

**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) Case No. EA-2016-0358
Voltage, Direct Current Transmission Line)
and an Associated Converter Station)
Providing an Interconnection on the)
Maywood-Montgomery 345 kV)
Transmission Line.)

**MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY COMMISSION'S OPPOSITION
TO MISSOURI LANDOWNERS ALLIANCE'S MOTION TO DISMISS APPLICATION,
OR ALTERNATIVELY, TO HOLD CASE IN ABEYANCE¹**

The recent decision by the Missouri Court of Appeals Western District in the *ATXI Mark Twain* case is not dispositive here because it fails to address the legal issue presented in this case: whether approval by any local government is necessary before the Public Service Commission may issue a “line” certificate of convenience and necessity (“CCN”) under Revised Statutes of Missouri §393.170.1 to an “electrical corporation”² for the construction of a transmission line³ when that electrical corporation does not already possess an “area” CCN under §303.170.2. Thus, the Missouri Joint Municipal Electric Utility Commission (“MJMEUC”) respectfully requests that the Commission deny the motion to dismiss filed by the Missouri Landowners Alliance (“MLA”) and joined by Show Me Concerned Landowners (“Show Me”) as that motion is grounded solely on the non-dispositive, and likely non-final, *ATXI Mark Twain* decision.

¹ In this one brief, MJMEUC also opposes Show Me Concerned Landowners’ Comments in Support of Motion to Dismiss Application, or Alternatively, to Hold Case in Abeyance. MJMEUC does not oppose the Commission’s decision to grant the requested expedited treatment of this Motion.

² §386.020(15) Revised Statutes of Missouri

³ The definition of “electric plant” in §386.020(14) Revised Statutes of Missouri includes transmission lines.

The *ATXI Mark Twain* Court of Appeals failed to address the legal issue presented in this case, so that decision has no precedential value here.

This Commission recognized, in EA-2015-0146, that ATXI sought a “line” CCN to construct and operate an electric transmission line across Missouri, that ATXI did not already possess and was not seeking an “area” CCN to serve Missouri retail customers,⁴ and that this presented a factual scenario not previously addressed by the PSC or Missouri’s appellate courts. Harkening back to the 1960 appellate decision in *Harline v. Public Service Commission*,⁵ and working forward through *Aquila I* (2005)⁶ and *Aquila II* (2008)⁷, this Commission found that “*Harline* and its progeny did not contemplate a utility having a line certificate without a corresponding area certificate, and thus did not address circumstances where a utility has not already sought county or municipal consent.”⁸

Indeed, although the *ATXI Mark Twain* decision addresses only the second and third subsections of §393.170,⁹ a review of the language of all three subsections of that statute reveals that consent “of the proper *municipal* authorities” is required only for an “area” CCN under §393.170.2. In contrast, a “line” CCN sought under §393.170.1 – the subsection *not* addressed by the *ATXI Mark Twain* Court of Appeals – contains no requirement for consent from any entity other than this Commission:

⁴ *State ex rel. Union Electric Company v. PSC*, 770 S.W.2d 283, 285 (Mo. App. W.D. 1989) (“Two types of certificate authority are contemplated under Missouri statutes.”)

⁵ *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177 (Mo. App. W.D. 1960).

⁶ *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. W.D. 2005)

⁷ *State ex rel. Cass County v. PSC*, 259 S.W.3d 544 (Mo. App. W.D. 2008)

⁸ *Report & Order*, EA-2015-0146, Issued April 27, 2016, page 39.

⁹ Analyzing §393.170.2 and §393.170.3, the *ATXI Mark Twain* Court of Appeals declared, inexplicably, that its “harmonization of the statute preserves the integrity of *both* subdivisions of section 393.170” as though there are only 2, and not 3, subdivisions of that statute. Slip Opinion at 8 (Emphasis added).

1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system *without first having obtained the permission and approval of the commission.*

Similarly, this Commission’s rule which sets forth filing requirements for electric utility applications for CCNs, 4 CSR 240-3.105, follows the distinction between subsections (1) (“line” certificates) and (2)(“area” certificates) of §393.170.¹⁰ Subsection (C) of 4 CSR 240-3.105 governs applications for a line certificate for which “no evidence of approval of the affected governmental bodies is necessary...” Subsection (D) of 4 CSR 240-3.105 governs applications for an area certificate for which “consent or franchise by a city or county is required....”

The *ATXI Mark Twain* Court of Appeals failed to recognize and address the unique factual and legal issue presented to it, and it is thus highly likely that the Court of Appeals will be petitioned for rehearing and/or transfer of that case to the Missouri Supreme Court. Therefore, this Commission should not consider *ATXI Mark Twain* to have any precedential value or application to this case and MLA’s and Show Me’s pending motion to dismiss should be denied.

The policy established by the *ATXI Mark Twain* decision, which sets a county’s more limited interests over the broader interests of the entire state, will not likely stand.

After reviewing and “harmonizing” only the second and third subsections of §393.170, the *ATXI Mark Twain* Court of Appeals declared that an applicant such as ATXI must “receive the consent of *local* government authorities before the PSC issues a CCN.”¹¹ As this Commission is aware, some or all of the counties affected by the proposed ATXI and Grain Belt Clean Line, LLC transmission lines have, over the past few years, given consent, rescinded that

¹⁰ *State ex rel. Cass County v. PSC*, 259 S.W.3d 544, 549 (Mo. App. W.D. 2008) (“A line certificate thus functions as PSC approval for the construction described in subsection 1 of section 393.170...Area certificates thus provide approval of the sort contemplated in subsection 2 of section 393.170.”)

¹¹ Slip Opinion at 8. RSMo §393.170.2 specifically requires the consent of the “proper *municipal* authorities,” not “county” or “local” authorities.

consent, and are most likely waiting for a final ruling on the pending applications for line certificates.¹² The *ATXI Mark Twain* decision elevates a single county's decision-making authority to the position of gate-keeper for the entire state of Missouri and even states beyond that would also be served by these lines. The *ATXI Mark Twain* decision thus invites applicants and those benefitted by these lines to seek federal decision-making, which could preempt the input of county and state governments. This troublesome policy established by the *ATXI Mark Twain* decision is another strong indicator that the decision will be challenged and not likely stand, and certainly must not ground a dismissal of this case.

Because the *ATXI Mark Twain* decision is neither dispositive nor final, it provides no grounds for a stay of either the briefing or the ruling on the merits of this case.

MLA's request (and Show Me's joinder) to "hold this case in abeyance" is solely grounded on the assertion that the *ATXI Mark Twain* decision is controlling. It is not. Therefore, there are no grounds to delay either the briefing schedule already set in this case or this Commission's ruling on the merits of this case. There are certainly no grounds to compel yet another hearing in this case, as requested by Show Me who simultaneously complains that too many hearings have already been held. All parties to this case, as well as the Commission and its Staff, have devoted countless hours and resources to this case and the presentation of the evidence last week. The briefing required of the parties will never be any more time and cost efficient than under the current schedule which requires the work to be done while memories of the evidence at hearing are fresh. All parties deserve a timely ruling on the merits of that

¹² MLA admits at page 2 of its Motion that it anticipates additional counties will rescind their consents, perhaps because it is lobbying for such. Seizing upon the flawed *ATXI Mark Twain* decision, MLA could persuade a single county to prevent the Commission from granting this CCN. If GBX is not built, hundreds of millions of savings will be lost by MJMEUC's customers, which at a minimum would include the thirty-five MoPEP cities, Kirkwood, Hannibal, Columbia and Centralia.

evidence. MLA and Show Me have seized upon the flawed *ATXI Mark Twain* decision as a way to preserve the status quo – which is a stalled project. But, authorizing this project to timely move forward will save hundreds of millions for MJMEUC’s customers, which at a minimum would include the thirty-five MoPEP cities, Kirkwood, Hannibal, Columbia and Centralia.

Conclusion

MJMEUC respectfully requests that this Commission deny the pending Motion to Dismiss Application, or Alternatively, to Hold Case in Abeyance.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Missouri Joint Municipal Electric Utility Commission's Opposition to MLA's Motion to Dismiss Application or Alternatively to Hold Case in Abeyance was served by electronically filing with EFIS and emailing a copy to the following interested persons on this 31st day of March, 2017:

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