

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Landowners Alliance, and)
Eastern Missouri Landowners Alliance)
DBA Show Me Concerned Landowners, and)
John G. Hobbs,)
)
Complainants,)
)
V.)
)
Grain Belt Express LLC, and)
Invenergy Transmission LLC)
)
Respondents.)

Case No. EC-2021-0059

RESPONDENTS’ RESPONSE TO COMPLAINANTS’ MOTION TO REVISE
PROCEDURAL SCHEDULE

Grain Belt Express LLC (“Grain Belt”) and Invenergy Transmission LLC (together with Grain Belt, the “Respondents”), pursuant to 20 C.S.R. 4240-2.080(13) and the December 18, 2020 Order Shorting Response Deadline, hereby file their Response to Complainants’ Motion to Revise Procedural Schedule. In support of this Response, Respondents state the following:

I. Background

1. On September 2, 2020, Missouri Landowners Alliance, Eastern Missouri Landowners Alliance d/b/a Show Me Concerned Landowners, and John G. Hobbs (collectively, “Complainants”) filed a Complaint with the Missouri Public Service Commission (the “Commission”) alleging that Respondents’ contemplated changes to the Grain Belt Express Project (the “Project”), as discussed in a website posting and press release, invalidated the Certificate of Convenience and Necessity (“CCN”) granted to Respondent Grain Belt in Case No. EA-2016-0358 (the “CCN case”).

2. On September 29, 2020, Complainants, Respondents, and the Staff of the Commission (“Staff” and together with Complainants and Respondents, the “Parties”) filed a Joint Motion to Suspend Deadlines and Establish a Briefing Schedule (“Joint Motion”). The Joint Motion states that the Parties agree that “the Complaint is limited to a legal question that can be resolved without Staff undertaking an investigation into the Complainants’ allegations and that would be more appropriately addressed through briefs...”¹ The Joint Motion identified the singular legal issue as “whether Respondents’ contemplated changes to the Project invalidate the CCN granted to Grain Belt in the CCN case.”²

3. The Commission partially granted the Joint Motion, establishing a briefing schedule on the question of “whether a Complaint that Grain Belt published a plan not authorized by its current CCN states a cause of action for the invalidation of its CCN.” On October 23, 2020, the Parties filed Initial Briefs on the question identified by the Commission and on October 30, 2020, the Parties filed Reply Briefs.

4. On December 16, 2020, the Commission issued an Order Directing Additional Briefing. The Order did not rule on whether the Complaint states a cause of action for the invalidation of Grain Belt’s CCN. Rather, the Order directs the Parties to file additional briefs addressing the following questions:

¹ Joint Motion to Suspend Current Deadlines and Establish a Briefing Schedule, ¶ 3. This is clearly either a binding judicial admission (“a more or less formal act done during a judicial proceeding which waives or dispenses with the production of evidence and concedes for litigation purposes that a certain proposition is true,” *Hewitt v. Masters*, 406 S.W.2d 60, 64 (Mo.1966)) or an admissible statement against interest. *Mitchell Eng'g Co., A Div. of CECO Corp. v. Summit Realty Co.*, 647 S.W.2d 130, 142 (Mo. Ct. App. 1982) (previous “writings” filed in court constitute admissions against interest). In either case, Complainants should not be permitted to change course regarding the scope of their discovery given their prior representations.

² *Id.* at ¶ 5(g).

- (1) Does the Respondents' conduct, as described in the pleadings and stipulation, violate the Report and Order on Remand issued in File No. EA-2016-0358?
- (2) Whether Respondents' contemplated changes to the Project invalidate the CCN granted to Grain Belt by the Report and Order on Remand issued in File No. EA-2016-0358?
- (3) Based upon the conduct, as described in the pleadings and stipulation, may the Commission revoke Respondent's CCN issued by the Report and Order on Remand issued in File No. EA-2016-03588?

5. On the same day as the Order Directing Additional Briefing, the Complainants propounded a set of nine data requests to Respondents. On December 17, 2020, the Complainants filed a Motion to Revise Procedural Schedule ("Complainants' Motion"), alleging that "one of the key questions in this case is the extent to which Invenenergy has made the decision to abandon the original project in favor of one comparable to that described in its press release" and that the data requests "are intended to shed light on that very question."

II. Argument

6. Complainants' data requests and Motion unilaterally revise the original agreement by the Parties that "the Complaint is limited to a legal question that can be resolved without Staff undertaking an investigation into the Complainants' allegations and that would be more appropriately addressed through briefs...."³ The Joint Motion established all of the stipulated facts necessary to brief the legal issue identified by the Parties.

³ *Id.* at ¶ 3.

7. Further, the “key question” that Complainants use as justification for their data requests and Motion has no basis in law. As Staff succinctly and accurately stated in its Reply Brief:

Section 393.170 is clear: a CCN expires two years after it is issued if it is not exercised. Under the plain language of the statute, if a CCN-holder truly does not intend to exercise its CCN authority, that authority expires on a specific date under a single, unambiguous, objective criterion. There is no provision in 393.170 to revoke a CCN on an uncertain date, based on unspecified and subjective evidence of a company’s intent to commit to a project.⁴

Accordingly, Complainants’ claim that discovery is required to determine “the extent to which Invenenergy has made the decision to abandon the original [P]roject” is based on a false and dangerous standard. If the type of internal management, planning, and private correspondence sought by Complainants can result in the involuntary “abandonment” of a CCN, then every public utility in Missouri will stop pursuing plans and corresponding with stakeholders about modifications to their projects that could significantly benefit the public interest, for fear that it will invalidate their CCNs.

8. The Complainants’ alleged “key question” is also not found in the Commission’s Order Directing Additional Briefing. The Commission identified three specific questions for additional briefing, and none of them ask “the extent to which Invenenergy has made the decision to abandon the original project.” Specifically:

- Question No. 1 asks whether Respondents’ conduct violates the Report and Order on Remand in the CCN case. There are only two conditions placed on the CCN that are possibly implicated by this case: (1) “if the design and engineering of the Project is materially different from how the Project is presented in Grain Belt

⁴ Staff’s Reply Brief, p. 2.

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”;⁵ and (2) “Grain Belt will not install transmission facilities on easement property in Missouri until it has obtained commitments for funds in an amount equal to or greater than the total cost to build the entirety of this multi-state transmission Project.”⁶ There is no nexus between the internal management, planning, and private correspondence sought by the Complainants and a potential violation of these conditions. First, internal management, planning and private correspondence cannot result in a violation of a condition that imposes a filing requirement when the “design and engineering of the Project is materially different.”⁷ A CCN is not even required under Section 393.190.1 until Grain Belt “begin[s] construction” and with construction yet to begin, there is no design and engineering yet to judge.⁸ Second, internal management, planning, and private correspondence cannot result in a violation of a condition that requires full financing before Grain Belt installs transmission facilities on easement property in

⁵ Report and Order on Remand, p. 52, ¶ 6, Case No. EA-2016-0358.

⁶ Section I.1., Exhibit 206 in Case No. EA-2016-0358, which was ordered and adopted in the Report and Order on Remand at p. 51, ¶ 2.

⁷ See *State ex rel. Harline v. Missouri Public Service Commission*, 343 S.W. 2d 177, 181-82 (1960) (“The utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation and does no harm to public welfare”).

⁸ See Respondents’ Initial Brief, ¶¶ 15-17 (discussing *State ex rel. Missouri Public Service Commission v. Missouri Gas Co.* 311 S.W.3d 368, 370-371 (Mo.App. W.D. 2010) and repeating Respondents’ commitment to seek regulatory approval for modifications once those modifications are solidified and before construction begins); Staff’s Initial Brief, p. 4-5 (“Grain Belt has explicitly acknowledged, within the press release attached to the complaint, that it will seek approvals as needed for the proposed changes to its CCN. Doing so would comply with the Commission’s condition.”).

Missouri. Once again, with construction yet to begin, a complaint based on this condition is not yet ripe.⁹

- Question No. 2 is the question agreed upon by the Parties in the Joint Motion. The Joint Motion included the stipulated facts necessary to brief this legal issue.¹⁰ Complainants have already agreed—through a binding judicial admission and/or admissible statement against interest—that no further discovery is needed on this issue.¹¹
- Question No. 3 is a purely legal question about the Commission’s authority. No further development of facts is necessary to address this question.

9. The Complainants’ Motion makes no attempt to tie their data requests to the questions in the Commission’s Order Directing Additional Briefing. Complainants’ Motion merely quotes the Order Directing Additional Briefing as stating, “[i]f any party believes additional evidence needs to be presented to fully respond to this order, that party may request such relief as the party deems necessary.” This statement does not give Complainants carte blanche to harass the Respondents with data requests based on a standard of Complainants’ own invention. While it is perfectly appropriate to provide parties with a reasonable opportunity to issue discovery relevant to the questions asked in the Commission’s Order, the data requests propounded by Complainants—with the possible exception of Data Request Nos. 8 & 9 (discussed below)—fail to meet that standard.

⁹ See Respondents’ Initial Brief, ¶ 18 (“Inasmuch as no transmission facilities have been installed, Respondents have not violated this condition.”).

¹⁰ Joint Motion to Suspend Current Deadlines and Establish a Briefing Schedule, ¶ 5.

¹¹ *Supra* note 1.

10. Data Request No. 8 asks, “Do Respondents presently plan to eventually seek regulatory approval from the Missouri Commission for the changes described in the press release attached as Exhibit 1 to the Complaint in this case, assuming no other significant changes are proposed to the project as originally approved?” Respondents have stated on *numerous* occasions that, if and when the modifications described in the press release are solidified, they will make a filing with the Commission pursuant to the condition set forth in the Report and Order on Remand in the CCN case.¹² Accordingly, while Data Request No. 8 may be relevant, it has been asked and answered many times.

11. Data Request No. 9 asks, “If the answer to the preceding item is ‘yes’, on what date or approximate date do Respondents anticipate they will file for such approval.” As the Commission knows, the Grain Belt Project is an extremely complex project with countless moving parts involving multiple regulatory jurisdictions, engineering issues, financing considerations, offtake negotiations, interconnection processes, subcontractor negotiations, and more. It would be a waste of the Commission’s and the stakeholders’ time for Grain Belt to file an application addressing modifications to the design and engineering of the Project while those modifications are still fluid and conceptual. Furthermore, because of the number and complexity of the moving parts, it is not possible to state with specificity when the potential modifications will be certain enough to file an application to comply with the CCN condition. Assuming that Grain Belt goes forward with the contemplated modifications, it is committed to filing as soon as practicable after such modifications are reasonably certain.

¹² August 25, 2020 Press Release, p. 1 (attached as Exhibit 1 to the Formal Complaint); September 2020 Landowner Letter, p. 1 (attached as Exhibit A to Joint Motion to Suspend Deadlines and Establish Briefing Schedule); Respondents’ Initial Brief, ¶ 11; Respondents’ Reply Brief, ¶ 14.

WHEREFORE, Respondents respectfully request that the Commission deny the Complainants' Motion to Revise Procedural Schedule and direct the Parties to file briefs on the schedule established in the Commission's Order Directing Additional Briefing.

Respectfully submitted,

/s/ Andrew O. Schulte

Anne E. Callenbach MBN 56028

Andrew O. Schulte MBN 62194

Polsinelli PC

900 W. 48th Place, Suite 900

Kansas City, MO 64112

Telephone: (816) 572-4760

Facsimile: (816) 817-6496 Fax

acallenbach@polsinelli.com

aschulte@polsinelli.com

ATTORNEYS FOR RESPONDENTS

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 22nd day of December, 2020.

/s/ Andrew O. Schulte

Attorney for Respondents