BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Landowners Alliance, and Eastern Missouri Landowners Alliance DBA Show Me Concerned Landowners, and John G. Hobbs, Complainants, V. Grain Belt Express LLC, and Invenergy Transmission LLC Respondents.	)	Case No. EC-2021-0059

RESPONDENTS' RESPONSE TO COMPLAINANTS' MOTION TO COMPEL

Grain Belt Express LLC ("Grain Belt") and Invenergy Transmission LLC (together with Grain Belt, the "Respondents"), pursuant to 20 C.S.R. 4240-2.080(13) and the January 26, 2021 Order Shortening Time for Responses, hereby file their Response to Complainants' Motion to Compel. In support of this Response, Respondents state the following:

A. Response to Complainants' Background Statements Regarding Scope

1. The Complainants' claims and legal theories in this case have been a moving target, with the scope recently expanding beyond any recognizable limits. In response to this Motion to Compel, the Commission must hold the Complainants to their original claims, or otherwise identify the boundaries of the inquiry and the legal basis for such inquiry. Accordingly, this Response addresses the scope of the proceeding before addressing the specific discovery requests, as one cannot judge the relevancy of discovery requests without first defining the scope. The Commission has previously recognized that, "[i]n Commission proceedings, evidentiary relevance

is determined by reference to the Commission's statutory mandate as well as the pleadings and testimony filed by the parties."[1]

2. Starting with the pleadings, the relief sought by Complainants is that the Commission "issue an Order declaring (1) because Grain Belt has *announced* that it plans to build something materially different from what the Commission authorized and approved in the CCN case, that at this time Grain Belt no longer has a valid CCN to build the line as originally proposed; and (2) consequently, Respondents have no legitimate right to claim that they still have the right of eminent domain in Missouri."[2] There is no other factual or legal basis alleged for the relief sought by Complainants. If the scope of discovery is limited to the allegations in the pleadings, as it must be, then the only proper area of inquiry is what Respondents have "announced."

3. The Complainants further confirmed the limited scope of this case when they joined the Joint Motion to Suspend Deadlines and Establish a Briefing Schedule, and agreed to factual stipulations that were limited to the August 25, 2020 Press Release and the September 24/25, 2020 letters to Missouri landowners (the "Stipulated Facts").[3] Complainants explicitly admitted that the Stipulated Facts were the only facts relevant to their Complaint, and that *no other discovery is needed*.[4]

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[1] *In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Case No. EO-2004-0108, Order Concerning Discovery Conference, p. 2 (Mar. 16, 2004) (hereinafter "AmerenUE Order").

[2] Formal Complaint, pp. 5-6 (emphasis added).

[3] Joint Motion to Suspend Deadlines and Establish a Briefing Schedule, ¶ 5 (Sept. 29, 2020).

[4] *Id*. at ¶ 3 ("Joint Movants … agreed that the Complaint is limited to a legal question that can be resolved without Staff undertaking an investigation into the Complaint's allegations and that would be more appropriately addressed through briefs, rather than Respondents filing a formal

4. Respondents recognize the authority of the Commission to expand the scope of discovery based on its "statutory mandate."[5] If the Commission chooses to do so, due process and regulatory efficiency require the Commission to define that scope and ensure that such scope stays within its statutory mandate.[6] Contrary to the Complainants' unsupported interpretation of the Commission's December 16, 2020 Order Directing Additional Briefing,[7] the Commission has not, in fact, expanded the scope of this case. Although the Commission identified three additional *legal* questions in its Order Directing Additional Briefing, those questions specifically referenced and were limited by "the Respondents' conduct, *as described in the pleadings and stipulation*."[8]

5. In place of the scope established by the Complaint, the Stipulated Facts, and the Order Directing Additional Briefing, Complainants, through their discovery requests, now attempt to establish an indefinite and limitless scope of inquiry into Respondents' internal planning and private correspondence in the hope of demonstrating "that Respondents have already abandoned

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Response."). This is clearly either a binding judicial admission ("a more or less formal act done during a judicial proceeding which waives or dispenses with the production of evidence and concedes for litigation purposes that a certain proposition is true," *Hewitt v. Masters*, 406 S.W.2d 60, 64 (Mo.1966)) or an admissible statement against interest. *Mitchell Eng'g Co., A Div. of CECO Corp. v. Summit Realty Co.*, 647 S.W.2d 130, 142 (Mo. Ct. App. 1982) (previous "writings" filed in court constitute admissions against interest). In either case, Complainants should not be permitted to change course regarding the scope of their Complaint given their prior representations.

[5] AmerenUE Order, p. 2.

[6] *Weinbaum v. Chick*, 223 S.W.3d 911, 913 (Mo. App. S.D. 2007) (citing *Brawley & Flowers, Inc. v. Gunter,* 934 S.W.2d 557, 560 (Mo. App. S.D. 1996)) ("In an administrative proceeding, due process is provided by affording parties the opportunity to be heard in a meaningful manner. The parties *must have knowledge of the claims of his or her opponent*, have a full opportunity to be heard, and to defend, enforce and protect his or her rights.") (emphasis added); *see also, Harter v. Missouri Public Service Comm'n*, 361 S.W.3d 52, 58 (Mo. App. W.D. 2011).

[7] Motion to Compel, p. 2.

[8] Order Directing Additional Briefing, p. 3 (emphasis added).

the project originally approved by the Commission."[9] The Commission must reject that scope because it is outside the Commission's statutory mandate. As the Commission Staff has stated, "There is no provision in 393.170 to revoke a CCN on an uncertain date, based on unspecified and subjective evidence of a company's intent to commit to a project."[10]

6. Not only is the Complainants' proffered scope outside of the Commission's statutory mandate (and more reflective of Complainants' effort to engage in an unwarranted fishing expedition), it violates Missouri case law and sound public policy. First, Complainants' proffered scope violates the principles articulated in *State ex rel. Harline v. Missouri Public Service Commission*, which holds:

> The utility's ownership of its business and property includes the right of control and management, subject, necessarily, to state regulation through the Public Service Commission. The powers of regulation delegated to the Commission are comprehensive and extend to every conceivable source of corporate malfeasance. Those powers do not, however, clothe the Commission with the general power of management incident to ownership. *The utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation and does no harm to public welfare*.[11]

As Staff has recognized, "So long as Grain Belt obtains prior Commission approval of any design or engineering materially different from that already approved, there is no violation of either Section 393.170 or the Commission's condition."[12] As Respondents have stated many times, Grain Belt will file for an amendment to its CCN if and when contemplated changes are more

[9] Motion to Compel, p. 2.

[10] Staff's Reply Brief, p. 2.

[11] 343 S.W.2d 177, 181-82 (Mo. App. K.C. 1960) (citing to *State ex rel. City of St. Joseph v. Public Service Commission*, 30 S.W.2d 8 (Mo. 1930) and *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923) (emphasis added).

[12] Staff's Initial Brief, p. 5.

certain and formalized, which would be well in advance of construction.[13] Accordingly, Complainants newfound interest in internal company memoranda and brainstorming *cannot* lead them to evidence supporting a cognizable claim that Respondents have failed to perform their legal duty or comply with lawful regulation.

7. Second, Complainants' proffered scope would result in problematic practical and public policy outcomes. If the Commission allows discovery based on Complainants' legally unsupported theory that a utility may involuntarily abandon its CCN based upon private correspondence and internal planning, every utility in Missouri would be subject to endless challenges and inquiries into their internal affairs, which will in turn, chill the ability of utilities to explore potential improvements to their projects. Complainants' proffered scope essentially establishes a "thoughtcrime," punishable by revocation of a CCN. This would lead to utilities filing CCN's to cover any potential future change to their projects, well in advance of any actual change, to meet the mandate established here. This would inundate the Commission with unripe CCN applications and/or complaints and burden all parties with delay and needless expense.

8. These concerns are not unique to Grain Belt. For example, Ameren Transmission Company of Illinois ("ATXI") received a CCN from the Commission in Case No. EA-2015-0146 for the Mark Twain Transmission Project, and eventually came back to the Commission with an improved route for the project that paralleled an existing transmission line in Case No. EA-2017-0345. Logic dictates that ATXI had significant internal and external correspondence regarding potential changes to the route, while it still held its original CCN. If ATXI could have "abandoned"

[13] *See, e.g.,* Joint Motion to Suspend Deadlines and Establish a Briefing Schedule, ¶ 5(c); Respondents' Initial Brief, ¶ 27.

its original CCN by engaging in such correspondence, it is possible that ATXI would not have explored the improved route to the detriment of ATXI and the public.

B. Response to Complainants' Arguments Regarding General Objections

9. Respondents' practice in answering Complainants' Data Requests is to respond first by stating general objections that are widely applicable to Complainants' instructions, definitions, and data requests themselves. As noted in the first paragraph of those General Objections, they are listed "for the convenience of the parties" and are explicitly incorporated into each response.[14] Respondents' reasoning in doing so is that there are certain objections, namely those concerned with instructions and definitions, which apply throughout the document. To avoid regurgitation of those sentences, Respondents list the general objections and incorporate them by reference in each objection and response.

10. Complainants cite to no case law prohibiting general objections, and begrudgingly acknowledge that Respondents met the only relevant statutory requirement—that objections be listed below the question.[15] Respondents acknowledge that some jurisdictions disapprove of general objections and that general objections are stylistically disfavored by some courts. However, Respondents are not aware of any authority which supports Complainants' contention that they must be rejected or ignored purely based on style. Each of these objections, as incorporated and further specified under each Request, should be accepted or rejected on their substantive merits.

[14] *See, e.g.*, Motion to Compel, Exh. 1 at 1, 3.

[15] Motion to Compel, p. 3 ("Instead, the General Objections listed at the outset are thereafter incorporated by reference into the specific objections *which do immediately follow the five data requests at issue here*.") (emphasis added).

i. General Objection No. 1 (Custody or Control)

11. Respondents objected to the Requests to the extent the Requests solicit communications which are not "within the personal knowledge or control of Respondents or their agents." It appears Complainants misinterpreted the scope of this objection.[16] To clarify, Respondents do not object to producing documents in their possession or in the possession of their agents, as discussed in *Hancock v. Shook,* 100 S.W.3d 786 (Mo. banc. 2003). Complainants' Requests do not expressly limit requests to documents *within the custody or control of the Respondents.*[17] Therefore, General Objection 1 objects to this style of Request to the extent it requests information *not* within the custody or control of Respondents, per Rule 58.01(a) ("are in the possession, custody or control of the party upon whom the request is served").

ii. General Objection No. 2 (Privilege)

12. Similarly, it appears Complainants misunderstand the limit of General Objection 2.[18] Complainants' Requests do not expressly limit requests to non-privileged documents. Therefore, General Objection 2 objects to this style of Request to the extent it requests privileged information. Respondents did not produce a privilege log regarding the Data Requests in controversy because Respondents contend they are not required to provide *any* documents. Should the Court compel Respondents to produce documents for any or all of the Requests, Respondents will provide a privilege log for each responsive but privileged document in line with applicable law.

[16] Motion to Compel, pp. 4-5.

[17] *See, e.g.*, Motion to Compel, Exh. 1, p. 3 (Request 1).

[18] Motion to Compel, pp. 5-6.

iii. General Objection Nos. 3-6

13. Complainants then broadly state that General Objections 3-6 either "do not constitute legitimate 'objections'" or are related to specific objections. To clarify, General Objections 3 (vagueness/overbreadth) and 4 (objections to listed definitions) are elaborated on in each of the specific objections because each of these objections require more specificity than what was stated in the general objections. After incorporating the general objections, Respondents did explain the merits of each objection to the specific Request.

14. Complainants are correct that General Objections 5-6 are not objections, but are reservations of rights listed out of caution that Responses could be viewed as admissions of admissibility or relevancy.

C. Response to Complainants' Arguments Regarding Data Request 1-4

15. Respondents objected to Requests 1-4 on the basis that they are not reasonably calculated to lead to the discovery of admissible evidence because, as explained above, there is no legal basis for Complainants' claims that correspondence can result in abandonment of a CCN. Accordingly, the correspondence sought in Requests 1-4 is not relevant to a cognizable claim and will not lead to the discovery of admissible evidence.

16. Respondents further objected to Requests 1-4 because they are not proportionate to the needs of the case. Missouri Supreme Court Rule 56.01(b)(1), as amended by Senate Bill No. 224 (2019), provides:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action … provided the discovery is proportional to the needs of the case considering the totality of the circumstances, including but not limited to, the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expenses of the proposed discovery outweighs its likely benefit.

The purported "need" for the information is based entirely on Complainants' proffered scope, which is outside of the Commission's statutory mandate and contrary to the *Harline* line of cases, as detailed above. On the other side of the ledger, the burden is not only upon Respondents, but upon all Missouri utilities and the public generally, which will be harmed by the vague specter of investigations into utilities' correspondence based on Complainants' highly problematic 'abandonment by correspondence' theory.

17. Respondents also object to Requests 1-2 because the correspondence could more easily be obtained through a request pursuant to the Kansas Open Records Act ("KORA"). Complainants' concerns about navigating KORA for the first time are not persuasive.[19] KORA is user-friendly, with step-by-step instructions available on the Kansas Attorney General's website. The Kansas Governor's Office routinely processes KORA requests. Obtaining the information sought in Requests 1-2 through KORA is easier because it does not involve the fatal legal flaws associated with Complainants' proffered scope in this case.

D. Response to Complainants' Arguments Regarding Data Request No. 23

18. Request 23 will not lead to the discovery of admissible evidence for the same reasons that Request Nos. 1-4 will not lead to the discovery of admissible evidence. However, the information sought by Request No. 23—*internal* correspondence among employees and agents of the Respondents—is an even more extreme violation of the principles of *Harline* and should be viewed with even greater caution. If Request 23 is a relevant and proper inquiry, it would open a Pandora's Box of inquiries into the internal correspondence of every Missouri utility with any notion of potential modifications to their certificated projects.

[19] Motion to Compel, p. 11.

19. Request 23 is also not proportionate to the needs of the case for the same reasons Requests 1-4 are not proportionate to the needs of the case, but with an even more extreme burden imposed on Respondents, and every other utility in Missouri, because Request 23 seeks *internal* correspondence, thereby opening a limitless pool of draft memoranda, strategy, planning sessions, and brainstorming with no legal justification.

WHEREFORE, Respondents respectfully request that the Commission deny the Complainants' Motion to Compel and for such further relief as the Commission deems appropriate.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all parties of record by email or U.S. mail, postage prepaid, this 29th day of January, 2021.

/s/ Andrew O. Schulte
Attorney for Respondents