**BEFORE THE PUBLIC SERVICE COMMISSION**
**OF THE STATE OF MISSOURI**

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| In the Matter of the Joint Application of Invenergy Transmission LLC, Invenergy Investment Company LLC, Grain Belt Express Clean Line LLC and Grain Belt Express Holding LLC for an Order Approving the Acquisition by Invenergy Transmission LLC of Grain Belt Express Clean Line LLC | ) | Case No. EM-2019-0150 |

**MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY COMMISSIONS'S REPLY BRIEF**

The Missouri Joint Municipal Electric Utility Commission ("MJMEUC") respectfully requests that the Missouri Public Service Commission ("Commission") grant Invenergy Transmission LLC ("Invenergy Transmission") the approval it requires to acquire Grain Belt Express Clean Line LLC ("Grain Belt"). Given that the Missouri Landowner's Association, Show Me Concerned Landowners, and the Kroners (collectively "MLA") are not taking a position on issues two and three presented to the Commission, this reply brief will only address issue one. Issue one is a question with a fairly obvious answer - - the Commission has jurisdiction and the statutory authority to approve the sale of Grain Belt to Invenergy.

I. The Prior Litigation History Collaterally Estops The Issue from Being Argued.

MJMEUC's position that the answer is obvious is not borne from hubris or a dismissive reading of MLA's arguments, but rather from a prior decision of this Commission. Grain Belt was found to be an electrical corporation by this very Commission in both EA-2016-0358 ("CCN Case") and in EA-2014-0207. Grain Belt is thus an electrical corporation as a matter of law, subject to this Commission's jurisdiction, including the requirement for prior approval

by this Commission of any sale of assets.[1] Attempts to overturn those prior, final decisions should be done in the appropriate venues.[2]

MLA improperly attempts to describe the doctrine of collateral estoppel as having no meaning with the Commission. That is not the case. Section 386.550 of the Revised Statutes of Missouri states, in its entirety, the following: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." Missouri courts apply the doctrine of collateral estoppel when prohibiting the re-litigation of an issue that was necessary and unambiguously already decided in a different cause of action.[3] Courts consider four factors in determining whether to apply collateral estoppel, as follows:

> (1) the identity of the issues involved in the prior adjudication and the present action,
>
> (2) whether the prior judgment was on the merits,
>
> (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and
>
> (4) whether the party had a full and fair opportunity in the prior adjudication to litigate the issue for which collateral estoppel is asserted. [4]

In this case, all four factors have been met, and as such, collateral estoppel prevents the re-litigation of the issue of whether Grain Belt is an electrical corporation. To hold otherwise would put the Commission in endless rounds of litigation over identical issues and facts between the same parties.

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[1] *See* §393.190, RSMo

[2] *See* Eastern Missouri Landowners Association d/b/a Show Me Concerned Landowers and Reichert's Notice of Appeal in the CCN Case where this issue will be brought before the Court of Appeals.

[3] *Brown v. Carnahan*, 370 S.W.3d 637, 658 (Mo. banc 2012); *Gamble v. Browning*, 379 S.W.3d 194, 198 (Mo. App. 2012).

[4] *In re Caranchini*, 956 S.W.2d 910, 912-13 (Mo. banc 1997) (internal quotation marks and citation omitted).

MLA's reference to the *Stop.Aquila* case is an excellent example of the principles stated above. In that case, the Western District Court of Appeals declined to exercise collateral estoppel regarding a prior judgment (a dismissal by the Commission of an application for a certificate of convenience and necessity), with different parties (Union Electric), in which neither Aquila nor the affected landowners had due process rights in the underlying Union Electric case. Instead, the Court interpreted prior Commission orders regarding Aquila's rights, and determined that Aquila did not possess the requisite legal rights to build the generating plant at issue.[5]

Because the issue of whether Grain Belt is an electrical corporation was fully litigated in the CCN Case, the report and order specifically addressed that issue, a ruling was made that Grain Belt is an electrical corporation, and the parties in this matter were the same parties in that matter, or parties with privity, collateral estoppel applies to this issue.[6] It is therefore barred from further argument in this case.

## II. Danciger Does Not Bar Grain Belt's Status as an Electrical Corporation

As to the application of *Danciger* to these facts, a key fact should be noted: *Danciger* (1918) was issued after the Missouri Public Service Act (1913) was adopted, but before the Federal Power Act (1920)[7] was made law. The distinctions between wholesale regulation (Federal Power Act) and retail regulation (Public Service Act) was not discussed or applied in *Danciger* because that regulatory construct did not exist. Regardless, *Danciger* does not hold that Grain Belt's sale of transmission capacity to MJMEUC is a sale excluded from the public, or any sale by Grain Belt to any other wholesale purchaser of transmission service. Instead,

[5] See *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005).
[6] *In the Matter of Grain Belt Express Clean Line LLC,* Report and Order, EA-2014-0207 (July 1, 2015), pp. 37-40.
[7] Initially called the Federal Water Power Act in 1920 in which wholesale regulation of hydro power generators was given, and then renamed the Federal Power Act in 1935 when wholesale regulation was expanded to all types of generators.

*Danciger* and the *Mississippi River Fuel* cases stand for the principle that an electrical corporation must make its product available to the public indiscriminately, regardless of the number of customers. [8]

Grain Belt already has an order from the Federal Energy Regulatory Commission that requires them to provide service in a non-discriminatory manner per the tariffed terms and conditions.[9] Hypothetically, if collateral estoppel did not apply, *Danciger* permits Grain Belt to be recognized as an electric corporation since Grain Belt will be providing service in an indiscriminate manner.

## III. Other Issues Raised

As to the matter of how the Commission chooses to enforce its filing rules, or their applicability, that issue is not before the Commission for determination.

The argument of whether a utility easement is needed by an electrical corporation in order to fulfill its corporate purpose of transmitting electrical energy is self-explanatory. The rabbit hole that MLA invites the Commission to pursue would effectively bar any new utility from being recognized in Missouri as an electrical corporation. The new utility would be required to possess assets currently being used to provide a public benefit in order to be an electrical corporation, but the new utility could not have those assets unless they were already an electrical corporation. There is no statute or law that supports this interpretation.

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[8] In *State ex rel. M. O. Danciger & Co. v. Pub. Serv. Com.*, 275 Mo. 483, 205 S.W. 36 (1918) at 501 the Court stated as follows: "The fundamental characteristic of a public calling is indiscriminate dealing with the general public." In *St. Louis v. Miss. River Fuel Corp.*, 97 F.2d 726, 730 (8th Cir. 1938), the Court held that "To constitute a public use all persons must have an equal right to the use, and it must be in common, upon the same terms, however few the number who avail themselves of it."

[9] Grain Belt Express Clean Line LLC, 147 F.E.R.C. P61,098, 2014 FERC LEXIS 722 (F.E.R.C. May 8, 2014).

MJMEUC would encourage the Commission to refrain from strained readings of statutes and speculation as to what courts pondered, but declined to address, in opinions.

**Conclusion**

The Commission should approve the acquisition of Grain Belt by Invenergy Transmission. Collateral estoppel bars the only legal issue argued by MLA. MJMEUC, and its hundreds of thousands of customers in this state that are represented by its municipal members, respectfully requests that the Commission approve this transaction.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or electronically mailed to all counsel of record this 15th day of May, 2019.

/s/ Douglas L. Healy

Douglas L. Healy