BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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| In the Matter of the Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity Authorizing It to Construct, Own, Operate, Control, Manage, and Maintain a High Voltage, Direct Current Transmission Line and an Associated Converter Station Providing an Interconnection on the Maywood – Montgomery 345 kV Transmission Line | ) | File No. EA-2016-0358 |

**JOINT SUPPLEMENTAL BRIEF OF NRDC, SIERRA CLUB, RENEW MISSOURI, IBEW UNIONS, WIND ON THE WIRES, AND THE WIND COALITION**

The Missouri Supreme Court has now denied transfer in the case of *Neighbors United against Ameren's Power Line v. PSC and Ameren Transmission Co. of Illinois (ATXI),* WD79883 (slip op. March 28, 2017). The decision of the Court of Appeals Western District is the last word in that case. The Joint Parties listed in the title file this Supplemental Brief in response to the Commission's "Order Directing Filing and Setting Oral Arguments" of July 5, 2017, to consider the effect of *ATXI* on this case.

The Joint Parties ask the Commission to grant the line certificate sought by Grain Belt Express ("GBX") and deny MLA's motion to dismiss. *ATXI* is the law of that case, but if applied here it is unsettled and unsettling law. Without clarification from the Court of Appeals, the Commission should not conclude that *ATXI* governs this case.

*ATXI* appears to read Section 393.170.1, RSMo, out of the statute. The opinion never names line certificates or area certificates, or mentions the differences between them. This goes against long-established precedent recognizing these two kinds of certificates of convenience and necessity. (CCNs). As the case at issue involves a line

certificate, any case that fails to recognize the difference must not be viewed as controlling precedent.

## Summary of Argument

The Joint Parties ask the Commission not to concede that the *ATXI* decision abrogates the practice of granting CCNs on condition that the applicant subsequently obtain county assents over road crossings. The Court of Appeals, for whatever reason, overlooked Section 393.170.1, the very subsection that deals with line certificates. Whether the court really intended to do this needs clarification.

Should Caldwell County finally refuse to give assent, the upshot will be that it has singlehandedly stopped an interstate transmission line. This may raise state issues under Section 229.100, RSMo, and federal issues of preemption and infringement of the Commerce Clause of the U.S. Constitution. These are judicial questions beyond the Commission's jurisdiction, but until the Commission exercises its own jurisdiction, these judicial issues will not be ripe for adjudication.

GBX has met the *Tartan* criteria, and, given the stakes for GBX, its investors and the municipal utilities that wish to subscribe to the line, and the public interest in clean and affordable power, the Commission should grant the CCN or make clear that it will grant it if the resolution of the county assent issue permits.

## A line certificate may issue on condition that the applicant later obtain county assents.

"Electric plant" includes transmission equipment according to Section 386.020(14), RSMo:

> "Electric plant" includes all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, **transmission**, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the **transmission** of electricity for light, heat or power; (emphasis added).

GBX's HVDC line and converter station are "electric plant" subject to Section 393.170.1, RSMo:

> No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.

GBX filed its application under this provision (Application, p. 1).

It is clear from the Court of Appeals' description of ATXI's transmission line project (slip op. 2) that it was also subject to a line certificate, but the *ATXI* Court surprisingly never mentions Section 393.170.1 RSMo. Rather, the court construes § 393.170.2:

> No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter

of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

The *ATXI* Court held that the Commission could not issue a CCN before the necessary franchise or consent was received; *i.e.* it could not issue the CCN on condition that a consent be received later (slip op. pp. 6–8).

A "line certificate" is given for the pre-construction approval of any electric plant, including transmission lines, under Section 393.170.1. *State ex rel. Cass County v. PSC*, 259 S.W.3d 544, 549 (Mo.App. W.D. 2008). A line certificate carries no obligation of general service to the public. *State ex rel. Union Electric v. PSC,* 770 S.W.2d 283, 285 (Mo.App. W.D. 1989). There is no requirement of county consents in Section 393.170.1, although they must still be obtained under the independent authority of Section 229.100.

An "area certificate" is issued for the exercise of a franchise under Section 393.170.2. *Cass County, loc cit.* "Franchise" generally refers to the obligation to serve the public in the area. *State ex rel. Harline v. PSC,* 343 S.W.2d 177, 181 (Mo.App. W.D. 1960).

The Court of Appeals' failure to address Section 393.170.1 is baffling. The Commission should not hasten to read the opinion as overruling by mere implication the Court's own line of precedents recognizing the distinction between line and area certificates. The decision to overrule settled precedent is not taken lightly. Overruling upsets the rule of law and the reliance that parties have placed on prior decisions.

*Planned Parenthood v. Casey,* 505 U.S. 833, 854, 112 Sup.Ct. 2791, 2808, 120 L.Ed.2d 674 (1992).

Past cases have considered both kinds of CCN at the same time, unlike *ATXI.* The Court of Appeals held in *Harline* that a utility with an area certificate did not need a line certificate to extend transmission lines within its service territory but would need a line certificate for lines outside its territory. 343 S.W.2d at 183. The same court held in *State ex rel. Union Electric v. PSC,* 770 S.W.2d 283, 287–8, that Union Electric's pre-existing line certificate could coexist with the area certificate later granted to a cooperative. The court noted that the distinction between area and line certificates had become "blurred" and "unclear," 770 S.W.2d at 285, but clarity is not gained by disregarding one part of the statute.

In *State ex rel. Cass County v. PSC*, 259 S.W.3d 544, 549, the court made it clear that Section 393.170.1 covers line certificates to build transmission lines and production facilities, while Section 393.170.2 covers area certificates "to exercise a franchise by serving customers."

Whatever confusion may still exist, it is clear in this case that GBX neither has nor seeks an area certificate, but rather a line certificate. It is also clear that the requirement that "franchises" and the "consent of the proper municipal authorities" be obtained before the CCN can issue is found only in 393.170.2, not in 393.170.1. The Commission has quite reasonably concluded in the past that it could grant a line certificate conditionally.

**Area certificates and line certificates are different kinds of franchise.**

There is precedent for considering the county assents of Section 229.100, RSMo, to be franchises. *State ex rel. Public Water Supply District v. Burton,* 379 S.W.2d 593, 599 (Mo. 1964). But there are franchises and then there are franchises.

An area certificate is "the principal vehicle for saturating a geographically defined area with retail electric service." *State ex rel. Union Electric v. PSC,* 770 S.W.2d at 285. "In other words, a certificate of the commission is only, where required, an additional condition imposed by the state to the exercise of a privilege which a municipality may give or refuse, and the commission is not to give its certificate to a company until after the city has consented that it may operate within its boundaries." *State ex rel. City of Sikeston v. PSC,* 336 Mo. 985, 82 S.W.2d 105, 108–9 (1935). It is "a necessary condition to the exercise of **any** rights by an electrical corporation in a city," *id.* at 107 (emphasis added). The court spoke of "[a]dditional requirements as to municipal consent" (*i.e.* 393.170.2) but not county assent. 82 S.W.2d at 109.

County assent, on the other hand, has been described as a "license" to use the public roads. *State ex rel. Union Electric v. PSC,* 770 S.W.2d at 286. Such a franchise has also been called a "street easement." *State ex rel. Springfield v. Springfield City Water Co.,* 345 Mo. 6, 131 S.W.2d 525, 530 (Mo. banc 1939). When the Supreme Court said that county assents came within the requirements for municipal consents of Section 393.170.2, it interestingly put the terms "franchise" and "county franchise" in quotation marks. *State ex rel. Public Water Supply District v. Burton,* 379 S.W.2d 593, 599–600 (Mo. 1964).

County assent is a lesser order of franchise than an area certificate, which is an absolute prerequisite to operating as a monopoly utility. It is evident why an area certificate would have to be obtained before a CCN because without it a utility cannot exercise any of the numerous rights and powers of an exclusive service provider. No such necessity exists for a line certificate, which carries with it no obligation to serve retail load. This justifies the distinction made between Section 393.170.1 and Section 393.170.2, if any justification were needed beyond the plain words of the statute.

**A county does not have complete discretion to deny assent.**

A municipality may have unfettered discretion to deny a franchise to serve its territory, but the same does not apply to a county. A county may not deny assent just because it comes under political pressure from landowners. Any denial must have a basis in the county's highway regulations.

Section 229.100 RSMo. contains specific direction on how the county must assent to the approval of these projects: "no poles shall be erected or such pipes, conductors, mains and conduits be laid or maintained, except under such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county commission."

Simply saying a county commission may or may not assent to this project ignores a large swath of Section 229.100, RSMo.

The Commission's role with regard to county assents is to obtain proof that they were granted. Any proceedings against a county based on Section 229.100 lie outside the Commission's jurisdiction.

**The Commission should grant the CCN and deny the motion to dismiss.**

The most troubling aspect of this case is the possibility that a single county could torpedo a four-state transmission line for which GBX already has rate approval from FERC (Application of GBX, p. 8, ¶ 16).

Staff chronicled the history of Section 229.100 in its Initial Post-Hearing Brief in the *ATXI* case, EA-2015-0146. It was enacted in 1901 and amended in 1907, thus predating the Commission itself. It was written in a different world. If Caldwell County denies assent, federal issues of pre-emption and infringement of the dormant Commerce Clause may arise that are beyond the scope of this proceeding and ripe for suit in federal court. There may also be state statutory issues regarding the county's process that are also judicial questions within the exclusive jurisdiction of the courts.

Nevertheless, it matters that the Commission grant the CCN now. Much time and treasure have been expended in the two iterations of this case. GBX has met the *Tartan* criteria. It has shown benefits to Missouri that establish the public interest in the project, particularly by bringing low-cost, clean energy to the state that municipal utilities are eager to avail themselves of. The commitment of these utilities and of investors threatens to unravel with further delay as the realization of the project appears ever more in doubt.

At some point GBX must get the Caldwell County assent. If the county affirmatively denies assent, the state and federal implications of Section 229.100 will arise. But, as the Court of Appeals said in an earlier phase of the ATXI case, until the Commission exercises its jurisdiction those issues will not be ripe for adjudication. *ATXI v. PSC,* 467 S.W.3d 875 (Mo.App. W.D. 2015).

## CONCLUSION

WHEREFORE Sierra Club, NRDC, Renew Missouri, IBEW Unions, Wind on the Wires and The Wind Coalition ask the Commission to either (1) grant the CCN, explaining that it does not consider the *Neighbors United v. ATXI* opinion determinative under the circumstances of this case; or (2) find that GBX has met the *Tartan* criteria and that the Commission will grant the CCN if the outcome of the county assent issue is resolved in favor of GBX.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct PDF version of the foregoing was filed on EFIS and sent by email on this 18th day of July, 2017, to all counsel of record.

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