

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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) Case No. EA-2014-0207
Current Transmission Line and an Associated Converter)
Station Providing an interconnection on the Maywood-)
Montgomery 345 kV Transmission Line)

**UNITED FOR MISSOURI, INC.’S
REPLY BRIEF**

COMES NOW United for Missouri, Inc. (“UFM”), by and through its counsel, and for its Reply Brief, states as follows:

INTRODUCTION

This case concerns a request from Grain Belt Clean Line LLC (“Grain Belt Express”) for a certificate of convenience and necessity (“CCN”) to build a 750-mile, overhead, multi-terminal ±600 kilovolt (kV) HVDC transmission line and associated facilities (“project”) across and within the state of Missouri (“Application”). As explained by Grain Belt Express and its customers in the wind industry, they need this new transmission system to compete with the existing AC system that presently serves the electric consuming public. As such, this is not a public utility service subject to Section 393.170.¹ Therefore, Grain Belt Express should exercise its free rights in the marketplace without the power of the state, particularly in the form of right of eminent domain.

¹ All statutory references are to the Missouri Revised Statutes (2000), as amended, unless otherwise noted.

ARGUMENT

The Missouri Public Service Commission (“Commission” or “PSC”) is a regulatory agency of the state of Missouri, established for the purpose of implementing the law over electrical corporations. That law requires it to exercise its authority over electrical corporations, granting and denying authority to exercise certain corporate powers and franchise rights as a condition of providing public utility services in the public interest.² The extent of the Commission’s authority is clearly limited.

The PSC “is a creature of statute and can function only in accordance with” its enabling statutes. *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 796 (Mo. banc 1986). Its “powers are limited to those conferred by ... statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted.” *Util. Consumers' Council of Missouri, Inc.*, 585 S.W.2d at 49; *see also* § 386.040 (creating the PSC and vesting it with “the powers and duties ... specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes” of its governing statutes). If a power is not granted to the PSC by Missouri statute, then the PSC does not have that power.

Though section 386.610 provides that statutes pertaining to the PSC “shall be liberally construed with a view to the public welfare,” this provision does not authorize the Court to vest the PSC with authority that the legislature has not granted it either expressly or by clear implication. *Cf. Reichert v. Bd. of Educ. of City of St. Louis*, 217 S.W.3d 301, 305 (Mo. banc 2007) (“[T]he Court has no authority to read into a statute legislative intent contrary to the intent made evident by the plain language.”).³

In the execution of its authority, it cannot go beyond the clear constraints of what the Legislature has set for the benefit of the public or the benefit of any one company or market participant.

1. Grain Belt Express is not a Public Utility.

In its Initial Brief, Staff cited the case of *State ex rel. M. O. Danciger & Co. v. Public Service Commission of Missouri*⁴ for the proposition that Grain Belt Express is a public utility.

UFM respectfully disagrees. *Danciger* describes characteristics of a public utility that mandate a

² *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177, 181 (Mo. App., 1960).

³ *State ex rel. Mogas Pipeline LLC v. Mo. Pub. Serv. Comm'n*, 366 S.W.3d 493, 496 (Mo., 2012).

⁴ 275 Mo. 483; 205 S.W. 36; 18 A.L.R. 754 (Mo.1918). See “Staff’s Initial Brief,” pp. 15-16.

different conclusion. Prior to the quote cited by the Staff, the Court cites with approval a declaration made by the Washington Supreme Court.

Granting for the sake of argument the right of the Legislature to exercise the police power to the extent of regulating and controlling the price to be charged for power sold to private individuals or to others, such right should not be declared by the courts in the absence of express legislation. The regulation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when the courts have been able to say that a business is in character and extent of operation such that it touches the whole people and affects their general welfare. [citations omitted] Until the Legislature brings a business within the police power by clear intent, courts will not do so. * * * Neither has the business of selling surplus power been so notoriously beset by abuses that we can judicially notice it as having an outlaw character. The right to regulate under the present law must be measured by the public interest. It will hardly be contended that appellant's contracts with those to whom it sells its surplus is of any interest or concern to any one other than the immediate parties. It is not alleged that it is neglecting its public duty because of them. No one has a right to compel appellant to sell its surplus. The act of sale is purely voluntary. Like the merchant, it can sell at one price to one man and at another price to another. * * * If either is not content with the offering of the other, he does not have to contract. He can go his way. But it is not so with appellant, when exercising its public function; that is, furnishing something, a necessity, that all are entitled to receive upon equal terms, under equal circumstances, and without exclusive conditions. *Beale & Wyman, Rate Regulation*, § 1.⁵

The character of the service of a public utility is that which “touches on the whole people,” one pertaining to a “public duty,” a service “that all are entitled to receive upon equal terms, under equal circumstances, and without exclusive conditions.” A public utility is not, “like the merchant, it can sell at one price to one man and at another price to another.”

Grain Belt Express is a merchant. It characterizes itself as a merchant. Grain Belt Express is proposing is a “merchant transmission project.”⁶ The customers of Grain Belt Express will be privately owned wind generators or load serving entities and not the public.⁷ While Grain Belt Express will be subject to supervision by the Federal Energy Regulatory Commission, that

⁵ *Danciger*, 205 S.W. at 41, 42.

⁶ Tr. 10:31.

⁷ *Id.*

regulation permits Grain Belt Express to “initially screen customers” and “rank potential customers for the initial and any subsequent phases of bilateral negotiations.”⁸ Its negotiations and contracts will be beyond the purview of this Commission. Grain Belt Express will not have a schedule of rates on file with this Commission. In addition, Grain Belt Express’ project will be beyond the supervision of the RTO regional planning process.⁹ The foundation of Grain Belt Express’ financing will be privately negotiated contracts, not tariffs filed with this Commission. “The Company will rely on specific revenue contracts with shippers or transmission service customers in order to support the financing of the Grain Belt Express Project.”¹⁰

In essence, Grain Belt Express will be providing a marketing service for wind generators and load serving entities of its choosing. These services are not within the clearly intended focus of the police power the Legislature granted to the PSC. These services are merchant services beyond the direct authority of this Commission.

2. The Grain Belt Express project will facilitate a duplication of services and destructive competition.

Grain Belt Express and the wind industry want this Commission to grant Grain Belt Express authority to build its project in order to gain an advantage in their marketing efforts in competing with other sources of electric generation. As explained by Wind on the Wires and the Wind Coalition in their Initial Brief,

To deliver electricity across multiple RTOs using the existing AC transmission system would result in pancaking of transmission cost charges that pose significant cost risk for either the generator or end use customer. To deliver electricity from western SPP to PJM using the existing AC transmission system, there are two main costs -- firm point-to-point

⁸ See “Staff’s Initial Brief,” p. 17.

⁹ See “Initial Post-Hearing Brief of Applicant Grain Belt Express Clean Line LLC,” p. 8.

¹⁰ *Id.*, p. 23.

transmission delivery rates and congestion costs. Firm transmission rates to the SPP/MISO border and from there to the PJM/MISO border are known, however, they are volatile over extended periods of time. For SPP, the cost of firm transmission rights have continuously increased since 2005, sometimes dramatically. Since most power purchase agreements for wind are for twenty years, trying to estimate the increase in price of firm transmission rights in two RTOs and still produce a competitive price for delivery of your product is extremely difficult. Moreover, there is no mechanism for a generator to hedge its financial exposure to continual increases in firm point-to-point transmission rates over twenty years.¹¹

No other generation source has these advantages. While other generation sources face pancaked transmission charges, congestion charges and the other variables of the AC transmission system, the wind industry wants Grain Belt Express to be able to bypass these market variables to bring their competitive service to the market at an advantage. This new merchant service will result in destructive competition and produce a duplication of facilities with the existing public utility services.

As UFM argued in its Initial Brief, one of the Commission's main purposes is to limit destructive competition and duplication of facilities.

From analysis of court decisions on this subject, the general purpose of what is necessary and convenient encompasses regulated monopoly for destructive competition, prevention of undesirable competition and prevention of duplication of service. The underlying public interest is and remains the controlling concern, because cut-throat competition is destructive and the public is the ultimate party which pays for such destructive competition.¹²

The Commission has no authority to circumvent the public policy of the state as expressed by the Legislature by granting this Application.

3. There is no public policy justification in the Missouri Renewable Energy Standard for granting this Application.

¹¹ "Initial Brief of Wind on the Wires and the Wind Coalition," p. 10.

¹² *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App.W.D., 1980).

Grain Belt Express relies heavily on the states Renewable Energy Standard¹³ for its justification for its application.

There is a demonstrated need for the service provided by Grain Belt Express. The open access transmission service offered by the Company is necessary to meet the requirements of Section 393.1020, the Missouri Renewable Energy Standard (“RES”), as well as the renewable portfolio standard (“RPS”) requirements of the other states served by MISO and PJM at a low cost.¹⁴

However, there is no public policy justification in the Renewable Energy Standard (“RES”) to authorize the Commission granting Grain Belt Express’ Application. It is true that the Commission is responsible to prescribe a portfolio requirement for all electric utilities to generate or purchase electricity generated from renewable energy resources and establish a certification process for electricity generated from renewable resources.¹⁵ However, the Commission’s conduct in this regard is subject to very specific limits. The RES is directed specifically at portfolio requirements for electric utilities.¹⁶ There is a one percent rate cap limitation on each electric supplier’s investment in the portfolio.¹⁷ The intent of the RES is to require this Commission and the electrical corporations to work within the present delivery system and not outside of it. If the Legislature had wanted the Commission to go beyond these limits and create a whole new competitive DC transmission system, it could have done so in the RES. It did not, and the Commission cannot now *sua sponte* permit one.

Grain Belt Express and its wind power industry allies claim that the existing AC transmission system is inadequate to their needs and the needs of the electric utility industry in

¹³ Sections 393.1020-393.1050, RSMo.

¹⁴ See “Initial Post-Hearing Brief of Grain Belt Express Clean Line LLC,” p. 12.

¹⁵ Section 393.1030, RSMo.

¹⁶ *Id.*

¹⁷ Section 393.1045.

the state for complying with the RES.¹⁸ This claim is dubious at best. This claim is not being echoed outside of the wind industry. MISO makes no claim in this case that the AC system is inadequate. SPP makes no claim in this case that the AC system is inadequate. No load serving entity in Missouri is making a claim in this case that the AC system is inadequate. As a matter of fact, wind industry advocates observe that load serving entities are doing just fine in acquiring renewable resources utilizing the present AC system. Grain Belt Express observes in its Initial Brief,

Missouri cooperative and municipal utilities, who are not subject to the state's RES standards, are also increasing their purchases of wind generation because it is a cost-effective resource. Associated Electric Cooperative Inc. (“AECI”) has increased its purchase of wind energy. In 2013 wind and hydro power provided 16% of AECI’s energy, including 600 MW from wind resources in Missouri, Kansas and Oklahoma. Noting that “locking in economical, fixed-price wind energy is good for member systems,” AECI has stated that its “board and management are open to additional renewable resources that meet the purpose of providing clean, affordable, reliable electricity for members.” See Ex. 148, Excerpts from AECI 2013 Annual Report (final page). In addition to AECI, City Utilities of Springfield, Columbia Light and Water, and the Missouri Joint Municipal Electric Utility Commission have all purchased renewable energy from wind farms. See Ex. 118 at 26 (Berry Direct).¹⁹

As a matter of fact, Wind on the Wires and the Wind Coalition observe that, “Ameren Missouri is the only utility in Missouri that needs to procure renewable energy to comply with the Missouri Renewable Energy Standard (“RES”).”²⁰ And yet, Ameren Missouri has not expressed a position in this case.

There is a need for the project from the wind industry’s standpoint, but it is not a public need.

Many wind generators stand ready to supply the Project with low-cost wind power but need the Company’s transmission service to construct their projects. Grain Belt Express conducted a Request for Information (“RFI”) on wind generators in the region of western

¹⁸ “Initial Post-Hearing Brief Of Applicant Grain Belt Express Clean Line LLC,” p. 12; “Initial Brief Of Infinity Wind Power,” p. 4.

¹⁹ “Initial Post-Hearing Brief Of Applicant Grain Belt Express Clean Line LLC,” pp. 13-14.

²⁰ “Initial Brief of Wind on the Wires and the Wind Coalition,” p. 5.

Kansas. Fourteen wind developers responded, who together are advancing 26 wind projects totaling over 13,500 MW. Without the Project, it is doubtful that these proposed wind farms in western Kansas would be built to serve the clear need for low-cost renewable energy in Missouri and elsewhere in the region. See Ex. 876 (Langley Surrebuttal) at 5-6; Ex. 875 (Langley Rebuttal) at 3-7; Ex. 725 at 2-3 (Costanza Rebuttal); Ex. 700 (Goggin Rebuttal) at 3-7; Ex. 701 (Goggin Surrebuttal) at 7-8.²¹

This quote expresses a desire of individual business entities. Grain Belt Express is trying to get out “ahead of the market.”²² The wind industry needs to bolster this “viable competitive investment.”²³ “TradeWind believes that Grain Belt can provide a viable cost competitive alternative to using the SPP RTO for energy transport.”²⁴ As Mr. Berry explained, Grain Belt Express relies on the shippers and transmission service customers.²⁵ And both the capital markets and the shippers depend on Grain Belt Express. “The management of Grain Belt Express and its investors both have substantial experience in project finance and know how to develop the Project to meet the requirements of the capital markets.”²⁶ All of these market participants have built their decisions upon Grain Belt Express being “ahead of the market.” That is the way a merchant functions in a free marketplace but is not the way regulated utilities function under the regulatory scheme in Missouri. Public utilities respond to needs; they do not get ahead of them. It is not the role of this Commission to bolster a “viable competitive investment” or get “ahead of the market” at the expense of other endeavors or the landowners of the state of Missouri.

²¹ See “Initial Post-Hearing Brief of Grain Belt Express Clean Line LLC,” p. 15.

²² Tr. 10:256.

²³ See “Initial Brief of Infinity Wind Power,” p. 8.

²⁴ See “TradeWind Energy, Inc.’s Post-Hearing Brief,” p. 3.

²⁵ Ex. 118 at p. 5.

²⁶ See “Initial Post-Hearing Brief of Applicant Grain Belt Express Clean Line LLC,” p. 23.

CONCLUSION

What should the Commission do with this request? The answer is provided in the brief of Wind on the Wires and the Wind Coalition.

Going forward, a robust transmission grid can provide valuable protection against a variety of uncertainties in the electricity market. Fluctuations in the price of fossil fuels are likely to continue, particularly if the electric sector becomes more reliant on natural gas. Further price risk associated with the potential enactment of environmental policies place a further premium on the flexibility and choice provided by a robust transmission grid. As a result, transmission should be viewed as a valuable hedge against uncertainty and future price fluctuations for all consumers.²⁷

A single, isolated DC line does not constitute a grid and does not provide the flexibility that the AC grid does. This Commission and the Federal Energy Regulatory Commission have overseen the development of a transmission system that has been characterized as the most complex machine mankind has ever known.²⁸

FERC Order No. 888²⁹ requires that Transmission Providers operating the transmission system provide transmission service on a non-discriminatory basis. In addition, FERC Order No. 1000 requires public utility transmission providers provide for the consideration of transmission needs driven by Public Policy Requirements in the local and regional transmission planning processes.³⁰ Section 393.130.1 requires that every electrical corporation shall provide such service and instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. The AC system in place now is adequate to the task. The Commission should

²⁷ “Initial Brief of Wind on the Wires and the Wind Coalition,” p. 9.

²⁸ Prepared Testimony of Jon Wellinghoff, Commissioner Federal Energy Regulatory Commission Before the House Energy and Commerce Subcommittee on Energy and Air Quality, <http://www.ferc.gov/EventCalendar/Files/20070503100145-wellinghoff-5-3-7-testimony.pdf>, unnumbered p. 1.

²⁹ 61 FR 21,540, 21,543; FERC Stats. & Regs. ¶ 31,036 at 31,638 (1996).

³⁰ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, III FERC Stats. & Regs., Regs. Preambles ¶ 31,323 at P 203 (2011) (“FERC Order No. 1000”).

deny the Application and focus its attention on maintaining and developing the AC grid in a just, reasonable and non-discriminatory manner.

If Grain Belt Express and the wind industry want to provide a competitive service, they should be able to do so, but they should not do so with the power of the state.

WHEREFORE, UFM prays that the Commission deny the Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading was sent to all parties of record in File No. EA-2014-0207 via electronic transmission this 22nd day of December, 2014.

/s/ David C. Linton