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, and Invenergy Investment Company, Respondents	)	Case No. EC-2021-0034

REPLY BRIEF OF COMPLAINANTS

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September 30, 2020

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I. Introduction. Complainants respectfully submit this Reply Brief in response to the Initial Briefs from the Staff of the Missouri Public Service Commission ("Staff") and from Respondents "Invenergy" and "Grain Belt". This Reply Brief will first address the arguments from those parties regarding the three separate claims made by Complainants as to why the Respondents' use of the "revised easements" is in violation of the Commission's CCN Order.[1] In Section III Complainants will then address an argument raised in Section III.D of Respondents' Initial Brief, which Complainants did not discuss in their own Initial Brief.

II. Invenergy's decision to unilaterally discard the original easement in favor of its revised easements is in violation of the Commission's CCN decision for three separate and equally-valid reasons.

1. Violation of a condition in Exhibit 206. Exhibit 206 is a document which consists of "conditions" to the CCN which Staff and Grain Belt agreed upon during the course of the CCN proceedings. The Exhibit was attached to the CCN Order, and the Commission directed Grain belt to comply with the conditions listed in that Exhibit.[2]

One of the mandates of Exhibit 206 was that Grain Belt was not to change any of its right-of-way acquisition policies and practices, even if it were to be granted a CCN.[3] Complainants contend that under the plain meaning of that provision, the changes made by Grain Belt to its easement amount to changes in its acquisition policies and practices.[4] Therefore, those changes constitute a direct violation of the CCN Order, which required Grain Belt to comply with all of the conditions listed in Exhibit 206.

[1] Report and Order on Remand in Case No. EA-2016-0358, issued March 20, 2019.
[2] CNN Order p.51, par. 2
[3] Exh. 206, Section VII.7.
[4] See Complainants' Initial Brief, pp. 11-14.

Neither Staff nor Respondents attempted to argue that the easements do not fall within the ordinary meaning of the term "acquisition policies and practices." Instead, they contend that Section VII.7 is inapplicable because Exhibit 206 does not expressly mention the original easement agreement shown at Schedule DKL-4.[5] (Respondents go so far as to state that the Commission did not even mention the original easement anywhere in the "body" of its CCN order.[6] While perhaps technically true, as a matter of full disclosure they might have mentioned the specific references to Schedule DKL-4 in the footnotes to that Order).[7]

Complainants contend that this basic argument from Staff and Respondents misses the point. The prohibition against changes to Grain Belt's acquisition policies and practices is an independent, stand-alone condition appearing at paragraph 7 of Section VII to Exhibit 206. There is nothing in the language of that paragraph which indicates it is applicable only to policies and practices which are otherwise mentioned somewhere in that Exhibit.

Stated another way, there is nothing in Exhibit 206 which purports to give Grain Belt the unilateral right to make whatever changes it may wish to make in its acquisition policies and practices, so long as those policies and practices are not explicitly mentioned somewhere in Exhibit 206.

Respondents argue that paragraph 7 of Section VII simply refers back to the other six conditions listed in that Section, as well as to other Grain Belt documents such as the Landowner Protocol.[8] However, there is nothing in paragraph 7 which indicates that it refers only to the documents selectively listed by Respondents, yet is not intended to refer to perhaps the most significant document dealing with Grain Belt's acquisition policies and practices. Instead, by

[5] Staff Brief, pp. 3-4; Respondents' Brief, pp. 13-14.
[6] Respondents' Brief, p. 9.
[7] See CCN Order p. 12 notes 35 and 36.
[8] Respondents' Brief, p. 13.

its very terms paragraph 7 refers to all of Grain Belt's acquisition policies and procedures, including its easement agreement.

Moreover, Respondents' argument that paragraph 7 simply refers back to the six other paragraphs of Section VII requires that all six of those paragraphs relate to right-of-way acquisition policies and practices. But paragraphs 3 and 5 of that Section apply only to activities after construction of the line is completed. Accordingly, those two paragraphs cannot possibly be deemed a part of Grain Belt's policies or practices for the acquisition of easements. Thus contrary to Respondents' argument, paragraph 7 could not have been intended as a mere "add-on", referring back to the first six paragraphs of Section VII.

As part of this same general argument, Respondents also claim that the seven conditions listed in Section VII of Exhibit 206, "when taken together, constitute Respondents' 'right-of-way acquisition policies and procedures.'"[9] That clearly is not correct. In fact, it is inconceivable that the acquisition policies and procedures of any multi-state transmission line could be covered in six or seven short paragraphs.

In this instance, for example, "as part of its approach to easement negotiations" Grain Belt committed in its Landowner Protocol to the following:

> Utilizing the same methodology for determining compensation for all landowners in order to ensure that all landowners receive fair and consistent compensation, regardless of who they are or when they sign an easement agreement.[10]

In that same document, Grain Belt also committed to paying landowners 110% of the market value of the property taken for the easement.[11]

[9] Respondents' Brief, p. 14.
[10] Schedule DKL-1, pp. 3-4.
[11] *Id.* at 4.

Both of these items obviously are significant elements of Grain Belt's "acquisition policies and procedures". But there is no mention in Section VII of either of those items, nor of the many other policies and procedures covered throughout other Grain Belt documents.

So again, Respondents have provided no logical explanation for finding that paragraph 7 was intended to refer back to the policies listed in the other six paragraphs of Section VII.

On a different issue, Staff and Respondents both co-mingle their responses to the three distinct arguments raised by Complainants. They can legitimately argue that Complainants are suggesting in their third argument that the CCN Order could be read to include an "implied" condition regarding the continued use of the original easement. However, the "implied condition" argument has no place in responding to Complainants' first two points of their Complaint.[12] And contrary to what Respondents claim, Complainants do in fact assert an "explicit violation" of Exhibit 206, Section VII.7, and not simply a violation of an "implicit" condition of that Exhibit.[13]

Complainants contend that the issue here is simply one of interpreting the express language of paragraph VII.7 of Exhibit 206. And as the Missouri Supreme Court stated in the context of statutory interpretation:

> The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language…. When the words are clear, there is nothing to construe beyond applying the plain meaning of the law. A court will look beyond the plain meaning of the statute only when the language is ambiguous or would lead to an absurd or illogical result.[14]

[12] See Staff's Initial Brief, p. 4; and Respondents Initial Brief, p. 13.
[13] Respondents' Brief, p. 12.
[14] *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013). (citations and quotation marks omitted).

The same general rules for interpreting statutory language also apply when interpreting contracts.[15] And there is no logical reason to apply a whole new set of rules to interpreting paragraph VII.7. Accordingly, there is no need here to consider the extrinsic references to other documents relied upon by Staff and Respondents . Their arguments would have the Commission violating the accepted judicial concept that "a court must not use its inventive powers for the purpose of creating an ambiguity when none exists."[16]

For the above reasons, the changes to the easement constitute a violation of the mandatory requirements of Exhibit 206, and thus a violation of the CCN Order.

2. Violation of the Missouri Landowner Protocol. Complainants' second argument is that the changes to the original easement also violate a provision of Grain Belt's Missouri Landowner Protocol.[17] The Commission ordered that this Protocol be incorporated into the easement agreements with landowners, and further ordered that Grain Belt "shall comply" with the terms of that document.[18]

One restriction imposed in the Protocol is that "Grain Belt Express's approach to landowner negotiations will not change regardless of when these negotiations take place."[19] As discussed in their Initial Brief, Complainants contend that this provision in the Protocol precludes Grain Belt from making any substantive changes to its original easement.[20]

With all due respect, Staff and the Respondents' take the same wrong approach to this issue which they took with respect to the argument concerning Exhibit 206. That is, they point

[15] *Thiemann v. Columbia Public School District,* 338 S.W.3d 835, 840 (Mo. App. 2011) ("We give the language used in an insurance contract its plain and ordinary meaning. If, giving the language used its plain and ordinary meaning, the intent of the parties is clear and unambiguous, we cannot resort to rules of construction to interpret the contract.") (Internal citations and quotation marks omitted).
[16] *The Holland Corp. v. the Maryland Casualty Co.,* 775 S.W.2d 531, 533 (Mo. App. 1989) (internal quotation marks omitted).
[17] This document is marked as Schedule DKL-1 to Grain Belt's Exhibit 113, EFIS 372.
[18] CCN Order, p. 52, par. 8.
[19] Schedule DKL-1, *supra,* p. 4.
[20] Complainants' Initial Brief, pp. 14-15.

out that the Landowner Protocol does not specifically mention the original easement, and does not mention that it must be actually be used in landowner negotiations. Accordingly, they conclude that the Protocol must not be applicable here.[21]

But as with their discussion of the first issue, that argument misses the point. By its very terms, the plain language of the Protocol prohibits any and all changes to Grain Belt's approach to landowner negotiations. Thus there is no need to look beyond this clear directive, as both Respondents and Staff have found it necessary to do. As discussed above, the first test in determining the meaning of a document is to look at the plain meaning of the words in question. Here, the language in the Protocol is unambiguous.

Staff also argues that the Commission did not intend for there to be a "one-size fits all" easement agreement.[22] That concern, however, can best be managed in the manner suggested by Ms. Lanz when addressing the original easement in her direct testimony: that Grain Belt could negotiate "reasonable modifications" to the original easement in order to accommodate unique circumstances of an individual landowner.[23]

Moreover, Staff's "one-size fits all" argument is as applicable to the revised easements as it is to the original easement. Thus the point made by Staff does not favor either easement over the other.

Finally, Respondents state that Grain Belt's "approach to landowner negotiations" is a compilation of practices intended to ensure that its "easement negotiations" are conducted in a fair and respectful manner.[24] That being the case, Respondents have expressly conceded

[21] Respondents' Brief, p. 15; Staff Brief, p. 5.
[22] Brief, p. 6.
[23] Exhibit 113, p. 15, EFIS 372.
[24] Brief, p. 15.

Complainants' second argument: that in revising the underlying document for their easement negotiations, Grain Belt has necessarily changed their "approach to landowner negotiations".

For the above reasons, the changes to the easement constitute a violation of the mandatory provisions of the Landowner Protocol, and thus violate the CCN Order.

3. The unilateral changes to the document presented to the Commission in the CCN case constitute a violation of the CCN Order. Complainants' third argument is based on the undisputed fact that Invenergy has reneged on the sworn testimony from Grain Belt during the CCN proceedings to the effect that the original easement would be the document presented to landowners in easement negotiations. Other than addressing two points below, Complainants will stand on their Initial Brief regarding that argument.[25]

First, at page 11 of their Initial Brief, Respondents claim that the Complaint constitutes a "collateral attack" upon the Commission's CCN decision.

To the contrary, a collateral attack upon a Commission order involves an attempt to have that order modified, amended or declared void; it seeks to render the order ineffective.[26] Here, the Complaint is merely concerned with the appropriate interpretation of certain provisions in the CCN Order. If Complainants prevail, the CCN Order remains totally intact. It would not be modified, amended, declared void, or ineffective. Thus the Complaint cannot possibly constitute a collateral attack on the CCN Order.

Notably, the Court of Appeals recently rejected a similar claim from Grain Belt regarding a supposed "collateral attack" on Commission orders. In fact, that decision cited the same *Fee*

[25] Complainants Initial Brief, pp. 15-18.
[26] *See State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz,* 596 S.W.2d 466, 468 (Mo. App. 1980).

Fee Trunk Sewer case relied upon here by the Complainants, and it set forth the same criteria for such an attack as those recited by Complainants in the preceding paragraph.[27]

Finally, if the Commission paid no heed to Grain Belt's testimony regarding the original easement during the CCN proceedings, and did not actually believe Grain Belt when it swore that the original easement would be the document presented to landowners in easement negotiations, then Complainants would concede that this third argument could be considered moot. But if that is not the case, then Complainants maintain that the Commission may and should put a stop to the unapologetic changes to the easement now being implemented unilaterally by Invenergy to the detriment of landowners.

III. Reply to Respondents' argument that the content of the easement is beyond the Commission's jurisdiction. In Section III.D of their Brief, Respondents raise an issue which was not addressed by the Complainants in their own Initial Brief.[28] Their argument, which even questions itself, is that the Commission "may not" have the authority to require that Grain Belt use a specific easement in its negotiations with landowners.[29] That contention is based primarily upon statements in the *Harline* case to the effect that a utility has the right to manage its own affairs, and conduct its business as it may choose.[30]

This argument fails for several reasons. First, if the Commission had attempted to dictate some or all of the terms of the easement in the first instance, Respondents might have a point. However, all the Commission is being asked to do here is to require that Grain Belt utilize the easement which Grain Belt itself had written, and which it committed to use in negotiations with

[27] *Missouri Landowners Alliance v. Public Serv. Comm'n,* 593 S.W.3d 632, 640-41 (Mo. App. 2019).
[28] This issue was not addressed earlier by the Complainants because Respondents were not required to disclose their defenses to the Complaint prior to filing their Initial Brief, and thus Complainants were not aware this matter was an issue.
[29] Respondents' Initial Brief, p. 16.
[30] *State ex rel. Harline v. Missouri Public Service Commission,* 343 S.W.2d 177 (Mo. App. 1960), quoted at page 16 of Respondents' Initial Brief.

landowners. Grain Belt may have the right to manage its own affairs, but there is nothing in *Harline* which remotely suggests that a utility may exercise its managerial discretion by ignoring a commitment made in sworn testimony to the Commission.

Second, Section 393.170.3 RSMO authorizes the Commission to "impose such condition or conditions as it may deem reasonable and necessary" when granting a CCN. There is nothing in that section which would suggest that the "conditions" to the CCN may not extend to the contents of the easement agreement. For example, if Grain Belt's revised easements provided that its land agents could arrive unannounced at the landowner's residence at any time of the day or night, there could be little doubt that the Commission's rejection of that change would qualify as a reasonable condition to the CCN.

Supporting that point, the general principle from *Harline* relied upon by Respondents comes with an important caveat. As the Missouri Supreme Court has stated, a utility has the right to manage its own business in any way it chooses, "provided that in so doing it does not injuriously affect the public."[31] Here, the changes made to the original easement are clearly detrimental to Missouri landowners.[32] If for no other reason, the Commission would be justified in holding Grain Belt to its original commitment on the ground that doing so would prevent the erosion of the landowner protections which the Commission intended to incorporate into its CCN Order.

In the course of arguing that the Commission may not dictate the terms of the easement, Respondents point to the fact that the Commission once found it did not have the authority to

[31] *State ex rel. City of St. Joseph v. Public Service Comm'n,* 30 S.W.2d 8, 14 (Mo. banc 1930). To the same effect see *State ex rel. General Telephone Co. of the Midwest v. Public Service Comm'n,* 537 S.W.2d 655, 661 (Mo. App. 1976).

[32] See discussion of a number of those changes at pp. 4-11 of Complainants' Initial Brief.

"interpret" the rights of the parties to the easements.[33] This argument is based on a classic apples and oranges comparison. In the language relied upon by Respondents, the Commission in effect was simply reiterating the traditional rule that it does not have the authority to decide principles of law.[34] But the Commission's right to oversee the terms of the easement as a condition to the CCN has nothing to do with its right to thereafter interpret the legal rights of the parties to whatever easement is being utilized by Grain Belt.

In any event, even if the Commission would not ordinarily have the authority to involve itself with the terms of Grain Belt's easements, on two occasions in this proceeding Grain Belt waived that objection.

First, Grain Belt willingly agreed with Staff to the conditions in paragraph VII.7 of Exhibit 206.[35]

Second, as the Commission noted in the CCN Order, Grain Belt willingly agreed to adhere to the terms of the Missouri Landowner Protocol as a condition to the CCN.[36] One of those terms was that Grain Belt would not change its approach to landowner negotiations, regardless of when such negotiations take place.[37]

Waiver is "the intentional relinquishment of a known right."[38] "The essential elements of waiver are 1) the presence of an existing right, benefit or advantage; 2) knowledge of its existence; and 3) an intention on the part of the party to relinquish it."[39]

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[33] Respondents' Brief, p. 17.
[34] See Commission's quotation at p. 17 of Respondents' Brief. And see *State Tax Commission v. Administrative Hearing Commission,* 641 S.W.2d 69, 75 (Mo. banc 1982) for the proposition that the "Public Service Commission has no power to declare … any principle of law or equity." (internal quotation marks omitted).
[35] See CCN Order, p. 51, par. 2.
[36] See CCN Order p. 35, par. 121. See also Respondents' Initial Brief in this case, where they acknowledge that Grain Belt committed in testimony during the CCN proceedings to incorporating the Protocol into the easement agreements. Initial Brief, p. 10 and footnote 14.
[37] Section 2, page 4 of Schedule DKL-1 of Exh. 113, EFIS 372.
[38] *Boulds v. Dick Dean Economy Cars,* 300 S.W.3d 614, 619 (Mo. App. 2010).
[39] *Federal National Mortgage Assoc. v. Pace,* 415 S.W.3d 697, 704 (Mo. App. 2013).

Based on Respondents' own argument in section III.D of its Initial Brief, the first two elements are clearly satisfied. The third was satisfied when Grain Belt knowingly and intentionally agreed to the terms of Exhibit 206 and the Landowner Protocol. Thus even assuming *arguendo* that Grain Belt ordinarily would have the right under *Harline* to unilaterally change the terms of the original easement, it voluntarily waived that right by agreeing to the conditions in Exhibit 206 and the Landowner Protocol.

Finally, Respondents' include two paragraphs at page 17 of their Initial Brief which describe in glowing terms their track record regarding transmission lines, and their future intentions regarding easement negotiations. That material is not relevant to the discussion of the holdings in *Harline,* or to any other issue in this case. It therefore has no place in Respondents' brief.

IV. Conclusion and Prayer for Relief. For the foregoing reasons, Complainants respectfully contend that neither Staff nor the Respondents have effectively refuted any of the three arguments which demonstrate that Respondents' use of the revised easements is in violation of the Commission's CCN order. Accordingly, Complainants renew the Prayer for Relief set forth in Section V, pp. 18-19 of their Initial Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by email upon counsel for all parties this 30th day of September, 2020.

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