BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Grain Belt Express LLC for an Amendment to its Certificate Of Convenience and Necessity Authorizing it to Construct, Own, Operate, Control, Manage, and Maintain a High Voltage, Direct Current Transmission Line and Associated Converter Station	))))))	File No. EA-2023-0017

RESPONSE TO GRAIN BELT'S
MOTION FOR DISCOVERY CONFERENCE

Pursuant to Commission Rule 20 CSR 4240-2.080(13), the Missouri Landowners Alliance (MLA) and the Eastern Missouri Landowners Alliance d/b/a Show Me Concerned Landowners (Show Me) hereby file this Response to the Motion for Discovery Conference (Motion) filed by Grain Belt Express (Grain Belt) on February 15, 2023.

I. **Summary**

Grain Belt's Motion asks the Commission to compel the MLA and Show Me (Respondents) to each provide answers to four similar data requests.

Respondents' primary objection to the Motion, as discussed below, is that Grain Belt is seeking information concerning the Respondents' members and their internal communications, none of which is remotely relevant to any issue before the Commission in this case.

II. Data Requests at Issue

In Part II of its Motion, Grain Belt accurately describes the four data requests at issue here, as well as the Respondents' objections and responses thereto. To summarize, Grain Belt is asking for the following information from both Respondents:

1. Data request 3 asks for a list of all current members of both organizations.

2. Data request 4 asks for a list of the members who live or own property within 2,000 feet of the centerline of the proposed transmission line.

3. Data request 6 asks for meeting minutes, recordings and/or transcripts for the last three years, if the organizations take such meeting minutes or hold membership meetings.

4. Data request 14 asks for the number of members who have contributed money to each organization over the last 12-, 24- and 36-month periods.

III. Statement of Law Regarding Relevance

Commission Rule 20 CSR 4240-2.090(1) provides that "Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court."

Supreme Court Rule 56.01(b)(1) generally provides, with qualifications, that in civil actions "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action …." That rule further states that "Information within the scope of discovery need not be admissible in evidence to be discoverable if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

To be admissible, evidence must be both logically and legally relevant. *State v. Taylor,* 466 S.W.3d 521, 528 (Mo banc 2015).

Evidence is logically relevant "if it tends to prove or disprove a fact in issue." *Medley v. Joyce Meyer Ministries,* 460 S.W. 3d 490, 495 (Mo App. 2015). *See also State*

v. Williams, 976 S.W.2d 1, 4 (Mo App. 1998) (stating that "evidence is logically relevant when it tends to prove a material fact.")

Evidence is legally relevant "when it is more probative than prejudicial." *Id.*

If the Commission agrees that the material sought by Grain Belt is not logically relevant, then it need not consider the question of whether it is legally relevant. If the material does not tend to prove or disprove a fact in issue, then it cannot possibly have any probative value under the "legally relevant" test. *See Kappel v Prater,* 599 S.W.3d 189, 193 (Mo banc 2020), stating that "Once logical relevance is established, legal relevance weighs the probative value of the evidence against its costs …." (emphasis added).

Finally, and particularly applicable in this case, is the black-letter rule that "The party seeking discovery shall bear the burden of establishing relevance." Supreme Court Rule 56.01(b)(1).

IV. Argument

Data Request 3: the names of all members in both organizations. Given that this proceeding involves a request for a Certificate of Convenience and Necessity, under Commission precedent the case will in all probability be decided solely on the basis of whether Grain Belt has satisfied the five Tartan factors:

1. There must be a need for the service;
2. The applicant must be qualified to provide the proposed service;
3. The applicant must have the financial ability to provide the service;
4. The applicant's proposal must be economically feasible; and

5. The service must promote the public interest.[1]

Grain Belt does not even attempt to argue that a list of all membership names is somehow relevant to any of the Tartan factors. Instead, Grain Belt attempts to bootstrap its case here by creating issues which are not germane to any of the questions which must actually be decided in this case. It then proceeds to argue that the information it seeks is relevant to the new-found issues which it has sought to introduce.

Grain Belt begins by arguing as follows: "MLA and Show-Me should not be permitted to rely upon their membership to justify their participation in this docket, and then refuse to provide that information."[2]

But that begs the question as to why the number of members in each organization is relevant to any real issues in this case.

Grain Belt claims that Respondents used the numbers in order to justify their "standing" in this case.[3] However, no particular number of members is required for an organization to establish standing while representing others in a Commission proceeding. As explained in *State ex rel. Summers v. Pub. Serv. Comm.,* 366 S.W.2d 738, 742 (Mo. App. 1963):

> the interest necessary to authorize intervention should be the same as that required to become a complainant upon whose complaint a case is commenced. Any local partisan interest in the situation involved, such as a customer, (or) representative of the public in the locality or territory affected … is … a sufficient basis for intervention. (ellipses in original).

[1] Case No. EA-2016-0358, Report and Order on Remand, issued March 20, 2019, p. 40. Based on this last case, if the Tartan factors are satisfied then the question of conditions and waivers may also be at issue. *Id.* p. 47.
[2] Motion, par. 13, p. 3.
[3] Id., par. 14, p. 3.

Stated another way, the Respondents have the right to represent their members, regardless of their numbers, under what is termed "associational standing". To qualify for standing under that test, an organization must demonstrate (1) their members would otherwise have standing to participate in their own right; (2) the interests they seek to protect are germane to their organizations' purpose; and (3) neither the claim asserted nor the relief requested requires participation of individual members in the case. *St. Louis Ass'n of Realtors v. City of Ferguson,* 354 S.W.3d 620, 623 (Mo banc 2011)

Here, those three criteria have clearly been met, and "standing" has been established for both Respondents regardless of the specific number of their members.

Grain Belt relies at paragraph 12 of its Motion on two cases which it rejected itself when arguing against the Respondents' earlier Motion for Discovery Conference: *Arkansas Power & Light, and Utility Consumers Counsel.*[4] Neither case is significant here, in that they dealt with information actually submitted by a utility to support its case-in-chief, not on information which has no bearing on any of the issues in the case.

Grain Belt's real argument regarding Data Request No. 3 is that the more members an organization has, the more weight the Commission will give to what that organization has to say. In Grain Belt's words, they fear that the quantity of Respondents' membership rolls will "amplify the weight of their arguments."[5] They further contend that the Commission must be able to ascertain the weight it should give to Respondents' positions in this docket, based on the size of their memberships.[6] And they

[4] Grain Belt's Sur-Reply to MLA's Response to Grain Belt's Response to Motion for Discovery Conference, filed January 27, 2023.
[5] Motion, par. 14, p. 3.
[6] Motion, par. 15, p. 4.

argue that ascertaining the numbers in each organization "will allow the Commission to properly consider and assign appropriate weight to their positions."[7]

This line of argument not only lacks any evidentiary or logical support, but it amounts to a disservice to the Commission.

As the Commission is well aware, its decisions must be based on facts, and its findings may not be "completely conclusory." *State ex rel. Coffman v. Pub. Serv. Comm.*, 150 S.W.3d 92, 101 (Mo. App. 2004). Neither the law nor Commission precedent provides that a case may be decided on the basis of which side brings the most voices to the table.

Yet under Grain Belt's theory, in contemplating how to rule on any of the Tartan factors, a Commissioner's thought process, whether consciously or subconsciously, would go something like this: "Well, the MLA and Show Me between them have some 1,500 members. I might be tempted to resolve this issue against them if they had significantly fewer numbers, but given the extent of their membership I'll vote in their favor."

While that scenario is obviously ludicrous, it does in fact represent the theoretical basis for Grain Belt's claim that the number of Respondent's members is relevant here.

If common sense and past results mean anything, that is definitely not the way the Commission operates. In the last CCN case, Respondents' Motions to Intervene cited the same number of members as they did in this case: over 1,100 in the MLA, and over 400 in Show Me[8]. .Despite these numbers, in the last case the Commission summarily

[7] *Id.*
[8] For the last case, EA-2016-0358 see Motions to Intervene at EFIS 51 and 60. For this case, see EFIS 5 and 6.

dismissed the testimony of two of their expert witnesses.[9]; it made no mention at all of their other witnesses;[10] and it rejected their legal argument regarding the status of Grain Belt as a public utility.[11] Furthermore, in the two complaint cases cited by Grain Belt which went to the Commission for a decision, the Respondents' position was rejected in both instances.[12]

Respondents are not claiming here that they were treated unfairly with respect to any of these matters. The point is, if any conclusion at all can be drawn with respect to Grain Belt's Data Request number 3, it is, as would be expected, that the Commission is not swayed by the membership numbers of the MLA and Show Me.

For the reasons set forth above, Respondents respectfully submit that Grain Belt has failed to meet its burden of proving that the names of Respondents' member are somehow relevant here.

Data Request 4: list of members who live or own property within 2,000 feet of the proposed line. First, if the Commission unfortunately rules that Respondents must produce their entire membership lists, as addressed above, then Data Request 4 is moot. As Grain Belt states, with the membership lists it can use its own land records to determine the number of landowners within 2,000 feet of the line. (Motion, par. 26).

If Data Request 4 is not rendered moot, then it should be denied on the ground that the number of landowners within the arbitrary distance of 2,000 feet from the line is not relevant to any issue in this case.

[9] File EA-2016-0358, Report and Order on Remand, p. 27.
[10] At Exh. 300, 301, 401, 402, 403 and 404.
[11] Id. at 37-40.
[12] Case numbers EC-2021-0034 and EC-2021-0059, cited by Grain Belt at par. 35, p. 9 of its Motion.

As Grain Belt indicates, Respondents' Motions to Intervene state that its members consist "in large part" of people who live on or in the general vicinity of the proposed line. (Motion, par 22, p. 6) However, the term "in large part" has no particular definition, and was used only in its general sense in the Motions to Intervene.

Another problem with Grain Belt's argument is that it assumes the term "in the general vicinity of the proposed line" is somehow defined by a distance of 2,000 feet. That figure is totally arbitrary. It implies that someone living 1,999 feet from the line is within the line's "general vicinity", while a landowner living 3,000 feet from the line is not. Respondents' Motions to Intervene implied no such distinction.

In short, due to the inherent ambiguities surrounding data Request 4, and the generalized nature of the terms used in the Motions to Intervene, the number of people within 2,000 feet of the line will not refute the assertion that Respondents' memberships consist "in large part" of people who live "in the general vicinity" of the proposed line.[13]

Grain Belt questions how the Respondents could claim that their memberships consist in large part of people who live on or in the general vicinity of the line, when they do not have records which show the exact distance between each member and the proposed line. (Motion, par. 22, p. 6).

However, it is logical to assume that through contacts and discussions such as those at grass-roots organizational meetings, and the numerous local public hearings sponsored by the Commission in the two prior CCN cases, the organizers of the MLA and Show Me could say with confidence that their membership consists in large part of people who live in the general vicinity of the proposed line. Grain Belt has certainly not

[13] Motions to Intervene, par. 4.

met its burden of proving that its artificial figure of 2,000 feet somehow defines the term "in the general vicinity."

The verified responses from both Respondents to Data Request 4 state that their records do not show the distance of their members' property from the centerline of the proposed line. They state, therefore, that compiling a list of members within 2,000 feet of the line would require them to create a study or analysis which does not exist, and which would be unduly burdensome to compile, if it could be compiled at all. (Motion, par. 17, p. 4-5; par. 19, p. 5)

The fact is, if Respondents' records do not indicate the distance from a member's property to the proposed line, then obviously the data requested by Grain Belt cannot be extracted from Respondents' existing records. Accordingly, Respondents contend that armed only with a list of members, the task of determining which of those members lived within exactly 2,000 feet of the line would indeed be unduly burdensome and thus costly to compile. This would be particularly true if a mailing address is not available for all of the members – a matter not addressed by Grain Belt. Given that Grain Belt has failed to meet its burden of proving that the evidence is even relevant, Respondents should not be made to compile the analysis sought by Grain Belt.

Grain Belt states that the Motions to Intervene talk about members being in the general vicinity of the line, "yet now, when called for specifics, they claim that they do not have such records." (Motion, par. 22, p. 6) That should come as no surprise. Grain Belt's analysis wrongly implies that Respondents claimed to have records of how far each member lives from the proposed line. That obviously is not the case.

Grain Belt next claims that it is not requesting a study or analysis from Respondents, but only a portion of their membership rolls consisting of individuals who live within their 2,000 foot criterion. (Motion, par. 23, p. 6). But Grain Belt fails to explain how that portion of the membership rolls is to be extracted – other than by a new study or analysis. Yet Grain Belt goes on inexplicitly to argue that it simply requests that the data be collected, and that "No study or analysis is required." (Motion, par. 24, p. 7)

Grain Belt also points out that both Respondents provided the names of certain individuals who Respondents believed to live or own property within 2,000 feet of the line. They then take satisfaction in stating that providing these names "indicates the list is not complete and accurate." (Motion, par. 25, p. 7). Respondents could not agree more, which is precisely why they cannot comply with this data request without conducting a complicated study or analysis of where all of their members live.

Grain Belt itself recognizes the general principle that discovery cannot compel a party to create a study which does not already exist. As shown in the attached copy of data request AP6 to Grain Belt from the MLA, one of Grain Belt's objections to the data request was as follows:

> Grain Belt further objects to this request in that it requests that Grain Belt or its witness to create a study or analysis not currently in existence ….

In conclusion, Grain Belt has failed on several grounds to meet its burden of proof regarding its Data Request 4.

Data Request 6: meeting minutes, recordings and transcripts from the last 3 years. With all due respect, Grain Belt's initial argument on this item is confusing. They point out that the Respondents' Motions to Intervene state their "members have interests which are different from that of the general public and those interest could be adversely

affected" by the proposed line. (Motion, par. 32, p. 8) From this fact they then conclude that the documents requested here "would reflect the scope and extent of the interests of MLA's and Show-Me's membership, which is directly relevant to their participation and weight of their arguments in this docket." (Id.).

The nature of this argument makes it difficult to address. Respondents can only say that aside from the common interest of opposing the Grain Belt Project, the scope and extent of their members' interests are totally irrelevant to any issue in this case.

Even under Grain Belt's expanded view of relevance, the only documents which could possibly qualify for discovery under this item would be the authorizations by Respondent's Boards and/or officers to intervene <u>in this particular proceeding</u>. And proof of those authorizations was in fact provided to Grain Belt by both the MLA and Show Me in their responses to its Data Request No. 11. (See accompanying Supplemental Response to MLA 11 and to Show Me 11).

The request for internal documents covering the last three years is an obvious fishing expedition. Or as Grain Belt states, information from the last three years would provide information to Grain Belt about Respondents' Board of Directors involvement in four cases from past years. (Motion par. 33 and 35, p. 9) Regardless of what transpired with respect to those four closed cases, it could have no possible bearing on any issue in this proceeding. The same holds true with respect to any deviation between Respondents' Bylaws and its retrievable records. To the extent there were any oversights there, that matter is certainly not a proper subject for debate in this forum.

<u>Data Request 14: the number of members who have contributed money to the MLA and Show Me over the last 12, 24 and 36 month periods.</u> Grain Belt claims that

this information is relevant because the level of contributions will "demonstrate MLA's and Show-Me's members' actual level of activity and interest in the docket …."

First, the level of interest in this case on the part of Respondents' members is absolutely irrelevant to any issue to be decided by the Commission in this proceeding.

In particular, and contrary to Grain Belt's contention, the members' level of interest has nothing to do with the Respondents' standing to participate in this case, or to the weight to be ascribed by the Commission to their arguments in this proceeding. (See Motion, p. 11).

And even if the inquiry was somehow relevant to anything, Grain Belt has offered no basis for assuming that the level of contributions is a legitimate barometer of the members' interest in this proceeding. To overcome this hurdle, Grain Belt would have had to demonstrate a correlation between the timing of any solicitations and the response from the members thereto. The simple level of any contributions over the last three years shows nothing about the level of the members' current interest in these proceedings. In short, Grain Belt has failed to meet its burden of proving that the data sought in Data Request 14 is somehow relevant in this proceeding.

V. Conclusion

Grain Belt has failed, first, to raise any issue which is relevant to any legitimate issue in this case. Moreover, in addressing the issues which it did manufacture, it failed to meet its burden of proving that any of its data requests are relevant even to those issues. Accordingly, the MLA and Show Me respectfully request the Commission to deny Grain Belt's Motion with respect to the four sets of data requests discussed above.

Respectfully submitted,

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I certify that a copy of this filing was sent by electronic mail this 21st day of February, 2023, to all parties of record.

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