

**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) Case No. EA-2016-0358
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)

WIND ON THE WIRES and THE WIND COALITION’S RESPONSE
to the MISSOURI LANDOWNERS ALLIANCE
MOTION TO STRIKE CERTAIN PRE-FILED TESTIMONY

COMES NOW Wind on the Wires and The Wind Coalition (“Wind Advocates”), by counsel, **responding in opposition** to Motion of *Missouri Landowners Alliance To Strike Certain Pre-Filed Evidence on the Basis of Section 536.070(11) RSMo (Motion)*, filed on February 6, 2017. This response is in conformance with 4 CSR 240-2.080. In support of this response, Wind on the Wires and The Wind Coalition state the following:

1. On February 6, 2017, Missouri Landowners Alliance (MLA) filed a motion to strike certain portions of the testimony of Michael Goggin and other witnesses of other parties. Mr. Goggin’s testimony was filed on behalf of Wind on the Wires and The Wind Coalition.
2. In its Motion, MLA argues that specific schedules and portions of Mr. Goggin’s rebuttal testimony are inadmissible under section 536.070(11) RSMo. (Motion at ¶9 and Exhibits E through J), and MLA objects to certain testimony as being hearsay without regard to section 536.070(11) (Motion at ¶9).

3. MLA's argument improperly applies section 536.070(11), conflating the admission of data from a document with the formation and admission of expert testimony. An expert's testimony is not automatically disqualified merely because he/she relied on information and the opinions of others. *American Eagle Waste Industries, LLC v. St. Louis Co., Missouri*, 463 S.W.3d 11, 26 and 27. A witness is entitled to testify as to out-of-court records, like Mr. Goggin has relied upon, if the records are the type reasonably relied upon by experts in the field. *Lau v. Pugh*, 299 S.W.3d 740, 755 (Mo. App. S.D. 2009).
4. An expert's opinion can be used to assist the Commission in understanding evidence or determine a fact in issue. Section 490.065.1 RSMo. can serve as a guide, if the Commission so chooses. Under Section 490.065.1 RSMo., expert opinions may be based on facts and data derived from sources outside of court and outside of the witness's personal perception. *American Eagle Waste Industries, LLC v. St. Louis Co., Missouri*, 463 S.W.3d 11, 25 (MO. App. E.D. 2015). Facts or data upon which an expert relies upon in forming his/her opinions need not be independently admissible as long as the evidence satisfies the following requirements of Section 490.065.3: (1) be of a type reasonably relied upon by experts in the field in forming opinions or inferences on a subject; and (2) must be otherwise reasonably reliable. MO. Rev. Stat. §490.065.3; *see also CADCO, Inc. v. Fleetwood Enterprises, Inc.*, 220 S.W.2d 425, 434 (Mo. App. E.D. 2007). If facts or data are both reasonably reliable and reasonably relied on by experts in the field when forming an opinion on the matter at issue, they will necessarily be relevant to the case, and testimony as to the facts and data will be admissible. *Murrell v. State*, 215 S.W.3d 96, 110 (MO. en banc 2007). Facts are reasonably reliable if the

expert's sources "are not so slight as to be fundamentally unsupported." *CADCO, Inc.*, at 434. In *Doe v. McFarlane* (207 S.W.3d 52, 62 (Mo. App. E.D. 2006)) the court focused on what makes sources "fundamentally unsupported" and stated that the opinion could not be based on mere conjecture or speculation, and there must be a rational basis for the opinion. When determining whether facts and data are reasonably relied upon by experts in the field, the trier of fact is generally expected to defer to the expert's assessment of which data is reasonably reliable. *CADCO, Inc.* at 434.

5. The Commission should reject the manner in which MLA applies section 536.070(11) RSMo. because it only admits evidence that is created by the witness and eliminates the ability for witnesses to provide reliable expert opinions and explain the basis for that opinion. In *Empire District Electric Company v. Cox*, the court recognized that

testimony given by an expert in explaining the basis of his opinion of value, even when logically relevant, tends to suggest collateral considerations. Yet, any disadvantage which might result from the use of such evidence is more than compensated by the advantage of a more enlightened basis for its [the courts] ultimate determination of value. (588 S.W.2d 263, 268-69 (Mo. App. S.D. 1979)).

6. The Missouri General Assembly granted the Commission discretion to determine which facts are reliable and use them to inform the Commission's decision when the General Assembly approved Section 386.410.1, which states: "And in all investigations, inquiries or hearings **the commission or commissioner shall not be bound by the technical rules of evidence.**" MO. Rev. Stat. § 386.410.1 (emphasis added). This gives the Commission the flexibility to hear information

and expert opinions, and assign them weight or value, even if the source information is not typically admissible. *See American Eagle Waste Industries*, 463 S.W.3d at 27; *see also Stallings v. Washington Univ.*, 794 S.W.2d 264, 271 (Mo. App. E.D. 1990). Accordingly, the Commission has broad discretion in evidentiary determinations. *Deaconess Manor Ass'n v. PSC*, 994 S.W.2d 602, 611 (Mo. App. W.D. 1999).

7. The Commission is plainly capable, as the fact-finding body on electric utility issues, to determine if the schedules and testimony being challenged by MLA are reasonably reliable and relied upon by the wind and energy industries in forming expert opinions. The items challenged by MLA are background on the information relied upon by Mr. Goggin to form his opinions and positions. *See Del-Mar Redevelopment Corp. v. Associated Garages Inc.*, 726 S.W.2d 866, 871 (Mo. App. 1987) (*stating* that a witness should not be precluded from testifying about sources if the testimony serves as background for his opinion). Mr. Goggin used reliable information that are relied in the industry for forming opinions. Below are the items being challenged by MLA followed by a description of the source of the facts and the opinion or position in Mr. Goggin's testimony that it supports:

- **MG-2 and lines 90-95, 130-139 and 178-182:** Schedule MG-2 depicts windspeeds at the hub height of wind turbines. The schedule and testimony in questions supports the formation of the opinion that Kansas has some of the best wind resources in the country (lines 90-92 and 178-182), and is an aid in Mr. Goggin's explanation of the relationship between wind speed and energy production of a turbine (lines 130-139).
- **MG-3 and lines 143-147, 499-501 and 510-512:** Schedule MG-3

depicts the average of wind power purchase agreement prices and was collected by Lawrence Berkeley National Laboratories on behalf of the Department of Energy. This schedule and testimony supports formation of the opinion that wind energy projects in Kansas have some of the lowest-priced wind energy in the country (lines 147-148). This schedule and testimony also support formation of the opinion that the Grain Belt Express Project would deliver wind energy at a cost lower than other renewable energy resources in the Great Lakes region (lines 499 to 504). Finally, this schedule and testimony support formation of the opinion that the Grain Belt Express Project is economically feasible (lines 508-512).

- **MG-4 and lines 152-157:** Schedule MG-4 is a graph prepared by a federally authorized regional transmission organization (RTO) serving Missouri -- MISO. The schedule and testimony supports formation of the opinion that a mix of wind resources with some having high and some having low capacity factors tends to provide the lowest cost to consumers (lines 152-157).
- **MG-6 and lines 461-466:** Schedule MG-6 is a graph prepared by a well-known and respected energy markets consultant -- Synapse Energy Economics, Inc. -- depicting the relationship of energy market prices relative to the amount of wind generating capacity. This schedule and testimony supports formation of the opinion that wind energy tends to reduce electricity market prices (lines 371-372, 383-386 and 411-412).
- **MG-7 and lines 538-544:** Schedule MG-7 is a graph depicting how wind prices can provide a hedge to natural gas fuel prices. The data was

collected by Lawrence Berkeley National Laboratories on behalf of the Department of Energy. This schedule and testimony supports formation of the opinion that Grain Belt Express's delivery of energy from wind resources can act as a hedge against fuel price volatility (line 514-515).

- **lines 67-70 (see Motion, Exh. E):** This testimony supports the formation of the opinion that transmission expansion can save consumers money (see lines 60-63). The study relied upon by Mr. Goggin was prepared by LCG Consulting which is a widely recognized leader in electric industry restructuring studies and in modeling energy markets.
- **lines 76-81 (see Motion, Exh. F):** This testimony supports the formation of the opinion that wind developers are likely to build where there is transmission and thus save consumers money, as stated in lines 60-63. The data relied upon by Mr. Goggin was prepared by a federal regional transmission organization -- ERCOT -- about its own market.
- **lines 278-279 (see Motion, Exh. G):** This testimony supports the formation of the opinion that the Grain Belt Express Project can deliver energy at a comparable or lower price than alternative forms of generation that would be used to replace generating plants that will retire (see lines 271 and 276-278). This testimony cites a study prepared by Lazard, which is a well-known and respected financial advisory and asset management firm.
- **lines 289-94 (see Motion, Exh. H):** This testimony describes MISO's projection of coal plant retirements from 2017-2031 which supports formation of the opinion that the Grain Belt Express Project is needed to

deliver energy to replace generation that will be retiring (see lines 271 and 276-278). The underlying report -- MTEP16 -- was prepared by MISO.

- **lines 295-97 (see Motion, Exh. I):** This testimony supports the formation of the opinion that the Grain Belt Express Project is needed to deliver energy to replace generation that will be retiring (see lines 271 and 276-278). The report relied upon by Mr. Goggin was an analysis and report on the Clean Power Plan prepared by MISO.
- **lines 413-23 (see Motion, Exh. J):** This testimony supports the formation of the opinion that the Grain Belt Express Project can deliver energy that can help lower wholesale electricity prices (see lines 371-372).
- **lines 498-499 (see Motion, Exh. G):** This testimony supports the formation of the opinion that Grain Belt Express can deliver energy that can help lower comparable to or lower than alternative forms of generation, such as a combined cycle natural gas plant. This testimony cites a study prepared by Lazard, which is a well-known and respected financial advisory and asset management firm.

The items listed below are lines in Mr. Goggin's rebuttal testimony that MLA requests be stricken as hearsay. As described below, the information cited by MLA was used to inform Mr. Goggin's positions and opinions. As noted above, the Commission is not bound by the rules of evidence (MO. Rev. Stat. § 386.410.1) and Missouri statutes allow evidence that would typically be considered hearsay to be used to form or support an expert opinion. MO. Rev. Stat. § 490.065; *see also Del-Mar Redevelopment Corp. v. Associated Garages Inc.*, 726 S.W.2d 866, 871 (Mo. App. 1987).

- **Lines 84-86:** This testimony supports the formation of the opinion, that is on lines 60-63, that wind developers are likely to build when transmission is built to provide access to areas of wind potential that are under-utilized and thus bring savings to consumers. The report relied upon by Mr. Goggin was prepared by a federally authorized regional transmission organization -- ERCOT -- about its own market.
- **Line 295:** This testimony supports the formation of the opinion that the Grain Belt Express Project is needed to deliver energy to replace generation that will be retiring (see lines 271 and 276-278). The information relied upon in this quote is from a report prepared by MISO about forecasted generation retirement in its market.
- **Lines 330-333:** This testimony describes public statements of a public utility. This testimony supports the formation of the opinion that many utilities recognize that carbon regulation is inevitable in the long-term and are moving toward lower carbon forms of generation (see lines 327-328).
- **Lines 335-336:** This testimony describes statements of a CEO of a MISO utility. This testimony supports the formation of the opinion that many utilities recognize that carbon regulation is inevitable in the long-term and are moving toward lower carbon forms of generation (see lines 327-328).
- **Lines 415-423:** This testimony supports the formation of the opinion that the Grain Belt Express Project can deliver energy that can help lower wholesale electricity prices (see lines 371-372).
- **Lines 451-456:** This testimony supports the formation of the opinion that the Grain Belt Express Project can deliver energy that can help lower

wholesale electricity prices (see lines 371-372). This testimony cites testimony presented to FERC by an employee of Charles River Associates, International, which is a well-known and respected energy consulting firm with expertise in economic, financial and strategic analyses.

- **Lines 474-476:** This testimony relies on a public announcement by a utility, and supports the formation of the opinion that the Grain Belt Express Project can deliver energy that can help lower wholesale electricity prices (see lines 371-372).
- **Lines 478-479:** This testimony relies on testimony provide by Walmart to the Arkansas Public Service Commission and supports the formation of Mr. Goggin's opinion that the Grain Belt Express Project can deliver energy that can help lower wholesale electricity prices (see lines 371-372).
- **Lines 483-485:** This testimony relies on a publically available news report on wind energy saving people money, which supports the formation of the opinion that the Grain Belt Express Project can deliver energy that can help lower wholesale electricity prices (see lines 371-372).

8. Missouri courts have found that questions as to the source of the facts and data that the witness relies upon in forming his opinion affect the weight accorded the expert opinion, not the admissibility of the opinion. *Doe v. McFarlane*, 207 S.W.3d at 62. Thus, the testimony listed above should not be stricken, but should remain in the record as informative background material and the Commission is free to allocate as much or as little weight or value to the testimony and opinions as the Commission deems appropriate. *See American Eagle Waste Industries*, 463 S.W.3d at 27; *Stallings v. Washington Univ.*, 794 S.W.2d at 271.

WHEREFORE, Wind on the Wires and The Wind Coalition request that the Commission deny the MLA motion to strike as it relates to Mr. Goggin's testimony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that this Response to Motion to Strike was electronically served upon all parties to this case on March 15, 2017.

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