this case, it appears unlikely that the current procedural proposals will lead to a disposition of this case on briefs without an evidentiary hearing. Accordingly, the Commission cancelled the briefing schedule and directed the parties to file a procedural schedule, including an evidentiary hearing and post-hearing briefs, no later than January 4, 2020.

7. On December 31, 2020, counsel for Staff, Complainants, and Respondents convened a conference call to discuss a potential procedural schedule, pending discovery issued by Complainants, and the appropriate scope of the evidentiary hearing. During these discussions, it became apparent that the Parties disagree upon the scope and purpose of the evidentiary hearing. Complainants assert that all pending discovery disputes must be resolved prior to an evidentiary hearing, and Respondents submit that the discovery requests issued by Complainants on December 16, 2020, December 28, 2020 and December 31, 2020 impermissibly expand the scope of issues

beyond those contained in the original Complaint and beyond the questions set forth in the Commission's Order Directing Additional Briefing, and are thus irrelevant.

8. Absent an agreement regarding the appropriate scope and purpose of the evidentiary hearing, and rather than subjecting the Commission to motions to compel and responses thereto, the Parties concluded that it would be more efficient to request that the Commission first clarify the scope of the evidentiary hearing. Accordingly, Joint Movants agreed to file this Joint Motion requesting that the Commission suspend the Parties' obligation to file a proposed procedural schedule no later than January 4, 2021, and further requesting that the Commission clarify the scope of the evidentiary hearing. In doing so, the Commission could potentially eliminate the need to resolve some or all of the disputes related to discovery requests. Once the Commission determines the scope of the evidentiary hearing, the Parties agree to immediately confer and propose a procedural schedule for the Commission's consideration.

9. Set forth below are the Parties' respective arguments concerning the appropriate scope of the evidentiary hearing, and the Parties respectfully request that the Commission make a determination regarding scope based upon the Parties' assertions and the Commission's assessment of what evidence it requires to render a decision regarding the allegations in the Complaint. The inclusion of the arguments below in this Joint Motion does not indicate any party's agreement with the arguments of any other party, unless otherwise specifically noted.

II. Argument

A. Complainants' Statement of Scope of the Evidentiary Hearing

For their statement regarding the scope of the Evidentiary Hearing, Complainants state as follows:

1. The scope of the evidentiary hearing should be the same as in virtually every other case: to allow the parties to submit all available, relevant evidence in support of its position on any of the issues before the Commission. In this instance, that would include any relevant evidence obtained by Complainants in answer to their pending data requests.

2. The issue here had its genesis in the joint Motion submitted by the parties on September 29, 2020.³ In it, the parties agreed to present the case to the Commission on the basis of briefs.⁴ That in effect meant that the evidence before the Commission concerning Respondents' intentions with respect to abandoning the original project was limited to what Respondents said in a website posting, and in their press release of August 25.⁵

3. It seems fair to say that the Commission was not content to decide this case on the basis of those statements alone. After the briefs were filed pursuant to the joint Motion of September 29, the Commission issued an Order on December 16 which stated that “[i]f any party believes additional evidence needs to be presented to fully respond to this order, that party may request such relief as the party deems necessary.”⁶

4. In response to that Order, Complainants filed a Motion the following day asking that the then-current briefing schedule be revised, allowing time for Complainants to produce additional evidence related to their contention that Respondents have already abandoned the original transmission project.

³ All date citations are to 2020.

⁴ Joint Motion to Suspend Current Deadlines and Establish a Briefing Schedule, September 29, par. 6.

⁵ See Commission's "Order Directing Additional Briefing", pp. 1-2, issued December 16.

⁶ Order, p. 3.

5. In support of that Motion, Complainants attached a set of nine data requests which they argued would be relevant to Respondents' intentions concerning the abandonment of the original transmission project. A copy of Respondents' Objections and Responses to those data requests is attached to this joint filing as Complainants' Exhibit A. That document objects on numerous grounds to providing copies of any of the requested correspondence, including that between Respondents and the state officials from Kansas who are quoted in Respondents' August 25 press release.⁷

6. On December 22, Respondents filed what amounted to an objection to Complainants' Motion of December 17. Despite such objections, on December 23, the Commission issued an Order finding it "unlikely that the current procedural proposals will lead to a disposition of this case on briefs without an evidentiary hearing."⁸

7. It seems apparent that in ordering an evidentiary hearing, the Commission must have anticipated the possibility that evidence would be introduced beyond that included in the press release. Otherwise, why bother with an evidentiary hearing? The significance of the press release had already been fully briefed by the parties in response to the Commission's Order of October 5.⁹

8. The only other potentially relevant evidence cited by any of the parties thus far would be that which may be produced in answer to Complainants' data requests. In determining

⁷ Complainants subsequently submitted a second and third set of data requests, with a total of 14 items. They also withdrew items 5 and 6 from the first set of data requests related to correspondence to and from Invenergy's Mr. Zadlo.

⁸ Order, p. 2.

⁹ See Initial Briefs filed by the parties on October 23, and Reply Briefs filed on October 30.

Respondents' actual intent with respect to the original project, that evidence could potentially dwarf in importance the material volunteered in their press release.

9. Complainants' position regarding the scope of the evidentiary hearing does not in any sense expand the basis of the original Complaint. It merely allows for additional evidence in support thereof.

10. Complainants' position here does envision the submission of evidence not contemplated in the parties' Joint Motion of September 29, 2020.¹⁰ However, the possibility of submitting additional evidence regarding the abandonment of the original project was raised by the Commission itself. If the parties' initial suggestion to forego an evidentiary hearing did not suit the needs of the Commission in resolving this case, then the Commission obviously had every right to permit the introduction of additional evidence. In principle, that is not unlike the traditional practice of Commissioners asking questions of witnesses during an evidentiary hearing, in order to obtain information which the parties had not produced themselves.

11. In reaching a decision here, the Commission should at least have access to the information regarding the project which Respondents shared with the state officials from Kansas.

12. After all, Respondents have told the Commission that the press release was issued as a means of promoting "transparency" in their dealings with the public and regulatory authorities.¹¹ The concept of transparency should apply in Missouri as well.

13. To summarize, Complainants' position is that the evidentiary hearings and other aspects of the procedural schedule should be delayed until after the outstanding data requests are answered or otherwise resolved.

¹⁰ Joint Motion to Suspend Current Deadlines and Establish a Briefing Schedule.

¹¹ Respondents' Initial Brief, p. 8, filed October 23, 2020.

B. Staff's Statement of Scope of the Evidentiary Hearing

For its statement regarding the scope of the Evidentiary Hearing, Staff states as follows:

1. The Complaint filed by Complainants on September 2, 2020 asks that the Commission issue an "Order declaring (1) because Grain Belt has announced that it plans to build something materially different from what the Commission authorized and approved in the CCN case, that at this time Grain Belt no longer has a valid CCN to build the line as originally proposed..."¹²

2. Complainant bases its Complaint on the announcement of a number of potential changes to the transmission project approved by the Commission in the CCN Case. These potential changes were announced via press release on August 25, 2020.¹³

3. The Joint Movants later agreed that, rather than hold an evidentiary hearing, the Commission should direct the Joint Movants to file briefs regarding the sole legal issue in contention: "[W]hether Respondents' contemplated changes to the Project invalidate the CCN granted to Grain Belt in the CCN case."¹⁴ The Commission agreed, and ordered the Joint Movants to file briefs regarding that sole legal issue.

4. It is Staff's position that the sole issue in this case remains whether Respondent's contemplated changes to the transmission project approved by the Commission in the CCN Case invalidate the CCN granted to it with that approval, and any evidentiary hearing should be centered on that issue.

¹² *Formal Complaint*, pg. 5-6, September 2, 2020. MLA also requested relief regarding the eminent domain authority of Grain Belt. However, as noted in Staff's initial brief, Grain Belt's eminent domain authority is beyond the scope of this proceeding. See *Staff's Initial Brief*, pg. 3, footnote 10.

¹³ *Id.*, Exhibit 1.

¹⁴ *Joint Motion to Suspend Deadlines and Establish Briefing Schedule*, ¶5 (g), September 29, 2020.

C. Respondents' Statement of Scope of the Evidentiary Hearing

For their statement regarding the scope of the Evidentiary Hearing, Respondents state as follows:

1. Respondents submit that the appropriate scope of the evidentiary hearing should be limited to the allegations in Complainants' September 2, 2020 Complaint, and whether those allegations entitle Complainants to the relief requested. The three legal questions identified by the Commission in its December 16, 2020 Order Directing Additional Briefing may also be addressed, but those questions should not be interpreted as expanding the scope of the underlying factual allegations in the Complaint.

2. The relief sought by Complainants is that the Commission "issue an Order declaring (1) because Grain Belt has announced that it plans to build something materially different from what the Commission authorized and approved in the CCN case, that at this time Grain Belt no longer has a valid CCN to build the line as originally proposed; and (2) consequently, Respondents have no legitimate right to claim that they still have the right of eminent domain in Missouri."¹⁵ Complainants sought no other relief.

3. Respondents submit that the appropriate scope of the evidentiary hearing must be limited to the allegations in the Complaint, which is in turn limited to what the Respondents have "announced." The Original Joint Motion and Stipulation included factual stipulations that were limited to the August 25, 2020 Press Release and the September 24/25, 2020 letters to Missouri landowners. Complainants agreed that those were the only facts relevant to its Complaint.¹⁶

¹⁵ Formal Complaint, pp. 5-6 (emphasis added).

¹⁶ This is clearly either a binding judicial admission ("a more or less formal act done during a judicial proceeding which waives or dispenses with the production of evidence and concedes for litigation purposes that a certain proposition is true," *Hewitt v. Masters*, 406 S.W.2d 60, 64 (Mo.1966)) or an admissible statement against interest. *Mitchell Eng'g Co., A Div. of CECO Corp. v. Summit Realty Co.*, 647 S.W.2d 130, 142 (Mo. Ct. App. 1982) (previous "writings" filed in

4. In its Order Directing Additional Briefing, the Commission requested that the parties file additional briefs on the following questions:

- (1) Does the Respondents' conduct, as described in the pleadings and stipulation, violate the Report and Order on Remand issued in File No. EA-2016-0358;
- (2) Whether Respondents' contemplated changes to the Project invalidate the CCN granted to Grain Belt by the Report and Order on Remand issued in File No. EA-2016-0358; and
- (3) Based upon the conduct, as described in the pleadings and stipulation, may the Commission revoke Respondent's CCN issued by the Report and Order on Remand issued in File No. EA-2016-0358?

5. Although the Commission has canceled the briefing schedule regarding the three legal issues it identified, Respondents submit that these questions may also be addressed at the evidentiary hearing, but the underlying facts must still be limited to the allegations in the Complaint. The "conduct" referenced in the Commission's questions must be limited to the "conduct" complained of in the Complaint and set forth in the Original Joint Motion and Stipulation—that is, what the Respondents have "announced" through their Press Release and letters to landowners.

6. Notably, however, Complainants' December 17, 2020 Motion to Revise Procedural Schedule expands both the scope of its Complaint and the Commission's three questions by alleging that "one of the key questions in this case is the extent to which Invenenergy has made the decision to abandon the original project in favor of one comparable to that described in its press release" and that the data requests it issued "are intended to shed light on that very question."

7. The "key question" regarding Invenenergy's "decision to abandon the original project" that Complainants use as justification for their data requests has no basis in law and has

court constitute admissions against interest). In either case, Complainants should not be permitted to change course regarding the scope of their Complaint given their prior representations.

neither been recognized nor endorsed by the Commission. As Staff succinctly and accurately stated in its Reply Brief:

Section 393.170 is clear: a CCN expires two years after it is issued if it is not exercised. Under the plain language of the statute, if a CCN-holder truly does not intend to exercise its CCN authority, that authority expires on a specific date under a single, unambiguous, objective criterion. There is no provision in 393.170 to revoke a CCN on an uncertain date, based on unspecified and subjective evidence of a company's intent to commit to a project.¹⁷

8. The Complainants' alleged "key question" is also not found in the Commission's Order Directing Additional Briefing. The Commission identified three specific questions for additional briefing, and none of them ask "the extent to which Invenergy has made the decision to abandon the original project."

9. The Complainants' discovery requests attached to Complainants' Motion make it clear that Complainants are attempting to make a case for their novel "abandonment" theory based on internal correspondence and management discussions of Respondents. Not only is this beyond the scope of the Complaint, but it is contrary to Missouri law protecting the right of public utilities to manage their own affairs.¹⁸

10. This Complaint has been pending for over four months, and Complainants should not be permitted to continuously refine and revise its scope through the issuance of discovery that will not aid the Commission's determination of the issues originally raised by the Complaint. Accordingly, Respondents request that the Commission limit the scope of the evidentiary hearing

¹⁷ Staff's Reply Brief, p. 2.

¹⁸ See *State ex rel. Harline v. Missouri Public Service Commission*, 343 S.W. 2d 177, 181-82 (1960) ("The utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation and does no harm to public welfare").

to the allegations in Complainants' September 2, 2020 Complaint, and whether those allegations entitle Complainants to the relief requested.

WHEREFORE, Joint Movants respectfully request that the Commission suspend the obligation to file a proposed procedural schedule no later than January 4, 2021, clarify the scope and purpose of the evidentiary hearing, and for any such further relief as the Commission may deem just and appropriate.

Respectfully submitted,

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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 4th day of January, 2021.

/s/ Anne E. Callenbach

Attorney for Respondents