

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Application of Grain Belt)
Express LLC for an Amendment to its Certificate)
of Convenience and Necessity Authorizing it to)
Construct, Own, Operate, Control, Manage, and) File No. EA-2023-0017
Maintain a High Voltage, Direct Current)
Transmission Line and Associated Converter)
Station)

RESPONSE TO MOTION FOR DISCOVERY CONFERENCE

Pursuant to paragraph 3(m) of the Commission’s Order of December 21, 2022, Grain Belt Express LLC (“Grain Belt Express”) hereby files this Response to the Motion for Discovery Conference (“Motion”) filed by Missouri Landowners Association (“MLA”) the Eastern Missouri Landowners Alliance d/b/a Show Me Concerned Landowners, Norman Fishel, Gary and Carol Riedel, and Dustin Hudson (collectively, “Movants”):

I. Background

1. Movants have requested a Discovery Conference to review objections to MLA’s Data Requests SS-5, SS-6, SS-7, SS-8, SS-22, G-13, G-14, G-15, G-16, G-17, and G-18. These are eleven of the approximately 250 data requests (not counting multi-part questions) served by MLA so far during this proceeding.

2. Some of Movants’ requests seek signed Memoranda of Understanding (“MOUs”) between Grain Belt Express or Invenergy, on one hand, and potential customers and suppliers of the Amended Project, on the other hand, relating to capacity on the transmission line. Grain Belt Express objected to these requests, in part, because the MOUs are protected by Nondisclosure Agreements (“NDAs”) with third parties. Grain Belt Express has since notified those parties

pursuant to the terms of the various NDAs, but has not been granted authority by the counterparties to voluntarily disclose copies of the MOUs, even under the Highly Confidential designation.

3. Broadly stated, the remaining data requests at issue concern requests for all documents associated with confidential negotiations between Grain Belt Express and potential customers and suppliers of the Amended Project.¹ These requests go beyond requests for executed MOUs but would require disclosure of every step in the negotiation process, regardless of whether an agreement was reached. Grain Belt Express objected to these questions, because the harm to Grain Belt Express, its potential and current business partners (including those who are not parties to this proceeding), and the public outweighs the probative value of the information sought.

II. Data Requests at Issue

4. **Data Request SS-5** seeks MOUs between Grain Belt Express and commercial and industrial consumers and electric utilities interested in acquiring transmission capacity from the Amended Project. These MOUs are subject to NDAs with third parties. As described above, Grain Belt Express is in correspondence with the third parties pursuant to the terms of various NDAs, but does not yet have authority to voluntarily disclose the MOUs. As an alternative to full disclosure, Grain Belt Express has discussed the possibility of providing descriptions of the MOUs or producing the MOUs with redactions, which would serve the purpose for which copies of the MOUs are sought—that is, to evaluate whether there is existing demand for the Amended Project as it relates to the “need” and “economic feasibility” elements of the Tartan Factors.

5. **Data Requests SS-6, SS-7, SS-8** seek all documents between Grain Belt Express and Ameren (**SS-6**), Evergy (**SS-7**), the Tennessee Valley Authority (**SS-8**) regarding negotiations

¹ “Amended Project” refers to the transmission project described in Grain Belt Express’ Application to Amend Existing Certificate of Public Convenience and Necessity filed on August 24, 2022.

between the parties regarding a possible purchase of an ownership interest in and/or capacity from the Amended Project. Grain Belt Express has objected to these requests, as the harm to Grain Belt Express, third parties, and the public interest outweighs the probative value of the information sought.

6. **Data Request SS-22** seeks all documents relating to any negotiation Grain Belt Express has had for a MOU between it and any potential customer, including pricing. Grain Belt Express has objected to these requests, as the harm to Grain Belt Express, third parties, and the public interest outweighs the probative value of the information sought.

7. **Data Request G-13** seeks a list of all entities, other than wind and solar developers, that Grain Belt Express or Invenergy has approached regarding potential sale of capacity, along with detailed information about the outcome of any such meeting. **Data Request G-14** seeks information relating to any offers by Grain Belt Express, including pricing, duration, and capacity. **Data Request G-15** requests any other counter-offers by those entities. Grain Belt Express has objected to these requests, as the harm to Grain Belt Express, third parties, and the public interest outweighs the probative value of the information sought.

8. **Data Requests G-16, G17, and G-18** seek the same information as Data Requests G-13 through G-15, but as it relates to negotiations with wind and solar developers. Grain Belt Express has objected to these requests, as the harm to Grain Belt Express, third parties, and the public interest outweighs the probative value of the information sought.

III. Statement of Law

9. The party seeking production of documents which contain trade secrets or confidential information must establish that the documents are relevant and that it has a specific

need for the documents in order to prepare for hearing. *State ex rel. Blue Cross & Blue Shield of Missouri v. Anderson*, 897 S.W.2d 167, 170 (Mo. Ct. App. 1995).

10. Determination of the appropriate boundaries of discovery requests involves “the pragmatic task of weighing the conflicting interests of the interrogator and the respondent.” *State ex rel. Hoffman v. Campbell*, 428 S.W.2d 904, 906 (Mo. App. 1968). In ruling upon objections to discovery requests, judges must “balance the need of the interrogator to obtain the information against the respondent's burden in furnishing it.” *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 328 (Mo. Ct. App. 1985).

11. When a request might affect the privacy rights of non-parties, the privacy rights of non-parties must be considered in weighing the need for requested documents. *Anderson*, 897 S.W.2d at 171; *Anheuser*, 692 S.W.2d at 328 (“Included in this burden may well be the extent of an invasion of privacy, particularly the privacy of a non-party.”).

12. Even if information sought is properly discoverable, “upon objection the trial court should consider whether the information can be adequately furnished in a manner less intrusive, less burdensome or less expensive than that designated by the requesting party.” *Anheuser*, 692 S.W.2d at 328.

IV. Argument

13. The substance and nature of private negotiations—which, in many cases, are still active—are deeply sensitive to both the transmission line owner (Grain Belt Express) and those seeking capacity on the Amended Project for the purposes of providing or purchasing electricity through the line. Disclosure of pricing, capacity, duration, material terms of contracts, and bargaining strategies for capacity would disrupt the competitive ecosystem across the region for the purchase and sale of electricity.

14. Further, disclosure will create a chilling affect for Grain Belt Express' ability to negotiate for the sale of capacity on the Amended Project. Electric companies, generation companies, and commercial and industrial customers are deeply sensitive to the disclosure of their confidential information and business strategies. If Grain Belt Express is under an ongoing duty to disclose every step of its negotiations with those companies, those companies will not want to do business with Grain Belt Express. This all serves to harm the competitive nature of the energy markets, thereby increasing the cost of energy for the Missouri public.

15. Even with the Protective Order in place, the mere prospect of revealing confidential negotiations with any third party would chill such negotiations. Suppliers and potential customers depend on discretion and privacy. If Grain Belt Express is unable to guarantee basic protections afforded to competitors in the energy markets, then it will lose business.

16. Movants do not meet their burden to establish that these confidential documents are relevant and that they have a specific need for the documents in order to prepare for trial. *State ex rel. Blue Cross & Blue Shield of Missouri v. Anderson*, 897 S.W.2d 167, 170 (Mo. Ct. App. 1995). Nor does the balance test support Movants' request, as the harms to Grain Belt Express, its potential and current business partners, and the public far outweigh the probative value that could be gained from negotiations between Grain Belt Express and its potential and current business partners—especially where, as here, Grain Belt Express can provide descriptions of the signed MOUs or redacted versions thereof that serve the purpose for which the information is sought.

17. Proposals shared between parties in negotiations would not provide worthwhile evidence of pricing or any other material terms of such contracts because they often depend on puffery, evolving understandings of the project itself, and the constant changes in supply, demand, and pricing of electricity in the market and for that potential supplier or customer. Whether any

particular offer is made and/or denied, especially years before the line becomes operational, is of negligible relevance. Nevertheless, Grain Belt Express can provide descriptions of the MOUs, and potentially, redacted versions of the MOUs, which would be the only material product of those negotiations.

18. The prospect of admitting negotiations into the record would only serve to muddy the evidentiary record with materials that did not survive the negotiating process. When reviewing the Report and Order on Remand in Case No. EA-2016-0358 that granted Grain Belt Express' existing CCN, there is no indication that the Commission considered negotiations or bargaining positions of parties potentially interested in supplying or purchasing capacity on the line. Such evidence was not necessary for the Commission to make findings on "need" and "economic feasibility" in Case No. EA-2016-0358 and is not necessary here.

19. Accordingly, the probative value of these confidential materials is insignificant in view of the overwhelmingly negative effects that disclosure would have for Grain Belt Express, its potential and current business partners, and the public at large.

V. CONCLUSION

20. For the reasons provided above, the Commission should:

- a. Find Movants' Motion moot, in part, with respect to MLA's Data Requests SS-5 and SS-22 to the extent the requests call for descriptions or redacted versions of signed MOUs.
- b. Deny Movants' Motion, in part, with respect to MLA's Data Requests SS-5 and SS-22 to the extent the requests call for more than descriptions or redacted versions of signed MOUs.

- c. Deny Movant's Motion with respect to MLA's Data Requests SS-6, SS-7, and SS-8.
- d. Deny Movant's Motion with respect to MLA's Data Requests G-13, G-14, G-15, G-16, G-17, and G-18.

Respectfully submitted,

/s/ Andrew O. Schulte

Frank A. Caro, Jr. MBN 42094

Anne E. Callenbach MBN 56028

Andrew O. Schulte MBN 62194

Polsinelli PC

900 W. 48th Place, Suite 900

Kansas City, Missouri 64112

(816) 572-4754

fcaro@polsinelli.com

acallenbach@polsinelli.com

aschulte@polsinelli.com

ATTORNEYS FOR GRAIN BELT EXPRESS LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the parties listed on the official service list by email, this 17th day of January, 2023.

/s/ Andrew O. Schulte

Andrew O. Schulte