BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Grain Belt Express Clean Line LLC for Approval of its Acquisition by Invenergy Transmission LLC	)))	No. EM-2019-0150

MOTION TO COMPEL GRAIN BELT TO ANSWER DISCOVERY REQUEST, AND MOTION FOR EXPEDITED TREATMENT

Pursuant to Commission Rules 4 CSR 240-2.080(14) and 4 CSR 240-2.090(8), intervenors Joseph and Rose Kroner ("Kroners) respectfully request the Commission to direct Grain Belt Express ("Grain Belt") to admit the accuracy of two pages of a document submitted to Grain Belt by the Kroners in their "First Set of Requests for Admissions from Joseph and Rose Kroner to Grain Belt Express Clean Line LLC" ("Requests for Admissions"). In support of this Motion, the Kroners state as follows:

1. On March 7, 2019, the Kroners served the Requests for Admissions, a copy of which is submitted herewith. On April 8, 2019, Grain Belt served its objections and responses to this set of Requests for Admissions. Grain Belt's response to item 8 of the Requests for Admissions was as follows:

> **RESPONSE:** Objection. This Request seeks information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence in this proceeding. Subject to all objections, the Company states as it did not prepare or file the Substitute Brief referred to above, it is unable to admit that Schedule 8 is an accurate copy of the pages contained there.

2. The Kroners anticipate they will argue in this case that the Commission does not have the jurisdiction or statutory authority under Section 393.190 to approve the sale

of Grain Belt to Invenergy because Grain Belt is not an "electrical corporation", which is a prerequisite for approval of the sale under that statute.

In the recent CCN case (EA-2016-0358) Grain Belt argued it was an electrical corporation because it owned or had an interest in several items of "electric plant", which allegedly qualified it as an electrical corporation. One such item was the county assents which they had obtained from two of the eight county commissions. These assents, according to Grain Belt, constituted "franchises", which fell within the definition of electric plant.[1]

The Kroners have several arguments to counter this contention from Grain Belt, one of which is that in the appeal of the CCN case (EA-2016-0358) the Missouri Supreme Court implicitly ruled that the consents from County Commissions do not amount to "franchises".[2] The request for admissions at issue here, item 8, asked that Grain Belt admit that two pages from the MLA's brief to the Supreme Court in that case were accurate copies of two pages from the brief which the MLA had filed. The purpose of this request was to establish that the MLA had in fact argued to the Missouri Supreme Court that the county consents were franchises, paving the way for the MLA's argument in that brief that under the CCN statute (Section 393.179) the Commission could not issue the CCN until Grain Belt had obtained all of the necessary county consents.

3. Grain Belt raises two objections to item 8 of the Request for Admissions: that the two pages from MLA's brief to the Supreme Court are not relevant here; and that even if they were relevant, because Grain Belt did not author or file the brief, it is unable to admit the accuracy of the two pages in question.

[1] Initial Post-Hearing Brief on Remand of Applicant Grain Belt Express Clean Line LLC, last par. p. 9 and last par. p. 11; EFIS 735.
[2] *Grain Belt Express Clean Line, LLC v. Pub. Serv. Comm.,* ?, (MO banc 2018)

4. Argument as to relevance. The Supreme Court did not address the MLA's argument in the appeal of EA-2016-0358 that the consents from the county commissions amounted to franchises. However, in order to find for Grain Belt in that case, the MLA and the Kroners suggest and will argue that the Court by necessary implication must have ruled against the MLA's argument concerning the meaning of franchises. If that were not the case, the Court would necessarily have ruled in the MLA's favor. And as the Missouri Supreme Court has said, "what is contemplated in an opinion by necessary implication is equivalent to that which is clearly and expressly stated". *Frost v. Liberty Mutual Ins. Co.,* 813 S.W.2d 302, 305 (Mo banc 1991). To the same effect see *Fischer v. Brancato,* 174 S.W.3d 82, 86 (Mo. App. 2005); and *Missouri Board of Pharmacy v. Tadrus,* 926 S.W.2d 132, 137 (Mo. App. 1996).

5. Grain Belt has argued that the Supreme Court decision specifically stated it was not addressing the MLA's argument regarding the meaning of the term "franchise", pointing to footnote 5 of that decision. The Court stated there as follows:

> MJMEUC and MLA's briefs assert several points on appeal. The Commission filed a motion to dismiss MLA's appeal, which was taken with the case. Because this Court's review of Grain Belt's points on appeal is dispositive, this Court does not reach the claims raised by MJMEUC or MLA. Consequently, the Commission's motion to dismiss MLA's appeal is overruled as moot.

6. The MLA and the Kroners contend that the MLA's issues addressed in that footnote had nothing to do with the MLA's primary argument as a respondent in that case regarding the meaning of the term franchise. Instead, as indicated in the footnote, the Court was referring there to a totally different set of arguments raised by the MLA in its position as appellant in that case, and it was those arguments which were the subject of the Commission's Motion to Dismiss.

The Commission's Motion to Dismiss was filed on March 6, 2018, in Supreme Court case No. SC9693, and is readily available on Case Net (as well as in the files of Grain Belt's appellate counsel). The Commission's Motion to Dismiss was based on its contention that because the Commission decision had been issued in the MLA's favor, that the MLA had no right to file an appeal. Therefore, it argued that the MLA appeal should be dismissed. The Court ruled that this Motion, and hence the issues raised therein, should be taken with the case. Thus it was the issues which were the subject of the Commission's Motion to Dismiss which the Supreme Court found to be moot. Footnote 5 simply makes no reference to the issue of the meaning of the word "franchise."

7. Accordingly, the MLA's argument in the Supreme Court that the county consents amounted to franchises was never addressed, particularly in the Court's footnote 5. The pages from the MLA's brief referenced in item 8 of the Request for Admissions is therefore relevant, as it bolsters the argument that the meaning of the word "franchise" was in fact presented to the Court, and that the MLA's argument on that point was denied. This argument at least deserves to be heard by the Commission.

8. Grain Belt's claim that it need not admit to the authenticity of the two pages from the brief because it did not "prepare or file them." There is absolutely nothing in Supreme Court Rule 59.01 (dealing with requests for admissions) which exempts documents not prepared or filed by the party upon whom the request is served. In fact, the rule applies, without qualification, to admissions of "the genuineness of any documents described in the request." (Rule 59.01(a))

9. Grain Belt is in effect claiming it need not admit to the accuracy of the two pages in question because it has no knowledge on which to base a response. However, Rule 59.01(d) includes the following provision:

> A responding party may give lack of information or knowledge as a reason for failure to admit or deny if such party states that the party has made reasonable inquiry and the information known or readily obtainable by the party is insufficient to enable the party to admit or deny.

Contrary to the requirements of this Rule, Grain Belt made no claim that it had made any inquiry at all which would enable it to admit or deny the authenticity of the two pages in question. Nor could it have made such a claim. Assuming the Denton firm did not already have a copy of the documents from the Supreme Court appeal, counsel could readily have obtained those pages with a brief telephone call to any of Grain Belt's appellate court counsel, or any para-legal who worked for those firms. Thus to simply deny the authenticity of the documents without making the slightest effort to verify their authenticity is clearly a violation of the spirit and the letter of Rule 59.01.

10. Remedy for Grain Belt's breach of the Rule. Rule 59.01(f) provides as follows:

> The party who has requested the admissions may move to have determined the sufficiency of the answers or objections. Unless the court determines that an objection is proper, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this Rule 59.01, it may order either that:
>
> (1) The matter is admitted, or
>
> (2) An amended answer be served

Given that Grain Belt did not include any reference to having made a reasonable inquiry into the authenticity of the two pages in question, its answer clearly is in violation of Rule 59.01. Accordingly, pursuant to the provision of section (f), quoted immediately

above, the Kroners suggest that the following directive to Grain Belt would be appropriate, and well within the Commission's authority:

(1) That if Grain Belt continues to deny the authenticity of the documents subject to item 8 of the Request for Admissions, that it be required to incorporate in its answer to that item the following language derived from the Rule as quoted in paragraph 9 above: that Grain Belt has made a reasonable inquiry and the information known or readily obtainable by Grain Belt is insufficient to enable it to admit or deny the authenticity of the documents attached as Schedule 8 to the Request for Admissions;

(2) Alternatively, as authorized by Rule 59.01(f), Grain Belt should be directed to admit the request in item 8 of the Request for Admissions.

11. Given the time already spent by both parties on this issue, and the fact that the evidentiary hearings are scheduled to begin on April 23, the Kroners respectfully request under Commission Rule 4 CSR 240-2.080(14) that Grain Belt be required to respond to this Motion within two days from the date it is filed, instead of the ten days which normally would be allowed.

12. The Kroners represent to the Commission that they complied with the requirements of Commission Rule 4 CSR 240-2.090(8) before this Motion was filed.

WHEREFORE, the Kroners respectfully ask the Commission to enter an order at its earliest convenience to include the directives to Grain Belt set forth in paragraph 10 above.

Respectfully submitted,

/s/ Paul A. Agathen
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by electronic mail upon counsel for all parties this 11th day of April, 2019.

/s/ Paul A. Agathen
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