BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Ameren Transmission Company of Illinois for Other Relief or, in the Alternative, a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Maintain and Otherwise Control and Manage a 345,000-volt Electric Transmission Line from Palmyra, Missouri, to the Iowa Border and Associated Substation near Kirksville, Missouri.	)	**File No. EA-2015-0146**

INITIAL POST-HEARING BRIEF OF NEIGHBORS UNITED

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COMES NOW Neighbors United Against Ameren's Power Line (Neighbors United), by and through the undersigned counsel, and for its Initial Post-Hearing Brief respectfully states as follows:

(1) Introduction And Issues Being Briefed By Neighbors United

Neighbors United is a non-profit organization that was organized in June 2015. The membership includes over four hundred members, comprised mostly of landowners that the proposed Mark Twain Transmission Project (MTTP) would directly impact, but also other landowners that have an interest in protecting the prosperity of the rich farming land in their community, as well as other interested community members. Membership includes individuals from all five counties (Marion, Knox, Shelby, Schuyler and Adair) that the proposed Mark Twain Transmission Project will impact. They are hard working farmers and ranchers who depend on the land for their livelihoods and to take care of their families. The proposed route of the Mark Twain Transmission Project goes through some of the most rich and productive farmland in Missouri.

On January 15, 2015, the Parties to this case filed a joint *List of Issues, Order of Witnesses, Order of Cross-Examination, and Order of Opening Statements*. The issues listed for the Commission's decision, all of which Neighbors United will brief, are listed below:

1. Does the Commission possess authority to approve ATXI's application?

2. Does the evidence establish that the Mark Twain transmission line project, as described in ATXI's application in this docket, and for which ATXI is seeking a certificate of convenience and necessity ("CCN"), is "necessary or convenient for the public service within the meaning of that phrase in section 393.170, RSMo?

3. Do §§ 393.170 and 229.100, RSMo., require that before the Commission can lawfully issue the requested CCN the evidence must show the Commission that

where the proposed Mark Twain transmission line project will cross public roads and highways in that county ATXI has received the consent of each county to cross them? If so, does the evidence establish that ATXI has made that showing?

4. If the Commission decides to grant the CCN, what conditions, if any, should the Commission impose?

As part of the second issue for the Commission's decision, Neighbors United will also address the Tartan Criteria, the criteria being: 1) *there must be a need for the service*; 2) *the applicant must be qualified to provide the proposed service*; 3) *the applicant must have the financial ability to provide the service*; 4) *The applicant's proposal must be economically feasible*; and 5) *the service must promote the public interest.*

Finally, Neighbors United will explain the United States Supreme Court's recent decision in *State of West Virginia, State of Texas, et al., v. United States Environmental Protection Agency, and Regina A. McCarthy, Administrator, United States Environmental Protection Agency,* to grant the Petitioners' Application for an immediate stay of the Environmental Protection Agency's final agency action during the pendency of the Petitions for review filed in the D.C. Circuit Court of Appeals. On February 9, 2016, the U. S. Supreme Court stayed the effectiveness of the EPA's Clean Power Plan (CPP) rule until the D.C. Circuit decides the Petitions now before it. A large part of the impetus for the MTTP was to increase wind development to comply with the CPP. At the least, the Commission should not rely on the arguments made by ATXI, MISO, or Staff in regard to the CPP as support for ATXI's Application. This will be explained in more detail infra.

In summary, Neighbors United requests the Commission deny ATXI's Application as it violates the absolute Missouri Right to Farm Constitutional Amendment (that the Commission may not limit until an Article III Court limits the absolute right, if/when that

occurs), the MTTP does not meet the Tartan Criteria, ATXI has failed to obtain the required assents from the County Commissions necessary for ATXI to build in each respective county, and the Supreme Court's stay of the Clean Power Plan requires the Commission to consider the value of the MTTP without the requirements of the CPP to support the proposed line.

(2) The United States Supreme Court's Stay Of The Clean Power Plan And Relation To The Commission's Decision In This Case

On October 23, 2015, the EPA published its final rule of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, known as the Clean Power Plan (CPP) under Section 111(d) of the Clean Air Act. The CPP established emission guidelines for states to follow in developing state plans to reduce greenhouse gas emissions from existing stationary sources, those being existing fossil fuel-fired electric generating units. As set forth in the rule summary, the CPP established:

> Carbon dioxide (CO_2) emission performance rates representing the best system of emission reduction (BSER) for two subcategories of existing fossil fuel-fired EGUs [electric generating units]—fossil fuel-fired electric utility steam generating units and stationary combustion turbines; state-specific CO_2 goals reflecting the CO_2 emission performance rates; and guidelines for the development, submittal and implementation of state plans that establish emission standards or other measures to implement the CO_2 emission performance rates, which may be accomplished by meeting the state goals. [1]

The final rule was effective on December 22, 2015. However, since the evidentiary hearing in this matter, the U.S. Supreme Court has stayed the effectiveness of the CPP

[1] 40 CFR Part 60, 80 FR 64662 (October 23, 2015).

until the resolution of a pending application before the D.C. Circuit Court of Appeals filed by 22 states challenging the CPP.

On October 23, 2015, 22 state Petitioners filed a Petition For Review with the U.S. Court of Appeals for the District of Columbia. Missouri was one of those states, with Solicitor General James R. Layton as Counsel of Record for the State of Missouri. The Petition requests the Court of Appeals to hold the CPP unlawful and set aside the rule as being in excess of the EPA's statutory authority.[2] Also on the same date, the 22 states filed a *Motion For Stay And For Expedited Consideration Of Petition For Review* (*Motion for Stay*). The Petitioners argued that the states would suffer irreparable injury absent a stay in the CPP, stating "[t]he changes will displace the policies States have carefully crafted over decades concerning the regulation of electrical utilities and questions of need, reliability, and cost. Once made, many of these changes will be 'impossible' to reverse."[3] On January 21, 2016, the D.C. Court of Appeals denied the Petitioners' *Motion for Stay*. The Petitioners then filed an Application with the U.S. Supreme Court.

On January 26, 2016, the State Petitioners filed an *Application By 29 States And State Agencies For Immediate Stay Of Final Agency Action During Pendency of Petitions For Review* (*Application*) with the U.S. Supreme Court after the D.C. Court of Appeals denied the Petitioners' *Motion for Stay*. Among the rationales were that states would suffer irreparable harm and would expend unrecoverable resources should the

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[2] *State of West Virginia, State of Texas, et al. v. United States Environmental Protection Agency, and Regina A. McCarthy, Administrator, United States Environmental Protection Agency*, Case No. 15-1363, D.C. Court of Appeals.

[3] *State of West Virginia, State of Texas, et al. v. United States Environmental Protection Agency, and Regina A. McCarthy, Administrator, United States Environmental Protection Agency*, Case No. 15-1363, D.C. Court of Appeals. *Motion for Stay And For Expedited Consideration Of Petition For Review* at p. 16.

CPP be found unlawful. The *Application* also stated that oral argument on the D.C. Court of Appeals Petitions will not be heard until June 2, 2016—"[t]hat means that a decision on the merits is at least half a year away, and likely more. In addition, possible rehearing or rehearing en banc proceedings may take many additional months. An immediate stay from this Court is necessary to prevent the irreversible changes and harms that will continue to occur during the D.C. Circuit proceedings, which could stretch well into 2017."[4] The *Application* also argued how investments in renewable energy to meet the CPP are contrary to the public interest. The *Application* states "On the other side of the generation shifting calculus, renewable energy businesses supporting EPA explained below that the Plan is 'driving' *billions* of dollars of investments to their industry. Such a dramatic reallocation of capital resources, in reliance on a rule that this Court is likely to find unlawful, is also contrary to the public interest."[5] The U.S. Supreme Court granted the Petitioners' *Application* on February 9, 2016, and stayed the CPP. This Commission's approval of the MTTP in light of the U.S. Supreme Court's stay of the CPP is also contrary to the public interest.

As mentioned above, The U.S. Supreme Court granted the Petitioners' *Application* for stay of the CPP. The U.S. Supreme Court's Order stated:

> The application for a stay submitted to The Chief Justice and by him referred to the Court is granted. The Environmental Protection Agency's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 Fed. Reg. 64,662 (October 23, 2015), is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition,

[4] *Application By 29 States and State Agencies For Immediate Stay of Final Agency Action During Pendency of Petitions For Review, U.S. Supreme Court*, page 48.
[5] I*d*. at 46-47. Emphasis in original. Internal citations omitted.

> this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment. [6]

While the Court did not provide reasoning for the stay, some legal scholars have offered that the stay during litigation was to avoid the effect of the Court's decision last term in *Michigan v. EPA*[7] in this case. The Petitioner State's *Application* to the U.S. Supreme Court provides this as a rationale for the stay. The *Application* states:

> This Court's decision last Term in Michigan v. EPA, 135 S. Ct. 2699 (2015), starkly illustrates the need for a stay in this case. The day after this Court ruled in Michigan that EPA had violated the Clean Air Act ("CAA") in enacting its rule regulating fossil fuel-fired power plants under Section 112 of the CAA, 42 U.S.C. § 7412, EPA boasted in an official blog post that the Court's decision was effectively a nullity. Because the rule had not been stayed during the years of litigation, EPA assured its supporters that "the majority of power plants are already in compliance or well on their way to compliance."[8] Then, in reliance on EPA's representation that most power plants had already fully complied, the D.C. Circuit responded to this Court's remand by declining to vacate the rule that this Court had declared unlawful. See Per Curiam Order, White Stallion v. EPA, No. 12-1100, ECF 1588459 (Dec. 15, 2015). In short, EPA extracted "nearly $10 billion a year" in compliance from power plants before this Court could even review the rule, Michigan, 135 S. Ct. at 2706, and then successfully used that unlawfully-mandated compliance to keep the rule in place even after this Court declared that the agency had violated the law. [9]

Essentially, the U.S. Supreme Court's decision in *Michigan* was effectively a nullity because the EPA's rule regulating power plants under Section 112 of the Clean Air Act had not been stayed during the years of litigation.

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[6] http://www.supremecourt.gov/orders/courtorders/020916zr3_hf5m.pdf

[7] 135 S.Ct. 2699 (2015).

[8] *Application By 29 States and State Agencies For Immediate Stay Of Final Agency Action During Pendency of Petitions For Review*, pg. 1-2. citing https://blog.epa.gov/blog/2015/06/in-perspective- the-supreme-courts-mercury-and-air-toxics-rule-decision/.

[9] *Application By 29 States and State Agencies For Immediate Stay Of Final Agency Action During Pendency of Petitions For Review*, pg. 1-2.

ATXI, MISO and Staff argued in testimony and at the evidentairy hearing that the MTTP will aid the MISO states in meeting the goals of the CPP. Is it realistic to think that wind resources will be lining up to build wind projects in Missouri if the U.S. Supreme Court finds the CPP to be unlawful? If the Commission approves the MTTP while the CPP is stayed, what irreparable harm to landowners will it be condoning? The Commission should not rely on the CPP to support ATXI's Application while the U.S. Supreme Court has stayed the CPP.

(3) Missouri Constitutional Right To Farm-- ***Does the Commission possess authority to approve ATXI's application***

Summary

Respectfully, No. ATXI asks the Commission to grant it a Certificate of Convenience and Necessity (CCN) to build a transmission line through approximately 378 properties, with the majority if not all, engaged in farming and/or ranching practices. ATXI makes its request despite the Missouri Right-to-Farm Constitutional Amendment 1 passed by voters on August 5, 2014. Article 1 of the Missouri Constitution contains the Bill of Rights. Article 1, Section 35 of the Missouri Constitution reads:

> That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.

ATXI requests relief that would permanently remove citizens' property from production and prevent these citizen farmers and ranchers from engaging in farming and/or ranching practices. ATXI's Application presents issues that require constitutional interpretation and application. Such questions are beyond the authority of administrative

agencies and any Commission action other than dismissal would require the Commission to decide such questions.

Further, Commission Rule 4 CSR 240-3.105(1)(D)1. provides:

> (D) When approval of the affected governmental bodies is required, evidence must be provided as follows: 1. When consent or franchise by a city or county is required, approval shall be shown by a certified copy of the document granting the consent or franchise, or an affidavit of the applicant that consent has been acquired[.]

And Section 229.100, RSMo provides:

> No person or persons, association, companies or corporations shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public roads or highways of any county of this state, without first having obtained the assent of the county commission of such county therefor; and no poles shall be erected or such pipes, conductors, mains and conduits be laid or maintained, except under such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county commission.

ATXI, by its own admissions made in testimony in this case, admissions made in Case No. EA-2015-0145,[10] as well as admissions made to the county commissions themselves acknowledges that approval from the county commissions is required as part of this case. The Commission may not grant ATXI the authority it seeks until the required approvals from the county commissions are received and submitted to this Commission for consideration.

Constitutional Right to Farm

ATXI asks the Commission to grant it a Certificate of Convenience and Necessity (CCN) to build a transmission line through approximately 378 properties,[11] majority if not

[10] Exhibit 50.

[11] Exhibit 7, page. 6, line 22; page 7, line, 18; page 8, line 7.

all, are engaged in farming and/or ranching practices, despite the Missouri Right-to-Farm Amendment 1 passed by voters on August 5, 2014. The legislatively-referred constitutional amendment appeared on the ballot as "Shall the Missouri Constitution be amended to ensure that the right of Missouri citizens to engage in agricultural production and ranching practices shall not be infringed?" and was placed in the Missouri Constitution as Article 1, Section 35. Article 1 of the Missouri Constitution contains the Bill of Rights. Article 1, Section 35 of the Missouri Constitution reads:

> That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.

Article IV delineates the powers given to local government.

"In general, constitutional provisions are subject to the same rules of construction as other laws, except that constitutional provisions are given a broader construction due to their more permanent character."[12] "The primary rule is to 'give effect to the intent of the voters who adopted the [voter-adopted constitutional provision]' by considering the plain and ordinary meaning of the words used."[13] When a word is not given a technical meaning or defined in the constitution, "…the Court determines the plain and ordinary meaning of the word as found in the dictionary."[14]

[12] *Neske v. City of St. Louis*, 218 S.W.3d 417, 421 (Mo. banc 2007) (overruled on other grounds), *citing StopAquila.org v. City of Peculiar,* 208 S.W.3d 895, 899 (Mo. banc 2006); *School District of Kansas City v. State*, 317 S.W.3d 599, 605 (Mo. banc 2010).
[13] *Pearson v. Koster*, 367 S.W. 3d 36, 48 (Mo. 2012), *citing Keller v. Marion Cnty. Ambulance Dist.,* 820 S.W.2d 301, 302 (Mo. banc 1991)
[14] *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012).

Black's Law Dictionary does not define "farming," but it does define "farming operation" as a "business engaged in farming, tillage of soil, dairy farming, ranching, raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." [15] The dictionary does not define "ranching," but it does define "ranch" as "1. an establishment maintained for raising livestock under range conditions. 2. a large farm used primarily to raise one kind of crop or animal." [16] "Practice" is defined as "1. habitual or customary performance; operation…5. the action or process of performing or doing something."[17]

ATXI's proposed line crosses through citizens' properties in each of five counties (Marion, Shelby, Knox, Adair and Schuyler Counties) that are engaged in farming and/or ranching practices. While there may be a dispute as to the extent to which citizens' farming and/or ranching practices will be impacted, neither ATXI nor Neighbors United dispute that some amount of farm and/or ranch property will be permanently removed from production.[18]

ATXI's Application presents issues that require constitutional interpretation and application. Such questions are beyond the authority of administrative agencies.[19] At the evidentiary hearing, Chairman Hall asked counsel for Neighbors United whether the Right to Farm amendment is absolute, stating that other federal constitutional rights have limitations. The difference between other federal constitutional rights and the

[15] Black's Law Dictionary 681 (9th ed. 2009).
[16] Dictionary.com Unabridged. Random House, Inc., http://dictionary.reference.com/browse/ranch (accessed: October 11, 2015).
[17] Dictionary.com Unabridged. Random House, Inc. http://dictionary.reference.com/browse/practice (accessed: October 11, 2015).
[18] Direct Testimony of Douglas J. Brown, p. 6, lines 6-15. Transcript, Vol 7, page 487, lines 8-11.
[19] *See Duncan v. Missouri Bd. for Architects, Professional Engrs., & Land Surveyors,* 744 S.W.2d 524, 530–31 (Mo.App.1988). *See also Fayne v. Department of Social Servs.,* 802 S.W.2d 565 (Mo.App.1991).

Missouri Right to Farm is that the federal constitutional rights have many years of case law setting forth what limitations the courts have found to be on the right. That is not the case with the Missouri Right to Farm. It is an absolute right, and until an Article III courts find limitations, if there are any, the Commission should not limit the right. Any Commission action other than dismissal would require the Commission to decide such questions and effectively order what land ATXI can seek condemnation on and build the proposed route across.

A Commission Order granting a Certificate of Convenience and Necessity (CCN) to ATXI is akin to a regulatory taking and violates Article 1, Section 35 of the Missouri Constitution. A Commission decision granting a CCN to ATXI is essentially the first step in the list of steps for a public utility to condemn property through an eminent domain action. The elements of an eminent domain action are: a) whether the applicant has the authority to condemn; b) whether the project has a public purpose; c) whether there is a necessity for the project; d) whether there is a description of the nature and scope of the interest to be condemned; and e) the requirement of a payment of just compensation.[20] Any order by the Commission granting ATXI a CCN will have a finding that the project is in the public interest because that is one of the Tartan Criteria requirements for granting a certificate. The Commission's granting of the order will also approve ATXI constructing the transmission line in a specified location. And the Commission's granting of the order will have a finding that the project is necessary, stated another way, there is a need for the service. The Commission's order contains many of the filing requirements for an eminent domain action and it will be used to support such an action

[20] 35 Mo. Prac., Cont., Eq. & Stat. Actions Handbook § 35:3.

in circuit court. Without the authority from the Commission, ATXI could not site the project in Missouri and would not be able to complete the next step of filing an eminent domain action in circuit court to condemn the farming and ranching properties.

The plain language of Article 1, Section 35 of the Missouri Constitution leads to a finding that any action other than dismissal of the Application violates the constitutional provision. ATXI requests relief that would permanently remove citizens' property from production and prevent these citizen farmers and ranchers from engaging in farming and/or ranching practices. For the Commission to find that the potential issuance of a CCN does not deprive any member of Neighbors United of their property rights ignores the Commission's prominent place in the eminent domain process for utilities. Because a Commission decision granting ATXI a CCN allows ATXI to seek condemnation of property in violation of the Missouri Constitution, the Commission must dismiss ATXI's Application.

General Routing Decisions by ATXI

In regard to the line routing of the Mark Twain Transmission Project, ATXI gave Burns and McDonnell three points to do routing, one being Maywood, one being the Zachary substation and one as the point at the Iowa/Missouri border where the line would cross into Iowa.[21] Mr. Jontry testified that there was no specific reason for picking this end point, that ATXI and Mid-America "…agreed that that was a convenient point on the border to route to. Not knowing exactly where anything else may occur but the routing effort, we agreed that that was a convenient point."[22]

[21] Tr. Vol. 7, page. 527, lines 23-25, p. 528, lines 1-14.
[22] Tr. Vol. 7, page. 528, lines. 7-14.

The proposed power line will impede current farming practices. Construction would interfere with equipment usage and access to land. Future land options will also be at risk if the Commission allows a right of way on farming property.

Ranching Practices

The Missouri Cattlemen's Association strongly opposes the Commission approving ATXI's application by which ATXI can then use eminent domain to condemn private property and farmland for the proposed Mark Twain Transmission Project.[23] The use of eminent domain at any time is of great concern to the number one industry in our state, that being Agriculture.[24] The United States now has the smallest beef cowherd since 1962 and the rights of private property owners should be preserved in order to ensure family farms remain in business in Missouri.[25] The ability to use the practice of rotational grazing around and under the MTTP is a legitimate concern.[26] ATXI witness Silva stated that he did not know whether ATXI would pay for a rancher to move his/her cattle onto another rented parcel to graze while ATXI is constructing the portion of the MTTP on the rancher's property.[27] Cattlemen have serious concerns about the MTTP that remain unanswered by ATXI, about how this project will impact the health and well-being of cattle around the transmission lines, as well as the ranching families[28], as well as whether additional ranching costs caused by the MTTP will be paid for by ATXI.[29]

[23] Exhibit 36, page 2, lines 13-16.
[24] Exhibit 36, page 2, lines 21-22.
[25] Exhibit 36, page 3, lines 7-9.
[26] Exhibit 30, page 1, lines 24-30; page 2, lines 1-7.
[27] Tr. Vol. 5, page 238, lines 10-21.
[28] Exhibit 36, page 3, lines 19-21.
[29] Tr. Vol. 5, page 238, lines 10-21.

Limits on Aerial Application Practices

Farmers are choosing to use aerial applications at an increasing rate every year.[30] At the evidentiary hearing, Mr. Palmer, an aerial sprayer testified.[31] Mr. Palmer has 39 years of flying experience conducting aerial applications of herbicides, fungicides and insecticides on agricultural property the subject of this case, as well as properties in Mississippi and Minnesota.[32] He testified that he, obviously, must avoid any contact with the power lines and/or structures, so for safety he stays 2 passes (100-120 ft total, 50-60 feet on each side) away from the closest conductor when flying parallel to the electric transmission lines.[33] This reduces the total number of acres that can be treated due to the line.[34] Large transmission lines, like that proposed in this case, do not allow fields to be finished.[35] In this way Mr. Palmer differentiated the MTTP from distribution lines, stating:

> "Simply put, I cannot and do not finish fields with the big transmission lines and this is why--unlike distribution lines that run along field borders and roads in a square and organized pattern, transmission lines simply cut across country in a straight line cutting fields in odd angle patterns. Flying under these lines with an 8-10 foot tall crop, a 12-foot tall aircraft with a safe crop clearance is impossible especially with the heat of summer, growing season and tremendous line sag. (Heat sag that will also affect modern day, tall ground equipment, sprayers with 80-120 foot spray booms used by custom applicators). Flying over the top of the line is just too high to control spray drift for insurance reasons and crop penetration performance. Some pesticides are quite corrosive even to stainless steel.[36]

The MTTP will make it impossible to spray farmland near the transmission line

[30] Exhibit 41, page 4, line 18.
[31] Exhibit 37.
[32] Exhibit 37, page 2, lines 21-23; page 3, lines 3-4.
[33] Exhibit 37, page 3, lines 8-12; page 4, lines 12-15.
[34] Exhibit 37, page 3, line 12.
[35] Exhibit 37, page 3,lines 13-14.
[36] Exhibit 37, page 3, lines 13-22.

and structures.[37] When using an easement of 150 feet in width that cannot be treated, there is a loss of approximately 8-10 acres of farmland for every half mile along a transmission line.[38] Sometimes the only option to treat agricultural land is by air.[39] Transmission structures will create serious impediments to the ability to uniformly apply products to the field.[40] Ground equipment cannot apply treatment if the crops are too tall or the ground is too wet.[41] If air application is the only option, crop yield will be negatively affected, which in turn will negatively impact agricultural business.[42]

Limits on Irrigation Practices

The use of irrigation as an agricultural practice has become much more prevalent over the past several years as a necessity.[43] In Missouri, the two most prevalent types of irrigation are flood irrigation and center pivot irrigation.[44] With flood irrigation, the land is shaped so there is a slight grade, and the irrigation water is then run between the rows of crop.[45] With center pivot irrigation, a large structure moves in a circle around the field, distributing water on the crop as it moves.[46] The proposed route for the ATXI project has land that, because of topography, is much more conducive to center pivot irrigation.[47] The monopoles proposed by ATXI will make it impossible to irrigate the

[37] Exhibit 37, page 3, lines 13-14.
[38] Exhibit 37, page 4, lines 10-11.
[39] Exhibit 37, page 4, line 19.
[40] Exhibit 41, page 4, lines 20-21; page 5, lines 1-5.
[41] Exhibit 37, page 4, lines 19-20.
[42] Exhibit 37, page 5, lines 6-8. See also Exhibit 41, page 4, lines 20-21; page 5, lines 1-5.
[43] Exhibit 41, page 4, lines 5-6.
[44] Exhibit 41, page 4, lines 6-7.
[45] Exhibit 41, page 4, lines 7-8.
[46] Exhibit 41, page 4, lines 8-9.
[47] Exhibit 41, page 4, lines 9-11.

fields impacted by these structures.[48] Timely moisture is the greatest variable to maximizing crop production.[49] The inability to use this type of irrigation as a result of the monopoles will dramatically reduce the potential uses for this agricultural land.[50] Diminished productivity potential will reduce the value of the land significantly.[51]

Soil compaction

Soil compaction is a very serious problem in agriculture today.[52] Farmers and Ranchers spend a lot of time and money to prevent soil compaction from adversely affecting their crops and pastures.[53] Soil compaction can result in stunted growth of plants, impede the uptake of plant nutrients, and cause an adverse effect on plant growth and development.[54] Soil compaction is made much worse by heavy equipment moving over the land.[55] When heavy equipment is used during wet conditions, the compaction issues become much worse.[56] Without question, the construction of the MTTP on farmland will result in very significant soil compaction, due to both the heavy equipment moving over the land and construction during wet soil conditions.[57]

GPS Use

Farmers and Ranchers are utilizing GPS at a greater level than ever.[58] GPS is used to guide equipment so that rows are straight and uniform, herbicides are not

[48] Exhibit 41, page 4, lines 11-12.
[49] Exhibit 41, page 4, lines 12-13.
[50] Exhibit 41, page 4, lines 13-14.
[51] Exhibit 41, page 4, lines 13-15.
[52] Exhibit 41, page 3, line 15.
[53] Exhibit 41, page 3, lines 15-17.
[54] Exhibit 41, page 3, lines 17-18.
[55] Exhibit 41, page 3, lines 18-19.
[56] Exhibit 41, page 3, lines 19-20.
[57] Exhibit 41, page 3, lines 20-21; page 4, lines 1-2.
[58] Exhibit 41, page 5, line 8.

overlapped, and fertilizer applications are uniform with no double-applications or untreated spots.[59] GPS is very important for both row-crop and pasture land. It has been shown that numerous structures such as ones proposed by ATXI can have an adverse effect on receiving satellite signal and thereby causing serious problems for agriculture.[60] Real Time Kinematic (RTK) equipment is used to greatly improve the accuracy of GPS systems used in farming.[61] Trimble, a manufacturer of the RTK equipment, has advised users to avoid overhead power lines when using the equipment.[62] Specifically, the Trimble manual states: "Do not use the rover receiver directly beneath or close to overhead power lines or electrical generation facilities. The electromagnetic fields associated with these utilities can interfere with GPS receiver operation."[63]

Large Equipment Use and Precision Farming

By necessity, farm equipment continues to get larger.[64] Fifty years ago, a four-row planter was considered large.[65] Today, it is not uncommon for farmers to have 24-row planters or larger.[66] Spray booms can be 120 feet wide.[67] It is not unusual for tillage equipment to be 35-40 feet wide.[68] Combine grain headers can be 45 feet wide.[69] With all the large equipment used today, it is a nightmare to try to maneuver around

[59] Exhibit 41, page 5, lines 8-10.
[60] Exhibit 41, page 5, lines 10-13.
[61] Transcript Vol. 5, page 220, lines 12-24.
[62] Transcript Vol. 5, page 221, lines 8-21; page 222, lines 4-10. Exhibit 54, page 37.
[63] Transcript Vol 5, page 222, lines 4-10. Exhibit 54, page 37.
[64] Exhibit 41, page 5, line 16.
[65] Exhibit 41, page 5, lines 16-17.
[66] Exhibit 41, page 5, lines 17-18.
[67] Exhibit 41, page 5, line 18.
[68] Exhibit 41, page 5, lines 18-19.
[69] Exhibit 41, page 5, line 20.

obstacles such as the monopoles ATXI is proposing.[70] A very high percentage of these obstacles will traverse farmland at an angle, which will make the maneuverability problems even worse.[71]

Precision farming has become very popular in recent years.[72] Precision farming is simply utilizing technology to, for example, apply optimum amounts of fertilizer to small areas of fields based on intensive soil testing instead of applying the same rate of fertilizer to the entire field.[73] This practice is not only more cost-effective, it also eliminates the practice of over-fertilizing some areas of fields.[74] The ATXI project would make it much more difficult to utilize precision farming practices.[75] The fact that the proposed structures would traverse fields at an angle would make precision farming extremely difficult.[76]

Overall Impact on Farming and Ranching

The MTTP will subject farmers and ranchers to unwarranted intrusion onto their land and infringe upon their ability to continue their farming and ranching practices and operations on their land. Witness Silva for ATXI provided prefiled testimony that stated "The existence of the transmission line should not effect their [farmers] ability to farm or their yield for that matter."[77] However, Mr. Silva's testimony is illustrative because he uses "should not" verses "will not" when discussing whether the MTTP will impact agricultural practices. Mr. Silva confirmed at the evidentiary hearing that there is a

[70] Exhibit 41, page 5, lines 20-21.
[71] Exhibit 41, page 5, line 21; page 6, lines 1-2.
[72] Exhibit 41, page 6, line 5.
[73] Exhibit 41, page 6, lines 5-8.
[74] Exhibit 41, page 6, lines 8-9.
[75] Exhibit 41, page 6, lines 9-10.
[76] Exhibit 41, page 6, lines 10-11. See also Exhibit 44, Schedule 6.
[77] Transcript Vol. 5, page 236, lines 20-24; page 237, lines 4-12.

difference in meaning between "should not" and "will not."[78] ATXI would not state that the MTTP will have no effect on farming yields or farming ability.

Mr., Jackson provided written testimony and testified at the evidentiary hearing.[79] Mr. Jackson has over 45 years experience farming in Missouri.[80] Mr. Jackson has farming and ranching experience, owning and managing approximately 1500 acres throughout the years raising corn, soybeans, hay crops, lambs and cattle.[81] He has been active in working with Missouri farmers beginning in the 1970's, serving on the Missouri State Farm Bureau Board of Directors and as State Vice President.[82] Since 1968, Mr. Jackson has been a member of the Adair/Schuyler County Farm Bureau and has served as the local Farm Bureau President since the 2000's.[83] He testified that the route chosen by ATXI diagonally cuts across many of the farming/ranching parcels, interrupting operations across the entire parcel.[84] Attached to Mr. Jackson's testimony as schedules are the impacts that the MTTP will have on farming and ranching practices in each of the five counties the MTTP is proposed to cross.[85] From his 45 plus years of agricultural experience and Farm Bureau service in Missouri, and in the impacted area in particular, Mr. Jackson has verified that the impacts discussed in the Schedules are reasonable representations of the effect the MTTP will have on the farming and ranching parcels it crosses.[86] Testimony provided at

[78] Transcript Vol. 5, page 237, lines 4-12.
[79] Exhibit 44.
[80] Exhibit 44, page 1, line 4.
[81] Exhibit 44, page 1, lines 4-6.
[82] Exhibit 44, page 1, lines 9-12.
[83] Exhibit 44, page 1, lines 13-14.
[84] Exhibit 44, page 3, lines 10-14.
[85] Exhibit 44, Schedules 1-5.
[86] Exhibit 44, page 3, lines 4-7.

the local public hearings also supports the impact the MTTP will have on a farmer's and rancher's practices.[87]

(4) The Tartan Criteria—*Does the evidence establish that the Mark Twain transmission line project, as described in ATXI's application in this docket, and for which ATXI is seeking a certificate of convenience and necessity ("CCN"), is "necessary or convenient for the public service within the meaning of that phrase in section 393.170, RSMo?*

a. ***There must be a need for the service***
b. ***The applicant must be qualified to provide the proposed service***
c. ***The applicant must have the financial ability to provide the service***
d. ***The applicant's proposal must be economically feasible***
e. ***The service must promote the public interest***

The Commission has traditionally used the Tartan criteria to determine whether a project is "necessary or convenient for the public service within the meaning of Section 393.170, RSMo. It is ATXI's burden to present evidence showing that all five factors are met with MTTP. As an interesting side note in respect to the need for assent, the applicant in GA-94-127 did not seek approval from the Commission for a CCN in areas where they did not have the necessary assents.[88] The five Tartan criteria are: 1) there must be a need for the service; 2) the applicant must be qualified to provide the proposed service; 3) the applicant must have the financial ability to provide the service; 4) The applicant's proposal must be economically feasible; and 5) the service must promote the public interest. It is the position of Neighbors United that ATXI has not met all five of the Tartan criteria and the Commission should not approve the Application.

[87] *See Generally* Transcript Vols. 2, 3, and 4.
[88] In Re Tartan, GA-94-127, Report and Order, pages 3-4.

There must be a need for the service

Summary

ATXI inappropriately dropped its evaluation of alternatives to the MTTP when the MISO Board of Directors approved the MVP Portfolio containing the MTTP. These other alternatives neither require a costly investment in a new 345 kV line nor interfere with landowner rights as the MTTP does. Further, Ameren Missouri (the Missouri investor owned utility beneficiary of the MTTP) does not require the MTTP to meet its target of 400 MW of new wind power contracts by 2021. The instate incentive in the Missouri Renewable Energy Standard reduces the wind target, if the wind power is located in Northeast Missouri in the Adair Wind Zone, to approximately 300 MW. MISO has determined through an interconnect study that—with modest upgrades totaling less than $11 million that the wind developer is obligated to pay for—at least 300 MW of wind power can be accommodated at the Adair Substation. Ameren Missouri also has the ability to buy additional renewable energy credits to meet its 2020 targets. ATXI ignores the current economic competitiveness of solar power with wind power, as well as the better match of solar output with summer peak demand, in its economic analysis of the benefits of the proposed 345 kV line. Potential benefits to other states should not be a rationale used by the Commission to support a finding that there is a need for the service in Missouri, especially when considering the economic impact of running the MTTP through operational farms and ranches in Northeast Missouri. Also, the MTTP is not necessary to solve alleged reliability concerns

In sum, there are viable and cost-effective alternatives to constructing the proposed ATXI 345 kV line that achieve the project objectives described in the ATXI

application while avoiding the economic and environmental impacts that will be caused by the project.

Reliability and Wind Transport Justifications for Mark Twain Line

ATXI's application lists three justifications for the 345 kV MTTP: 1) wind development in Northeast Missouri, 2) grid reliability in Northeast Missouri, and 3) regional MVP benefits. The Application states:

> There is a need for the transmission capacity to be provided by the Mark Twain Project, and the Project is in the public interest in that it will provide for the integration of wind energy in Missouri to increase the amount of electricity available from renewable resources, including wind energy that would be transported to aid Missouri public utilities in complying with Missouri's Renewable Energy Standard, section 393.1020, RSMo., et seq. The Project is also part of improvements to the regional transmission system under MISO's functional control and will improve the overall reliability of the regional transmission system and reduce transmission system congestion. The Project will provide the additional benefit of providing a remedy to several reliability issues which can result in unacceptable low voltage conditions in the Kirksville area. [89]

In fact, MISO is pursuing the Mark Twain transmission line because it is an element of the one resource type, regional transmission networks, that MISO can "obligate" utilities to build.[90] The authority of MISO to obligate the construction of transmission encroaches on the regulatory authority of state public utilities commissions, like the Missouri PSC.[91] ATXI and Ameren Missouri, affiliates of the same holding company are pursuing the Mark Twain line because of the high rate of return that will be realized by construction of the project.[92] ATXI and Ameren Missouri will be the financial beneficiaries should this project receive Commission approval. The losers will be the ratepayers of Missouri, who

[89] Exhibit 42, Schedule PE-01, page. 5, lines 1-12.
[90] Tr. Vol. 9, page. 605, lines 3-17.
[91] *Id.*
[92] Tr. Vol. 7, page. 428, lines 8-14.

will pay $18 million and receive no benefit from this line that cannot be achieved more cost-effectively by other means, as demonstrated by Neighbors United's witness, Mr. Powers, and the farmers and wildlife of Northeast Missouri that will see their lands and habitat compromised along the pathway of the line.

I. The Assertion by ATXI that the Mark Twain Line Is Necessary for Ameren MO to Meet Its 2021 RPS Obligation Is False

Ameren MO states in its 2014 IRP that it will add 400 MW of wind power, and 45 MW of solar power, to meet its 15 percent RPS target by 2021.[93] There is no other wind power justification for building the Mark Twain line in Missouri. Any renewable energy developed within Missouri receives a multiplier of 1.25 compared to out-of-state generation.[94] Therefore, if Ameren MO contracts for wind constructed in Northeast Missouri, a total of 320 MW of new wind capacity will fully meet the Ameren MO wind power 2021 RPS target.[95] The total wind power need, in the context of this CCN Application, is for 320 MW of wind power in Northeast Missouri. MISO has demonstrated through an interconnection study that at least 300 MW of wind power can be delivered over the existing 161 kV system in Northeast Missouri at no cost to Missouri ratepayers.[96] In other words, the existing 161 kV transmission system in Northeast Missouri is adequate to transport all of the new wind power Ameren MO needs to meet its 2021 RPS obligation.

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[93] Exhibit 42, Schedule PE-01, page 5, lines 16-19.

[94] *Id*. at page 6, lines 6-8.

[95] 400 MW ÷ 1.25 = 320 MW.

[96] Exhibit 42, Schedule PE-01, page 11, lines 6-9. All transmission system upgrade costs necessary to make the 300 MW deliverable would be paid by the wind project developer.

It does not matter whether the Mark Twain line could in theory carry 1,347 MW[97] of wind power. The only demonstrable renewable energy need is for 320 MW of wind power in Missouri or 400 MW of wind power from outside of Missouri. This out-of-state wind energy can be obtained either through the purchase of low cost Renewable Energy Credits ("RECs"),[98] or through a power purchase agreement ("PPA") with an out-of-state wind power provider.[99] The PPA format would be similar to the PPA that Ameren MO has with Pioneer Prairie II wind farm in Northern Iowa for 102 MW of wind capacity. Ameren MO can readily contract for 320 MW of instate wind power or 400 MW of out-of-state wind power at no cost to Ameren MO ratepayers for new transmission infrastructure.

MISO has already demonstrated that 300 MW of new wind power can be delivered over the existing 161 kV lines in NE MO.[100] However, the testimony of MISO's witness Mr. Smith misleads the Commission by asserting that the MISO interconnection study for the 300 MW Shuteye Creek project in Northeast Missouri evaluated only a 60 MW wind project:[101]

> 23 Q. And even if we were in 2007, as I understand
> 24 it, the study didn't conclude that all of the generation
> 25 that was being considered at the time (300 MW) could actually be
> 1 sold or was deliverable to load, it only concluded that
> 2 some small fraction of that could be interconnected; isn't
> 3 that right?
> 4 A. That is correct. The study focused on a --
> 5 20 percent of the total capacity of the unit to be
> 6 interconnected, which was -- I believe it was a
> 7 300-megawatt unit, so it would've been a 60-megawatt

[97] Exhibit 35.
[98] Exhibit 26.
[99] Exhibit 42, Schedule PE-01, page 10, lines 9-11.
[100] Id. at page 10, lines 14-18; page 11, lines 5-9.
[101] Tr. Vol. 9, pages 573-574.

8 evaluation.
9 Q. And all it really concluded is that you can
10 perhaps spend $11 million and you could -- you could
11 deliver 60 megawatts. Whether you could deliver more was
12 not concluded by the study; isn't that right?
13 A. That is correct.

The interconnection study specifically looks at summer peak conditions when congestion is expected to be highest on the transmission system.[102] MISO assigns wind power a capacity factor of 20 percent for interconnection studies, as little wind power is typically available at the summer peak.[103] The interconnection study evaluated the 300 MW nameplate capacity Shuteye Creek wind farm that MISO assumes will produce 60 MW during the summer peak, and implicitly will produce up to its 300 MW capacity at other off-peak periods when there is ample spare capacity on the existing transmission system.

ATXI witness Mr. Kramer's statement that output from a newly proposed 400 MW wind farm in Schuyler County could not be delivered over the existing 161 kV system in Northeast MO is flawed.[104] In the first instance, only 320 MW of instate wind power would be necessary to fully meet the wind component of Ameren MO's 2021 RPS target. There is no coherent basis for Ameren to sign a contract for 400 MW of wind power when the only defensible need in the context of this CCN application is for 320 MW of instate wind power. In the second instance, Mr. Kramer grossly underestimates the collective capacity of the three 161 kV lines serving the Adair Substation when he states that the capacity is 233 MVA and that this is inadequate to transport 400 MW of

[102] Exhibit 42, Schedule PE-10, pages 38-39.
[103] *Id.*
[104] Tr. Vol. 5, page 204, lines 13-18.

wind power.[105] The combined capacity of these three 161 kV lines according to ATXI is 823 MVA, about double the capacity of a 400 MW wind farm.[106,107]

II. Assuring Grid Reliability in Northeast Missouri Is Not a Primary Reason Identified by ATXI to Build the Mark Twain Line - Reliability Objectives Can Be Met at Lower Cost by Other Means

ATXI witness Kramer acknowledges that claiming that Mark Twain must be built to address low voltage conditions in NE MO is/was an afterthought and not the reason for building the Mark Twain line:

> *The fact that the Project addressed all of the NERC Category C Contingency events is not the primary reason why the Project is needed. As explained by MISO witness Jameson T. Smith, the Project is part of an MVP Portfolio that provides multiple benefits to the Missouri customers that far exceed the cost they will pay for the Project. In the unlikely event that the NERC Category C Contingency events were to suddenly disappear, the Project's remaining set of benefits would more than justify its implementation*."[108]

It is important to highlight that Ameren MO was working on meeting the low voltage contingencies with voltage regulation devices when the MVP Portfolio was approved by MISO:

> *When Ameren Services performed its annual analysis of the transmission system in 2011, it identified system configurations caused by NERC Category C events in Northeast Missouri that would result in low voltage and place Ameren Missouri and cooperative load at risk for loss. During subsequent discussions, various high level solution options were discussed which included a new 345 kV line to supply the Adair substation, as well as possible installation of voltage support devices such as static Var compensators to help address the problem*.[109]

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[105] Tr. Vol. 5, page 204, lines 13-18.
[106] Exhibit 42, Schedule PE-13, pages 1-2.
[107] MVA and MW are assumed to be equivalent in this example.
[108] Exhibit 4, page 30.
[109] *Id.* at 33.

The NERC Category C Contingency events identified by ATXI would have disappeared if the analysis of the static Var compensator (SVC) option had been completed by Ameren MO [and those SVCs installed] at the appropriate NE MO substations, instead of suspending its evaluation when the MISO Board of Directors approved the MVP portfolio.

***[redacted]

[redacted][110]*** However, Mr. Kramer made no comment about the most effective locations for SVCs in Northeast MO to address the contingencies using voltage regulation devices instead of building the Mark Twain. It is not Neighbors United's responsibility to design the appropriate distribution of SVC's at Ameren MO substations in Northeast MO in address Category C contingencies. It is ATXI's role and responsibility to ratepayers in this proceeding to present this voltage regulation option to the Commission for review as an alternative to the Mark Twain line. An ATXI response in surrebuttal testimony to Neighbors United's recommendation on a possible location for voltage regulation devices to address Category C contingencies is a wholly inadequate substitute to ATXI conducting a rigorous assessment of the proper location of voltage control devices in Northeast MO to address the identified contingencies.

***[redacted]

[110] Tr. Vol. 6, page 210, lines 6-24.

HC

[redacted][113]***

Mr. Kramer did not acknowledge that placing only 5 MW of the 45 MW of solar that Ameren MO is planning to install to meet its 2021 RPS obligation at the Adair Substation would resolve with no need for future corrective action, by reducing the amount of load to be shed to less than ***[redacted]***, the Category C contingency that Mr. Kramer described as the "most severe" in his surrebuttal testimony.[114] The placement of 5 MW of solar at the Adair Substation would impose no additional cost on Ameren MO ratepayers, as Ameren MO is already planning to install this solar capacity somewhere in its service territory.

[redacted][115,116] In other words, ATXI is justifying the Mark Twain line as the reliability solution to contingency conditions that have never happened to the existing 161 kV system in Northeast MO. Neighbors United's witness Mr. Powers demonstrated

[111] Exhibit 4, page 18, lines 15-18.
[112] Id. at 31, lines 7-13.
[113] *Id*. at 31, lines 16-22.
[114] *Id*. at 31, lines 7-15.
[115] Exhibit 42, Schedule PE-13, page 3.
[116] Tr. Vol. 6, page 185, lines 15-21.

HC

in his testimony and at the hearing that Ameren MO can petition SERC to reclassify some of the Category C contingencies modeled by ATXI, the N-2 events, as demonstrably low probability "extreme" Category D contingencies that require no corrective action. This would be consistent with policy established in the WECC in 2012 for a certain category of N-2 event.[117] Ameren MO territory is in SERC jurisdiction. The procedure for SERC to acknowledge the WECC policy regarding N-2 events is known as the "regional consistency reporting tool."[118] ATXI had not investigated this potential administrative resolution to a substantial number of the Category C contingencies it evaluated,[119] in part because Mr. Kramer was unaware that this option existed.

*** [redacted] .***[120] In other words, the presence of Mark Twain may have no impact on alleviating the causes of real outages that occur with regularity in Northeast MO while helping to address Category C contingencies that have never occurred in Northeast MO. Mark Twain could be characterized as the wrong reliability solution to a non-existent problem, while the real grid reliability problems in Northeast MO go unattended.

[117] Exhibit 42, Schedule PE-01, page 21, lines 8-17.
[118] Tr. Vol. 5, page 173, lines 16-25.
[119] Exhibit 4, page 28, lines 6-9.
[120] Tr. Vol. 6, page 189, lines 16-24.

HC

The applicant must be qualified to provide the proposed service

Neighbors United asserts that ATXI has failed to show that it is a qualified entity to provide the proposed service. Owning the transmission line will require ongoing relationships with the landowners that ATXI proposes to acquire easements from. If the MTTP is approved, normal and unexpected maintenance requirements will require ATXI to enter upon the easements acquired from the landowners. From the onset of this project, ATXI has failed to build a working relationship with the landowners that this project will require them to continually work with. ATXI held three open houses in the fall of 2014 to allow landowners to ask questions about the project. Before landowners could enter the public meetings to inquire of the project, they were required to sign a "Sign-In Sheet" or they were not allowed to enter to inquire about how the project would impact their land.[121] The "Sign-In Sheet" contained a disclaimer that stated an individual's signature on the "Sign-In Sheet" was their release and that it allowed ATXI to use the individual's image and statements made at the public meeting for any purpose in the future.[122] Also, a reporter with WGEM provided a report on the news station's website as well as the 10 p.m. news after the October 28, 2014 Open House. The news report included statements made by ATXI's former Director of Stakeholder Relations, Peggy Ladd. The report provided: "'I think if the route is on the property they're a little more concerned, and if not, they've just breathed a sigh of relief,' Ladd said." The news also reported Ladd stating "…*the project is moving ahead either way, and it's up to the residents to jump on board or jump ship*."[123] Statements as such

[121] Tr. Vol. 5, page 113, lines 11-12.
[122] Exhibit 49.
[123] Exhibit 45.

are hardly supportive of the idea that the utility can work cooperatively with landowners and consider their interests in their decision-making.

Besides inappropriate statements, ATXI has also failed to identify and notify all landowners along the proposed route. While the Commission has recently stated that there is no statutory requirement to do so, ATXI witness Ms. Borkowski states "All landowners whose property is impacted by the final route described and depicted in ATXI witness Chris Wood's direct testimony have been notified in writing."[124] A recent Notice of Extra Record Communication identifies one individual that has stated he did not receive notice that the final route was to cross his property, and Neighbors United has identified other non-members that ATXI failed to notify.[125] While there may be no statutory requirement, the idea of fair and honest dealing suggests a utility would provide notice to the affected landowners that they intend to seek either a voluntary easement or begin condemnation proceedings to build a transmission line over their property. ATXI's failure to provide basic notice should cause one to wonder what other misrepresentations are contained in the Application? And can ATXI engage in fair dealings with the citizens of Missouri if the Commission approves this Application. Statements made by ATXI that this project "is going to go through no matter what" should raise concerns with the Commission.

The applicant must have the financial ability to provide the service

Neighbors United does not take a position on this issue at this time and reserves the right to brief the issue.

[124] Exhibit 2, page 4, footnote 1.
[125] Exhibit 48.

The applicant's proposal must be economically feasible

Summary

In short, ATXI has failed to show that the MTTP project is an economic project standing on its own outside the portfolio. ATXI has used MISO studies to suggest the economic feasibility of the project—however MISO admits that it did not conduct independent cost benefit studies for the specific Missouri Mark Twain Transmission Project (MTTP), which is the specific project the Commission is being asked to approve, not the entire MVP portfolio. Since the Commission is being asked to specifically approve the MTTP, it should require evidence of whether the specific project's economic benefits outweigh the costs, and without it, the Commission cannot determine whether the project is in the economic interest of Missouri citizens. Without it the Commission lacks substantial and competent evidence to support such a finding. Further, ATXI witness Ms. Borkowski states that "…it is true that one cannot quantify the precise retail rate impact based upon such analyses…" provided by MISO.[126] The Commission should deny a project that cannot be supported by its own cost/benefit analysis. The Commission makes decisions for Missouri ratepayers, not a multi-state region as a whole.

I. No Economic Benefit to Missouri Ratepayers Has Been Demonstrated by ATXI for the Mark Twain Line

MISO did no analysis of whether the economic benefits of the overall MVP Portfolio were impacted without the Mark Twain line, or what specific rate benefits the Mark Twain line provided to Missouri ratepayers.[127]

[126] Exhibit 2, page 8.

[127] Tr. Vol. 9, p. 589, lines 11-15.

ATXI witness Schatzki in his testimony included a table of locational market prices in MO with and without the Mark Twain line. However, there was essentially no difference, less than 0.5 percent on average, in the price of power with or without the Mark Twain line in the carbon-constrained scenario. Also, that analysis presumed that virtually all renewable power going forward to meet RPS requirements in the MISO footprint will be wind power. However, both MISO and ATXI acknowledged that some or all of the power generation utilizing the Mark Twain line could be natural gas-fired power, as the line is being collocated near an existing natural gas pipeline right-of-way.[128]

In fact, the economic benefit of solar power is eclipsing the economic benefit of wind power.[129] Any study limited to assessing the relative economic benefit of wind power based on geographic location in the MISO footprint is obsolete for its failure to consider a more cost-effective solar alternative that does not require a major transmission expansion project like the Mark Twain line to be fully deliverable. The claim by ATXI that wind is more cost-effective than solar power is based irrelevant, obsolete cost comparisons that assume solar power costs two to three times current solar contract prices.[130] One example of this phenomenon is the selection by Cedar Falls Utility in Iowa, historically a major wind power development state, of solar power as the more cost-effective renewable energy resource over wind power for a community-based renewable energy program.[131] A principal reason given by Cedar

[128] Tr. Vol. 9, page 586, lines 2-16.
[129] Exhibit 42, Schedule PE-01, pages 36-41.
[130] Tr. Vol. 7, page 439, lines 18-25; page 440, lines 1-5.
[131] Tr. Vol. 7, page 436, lines 9-23.

Falls Utility for selecting solar over wind is that solar power is produced at the right time of day to meet the demand.[132]

There is almost no difference in ATXI witness Schatzki's calculated locational market prices in Missouri with or without the Mark Twain line.[133] This is the case without addressing the legitimacy of the nearly exclusive emphasis on wind power as the basis for witness Schatzki's economic benefit assertions.[134] Furthermore, Schatzki conducted no analysis of the accuracy of his forecast price projections, to assess whether the small difference in calculated locational market price difference with or without the Mark Twain line lies within the margin of error of the calculation procedure employed by Schatzki to derive the forecast values.

The service must promote the public interest

As discussed above, the Missouri Constitution states that Agriculture "…is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri." ATXI seeks to build the MTTP through approximately 378 properties, majority if not all, engaged in farming and/or ranching practices. ATXI requests relief that would permanently remove citizens' property from production and prevent these citizen farmers and ranchers from engaging in farming and/or ranching practices. While the exact extent of intrusion is a

[132] Tr. Vol. 7, page 436, lines 9-23.

[133] Exhibit 21, Table 1.

[134] Exhibit 42, Schedule PE-01, page 34, lines 11-13. "*MISO determined in its "Regional Generation Outlet Study" that wind power will provide approximately 90 percent on average of the renewable power used to meet RPS targets for states in MISO and PJM*."

point of argument, even ATXI admits that some land will be removed from production. As ATXI's actions infringe on a constitutional right, the service cannot promote the public interest.

Health Impact of the MTTP line

Dr. Dennis Smith submitted prefiled testimony and testified at the evidentiary hearing on behalf of Neighbors United concerning the real potential for detrimental health consequences from exposure to low level EMFs. Dr. Smith is a medical doctor, having a degree in Osteopathic Medicine from Des Moines University and treats patients at Moberly Regional Medical Center in Moberly, MO.[135] The following is a table of individuals that will be impacted by the MTTP and how close ATXI choose to build the line to their residences (or other structures where indicated) on the land:[136]

Name of Owner	Parcel Number	Approximate Distance of House from Line as Shown on Exhibit 74 maps	County
Arnett, Johnathun	021-01-06-24-000-00-01.01	400 ft	Shelby
Defries, William & Kamra	19-05.0-15-000-00-08.000000	750ft	Adair
Di Stefano, Maria	S of 13-06.0-23-000-00-05.001000	490ft	Adair
Hollenbeck, Margaret	13-05.0-22-000-00-54.002000	1575ft	Adair
Murphy, Benjamin & Marla	19-03.0-07-000-00-02.000000	1100ft	Adair
Gregory, Richard & Jeanette	18-01.0-01-000-00-07.000000	750ft	Adair
Moore, John D & Kimberly A	18-01.0-01-000-00-05.001000	450ft	Adair
Parks, Charles & Peggy	1503007000000000000	320ft	Adair
Weaver, Patrick Jeb	0604020000000000000	740ft from Livestock barn, 980ft from house	Adair
Pruett, Russel & Sheila	13-07.0-26-000-00-09.003000	250ft from house, 750ft from Winery	Adair

[135] Exhibit 40, page 3, lines 4-7.
[136] Exhibit 74

Blankenship, William & Judy	W of 18-01.0-01-000-00-07.000000	900ft	Adair
Lawrence, Gregory	13-06.0-23-000-00-12.000000	400ft	Adair
Tallman, Justin & Janette	N of 13-06.0-24-000-00-06.000000	450ft	Adair
Schilling, Jay & Brenda	N of 13-06.0-24-000-00-06.000000	750ft	Adair
West, Waldo	12-04.0-18-000-00-06.000000	700ft	Adair
Porter, Cary & Tonya	12-03.2-07-000-00-06.000000	150ft & 250ft both homes	Adair
Phipps, Jerry & Sharon	12-03.1-06-000-00-13.000000	450ft	Adair
Anesi, James	12-03.1-06-000-00-10.000000	1150ft	Adair
Rhon, Heather & Thomas	12-03.1-06-000-00-14.000000	800ft	Adair
Hatfield, Leon & Doris	12-03.1-06-000-00-15.001000	1100ft	Adair
Wait, Kenneth & Marilyn	09-09.0-31-000-00-07.000000	1000ft	Adair
Moyer, Harold & Bettie	09-09.0-31-000-00-02.000000	450ft	Adair
Kilmer, Caitlin	E of 09-09.0-31-000-00-02.000000	500ft	Adair
Young, David & Sharon	E of 09-09.0-30-000-00-08.000000	800ft	Adair
Pryor, Bennie & Corie	09-09.0-30-000-00-09.000000	450ft barn, 600ft house	Adair
Roberts, Andrew	E of 09-09.0-30-000-00-01.000000	600ft building, 900ft house	Adair
Collop, Ellis & Lucille	09-09.0-20-000-00-04.000000	650ft	Adair
Ambrosia, Ray	09-04.0-18-000-00-05.000000 -	550ft	Adair
O'Brien, Becky	007.03.07.0.00.002.00	1800 ft	Marion
Hall, Matt	N of 006.01.12.0.00.001.02	1000 ft	Marion
Ferguson, Joe	SW of 006.01.12.0.00.001.02	600 ft	Marion
O'Brien, Tim	N of 006.01.12.0.00.002.00	500 ft	Marion
Hall, Raymond	006.01.02.0.00.007.00	1000 ft	Marion
Patterson, Larry & Barbara	003.08.34.0.00.004.00	850 ft	Marion
Voepel, Glen & Larry	003.08.34.0.00.005.00	600 ft	Marion
Wright, April & Tim	09-03.0-08-000-00-02.00200	500ft	Adair
Schrock, Joe & Rachel	003.08.33.0.00.003.00	600 ft	Marion
Keller, Jim	S of 003.08.33.0.00.003.00	1000 ft	Marion
Keller, Donald	003.09.32.0.00.001.00	250 ft	Marion
Pontius, Michael	003.09.30.0.00.013.01	375 ft	Marion
Corey, Robert	N of 003.09.30.0.00.013.01	750 ft	Marion
Leckbee, Maureen	003.09.30.0.00.012.00	375 ft & 800 ft both	Marion

		homes	
Gottman, Wayne	W of 003.09.30.0.00.012.00	750 ft	Marion
Denish, Geene & Lily	N of 003.09.30.0.00.009.00	850 ft	Marion
Hepner, Timothy & Jan	09-03.0-06-000-00-07.001000	1050ft house, 800ft building	Adair
Bishop, Roger	NW of 004.07.25.0.00.003.00	550 ft	Marion
Frost, Daniel	004.06.24.0.00.005.00	1100 ft	Marion
S & Z Acres LLC	004.05.22.0.00.002.00	775 ft	Marion
Bohon, Annie	SE of 004.05.21.0.00.002.00	600 ft & 825 ft homes	Marion
Gering, Jonathan & Deborah	09-03.0-06-000-00-07.000000	850ft	Adair
Schroeder, William & Mary	004.05.16.0.00.008.00	950 ft	Marion
Stone, Randall & Elsie	004.04.17.0.00.004.00	750 ft	Marion
Dooley, Everett	004.04.19.0.00.002.00	850 ft	Marion
Pulliam, David K	02-09.0-32-000-00-05.00100	850ft	Adair
Pickens, Frank M	E of 02-09.0-32-000-00-05.00100	750ft	Adair
Arnett, Linda	S of 021-01-06-24-000-00-01.01	750 ft	Shelby
Lund, Richard	021-01-06-14-000-00-09.00	700 ft	Shelby
Jensen, Dean	N of 021-01-06-14-000-00-09.00	900 ft	Shelby
McCormick, Donald & Deborah	S of 02-09.0-32-000-00-04.000000	1000ft	Adair
Blake, Larry	021-01-06-14-000-00-08.00	375 ft	Shelby
MOCH LP, Larry Clark	021-01-05-16-000-00-08.00	300 ft	Shelby
Lindsey, Don	S of 021-01-05-16-000-00-08.00	850 ft	Shelby
Billington, Joseph	02-09.0-30-000-00-01.000000	1200ft	Adair
Marquardt, Donald & Blenda	02-09.0-29-000-00-02.000000	1100ft building	Adair
Lindsey, Kayla	S of 021-01-05-16-000-00-08.00	1650 ft	Shelby
Orr, Kimberly	SE of 021-01-05-16-000-00-08.00	1950 ft	Shelby
King, Kevin & Bonnie	02-04.0-19-000-00-06.000000	1200ft Building, 1500 ft House	Adair
Lindsey, Kelly & Brenda	S of 021-01-05-16-000-00-08.00	2000 ft	Shelby
Marquardt, Donald & Blenda	E of 02-04.0-19-000-00-06.000000	300 ft Barn	Adair
Daugherty, John & Louise	N of 021-01-04-17-000-00-06.01	1600 ft	Shelby
Wood, Glenn & Louise	021-01-05-16-000-00-05.00	1750 ft	Shelby

Daugherty, Pat	N of 021-01-04-17-000-00-07.00	1550 ft	Shelby
Vanskike, Ron	021-02-06-13-000-00-04.00	450 ft	Shelby
Hawkins, Tandy ETAL	021-02-06-14-000-00-01.01	1090 ft	Shelby
Hawkins, Tandy ETAL	021-02-06-14-000-00-03.00	1300 ft	Shelby
Hawkins, Tandy & Sharla	021-02-05-15-000-00-01.00	900 ft	Shelby
Allen, Lenora	021-02-06-14-000-00-04.00	800 ft	Shelby
Hawkins, Dale & Sonja	S of 021-02-04-17-000-00-01.00	1350 ft	Shelby
Berry, Dustin	SW of 021-02-04-17-000-00-01.00	1400 ft	Shelby
Pleasant Prairie Cemetery	N end of 021-02-04-18-000-00- 01.00	900 ft	Shelby
Mersman, Weldon & Donna	021-03-06-13-000-00-02.00	1500 ft	Shelby
Phillips, Danny & Janice	021-03-06-14-000-00-04.00	1100 ft	Shelby
Mann, Jack & Sandra	021-03-02-09-000-00-04.00	550 ft	Shelby
Mann, Richard & Susan	S of 021-03-02-09-000-00-02.00	1250 ft	Shelby
Blaise, Brian	021-03-03-05-000-00-02.00	500 ft	Shelby
Harder, Loren & Jane	021-03-03-05-000-00-05.00	1450 ft	Shelby
Reed, Shawn	N of 021-02-04-18-000-00-01.00	1400 ft	Shelby
Roan, Dallas & Danielle	N of 021-03-06-14-000-00-04.00	1400 ft	Shelby
Franke, Stan & Myrna	15-09.0-00-00 030.006.00.000	1050 ft	Knox
Daggett, Colleen	15-09.0-00-00 030.005.00.000	800 ft	Knox
Gaines-Beach, Edra	14-06.0-14-00 014.011.00.000	400 ft	Knox
Milligan, Floyd & Joyce	14-03.0-00-00 008.003.00.00	375 ft	Knox
Head, Glenn	14.03.0-00-00 006.003.00.000	575 ft	Knox
Locust Hill Church	S of 14.03.0-00-00 006.003.00.000	1125 ft	Knox
Kerby, Keith & Nancy	0603007000000000000	1150ft	Schuyler
Ford, Walter & Sandra	0501001000000001000	500ft building, 700ft house	Schuyler
Morgan, Terry	1504018000000000000	1000ft Home or building	Schuyler
Bauer, John & Julie	N of 004.05.16.0.00.008.00	1950 ft	Marion
Spratt, Eric	S of 004.05.16.0.00.008.00	1525 ft	Marion
Hall, Raymond	N of 006.01.12.0.00.001.02	1400 ft	Marion
Turnbull, Maurice & Sandra	S of 004.04.17.0.00.005.00	1550 ft	Marion
Kaden, Ivan & Margaret	0501001000000000000	950ft	Schuyler

Weaver, Dennis	0604018000000000000	400ft building	Schuyler
Anderson, Olin & Alice	0604020000000000000	750ft	Schuyler
Parsons, Charles & Jill	0604020000000000000	950ft	Schuyler
Dobson, Raymond	0607035000000001000	650ft & 900ft	Schuyler
Shephard, Florence	1101002000000000000	950ft	Schuyler
Morgan, Albert & Kay	1503007000000000000	1100ft	Schuyler
Miller, Richard	1009030000000000000	600ft building, 1400ft house	Schuyler
Haley, Mathew & Elizabeth	0607035000000000000	400ft building, 800ft house	Schuyler
Hollenbeck, Aaron	Transcript Vol. 4, page 125, lines 11-12.	320yrds	Adair
Gullion, Carol & Dan	1101002000000000000	700ft building, 900ft house	Schuyler
Bruner, Ev'Anne	E of 11010020000000000500	900ft	Schuyler
Kramer, Jerry	N of 11010020000000000200	950ft	Schuyler
Lunen, John & Deb	S of 06070350000000000500	450ft	Schuyler
Steen, Gerald	E of 06050210000000000500	750ft	Schuyler
Lamb, Patricia	W of 06040200000000000400	1250ft	Schuyler
Weaver, Betty	E of 06030070000000000200	1250ft	Schuyler
Strunk, David	0501012000000000000	1550ft	Schuyler
Funk, Judy	W of 05010010000000000200	1250ft	Schuyler
Donaldson, Charles	13-05.0-22-000-00-52.000000	250ft shed	Adair

ATXI choose to route the MTTP within 2000 feet of residential or other structures on at least 121 parcels it will cross. How many of you reading this would have no concern with your home being placed 250 feet from a 345kV transmission line? Families within these homes will have no choice but to spend their lives living near a high voltage power line, or move away from the structure that ATXI has routed so close to their home. ATXI's website regarding the Mark Twain project states that the World Health Organization concluded that current evidence "…does not confirm the existence of any health consequences from exposure to low level EMFs."[137] However, ATXI's website

[137] Exhibit 40, Schedule DS-02.

does not deny the existence of any health consequences from exposure to low level EMFs, and yet they chose to route the MTTP very close to residential structures.[138] ATXI's website about the project fails to address that ongoing concerns about adverse health effects triggered the World Health Organization to call for research in multiple health areas.[139]

The general belief is that cancers are caused by damage to DNA.[140] Low levels of environmental EMF penetrate the nucleus of a cell, inducing a DNA stress response.[141] Cells can be affected at energy levels as low as 0.5 **µT** to 1 **µT** (5-10mG).[142] ATXI reports, "Ameren levels at the edge of Right-of-Way for 345kV transmission lines (75ft) are typically at or below 90 mG." [143] The exposure quoted by ATXI is 9-18 times greater than the level of energy found to interact with the DNA of cells.[144] Landowners should not be forced against their will to expose their families to any element they fear on the property they have toiled to purchase and maintain.[145]

Land Values

Mr. Harris is a certified real estate appraiser and his practice has focused on agricultural production and agribusiness properties since 1991.[146] Mr. Harris provided prefiled testimony that the easement required for ATXI will significantly impact the

[138] Exhibit 40, Schedule DS-02.
[139] Exhibit 40, page 4, lines 7-9; Schedule DS-02; Schedule DS-03.
[140] Exhibit 40, page 5, lines 4-5.
[141] Exhibit 40, page 5, lines 6-7.
[142] Exhibit 40, page 5, lines 10-11.
[143] Exhibit 40, page 5, lines 11-12.
[144] Exhibit 40, page 5, lines 12-14.
[145] Exhibit 40, page 7, lines 7-9.
[146] Exhibit 38, page 1, lines 10-11.

values of productivity from the cropland.[147] Land values will be impacted from the placement of towers impacting the functionality of the farmland, compaction from construction limiting grain production, and lack of demand on the market due to the impacts.[148] Residential properties will also be affected because of the unsightly appearance of the power line and health concerns.[149] The representative effect of the transmission line on agricultural properties of approximately 135 acres is a reduction in value by 63 percent.[150] A smaller agricultural property, of approximately 30 acres, would decrease property value by approximately 84 percent.[151] Finally, the value of residential lots approximately 10 acres in size would be reduced by approximately 91 percent.[152]

Cultural and Environmental Resources

Further, ATXI proposes to build the MTTP through environmentally sensitive areas where several endangered species are known to reside. ATXI failed to fully consult with the United States Fish and Wildlife Service (FWS) prior to submitting their Application to the Commission containing a final route.[153] The Missouri Department of Conservation also expressed concerns about ATXI's planning.[154] For a project that is based on bringing renewable energy into the region and is toted as supporting "GREEN" initiatives, it is quite ironic that the MTTP will disturb environmentally sensitive areas including large maternal colonies of bats listed as endangered species by the

[147] Exhibit 38, page 3, lines 1-4.
[148] Exhibit 38, page 3, lines 4-7.
[149] Exhibit 38, page 3, lines 7-8.
[150] Exhibit 38, page 6, lines 1-7.
[151] *Id.*
[152] *Id.*
[153] *See Generally* Exhibit 73.
[154] *See Generally* Exhibit 72.

FWS. Neighbors United recommends the Commission order ATXI to further consult with FWS and the Missouri Department of Conservation prior to granting the certificate in an effort to minimize environmental impact. The Commission has the ability through this order to instill the need for appropriate planning prior to case filings. If authority is granted prior to proper planning, there is a potential for running roughshod through the process because the applicant already has what they want—in this case—the ability to build the MTTP.

Another great concern of Neighbors United is ATXI's decision to build the MTTP near Amish and Mennonite communities. Again—another great irony—the MTTP will be built near communities that do not even use power. The Amish and Mennonites religious beliefs keep them from actively opposing the MTTP, a fact that only benefits ATXI. Neighbors United argues that building across these communities is against the public interest as the project goes against their very way of life. The MTTP will cross one Amish property and he right-of-way centerline of the proposed route does pass approximately 3,500 feet from Mr. Miller's easternmost boundary, and approximately 4,000 feet from Mr. Graber's easternmost boundary.[155]

The Amish hold their bi-weekly church meetings within their homes, so every Amish home is a church and used 2-3 times a year for services and community meetings.[156] Because of this, every Amish family will be affected. The Amish and Mennonite lifestyles are inseparable from their religious practices.[157] Everything about the use of electricity and this Project runs directly counter to the principles of

[155] *Joint Report on the Location of ATXI's Transmission Line in Relation to Identified Amish and Mennonite-Owned Properties* (February 19, 2016).
[156] Exhibit 39, page 5, lines 7-12.
[157] Exhibit 39, page 5, line 21.

environmental justice as it would burden their religious practice, which is their way of life.[158] Neighbors United requests that if the MTTP is approved, the Commission's order be sensitive to the cultural realities of these groups.

(5) ATXI Has Not Met The Filing Requirements For a CCN (County Commission Assent) And Therefore The Commission May Not Grant ATXI The Authority It Seeks—*Do §§ 393.170 and 229.100, RSMo., require that before the Commission can lawfully issue the requested CCN the evidence must show the Commission that where the proposed Mark Twain transmission line project will cross public roads and highways in that county ATXI has received the consent of each county to cross them? If so, does the evidence establish that ATXI has made that showing?*

ATXI has failed to satisfy a statutory prerequisite for the Commission's issuance of a CCN in this case—that is, to obtain the assent of the County Commission in each of the five counties in Northeast Missouri where the line is proposed to be located.

Commission Rule 4 CSR 240-3.105(1)(D)1. provides:

> (D) When approval of the affected governmental bodies is required, evidence must be provided as follows: 1. When consent or franchise by a city or county is required, approval shall be shown by a certified copy of the document granting the consent or franchise, or an affidavit of the applicant that consent has been acquired[.]

And Section 229.100, RSMo provides:

> No person or persons, association, companies or corporations shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public roads or highways of any county of this state, without first having obtained the assent of the county commission of such county therefor; and no poles shall be erected or such pipes, conductors, mains and conduits be laid or maintained, except under such reasonable rules and regulations as may be prescribed and

[158] Exhibit 39, page 5, lines 22-23.

> promulgated by the county highway engineer, with the approval of the county commission.

The Commission may not grant ATXI the authority it seeks until the required approvals from the county commissions are received and submitted to this Commission for consideration. Any possible doubt about the mandatory nature of Section 229.100 has been eliminated by the courts. For example, in *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24, 40 (Mo App 2005), the court declared that § 229.100 "simply prohibits public utilities from erecting power lines 'without first having obtained the assent of the county commission of such county therefore.'"

ATXI admitted in prefiled testimony that it will need the approval of the five county commissions before it can begin construction of the proposed line for the MTTP. Ms. Borkowski is the President of ATXI.[159] As President of ATXI, she has the overall management responsibility of ATXI,[160] including oversight of the development and planning of the Mark Twain Transmission Project.[161] Ms. Borkowski's oversight includes ATXI's compliance with all applicable rules and requirements regarding the construction of the Mark Twain Transmission Project.[162] Ms. Borkowski testified as part of her direct testimony filed with the Application in this case that ATXI would obtain the *necessary* assents from the county commissions of Marion, Shelby, Knox, Adair and Schuyler Counties before construction.[163]

Ms. Borkowski testified at hearing that ATXI on numerous occasions contacted the county commissions to explain the Mark Twain Transmission Project and to provide

[159] Tr. Vol. 5, page.97, lines 1-3.
[160] *Id.* at lines 4-6
[161] *Id.* at lines 7-10.
[162] *Id.* at lines 11-15.
[163] Exhibit 1, page. 7, lines. 15-16.

information regarding the project.[164] Ms. Borkowski identified correspondence from ATXI to each County Commissioner in each of the five counties dated July 16, 2015, approximately six weeks after ATXI filed its Application with the Public Service Commission.[165] The letter to the Adair County Commission was addressed from Mr. Jeffrey K. Rosencrants, ATXI's Senior Corporate Counsel. His letter stated, "As part of the Project, ATXI anticipates asking for the assent of the Adair County Commission ("Commission") to construct, erect, place, maintain, own and operate lines and conductors across and over the public roads and highways of Adair County."[166] The letter further states that "It is our expectation that we will have any required assents prior to the issuance of a [Missouri Public Service Commission] MPSC order. Therefore, your prompt response would be appreciated."[167] The exact same letter was also addressed to the other four counties. However, to date ATXI does not have those county commissions' assents to suspend wires across the public roads and highways of their respective county that the Mark Twain Transmission Project will cross,[168] nor does it have any authorization from the State of Missouri to suspend wires across the public roads or highways anywhere in Missouri for the Mark Twain Transmission Project.[169] In fact, each of the five County Commissions have formally passed resolutions opposing the Mark Twain Transmission Project as currently proposed by ATXI.[170] It appears ATXI changed its position in testimony regarding the need for county assent prior to a

[164] Tr. Vol. 5, page 102, lines 2-7.
[165] Exhibit 46; Tr. Vol. 5 at 99, lines 9-22.
[166] Exhibit 46.
[167] Exhibit 46.
[168] Tr. Vol. 5, page 95, lines 2-7.
[169] *Id*. at 95, lines 8-13.
[170] Exhibit 45

Commission order only after ATXI realized it would not have the required authorization necessary for the Commission's order.

Despite its acknowledgement that it lacks county commission assent, ATXI argues that it should nevertheless be granted a CCN now, conditioned on subsequently obtaining the necessary approval from the County Commissions. ATXI is essentially arguing that when the applicant is seeking a line certificate, as opposed to an area certificate, the Commission may issue a CCN before County Commission assent is obtained pursuant to Section 229.110. To the contrary, Neighbors United argues that regardless of what type of CCN an applicant seeks (line or area), the Commission may not grant an applicant a CCN without the applicant first securing the assent of each county for the project.

Before addressing the merits of this issue, it may be helpful to clarify two points that sometimes arise in discussions on this topic. First, some of the cases addressing this general issue involve consent from municipalities, as opposed to counties. However, that distinction is not relevant here. If the line is being built within an incorporated municipality, consent to build the line is simply governed by a different statute, that being § 71.520. Both this law and Section 229.100 governing consent from the county are essentially the same with respect to the consent that is required to build the line. And neither statute states or implies that a CCN may be issued by the Commission before the county or municipal consent is obtained.

Second, although § 229.100 does not actually use the term "franchise", over the years the consent of the county commission has at times been referred to in those terms. See, e.g., *StopAquila.org v. Aquila, Inc.,* 180 S.W.3d 24 (Mo App 2005) (where

the court refers to the "county franchise" at pages 27, 28, 37 and 40); and *City of Bridgeton v. Missouri-American Water Co.,* 219 S.W.3d 226, 228 (MO banc 2007) (where permission from St. Louis County to "lay and maintain mains and pipes, along and across all the public highways…" was referred to as a "County Franchise").

In this regard, the permission from the county commissions is essentially the equivalent of the consent from municipalities. Like its county counterpart, the statute governing municipal consent (§ 71.520) makes no mention of a "franchise". However, over the years that term has been applied to municipal consents in the same sense it has been applied to county consents.[171] *See, e.g., Union Electric Company v. City of Crestwood,* 499 S.W.2d 480, 481 and 482 (Mo 1973) (referring to the city ordinance granting permission to use public rights of way for utility purposes as a "franchise"). Accordingly, for both municipalities and counties, the terms franchise and consent are frequently used interchangeably.

On the merits of ATXI's argument, the interplay between the statute requiring county consent (§ 229.100) and the statute authorizing the CCN (§ 393.170) was discussed at length in *State ex rel. Public Water Supply District No. 2 of Jackson County v. Burton,* 379 S.W.2d 593 (MO 1964). To summarize a somewhat complicated set of facts in that case, in 1925 the Raytown Water Company asked for and received permission from the Jackson County Court to build certain water mains along 17 enumerated roads in an unincorporated area of Jackson County. *Id*. at 595.

Raytown Water then sought a CCN from the Commission, in which it not only asked for permission to build the water mains approved by the County, but also asked

[171] Additional provisions regarding municipal consent are included at § 393.010, but that statute makes no mention of a "franchise" either.

for permission to serve customers generally within the boundaries of Jackson County. The Commission granted the CCN as requested by Raytown Water. *Id*. at 595-96. In other words, Raytown Water asked the County only for permission to build water mains along and near certain specified roads, but asked for and received from the Commission a much broader certificate, which generally allowed it to supply water to the entire county.

As the area grew in population, Raytown Water laid additional mains, along roads not specified in its franchise from Jackson County. *Id.* at 597. After years of disputes among various parties, a competing water company (Public Water Supply District No. 2) filed a complaint with the Commission, alleging that Raytown Water was providing service in areas not authorized by the Jackson County Court. The Commission dismissed the complaint, finding that the CCN granted to Raytown Water authorized it to serve the area in dispute.

On appeal, the state Supreme Court reversed the Commission's decision. One of the key grounds for doing so was stated as follows:

> If … the county "franchise" is a condition precedent to the issuance of a certificate by the Commission for an operation involving use of county roads in unincorporated areas of the county, it must follow that the authority which the Commission confers must be in accord with the "franchise" which the county grants. ***Otherwise, the requirements of Section 393.170, insofar as municipal consent is concerned, would be practically meaningless. (Id. at 599)***

(emphasis added). The Court quoted the Commission itself in expressing the applicable rule as follows:

> An examination of the findings of this Commission for many years back will show that the Commission has consistently required a showing that the applicant has secured the consent of what is considered proper

> municipal authority before granting authority to own, lease, construct, maintain, and operate any water, gas, electric, or telephone system as a public utility. Consent of the city, town, village, the county court or the State Highway Commission, depending upon whether the line or system was to be placed within the incorporated city, within the unincorporated area of the county, or along a state highway, ***has always been made a condition precedent to the granting of such certificate by this Commission.***

Id. at 599 (emphasis added). What this says, of course, is that the Commission cannot grant a CCN that is not in accord with the permission granted by the County Court (or in our case, the county commission). And the Commission cannot possibly know the extent of the authority given by the county until that authority is granted. Thus, ATXI is in error and in effect it is asking the Commission to do what the Supreme Court said it cannot do: grant a CCN that goes beyond the scope of what has been approved by the county authorities.

Another case on point is *State ex rel. City of Sikeston v. Missouri Utilities Company,* 53 S.W.2d 394, 399 (MO banc 1932). The state Supreme Court stated there that securing municipal consent to build utility facilities is "an essential prerequisite" to the Commission's grant of a certificate of public convenience and necessity. This case was later cited by the Commission for the proposition that it "may not grant a certificate of convenience and necessity unless the applicant has already obtained a local franchise, which is an 'absolute prerequisite.'" *Southern Missouri Natural Gas,* 16 Mo. P.S.C. 3d at 284 (2007).

As part of this case, the Commission's Staff prepared an analysis of the assent issue and made it available to the parties. The Staff's Memorandum included the following court and Commission cases, along with analysis:

1. *Public Service Commission v. Kansas City Power & Light Company*, 325 Mo. 1217, 31 S.W.2d 67 (1930) (In response to argument had a county franchise for many years and was operating in that county under authority of the commission the Court responded that a franchise does not allow operation of new electric line without a Commission certificate of convenience and necessity, and utility admitted it did not have such a certificate).

2. *State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Company*, 331 Mo. 337, 53 S.W.2d 394 (1932), where the Court, when affirming judgment denying to oust the utility from the city after its franchise expired, said:

> Under sections 4962 and 7683, R. S. 1929 (Mo. St. Ann. §§ 4962, 7683), municipal authorities may, under such delegated power, grant or refuse permission to electrical companies to place appliances in public ways within their corporate limits. *Seventh Street Realty & Power Co. v. St. Louis*, 282 Mo. 180, 190, 221 S. W. 51. However, the state as the sovereign power may condition the exercise of a privilege granted by one agency upon approval of another. Such was done in the passage of the Public Service Commission Act, particularly instanced in the commission's authority to grant or withhold certificates of convenience and necessity requested by electrical corporations as provided in section 72 (Laws 1913, pp. 610, 611), now section 5193, R. S. 1929 (Mo. St. Ann. § 5193) . . . .
>
> * * * *
>
> But sections 4962 and 7683, supra, plainly make the consent of the municipality, in manner and form there indicated, an essential prerequisite to lawful exercise of the rights therein mentioned, and we find nothing in the Public Service Commission Act or in our decisions construing the same that lends any substantial support to respondent's suggestion that this statutory requirement has been repealed, or that the commission's grant of a certificate of public convenience and necessity is a grant of any privilege, franchise, or right which municipalities, as agents of the state, are empowered to grant or withhold at their pleasure. As said in *Bethlehem C. W. Co. v. Pub. Serv. Com.*, 70 Pa. Super. Ct. 499, 501: "In granting a certificate of public convenience the commission confers no new chartered powers on any company. It takes away from no company any right or power then legally existing. As it is not a judicial body but an administrative one, its order, made from the standpoint of the public convenience solely, cannot be made the foundation for the judicial determination of what franchises do or do not belong to any corporation

interested. Such matters must be determined as heretofore in a legal proceeding properly instituted in the courts for that purpose."
Also, in Wilson v. Publ. Serv. Com., 89 Pa. Super. Ct. 352, 358, 359, the court said: "If an electric company, incorporated under or accepting the provisions of the Act of 1889, supra, does not for any reason possess the right of eminent domain, or does not procure when necessary proper municipal consent, the order of the Commission approving an application under the Act of 1921 does not and could not cure any such defect." See, also, 51 C. J. p. 41, § 79, notes 67, 68, 69, 72, 73, and page 52, § 95, notes 28, 29.

So, even though relator has not questioned the commission's jurisdiction to make the order purporting to authorize respondent to operate its electric plant at Sikeston, which is referred to in respondent's return and answer as a certificate of public convenience and necessity, yet the effect of such order could not extend beyond ***the scope of the commission's power in the particular proceeding culminating therein, which was to determine the single question of whether the proposed exercise of the right, privilege, or franchise was "necessary or convenient for the public service." This order did not confer any new powers upon respondent. It simply permitted respondent to exercise the rights and privileges presumably already conferred upon it by state charter and municipal consent.*** (Emphasis added).

331 Mo. at 347-51, 53 S.W.2d at 397-99.

3. *State ex rel. City of Sikeston v. Public Service Commission of Missouri*, 336 Mo. 985, 82 S.W.2d 105 (1935) (Court affirmed Commission's denial of the City of Sikeston's request to find Missouri Utilities Company was no longer authorized by the Commission to provide electric service in Sikeston). In its opinion the Court said the following:

> The commission held that . . . the grant of such certificate [of convenience and necessity] to an electrical corporation is only required and authorized in case of, ***"First, the beginning of construction of an electric plant; second, the commencing to exercise any right or privilege under any franchise"*** (Emphasis added.) (section 5193, R. S. 1929 [Mo. St. Ann. § 5193, p. 6617]) . . . .

* * * *

> . . . . The Public Service Commission Law was intended to prevent overcrowding of the field in any city or area and thus "restrain cut-throat competition upon the theory that it is destructive, and that the ultimate result is that the public must pay for that destruction." State ex rel. Union Electric Light & Power Co. v. Public Service Commission, 333 Mo. 426, 62 S.W.(2d) 742, 745. ***To accomplish this the commission was given the authority to pass upon the question of the public necessity and convenience for any new or additional company to begin business anywhere in the state, or for an established company to enter new territory.*** (Emphasis added). . . . .

336 Mo. at 996-97, 82 S.W.2d at 109-10.

Commission Reports and Orders

1. *In Re Lanagan Telephone Company*, 8 Mo.P.S.C. 597. (Report and Order 1919) (Required franchise filed date certificate of convenience and necessity issued).[172]
2. *In Re Missouri-Kansas Pipe Line Company*, 17 Mo.P.S.C. 98 (Report and Order 1928) (Certificate of convenience and necessity withheld pending showing of franchise).[173]
3. *In the Matter of the Application of Missouri Public Service Corporation*, 23 Mo.P.S.C. 740, 741-46 (Report and Order 1938).[174] (Certificate did not include

[172] "In no event can such certificate of convenience and necessity be issued by the Commission until the applicants file in the office of the Commission a verified statement showing that the required consent of the proper municipal authorities has been obtained. We construe that to mean that in the instant case [(where the applicants proposed exchanges in Lanagan and Pineville with a toll line between them)] the applicants will be required to file with the Commission the evidence of the granting of authority by the County Court for the construction of the proposed telephone exchanges and the use of the highways incident to the construction and operation of the same.

Under all the evidence in this case the Commission will grant a certificate of convenience and necessity to applicants to construct and operate a telephone exchange at Lanagan and to build a toll line to Pineville upon filing evidence of consent of the proper municipal authorities. . . ." 8 Mo.P.S.C. at 602-03.

[173] "The applicant however, has not filed with the Commission as is required under Section 72 of the Public Service Commission Law [(precursor to § 393.170, RSMo.)], proper evidence showing that it has received the consent of the municipal authorities for its proposed pipe lines, therefore the certificate prayed for will be withheld until such time as the requirements of the statutes are met."

[174] "As a condition precedent to the granting of a certificate of convenience and necessity by this Commission in any of the towns now served, or for the construction of electric lines along certain routes in the above counties, the applicant has presented to the Commission proof that it had received the required consent of the proper municipal authorities or orders of the respective county courts for the location of the

area in Livingston county where not have franchise, since franchise is a precondition).

4. *Re S.W. Water Co.*, 25, Mo. P.S.C. 637, 638 (Report and Order 1941, on rehearing of Report and Order at 25 Mo. P.S.C. 463) (Commission dismissed application because water company did not have franchise from Jackson County). In its report the Commission said:

> The protestant submitted additional evidence concerning its status as well as showing that since the first hearing of this case, the County Court of Jackson County has again refused to give its consent to the applicant to lay or maintain its water mains or lines along and across the streets and roads of Jackson County.
>
> Without that consent the applicant contends and argues in its brief that Section 5193, Mo. R. S. 1929 (Sec. 5649, Mo. R. S. 1939) does not require that "consent of the proper municipal authorities" is a condition precedent to the granting of a certificate of convenience and necessity for the construction, maintenance and operation of a water system as a public utility in an

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proposed pole line or lines along and across the streets, roads and highways of said incorporated or unincorporated areas, as the jurisdiction of the local authorities may require.
* * * *

In Livingston County the applicant does not have authority from the county court to locate its lines as it may desire along the highways of that county, so without such consent of local authority it does not include in its petition a request for a certificate of convenience and necessity for that county, but asks that [the] Commission declare the line it has shown in its exhibit, and proposes to have it as a matter of record, as outlining the area in Livingston County wherein it should be expected to operate and extend service as against other public utilities which are now operating and may be called upon to serve the remaining portions of the county. As we mentioned above, it now has a line in that area, the northwestern part of Livingston County, and is operating a distribution system in the town of Chula. For these it has been granted, from time to time, certificates of convenience and necessity for the construction of the lines it now has in operation and for the operation of those lines.

. . . . It was apparent at the hearing that the applicant was not in a position to present a request for any authority of any kind concerning its operations in Livingston County, and in reviewing the evidence submitted the Commission now finds that in view of Section 5193 of the 1929 Revised Statutes of Missouri, the applicant was in no position to present any request for authority to operate in Livingston County. It is now operating at certain points in that county, but should it desire to extend its lines, our understanding of the law is that it will be required to seek a certificate of convenience and necessity for any further extension, and as a condition precedent to the granting of such authority, it must show that it has received the consent of the county court either for the specific line or for a prescribed area, as the court may determine. Our view of the position of the applicant in this case insofar as Livingston County is concerned is that the applicant can only ask to have the record show the area in which it professes its willingness to furnish the service should anyone want it and the conditions warrant the extension. The Commission has no power to grant any right or privilege upon such request. Nothing further need be said on that point in this case." 23 Mo. P.S.C. at 742-43. The Western District Court of Appeals addressed this same certificate in *State ex rel. Harline v. Public Service Commission of Missouri*, 343 S.W.2d 177 (Mo. App. 1960), *Stopaquila.Org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo.App. 2005), and *State ex rel. Cass County v. Public Service Commission*, 259 S.W.3d 544 (Mo. App. 2008).

> unincorporated area in this state. It contends that section is confined to areas within the corporate limits of incorporated cities, towns and villages. Protestant's brief contends to the contrary. The case now hinges on that point.
>
> An examination of the findings of this Commission for many years back will show that the Commission has consistently required a showing that the applicant has secured the consent of what is considered proper municipal authority before granting authority to own, lease, construct, maintain and operate any water, gas, electric or telephone system as a public utility. Consent of the city, town, village, the County Court or the State Highway Commission depending upon whether the line or system was to be placed within the incorporated city, within the unincorporated area of the county, or along a state highway, has always been made a condition precedent to the granting of such certificate by this Commission. We find nothing in this case convincing us the former findings have been in error. We find our former disposition of this case is correct.

Re S.W. Water Co., 25, Mo. P.S.C. 637, 638 (Report and Order on rehearing of Report and Order at 25 Mo. P.S.C. 463).

5. *Re Union Electric Company of Missouri*, 3 Mo. P.S.C. (N.S.) 157 (Report and Order 1951) (When dismissing Union Electric Company's application for authority to exercise rights and privileges described in municipal ordinances, since Union Electric Company already had that authority under a prior county franchise and existing Commission certificates of convenience and necessity, in its Order, the Commission stated, "At all times here involved, the county courts were authorized (Laws, 1901, p. 233, now Section 229.100, RSMo. 1949) to grant franchises for the construction and maintenance of electric facilities on, under and across the public roads and highways of the county, and the cities, towns and villages of the county also were authorized to grant franchises of like import. (Section 1341, R. S. Mo. 1899, now Section 393.010, RSMo. 1949 and Section 6501, R. S. Mo. 1899, now Section 71.520, RSMo. 1949.) Such last named franchises are a prerequisite to the right to serve in such cities, towns and villages as were incorporated and in existence when a county court franchise was granted. It is otherwise in cases wherein the cities, towns and villages were incorporated after the county court had granted franchises covering unincorporated territory of the county which was subsequently enveloped in the boundaries of the newly created and incorporated city, town or village and when the holder of the county franchise had begun operations in such territory under the county franchise prior to the creation of the municipality. In such cases the

county court franchises constitute 'the proper municipal authorities' as the term is used in Section 393.170, ibid, and the proper support for granting the certificates of convenience and necessity. The fact that some of' these twelve municipalities were created and incorporated prior to 1922 and 1923 when we granted the certificates of convenience and necessity is immaterial, as our next section hereof will demonstrate." *Id*. at 160.)

6. *Re: Central Missouri Gas Company*, 8 Mo.P.S.C.(N.S.) 341 (Report and Order 1958) (Commission issued preliminary certificate of convenience and necessity to provide gas service in and about the cities of Lancaster, Queen City and Greentop, Missouri, when the mayors, council members and businessmen of the cities had assured that the proper municipal consents would be given).
7. *Re: Frimel Water System, Inc.*, 11 Mo.P.S.C. (N.S.) 839, 844 (Report and Order 1964) ("Conditional" certificate issued, with "final" certificate to issue upon conditions being met, including county franchise).
8. *Re: National Development of Clay County, Inc., et al.*, 12 Mo. P.S.C. (N.S.) 199, 206 (Report and Order 1965) (Preliminary and conditional certificate issued to become permanent upon obtaining Kansas City franchise; made permanent upon filing of motion and agreement which the city had executed, 12 Mo. P.S.C. (N.S.) 207-09 (Supplemental Report and Order).
9. *Re: Gray Summit Water Company*, 13 Mo. P.S.C. (N.S.) 536, 548 (Report and Order 1968) (Conditional certificate, conditioned on showing of franchise or certified statement such consent unnecessary).
10. *Re: Saline Sewer Company*, 15 Mo. P.S.C. (N.S.) 25, (Report and Order 1970) (Certificate issued upon showing within three months, *inter alia*, county franchise, dismissed otherwise).
11. *Re: Bonneville Water*, 20 Mo. P.S.C. (N.S.) 240 (Report and Order 1975) (Conditional certificate, conditioned, *inter alia*, on showing within 90 days of required consent of municipal authorities).

While it stated Grand River Mutual Telephone Company had obtained some of the municipal franchises it needed in its November 3, 1958 Report and Order, in its January 19, 1959, Report and Order by which the Commission issued Grand River Mutual Telephone Company a certificate of convenience and necessity to provide telephone service in and about Lone Star, Gentry, Ravenwood, Denver, Parnell, Darlington, Alanthus, Worth and New Hampton, Missouri, the Commission was silent regarding whether the applicant had obtained the remainder of the franchises. *Re: Grand River Mutual Telephone Corporation*, 8 Mo. P.S.C. (N.S.), 407 (Report and Order 1959) and 315 (Report and Order 1958).

In a 1962 Report and Order the Commission acknowledged the prerequisite of franchises, then ignored full compliance with it by issuing Midstate Telephone Company

a certificate of convenience and necessity to provide improved telephone service by exchanges located at Brazito, Centertown, Schubert and New Bloomfield, Missouri, although Midstate Telephone Company did not show it had franchises from Brazito or Schubert, Missouri). In its report the Commission stated:

> The Commission is now of the opinion that the public should not be required to wait for Applicant to obtain franchises in all of the points involved in the original hearing before beginning construction, especially since Applicant has expressed the desire to go forward with providing telephone service to the public at points for which funds are now available.

Re: Midstate Telephone Company, 10 Mo. P.S.C. (N.S.), 454 (Report and Order 1962).

The prioritization between county or municipal consent on the one hand, and the issuance of a CCN on the other, is now explicitly embodied in the Commission's Rules. Rule 4 CSR 240-3.105 applies to the filing requirements for a CCN – for both line certificates and area certificates. Subsection (1)(D) requires the applicant to provide evidence that it has obtained any necessary approvals of affected governmental bodies – in this case meaning the approvals of the eight county commissions. Then in subsection (E)(2), the rules provide as follows: "If any of the items required under this rule are unavailable at the time the application is filed, they shall be furnished prior to the granting of the authority sought." (emphasis added)

There is an obvious reason for requiring county permission before the CCN may be issued. Without assent of the five counties, ATXI does not have a list of the roads it may use within each county. Until the appropriate roads are designated by the county, ATXI has no authority to choose which roads within the county it will cross or otherwise use for its line. If the Commission approves the route now before it, it is certainly conceivable that even if ATXI later receives the required consents from the counties, those consents could be inconsistent with the route approved by the Commission. For

example, one or more of the counties may restrict ATXI's use of county roads in such a way that the line could not be built on the route approved by the CCN. At that point, the Commission and ATXI would be faced with the same dilemma that occurred in the Raytown Water case described above, where a CCN granted authority that was inconsistent with the authority granted by county officials. The only means of assuring this does not happen is to require that the applicant secure the necessary county and/or municipal approvals before the CCN is issued – which is exactly what subsection (E)(2) of Rule 4 CSR 240-3.105 requires.

Further, at hearing Ms. Borkowski testified that if ATXI received a CCN, it would begin condemning and building on farming/ranching land but would not cross any county roads. It would be absolutely absurd for the Commission to issue an order granting ATXI authority to begin building without county commission assent, in effect giving its blessing for ATXI to condemn land and begin building on it when ATXI does not even know for sure where the line will be able to cross county roads.

County Commission approval of the line is not a mere technicality, to be relegated to a secondary position in terms of the approvals that ATXI must obtain. By statute, the county and municipal authorizations stand on an equal footing with a CCN approval from this Commission. Without both, the line cannot be built. Nevertheless, ATXI asks the Commission to essentially overlook the fact that it does not have the necessary county commission approvals. It asks, instead, that the Commission grant the CCN with an added "condition" that the necessary county commission assents be obtained at some unspecified time in the future. This is no different from ATXI asking that it be granted the CCN on the condition that it comes back later with evidence that

the line is really "needed" or is in the "public interest." The Commission would no doubt be quick to reject such a request. Because the county approvals are required by statute, that requirement should be given at least as much weight as the five Tartan criteria.

The General Authority of Section 393.170.3 verses the Specific Authority of Section 393.170.2

Before leaving the specific issue of assent, one remaining area warrants discussion—that is the Commission's finding in its November 4, 2015 "Order Regarding Motion to Dismiss" in this case. In its Order, the Commission rejected the argument being made here by Neighbors United. Citing subsection 3 of Section 393.170, the Commission ruled that it may issue a CCN with any conditions that it deems reasonable and necessary, which would permit it to issue a CCN conditioned upon the subsequent proof of assents from the county commissions. Order, p. 4-5. Neighbors United respectfully contends that this ruling was in error, and asks the Commission to reconsider the basis of its earlier holding in this regard.

The issue here is one of statutory construction. Subsection 2 of Section 393.170 states specifically that evidence of the county commission consents must be on file before the CCN may be issued. Subsection 3, relied upon in the Commission's earlier ruling, grants the Commission the broad general authority to impose such conditions on the CCN as it may deem reasonable. If the commission relies upon subsection 3 to condition the CCN on subsequently obtaining the county consents, subsections 2 and 3 of Section 393.170 are in conflict with each other. This inconsistency necessarily raises the issue of how to harmonize the two provisions of Section 393.170. *See South Metro v. City of Lee's Summit,* 278 S.W.3d 659, 666 (Mo banc 2009) (when "two statutory

provisions covering the same subject matter are unambiguous standing separately but are in conflict when examined together, a reviewing court must attempt to harmonize them and give them both effect.")

Not surprisingly, the courts here and elsewhere have found it necessary on countless occasions to resolve such conflicts between two or more statutory provisions. A number of well-accepted rules of statutory construction have developed for dealing with such situations. The rule most directly applicable here, in the words of the United States Supreme Court, is that "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence." *Busic v. United States,* 446 U.S. 398, 406 (1980).

That same principle of statutory construction has been cited and applied in numerous Missouri appellate court decisions. One such case is *State ex rel. Taylor v. Russell,* 449 S.W.3d 380 (Mo banc 2014). The question there was whether a prison warden could lawfully bar a particular person from witnessing an execution when that individual was asked to attend by the person scheduled to be executed. The warden relied on a general statutory grant of authority to make such rules and orders as he deemed necessary "for the proper management of all correctional centers and persons subject to the department's control." *Id.* at 382

The petitioners argued instead that a specific statute was controlling, one which generally allowed the person being executed to name up to five people of his own choosing to witness the execution. The defendant named a half-brother who had participated in the robbery leading to the execution. The warden contended that this person could be excluded on the basis of the warden's general grant of authority over

the prison, arguing that because the victim's family was attending the execution, the presence of the half-brother would pose a safety and security risk.

Citing the general rule of statutory construction noted above, the Missouri Supreme Court held that the specific provisions regarding who may witness an execution prevailed over the general grant of authority to the warden to make whatever orders he deemed necessary for the proper management of the prison. *Id.*

Another example is *State ex rel. Fort Zumwalt School Dist. v. Dickherber,* 576 S.W. 2d 532 (Mo banc 1979). One statute at issue there required that the county collector pay all money received, and the interest thereon, to the county's general revenue fund. A second statute provided that interest on school funds (and certain other funds) should be credited to those funds, respectively. The court held that despite the unambiguous language of the first of these statutes, it was in effect trumped by the specific statute dealing with interest on school funds. *Id.* at 536-37.

In *Boyd v. State Board of Registration,* 916 S.W.2d 311 (Mo App 1995), one subsection of a statute generally provided for discipline of a physician for careless misconduct, without proof of any element of scienter. A second subdivision of the statute addressed falsification of Medicare records, but did require the element of scienter. The court held that any prosecution regarding careless completion of Medicare forms must be brought under the second of these subdivisions, which would require a showing of scienter. In the words of the court:

> When one statute deals with a particular subject in a general way, and a second statute addresses a part of the same subject in a more detailed way, the more general should give way to the more specific. This rule of statutory construction is applicable, and arguably more so, in the present case where the two provisions at issue are contained within the same section of a statute…. (*Id.* at 315; citation omitted)

Other Missouri cases applying this same general rule of statutory construction include the following: *MFA Petroleum Co. v. Director of Revenue,* 279 S.W.3d 177, 178 (Mo banc 2009); *Ladd v. Missouri Board of Probation,* 299 S.W.3d 33, 37 (Mo App 2009); *Younger v. Missouri Public Entity Risk Management Fund,* 957 S.W. 2d 332, 336-37 (Mo App 1997); *Robinson v. Health Midwest Development Group,* 58 S.W.3d 519, 522-23 (Mo banc 2001); and *Jones v. GST Steel Co.,* 272 S.W. 3d 511, 518 (Mo App 2009).

In applying this rule to the issue here, subsection 3 of Section 393.170 obviously does authorize the Commission to impose reasonable conditions on a CCN – as the Commission noted in its earlier "Order Regarding Motion to Dismiss." Standing alone, that provision would seemingly authorize the Commission to issue a CCN conditioned upon later receipt of the necessary county commission approvals. However, subsection 2 of that same statute specifically states that the county approvals must be on file "before such certificate shall be issued." Following the rule of construction discussed above, the specific provision in subsection 2 acts to modify the general grant of authority provided in subsection 3. Thus based on the case law discussed above, the Commission may not grant a CCN conditioned upon later proof of the county approvals.

The rules of statutory construction are not just so much legalese invented by the courts. Instead, they generally represent "an expression of principles deduced from common sense and long experience." *Short v. Short,* 947 S.W.2d 67, 71 (Mo App 1997).

In its earlier ruling on this issue the Commission essentially looked at subsection 3 of Section 393.170 in isolation, without regard to the specific provision of subsection 2 requiring that the county commission assents be obtained before the CCN may be issued. In doing so, the Order ignored the rule discussed above, as well as a related tenant of statutory construction: that "no portion of a statute is read in isolation, but rather is read in context to the entire statute, harmonizing all provisions." *Utility Service Co., Inc. v. Dept. of Labor,* 331 S.W.3d 654, 658 (Mo banc 2011). Here, the two subsections of Section 393.170 can only be harmonized by recognizing that the specific provision in subsection 2 acts to modify the general grant of authority in subsection 3.

For the foregoing reasons, Neighbors United respectfully asks the Commission to reconsider its earlier ruling on this issue, and to deny ATXI's application for the CCN on the ground that it has failed to provide evidence of the county commission assents required by Section 229.100.

(6) Conditions To Protect Landowners' Rights—*If the Commission decides to grant the CCN, what conditions, if any, should the Commission impose?*

Neighbors United asserts that no condition will completely alleviate the impacts this project will have on landowners. And in no way should this discussion be viewed as a waiver of Neighbors United's argument that this project violates the Missouri Constitution and the protections it affords farmers and ranchers. But if the Commission grants ATXI's Application, Neighbors United would ask that the conditions set forth in Dan Beck's direct testimony be ordered, especially the condition "That the certificate is limited to the construction of this line in the location specified in the application, and as represented to landowners on the aerial photos provided by ATXI, unless a written

agreement fro the landowner is obtained, or ATXI gets a variance from the Commission for a particular property."[175] The farmers and ranchers that are subject to this proposed line are making decisions about their livelihood everyday.[176] The decisions are time sensitive.[177] They are making decisions such as where to grow crops, where to build barns and overall where to make investments in their property and livelihood. For these reasons, if the Commission approves the line it should do so as represented in the Application. The landowners are going to experience impact just by the line crossing their property. They should not have to wonder whether the decisions they have to make today regarding their farm will be negated by ATXI down the road without an opportunity to defend their investment.

Finally, Neighbors United recommends the Commission order ATXI to further consult with FWS and the Missouri Department of Conservation prior to granting the certificate in an effort to minimize environmental impact.

(7) Conclusions and Prayer for Relief

In summary, Neighbors United requests the Commission deny ATXI's Application as it violates the absolute Missouri Right to Farm Constitutional Amendment (that the Commission may not limit until an Article III Court limits the absolute right, if/when that occurs), the MTTP does not meet the Tartan Criteria, ATXI has failed to obtain the required assents from the County Commissions necessary for ATXI to build in each respective county, and the Supreme Court's stay of the Clean Power Plan requires the

[175] Exhibit 25.
[176] Transcript Vol. 5, page 244, lines 14-16.
[177] Transcript Vol. 5. page 244, lines 17-19.

Commission to consider the value of the MTTP without the requirements of the CPP to support the proposed line.

WHEREFORE, Neighbors United submits this Initial Brief and recommends the Commission deny ATXI's Application for the reasons contained herein.

Respectfully submitted,

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Certificate of Service

I certify that a true copy of the above and foregoing was served to all counsel of record by electronic mail this 4th day of March 2016.

/s/ Jennifer Hernandez
Jennifer Hernandez