

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Landowners Alliance, and)
Eastern Missouri Landowners Alliance)
d/b/a Show Me Concerned Landowners,)
and John G. Hobbs)

Complainants,)

Case No. EC-2021-0059

V.)

Grain Belt Express LLC and)
Invenergy Transmission LLC,)

Respondents)

RESPONDENTS' POST-HEARING BRIEF

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ATTORNEYS FOR RESPONDENTS

May 18, 2021

Table of Contents

I. Introduction..... 1

II. Statement of Facts..... 3

III. Argument 5

Issue 1: Does the evidence show that Grain Belt’s website and press release demonstrate the Project’s design and engineering is materially different from what was approved in the Report and Order on Remand in File No. EA-2016-0358? 5

Issue 2: Did the public announcement of those potential changes violate the Commission’s Report and Order on Remand granting Grain Belt a certificate of convenience and necessity (“CCN|”) in File No. EA-2016-0358?..... 8

IV. Renewal of Respondents’ Motion to Dismiss..... 9

I. Introduction

Pursuant to the agreement of the Parties and the concurrence of the Regulatory Law Judge made at the conclusion of the April 15, 2021 evidentiary hearing, Grain Belt Express LLC (“Grain Belt”) and Invenergy Transmission LLC (together with Grain Belt, the “Respondents”), hereby submit their Post-Hearing Brief.

On September 2, 2020, Complainants filed a formal complaint against Respondents with the Missouri Public Service Commission (“Commission”), alleging that Respondents’ potential changes to the Grain Belt Express Project (the “Project”) invalidated the Certificate of Convenience and Necessity (“CCN”) granted to Respondent Grain Belt pursuant to the *Report and Order on Remand* (“CCN Order”) in Case No. EA-2016-0358.

Complainants’ allegations are limited to a single condition established by the Commission in the CCN Order: “if the design and engineering of the Project is materially different from how the Project is presented in Grain Belt Express Clean Line LLC’s Application, Grain Belt Express Clean Line LLC must file an updated application with the Commission for further review and determination.”¹

In its *Order Granting in Part and Denying in Part Motion to Compel*, the Commission defined the issues in this case as (1) whether the Respondents’ website and press release demonstrate the Project’s design and engineering is materially different from what was approved by the CCN Order and (2) whether the public announcement of those potential changes violated

¹ Report and Order on Remand, p. 52, ¶ 6, Case No. EA-2016-0358 (hereinafter “CCN Order”).

the Commission's CCN Order.² Respondents, Complainants, and Commission Staff adopted the Commission's statement of the issues in their *Joint List of Issues*, filed on March 25, 2021.³

The Complainants, who bear the burden of proof, have not submitted any substantive evidence in support of their claims. Complainants' witness, Donald Lowenstein ("Lowenstein"), is not a professional engineer, has never worked for a public utility, has no experience regarding the design and engineering of a high voltage direct current ("HVDC") transmission line, and has no first-hand knowledge of the specific design and engineering of the Project.⁴ The *only* testimony provided by Lowenstein was to note the existence of a factually correct statement regarding eminent domain on the Grain Belt website.⁵ The exhibits entered into the record by Complainants are devoid of foundation or context and, as previously recognized by the Commission, "do not explain their case-in-chief."⁶

To the contrary, the witness for the Respondents, Kris Zadlo ("Zadlo"), is a licensed professional engineer, has been employed by Respondents' affiliate, Invenergy LLC, since 2008, and is responsible for the design and engineering of the Project. He testified that the design and engineering of the Project *has not changed*.⁷ He further testified that Respondents "have not

² Order Granting in Part and Denying in Part Motion to Compel, EFIS Item No. 26, p. 4 (Feb. 24, 2021)

³ Joint List of Issues, Order of Opening, Witnesses and Cross Examination, EFIS Item No. 41, pp. 1-2 (Mar. 25, 2021).

⁴ Tr. 41-42 (Lowenstein).

⁵ Tr. 43 (Lowenstein).

⁶ Order Directing the Filing of Direct Testimony and Modifying the Procedural Schedule, EFIS Item No. 35, p. 2 ("Complainants have provided exhibits that, devoid of context, do not explain their case-in-chief") (Mar. 19, 2021).

⁷ Tr. 76 (Zadlo).

stopped and are continuing to pursue the certificated version of the Project” and “that [the originally certificated] design and engineering is still very much in place.”⁸

Shawn Lange (“Lange”), the witness for Commission Staff, is a professional engineer, has worked for the Commission Staff since 2005, and has testified several times regarding the Project.⁹ Lange reviewed all of the exhibits submitted by Complainants in this case and concluded that those exhibits do not demonstrate that the current Project has materially changed.¹⁰

Accordingly, the only credible and substantive evidence in this case was provided by Zadlo and Lange, and they are in agreement that the design and engineering of the Project is not presently materially different from how the Project was presented in Case No. EA-2016-0358.

Because Complainants have failed to submit evidence in support of their claim or the relief sought (and the evidence is in fact completely contrary to their claim); and because that claim is further not supported by the Commission’s practice and policy or Missouri law, the Complaint should be dismissed and the requested relief denied.

II. Statement of Facts

By virtue of the CCN Order, Respondents possess a CCN to construct, own, operate, control, manage and maintain a high voltage, direct current transmission line and associated facilities in Buchanan, Clinton, Caldwell, Carroll, Chariton, Randolph, Monroe and Ralls Counties, Missouri.

Respondents issued a press release on August 25, 2020, announcing potential changes to the Project that, if implemented, would increase local clean energy access, accelerate billions of

⁸ Tr. 76-77 (Zadlo).

⁹ Tr. 103-104 (Lange); Hearing Exhibit No. 100.

¹⁰ Tr. 102 (Lange).

dollars in economic investment in Kansas and Missouri, and result in up to \$7 billion in electricity cost savings in Kansas and Missouri by 2045.¹¹

The press release also stated that, “Building on the unanimous regulatory approvals from Kansas and Missouri in 2019, Grain Belt Express will seek approvals to the extent necessary for expanded delivery to Kansas and Missouri, as well as for beginning the first phase of Project construction prior to Illinois regulatory approval.”¹²

Several key conclusions were confirmed at the hearing of this matter:

1. None of the potential design and engineering changes mentioned in the press release have been implemented in any way.¹³
2. Complainants have not provided any blueprints, engineering studies or other documentation that Staff would need to review to conclude whether there has been a material change to the Project.¹⁴
3. Staff reviewed the exhibits submitted by Complainants and has been unable to conclude that there have been any material changes to the Project in violation of the Commission’s CCN Order.¹⁵
4. The design and engineering of the Project for which Respondents hold a CCN has not changed from that approved by the Commission in the CCN Order.¹⁶

¹¹ August 25, 2020 Press Release, p. 1 (Hearing Exhibit No. 1)

¹² August 25, 2020 Press Release p. 1 (Hearing Exhibit No. 1).

¹³ Tr. 95 (Zadlo).

¹⁴ Tr. 115 (Lange).

¹⁵ Tr. 102, 103, 110 (Lange).

¹⁶ Tr. 76 (Zadlo) (“**Q:** [by Mr. Schulte] Thank you. This complaint is based on the premise that an August 25, 2020 press release indicates that the design and engineering of the project is materially different than the design and engineering described in the CCN case. So has the design and engineering of the project changed?

A: [by Mr. Zadlo] Absolutely not.”)

III. Argument

ISSUE 1: DOES THE EVIDENCE SHOW THAT GRAIN BELT'S WEBSITE AND PRESS RELEASE DEMONSTRATE THE PROJECT'S DESIGN AND ENGINEERING IS MATERIALLY DIFFERENT FROM WHAT WAS APPROVED IN THE REPORT AND ORDER ON REMAND IN FILE NO. EA-2016-0358?

Complainants have failed to present any substantive or credible evidence explaining their case-in-chief.¹⁷ Even had Complainants presented evidence explaining their case-in-chief, a press release and a website's reference to broadband expansion, developed by Respondents' marketing department, cannot possibly demonstrate anything of substance about the design and engineering of a future, approximately 800-mile, high voltage direct current transmission line.¹⁸ This is particularly true when the project design discussed in the press release and on Grain Belt's website is fluid and conceptual and subject to multiple assumptions and business scenarios still under consideration.¹⁹

The condition on Respondents' CCN clearly states that "if the design and engineering of the Project is materially different from how the Project is presented in Grain Belt Express Clean Line LLC's Application, Grain Belt Express Clean Line LLC must file an updated application

¹⁷ Complainants' witness was not qualified to testify regarding anything of substance or relevance to the Complaint. Tr. 41-42. Complaints exhibits were entered into the record devoid of context. Tr. 52-54, 56-59, 61-62, 66-67, 70-71 (Exhibit Nos. 2-10 received into evidence without foundation or any context provided through witness testimony); *see also*, Order Directing the Filing of Direct Testimony and Modifying the Procedural Schedule, EFIS Item No. 35, p. 2 ("Complainants have provided exhibits that, devoid of context, do not explain their case-in-chief.") (Mar. 19, 2021).

¹⁸ Tr. 76 (Zadlo) ("The press release was a marketing exercise to indicate our openness to exploring the potential to drop off more power in Missouri."); Tr. 94 (Zadlo) ("The point of the press release was to announce those consumer benefits publicly and announce an openness by Grain Belt to increase the converter station and dropoff in Missouri.")

¹⁹ Tr. 76-77 (Zadlo) ("The press release also announced the results of a conceptual study by PA Consulting regarding the opportunity to achieve additional consumer savings based upon various assumptions. These assumptions were part of a theoretical analysis. Design and engineering is not theoretical.")

with the Commission for further review and determination [emphasis added].”²⁰ However, the design and engineering of the transmission line for which Respondents possess the CCN is only approximately 30% complete at this time.²¹ Respondents have yet to start design and engineering of the converter station in Missouri.²² It defies logic for Complainants to suggest that the press release demonstrates that the design and engineering of the Project is at this time “materially different” from that approved, when the design and engineering for the transmission line is not even halfway finished and the design and engineering for the Missouri converter station has not yet begun.

More to the point, Respondents’ August 25, 2020 press release, upon which this Complaint hinges, was simply the initial announcement that potential changes to the Project are under consideration. If and when the potential changes are formalized, as indicated in the press release, Respondents will seek Commission approval of any such Project modifications. Of course, at such future date any such modifications will be supported by documentation, testimony and other evidence for the Commission’s consideration.

Complainants argue that, “Inasmuch as Respondents have publically [sic] announced that they no longer plan to build the Project for which the CCN was granted, at this point Grain Belt does not have a valid CCN to build anything in Missouri.”²³ Respondents have made no such announcement, and in fact have unequivocally stated that they are *not* abandoning the Project for which they hold a CCN.²⁴ Respondents have announced that they are merely exploring an

²⁰ CCN Order, p. 52, ¶ 6.

²¹ Tr. 95.

²² Tr. 81.

²³ Formal Complaint, EFIS Item No. 1, ¶ 7.

²⁴ Tr. 96 (Zadlo) (“We are not abandoning the current CCN.”)

alternative, and have stressed that there have been no commitments made for any of the potential changes discussed in the press release.²⁵

Far from publicly announcing that Respondents no longer plan to build the Project for which it was granted a CCN, all of Respondents' actions reinforce the conclusion that development activities on the certificated Project continue ahead with full steam.²⁶ Accordingly, Complainants' assertion that Respondents no longer have a CCN (or eminent domain authority) is unsupported by any evidence in this proceeding.

Not only are Complainants' claims devoid of factual support, but their requested relief is contrary to Missouri law. If the design and engineering is now materially different (which it is not), it triggers a filing requirement, not invalidation of the CCN. As Commission Staff noted in its October 30, 2020 Reply Brief, there is no provision in 393.170 RSMo. to revoke a CCN on an uncertain date, based on unspecified and subjective evidence of a company's intent to commit to a project.²⁷ And there are certainly no provisions to support revocation of a CCN when the company *has* demonstrated its intent to commit to the certificated project, as is the case here.²⁸

²⁵ Tr. 94-95 (Zadlo).

²⁶ *See*, September 2020 Landowner Update Letter, Exhibit A to Joint Motion to Suspend Deadlines and Establish a Briefing Schedule, "...as the proposed changes do not affect the approved route, project development activities are proceeding based on existing regulatory approvals."

²⁷ Reply Brief of Commission Staff, p. 2 (Oct. 30, 2020).

²⁸ *See, State ex rel. City of Sikeston v. Public Service Com'n of Missouri*, 336 Mo. 985, 996-97, 82 S.W.2d 105, 109 (1935) (finding that the Missouri Legislature made no provision for the Commission to order a utility, against its wishes, to cease and desist from its operations).

ISSUE 2: DID THE PUBLIC ANNOUNCEMENT OF THOSE POTENTIAL CHANGES VIOLATE THE COMMISSION’S REPORT AND ORDER ON REMAND GRANTING GRAIN BELT A CERTIFICATE OF CONVENIENCE AND NECESSITY (“CCN”) IN FILE NO. EA-2016-0358?

Section 386.390 RSMo. authorizes the Commission to hear a complaint that sets forth an act or omission by a public utility to determine whether there has been a violation of “any provision of law subject to the [C]ommission’s authority, of any rule promulgated by the [C]ommission, of any utility tariff, or of any order or decision of the [C]ommission.” The “acts” that are the subject of this Complaint are Respondents’ publishing of a press release and certain verbiage on Respondents’ website.

Complainants have not presented any evidence demonstrating how a press release and a website could possibly violate the Commission’s CCN Order. The only condition referenced in the Complaint states, “if the design and engineering of the Project is materially different from how the Project is presented in Grain Belt Express Clean Line LLC’s Application, Grain Belt Express Clean Line LLC must file an updated application with the Commission for further review and determination.”²⁹ As Staff has recognized, “So long as Grain Belt obtains prior Commission approval of any design or engineering materially different from that already approved, there is no violation of either Section 393.170 or the Commission’s condition.”³⁰

As Respondents have stated many times, Respondents will file for an amendment to the CCN if and when potential changes are in fact formalized.³¹ Accordingly, there is no violation of the Commission’s CCN Order.

²⁹ CCN Order, p. 52, ¶ 6.

³⁰ Staff’s Initial Brief, EFIS Item No. p. 5.

³¹ *See, e.g.*, Joint Motion to Suspend Deadlines and Establish a Briefing Schedule, ¶ 5(c); Respondents’ Initial Brief, ¶ 27; Respondents’ Response to Complainants’ Motion to Compel, ¶ 6.

IV. Renewal of Respondents' Motion to Dismiss

20 CSR 4240-2.070(7) provides that, "The commission, on its own motion or the motion of any party, may after notice dismiss a complaint for failure to state a claim on which relief may be granted or failure to comply with any provision of these rules or an order of the commission."

On March 12, 2021, Respondents filed a *Motion to Dismiss Complaint, or, in the Alternative, Motion to Waive Filing of Rebuttal Testimony, Cancel Evidentiary hearing, and Proceed to Briefing; and Motion for Expedited Treatment* ("Motion to Dismiss"). In their Motion to Dismiss, Respondents asserted that Complainants' case-in-chief is comprised solely of copies of certain of Respondents' data request responses, including preliminary drafts of Respondents' August 25, 2020 press release and several pieces of Respondents' e-mail correspondence, as well as a landowner door-hanger prepared by Respondents or their agents. Respondents further noted that, at that time, the Complainants had not provided any witness testimony,³² nor offered any context for the submitted exhibits and had provided no argument or analysis "explaining that party's entire case-in-chief," in contravention of the Commission's rules.

During the April 15, 2021 evidentiary hearing, Respondents renewed their Motion to Dismiss after Complainants' witness, Lowenstein, demonstrated that he did not have any expertise or firsthand knowledge relevant to this Complaint.³³

In cases where a "complainant alleges that a regulated utility is violating the law, its own tariff, or is otherwise engaging in unjust or unreasonable actions, . . . the burden of proof at

³² MLA did present Lowenstein as a witness at the April 15, 2021 evidentiary hearing. However, Lowenstein's brief testimony added no context, argument or analysis to lend credence to Complainants' case.

³³ Tr. 49-50; 73-34.

hearing rests with the complainant.”³⁴ In order to meet the burden of proof, Complainants were required to meet the preponderance of the evidence standard.³⁵ To meet the preponderance of the evidence standard, Complainants were in turn required to convince the Commission that it is “more likely than not” that Respondents have violated a Commission law, rule or Order.³⁶

As previously noted by the Commission, the burden of proof has two parts: the burden of production and the burden of persuasion.³⁷ The burden of production requires that the complainant introduce enough evidence on the material issue or issues to have that issue or those issues decided by the Commission, rather than the Commission deciding against the complainant in a peremptory ruling such as a summary determination or a determination on the pleadings.³⁸ The burden of persuasion requires that the complainant convince the Commission to favor its position, and this burden always remains with complainant.³⁹

Prior to the evidentiary hearing, the Complainants admitted that the testimony they planned to present would “serve no useful purpose.”⁴⁰ The Complainants followed through on that prediction, and did not present anything of substance or relevance.

³⁴ *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Comm'n*, 116 S.W.3d 680, 693 (Mo. App. 2003). See also, December 11, 2008 Report and Order, Peter B. Howard v. Union Electric Company, d/b/a Ameren UE, Case No. EC-2008-0329 (hereafter “Ameren UE Report and Order.”)

³⁵ *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 109 -111 (Mo. banc 1996), citing to *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979).

³⁶ *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 109-111 (Mo. banc 1996); *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

³⁷ See, Ameren UE Report and Order at p. 11.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Complainants’ Motion for Waiver of Commission Requirement for Filing of Direct Testimony, or Alternatively, for Extension of Current Procedural Schedule, EFIS Item No. 36, p. 3 (Mar. 21, 2021).

“The Commission can only base its decision on the record evidence, and it must have competent and substantial evidence of a party meeting its burden of proof...and a party without evidence, or with insufficient evidence, may fail.”⁴¹

Complainants have failed to carry their burdens in this matter, both the burden of production and the burden of persuasion. Not only has the weight of Complainants’ “evidence” not tipped the balance in Complainants’ favor, it fails to even register on the scales.

For the reasons set forth herein, Respondents are in violation of no conditions, nor any other provision of the CCN Order. Further, the Complainants’ requested relief is contrary to Missouri law. Accordingly, Complainants have failed to state a cause of action for invalidation of Respondents’ CCN, and are therefore not entitled to their requested relief.

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⁴¹ Ameren UE Report and Order at p. 12.

WHEREFORE, Respondents respectfully request that the Commission dismiss this Complaint. Given that this is the third complaint filed by Complainants that is devoid of any factual basis,⁴² Respondents also request that the Commission direct that any future complaints filed by Respondents must be supported by competent evidence, and for any such further relief as the Commission may deem just and appropriate.

Respectfully submitted,

/s/ Anne E. Callenbach

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⁴² See Case No. EC-2020-0408, in which the Missouri Landowners Alliance and Gary Mareschal withdrew their Complaint on the eve of hearing because they had no evidentiary support for the claims that they made nearly seven months earlier; *see also*, Case No. EC-2021-0034, in which the Commission denied a Complaint by the Missouri Landowners Alliance, Eastern Missouri Landowners Alliance d/b/a Show Me Concerned Landowners, and John G. Hobbs, finding that, “On the record in this case, the Commission sees no basis for finding that as used in the CCN Order, the term ‘condition’ means something different and broader than the meaning ordinarily ascribed to the term by this Commission” and that Grain Belt is not required to begin easement negotiations with a particular form of easement agreement, as claimed by the Complainants in that case.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all parties of record by email or U.S. mail, postage prepaid, this 18th day of May, 2021.

/s/ Anne E. Callenbach
Attorney for Respondents