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

MLA'S RESPONSE TO GRAIN BELT'S
"RESPONSE TO MOTION FOR DISCOVRY CONFERENCE"

Pursuant to the discussion at the Discovery Conference on January 20, 2023, and the Commission's Order of that same date, the MLA respectfully submits this Response to Grain Belt's "Response to Motion for Discovery Conference", filed on January 17, 2023.[1]

1. Objections Based on Nondisclosure Agreements.

Grain Belt has objected to all eleven of the data requests at issue on the ground that the documents include confidentiality agreements and/or nondisclosure agreements with counterparties.[2] This objection has at least one flaw, and probably two.

First, the material requested in data requests SS-5 through SS-8, and SS-22, was all relied upon by Grain Belt in support of its case-in-chief.[3] But a party which submits evidence in support of its direct case cannot later withhold that material from its opponents. *See State ex rel. Arkansas Power & Light v. Mo PSC,* 736 S.W.2d 457 (Mo. App. 1987), cited at pages 3-4 of the MLA's Motion for Discovery Conference.

[1] This filing is being submitted by the MLA, the Eastern Missouri Landowners Alliance d/b/a Show Me Concerned Landowners, Norman Fishel, Gary and Carol Riedel, and Dustin Hudson. For convenience, this group will be collectively referred to here as the MLA.
[2] See Grain Belt's Response, p. 1, par. 2; p. 2 par. 3; p. 2 par. 4; and Grain Belt's objections as set forth in the MLA's Motion for Discovery Conference, at pages 1, 5, 6-7, 7, 8, 10, 11, 12, 13 and 14.
[3] MLA's Motion for Discovery Conference, pp. 2, 5, 7, and 9, and testimony from Grain Belt referenced therein.

And in *State ex rel. Utility Consumers Counsel v. Pub. Serv. Comm.,* 562 S.W. 2d 688, 694 (Mo. App. 1978) the Court held as follows:

> Though the court acknowledges that in some circumstances the proprietary nature of information may shelter it from examination, the Company here cannot hide behind the proprietary nature of the information. The Company proffered testimony and exhibits based on proprietary information. If it seeks to rely on proprietary information to carry its burden of proof and, thereby, benefit from the use of such information, then it may not protect that information from scrutiny by claiming it need not disclose.[4]

As the Court also noted: "The hearings of administrative agencies must be conducted consistently with fundamental principles of due process which include the right of cross-examination."[5] Obviously the MLA will not be able to conduct meaningful cross-examine concerning documents which it has never seen, thereby depriving Movants of their constitutional rights to due process under the federal and state constitutions.

Second, based on recollection, counsel for Grain Belt stated at the Discovery Conference on January 20, 2023, that its nondisclosure agreements include a provision allowing disclosure if so ordered by a court or administrative agency of competent jurisdiction.

If that is the case, then if the Commission does direct Grain Belt to disclose the materials at issue here, the rest of the nondisclosure agreement becomes meaningless.

And in any event, the parties to the MOU obviously cannot dictate the terms under which a court or the Commission may control the discovery process.

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[4] The court ultimately ruled in the Company's favor, on the ground that the issue was not properly preserved.
[5] Id. 693-94.

2. <u>New Objections Which Have Been Waived.</u>

In its Response, Grain Belt raises the following objections to the data requests at issue here:

(a) At page 4 of its Response, Grain Belt claims that the disclosure of the information in question would "disrupt the competitive ecosystem across the region for the purchase and sale of electricity."

(b) At page 5 Grain Belt claims that the negotiations in question "often depend on puffery, evolving understandings of the project itself, and the constant changes in supply, demand, and pricing of electricity in the market and for that potential supplier or customer."

(c) At page 6 Grain Belt argues that the documents in question would only serve to muddy the evidentiary record with materials that did not survive the negotiating process.

(d) Finally, Grain Belt claims at page 6 that in the last CCN case (EA-2016-0358) the Commission did not rely on evidence of negotiations or bargaining positions in ruling on the need for and economic feasibility of the line.[6]

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[6] Even assuming that was true, in the last CCN case, unlike the current one, the record contained hard evidence from which the Commission could rule on the need and economic feasibility issues. For example, there was documented evidence in the last case of the following: that power prices in the PJM (which would receive power from the converter station at the Illinois/Indiana line) are generally $10.00/MWh higher than prices that would be paid for the 500 MW of energy sold over the Project into Missouri (Report and Order on Remand, p. 25, par. 75); that there is a very strong corporate demand for renewable energy in PJM, which contributes to Grain Belt being able to charge higher prices for the energy in PJM (p. 25, par 76); a Grain Belt witness compared the Project's delivered cost of wind energy in Missouri to other alternatives through a levelizd cost of energy analysis, "which is the best financial technique to compare different energy generation sources (p. 26, par. 80); when Grain Belt conducted an open solicitation in 2015, it offered a price that was higher than the price offered to a group of Missouri municipalities and the normal Missouri rate, yet it received bids that were 6 ½ times the capacity available on the project (p. 29, par 93). Grain Belt has not conducted such a solicitation since that date. And because of the price spread between the PJM and Missouri markets, the Commission found that "it is the 3500 MW portion of the project to be sold in PJM that demonstrates the financial viability of the project overall …." (p. 44) No comparable data has been presented in the current case.

None of these points was raised by Grain Belt in their original objections to the data requests, and it is too late to do so now.

Commission Rule 20 CSR 4240-2.090 provides that discovery may be obtained under the same conditions as in actions in the circuit courts. And Supreme Court Rule 57.01(c)(3), which pertains to written interrogatories (the equivalent of data requests), states that "if information is withheld because of an objection, then each reason for the objection shall be stated." Or as explained in *Carmed 45 v. Huff,* 630 S.W.3d 842, f.n. 13 (Mo. App. 2021), "Missouri rules of discovery require a party to include any objection in their timely responses to discovery."

The objections referenced in paragraphs (a) through (d) above were not raised by Grain Belt in their initial, timely response to discovery. Therefore, in addition to relying on unsubstantiated assertions, those objections have been waived.

3. Miscellaneous Points.

(a) At paragraph 6 page 3 of its Response, Grain Belt states that data request SS-22 seeks "all documents relating to any negotiation Grain Belt Express has had for a MOU between it and any potential customer …." That assertion is incorrect. When read in context, including the testimony referenced in the data request, the MLA was only asking for documents related to the existing MOUs – not documents relating to "any potential customer." See data request SS-22 at page 8 of the MLA's Motion for Discovery Conference.

(b) At paragraph 4, p. 2 of its Response (and elsewhere) Grain Belt argues that as opposed to providing complete copies of the MOUs, it could provide descriptions of the MOUs, or redactions which would serve the purpose for which copies of the MOUs are

sought. Supposedly, the MLA's "purpose" was "to evaluate whether there is existing demand for the Amended Project as it relates to the 'need' and 'economic feasibility' elements of the Tartan Factors."

Grain Belt's suggestion has two problems. First, as initially stated in data request SS-5, the MOUs were sought not only to determine demand for the Project, but also for the prices at which capacity could be sold from the Project. (See 1st par. of p. 3 of the MLA's Motion). And pricing information is obviously a key component in determining whether the Project is economically feasible; i.e., whether it can at least cover its own costs.

Second, Grain Belt did not offer any type of concrete proposal for what it might be willing to offer in lieu of the full MOUs. Anything short of all of the information referenced at page 3 of the MLA's Motion would clearly deprive the MLA of the information which is essential to a proper evaluation of the MOUs.

(c) Finally, Grain Belt states at page 5, par. 16 that the MLA did not establish that "these confidential documents" were relevant here. While it is not clear which documents are being referred to there, in Grain Belt's initial objections they made no mention of relevance with respect to data requests SS-5 through SS-8, and SS-22.[7]

[7] For SS-5, see p. 1 of the MLA's Motion; for SS-6, see p. 5; for SS-7, see p. 6-7; for SS-8, see p. 7; and for SS-22, see p. 8.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this filing was sent by electronic mail this 24th day of January, 2023, to all parties of record.

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