BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Landowners Alliance, et al.,	)	
	)	
	)	
Complainants,	)	
	)	
V.	)	
	)	Case No. EC-2021-0059
Grain Belt Express LLC, et al.,	)	
	)	
Respondents	)	

COMPLAINANTS' MOTION TO COMPEL ANSWERS TO DATA REQUESTS

For the reasons set forth below, Complainants respectfully ask the Commission to direct Respondents to promptly provide full and complete answers to items 1-4 in Complainants' First Set of Data Requests, and to item 23 in Complainants' Third Set of Data Requests. This Motion is accompanied by a copy of both sets of those data requests, with Respondents' objections and responses thereto (Respondents' "Objections").

Background. The gist of the Complaint in this case is that Respondents no longer intend to build the transmission project approved by the Commission in Case No. EA-2016-0358 (the "original project"). In its place, Respondents are now planning to build a transmission project which includes substantial differences from the original project approved by the Commission (the "revised project"). Complainants contend that if Respondents no longer intend to build the project originally approved by the Commission, then that project has been abandoned.

The original project was to deliver 500 MW of power to Missouri, with the remaining 2,500 MW delivered to the eastern converter station for delivery into the PJM

system. No mention was made in the CCN case by either Grain Belt or the Commission that power from the project would be delivered to the state of Kansas.[1]

One of the more significant changes being proposed for the revised project is that of the line's 4,000 MW total capacity, Grain Belt would now deliver up to 2,500 MW to Kansas and Missouri.[2] The remaining power presumably would be delivered to the converter station in Illinois – if indeed the line is ever extended into that state.

Early in the proceedings the parties proposed to submit the case on briefs to the Commission, stating that the sole issue here was whether the changes to the project acted to invalidate the CCN originally granted to Grain Belt.[3]

However, that proposal was rejected by the Commission, at least implicitly. In an Order of December 16, 2020,[4] the Commission declined to dispose of the case on the basis of the briefs which had been submitted on that one issue. Instead, the Commission identified three additional issues to be briefed, and stated that "If 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."[5]

That is exactly what Complainants are attempting to do through the discovery process at issue here: to seek additional evidence that Respondents have already abandoned the project originally approved by the Commission.

[1] See Report and Order on Remand, p. 9 par. 5 in Case No. EA-2016-0358 (the "CCN case").
[2] Exhibit 1 to Complaint, p. 1.
[3] Joint Motion to Suspend Current Deadlines and Establish a Briefing Schedule, filed September 29, 2020, EFIS 4.
[4] EFIS 13.
[5] *Id.* at 3.

General Rules Regarding Discovery. In Rule 20 CSR 4240-2.090, the Commission has in effect adopted the rules of discovery set forth in the applicable Supreme Court's Rules of Civil Procedure.[6]

The fundamental rule regarding discovery is set forth in Rule 56.01, titled "General Provisions Governing Discovery". At subsection (b)(1), that Rule provides that "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action." As used in that Rule, the word relevant "is broadly defined to include material reasonably calculated to lead to the discovery of admissible evidence."[7]

Respondents' "General Objections". Respondents begin their response to both sets of data requests at issue here with what they refer to as "General Objections." Complainants respectfully contend that those General Objections are defective for a number of reasons, and should therefore be rejected or ignored by the Commission in ruling on this Motion to Compel.

First, the Rule covering written interrogatories, as well as the Rule covering production of documents, both require that all objections to a discovery request must be listed "immediately" below the question to which the objection is raised.[8] Respondents' General Objections ignore this rule. Instead , the General Objections listed at the outset are thereafter incorporated by reference into the specific objections which do immediately follow the five data requests at issue here.

---

[6] Respondents seemingly agree, relying upon Supreme Court Rule 56.01 repeatedly in their Objections. (See pp. 3-6 of Objections).

[7] *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 464 (Mo. Banc 1995) (internal quotation marks omitted); *State ex rel. Dixon Oaks Health Center v. Long*, 929 S.W.2d 226, 231 (Mo. App. 1996) (internal quotation marks omitted).

[8] Sections (c)(2) of Rules 57.01 and 58.01 respectively.

This violation is more than a mere technicality. In particular with respect to the first two General Objections to the First Set of Data Requests, it is difficult to formulate a response to those objections because they are not presented in the context of any of the actual data requests.

Perhaps more importantly, the first two of the General Objections are also defective on substantive grounds.

The first General Objection, incorporated into the response to data requests 1-4, objects "to the extent they seek information which is not, and may not have been, within the personal knowledge or control of Respondents or their agents." The basic objection here is that some or all of the correspondence sought in these four data requests is in the possession of Respondents' agents, as opposed to Respondents themselves.

In principle, the case of *Hancock v. Shook,* 100 S.W.3d 786 (Mo. banc. 2003) is directly on point. The plaintiff there claimed that his veterinarian/expert witness had possession of certain documents sought in discovery, and that because they were not in his own possession, he was not obligated to produce them. The Supreme Court rejected this argument, stating as follows:

> Plaintiff misses the thrust of Rule 58.01(a). The rule is not limited to documents only in the possession of a party. Instead, Rule 58.01(a) … [applies to any documents] which are in the possession, custody or *control* of the party upon whom the request is served …. The basic test of the rule is "control" rather than custody or possession…. [d]ocuments are considered to be under a party's control when that party has the right, authority, or practical ability, to obtain the documents from a nonparty to the action. (footnote, internal quotation marks and citations omitted; emphasis in original)
>
> Id. at 796-97.

The Court went on to state that even though the plaintiff was not in direct possession of the records in question, he had "'the practical ability to obtain'" those records from his retained expert.[9]

Similarly, to the extent that Respondents do not have immediate possession of the requested correspondence, they undoubtedly have the practical ability to obtain such documents from their own retained agents. In fact, Respondents have not suggested otherwise.

Accordingly, Respondents' first General Objection is without merit.

The second General Objection attempts to raise a number of "privileges", as that word is used in Rule 56.01(b)(1), *supra,* including attorney work product, and apparently attorney-client privilege. This objection is defective on its face.

Rule 57.01(c)(3) includes the following requirement:

> If a privilege or the work product doctrine is asserted as a reason for withholding information, then without revealing the protected information, the objecting party shall state information that will permit others to assess the applicability of the privilege or work product doctrine.

Nearly identical language is included in Rule 58.01(c)(3). And Respondents made no attempt to provide the information which would be required in order to invoke the privileges they are claiming in General Objection 2.

The courts have consistently reinforced the express requirements of these Rules when addressing any type of privilege which is asserted as the basis for refusing to provide answers in discovery.

[9] *Id.* at 797.

As a starting point, claims of privilege constitute an exception to the general rule allowing for the discovery of relevant evidence. "As such, they are carefully scrutinized."[10]

In accordance with this general proposition, the state Supreme Court has stated that when a party claims that a privilege precludes disclosure, the party asserting the privilege usually has the burden of proof to show that the privilege applies. As the Court went on to state:

> Blanket assertions of work product are insufficient to invoke protection. In order to invoke work product protection, the party opposing discovery must establish, via competent evidence, that the materials sought to be protected (1) are documents or tangible things, (2) were prepared in anticipation of litigation or for trial, and (3) were prepared by or for a party or a representative of that party. [The] party challenging privilege must have sufficient information to assess whether the claimed privilege is applicable.[11]

See also State ex rel. Collom v. Fulton, 528 S.W.3d 42, 47 (Mo. App. 2017) (holding that blanket assertions of work product are insufficient to invoke protection, and bare assertions by counsel are not evidence of the facts asserted); and *Diehl v. Fred Weber,* 309 S.W.3d 309, 323 (Mo. App. 2010) (stating that once relevance is established, a party asserting a privilege bears the burden of demonstrating that the privilege applies).

One method of properly asserting such a privilege, for example, is through the use of a "privilege log".[12]

---

[10] *State ex rel. Dixon Oaks Health Center v. Long, supra,* 929 S.W.2d 226, 229 (Mo. App. 1996); *State ex rel. Missouri Ethics Commission v. Nichols,* 978 S.W.2d 770, 773 (Mo. App. 1998) (stating "Because claims of privilege present an exception to the usual rules of evidence they are carefully scrutinized").
[11] *State ex rel. Ford Motor Co. v. Westbrooke,* 151 S.W.3d 364, 367 (Mo. banc 2004). (citations and quotation marks omitted).
[12] *See State ex rel. Collom v. Fulton,* 528 S.W.3d 42, 47 (Mo. App. 2017); and *State ex rel. Tracy v. Dandurand,* 30 S.W.3d 831, 833 (Mo. banc 2000).

Here, Respondents have made no attempt by this or any other means to provide any information from which the Commission or the Complainants could assess whether the claimed privileges are applicable to the facts of this case.

For example, in order for the privilege of attorney-client communication to apply, "The communication must be made in order to secure legal advice."[13] And the privilege of "work product" is limited to documents or other tangible things.[14]

But Respondents offered no evidence that any of the requested correspondence fell within either of these categories, or any other category which would make the documents privileged. General Objection number 2 must therefore be rejected.

Any attempt by Respondents to correct this deficiency in their reply to this Motion should also be rejected. Complainants' should not be required to respond to a moving target of objections.

Respondents chose to ignore a standard rule of discovery in the first instance; they should not be given a second bite at the apple. If they are, the process presumably would be further delayed by affording Complainants another opportunity to file a Motion to Compel with respect to any revised objections relied upon by Respondents.

A trial court, and by extension the Commission, is given broad discretion in the control and management of discovery issues. That discretion is only abused "when its ruling is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration."[15]

---

[13] *Bar Plan Mutual Ins. Co. v. Chesterfield Management Assoc.,* 407 S.W. 621, 634 (Mo. App. 2013).
[14] *State ex rel. Krigbaum v. Lemon,* 854 S.W.2d 72, 73 (Mo. App. 1993).
[15] *State ex rel. MacDonald v. Franklin,* 149 S.W.3d 595, 597 (Mo. App. 2004).

In light of the current procedural schedule for this case, and Respondents' knowing violation of clearly established rules of discovery in the first instance, it would certainly not shock the sense of justice for the Commission to refuse them permission at this point to totally revamp their objections regarding alleged claims of privilege. Instead, Complainants contend that the appropriate remedy for ignoring the Rules is to ignore the objections.

As to General Objections 3-6, they either do not constitute legitimate "objections" to begin with, and/or they are dealt with below in discussing Respondents' specific objections to data requests 1-4.

Respondents' Specific Objections to Data Request Number 1 in the First Set of Data Requests.

Items 1-4 of the first set of data requests ask respectively for copies of correspondence between Respondents and four individuals who were quoted in Invenergy's press release attached as Exhibit 1 to the Complaint (the "press release"). The first was Ms. Laura Kelly, the Governor of Kansas. The second was Mr. David Toland, the Kansas Secretary of Commerce. The third was Mr. James Owen, Executive Director of Renew Missouri. And the last was Mr. John Coffman, Executive Director of the Consumers Council of Missouri. The latter two organizations were allies of Grain Belt during the Commission's CCN case.[16]

Complainants' data request number 1 was as follows:

> Please provide a copy of all correspondence between either or both of the Respondents on the one hand, and Kansas Governor Laura Kelly and/or any member of her staff on the other, which address (1) any of the changes to the proposed Grain Belt transmission project as referred to in the press

[16] CCN Order, p. 4.

release included as Exhibit 1 to the Complaint in this case; or (2) the content of the press release itself.

Respondents' objections to this data request generally fall into 5 different categories. One such objection was that this first data request is "not reasonably calculated to lead to the discovery of admissible evidence."[17]

The press release announced a major change in the project: that it would now deliver power directly to Kansas.[18] Given this announcement, Governor Kelly is quoted as saying that "The Grain Belt Express will be instrumental in helping to power Kansas…."

Obviously, before singing the praises of Grain Belt, and extolling the positive impact the change in the project would have for Kansas, the Governor must certainly have been assured by Respondents that the Grain Belt line would indeed deliver power to Kansas.

Accordingly, it is reasonable to assume that prior to issuance of the press release, correspondence must have been exchanged between the Governor and her staff on the one hand, and Respondents or their agents on the other. And undoubtedly, such correspondence would have gone to the issue of the change in the project which would allow for delivery of power to the citizens of Kansas. Without any such assurance, the Governor's participation in the press release would be nonsensical.

Therefore, the correspondence in question surely passes the basic test for discovery: that the requested information is relevant, in that it is "reasonably calculated to lead to the discovery of admissible evidence."[19]

[17] Objections, p. 3.
[18] Exh. 1 to Complaint, p. 1.
[19] *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 464 (Mo. Banc 1996).

Respondents also contend that data request number 1 "is overly broad, intrusive, unduly burdensome …."[20] Complainants believe that in order to determine what Respondents actually told the Governor about the changes to the project, the data request could hardly have been less broad, less intrusive or less burdensome. It simply requests written correspondence which would have been exchanged at or near the time the press release was issued.

In contrast, for example, an interrogatory covering a four-year time frame, dealing with information regarding facsimile advertisements, was deemed not unduly burdensome or overbroad.[21]

Furthermore, as the state Supreme Court has stated:

> A party must specify why a discovery request is overbroad, oppressive, burdensome or intrusive. Relator has made only general objections and not shown "good cause" for a writ of prohibition.[22]

Respondents' objection on comparable grounds suffers from this same flaw.

A third objection to data request number 1 is that it is "not proportional to the needs of the case".[23] In making this claim, Respondents repeatedly cite Supreme Court Rule 56.01.[24] However, they complicate matters by failing to designate which section or what particular language of that rather lengthy Rule they are relying upon.

The provision in that Rule most applicable to this objection would seem to be the following:

> In ruling on an objection that the discovery request creates an undue burden or expense, the court shall consider the issues in the case and the serving party's need for such information to prosecute or defend the case

[20] Objections, p. 3.
[21] *State ex rel. Coffman Group v. Sweeney*, 219 S.W.3d 763, 767 (Mo. App. 2005).
[22] *State ex rel. Health Midwest Development Group v. Daugherty*, 965 S.W.2d 841, 844 (Mo. banc 1998).
[23] Objections, p. 3.
[24] Objections, pp. 3, 4, 5 and 6.

> and may consider, among other things, the amount in controversy and the parties' relative resources in determining whether the proposed discovery burden or expense outweighs its benefit.

Giving due consideration to all of these factors, including the significance of this case to all parties concerned, and the fact that Invenergy's total assets amount to some $9 billion,[25] Complainants would suggest that the Rule relied upon by Respondents generally supports the rejection of their objections.

A fourth objection to data request number 1 is that the correspondence "could more easily be obtained through a request through the Kansas Open Records Act directed to the Governor of Kansas and her staff."

First, Complainants submit that attempting to navigate the Kansas Open Records Act for the first time would hardly be easier than submitting a data request to Respondents for the same information.

More importantly, Rule 57.01(c) specifically provides that "The party answering the interrogatories shall furnish such information as is available to the party." It does not require that the inquiring party utilize alternative means of acquiring the information, even if those alternatives were in fact "easier" than requesting material directly from the opposing party.

Finally, Respondents object to Data Request number 1 "to the extent this request calls for confidential business information." It is not clear whether Respondents are actually claiming that any of the information in question qualifies for the privilege of confidentiality. In any event, this objection fails for the same basic reason discussed earlier regarding General Objection number 2: it attempts to raise a privilege

[25] According to testimony of Invenergy witness Ms. Andrea Hoffmann in Case No. EM-2019-0150, Exh. 2, p. 4, EFIS 53., the total assets of the Invenergy companies exceed $9 billion.

(confidentiality) without in any way demonstrating why or how that privilege is applicable.

In addressing the claims of confidentiality and privilege, one Missouri decision quoted Wigmore with approval for the following proposition:

> The mere fact that a document concerns the property or other private affairs of the witness … does not create a privilege. The duty to assist the truth is paramount and indeed presupposes some sort of sacrifice by the witness. Subject, then, to a general discretion in the court to decline to compel production where in the case in hand the document's utility in evidence would not be commensurate with the detriment to the witness, any and every document may be called for, however personal and private its contents may be.[26]

See also State of Missouri ex rel. Missouri Ethics Commission v. Nichols, supra, 978 S.W.2d 770, 774 (Mo. App. 1998), observing that "the Rules often allow extensive intrusion into the affairs of both litigants and third parties."

Particularly in the absence of any explanation from Respondents as to why the correspondence merits the privilege of confidentiality, this last objection to data request number 1 is also without merit.

Respondents' Specific Objections to Data Requests 2-4 of the First Set of Data Requests.

The discussion above regarding Respondents' objections to data request number 1 also covers all of the objections raised to data requests 2-4 in the First Set of Data Requests. Accordingly, those arguments will not be repeated here.

Respondents' Objections to Data Request 23 in the Third Set of Data Requests.

Data request number 23, in the Third Set of Data Requests, was as follows:

> Please provide a copy of all correspondence between Mr. Kris Zadlo of Invenergy Transmission on the one hand, and officers, employees

[26] *State ex rel. Williams v. Koffman,* 869 S.W.2d 850, 852 (Mo. App. 1994).

> or agents of Invenergy Transmission or its affiliated companies on the other, expressly addressing the language to be included in or excluded from the press release attached as Exhibit 1 to the Complaint in this case.

Again, Respondents begin with a list of General Objections. The first is that the data request may seek information not within the possession or control of Respondents or their agents.

Given the limited scope of the data request, it is difficult to imagine how this objection could possibly have any merit.

To the extent the objection claims the documents are not in the actual possession of either Respondent, that question was addressed above with respect to General Objection 1 to the First Set of Data Requests.

General objection number 4 (numbers 2 and 3 do not exist) complains that the definition included in Complainants' data request renders the data request itself "vague, ambiguous, overbroad, and/or unduly burdensome."

The only definition included in this third set of data requests was as follows: "'Correspondence' includes all forms of written communication, including but not limited to letters, emails and text messages."[27] Complainants submit that asking for "all forms of written communication" is a perfectly clear request, and is not objectionable on any of the grounds specified by Respondents.

General Objections 5 and 6 do not amount to actual objections, and should not have been listed as such.

Among the specific objections to item 23 are the following: that the request is not reasonably calculated to lead to the discovery of admissible evidence; that it is "not proportional to the needs of the case"; and that it calls for confidential business

[27] Objections, p. 2.

information and information protected under attorney-client privilege and work product privilege.

Complainants contend these specific objections are without merit for the same reasons discussed with respect to data request number 1 above. In particular, Respondents have once again failed to provide any facts which would support any of their claimed privileges.

Respondents argue again that this data request is "overly broad, intrusive, unduly burdensome".[28] This objection was also covered to some extent in the discussion above regarding data request number 1. Further, as to the claim that the request is "overly broad", Complainants content it could hardly have been more narrowly drafted. It simply seeks correspondence to or from Mr. Zadlo "expressly addressing the language to be included in or excluded from the press release …."

In submitting this data request, and as a concession to Respondents and to Mr. Zadlo, Complainants withdrew more extensive data request numbers 5 and 6 of the First Set of Data Requests. In doing so, Complainants submit they eliminated any objection on the grounds that data request 23 is itself overly broad, intrusive, or unduly burdensome.

In considering the merits of this objection, the Commission will recall that Mr. Zadlo is seemingly the key person from Invenergy with respect to any proposed revisions to the original Grain Belt project. He is the only person from Invenergy quoted in the press release announcing the changes to the Grain Belt project.[29] He was also the lead

[28] Objection, p. 2.
[29] Exhibit 1 to Complaint, p. 1.

witness from Invenergy in the Commission case in which Invenergy was granted approval to purchase Grain Belt.[30]

Accordingly, it is reasonable to assume that Mr. Zadlo, more than any other person associated with the Respondents, would have first-hand knowledge of the extent to which Respondents have already abandoned the project approved in the CCN case.

Respondents argue that this request would require Mr. Zadlo to search hundreds of documents, "many" of which are not relevant here. However, the relevance of the documents can only be determined after examining the documents themselves. If any irrelevant documents are produced in response to this request, then to the extent they are offered in evidence, Respondents would have every right at that point to object on grounds of relevance.

Moreover, by claiming that "many" of the documents in question are not relevant here, Respondents concede that some of them are in fact relevant.

Like with any discovery request, providing an answer does to some extent constitute a burden. But given the potential importance of the information sought from Mr. Zadlo, and his ability to tap into Invenergy's extensive resources in retrieving the correspondence in question, Complainants submit that responding to the data request would not be "unduly" burdensome to Mr. Zadlo.[31]

Finally, Respondents complain that "There are no allegations, beyond what was said in the press release, that Respondents have pursued other actual material changes to the design or engineering of the project."[32]

[30] Direct Testimony of Kris Zadlo, Case No. EM-2019-0150, Exh. 3, EFIS 54.
[31] As indicated above, Invenergy and its affiliates have in excess of $9 billion in total assets.
[32] Objections, p. 3.

That statement demonstrates exactly why the data requests at issue here are legitimate subjects for discovery. Each of them, including number 23, is designed to solicit additional information as to exactly what Respondents have planned with respect to the continuation or abandonment of the original project. As such, these data requests simply fulfill the fundamental purpose of discovery: to obtain information from an opposing party which is relevant to an issue in the case.

WHEREFORE, Complainants respectfully ask the Commission to direct Respondents to fully, completely and promptly answer data requests 1-4 of the First Set of Data Requests, and data request 23 in the Third Set of Data Requests. In addition, in order to clarify matters, Complainants further ask that Respondents be specifically directed in responding to these data requests to include all correspondence sent by or to Respondents' agents, and all correspondence in the possession of their Agents if not in the possession of Respondents themselves.

Respectfully submitted

/s/ Paul A. Agathen
Paul A. Agathen
Attorney for Complainants
Mo Bar No. 24756
485 Oak Field Ct.
Washington, MO 63090
636-980-6403
Paa0408@aol.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was served upon all parties of record by electronic mail this 25th day of January, 2021.

/s/ Paul A. Agathen
Attorney for Complainants