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, 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	)	Case No. EA-2016-0358

SHOW ME CONCERNED LANDOWNERS'
INITIAL POST-HEARING BRIEF

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INTRODUCTION

The Grain Belt Express Clean Line proposal is for an approximately 780-mile, overhead, multi-terminal +600 kilovolt ("kV") HVDC transmission line ("HVDC Line") and associated facilities that will collect over 4,000 megawatts ("MW") of wind-generated power in western Kansas. The proposal, if built, would deliver 500 MW of direct current electric power into Missouri and 3,500 MW into Illinois, Indiana and states farther east.

This is now the second time that Grain Belt Express has brought its application to the Missouri Public Service Commission ("Commission") for its approval to build the line. In Case No. EA-2014-0207, Grain Belt Express made the proposal to build the line, but that application was rejected by the Commission. The Commission, in that case, determined that the proposal was neither needed nor economically feasible. It also found that the proposed line was not in the public interest. "[A]ny actual benefits to the general public from the Project are outweighed by the burdens on affected landowners."[1]

In this its second application to this Commission, Case No. EA-2016-0358, it touts some changes intended to bolster its claim to the public interest. The first of these is the transmission service agreement ("TSA") with the Missouri Joint Electric Utility Commission ("MJMEUC"). The second is 500 MW of bi-directional service from the Missouri converter station to the PJM Interconnection LLC. Other changes, such as an engineering, procurement, and construction contractor; an additional investor; a construction plan; a NERC compliance plan; a further advanced interconnection agreement with Southwest Power Pool; routing changes; a decommissioning fund; a

[1] *In the Matter of Grain Belt Express Clean Line LLC*, Report and Order, dated July 1, 2015 ("2015 Report and Order"), p. 26.

landowner protocol; and an agricultural impact mitigation protocol, are all intended to give greater credibility to the capabilities of Grain Belt Express and better define an uncertain proposal.

Rather than bolster its claims, these changes have failed to remedy the Grain Belt Express proposal weaknesses and have highlighted key flaws in the proposal. There continues to be no need for the project. A special contract, one that is too good to turn down, does not show a need. This application shows an attempt to manipulate the regulatory system which will make future service from the project less economically feasible. And it shows an exercise of market power, a concern this Commission has expressed in the past. Finally, the proposal has not been restructured to benefit the public adequately enough to outweigh the burden on the affected landowners. The rights of the landowners are the paramount interest in the Commission's decision in this case. Grain Belt Express, with its changes, has not approached overcoming that significant constitutionally protected interest of property owners in the state, and it has not shown that the project is necessary or convenient to the public service.

INITIAL ARGUMENT

Grain Belt Express is a merchant transmission company. It is proposing to build a participant funded transmission line. As such, neither the applicant nor the proposed project embody the business characteristics the Legislature authorized this Commission to regulate.

The Missouri Supreme Court outlined the limits of the Commission's authority to regulate in 1918, in the case of *State ex rel. M. O. Danciger & Co. v. Public Service*

Commission, 275 Mo. 483, 205 S.W. 36; 18 A.L.R. 754 (Mo. 1918). The question for the Court was whether the business entity constituted a public utility.

> We are of opinion that it does not; for, as forecast above, state regulation of private property can be had only pursuant to the police power, which power is bottomed on and wholly dependent upon the devotion of private property to a public use. If the requirement that the private property shall be devoted to a public use, before it can be regulated, and before inquisitorial authority be exercised over it, is not to be read into the applicatory law, then that law is obviously unconstitutional, because it takes private property for public use without compensation.[2]

By way of explanation, the Court cited Mr. Wyman, in his work on Public Service Corporations, saying:

> In the same way the business of supplying electrical energy has generally been recognized as public in character. There are, however, several cases where the company supplying electricity has not professed to sell to the public indiscriminately at regular rates, but has from the beginning adopted the policy of entering into special contracts upon its own terms; such companies are plainly engaged in private business.[3]

The Court recognized that when a private business enters into special contracts upon its own terms and not at a regular rate, there is not only no need for the Commission to regulate, to do so would be a violation of the constitution. The purpose of regulation is to bring the power of government to bear on a common carrier service. Private initiatives not devoted to the public use of all do not justify the comprehensive regulations dictated by the Public Service Commission Law. Stated another way, when facilities are not devoted to a public use, there is no need for the Commission. That is the situation before the Commission in this Grain Belt Express case.

Grain Belt Express has clearly conducted itself as a merchant. Grain Belt Express' application declares it so. Page 18, footnote 15 of Grain Belt Express'

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[2] *Danciger*, 205 S.W. at 40.
[3] 205 S.W. at 41.

Application cites to the Federal Energy Regulatory Commission: "FERC has stated: 'Commission precedent distinguishes merchant transmission projects from traditional public utilities in that developers of merchant projects *assume all of the market risk of the project* and *have no captive customers* from which to recover the cost of the project." Grain Belt Express Clean Line LLC, 147 FERC ¶ 61,098, n.1 (2014) (citations omitted) (emphasis added).'" Mr. Zobrist, in his opening statement, declared that, "This is a participant-funded business model, so it's not a traditional regulatory model, where the utility fully regulated by this Commission builds infrastructure and then charges it to the ratepayers after seeking your approval in a rate case."[4]

Grain Belt Express' Kelly declared that the Commission is not needed. She described Grain Belt Express service as individual contracts based on one-on-one negotiations.[5] In her direct testimony, she claimed that, "In short, regulators can safely rely on the presence of voluntary customers and investors, 'i.e., the market,' to determine that a participant-funded project is needed."[6] To a similar point, she stated, "instead, participant-funded lines rely on voluntary contracts with transmission customers to recover their costs and their earnings."[7] At the hearing, she echoed those same ideas.

> [W]hen the Commission considers need with a participant-funded project, it does not have to -- it's different from when it considers need for a transmission project developed by a traditional franchise regulated utility with costs imposed on captive ratepayers, and the point that I was trying to make was that need is different when the regulator doesn't have to protect the customers, like with the participant-funded project, the customers are only voluntary customers and don't need the protection of the Commission like the Commission needs to protect captive ratepayers.[8]

[4] Tr. Vol. 10, pp. 49-50.
[5] Tr. Vol. 12, p. 517.
[6] Ex. 111, GBX witness Kelly direct, p. 22.
[7] Ex. 111, GBX witness Kelly direct, p. 20.
[8] Tr. Vol. 12, p. 514.

Ms. Kelly sees Grain Belt Express as a merchant, much as the Missouri Supreme Court saw Danciger. The Public Service Commission is not needed and its regulation would go beyond the limits of what the Missouri Legislature intended for this Commission.

It is important to recognize the distinction for one simple fact. Grain Belt Express wants to be a regulated electric utility, but it does not want to take on the obligations of a regulated electric utility. It wants the recognition and powers that come from the CCN, but it does not want to accept the obligation to serve or the obligation to subject its rates to Commission oversight. It wants this Commission to give it the keys to the car, but does not want to follow the rules of the road.

The Commission must recognize that the rights and powers of a regulated electric utility run in tandem with the obligations. Grain Belt Express cannot have the keys to the car without following the rules of the road. Grain Belt Express seeks to be recognized as an "electrical corporation" pursuant to section 393.170.[9] But once they become an electrical corporation pursuant to section 393.170, they are an electrical corporation under the Missouri Public Service Commission Law for all purposes, including section 393.130.2, which requires,

> 2. No . . . electrical corporation . . . shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas, electricity, water, sewer or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

Yet Grain Belt Express does not propose to subject its rates to the Commission's supervision. There is no way for the Commission to waive this statutory requirement.

[9] All statutory references are to the Missouri Revised Statues (2000), as amended, unless otherwise noted.

And there is no way for the Commission to waive the obligation to submit to its jurisdiction on service. The Commission may not slice and dice its authority in the manner Grain Belt Express requests. The Commission is not authorized to hand out the powers of the state and simply look the other way when the law requires the applicant to submit to the authority of the Commission. Such conduct by the Commission will only permit mischief by the applicant as this case has already shown.

As a matter of fact, Grain Belt Express' efforts to sell this Commission on its new application is based on a MJMEUC rate that is an "exceptional economic value."[10] The very proposal indicates a violation of section 393.130. For the Commission to fulfill its role properly, the Commission must exercise its authority under section 393.130 to investigate this "exceptional economic value" or to deny this application.

This character of private business interests of Grain Belt Express explains the anomalies presented in this case. The Chairman rightly pointed out during the evidentiary hearing that the economic feasibility factor of Tartan is an anomaly.[11] But rather than dismissing the factor out of hand or taking it on faith that the project is economically feasible because it is participant-funded, the Commission should ask the question why is the factor an anomaly in this case to begin with. The answer is that the Tartan test is designed to guard the ratepayers against an investment that cannot be completed in an efficient manner. The reason the factor is an anomaly is because Grain Belt Express is asking the Commission to do something anomalous, grant it the powers of a public utility electrical corporation but not exercise the Commission's authority to regulate rates and service for the benefit of all ratepayers.

[10] Ex. 116, GBX witness Lawlor surrebuttal, p. 9.
[11] Tr. Vol. 10, p. 91.

Grain Belt Express is a merchant transmission service company and it has a participant-funded project. Grain Belt Express wants to claim all the authority a CCN provides, but it wants to remain a merchant and not subject itself to the obligations a public utility service would undertake, such as an obligation to serve and the regulatory scrutiny of its rates. This business model, if approved, will create a public policy dilemma for this Commission.[12] It would allow Grain Belt Express to function as a utility without the constraints of the Commission's rules and regulations. It would allow Grain Belt Express to build the line and condemn any land it deems valuable for its project, but Grain Belt Express would be beyond the scope of the Commission's regulating power to correct Grain Belt Express' wrongs. The Commission should reject this Grain Belt Express application as it did the last one.

CONTESTED ISSUES

1. Does the evidence establish that the Commission may lawfully issue to Grain Belt Express Clean Line LLC ("Grain Belt") the certificate of convenience and necessity ("CCN") it is seeking for the high-voltage direct current transmission line and converter station with an associated AC switching station and other AC interconnecting facilities?

The evidence establishes that the Commission may not lawfully issue to Grain Belt Express the certificate of convenience and necessity. This is so for two reasons.

[12] Grain Belt Express' application has already created another dilemma for the Commission. The Commission asks the parties to address how to require the actual construction of the proposed 500 MW converter station and the actual delivery of the 500 MW to the converter station. As has been discussed and will be further discussed below, this issue would not be a problem under the ordinary circumstance in which the Commission would treat Grain Belt Express as a public utility electrical corporation. It has every authority under section 393.130.1 to require a public utility electrical corporation to provide "service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." The problem is that Grain Belt Express has requested the Commission to slice and dice its responsibility to not treat Grain Belt Express as a public utility electrical corporation.

First, the Commission may not grant the CCN because Grain Belt Express has not obtained the county assents required by sections 229.100 and 393.170. Second, the Commission may not grant the CCN because Grain Belt is a merchant transmission provider, proposing a participant-funded project, which is not subject to the jurisdiction of this Commission.

a. County Assents

Section 229.100 prohibits any person or corporations from erecting power lines in a county without first obtaining the approval of the county commission:

> No person or persons, association, companies or corporations shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public roads or highways of any county of this state, without first having obtained the assent of the county commission of such county therefor; and no poles shall be erected or such pipes, conductors, mains and conduits be laid or maintained, except under such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county commission.

Section 393.170.2 requires the president and secretary of any corporation undertaking such activities to verify that the corporation has received the appropriate consents.

> Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

It is a fundamental principle of public utility law in the state of Missouri that a CCN creates nothing new. It merely permits a corporate entity to exercise the powers it has already been granted by corporate charter and municipal assents.

> The certificate of convenience and necessity granted no new powers. It simply permitted the company to exercise the rights and privileges already conferred upon it by state charter and municipal consent. State ex inf. Shartel ex rel. City of

> Sikeston v. Missouri Utilities Co., 331 Mo. 337, 53 S.W.2d 394, 89 A.L.R. 607. The certificate was a license or sanction, prerequisite to the use of existing corporate privileges.[13]

In other words, the Commission cannot permit what the corporation does not already have; it can only permit the authority the corporation already has. So, before an electrical corporation can receive an approval from this Commission to act pursuant to its local assents, the corporation must first have the local assents required by state statute. And in this case, Grain Belt Express does not have the local assents. Therefore, the Commission has nothing to permit.

Grain Belt Express attempts to distinguished between the so-called line certificate authority of subsection 1 and the area certificate authority of subsection 2 of section 393.170. State ex rel. Union Elec. Co. v. PSC, 770 S.W.2d 283, 285 (Mo. App. W.D. 1989) ("Two types of certificate authority are contemplated under Missouri statutes").[14] But the argument misses the point. Section 229.100 clearly requires a corporation to obtain a county assent before it erects poles on county roads. Therefore, the Commission cannot permit Grain Belt Express to exercise these assents, per *Harline*, until Grain Belt Express actually obtains the county assents.

The argument also fails to account for the use of the term "certificate" in subsections 2 and 3. Subsections 2 and 3 state as follows:

> 2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation,

[13] *State ex rel. Harline v. Public Service Commission of Mo.*, 343 S.W.2d 177, 181 (Mo. App., 1960).
[14] See Opposition of Grain Belt Express to Motion of Missouri Landowners Alliance for Expedited Treatment and Motion to Dismiss Application or To Hold Case in Abeyance, Item No. 423, p. 3.

> showing that it has received the required consent of the proper municipal authorities.
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> 3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

The first time the word "certificate" is used in section 393.170 is in the second sentence of subsection 2. Prior to the use of the term certificate, in both subsection 1 and subsection 2, the Legislature used the phrase "permission and approval." What does the word "certificate" refer to? Is it simply the "permission and approval" of subsection 2 or the "permission and approval" of both subsection 1 and 2?

Subsection 3 provides an answer. Subsection 3 discusses procedure. It goes back to the phrase "permission and approval," the same phrase used in both subsections 1 and 2, tying the two subsections together, to specify that the "permission and approval" may only be granted after due hearing and after a determination that the exercise of the right is necessary and convenient for the public service. The subsection then permits the Commission to impose conditions. The last sentence clarifies that the "certificate" of convenience and necessity must be exercised within two years of its issuance or it shall be null and void.

To conclude that the "certificate" applies only to subsection 2 makes no sense. The word "certificate" is clearly tied to the decisional standard of "convenience and necessity." It is also tied to "permission and approval," which is used in both subsections 1 and 2. If "certificate" only applies to subsection 2, that means the Legislature gave the

Commission no decisional standard for subsection 1 line certificates. It also means that there is no time limit on line certificates. Reading the word "certificate" within the context of the entire section makes it clear that the certificate is the official act constituting the "permission and approval" for both subsections 1 and 2.

As the recent opinion in *Neighbors United Against Ameren's Power Line v. Public Service Commission*, WD79883, points out, "As a creature of statute, the [PSC] only has the power granted to it by the Legislature and may only act in a manner directed by the Legislature or otherwise authorized by necessary or reasonable implications."[15] It must follow the law. As the Court further points out, to construe section 393.170 to allow the grant of a CCN without a verified statement of the president and secretary of the corporation showing that it has received the required consents of the counties would render the mandatory language in section 393.170.2 meaningless.

Grain Belt Express and others want the Commission to wait until the Court of Appeals opinion is "final". What they really want the Commission to do is ignore the law. Grain Belt Express speculates that the decision may be appealed. It also speculates that the decision will be overturned. Therefore, according to Grain Belt Express' logic, there is no law. But there is law. Grain Belt Express' speculation on what happens to the *Neighbors United* case does not vacate the law.

The concept of finality, as discussed in *Meierer v. Meierer*, 876 S.W.2d 36, 37 (Mo. App. 1994) and *Philmon v. Baum*, 865 S.W.2d 771, 774-75 (Mo. App. 1993), are concepts designed to define court jurisdiction and the right to appeal. Supreme Court Rules 83.02 and 83.04 likewise refer to timing of transfer of a case to the Supreme Court.

[15] slip op. p. 5, quoting Mo. Pub. Serv. Comm'n v. Consol. Pub. Water Supply Dist. C-1, 474 S.W.3d 643, 649 (Mo. App. W.D. 2015).

The first sentence of Rule 83.02 states, "A case disposed of by an opinion, memorandum decision, written order, or order of dismissal in the court of appeals may be transferred to this Court by order of a majority of the participating judges, regular and special, on their own motion or on application of a party." For purposes of this case, the Commission need read no further than the first seven words, "A case disposed of by an opinion . . .." The case has been disposed of by an opinion. It is not as if there is no law simply because the case is not final. Grain Belt Express' speculation as to the final outcome of the case will not change that. There is law. And the Commission must follow the declared law until that law is changed.

The *Neighbors United* case is on all fours the same as this case. It is a case for a CCN for authority to build a line. Ameren failed to obtain all the county assents. The Commission granted the CCN to Ameren without the county assents being granted. The Court vacated the Commission's *Report and Order* in the *Neighbors United* case. This case is no different. Grain Belt Express does not have the county assents, or has not shown that it does. The Commission can only permit Grain Belt Express to exercise the authority that it has through the county assents. Therefore, this Commission cannot grant Grain Belt Express permission to exercise those county assents. If the Commission proceeds to grant this CCN without the county assents being granted, it will be ignoring the clear declared law.

b. Participant-Funded Line

As previously mentioned, the Missouri Supreme Court established the limits of the Commission's authority early on in *State ex rel. Danciger v. Public Service Commission*. The *Danciger* case involved M. O. Danciger's Royal Brewing Company.

Royal Brewing Company installed in its plant the necessary machinery for producing electric light at the plant. Subsequently, after discovering he had excess generating capability, Danciger entered into special private contracts with neighbors to furnish power under certain circumstances to select private citizens. One W. H. Roach filed a complaint with the Commission after Danciger terminated his service. The Commission found for Roach and directed Danciger to reconnect service. The one question before the court was whether Danciger was engaging in such a business as permitted the regulation thereof by the Commission. The Court determined that he was not and annulled the Commission's decision and order in the case.

After reviewing the definitions of "electric plant" and "electrical corporation," the Court determined that it was apparent that the words "for public use" were to be understood and to be read therein. The Court recognized the characteristics of a merchant in Danciger as opposed to the character of a "public calling." "The fundamental characteristic of a public calling is indiscriminate dealing with the general public. As Baron Alderson said in the leading case: 'Everybody who undertakes to carry for any one who asks him is a common carrier.'"[16]

Grain Belt Express is essentially identical to Danciger. At least for its service within Missouri, it has only a limited quantity of transmission capacity to sell, 500 MW. It has been authorized by the FERC to enter into one-on-one negotiations with customers.[17] And it has and will do business with only select customers. One of the centerpieces of this case is the TSA with MJMEUC. Negotiations were held in private. An offer was made by Grain Belt Express and accepted by MJMEUC. Negotiations were

[16] 205 S.W. at 42. (internal citations omitted)
[17] Tr. Vol. 12, p. 517.

conducted according to a design.[18] The plan involved, in the words of Mr. Grotzinger, offering MJMEUC a price that was a "rare cost saving opportunity,"[19] and in the words of Mr. Lawlor, "extraordinary economic benefits."[20] The contract was entered into without regard to section 393.130. This is a type of business practice that the *Danciger* Court declared not to be a public service. This Commission should not give into the charade and cloak Grain Belt Express with the authority of a public electric utility when it is not.

2. Does the evidence establish that the high-voltage direct current transmission line and converter station for which Grain Belt is seeking a CCN are "necessary or convenient for the public service" within the meaning of that phrase in section 393.170, RSMo.?

a. Intercon Gas Standard.

The touchstone for evaluating a request for a CCN was expressed in *State ex rel. Intercon Gas, Inc. v. Public Serv. Comm'n*., 848 S.W.2d 593 (Mo. App. 1993).

> The PSC has authority to grant certificates of convenience and necessity when it is determined after due hearing that construction is "necessary or convenient for the public service." § 393.170.3. The term "necessity" does not mean "essential" or "absolutely indispensable", but that **an additional service would be an improvement justifying its cost**. *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d at 219. Additionally, what is necessary and convenient encompasses regulation of monopoly for destructive competition, prevention of undesirable competition, and **prevention of duplication of service**. *State ex rel. Public Water Supply Dist. No. 8 v. Public Serv. Comm'n*., 600 S.W.2d 147, 154 (Mo.App.1980).[21] (emphasis added)

[18] Tr. Vol 11 (HC), p. 302.
[19] Ex. 476, MJMEUC witness Grotzinger rebuttal testimony, p. 4.
[20] Ex. 116, GBX witness Lawlor direct testimony, p. 9.
[21] 848 S.W.2d at 597.

There are two salient standards set forth in the Court's formulation of convenience and necessity. First, the additional service must be an improvement justifying the cost, and second, the goal of regulation is to prevent the duplication of services.

While convenience and necessity may not mean indispensable or essential, it also does not mean merely desirable. "Public convenience and necessity is not proven merely by the desire for other facilities." *People's Tel. ex. v. Pub. Serv. Com. & Hanamo Tel*., 186 S.W.2d 531, 239 Mo.App. 166 (Mo. App., 1945). In 1990, this Commission applied these principles by denying a CCN to a number of incorporated subsidiaries of the rural electric cooperatives. In the 1990s, several rural electric cooperatives incorporated subsidiaries (such as CRESCO, Cuivre River Electric Service Company, identified below) to provide service in municipalities of over 1500 population. In denying a certificate to CRESCO, the Commission found,

> To the contrary, the evidence establishes that all prospective users of electric service can secure that service from either CRESCO's parent cooperative or from UE. Adding yet another supplier such as CRESCO will not diminish, and will only promote, destructive competition.
>
> * * * * *
>
> This Commission has denied applications for certificates of convenience and necessity by a regulated utility in the absence of requests for the utility's service even when the available alternatives were unregulated municipal utilities and rural electric cooperatives. *In the* matter *of The Empire District Electric Company,* 9 Mo. P.S.C. (N.S.) 349 (1960).[22]

If the Commission has denied applications for CCNs by regulated utilities when service is available from unregulated entities, how much more should it do so when service is available from regulated entities? Service is already available and

[22] *In re Cuivre River Electric Power Company*, Report and Order (Case No. EA-87-102 (consolidated) decided April 27, 1990) p. 11.

mandated from the two RTOs in Missouri.[23] Grain Belt Express' service is a duplicative service to the existing electric utility facilities and RTO services in the state.

It is clear as well that this duplicative service will be destructive. Not only will it damage the land across which it is built, it will diminish the ability of the RTOs to maintain a strong electric transmission system. As the wind industry representative Mr. Goggin explained, a strong electric transmission system is a benefit to customers. RTOs are presently responsible for planning and seeing that the electric transmission system is maintained and upgraded. However, to the extent service is provided on the Grain Belt Express system, it will diminish the financial ability of the RTOs and their members to plan and construct upgrades to the electric transmission system.[24] RTOs are already ahead of the game in expanding their facilities to respond to public policy needs such as wind energy.[25] The benefit to be derived from the Grain Belt Express project is limited and inconsequential to the cost and burden on landowners and the existing grid posed by developing a duplicative system across the state of Missouri.

b. Tartan Factors.

The Commission typically discusses its evaluation of the convenience and necessity for a project application in terms of the Tartan Factors. The Tartan Factors are as follows:

1. Whether there is a need for the facilities and service;

[23] Ex. 400 (P), Show Me witness Justis rebuttal testimony, pp. 7, 8.
[24] Tr. Vol. 16, p. 1130 – 1132.
[25] Tr. Vol. 11, p. 240. Exhibit 330. Tr. Vol. 15, pp. 842, 843. It is particularly noteworthy from Exhibit 330 that Grain Belt Express sees this effort as a duplicative, competitive effort to MISO and SPP.

2. Whether the applicant is qualified to own, operate, control and manage the facilities and provide the service;
3. Whether the applicant has the financial ability for the undertaking;
4. Whether the proposal is economically feasible;
5. Whether the facilities and service promote the public interest.[26]

1. Whether There Is a Need for The Facilities and Service.

Without repeating its discussion above, Show Me contends that there is no need for the Grain Belt Express project. As stated succinctly by the Commission in the *Cuivre River* case, this Commission has denied requests for a CCN when there are no requests for service. It has also denied requests for a CCN when there is service available from an unregulated entity such as a municipal utility or a rural cooperative. In this case, service is available from regulated entities.[27] And there are no legitimate requests for service. None of the electric utility companies in the state have requested service. What transmission service request there is is a highly discounted, contrived agreement that is designed to be a "rare cost saving opportunity"[28] and an "extraordinary economic benefits."[29] This is not a need.

2. Whether the Applicant Is Qualified to Own, Operate, Control and Manage the Facilities and Provide the Service;

Show Me takes no position on this factor.

3. Whether the Applicant Has the Financial Ability for the Undertaking;

Show Me takes no position on this factor.

[26] *In Re Tartan Energy*, GA-94-127, 3 Mo.P.S.C.3d 173, 177 (1994).
[27] Ex. 400 (P), Show Me witness Justis rebuttal testimony, pp. 7, 8.
[28] Ex. 476, MJMEUC witness Grotzinger rebuttal testimony, p. 4.
[29] Ex. 116, GBX witness Lawlor direct testimony, p. 9.

4. Whether the Proposal Is Economically Feasible;

The Commission found in its prior 2015 Report and Order in Case No. EA-2014-0207,

> Levelized cost analysis provides a way to compare investment alternatives that have differing investment costs, expenses, and asset lives. In regulated utility analysis, levelized costs represent the per-year revenue requirement to cover the return of and on investment as well as annual expenses over the life of the asset. It is an appropriate method to use in comparing resources that run at 100% of their capacity, which are sometimes called base-loaded generation resources.[30]

Mr. Proctor found in the prior case that Mr. Berry's capacity cost adder was insufficient, among other things, to adequately compare resources that run at 100% of their capacity.[31] Mr. Justis finds the same thing in this case. Mr. Justis ran two independent levelized cost of electricity analyses, one prior to receiving Mr. Berry's workpapers and one making appropriate modifications to Mr. Berry's workpapers. Both analyses showed similar results, gas fired combined cycle generation is the more economical generation source.[32]

Mr. Justis further identified a flaw in the overall scope of Mr. Berry's analysis. Mr. Berry used the heavily discounted MJMEUC first-mover rate in his analysis. Western Kansas wind carried via Grain Belt Express is only competitive to MISO wind if the MJMEUC first-mover rate is used. When the "normal" cost-based rate is used, the Western Kansas wind delivered via Grain Belt Express becomes highly uncompetitive.[33]

As the Commission addresses the economic feasibility of a project, it must determine whether the project is economically feasibility in its totality for Missouri, not as it is economically feasible for one highly discounted customer. The "normal" rate is

[30] p. 14.
[31] *Report and Order*, Case No. EA-2014-0207, p. 15.
[32] Ex. 400 (P), Show Me witness Justis rebuttal testimony, p. 13, l. 19, 20.
[33] Ex. 405, Show Me witness Justis surrebuttal testimony (HC), p. 11.

the rate Grain Belt Express will charge to other Kansas to Missouri customers.[34] And if the "normal" rate is not competitive with MISO wind, the project is not economically feasible.

Finally, a word must be said about congestion costs. Grain Belt Express and MJMEUC use congestion charges as smoke and mirrors to achieve a desired result. It is widely understood that congestion charges are hard to predict even on the short term.[35] That is because congestion charges are the mathematical difference between locational marginal prices or LMPs on specific nodes on the transmission system. LMPs change from hour to hour and from season to season. They are influenced by what generators are running and what transmission facilities are constructed and operating. The difficulty in predicting congestion costs increases as an estimate is projected out further into the future. This is because of the possibility that transmission upgrades are constructed by the RTOs.[36] It is just as likely in five years that any route from the Grain Belt Express interconnection point is more congested than an alternative route through SPP and MISO, especially since SPP and MISO will be responsible for planning the grid while Grain Belt Express will be static.

5. Whether the Facilities and Service Promote the Public Interest.

While under ordinary circumstances this factor "is in essence a conclusory finding," as pointed out by the Commission in its 2015 Report and Order in Case No. EA-2014-0207,[37] it is not so in this case. The Commission must remember the Court

[34] Tr. Vol. 15 (HC), p. 803.
[35] Tr. Vol 16, pp. 1190, 1191.
[36] Tr. Vol. 16, pp. 1012-1013.
[37] See page 25.

imposed standard is that the Commission must determine the public interest.[38] In light of the anomalous character of this application to one or more of the other factors, the public interest factor becomes more significant. Charting a path into new waters or building a bridge to any future requires a more careful examination of the public interest.

In this regard, the Commission's Conclusions of Law in its 2015 Report and Order in Case No. EA-2014-0207 is a good starting place. Therefore, Show Me will begin where the Commission majority left off in its 2015 Report and Order.

The Commission began its consideration of public interest issues by discussing where the public interest is to be found. Its discussion is sound for the most part, i.e. in a "constitutional provision, a statute, regulation promulgated pursuant to statute, or a rule created by a governmental body."[39] The Commission got the hierarchy right. The Commission got it wrong, however, when it stated, "This means that some of the public may suffer adverse consequences for the total public interest. Individual rights are subservient to the rights of the public."[40] (citations omitted) For the second of these two sentences, the Commission cited for authority *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956). The case the Commission should have cited is *State ex rel. Missouri Pac. Freight Transport Co. v. Public Service Commission*, 295 S.W.2d 128 (Mo., 1956), the Supreme Court opinion for the case taken in transfer from the Kansas City Court of Appeals. The Supreme Court opinion makes the following point about the public interest:

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[38] "From analysis of court decisions on this subject, the general purpose of what is necessary and convenient encompasses regulated monopoly for destructive competition, prevention of undesirable competition and prevention of duplication of service. The underlying public interest is and remains the controlling concern, because cut-throat competition is destructive and the public is the ultimate party which pays for such destructive competition." *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App.W.D., 1980).

[39] See page 24.

[40] 2015 Report and Order, p. 24.

> The Commission has the responsibility of determining the public's need for common-carrier service sought and of considering a new, enlarged, extended or additional, and duplication of service would adversely affect presently authorized carrier service with resultant deterioration of efficiency in adequately supplying the transportation needs of the public. In the determination of these matters, the rights of an applicant, with respect to the issuance of a certificate of convenience and necessity, are considered subservient to the public interest and convenience.[41]

It is the applicant's interests that are subservient to the needs of the public and not individual rights that are subservient to the regulators.

a. Project Costs and Benefits

The Commission's 2015 Report and Order then laid out several aspects of the public interest that the Commission determined to be significant. The Commission first identified that Grain Belt Express' claims of costs and benefits were based on flawed, incomplete or wrong analysis. The evidence in this case likewise fails to support a conclusion that the project will be beneficial. Indeed, Staff witness Stahlmann observed that the project design is not far along. He observed that HVDC lines are rare. "Consequently, it would not be unexpected that actual construction costs for the Project would be different than current estimations because Grain Belt does not have the benefit of experience for knowing and estimating the problems that can occur during construction."[42]

Mr. Justis also testified that Grain Belt Express failed to properly consider cost estimate risk. Based on the stage of the project development, Mr. Justis estimates, based on AACEI guidelines, that the expected accuracy range for the estimate of this project is (Class 4) -20% to +30%.[43] While Mr. Justis used U.S. Energy Information

[41] *State ex rel. Missouri Pacific Freight Transport Company v. Public Service Commission*, 295 S.W.2d 128, 133 (Mo. 1956)
[42] Ex. 201, Staff rebuttal report, p. 33.
[43] Tr. Vol. 18, p. 1629, Ex 422.

Administration ("EIA") data for consistency and reliability, Grain Belt Express and Infinity Wind used wind industry date for the capacity-weighted installed project cost for wind that was "perhaps skewed to the low side by one sizable project in a year when little capacity was built."[44] The project cost data uncertainty remains significant.

The Commission found in its 2015 Report and Order that the vaunted benefits in compliance with the Missouri RES standards and other environmental benefits were illusory. This has not changed. The Staff Rebuttal Report concluded that there is no need for the project based on the Missouri RES standard.[45] Mr. Arndt, in his Surrebuttal Testimony observed that, "Grain Belt Express does not propose the Project is justified based on climate change concerns."[46] Indeed, the federal government has significantly changed its position if not done an about face on its climate change agenda. What was unclear to the Commission in the last case is more clear now in that there is very little if any justification for the project in pursuing an environmental agenda.

b. Property Rights

In its 2015 Report and Order, the Commission rightly emphasized the interests of the Missouri landowners. There is likely no right in our nation that is more sacrosanct than the right of private property. Second only to the rights of life and liberty, the right to property is considered a foundational right on which we base our liberty.[47] The

[44] Ex. 876, Infinity Wind witness Langley surrebuttal testimony, Schedule ML-2, p. 54.
[45] Ex. 201, Staff rebuttal report, p. 17.
[46] Ex. 102, GBX witness Arndt surrebuttal testimony, p. 11.
[47] Sir William Blackstone described the English common law right to private property as follows:

SO great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide

unchallenged testimony of Ron Calzone highlights the significance the state of Missouri places on property rights. Mr. Calzone concludes his Rebuttal Testimony as follows:

> I must conclude that the people place a supreme value on property rights. Therefore, the supreme public interest in this and any governmental action such as this is the protection of property rights. As I pointed out earlier, the People through the Missouri Constitution declared exactly what they expect the government they created to **make the highest priority**. The People saw fit to define that highest priority where it is abundantly easy to find – in the third clause of the Constitution when they declared, "that to give security to these things [including property rights] is the **principal office of government**, and that when government does not confer this security, it **fails in its chief design**." This is a high hurdle to overcome. I do not believe Grain Belt Express can overcome that hurdle, most particularly because they would use the proposed project for a private use and not a public one.[48]

Grain Belt Express attempts to overcome this weighty public interest with claims of economic development and tax revenues. But it cannot be stated too strongly that the principle office of government is to secure the fundamental rights of life, liberty and property. A state interest in taxes or economic development, if a state has or ever had such an interest to begin with, must pale in comparison. It is the economic development rights of the existing landowners that the Commission must defend.

c. Economic Development and Taxes

Grain Belt and the Department of Economic Development attempt to overcome the basic right of landowners with claims of economic development gains and tax

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whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this, and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

1 William Blackstone, Commentaries *135. All citations to the Commentaries on the Laws of England by William Blackstone are made to a Facsimile of the First Edition of 1765-1769, published by The University of Chicago Press (Chicago & London, 1979)

[48] Ex. 401, Show Me witness Calzone rebuttal testimony, p. 11.

collections. Both are self-serving, and the tax collection "benefit" is an inappropriate consideration.

The suggestion that this Commission should consider tax revenues when deciding to grant this CCN is inappropriate. Justice should never be bought. The concept that an individual that brings payments or services to government in return for justice is foreign to good government. Nowhere in the Missouri or U.S. constitutions is there expressed a principle that government should protect its interest in receiving revenue. Government must tax merely to execute justice. To recognize tax revenue as a justification for the issuance of a CCN is beneath this Commission.

The Department of Economic Development ("DED") supported the Grain Belt Express application, based on a computer model (REMI) prediction that the project would bring jobs, increase personal income, produce a growth in GDP, and provide additional general revenue during the construction phase of the project as well as some lesser benefits during the operational phase of the project.[49] However, as the Staff appropriately warned, this assessment is one sided and self-serving. Mr. Stahlman, in the Staff Rebuttal Report observed that, "the analyses that determine the stated benefits typically ignore the opportunity costs; how the workers, land, and investment would otherwise be employed if the project is not constructed."[50] Both Grain Belt Express and DED witnesses recognized the one-sided nature of the argument. Mr. Lawlor recognized that there are opportunities for landowners that the project will foreclose.[51] DED witness Spell also admitted, specifically with regard to the REMI model, that the analysis did not

[49] Ex. 526, DED witness Spell rebuttal testimony, p. 3.
[50] Ex. 201, Staff rebuttal report, p. 42.
[51] Tr. Vol. 10, pp. 305-307.

take into account loss in property value or loss of use of agricultural land.[52] He identified the limits of the REMI model in that the analysis was conducted purely on the inputs provided by Clean Line without verification.[53] The REMI model itself has not be analyzed for its accuracy in predicting results and is merely an academic exercise.[54] So there is no real way to know if the REMI model accurately predicts the future.

There will be economic loss to the landowners. The Commission itself observed as much in its 2015 Report and Order.

> Additionally, several people testified sincerely about their concerns relating to the Project. Those concerns were conveyed by farmers who could experience problems related to soil compaction, interference with irrigation equipment, aerial applications to crops and pastures and difficulty in moving large equipment around the towers proposed as part of the Project.[55]

Those concerns have not diminished. Charlie Kruse testified to the same effect in this case.[56] And John Turner elaborated on the long-term impact of the line on the development of irrigation of the land along the route. In response to Mr. Turner's testimony, Mr. Arndt had to revise his testimony. "Subsequent review of the 2014 Routing Study and discussion with members of the routing team confirmed that the Project crosses fields with center pivots irrigation systems."[57] Indeed, center pivot irrigation can be effectively utilized along the route. Mr. Turner's Exhibit No. 421 shows eleven sites that would be conducive to irrigation reservoir development just in Tile 16[58]

[52] Ex. 526, DED witness Spell rebuttal testimony, p. 6.
[53] Tr. Vol. 16, p. 1251.
[54] Tr. Vol. 16, pp. 1243, 1246.
[55] 2015 Report and Order, p. 26.
[56] Ex. 404, Show Me witness Kruse rebuttal testimony.
[57] Ex. 102, GBX witness Arndt surrebuttal testimony, p. 17.
[58] Tile 16 is one of 21 separate tiles representing the route across the state of Missouri. See: http://www.grainbeltexpresscleanline.com/site/page/missouri_proposed_route.

of the Grain Belt Express route. The construction of the project and the easement would prevent development of these possible reservoirs.[59]

Despite an effort to explain away the interference, the infringement on the farmers' ability to farm is significant. Grain Belt Express' efforts just cannot add up to avoid the disruption. On irrigation alone, the line cannot be configured to avoid interference with center point pivot irrigation systems entirely. Grain Belt Express proposes line construction of 4 to 5 towers per mile. However, with a typical, well-designed center pivot irrigation systems with a quarter mile radius, there are only three potential locations along a one mile farm boundary where transmission towers may be placed without interfering with the system. And as Mr. Arndt confirmed it is impossible to construct a line to avoid interfering with future construction of an irrigation system.[60]

d. Market Power

This Commission also has a significant market power issue to confront in this case. In Case No. EM-96-149, this Commission approved the merger of Union Electric Company and Central Illinois Public Service Company on the condition that the resulting company join the MISO or some similar RTO.

> The Commission finds there are sufficient facts in evidence to be concerned about the potential increase in market power from the proposed merger. The merger could have a significant adverse impact on the degree of competition within UE's Missouri service territory due to limited transfer capability for imported power, as well as the disincentives caused by pancaked transmission rates. In order to eliminate pancaked transmission rates, Ameren would need to belong to a regional transmission group having a region-wide transmission rate. To address the vertical market power concern that Ameren could use its transmission system to restrict competition from other generation, the regional transmission group

[59] Tr. Vol. 18, pp. 1442, 1443, 1445.
[60] Tr. Vol. 12, pp. 595 – 601.

> should be an entity that will independently operate the transmission systems of the vertically integrated utilities within the region.[61]

The market power issues are quite complex in this case. This Grain Belt Express line would be a thin "competitive marketplace," 3,500 MW into PJM, and 500 MW into Missouri. In addition, Grain Belt Express has already taken the first steps to further constrain that marketplace through its negotiations with MJMEUC. Mr. Langley, a Vice President of Infinity Wind, also identified other significant market power issues in his cross examination by MLA attorney Paul Agathen. The confidential nature of the discussion prevents Show Me from identifying the issues in its brief, but they are significant concerns the Commission must address.[62] Grain Belt Express' request to be declared a public utility and yet cut free from the regulatory oversight of this Commission is inconsistent with this Commission's expressed public policy to limit the market power of electric transmission providers.

Grain Belt Express wants to receive the powers that come with the CCN, such as the CCN itself and the resultant power to condemn property, but it wants none of the obligations that come with the CCN, such as the obligation to submit its conduct and ratemaking to the regulatory oversight of this Commission. If market power is a concern to this Commission, this is a development that the Commission cannot ignore.

3. If the Commission grants the CCN, what conditions, if any, should the Commission impose? (If the Commission wanted to condition the effectiveness of the CCN on the actual construction of the proposed converter station and the actual delivery of 500 MW of wind to the converter station, how would it do it?)

[61] In the Matter of the Application of Union Electric Company, Report and Order, dated February 21, 1997, pp. 15, 16.
[62] Tr. Vol. 17 (HC), pp. 1200 – 1207.

The Staff's recommendations are all essential conditions in the event the Commission grants the CCN. As Show Me has set forth above, the Grain Belt Express project is not in the public interest. Staff's conditions are all intended in one way or another to limit the damage the project would do to the public interest should the Commission grant the CCN. In the event the Commission grants the CCN, Show Me supports all the proposed conditions of Staff, with the following elaborations, additions and modifications:

1. The Commission should condition the grant of the CCN to Grain Belt Express on it not attempting to condemn land using the power of eminent domain. Grain Belt Express is proposing to provide service in a duplicitous manner, as a public utility and not as a public utility, to receive the CCN and not be subject to the obligation to serve or the Commission's oversight on its rates. As a "merchant," Grain Belt Express should have no authority to use the power of the state to condemn land. If it is to be granted a CCN, it should be denied the most harmful power of a public utility company, the power of eminent domain.
2. The Commission should impose a condition on Grain Belt Express in the CCN that Grain Belt Express comply with its Missouri Agricultural Impact Mitigation Protocol (Schedule JLA-2) and the Agricultural Impact Mitigation Policy (Schedule JLA-3).[63] Mr. Skelly agreed to accept compliance with the landowner protocol and the landowner policy as conditions in the CCN.[64] Grain Belt Express relies on these two documents to assure the Commission that they will attempt to minimize harm to landowners. If they are only incorporated into an easement agreement, they are of

[63] Ex. 101, GBX witness Arndt rebuttal testimony, Schedules JLA-2 and JLA-3.
[64] Tr. Vol. 10, p. 158.

little value. The policy and protocol address but would not apply to activities and conduct occurring prior to entering into an easement agreement. They would also not apply in the event of a condemnation.[65] To make the policy and protocol fully binding on Grain Belt Express to achieve the full benefit Grain Belt Express claims, the policy and protocol should be made conditions of the CCN.

3. Show Me proposes that contributions to the decommissioning fund begin prior to commencement of construction. As a participant-funded transmission project, this project is different from any other transmission project in the state. Also, as a participant-funded project, it will only continue operations to the extent it can maintain participants. Therefore, the landowners should be protected against abandonment from the earliest stages of the project, during construction.
4. The Commission has requested the parties opine on how the Commission should require actual construction of the proposed converter station and the actual delivery of 500 MW of wind to the converter station. As Show Me has discussed above, Grain Belt Express has posited a service that is not needed and is not a public service. So, while Show Me believes the Commission should deny the CCN application, if the Commission grants the CCN, Show Me believes the Commission has and should exercise all authority pursuant to section 393.140 to regulate Grain Belt Express.

4. If the Commission grants the CCN, should the Commission exempt Grain Belt from complying with the reporting requirements of Commission rules 4 CSR 240-3.145, 4 CSR 240-3.165, 4 CSR 240-3.175, and 3.190(1), (2) and (3)(A)-(D)?

If the Commission grants Grain Belt Express a CCN, it should not exempt Grain Belt Express from any Commission rules or regulations. As Show Me has already

[65] Tr. Vol. 12, p. 412

shown, an "electrical corporation" is a corporation that devotes it property to the public service. Once so devoted, the property is subject to the regulation of this Commission for all purposes. Section 393.130 does not allow the Commission the discretion to exempt Grain Belt Express from its regulatory authority.

CONCLUSION

Grain Belt Express is proposing a duplicate service to the existing, well-established transmission grid. It is seeking to provide discriminatory service to one particular customer to obtain this Commission's approval. It is proposing as a merchant a service that is participant-funded. It wants to maintain that merchant status, free from the obligations imposed on an "electrical corporation" by the Missouri Public Service Commission Law. This unregulated utility will create many problems that the Missouri Public Service Commission Law was designed to thwart, such as destructive competition, damage to property from duplicative facilities, and the exercise of market power in a traditional monopoly service. Grain Belt is seeking the power of the state of Missouri granted by this CCN without any of the obligations imposed by the law. Show Me is concerned with one enterprise whose property is not devoted to the public service using the land of the state, particularly the eminent domain power of the state, for their own business interests. It is not just and it is not in the public interest of the state of Missouri.

WHEREFORE, Show Me Concerned Landowners requests the Commission reject the application of Grain Belt Express.

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 10th day of April, 2017.

/s/ *David C. Linton*