

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 24th day of
September, 2014.

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-2014-0207

**ORDER DENYING MOTION TO COMPEL AND GRANTING
MOTIONS FOR PROTECTIVE ORDER**

Issue Date: September 24, 2014

Effective Date: September 24, 2014

On March 26, 2014, Grain Belt Express Clean Line LLC (“Grain Belt Express”) applied to the Commission for a Certificate of Convenience and Necessity (“CCN”). Grain Belt Express wants the CCN so it can construct, own, operate, control, manage and maintain a high voltage, direct current transmission line and associated facilities within Buchanan, Clinton, Caldwell, Carroll, Chariton, Randolph, Monroe and Ralls Counties, Missouri, as well as an associated converter station in Ralls County.

Motion to Compel

On August 28, 2014, the Missouri Landowners Alliance (“MLA”) filed a motion seeking to compel Grain Belt Express to further respond to two data requests numbered 48 and 94 that MLA had previously directed to Grain Belt Express. Those data requests sought information regarding responses provided to Grain Belt Express from potential wind

farm generators pursuant to a request for information (“RFI”) and identification of the wind generators it used to calculate the lowest-priced cost of energy mentioned in the direct testimony of Grain Belt Express witness David Berry. In response to the data requests, Grain Belt Express provided several hundred pages of documents, including (1) copies of all responses to the RFI from the 26 wind farm generators, with the identity of the generators and exact locations redacted; (2) a list of all wind generators that responded to the RFI; (3) a credit analysis of those respondents; (4) a list of wind farm projects that responded to the RFI; (5) a map indicating the number of responding wind farms by county; (6) proprietary summaries of the RFI responses, including aggregated pricing and wind speed information, and (7) a map from the U.S. Department of Energy showing wind speeds in the counties where the responding wind farms are located. MLA was not satisfied with Grain Belt Express’ responses, as the information provided did not link the identity and precise location of the wind farm generators with specific wind speed and pricing information. The motion to compel was filed after the parties were unable to resolve their dispute through either negotiation or the procedures required in Commission Rule 4 CSR 240-2.090(8).

MLA argues that it needs to link the responses to the RFI to the name of each responding wind farm generator to determine if the cost of energy estimates are correlated with creditworthiness. MLA also states that it needs the exact location of each wind farm generator in order to confirm or challenge the projected wind speeds and pricing estimates. Grain Belt Express argues that the information requested by MLA is not relevant to the issues in this case; disclosure of that confidential information would reveal trade secrets of the wind generators and result in harm to their business interests; and requiring disclosure

may result in potential litigation and Grain Belt Express being unable to acquire such information in the future. TradeWind Energy, Inc. (“TradeWind”) and Infinity Wind Power (“Infinity”), who are intervenors in this matter, join in Grain Belt Express’ arguments.¹

Parties may obtain discovery regarding any matter, not privileged, that is relevant to a pending action or reasonably calculated to lead to the discovery of admissible evidence.² Missouri’s courts have indicated that there are two aspects to relevance – logical relevance and legal relevance.³ Logical relevance simply means that the questioned evidence tends to make the existence of a material fact more or less probable.⁴ MLA argues that the information requested is relevant because it relates directly to the projected price of energy from the wind farms on the proposed transmission line. Grain Belt Express argues that the information it withheld from MLA is not relevant, but admits that whether the project can provide low-cost wind power to Missouri is relevant. Therefore, the information MLA seeks is logically relevant because it concerns whether the proposed transmission line is economically feasible.

The more difficult question is whether the information MLA seeks is also legally relevant. In deciding whether a party should be allowed to discover certain information, the court, or administrative agency, must weigh “the probative value of the evidence against the dangers to the opposing party of unfair prejudice, confusion of the issues, undue delay,

¹ TradeWind also filed a motion for a protective order on September 8, 2014 regarding the data requests 48 and 94 issued to Grain Belt Express. The Commission need not rule on this motion because of its decision to deny MLA’s motion to compel.

² Mo. Sup. Ct. Rule 56.01(b)(1). Commission Rule 4 CSR 240-2.090(1) provides that discovery in matters before the Commission may be obtained by the same means and under the same conditions as in civil actions in the circuit court.

³ State v. Kennedy, 107 SW 3d 306, 311 (Mo. App. W.D. 2003). That two-part relevance test is used to analyze the appropriateness of an administrative investigative subpoena in Jackson v. Mills, 142 SW 3d 237 (Mo. App. W.D. 2004).

⁴ State v. Kennedy, at 311.

waste of time, cumulateness, or violations of confidentiality. Evidence is legally relevant if its probative value outweighs its prejudicial effect.”⁵ In this case the prejudicial effect to Grain Belt Express, TradeWind and Infinity of disclosure is great, as pricing and wind speed information is the most valuable trade secret of a wind developer. Disclosure of this information would cause Grain Belt Express to violate confidentiality agreements with the RFI respondents, as well as causing TradeWind and Infinity to violate confidentiality agreements with independent contractors who provided information for the RFI and are not parties to this matter. Requiring violation of these agreements will subject Grain Belt Express, TradeWind and Infinity to the risk of litigation and harm the wind generators’ ability to negotiate power purchase agreements with potential customers. Disclosure of such confidential information could result in wind generators and their contractors declining to provide any RFI information for future projects, which would prevent future applicants from obtaining this type of information.

The probative value of the additional information MLA seeks is relatively low. Grain Belt Express has already provided considerable information in response to MLA’s data requests that will permit MLA to develop close estimates of the wind speed and pricing information necessary to verify or challenge the energy cost estimates presented by Grain Belt Express. The balancing test for legal relevance indicates that the value of this additional information is outweighed by the prejudicial effects to Grain Belt Express, TradeWind, and Infinity. Even the Commission’s classification of this information as highly confidential in its records would not adequately protect these parties from disclosure to their

⁵ Jackson v. Mills, 142 SW 3d 237, 240 (Mo. App. W.D. 2004).

competitors' attorneys and experts. Therefore, the Commission will deny MLA's motion to compel disclosure of the requested information.

Motions for Protective Order

MLA has also issued data requests to TradeWind and Infinity seeking information regarding (1) communications between TradeWind and Infinity and prospective purchasers of energy transmitted over the proposed transmission line, and (2) descriptions of pricing calculations included in their RFI responses. TradeWind and Infinity object to the data requests and ask that the Commission issue a protective order to prohibiting the disclosure of the requested information. A copy of the data requests is attached as Exhibit A.

Commission rules provide for the issuance of protective orders when necessary to protect information from discovery more rigorously than would be provided from a highly confidential designation.⁶ Missouri Supreme Court Rule 56.01(c) states that protective orders may be issued "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including...that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way". Where confidential information is being sought, especially from non-parties, the burden is on the party seeking discovery to show that the probative value of the information outweighs the harm disclosure would cause to the person from whom the information is sought.⁷

⁶ Commission Rule 4 CSR 240-2.135(6).

⁷ *Litton Industries, Inc. v. Chesapeake & Ohio Railway Company*, 129 F.R.D. 528, 530 (E.D.Wis. 1990), analyzing Federal Rule of Civil Procedure 26(c), which is substantially similar to Mo. Sup. Ct. R. 56.01(c). The federal district court in *Litton* held that some confidential information could not be discovered where disclosure would provide an advantage to a non-party's competitors and harm the non-party's customer relations. "[F]ederal precedent concerning that [federal] rule...is a persuasive guide for the construction of Rule 56.01(c)". *Stortz by Stortz v. Seier*, 835 S.W. 2d 540, 541 (Mo. App. 1992).

MLA admits that the information it has requested from TradeWind and Infinity is confidential, so the Commission must balance the probative value of the information against the harm of its disclosure in order to determine if a protective order should be granted. As with the motion to compel discussed above, the Commission finds that disclosure of the requested information would be harmful to the business interests of TradeWind and Infinity. Release of that information would negatively impact their ability to negotiate power contracts with customers and subject them to litigation from their independent contractors who provided much of this information. Disclosure would also harm these independent contractors, who are not parties to this matter, as their commercially-sensitive algorithmic and modeling data formed the basis of a portion of TradeWind and Infinity's RFI responses to Grain Belt Express. Designation of this information as highly confidential, which permits disclosure to a party's attorneys and expert witnesses, would not adequately protect the information because once that information is known to other persons it could be utilized in the future in other forums.

MLA states that the information is necessary for it to address disputed issues in the case through testimony, cross-examination and briefs. But MLA has already received considerable information from Grain Belt Express regarding pricing and wind energy costs and is free to develop additional independent sources of information on its own. The Commission finds that the probative value of the information requested in the MLA data requests to TradeWind and Infinity is outweighed by the harm that disclosure would cause to TradeWind, Infinity, and their non-party independent contractors. So, the Commission will grant the motions for protective orders.

THE COMMISSION ORDERS THAT:

1. The Missouri Landowners Alliance's motion to compel filed on August 28, 2014, is denied.
2. The motions for protective order filed by TradeWind Energy, Inc. and Infinity Wind Power on September 11, 2014, are granted.
3. This order shall become effective upon issuance.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

R. Kenney, Chm., Stoll, W. Kenney,
and Rupp, CC., concur.
Hall, C., dissents.

Bushmann, Senior Regulatory Law Judge