

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Landowners Alliance, and)	
Gary Mareschal,)	
)	
Complainants,)	
)	
V.)	
)	Case No. EC-2020-0408
Grain Belt Express Clean Line LLC, and)	
Invenergy Transmission LLC, and)	
Invenergy Investment Company,)	
)	
Respondents)	

COMPLAINANTS' RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION
FOR SUMMARY DETERMINATION, AND RESPONSE TO LEGAL
MEMORANDUM IN SUPPORT OF SAID MOTION

Pursuant to Commission Rule 4 CSR 240-2.117(1)(C), Complainants respectfully submit this Response to Respondents' September 10, 2020 Motion for Summary Determination ("Motion"), as well as their Legal Memorandum in Support of that Motion.

OPPOSITION TO MOTION FOR SUMMARY DISPOSITION

1. Response to list of issues supposedly not in dispute. At pages 4-7 of their Motion, Respondents list 17 items which they claim to be material facts as to which there is no genuine issue.

First, Complainants agree with Respondents that the Commission Rule regarding summary determination is based on Supreme Court Rule 74.04 addressing summary judgments.¹ In summary judgment proceedings, "a material fact" is "one from which the

¹ Respondents' Legal Memorandum in Support of their Motion, p. 2, par. 2

right to judgment flows.”² In other words, in order to be “material”, the fact must impact the outcome of the case.

With that definition in mind, Complainants respond to the list of supposed material uncontested facts as follows:

(1) There is no genuine dispute that Grain Belt is required to adhere to the Code of Conduct, the Missouri Landowner Protocols, and the Missouri Agricultural Impact Mitigation Protocols (“AIMP”).

Response: Admitted. However, adherence to the second and third of the documents are not “material facts” in support of the Motion for Summary Disposition.

(2) There is no genuine dispute that the Code of Conduct requires that “all communications with property owners and occupants must be factually correct.”

Response: Admitted.

(3) There is no genuine dispute that packages sent to landowners during the week of May 29, 2020 included multiple clear references to Grain Belt as the current owner of the Project and noted that Clean Line Energy Partners LLC is no longer involved in the Project.

Response: Admitted for purposes of summary disposition only, but the statements in item (3) do not constitute “material facts” in support of the Motion for Summary Disposition.

(4) There is no genuine dispute that CLS agents received copies of the Code of Conduct on June 1, 2020.

Response: Admitted for purposes of summary disposition only, but the statement does not constitute a “material fact” in support of the Motion for Summary Disposition.

² *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 453 (Mo. banc 2011).

In particular, because this material was delivered to the land agents before the purported misrepresentation to Mr. Mareschal on June 17, 2020, it supports Complainants' position that merely distributing the Code of Conduct did nothing to ensure that it would be followed by the land agents.³

(5) There is no genuine dispute that Grain Belt trained its land agents on June 2-3, 2020, with a focus on the Code of Conduct, Missouri Landowner Protocols, and AIMP.

Response: Admitted for purposes of summary disposition only, but the statements in item (5) do not constitute "material facts" in support of the Motion for Summary Disposition. In particular, this fact again demonstrates that Grain Belt's training procedures were ineffective in preventing the misrepresentation made to Mr. Mareschal on June 17, 2020

(6) There is no genuine dispute that the script example used for training begins with the land agent introducing herself/himself as "with Contract Land Staff representing Invenergy and the Grain Belt Express transmission line project."

Response: Admitted for purposes of summary disposition only, but the statement does not constitute a "material fact" in support of the Motion for Summary Disposition.

(7) There is no genuine dispute that a phone call occurred between Complainant [sic] Marvin J. Daniels and CLS agent Alexander Brown on April 1, 2020.

Response: Denied. The Complaint alleges in paragraph 8 that a phone call between those two individuals occurred in late April or early May. This information was verified by Mr. Daniels in his affidavit attached to Complainants' "Opposition to

³ As to the date of June 17, 2020, see par. 6 of Complaint and item (9) below.

Respondents' Motion to Dismiss", filed on June 9, 2020. (EFIS 6). (And although not significant for purposes of Respondents' Motion, Mr. Daniels is not a Complainant).

(8) There is no genuine dispute that a phone call occurred between Complainant [sic] Marvin J. Daniels and CLS agent Daniel Walters on June 9, 2020.

Response: Admitted (except that Mr. Daniels is not a Complainant).

(9) There is no genuine dispute that a phone call occurred between Complainant Gary Mareschal and CLS agent Daniel Walters on June 17, 2020.

Response: Admitted.

(10) There is no genuine dispute that there are no recordings of the phone calls and therefore "it is nearly impossible to ascertain what exactly was said, and in what context of the conversation."

Response: Admitted, but the statement does not constitute a "material fact" in support of the Motion for Summary Disposition. In particular, while it may be nearly impossible to determine exactly what was said in unrecorded telephone conversations in any legal proceeding, it is nevertheless up to the trier of fact (in this case the Commission) to determine whose version of disputed conversations is most credible.

(11) There is no genuine dispute that, before filing their Complaint, Complainants did not contact CLS agents or Invenergy to report alleged violations of the Code of Conduct, as provided for in the Missouri Landowner Protocols.

Response: Admitted, but of course Missouri landowners had no obligation to abide by whatever the Landowner Protocol might say in that regard, even assuming they knew that such document existed. Further, the statements in item (11) do not constitute "material facts" in support of the Motion for Summary Disposition.

(12) There is no genuine dispute that, before filing the Complaint, Complainants did not take advantage of the informal complaint process set forth in 20 CSR 4240-2.070(2)-(3) [sic].⁴

Response: Admitted. However subsection (2) of that Rule specifically states that filing an informal complaint is not a prerequisite to filing a formal complaint. In any event, this statement does not constitute a “material fact” in support of the Motion for Summary Disposition.

(13) There is no genuine dispute that on Saturday, June 20, 2020, counsel for Complainants sent an electronic mail message to the undersigned, indicating that a formal complaint would be filed with the Commission and the Complaint was filed the next business day, on Monday, June 22, 2020, without further correspondence between Complainants and Respondents or their respective counsel.

Response: Admitted, but Commission Rule 4 CSR 240-2.070 does not require a complainant to provide a respondent with any form of advance notice of the filing of a formal complaint. Rule 4 CSR 240-2.070(4)(f) requires only that the complaint itself indicate after-the-fact whether or not the respondent was contacted about the matter on which the complaint was based. The email of June 20 was intended as a mere courtesy, to notify counsel for Respondents that the complaint would be forthcoming. In any event, the statements in item (13) do not constitute “material facts” in support of the Motion for Summary Disposition.

(14) There is no genuine dispute that, on June 20, 2020, the evening the undersigned received electronic mail correspondence from Complainants’ counsel

⁴ Complainants will assume here that Respondents intended to cite Rule 4 CSR 240-2.070(2)-(3), which deals with informal complaints.

regarding the alleged land agent misrepresentations, Respondents requested that CLS remind all land agents in writing of their communication obligations concerning Missouri landowners.

Response: Admitted for purposes of summary disposition only, but the statement does not constitute a “material fact” in support of the Motion for Summary Disposition.

(15) There is no genuine dispute that additional training of land agents occurred on June 25, 2020, with a focus on the Code of Conduct, Missouri Landowner Protocols, and the AIMP.

Response: Admitted for purposes of summary disposition only, but the statements in item (15) do not constitute “material facts” in support of the Motion for Summary Disposition. In particular, because this training took place well after the alleged misrepresentations, it has no relevance to the issues of whether or not those misrepresentations actually occurred.

(16) There is no genuine dispute that the actions in Undisputed Fact Nos. (14) and (15) satisfied the first two elements of Complainants’ requested relief.

Response: Denied. The actions discussed in items (14) and (15) go only to activities undertaken voluntarily by Grain Belt. But the first two elements of the requested relief in the Complaint ask the Commission to direct the Respondents to take certain action.⁵ Therefore, the facts set forth in items (14) and (15) could not possibly satisfy the first two elements of the requested relief.

(17) There is no genuine dispute that the third element of Complainants’ request [sic] relief is “for whatever further relief the Commission deems appropriate.”

Response: Admitted.

⁵ Complaint, p. 6, par. 18.

2. Material facts that remain in dispute. Pursuant to Rule 4 CSR 240-2.117(1)(C), Complainants state that the following material facts remains in dispute: whether or not one or more of Respondents' land agents told one or more Missouri landowners with property on the proposed right-of-way that Grain Belt is no longer involved with the proposed transmission line project.

The underlying basis for the Complaint is that two landowners on the proposed right-of-way were led to believe by Respondents' land agents that Grain Belt was no longer involved with the proposed transmission line project. (See Complaint, par. 6-8). If so, the agents would have misrepresented that fact, which would violate Grain Belt's Code of Conduct, which in turn would violate the Commission's CCN decision. (See Complaint, par. 12-13).

The allegations in the Complaint about what the landowners were told by the land agents are supported by affidavits from the two landowners in question. Those affidavits were attached to Complainants' "Opposition to Respondents' Motion to Dismiss", filed on June 9, 2020. (EFIS 6). On the other hand, Respondents submitted affidavits from the two land agents named in the Complaint, denying the landowners' version of what they had been told by the land agents. (Exhibits A and B to "Response to Formal Complaint, EFIS 9) So as the conflicting affidavits amply demonstrate, the primary factual issues underlying this Complaint are still in dispute.

LEGAL MEMORANDUM IN SUPPORT OF COMPLAINANTS’
OPPOSITION TO RESPONDENTS’ MOTION

As mentioned, the parties agree that the Commission Rule regarding summary determination is based on Supreme Court Rule 74.04 regarding summary judgments.⁶

Perhaps the most fundamental principle under Rule 74.04 is the following pronouncement from the Missouri Supreme Court: that summary judgment is only proper if the moving party establishes that there are no genuine issues of material fact, and that the movant is entitled to judgment as a matter of law.⁷

A genuine issue of material fact is said to exist “where there is evidence of two plausible, but contradictory, accounts of the essential facts.”⁸ “[T]he mere fact that a party can recite a list of uncontroverted facts is of no legal import until it can be shown that those facts establish a right to judgment as a matter of law.”⁹

Furthermore, “at summary judgment, the court does not test the weight of evidence, only whether there is a genuine issue of material fact.”¹⁰ And the non-movant party for summary judgment is accorded all reasonable inferences from the record.¹¹

The prerequisites for summary judgment under Rule 74.04 are comparable to the Commission’s own rules regarding summary determination. As stated in Rule 4 CSR 240.2.117(1)(E), the Commission may grant such a motion “if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, [and] that any party is entitled to relief as a matter of law....”

⁶ Respondents’ Legal Memorandum in Support of their Motion, p. 2, par. 2

⁷ See *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 377 (Mo. banc 1993). See also *Bank of America v. Reynolds*, 348 S.W.3d 858, 860 (Mo. App. 2011).

⁸ *Cridlebaugh v. Putnam County State Bank*, 192 S.W.3d 540, 543 (Mo. App. 2006).

⁹ *Midwest Crane and Rigging, Inc. v. Custom Relocation’s, Inc.*, 250 S.W.3d 757, 761 (Mo. App. 2008)

¹⁰ *Nokes v. HMS Host USA*, 353 S.W.3d 6, 10 (Mo. App. 2011).

¹¹ *ITT Commercial Finance Corp.*, *supra*, 854 S.W.2d at 376.

Here, there is clearly a genuine issue over whether the land agents told the landowners that Grain Belt is no longer involved in the project. This alleged misrepresentation forms the very basis for this Complaint. Therefore, applying the legal principles applicable to Summary Judgments, Respondents are not entitled to judgment as a matter of law.

Respondents say they have refuted Complainants' claim that the land agents made "intentional" statements about Grain Belt's lack of involvement in the project. (Legal Memorandum, p. 2, par. 4). They cite no evidence which in fact demonstrates that the allegedly false statements were not made intentionally. (*Id.* p. 2-3). But more importantly, the basis of this Complaint is simply that the inaccurate statements were made by the land agents -- not that they were made intentionally.¹² Thus intent is not even a material factor in determining the validity of the Complaint.

Respondents also contend there is no genuine dispute over what they term their affirmative defense: the fact that the relief sought by Complainants has already been granted. (Legal Memorandum, par. 6, pp. 3-4).

As discussed with respect to uncontested fact number (16), at page 6 above, that contention is not true. The Complaint requested that the Commission itself take certain steps to help ensure that inaccurate information would no longer be provided to landowners.¹³ The rationale for this request was that the Commission's involvement would carry more weight than whatever Grain Belt might say on its own to its land agents. Accordingly, Complainants have not yet received the relief for which they prayed.

¹² Complaint, par. 6-9 and 12-13.

¹³ Complaint, p. 6, par. 18.

Finally, Respondents' contentions in Section III of their Legal Memorandum regarding the "public interest" are totally irrelevant to the question of whether or not they are entitled to judgment as a matter of law. Accordingly, that discussion needs no further response.

Wherefore, Complainants respectfully request that Respondents' Motion for Summary Disposition be denied.

Respectfully submitted

/s/ Paul A. Agathen

Paul A. Agathen

Attorney for Complainants

Mo Bar No. 24756

485 Oak Field Ct.

Washington, MO 63090

636-980-6403

Paa0408@aol.com

Certificate of Service

I certify that a copy of the foregoing was served this 7th day of October, 2020, on all parties of record.

/s/ Paul A. Agathen