

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)	

MOTION FOR RECONSIDERATION OF MARCH 24, 2021 ORDER

Pursuant to 20 CSR 4240-2.160(2), Invenergy Transmission LLC (“Invenergy Transmission”) and Grain Belt Express LLC (“Grain Belt” and together with Invenergy Transmission, the “Respondents”) hereby file this Motion for Reconsideration of the Commission’s March 24, 2021 Order Regarding Complainants’ Motion for Waiver of the Rule Requiring the Filing of Direct Testimony or, Alternatively, to Extend the Procedural Schedule. In support of this Motion, Respondents state as follows:

I. BACKGROUND SUMMARY

1. On September 2, 2020, Complainants filed a formal complaint against Respondents at the Missouri Public Service Commission (“Commission”), alleging that Respondents’ contemplated changes to the Grain Belt Express Project (the “Project”), as reflected in their August 25, 2020 press release and as briefly described on their website, invalidated the Certificate of Convenience and Necessity (“CCN”) granted to Respondent Grain Belt in Case No. EA-2016-0358 (the “CCN case”).

2. On January 20, 2021, the Commission issued an order establishing a procedural schedule in this case. That procedural schedule required the Complainants to file direct testimony no later than February 26, 2021. The January 20, 2021 Order also contained additional procedural requirements, most notably that all parties must comply with Commission Rule 20 CSR 4240-2.130, the Commission's rule to file pre-filed testimony, and that each party's position statement shall cite to any pre-filed testimony in support.

3. Subsequently, on February 24, 2021, the Commission issued an Order Modifying the Procedural Schedule and Denying Motion to Suspend Procedural Schedule. In the February 24, 2021 Order, the Commission stated that it is modifying the procedural schedule to allow additional time to file direct testimony and rebuttal testimony.¹ The February 24, 2021 Order directed Complainants to file direct testimony no later than March 11, 2021.

4. On March 10, 2021, Complainants filed seven exhibits as the public portion of their direct case, and three additional exhibits as the confidential portion of their direct case. Complainants submitted no direct testimony, no analysis, and no arguments in support of their allegations.

5. In response to Respondents' March 12, 2021 Motion to Dismiss this proceeding because Complainants' failed to file direct testimony or otherwise explain and support their case-in-chief, on March 15, 2021 the Commission issued an order directing Complainants, no later than March 17, 2021, to either file direct testimony in support of their case-in-chief or an explanation as to why they believe no such testimony is necessary. Complainants responded to

¹ February 24, 2021 Order Modifying the Procedural Schedule and Denying Motion to Suspend the Procedural Schedule at pp. 1-2.

the Commission's Order by noting that they could not support the exhibits filed as their case-in-chief with any "meaningful testimony."²

6. Thereafter, on March 19, 2021, the Commission for the third time directed that Complainants file direct testimony, noting that:

Commission Rule 20 CSR 4240-2.130(7)(A) provides that direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief. Complainants have provided no testimony asserting and explaining their entire case-in-chief. Direct testimony must identify the claim and set out the prima facie elements establishing that claim. Complainants have provided exhibits that, devoid of context, do not explain their case-in-chief.³

7. The March 19, 2021 Order also modified the procedural schedule to dispense with prefiled rebuttal testimony from Respondents and Staff, and indicated that such testimony will be provided live at the evidentiary hearing.⁴

8. Thereafter, in response to Complainants' March 21, 2021 motion for waiver of the rule requiring direct testimony, or, alternatively, to extend the procedural schedule, the Commission, on March 24, 2021, issued an order dispensing with prefiled direct testimony for Complainants and directing that all testimony, both direct and rebuttal, will be provided live at the April 1, 2021 evidentiary hearing by all parties.⁵

9. The Commission's March 24, 2021 Order noted that complaint cases typically do not have prefiled testimony, and that dispensing with all prefiled testimony is consistent with how most complaints are conducted and treats the parties equally.⁶

² Complainants' Opposition to Respondents' Motions of March 12, 2021 at 2.

³ March 19, 2021 Order directing the Filing of Direct Testimony and Modifying the Procedural Schedule at p. 2.

⁴ Id.

⁵ Id.

⁶ Id.

II. RESPONDENTS' REQUEST FOR RECONSIDERATION

10. Respondents do not agree that live testimony for all parties treats the parties equally, or that dispensing with prefiled testimony is at all appropriate in this case. In accordance with 20 CSR 4240-2.160(2), Respondents assert that the Commission's March 24, 2021 Order is unlawful, unjust, and unreasonable.

11. Complainants allege that Respondents' contemplated changes to the Project, as reflected in their August 25, 2020 press release and as briefly described on their website, invalidated the CCN granted to Respondent Grain Belt in the CCN case. Complainants also assert that the announcement of these contemplated changes annuls Respondents' right to utilize eminent domain.⁷

12. This complaint is not merely a billing dispute instigated by a *pro se* litigant's electric or natural gas bill. In a complaint of that nature, Respondents agree that the rather limited factual and legal issues, coupled with the inexperience of a *pro se* litigant, would lend themselves to live on-the-record testimony by all parties. Respondents could only find two complaint cases that went to hearing with live testimony in 2020, and both were billing disputes involving a few hundred dollars, initiated by *pro se* litigants.⁸

13. In stark contrast, the allegations in the instant Complaint, if actually proven by Complainants, have the potential to invalidate the CCN for an approximately \$9 billion transmission infrastructure investment spanning 780 miles and traversing four states, which is

⁷ When the Commission issued the CCN to Grain Belt on March 20, 2019 (becoming effective on April 19, 2019), Grain Belt was appropriately vested with condemnation authority for purposes of developing the Project.

⁸ *Patricia Sue Stinnett v. Kansas City Power & Light Company*, EC-2020-0088; *Debbie Feken v. The Empire District Electric Company*, EC-2020-0183.

anticipated to save Missouri ratepayers millions of dollars annually, and which has already been deemed in the public interest by the Commission. The instant complaint also involves Complainants that have been engaged in proceedings before the Commission since 2014, represented by an attorney with decades of experience in proceedings before the Commission.

14. Moreover, requiring live testimony impermissibly shifts the burden of proof to Respondents. As Respondents have previously noted, 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 hearing rests with the complainant.”⁹ “In a complaint case the burden of proof lies solely with the complainant and neither the burden of production, nor the burden of persuasion, shifts.”¹⁰ The Western District Court of Appeals “has affirmed placing the burden of proof on the complainant, because the burden of proof properly rests on the party asserting the affirmative of an issue.”¹¹

15. As the complaining parties asserting the affirmative of an issue, Complainants bear the burden of proving the allegations in their complaint. By repeatedly failing to file direct testimony, Complainants have admitted that they possess no evidence whatsoever to support the allegations in their complaint. If Complainants possessed any evidence they would have filed direct testimony, argument and analysis fully supporting their case-in-chief.

16. It is unnecessarily punitive to require Respondents, one week before the evidentiary hearing, to prepare to hear, assimilate, and rebut live testimony offered by the

⁹ *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.”)

¹⁰ *Id.* at 695.

¹¹ *State ex rel. GS technologies Operating Co., Inc. v. Public Service Com'n of the State of Missouri*, 116 S.W.3d 680, 698 (W.D. 2003) quoting *State ex rel. Tel-Central of Jefferson City, Inc. v. Pub. Servc. Com'n*, 806 S.W. 2d, 432, 435 (Mo.App. 1991).

Complainants, with: (1) no prior notice of what Complainants' witness, whose identity has never before been disclosed in this proceeding, will say or what that witness will present; (2) no notice regarding the arguments and analysis allegedly in support of the Complaint; and (3) no opportunity to issue discovery or take a deposition to assess the validity of Complainants' arguments and its evidence in support of the same.

17. Live testimony concerning the potential invalidation of the CCN for a project the magnitude of the Grain Belt Project appears equivalent to requiring Respondents to endure a blindfolded blitzkrieg. The vague nature of Complainants' assertions that "rebuttal testimony from Respondents would be useful... in explaining questions inherently raised in the Exhibits filed by the Complainants,"¹² coupled with Complainants' admission that they can "provide no meaningful testimony", offer Respondents little reassurance that Complainants will not unfairly rely upon Respondents to meet Complainants' own burden of proof.

18. Requiring live testimony with little more than a week's notice,¹³ involving a witness that was just identified by Complainants as of the date of this Request for Reconsideration, and with no opportunity to issue discovery, is a violation of Respondents' due process rights. "Due process contemplates the opportunity to be heard at a meaningful time and in a meaningful manner."¹⁴ Permitting Complainants to ambush Respondents does not provide Respondents with a meaningful opportunity to be heard.

¹² Complainants' Opposition at p. 2.

¹³ 20 CSR 4240-2.070(12) requires notice of a hearing not fewer than ten (10) days before the time set for the hearing. Prior to the Commission's March 24, 2021 Order, the "notice" provided to Respondents indicated that they would have three weeks to review and respond to pre-filed testimony in advance of the hearing. Now, less than ten days before the hearing, Respondents are just getting notice of an entirely different type of hearing that completely forgoes pre-filed testimony.

¹⁴ *Moore v. Board of Educ. of Fulton Public Sch. No. 58*, 836 S.W.2d 943, 947 (Mo. banc 1992).

WHEREFORE, Respondents respectfully request that the Commission reconsider its March 24, 2021 Order and for any such further relief as the Commission may deem just and appropriate.

Respectfully submitted,

/s/ Anne E. Callenbach

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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 25h day of March, 2021.

/s/ Anne E. Callenbach

Attorney for Respondents