BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Grain Belt Express Clean Line LLC for Approval of its Acquisition by Invenergy Transmission LLC	)))	No. EM-2019-0150

POST-HEARING REPLY BRIEF OF THE MISSOURI LANDOWNERS ALLIANCE, SHOW ME CONCERNED LANDOWNERS, AND JOSEPH AND ROSE KRONER

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Section 1. Introduction. This brief is submitted in response to the initial briefs from Staff, the Joint Applicants, MJMEUC and Renew Missouri. With the exception of Section 3 below, the Landowners have already addressed much of what was said by these opposing parties. The Landowners trust there is no need to repeat those arguments here.

Section 2. The Commission lacks the jurisdiction and statutory authority to approve the sale of Grain Belt to Invenergy because Grain Belt is not an electrical corporation.

(1) Arguments based on case law. MJMEUC correctly notes that none of the parties opposing Grain Belt appealed the Commission's decision in the 2014 CCN case, No. EA-2014-0207.[1] And for good reason. The Commission ruled conclusively against Grain Belt in that case.[2] Even Grain Belt did not appeal. Thus there would have been no logical reason for those opposing Grain Belt (such as the MLA and Show Me) to appeal that decision. In fact, according to a Commission motion in the appeals of EA-2016-0358, the prevailing party to a Commission case is not even allowed to file an appeal.[3] Finally, whatever happened in the 2014 CCN case has no bearing on the Kroners, as they were not even parties to that proceeding.[4]

On a related note, Staff states that the parties being referred to here as the Landowners have opposed the Grain Belt project from the start.[5] Perhaps so, but the Kroners were not parties in either the 2014 or 2016 CCN cases.

Staff cites the final Report and Order in the 2016 CCN case for the following proposition: "The Commission found in that case that GBE is an electrical corporation

[1] Brief, p. 3.
[2] Report and Order, EA-2014-0207, p. 27 (EFIS 547).
[3] See Commission's Motion to Dismiss Notice of Appeal from the MLA, filed in the initial appeal of EA-2016-0358 on October 20, 2017 in *Missouri Landowners Alliance v. Public Serv. Comm'n,* Case No. ED106023, later consolidated with the main case, No. ED105932.
[4] See list of intervening parties at Report and Order, p. 3.
[5] Brief, unnumbered p. 2.

and a public utility, subject to the Commission's jurisdiction, including the requirement for prior approval by the Commission of any sale of assets. § 393.190.1 RSMo."[6] That sentence could be read to mean that the Commission specifically found in the CCN case that it had jurisdiction in this case under Section 393.190.1. While Staff's statement might be inferred from the Commission's Order in the CCN case, just to be clear, the Commission made no specific finding there regarding its jurisdiction in this case under Section 393.190.

At page 5 of its brief, Staff discusses the supposed purpose of the CCN statute, concluding as follows: "The legislative scheme for the protection of the public interest would be dangerously incomplete if intended public utilities – those without an existing relationship to utility plant – were not within the scope of the law." This appears to mean that an entity with no utility plant is still subject as an electrical utility to the Commission's jurisdiction under Section 393.190. Regardless of Staff's policy arguments (which are matters for the legislature) the very definition of an electrical corporation requires that the entity presently owns or controls some type of "electric plant." See Section 393.020(15). If it does not, then it plainly cannot be subject to the Commission's jurisdiction under Section 393.190.

Staff also claims that because the Commission eventually granted the CCN to Grain Belt in EA-2016-0358, "as a matter of law" GBE is now subject to the Commission's jurisdiction.[7] This argument ignores an essential point being made here by the Landowners. If the Commission did not have the authority or jurisdiction to issue that CCN in the first place, as the Landowners contend, then obviously the issuance of

[6] Brief, unnumbered p. 3.
[7] Brief, unnumbered p. 6.

that CCN could not bring GBE within the jurisdiction of the Commission. In other words, an unauthorized grant of the CCN could not turn Grain Belt into an electrical corporation.

The Joint Applicants contend that the "critical flaw" in the Landowners' jurisdictional argument is that it reads the word "retail" into the definition of electrical corporations under Section 386.020(15).[8] Actually, the only words which the Landowners are reading into that definition are those supplied by the various court decisions relied upon by the Landowners.[9] And the absence of retail service is only one of the factors mentioned in those cases for determining whether the entity was or was not providing service "for public use."[10]

The Joint Applicants also contend that the definitions of both electric plant and electrical corporation are broad, not narrow.[11] They cite no authority which has made that distinction. But in any event, they themselves have expanded the supposed definition of "electric plant" to the point where it is all but meaningless. Indeed, it is hard to imagine any asset which does not constitute either real property or personal property, and which could not conceivably be used directly or indirectly at some future point to somehow facilitate the construction of some sort of electrical facility. That is essentially the Joint Applicants' definition of electric plant.

The Joint Applicants then cite four Commission cases for the proposition that in the past, the Commission has approved other wholesale transmission projects which were

[8] Initial Brief, p. 7.
[9] See cases at Initial Brief, pp. 4-14.
[10] See also, e.g., the quote from the text in *Danciger,* 205 S.W. at 41, concluding that a company is not a public utility where it has adopted the policy of entering into special contracts upon its own terms.
[11] Initial Brief, p. 7. Actually, the definition of an electrical corporation is itself quite narrow: it is essentially an entity owning electric plant. See Joint Applicants' Initial Brief, last par. of p. 3.

to be rate-regulated by the FERC.[12] The Landowners would first note that in all four of those cases, no party was contesting the jurisdiction of the Commission to approve the transactions in question. Given that Commission jurisdiction was not a disputed issue, the precedential value of those cases regarding Commission jurisdiction is certainly weakened.

In any event, years of good-faith but erroneous interpretation of the Commission's authority will not excuse the continuation of that practice. This lesson was made clear in a case already discussed in a different context by the Landowners: *Stopaquila.org. v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005).[13]

The Western District ruled in that case that simply because the Commission over a period of 25 years had misinterpreted its statutory authority regarding the CCN statute, the unauthorized practice could not be allowed to continue.[14] Thus the precedent from the four Commission decisions relied on by the Joint Applicants cannot survive judicial scrutiny simply on the basis of their longevity or consistency. Instead, those cases are of no help to the Joint Applicants simply because they do not comply with the judicial and statutorily imposed requirements which define an electrical corporation.

Finally, on this particular aspect of the jurisdictional issue the Joint Applicants cite a case involving the transfer by ITC Midwest of a 9.5 mile segment of transmission line which served no retail customers in Missouri.[15] In yet another case involving no opposition to the Application, the Commission found it had jurisdiction over the transfer of the line, even though the charges for the line were not regulated by the Commission.

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[12] Initial Brief, p. 7.
[13] See Initial Brief, pp. 26-28.
[14] *Stopaquila.org.*, 180 S.W.3d at 36-37.
[15] *In re ITC Midwest LLC's and Fortis Inc.'s Joint Application for Approval of Merger,* No. EM-2016-0212 (Sept. 14, 2016), cited at Initial Brief p. 10.

Jurisdiction was found, instead, on the basis of "non-rate matters" involving the line in question, such as general safety and the transfer of the line itself.[16] In other words, the Commission found that an "electrical corporation" can indeed be subject to part but not all of the Commission's statutory authority over public utilities, despite the explicit holding to the contrary in the *Danciger* case.[17] Accordingly, the Landowners respectfully submit that this decision merits no consideration here.

And while on the subject of *Danciger,* the Joint Applicants criticize the Landowners for their "extreme position that if GBE is a Missouri electrical corporation and a public utility, 'then it is subject to the entire purview and regulation of the Commission….'"[18] Far from being extreme, the Landowners' position simply echoes the Supreme Court's language from *Danciger:*

> It is certainly fundamental that the business done by respondent either constitutes him a "public utility," or it does not. If he is a public utility, he is such within the whole purview, and for all inquisitorial and regulatory purposes of the Public Service Commission Act.[19]

(2) Arguments based on statutory interpretation. The Landowners are contesting the Commission's conclusion in the final Report and Order in EA-2016-0358 that Grain Belt qualified as an electrical corporation because it held two types of "electric plant": the 39 easements on the proposed right-of-way, and money.[20] The Joint Applicants have added nothing of substance regarding those two items which was not already addressed by the Landowners in Section 2(2) of their initial brief, p. 14-18. Therefore, no further discussion is needed here on those two items.

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[16] Id. at 4-5. In other words, the Commission found it had jurisdiction over the transfer of the line in part on the ground that it had jurisdiction over the transfer of the line.
[17] See discussion of this issue in the Landowners Initial Brief, pp. 8-9.
[18] Initial Brief, p. 9; emphasis was supplied by the Landowners in their Position Statement.
[19] *Danciger*, 205 S.W. 36 at 40.
[20] Report and Order, p. 37.

Although not supported by the Commission's Report and Order, the Joint Applicants argue that its two uncontested county road-crossing consents secured under Section 229.100 also amount to "electric plant."[21]

In an apparent attempt to head off their earlier insistence that these county consents do not amount to franchises, they now argue that these consents amount to "electric plant" regardless of what they are called.[22]

Their only support for this position was stated as follows:

> Regardless of whether a county road-crossing grant of authority is referred to as an "assent," a "franchise," a "license," a "permit" or something else, it is nonetheless a valid interest in personal property under Missouri law. And, relevant to the proceedings before this Commission, such an interest qualifies as personal property under the definition of electric plant in Section 386.010(14). None of Intervenors' discovery in this proceeding or filings from other cases can dispute this fact.[23]

Notably, the Joint Applicants provide absolutely no support of any kind for the supposedly undisputed fact that their alternative terms for the word franchise (such as a "permit") all constitute electric plant under the statute in question. And the argument regarding the status of a "franchise" was already covered by the Landowners in their Initial Brief, pp. 18-20.

Section 3. Even if Grain Belt is an electrical corporation, the Commission still lacks the jurisdiction and statutory authority to approve the sale under Section 393.190 because the sale does not transfer any assets of Grain Belt which are "necessary or useful in the performance of its duties to the public."

In Section 3 of their Initial Brief, the Landowners argued that the Commission does not have the jurisdiction or statutory authority to approve the sale of Grain Belt to

[21] Initial Brief, p. 5-6.
[22] Id. at 6.
[23] Id.

Invenergy because neither Grain Belt nor its assets are "necessary or useful in the performance of its duties to the public."

None of the other parties addressed this issue, perhaps because this specific question was not set out separately in the Landowners' Position Statement. However, that fact should be of no consequence when deciding this issue.

The other parties were made aware in the opening statements at the outset of the hearings that this matter was being raised as an issue in this case. As stated by counsel for the Landowners:

> So our first major contention is that the commission does not have the jurisdiction to approve this proposed sale under the terms of the statute in question. And even if it were an electrical corporation, under Section 393.190, we contend that what is being sold here is not necessary or useful to the performance of Grain Belt's duties to the public. So for this reason as well, the commission has no authority under 393.190 to approve the sale.[24]

So the parties were all aware from the outset of the hearings that this issue was being raised by the Landowners. And none of the other parties posed any objection during or after opening statements that this issue was beyond the scope of the Position Statements. Nor did they voice any other reason why the issue should not be addressed in this case.

By analogy, in civil court proceedings Rule 55.33(b) provides that "issues not raised in the pleadings are considered, in all respects, as if they had been raised by the pleadings when they are tried by implied or express consent of the parties."[25] Here, the Position Statements are comparable in many respects to the initial pleadings in civil court proceedings. In particular, they put the parties on notice as to the issues to be litigated.

[24] Tr. 40.
[25] *Bone v. Director of Revenue*, 404 S.W.3d 883, 886 (Mo banc 2013).

So because none of the parties objected at any point in this case to the litigation of the issue in question, it was clearly tried by implied consent.

But aside from mere legal technicalities, the Landowners should be heard on this issue as a simple matter of fairness. None of the other parties could possibly have been prejudiced by the omission of this particular item from the Landowners' Position Statement. Between the time that document was filed (on April 12, 2019) and the time of opening statements (on April 23), there was no opportunity for any party to file additional testimony on this issue anyway.

Nor would there have been time for submission of discovery on this question after the filing of the Position Statements. Not that discovery could have benefited anyone with respect to the legal question of the Commission's jurisdiction and statutory authority.

Moreover, the other parties will have ample opportunity in their Reply Briefs to address the issue in question. So from the perspective of fairness to the parties, the omission of this precise issue from the Landowners' Position Statement could not have been prejudicial to anyone, and thus should be of no consequence here. As our courts have acknowledged (although not specifically in the context of a Commission proceeding): "no harm, no foul."[26]

In any event, any argument that the omission of the issue from the Position Statement should be cause for its outright rejection is essentially moot.

The fact is, even if the Landowners had not alerted the other parties to this issue in their opening statement, it was not too late to raise it for the first time in their post-

[26] *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 164 (Mo banc 2004); *Dept. of Mental Health v. Continental Security Life Ins. Co.*, 835 S.W.2d 349, 356 (Mo. App. 1992)

hearing briefs. It is settled law that the issue of subject matter jurisdiction cannot be waived, and may be raised at any point in a proceeding.[27] Therefore, regardless of any arguments regarding the omission of this issue from the Position Statement, the question posed in Section 3 by the Landowners goes to the Commission's very authority to approve the sale. As such, the matter must be specifically considered and resolved in this proceeding.

Section 4. The Landowners jurisdictional arguments under Section 2 above do not constitute an impermissible collateral attack on the Commission's Report and Order on Remand in EA-2016-0358.

Several of the parties claim that the Landowners' jurisdictional arguments under Section 2 of their Initial Brief constitute a "collateral attack" on the final Report and Order in EA-2016-0358.[28]

These parties ignore the fact that the "collateral attack" here is on the very jurisdiction of the Commission to have issued the CCN in the first place. And as the Western District recently confirmed, "a judgment may be subject to collateral attack if it is void because it was rendered by a court lacking jurisdiction over the parties or the subject matter."[29] That is precisely the point being made here by the Landowners.

Section 5. Conclusion**.** For the reasons set forth above, and in their Initial Brief, the Landowners respectfully contend that the Commission lacks subject matter jurisdiction and the statutory authority to approve the joint application for the sale of Grain Belt to Invenergy. That joint application must therefore be dismissed or denied.

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[27] *McCraken v. Wal-Mart Stores*, 298 S.W.3d 473, 476 (Mo banc 2009) (stating that "Lack of subject matter jurisdiction is not subject to waiver; it can be raised at any time, even on appeal."); *Karrenbrock Construction, Inc. v. Saab Auto Sales and Leasing*, 540 S.W.3d 899, 901 (Mo. App. 2018).

[28] Initial Brief of Joint Applicants, p. 4; and Initial Brief of Staff, unnumbered p. 3. See also Initial Brief of MJMEUC, pp. 2-3.

[29] *Rischer v. Helzer*, 473 S.W.3d 188, 193 (Mo. App. 2015).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by electronic mail upon counsel for all parties this 15th day of May, 2019.

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