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

MOTION OF MISSOURI LANDOWNERS ALLIANCE TO STRIKE CERTAIN MATIERAL IN REPLY BRIEF OF GRAIN BELT EXPRESS

Comes now the Missouri Landowners Alliance (MLA), pursuant to Commission Rule 4 CSR 240-2.080, and respectfully requests that the Commission strike the material identified in the last paragraph below from the Reply Brief of Applicant Grain Belt Express Clean Line LLC (Grain Belt), filed on April 24, 2017.

In his direct testimony in this case, Grain Belt witness David Berry presented an analysis of the levelized cost of energy (LCOE) for wind energy delivered over the Grain Belt line, compared to three other sources of energy available to utilities in Missouri.[1] The results of that analysis are depicted on the bar charts at pages 29 and 30 of Mr. Berry's direct testimony, and purport to show that the levelized cost of the wind from the proposed line would be less costly than the three alternatives.

According to Mr. Berry, his Schedule DAB-05 "contains a complete list of assumptions underlying this analysis, along with sources for these assumptions."[2]

However, as the MLA pointed out in its Initial Brief, that statement is not accurate. Although Mr. Berry's Schedule DAB-05 did show that he used a 55% capacity

[1] Direct testimony of David A. Berry, Exh. 104 pages 27-31.
[2] Id. at p. 29, lines 2-3.

factor for the Kansas wind generators, he neglected to mention any "source" or any other justification for using that 55% capacity factor figure.[3]

Accordingly, in its Initial Brief the MLA argued that there is no support in the record to justify the 55% capacity factor used by Mr. Berry; that he therefore failed to meet his burden of proving that the 55% figure was reasonable; and that as a result he also failed to justify the cost in his LCOE analysis for the Kansas wind generation.[4]

Meanwhile, reinforcing the importance of this issue, in its own Initial Brief Grain Belt agreed that Mr. Berry's LCOE analysis can be viewed as the "lynch-pin" of the economic feasibility factor.[5] Thus if the Commission accepted the MLA's argument that Mr. Berry failed to meet his burden of proof with respect to his LCOE analysis, it clearly would have been (and still should be) a serious blow to Grain Belt's case.

Grain Belt's response in its Reply Brief was incredible. As Attachment A to that Brief, they incorporated answers from Mr. Berry to two MLA data requests, in which Mr. Berry purported to provide support for the 55% capacity factor.[6] Neither the data request responses nor the contents thereof were ever mentioned during the course of the five days of hearings. And obviously, those responses to the data requests were never offered or received into the record as evidence. They were nevertheless used by Grain Belt in its Reply Brief as support for the 55% capacity factor figure. It is difficult to imagine a more flagrant violation of the fundamental rules for briefing than what Grain Belt has done here.

[3] MLA's Initial Brief, p. 19.
[4] Id. p. 22.
[5] Grain Belt's Initial Brief, p. 39.
[6] Grain Belt's Reply Brief, p. 26.

And Grain Belt's misuse of its Attachment A is not the only case where it went beyond the evidence of record in its Reply Brief. At Page 27 of that Brief, they cite testimony from the cross-examination of Dr. Proctor in the 2014 case for the proposition that "there's no way I can dispute" the 55% capacity factor.

Not only was that testimony never made a part of the record in this case, but perhaps even worse Grain Belt totally misrepresented the exchange there with Dr. Proctor. Immediately before the sentence quoted by Grain Belt, Dr. Proctor had explained why he used a capacity factor of only 50%, which was on the high end of the actual data he had observed. He was then asked whether he would agree that a 55% capacity factor was a possibility or even a probability by the year 2019, to which he answered that he had no way to dispute that it was a "possibility."[7] Thus contrary to what Grain Belt implies, Dr. Proctor definitely did not agree that the 55% capacity factor was indisputable.

Grain Belt's tactics clearly would not be tolerated in the courts of this state. For example, in *Meiners Company v. Clayton Greens Nursing Center,* 645 S.W.2d 722, 724 (Mo App 1983) the Court of Appeals struck material which defendant relied on its brief but which had not been introduced in the record below. In fact, the Court went on to deny the defendant's motion to supplement the record with the documents in question.

Likewise, in *McGee v. City of Pine Lawn,* 405 S.W.3d 582, f.n. 1 (Mo App 2013) the Court held as follows: "The City attempted to supplement the record on appeal with new evidence to support its current argument that the City Administrator is not lawfully designated to accept service of process. This Court ordered the City's supplemental

[7] Tr. 1390, Vol. 15, 2014 case; EFIS 329.

material stricken. Documents not considered and not made part of the record below cannot be introduced into the record on appeal, and we cannot consider them.")

And see *Daly v. Kansas City,* 317 S.W.2d 360, 364 (Mo 1958 (copy of ordinance not offered in evidence would not be considered by the appellate court); *In re J. M.,* 328 S.W.3d 466, 469 (Mo App 2010 (documents not made a part of the record below "cannot be introduced into the record on appeal"); *Cooper v. Murphy*, 276 W.W.3d 380, 382-83 (court struck an exhibit included with the Legal File on the ground that it was never properly submitted or received into evidence); and *In re Adoption of C. A. H.*, 901 S.W.2d 285, 288 (Mo App 1995 (court would not consider certain medical records because they were not offered into evidence.)

There is no logical reason to apply a different standard to briefs which are filed with the Commission than is applied in the civil courts. If a party is allowed to attach whatever "evidence" they chose to their briefs, then the hearings at the Commission become a charade. Why bother to offer an exhibit into evidence if it can be safely submitted later in the briefs?

Moreover, as in this case, if the evidence is allowed to be offered after the close of the hearings, the opposing party is given no opportunity to challenge the "evidence" either through cross-examination or with contradictory evidence.

Some mistakes in briefing are understandable. Honest errors can be made in citing or summarizing evidence. But here, Grain Belt deliberately and knowingly made a conscious decision to violate a fundamental principle of briefing.

To make matters worse, Grain Belt seems to excuse their disregard for the rules by blaming counsel for the MLA. In Grain Belt's words:

> If MLA had been concerned that the 55% capacity factor was such a fiction, it would have questioned Mr. Berry about it during the hearing. MLA now states belatedly that "there is no support in the record" for that number.[8]

That statement is absurd. It is not the job of counsel to inform opposing parties of the deficiencies in their case. Nor is it somehow incumbent upon counsel to ask questions during cross-examination which would invite a witness to correct those deficiencies.

In any case of this complexity and duration, certain matters are bound to be overlooked and not introduced into evidence at the hearings. If the MLA was aware that such oversights could be corrected simply by introducing the evidence for the first time in the briefs, it certainly would have done so as well. Unfortunately, not everyone has played by the same rules. The Grain Belt Reply Brief is inexcusable, and appears to reflect the client's desperate need to win this case at any cost.

[8] Id.

Wherefore, the MLA respectfully asks the Commission to strike the second and third paragraphs of page 26 of Grain Belt's Reply Brief, its Attachment A thereto, and the last sentence of the last full paragraph of page 27.

Respectfully submitted,

Missouri Landowners Alliance

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion was served upon the parties to this case by electronic mail this 27 day of April, 2017.

/s/ Paul A. Agathen
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