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

STATEMENT OF POSITION OF THE MISSOURI LANDOWNERS ALLIANCE, SHOW ME CONCERNED LANDOWNERS, AND JOSEPH AND ROSE KRONER

Come now the Missouri Landowners Alliance (MLA), Show Me Concerned Landowners (Show Me), and Joseph and Rose Kroner (collectively referred to here for convenience as the MLA), and for their Statement of Position regarding the issues in this case state as follows:

1. Does the Commission have 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')?

No, it does not. For purposes of this proceeding, Section 393.190 authorizes the Commission to approve the sale only if Grain Belt is an "electrical corporation." However, based on two separate lines of argument, Grain Belt does not constitute an electrical corporation. Therefore, the Commission lacks the jurisdiction and statutory authority to approve the sale of Grain Belt.

The first argument is based on Missouri case law, which for years has held that regardless of the statutory definition of an "electrical corporation", in order to qualify as such, an entity must also be devoted to the "public use." Under Missouri case law, the Grain Belt project fails to meet this test.

The first case to address this issue was decided 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).[1]

In perhaps the key finding by the Missouri 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."[2]

The question, then, was what constitutes the supply of electricity for "public use", thereby qualifying the entity as an "electrical corporation." In answering that question, the Court began with an obvious but critical point: a company either is or is not a public utility. If it is, then it is subject to the entire purview and regulation of the Commission, including the authority of the Commission to compel the company to provide service to all residences and businesses in the area where it provided service.

Following that logic, if Grain Belt is an "electrical corporation" for purposes of Section 393.190, then it must necessarily be an "electrical corporation" as well for purposes of say Section 393.130.2. That statute 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.

[1] As to the date of the passage of the Public Service Commission Act, see *Danciger* at 39.
[2] *Id.* at 40.

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

As the Court found in *Danciger,* 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 the property in that case was not devoted to a public use, the entity could not be subject to any regulation by the Commission.[3] Or as the Court stated, "there is in this case no explicit professing of public service, or 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….[4]

The Court then punctuated its ruling by relying upon this passage from what it called an "excellent work on Public Service Corporations":[5]

> 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. <u>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.</u> (emphasis added)

The last sentence precisely describes the proposed operation of the Grain Belt line.

[3] *Id.* at 40.
[4] *Id.*
[5] *Id.* at 41.

To begin with, Grain Belt will not be selling any service to retail customers in Missouri.[6] 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 service at or near the converter stations in Missouri and Illinois.[7] So the project will provide only wholesale electric transmission service in Missouri, as opposed "to supplying [service] to the community in general."

In addition, Grain Belt's rates will be subject to regulation by the FERC, which has already granted Grain Belt the authority to enter into bilateral negotiations with potential customers for its capacity charges, for up to 100% of the line's capacity. Thus the line will never be subject to rate regulation by this or any other state commission.[8]

And in its Application to this Commission for the CCN, Grain Belt confirmed its position that its "services will be provided to the wholesale energy market at freely negotiated rates."[9]

And as would be expected when a utility is allowed to negotiate individual rates with its 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 cause for the differences in rates, in Mr. Skelly's words: "if you get in early, you often get a better deal."[11]

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[6] Direct Testimony of Mr. Michael Skelly, Ex. 100, p. 24 lines 15-18 (EFIS 35). *See also* Grain Belt's Application in this case (EFIS 34) at p. 29, par. 76 and p. 30 par. 78. In addition, inasmuch as Grain Belt has made it clear it is not applying for an area certificate in this case, it could not sell at retail in this state even if it desired to do so.
[7] *See* Application (EFIS 34) p. 8, pars 15, 16 and 18.
[8] *Id.* at p. 8, par. 16.
[9] Application (EFIS 34) p. 18 par. 47.
[10] Tr. Vol. 22, page 2038 line 222 – page 2039 line 9.
[11] Tr. Vol. 10, p. 204, lines 6-7.

While these differences in rates are perhaps permissible under FERC's regulation of merchant lines, the practice is not permissible for public utilities in Missouri.

In addition, in its application to the FERC, Grain Belt noted that the criteria used in its selection of 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. Inevitably, when rates are set through individual bilateral negotiations, the result will produce different rates for similarly situated customers.

In addition to case law, the MLA contends that Grain Belt also fails to meet the statutory definition of an electrical corporation, as set forth in Section 386.020(14) and (15).

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

The MLA contends that cash is not in the category of items which were intended to be considered "utility plant" by the General Assembly. If it were, then anyone with $25 in a checking account supposedly to be used for construction of any type of electrical facility could qualify as an "electrical corporation."

As to the 39 easements, the MLA contends 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

[12] Application from Grain Belt to the FERC, p. 18, cited by Mr. Skelly at Exh. 100, p. 24 f.n. 7.

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, EFIS 39).

So Grain Belt clearly 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 qualify Grain Belt as an Electrical Corporation until, at best, it actually begins construction of the proposed line.

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 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). Therefore, the 39 easements in question are in effect a nullity as far as granting Grain Belt a valid easement on property for the right-of-way. At this point, the easements are mere unenforceable and ineffective documents which do not constitute electric plant.

Perhaps the most unlikely support for the MLA's position on this matter comes from Grain Belt itself. In the 2016 CCN proceedings, Grain Belt unequivocally announced its position on this issue as follows: "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."[13]

Grain Belt's intuitive realization that it is not a true public utility was a well-reasoned observation, penned by one of the more experienced firms in Missouri in matters dealing with utility regulation. The fact that the point has now become a matter of inconvenience does not diminish its legitimacy.

2. If so, should the Commission find that Invenergy's acquisition of Grain Belt is not detrimental to the public interest, and approve the transaction?

No, it should not.

In the recent CCN case, No. EA-2014-0207, Grain Belt contended that one factor which qualified them to build and develop a 780 mile high-voltage transmission line was the extensive experience gained on earlier wind facilities by members of its project team.[14]

[13] Reply Brief of Grain Belt, EFIS 545, p. 43.
[14] See, e.g., Direct Testimony of Michael Skelly, pp. 1-2, p. 13-15. EFIS 12.

In addition, in support of its ability to successfully complete the line, Grain Belt relied on its extensive assistance from National Grid, one of Grain Belt's major investors. According to Grain Belt, "National Grid has made and has committed that it will continue to make its construction management resources available to aid Clean Line and its project companies whenever necessary."[15] National Grid is one of the largest investor-owned energy companies in the world, with $75 billion in assets. In the United States alone, apparently, it jointly owns and operates over 8,600 miles of high voltage transmission lines.[16]

Invenergy, however, concentrates on the ownership and operation of generating facilities. Its experience with long-distance high-voltage transmission lines is quite limited, consisting mainly of relatively short connections between its generating facilities and the bulk electrical grid. For example, the average distance of its five longest transmission lines is less than 38 miles – a distance under 5% of the line it will be undertaking to build if this sale is approved.

Because Invenergy does not have any experience with building a 600 kv DC line, as is being proposed by Grain Belt, and because it does not have the extensive experience of National Grid on which to rely, the MLA contends that the applicants have failed to meet their burden of proving that turning the project over to Invenergy will not be detrimental to the public interest.

3. Should the Commission condition its approval of Invenergy's acquisition of Grain Belt and, if so, what should such conditions be?

The MLA takes no position on this issue.

[15] Id. at p. 14.
[16] Id. at p. 8-9.

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 12th day of April, 2019.

/s/ Paul A. Agathen
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