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 Current Transmission Line and an Associated Converter Station Providing an interconnection on the Maywood-Montgomery 345 kV Transmission Line	)))))))	Case No. EA-2016-0358

Public Version
** Indicates Confidential Information Has Been Removed**

PROPOSED FINDINGS ON REMAND FROM THE MISSOURI LANDOWNERS ALLIANCE AND THE EASTERN MISSOURI LANDOWNERS ALLIANCE D/B/A SHOW ME CONCERNED LANDOWNERS

Come now the Missouri Landowners Alliance (MLA) and the Eastern Missouri Landowners Alliance D/B/A/ Show Me Concerned Landowners (Show Me) and hereby submit two alternative versions of their proposed Findings of Fact and Conclusions of Law.

Version A assumes the Commission will find it does not have the statutory authority or jurisdiction to grant the CCN to Grain Belt. Version B assumes the Commission will instead decide the case on the basis of the Tartan criteria.

Some of the MLA's uncontroverted proposed findings are copied in whole or in part from the proposed findings and other documents submitted by other parties during the 2016 proceedings, or from the Commission's Report and Order of August 16, 2017 (EFIS 606). Quotation marks so indicating have not been included here, but in each such case the source for the MLA's proposed finding is indicated.

Version A: case decided on the basis of lack of jurisdiction.

Proposed Findings of Fact

1. On August 30, 2016, Grain Belt Express Clean Line LLC ("GBE") filed an application with the Missouri Public Service Commission ("Commission") pursuant to Section 393.170.1 RSMo[1], 4 CSR 240-2.060 and 4 CSR 240-3.105(1)(B),for a certificate of convenience and necessity ("CCN") to construct, own, operate, control, manage and maintain a high voltage, direct current transmission line and associated facilities within Buchanan, Clinton, Caldwell, Carroll, Chariton, Randolph, Monroe and Ralls Counties, Missouri, as well as an associated converter station in Ralls County. [Report and Order of August 16, 2017, p. 1 (EFIS 601. Hereafter "Report and Order"].

2. The Project as proposed by GBE is an approximately 780-mile direct current ("DC") transmission line which would run from western Kansas, through Missouri and Illinois, and into Indiana. Approximately 206 miles of the line would be located in Missouri. [Id. par. 4 & 5]

3. The line is intended to deliver 500 megawatts ("MW") of wind energy generated at wind farms in western Kansas to customers in Missouri, and another 3,500 MW into Illinois, Indiana and states further east. [Id. par. 5; Grain Belt's Application, par. 14, EFIS 34].

4. The Project would have three converter stations. One would be located in western Kansas, where wind generating facilities would connect to the Project. The two other converter stations in eastern Missouri and eastern Illinois would deliver electricity to the standard alternating current ("AC") grid through interconnections with transmission owners in the systems of Midcontinent Independent System Operator, Inc. ("MISO") and PJM interconnection, LLC ("PJM") respectively. [Report and Order, par. 6]

[1] All statutory references are to the Missouri Revised Statutes (2016) unless otherwise noted.

5. Customers buying capacity on GBE's line would consist principally of wind energy producers in western Kansas, and wholesale buyers of electricity, such as traditional utilities, competitive retail energy suppliers, brokers and marketers. [Proposed Order, par. 10]

6. The Project would not provide service to end-use customers in Missouri, such as individual home-owners or businesses. Therefore, the rates of the GBE project would not be regulated by the Commission. [Id. par. 11; Grain Belt's Application, par. 76]

7. Instead, the rates which GBE may charge for the use of its line are regulated by the Federal Energy Regulatory Commission ("FERC"). [Grain Belt's Application, par. 16]

8. By an Order issued in 2014, the FERC granted GBE the authority to establish its rates for 100% of the capacity on its line by direct bilateral negations with potential wholesale customers of the line. [Direct Testimony of Mr. Michael Skelly, Exh. 100, p. 24, EFIS 35; Direct testimony of Ms. Suedeen Kelly, p. 10, EFIS 40; Staff's Proposed Findings from the 2016 proceeding, par. 14, EFIS 552; Grain Belt's Application, pars. 16 and 47, EFIS 34] Based on FERC policy, this allows GBE "to select a subset of customers…and negotiate directly with those customers to reach agreement on the key rates, terms, and conditions for procuring up to the full amount of transmission capacity." [Direct Testimony of Ms. Suedeen Kelly, pp. 9-10, EFIS 40]

9. Accordingly, GBE has not held itself out to the general public as an indiscriminate provider of electric service, and will not manufacture, sell or distribute electricity to the general public.

10. The use of the line for transmission of electric energy from Kansas to Indiana and states further east means that the proposed line will be offering interstate transmission service. [Direct testimony of Mr. Michael Skelly, Exh. 100, p. 24 lines 9-10; Grain Belt's Proposed Findings from 2016 proceeding, p. 39 Section II.A,1, EFIS 554; Staff's Proposed Findings from 2016 proceeding, p. 1, EFIS 552]

11. Thus far GBE has negotiated rates for the use of its line with only two wholesale customers: the Missouri Joint Municipal Electric Utility Commission (MJMEUC), and a company named Realgy, LLC. ** _____

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Proposed Conclusions of Law

1. The Commission "is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the Statutes and powers reasonably incidental thereto."[2] "Neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by statute."[3]

2. Out of necessity the Commission must frequently interpret statutory and constitutional provisions to adjudicate the issues within the scope of its jurisdiction. [See Report and Order in EA-2015-0146 (the ATXI case), April 27, 2016, p. 34, par, 14]

3. Section 393.170, under which GBE has applied here for the CCN, provides in relevant part as follows: no gas corporation, electrical corporation, water corporation or

[2] *State ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1046 (Mo. banc 1943).
[3] *State ex rel. Mo. Cable Telecomms. Ass'n v. Mo. Pub. Serv. Comm'n*, 929 S.W.2d 768, 772 (Mo. App. 1996).

sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without having first obtained the permission and approval of the commission.

4. If GBE is not an electrical corporation, then the Commission has no authority to grant it the CCN for which it has applied.

5. Section 386.020(15) defines an electrical corporation as follows:

> "Electrical corporation" includes every corporation, company, association, joint stock company or association, partnership and person … owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or for its own use or the use of its tenants and not for sale to others.

Subsection (14) of that statute defines "electric plant" to include property used "to facilitate the generation, transmission, distribution sale or furnishing of electricity for light, heat or power …."

6. Five years after the enactment of these provisions as part of the Public Service Commission Act, the Missouri Supreme Court declared as follows:

> While the definitions express therein [in the two sections quoted above] no word of public use, or necessity that the sale of the electricity be to the public, it is apparent that the words "for public use" are to be understood to be read therein. For the operation of the electric plant must of necessity be for a public use, and therefore be coupled with the public interest; otherwise the Commission can have no authority over it. The electric plant must, in short, be devoted to a public use before it is subject to public regulation.[4]

The Missouri Supreme Court went on to hold that even though the defendant did sell electricity to several individuals and businesses within a three block radius of its plant, there had been no explicit professing of public service or undertaking to furnish lights or power to the whole public, or even to all persons within the three block radius of

[4] *State ex rel. M. O. Danciger & Co. v. Public Serv. Comm'n,* 205 S.W.36, 40 (Mo. 1918).

the plant. Hence the Court ruled that the defendant was not an "electrical corporation" as defined in Section 386.020(15).

7. The Commission finds that because GBE has made no explicit professing of public service, and has not undertaken to furnish lights or power to the whole public, that it does not constitute a public utility in the sense required by *Danciger*.

8. Another fundamental point made by the Supreme Court in *Danciger* is that an entity either is a "public utility", or it is not. If it is, then it is "within the whole purview, and for all inquisitorial and regulatory purposes of the Public Service Commission Act.[5]

9. Thus based on *Danciger,* if GBE is a public utility for purposes of the CCN statute, 393.170, then it must also be a public utility for all other statutes which apply to public utilities in Missouri. For example, Section 393.140 contains extensive provisions regarding the filing of rate schedules with the Commission, and the methods by which rates may be changed for an electrical corporation. However, GBE claims it is not subject to the statutes pertaining to rate regulation by the Commission.

10. GBE claims instead that since it is subject to rate regulation by the FERC, that it is not subject to the rate making authority of the Commission. But as stated in *Danciger*, an actual public utility is subject to "the whole purview" of the Public Service Commission Act, not merely the sections which it might wish were applicable.

11. Among the other provisions applicable to electric utilities is Section 393.150, regarding the file and suspend method of changing rates, and 386.370, regarding the Commission assessment of electric corporations and other types of utilities. If GBE is a public utility for purposes of section 393.170, as it claims to be, then it is also subject to these and every other Section in Missouri law which applies to electrical utilities.

[5] Id. p. 40.

12. For the foregoing reasons, the Commission finds that under the criteria established in the *Danciger* case, GBE is not an electrical corporation for purposes of section 393.170. Therefore, the Commission lacks the statutory authority and the jurisdiction to grant a CCN to GBE.

13. The Commission also finds it lacks the authority and jurisdiction to grant the CCN on a second although related ground. When GBE claims that it is subject to rate regulation by the FERC, and not this Commission, what it really is saying is that the rate-making authority over GBE has been delegated under federal law to the FERC. And that is so because the GBE project will be engaged in interstate commerce, thus granting all authority over the line to the FERC.

14. On this point, Section 386.250(1) provides, in part, that the jurisdiction of the Commission extends only to the manufacture, sale or distribution of electricity "within the state."

And Section 386.030 also provides as follows:

> Neither this chapter, nor any provision of this chapter, except when specifically so stated, shall apply to or be construed to apply to commerce with foreign nations or commerce among the several states of this union, except insofar as the same may be permitted under the provisions of the Constitution of the United States and acts of Congress.

15. Instead, jurisdiction over GBE's interstate transmission facilities has been delegated to the FERC under the Federal Power Act. See 16 U.S.C. § 824(b), stating that "The provisions of this subchapter shall apply to the transmission of electricity in interstate commerce and to the sale of electric energy at wholesale in interstate commerce …. The [FERC] shall have jurisdiction over all facilities for such transmission or sale of electric energy…."

16. In this regard, the U.S. Supreme Court has stated that "transmission on the interconnected national grids constitute transmissions in interstate commerce."[6] The Court further noted that the FERC has exclusive jurisdiction over unbundled transmission of electricity under the Federal Power Act, and that such transmissions have "never been subject to regulation by the states."[7]

17. Inasmuch as GBE's line would operate in interstate commerce, as discussed above, the Commission has no authority or jurisdiction over such interstate operations unless such authority has been specifically granted to it by state law.[8]

18. The Commission has been pointed to no law in Missouri which specifically grants it any authority over interstate electrical transmission lines. In its Reply Brief on remand, GBE chose not to address this particular question. In the absence of any known state law which specifically grants the Commission authority over interstate electric transmission lines, Sections 386.030 and 386.250(1), *supra,* are strong indications that no such authority has been granted.

19. This finding with respect to electrical transmission lines is in accord with the accepted rule regarding interstate transmission of natural gas: that this Commission has no authority to regulate those pipelines.[9]

20. The Commission finds that all regulatory authority over the GBE project has been granted to the FERC. Therefore, for this reason also the Commission does not have the authority or jurisdiction to grant the requested CCN to GBE.

Decision

[6] *New York v. Federal Energy Regulatory Commission,* 535 U.S. 1, 16 (2002).
[7] *Id.* p. 21.
[8] See *State ex rel. MoGas Pipeline, LLC v. Pub. Serv. Comm'n,* 366 S.W.3d 493, 498 (Mo. 2012).
[9] *State ex rel. Mo. Pub. Serv. Comm. v. Missouri Gas Co.,* 311 S.W.3d 368, f.n.3 (Mo. App. 2010).

The Commission finds that it lacks the statutory authority and jurisdiction to grant GBE a certificate of convenience and necessity, as requested in its Application. Therefore, that Application is denied. Since the Commission's determination that it lacks the authority and jurisdiction to issue a CCN resolves the case, it is unnecessary for the Commission to consider and decide the remaining disputed issues.

Version B: decided on the basis of the Tartan criteria.

Proposed Findings of Fact

Background

1. On August 30, 2016, Grain Belt Express Clean Line LLC ("GBE") filed an application with the Missouri Public Service Commission ("Commission") pursuant to Section 393.170.1 RSMo[10], 4 CSR 240-2.060 and 4 CSR 240-3.105(1)(B),for a certificate of convenience and necessity ("CCN") to construct, own, operate, control, manage and maintain a high voltage, direct current transmission line and associated facilities within Buchanan, Clinton, Caldwell, Carroll, Chariton, Randolph, Monroe and Ralls Counties, Missouri, as well as an associated converter station in Ralls County. [Report and Order of August 16, 2017, p. 1 (EFIS 601. Hereafter "Report and Order"].

2. The entire Project as proposed by GBE is an approximately 780-mile direct current ("DC") transmission line which would run from western Kansas , through Missouri and Illinois, and into Indiana. Approximately 206 miles of the line would be located in Missouri. [Id. par. 4 & 5]

3. The line is intended to deliver 500 megawatts ("MW") of wind energy generated at wind farms in western Kansas to customers in Missouri, and another 3,500

[10] All statutory references are to the Missouri Revised Statutes (2016) unless otherwise noted.

MW into Illinois, Indiana and states further east. [Id. par. 5; Grain Belt's Application, par. 14, EFIS 34].

4. The Project would have three converter stations. One would be located in western Kansas, where wind generating facilities would connect to the Project. The two other converter stations in eastern Missouri and eastern Illinois would deliver electricity to the standard alternating current ("AC") grid through interconnections with transmission owners in the systems of Midcontinent Independent System Operator, Inc. ("MISO") and PJM interconnection, LLC ("PJM") respectively. [Report and Order, par. 6]

5. Customers buying capacity on the GBE line would consist principally of wind energy producers in western Kansas, and wholesale buyers of electricity, such as traditional utilities, competitive retail energy suppliers, brokers and marketers. [Report and Order, par. 10]

6. The Project would not provide service to end-use retail customers in Missouri, such as individual home-owners or businesses. Therefore, the rates of the GBE project would not be regulated by the Commission. [Id. par. 11; Grain Belt's Application, par. 76]

7. Instead, the rates which GBE may charge for the use of its line are subject to regulation by the Federal Energy Regulatory Commission ("FERC"). [Grain Belt's Application, par. 16]

8. By an Order issued in 2014, the FERC granted GBE the authority to establish its rates for 100% of the capacity on its line by direct bilateral negations with potential wholesale customers of the line. [Direct Testimony of Mr. Michael Skelly, Exh. 100, p.

24, EFIS 35; Direct testimony of Ms. Suedeen Kelly, p. 10, EFIS 40; Staff's Proposed Findings from the 2016 proceeding, par. 14, EFIS 552; Grain Belt's Application, pars. 16 and 47, EFIS 34] Based on FERC policy, this allows GBE "to select a subset of customers…and negotiate directly with those customers to reach agreement on the key rates, terms, and conditions for procuring up to the full amount of transmission capacity." [Direct Testimony of Ms. Suedeen Kelly, pp. 9-10, EFIS 40]

Need

9. GBE has negotiated two such contracts. The first is for the sale of up to 200 MW of capacity on the line to the Missouri Joint Municipal Electric Utility Commission (MJMEUC). [MJMEUC's suggested findings from the 2016 proceeding, par. 9, EFIS 2016.] MJMEUC expects that the capacity from this contract will in turn be sold to municipal utilities which are members of MJMEUC. [Id. at par. 13-17]

10. The second is for the sale of capacity to a company named Realgy, LLC, which is buying up to 25 MW of capacity for the Kansas to Missouri segment of the line, and up to 25 for the Kansas to PJM segment. [Staff proposed finding of fact in 2016 proceeding, par. 16, EFIS 552]

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_____** [See Revised Staff Supplemental Rebuttal Report, Exh. 208, p. 12]

12. The GBE transmission service agreement with MJMEUC could be satisfied through existing transmission markets through financial arbitrage, with or without the

GBE line, and with or without the Missouri converter station. [Staff's Suggested finding in 2016 proceeding, par. 19, EFIS 552].

13. GBE asserts its project is needed for meeting the renewable energy portfolio requirements of the Missouri Renewable Energy Standard. But, except for Union Electric d/b/a Ameren Missouri, all of the entities subject to the renewable energy portfolio requirements have existing capacity and new contracts sufficient to meet or exceed them, and the evidence in the record before the Commission does not show that Ameren Missouri will benefit from the GBE project to meet those requirements. [Id. par. 23].

14. There is no evidence that Ameren has expressed any interest in buying capacity on the GBE line.

15. GBE's loss of load expectation study does not demonstrate that the Project will improve reliability in Missouri. Its own study, showing a reduction from .004 day per year to .001 day per year does not demonstrate improved reliability, particularly when Missouri is already below the accepted target of .1 day per year. [Staff's proposed findings from 2016 proceeding, par. 25, EFIS 552].

16. In the two years since the 2016 proceedings concluded, GBE has not secured any additional contracts for the purchase of capacity on either segment of its line. [Tr. Vol. 22, p. 1858 lines 15-18] And during that same two years, GBE was unable to secure any Memorandums of Understanding ("MOUs") for the sale of capacity on its line. [Ed. at p. 1858 line 19 – page 1859 line 2].

17. During the 2016 proceedings GBE testified that it had two sister-projects intended to move wind energy to load centers in the east: the Plains and Eastern Line,

and the Rock Island Line. Both projects have since been abandoned by Clean Line, and in both instances Clean Line had failed to execute a single contract or MOU for capacity on the line. [Tr. Vol. 22 p. 1839 line 23 – p. 1841 line 10; p. 1843 line 1 – p. 1844 line 13.

18. ** _____

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Applicant's Qualifications and Applicant's Financial Ability.

19. At one point Clean Line had approximately 50 employees. [Tr. Vol. 22, p. 1837, lines 9-11]. All have since left, although Mr. Skelly remains as Chairman of the Board. [Id. p. 1836 , lines 17-19; p. 1838, lines 16-22]

20. During the 2016 proceedings GBE produced a list and brief resume of the top fourteen people on Clean Line's management team. [Exh. 100, Sch. MPS-2] However, none of those individuals are still employed by Clean Line (although, as indicated, Mr. Skelly remains as Chairman of the Board).

21. Neither of Clean Line's Grain Belt subsidiaries have any employees. [Tr. Vol. 22, p. 1837, lines 17-22.

22. The evidence shows that Clean Line and GBE together do not have a sufficiently qualified workforce at this time to meet the second of the Tartan criteria.

23. In anticipation of the sale of the GBE project to a company named Invenergy Transmission LLC (an affiliate of Invenergy LLC), on November 9, 2018, GBE and Invenergy Transmission LLC executed two related documents. The first was titled a Membership Interest Purchase Agreement, which in effect amounted to a contract for the sale of the GBE project to Invenergy Transmission LLC (hereafter referred to as

"Invenergy") [Schedule KZ-3 to Supplemental Direct Testimony of Mr. Kris Zadlo, Exh. 145]

24. The second document was titled Development Management Agreement. Subject to certain conditions, the contract generally obligated Invenergy to take control of and pay for all aspects of the development of the GBE project from the date the contract was signed, up to the point where the project owner could reasonably expect to approach institutional investors for construction financing. Invenergy estimates that the additional cost of proceeding through this "development phase" will be $50 to $100 million. [Exh. KZ-4 to Exh. 145; testimony of Ms. Andrea Hoffman at Tr. Vol. 22, page 2011 line 19 – page 2012 line 2; testimony of Mr. Kris Zadlo, Id. at p. 2067 lines 19-24.]

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_____** [See MLA's initial brief on remand, p. 19, second full par.]

26. The evidence shows that at this time, Clean Line and GBE combined do not have the financial resources to meet the third Tartan criterion.

27. No party has challenged the qualifications of Invenergy to meet the second and third Tartan criteria. Therefore, in order to find that these two criteria are met in this case, the Commission would be required to look not at the qualifications of the Applicant GBE/Clean Line, but at those of Invenergy.

28. The Membership Interest Purchase Agreement is conditioned upon approval of the line by the Kansas Corporation Commission, and the approval from this Commission of the CCN being sought here and its approval of the sale of the Project by

GBE to Invenergy. [Supplemental Direct Testimony of Mr. Zadlo, Exh. 145, p. 3 line 21 – p. 4 line 2; Tr. Vol. 22 p. 2035 lines 6-21]

29. GBE and Invenergy have not yet filed an Application for approval of the sale. [See Case No. EM-2019-0150] Therefore, without having heard any evidence in support of or in opposition to that sale, the Commission cannot assume that it will approve the Application, if and when it is filed.

30. If the sale is not approved by this Commission, then by the terms of the Membership Interest Purchase Agreement the sale will not close. And if the sale does not close, then Invenergy is relieved of any further obligation to fund the development phase of the project under the Development Management Agreement. [DMA, Article VIII, Section 8.03]

31. At this point, the Commission is in no position to assume that the resources of Invenergy will be available to GBE and Clean Line in order to allow them to complete the development phase of the project. Therefore, the Commission finds that GBE has failed to meet the third of the Tartan criteria.

Economic Feasibility of the Proposal

32. Given that only 500 of the 4,000 MW from the project will be delivered in Missouri, and given the rates at which GBE has negotiated for the 225 MW already sold in this state, no party has attempted to make a case that the Project is economically feasible solely on the basis of the Kansas to Missouri portion of the line. Instead, as GBE states, "it was the 3500 MW portion of the Project to be sold in the PJM that demonstrates the financial viability of the project overall." [Grain Belt Initial Brief, p. 36, EFIS 529]

33. Under the project as proposed, the GBE line would reach the PJM market by selling capacity at its eastern-most converter station, located in eastern Illinois.

34. GBE does not have the authorization of the Illinois Commerce Commission to build the line in that state. And the sale of the line from GBE to Invenergy is not contingent upon gaining approval for the Illinois segment of the line from the Illinois Commission. [Tr. Vol. 22, p. 2035, lines 6-21].

35. If the Illinois Commission and/or the Illinois Courts do not allow GBE to build the line in that state, there is no evidence that a line terminating in Missouri would be economically feasible. Nor is it even clear from the testimony what Invenergy might do if it is denied access to Illinois. [See MLA's initial brief on remand, p. 24-27]

36. At this point, the Commission is in no position to hazard a guess as to what the Illinois Commission might do if Invenergy and GBE reapply for a certificate in that state. Instead, the Commission will deal with the possibility of the line terminating somewhere in Missouri by the adoption of certain conditions discussed hereafter.

Promotion of the Public Interest

37. In the Tartan case the Commission summarized the appropriate analysis of this last criterion as follows:

> The requirement that an applicant's proposal promote the public interest is in essence a conclusory finding as there is no specific definition of what constitutes the public interest. Generally speaking, positive findings with respect to the other four standards will in most instances support a finding that an applicant for a certificate of convenience and necessity will promote the public interest. [Tartan Case, slip op. p. 23-24]

38. Conversely, the Commission finds that if an applicant fails most if not all of the other four criteria, the project is not likely to be in the public interest.

39. Based on the findings set forth above, the Commission finds that GBE did not meet its burden of proving that it presently meets any of the first four of the Tartan Criteria. And based on the above findings, the Commission also concludes that it has failed to meet its burden of proving the last criterion as well.

The MLA's Proposed Conditions (assuming the CCN is granted)

1. The MLA is recommending five conditions which were not agreed upon by GBE/Invenergy and Staff, or at least not agreed upon in language which the MLA views as adequate.

Condition 1: Decommissioning Fund.

2. Staff is proposing that some form of decommissioning fund should be established, in order to insure that the Project facilities such as the support towers and cables are removed from the Missouri right-of-way when (or if) they are no longer being utilized. Staff and GBE disagree as to when GBE should begin contributing to such a fund.[11]

3. The proposal from neither Staff nor GBE would provide sufficient decommissioning funds to remove the facilities if for some reason the project is abandoned during construction, or within several years after construction is completed.

4. Those scenarios may be unlikely, but as Staff notes, they are certainly a possibility.[12]

5. Given that possibility, the question is who should bear the financial burden of removing the facilities if they are abandoned at a point when the decommissioning funds as proposed by Staff and GBE have inadequate resources to do so.

[11] See comparison at page 12 of Schedule DAB-9 to Mr. David Berry's Surrebuttal testimony, Exh. 105.
[12] Exh. 201, Staff Rebuttal Report, p. 45.

6. GBE has estimated that ** _____

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7. GBE argues that no decommissioning fund has ever been required for a transmission line. However, as they also point out, their Project is unique in many ways. In particular, it appears that no single-asset merchant transmission line has ever been built in this state. Thus in all previous cases involving the construction of a new transmission line, the landowners and the Commission could rely on the incumbent utility to remove any decommissioned transmission facilities, in the unlikely event that was needed.

8. Here, the surviving owner of the GBE project (e.g. Invenergy or some unknown third party) will likely have no assets of any consequence, other than the line itself. So if the GBE facilities are no longer needed, for whatever reason, there will be no entity left with the resources to remove the unwanted facilities from the right-of-way. In short, the GBE project is not like other transmission lines in this state, and there is no logical reason to ignore that difference when deciding this particular issue.

9. To fully protect Missouri landowners, the Commission finds it is essential that the decommissioning fund in this case be capable of paying for the removal of the Project facilities from the beginning of construction. Neither the GBE nor the Staff proposal would cover that possibility.

10. While GBE may be correct that the risk of decommission the facilities within the first few years may be small, the cost of doing so is quite high. The Commission finds there is no equitable reason why the landowners should be forced to bear that risk. They will not be paid for that possibility as part of any easement. Furthermore, GBE has assured the Commission that it bears all of the financial risks of this project.[13] The Commission finds that early decommissioning of the project is just one of those risks assumed by GBE.

11. GBE would seemingly have at least two options for establishing such a fund. It could establish a decommissioning trust fund before construction begins in an amount which would fully decommission the Project facilities, and on which GBE would be entitled to all interest payments while the Project remained in operation. GBE would thus recover the time value of the money contributed at the outset to the decommissioning fund.

12. Alternatively, as Staff notes, GBE could secure insurance, a letter of credit, escrowed funds, or a bond in an amount sufficient to cover the full cost of the decommissioning.[14]

13. GBE seems to believe that if the terms of the decommissioning fund are made part of the Commission's Order in this case, that the Commission and individual landowners would then have the ability to enforce the terms of that document.[15] However, GBE has yet to produce a single cohesive document encompassing the

[13] Direct testimony of Mr. Skelly, exh. 100, p. 7 lines 9-13 and p. 15 lines 8-9.
[14] Exh. 201, Staff Rebuttal Report, p. 45.
[15] Tr. 422 line 8 – 423 line 2.

specifics of a proposed decommissioning fund.[16] Thus there is no such document for the Commission to make part of its final Order in this case.

14. For the foregoing reasons, the Commission will include the following condition to the grant of the CCN: "That at least six months before construction of the project begins in Missouri, GBE shall submit to the Commission a detailed proposal for a decommissioning fund for its facilities on Missouri right-of-way. The proposed decommissioning fund shall provide that it is sufficiently funded so as to allow the complete decommissioning of all project facilities built in Missouri, from and after the time those facilities are built. The proposed decommissioning fund shall be subject to Commission approval and/or any changes which the Commission may order so as to effectuate the purpose of the fund as stated herein."

Condition 2: Incorporation of documents into the Easement Agreements.

15. GBE witness Ms. Deann Lanz has agreed in testimony that the following documents should be incorporated into the GBE easement agreements with landowners, and made binding upon GBE: the Missouri Agricultural Impact Mitigation Protocol; the Missouri Landowner Protocol; and the GBE Code of Conduct.[17] GBE agrees it has already committed to do so.[18]

16. In order to formalize this agreement, the Commission will include the following condition to the grant of the CCN: "The the following documents must be incorporated into the GBE easement agreements with landowners, and made binding upon Grain Belt: the Missouri Agricultural Impact Mitigation Protocol; the Missouri Landowner Protocol; and the Grain Belt Code of Conduct."

[16] Tr. Vol. 22, p. 1981 line 21 – p. 1982 line 4.
[17] Surrebuttal of Ms. Lanz, Exh. 114, p. 5 lines 12-18.
[18] Grain Belt Reply Brief, EFIS 545, p. 44.

Condition 3: No reduction to highest and best offer.

17. GBE has offered to pay landowners 110% of the value of the underlying property when acquiring easements for the line's right-of-way.[19] However, GBE has said it has made no commitment not to reduce the amount of an easement offer if the matter later goes to arbitration or to court.[20]

18. GBE witness Ms. Lanz seemed to believe that is no longer GBE's position, and that they have now agreed with Staff not to reduce their offer if the matter goes to arbitration or to court.[21] However, that does not appear to be the case. Based on Exhibit 206, the closest agreement on point seems to be item VII.7. That provision simply says that GBE will not change its policies and practices regarding right-of-way acquisition after it obtains a CCN. But if GBE currently has no practice against reducing an offer to a landowner, and there is no evidence they do, then the agreement at Section VII.7 affords no protection from what the MLA is seeking to guard against.

19. GBE has agreed that it will not change its "structure" for calculating compensation in arbitration or court proceeding.[22] However, whether or not the structure is changed during the process leaves room for debate. Therefore, while there may be agreement here in principle, the MLA suggests that its own language is less likely to cause confusion if the situation does arise in the future.

20. Given that GBE has proposed the 110% of market value to the Commission as one inducement to securing the CCN, it is only fair that GBE should not be allowed to

[19] See e.g. Direct Testimony of Deann K. Lanz, Exh. 113, p. 6 lines 19-21.
[20] Tr. 417, lines 2 – 12.
[21] Tr. 417 line 13 – 418 line 21.
[22] Grain Belt Reply Brief, EFIS 545, p. 44.

ultimately pay a lower amount if the matter of compensation goes to arbitration or to court.

21. Accordingly, the Commission will add the following condition to the grant of the CCN to GBE: "GBE must pay landowners at least the amount of its highest and best offer for a right-of-way easement if the matter of compensation is later taken to arbitration or to court."

Condition 4: Modifications to GBE's standard form Easement Agreement.

22. In addition to proposed Condition 2, discussed above, the MLA is suggesting that the Commission condition the CCN on GBE's agreement to make two additional modifications to its standard form Easement Agreement with landowners.

23. The standard form Easement Agreement which GBE proposes to use as a starting point in negotiations with landowners is set forth at Schedule DKL-4 to the direct testimony of Ms. Lanz.[23]

24. The MLA asks that the following statement be added to the Easement, perhaps at the conclusion of existing paragraph 3: "GBE will pay landowners for any agricultural-related impact ('Agricultural Impact Payment') resulting from the construction, maintenance or operation of the Project, regardless of when they occur and without any cap on the amount of such damages."

25. This provision already reflects GBE's existing policy.[24] However, to insure that the policy is not later overlooked, or revised to the detriment of the landowners, its addition to the easement should be made a condition to the CCN.

[23] Exhibit 113.
[24] Direct testimony of Deann Lanz, Exhibit 113, page 7 lines 19-22.

26. The standard GBE easement presently includes the following provision: "Grain Belt Express agrees that it shall not pursue, and hereby waives, any Claims against Landowner, except to the extent caused by Landowner's breach of this Agreement, gross negligence or intentional misconduct …." [25]

27. Under the terms of this provision, landowners could be liable, with no monetary limits at all, if for example the landowner damaged a pole with farming equipment, and his conduct could be viewed either as mere "negligence" or "gross negligence".

28. GBE (or its successors) would be the party in the first instance to decide if they considered the actions of the landowner to be "gross negligence", and not mere negligence. If the landowner disagrees with GBE's determination of this complex legal question, then his or her only recourse apparently would be to take the matter to court.

29. The Commission finds that the distinction created in the easement between gross negligence and mere negligence simply invites allegations of "gross negligence" by GBE (or its land agents) which could ultimately be reversed by the landowner only through costly litigation.

30. Accordingly, the Commission will add the following condition to the grant of the CCN to GBE: "The following sentence shall be added at the end of Section 11.c of the Easement Agreement appearing at Schedule DKL-4: any allegation of negligence under this provision shall not be deemed to be "gross negligence" unless proven otherwise by GBE in a court of competent jurisdiction."

Condition 5: addressing the uncertainty in Illinois.

[25] Schedule DKL-4, p. 4, Section 11.c to Direct Testimony of Deann K. Lanz, Exh. 113.

31. The MLA suggests two related condition as a means of dealing with the uncertainty of the project gaining consent to build the Illinois segment of the line: (1) that the owner of the GBE project may not begin construction of the line in Missouri until it has a final non-appealable order from the Illinois Commerce Commission allowing it to build the Illinois section of the line; and (2) that if the owner of the Project has not obtained such an order within four years after issuance of this Report and Order on remand, the owner of the project must return to this Commission for a determination of the economic feasibility of the line.

32. The Commission finds the first condition to be reasonable. It will protect against the possibility of GBE beginning construction of the line before it has the permission to build the Illinois segment of the line. Accordingly, it protects against the possibility of GBE building an economically deficient line which terminates in Missouri, but nevertheless results in the well-documented burdens to landowners living on or near the line's right-of-way.

33. The second condition is also reasonable, in that it protects against the landowners from having to endure perhaps years of uncertainty while the matter winds its way through the Illinois Commission and the Illinois courts.

34. Accordingly, the following two additional conditions shall be added to the CCN: (1) the owner of the GBE project may not begin construction of the line in Missouri until it has a final non-appealable order from the Illinois Commerce Commission allowing it to build the Illinois section of the line; and (2) if the owner of the Project has not obtained such an order within four years after issuance of this Report and

Order, the owner of the project must return to this Commission for a determination of the economic feasibility of the line.

Conclusions of Law

1. The Commission may grant a certificate of convenience and necessity if it determines, after due hearing, that the proposed project is "necessary or convenient for the public service."[26]

2. It is within the Commission's discretion to determine when the evidence indicates that the public interest would be served by the award of the certificate.[27]

3. The Commission has traditionally used five criteria to determine whether to grant a certificate of convenience and necessity: (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.[28]

Decision

Applying the above Findings of Fact and Conclusions of Law, the Commission reaches the following decision:

The Commission finds that GBE has not met its burden of proving it is entitled to a CCN. This conclusion is based on the findings that GBE failed to prove it meets any of the five Tartan criteria specified above. The Commission therefore denies GBE the CCN for which it has applied in this case.

[26] Section 393.170.
[27] *State ex rel. Ozark Electric Coop. v. Pub. Serv. Comm'n,* 527 S.W.2d 390, 392 (Mo. App. 1975)
[28] Report and Order, *In re Application of Tartan Energy Company,* File No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by electronic mail upon counsel for all parties this 18th day of January, 2019.

/s/ Paul A. Agathen
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