

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

In the Matter of the Application of Grain Belt Express )  
Clean Line LLC for a Certificate of Convenience and )  
Necessity Authorizing it to Construct, Own, Operate, )  
Control, Manage, and Maintain a High Voltage, Direct ) Case No. EA-2016-0358  
Current Transmission Line and an Associated Converter )  
Station Providing an interconnection on the Maywood- )  
Montgomery 345 kV Transmission Line )

MISSOURI LANDOWNERS ALLIANCE  
MOTION TO COMPEL ANSWERS TO CERTAIN  
DATA REQUESTS SUBMITTED TO GRAIN BELT WITNESS  
PRESCOTT HARTSHORNE

Comes now the Missouri Landowners Alliance (MLA), pursuant to Commission Rule 4 CSR 240-2.090(8), and respectfully requests that the Commission direct Grain Belt Express (GBE) and its witness Mr. Prescott Hartshorne to provide full and complete answers to data request numbers PH.9, PH.17 and PH.18. In support of this Motion, the MLA states as follows:

1. Mr. Hartshorne submitted direct testimony in this case in support of GBE's Application. He is the Director, US Business Development at National Grid USA Service Company, a subsidiary of National Grid plc. He is also the Project Manager for National Grid's investment in Clean Line.<sup>1</sup>

2. The three data requests at issue here were submitted by the MLA to GBE and Mr. Hartshorne on October 17, 2016, and were as follows:

PH.9 Please provide a copy of all documents and correspondence compiled by or for National Grid which address its decisions about whether to make an additional investment in Clean Line at or near the time that Bluescape first invested in Clean Line.

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<sup>1</sup> Direct testimony of Prescott Hartshorne, August 30, 2016, p. 1 lines 1-7.

PH.17 Please provide a copy of all internal documents and correspondence written by you, by Mr. Blazewicz, or anyone else at National Grid for distribution to upper management at National Grid addressing in whole or in part the performance, status, progress, problems, profitability, scheduling and/or budget of Clean Line or of the Grain Belt project.

PH.18 Please provide a copy of all documents and correspondence compiled by or for National Grid which quantify the estimated or expected dollar value of any of Clean Line's transmission projects at any point after said projects are in service, or of any generic transmission project generally comparable to the Grain Belt project.

3. In the above data requests, National Grid was defined to mean "National Grid plc, and any and all of its subsidiaries."

4. Grain Belt objected to these three data requests on three grounds: (1) that National Grid is not a party to this action, and there is no basis to conduct discovery against a non-party; (2) that the request is not relevant to the subject matter of this case, and not reasonably calculated to lead to the discovery of admissible evidence; and (3) "on the basis that it seeks highly sensitive and confidential information."<sup>2</sup>

5. Objection that National Grid is not a party. The MLA believes that this first objection fails on three different grounds.

First, one of the National Grid subsidiaries is one of the principal owners of Clean Line, the parent company of Grain Belt.<sup>3</sup> National Grid has provided a witness in this case to support the Grain Belt project, which in turn directly supports National Grid's own financial interests. Thus National Grid has voluntarily inserted itself into these proceedings, offering information which it presumably believes will further its own best interests. Although National Grid may not technically be a party to this case, it should

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<sup>2</sup> Grain Belt also objected to PH.18 to the extent that is sought material covered by the attorney-client privilege or attorney work product. However, since GBE has not identified any documents which fall within those categories, the MLA does not believe that this objection is relevant at this point to a decision on the matters raised herein.

<sup>3</sup> See e.g., direct testimony of Mr. Michael Skelly, page 19 lines 10-12.

not be allowed to volunteer information through the testimony of a witness to the case, and then refuse to provide further information which could potentially be damaging to its cause. As a principal owner of a party to the case, National Grid is for all intents and purposes a party itself. This objection is akin to saying that Clean Line need not produce any documents which it keeps apart from Grain Belt's own records, on the ground that Clean Line is likewise not a party to this case.

Second, simply because an entity is not a party to a case, that does not shield it from the discovery process. Rule 4 CSR 240-2.090(1) provides that discovery in Commission proceedings "may be obtained by the same means and under the same conditions as in civil actions in circuit court." And in circuit court, of course, a third party may be required to produce documents at a deposition just as they would be required to do if they were a party to the case.<sup>4</sup>

Commission Rule 4 CSR 240-2.100 specifically provides for the issuance of a subpoena for the production of documents. That rule is not limited to parties to the proceedings at the Commission. Clearly, therefore, this rule is intended to apply to third parties as well, just as in circuit court proceedings. Here, given that National Grid is a major owner in the parent company of Grain Belt, and has volunteered to provide a witness in this case, it would make little sense to force the parties to resort to the subpoena process instead of utilizing the normal methods of discovery in Commission proceedings.

Third, even if National Grid is viewed as a totally independent third party here, and even assuming *arguendo* that neither Grain Belt nor Mr. Hartshorne has possession

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<sup>4</sup> See Mo Rules 57.03(a) and (b); Rule 58.01.

of the documents in question, they must nevertheless be produced if either Grain Belt or Mr. Hartshorne has the “practical ability” to obtain the documents from National Grid.

As explained in *Hancock v. Shook*, 100 S.W.3d 786 (Mo banc 2003), a party must produce not only documents in its actual possession, but also documents within its “control”, which includes documents where it has the “practical ability to obtain the documents from a nonparty to the action.”<sup>5</sup> In *Hancock*, the records in question were not in the possession of a party to the case, but were in the possession of the party’s expert witness and veterinarian. Given this relationship, the court noted that the actual party to the case did have “the practical ability to obtain” the records from his veterinarian.<sup>6</sup>

Likewise, given the close relationship here between Grain Belt and Mr. Hartshorne on the one hand, and Mr. Hartshorne’s employer on the other, there can be no doubt that even if they do not have actual possession of the documents in question, they have “the practical ability to obtain” the material requested here by the MLA from National Grid.

6. Objections on Grounds of Relevance. All of the material sought in the data requests at issue here is reasonably calculated to lead to the discovery of admissible evidence.

National Grid made no further investment in Clean Line at the time that Bluescape first became an investor in Clean Line.<sup>7</sup> Data Request PH.9 asked for documents which address the decision by National Grid not to do so. It is certainly conceivable that this decision was made by National Grid for reasons related to problems with the Grain Belt schedule, its financial solvency, cost overruns, or any number of

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<sup>5</sup> Id. at 797.

<sup>6</sup> Id.

<sup>7</sup> Grain Belt responses to MLA data requests MS.13 and G.72

other reasons which would be relevant to a Commission decision on whether or not to grant the CCN to Grain Belt.<sup>8</sup> There is obviously a reason why National Grid elected not to invest further in Clean Line. Depending on what that reason is, it could well be relevant in this case on a number of different levels.

Data request PH.17 asked for internal documents provided to upper management at National Grid addressing the performance, status, progress, problems, profitability, scheduling and/or the budget of Clean Line or the Grain Belt project. Clearly, any finding and reports of significant problems with the operations of Clean Line or Grain Belt in any of these respects would be relevant to a Commission decision on whether or not to grant the CCN. Without seeing the documents in question, there is no means to determine if indeed any such problems have been identified by National Grid.

Moreover, Grain Belt supports its case here by emphasizing the many benefits it supposedly receives from synergies with National Grid. For example, Mr. Skelly testified that “National Grid has made and has committed that it will continue to make, its construction management resources available to aid Clean Line and its project companies whenever necessary.”<sup>9</sup> Grain Belt should not be allowed to support its case on the basis of its close working relationship with National Grid, and then refuse to disclose any shortcomings in its operations which have been identified during that process by National Grid.

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<sup>8</sup> Grain Belt did provide a 4 page document to the MLA in response to a follow-up data request to PH.9. However, according to Grain Belt, that document was prepared in early January, 2015, well before the time that Bluescape initially invested in Clean Line. And that document makes no mention of the decision by National Grid about any additional investment in Clean Line at or about the time of the Bluescape investment. Therefore, that still leaves open the possibility that documents responsive to data request PH.9 have not been provided to the MLA.

<sup>9</sup> Direct testimony of Mr. Michael Skelly, p. 25 line 23 – p. 26 line 2.

Finally, data request PH.18 in essence asks for documents which quantify the estimated dollar value by National Grid of any of Clean Line's transmission projects. Comparable projections were provided by Grain Belt in the 2014 case, and included as part of HC Exhibit 313 in that proceeding.<sup>10</sup> It would clearly be relevant here if National Grid's projections now show a significant decrease in the estimated value of the Grain Belt project over the past two years, compared to the estimates shown in Exhibit 313.

7. Objection that the material contains highly sensitive and confidential information. In the 2014 case, numerous documents were disclosed in discovery with the "highly confidential" designation. Among them was a document produced by National Grid, and provided to the MLA.<sup>11</sup> The Commission's rules provide protection for any such material produced by Grain Belt and/or National Grid in this case, and to the MLA's knowledge there were no problems related in the last case to improper disclosure of any material marked as "highly confidential". This third objection to the MLA's data requests has no merit.

8. Pursuant to Commission Rule 4 CSR 240-2.090(8), counsel for Grain Belt and the MLA have discussed these issues by telephone on several occasions, and have reached an impasse.

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<sup>10</sup> EFIS No. 409. And see discussion of those projections in the HC version of the Initial Brief of the MLA in the 2014 case at pages 15-16, EFIS No. 471 .

<sup>11</sup> HC Exhibit 324, EFIS No. 417.

WHEREFORE, the MLA respectfully requests the Commission to direct Grain Belt Express and Mr. Prescott Hartshorne to provide a full and complete response to MLA Data Requests PH.9, PH.17 and PH.18.

Respectfully submitted,

/s/ Paul A. Agathen

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion was served upon the parties to this case by electronic mail this 20<sup>th</sup> day of January, 2017.

/s/ Paul A. Agathen

Paul A. Agathen