



Missouri Public Service Commission

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OCT 2 2017

Missouri Public Service Commission
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Judge or Division:	Appellate Number: ED105932
Appellant: Missouri Joint Municipal Electric Utility Commission	Missouri Public Service Commission File Number: EA-2016-0358
vs.	
Respondent: Missouri Public Service Commission	

(Date File Stamp)

Notice of Appeal

Notice is given that Missouri Joint Municipal Electric Utility Commission appeals to the Missouri Court of Appeals Western Eastern Southern District.

October 2, 2017
Date Notice of Appeal Filed
(to be filled in by Secretary of Commission)

Peggy A. Whipple
Signature of Attorney or Appellant

The notice of appeal shall include the appellant's application for rehearing, a copy of the reconciliation required by subsection 4 of section 386.420, a concise statement of the issues being appealed, a full and complete list of the parties to the commission proceeding, and any other information specified by the rules of the court. The appellant(s) must file the original and (2) two copies and pay the docket fee required by court rule to the Secretary of the Commission within the time specified by law. Please make checks or money orders payable to the Missouri Court of Appeals. At the same time, Appellant must serve a copy of the Notice of Appeal on attorneys of record of all parties other than appellant(s), and on all parties not represented by an attorney.

CASE INFORMATION

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Date of Commission Decision: August 16, 2017	Date of Application for Rehearing Filed: August 25, 2017	Date Application for Rehearing Ruled On: September 19, 2017	

DIRECTIONS TO COMMISSION

A copy of the notice of appeal and the docket fee shall be mailed to the clerk of the appellate court. Unless otherwise ordered by the court of appeals, the commission shall, within thirty days of the filing of the notice of appeal, certify its record in the case to the court of appeals.

Certificate of Service

I certify that on October 2, 2017 (date), I served a copy of the notice of appeal on the following parties, at the following address(es), by the method of service indicated.

See List of Parties to Commission Proceeding, attached hereto, for a list of counsel to be served via email.

Peggy A. Whipple
Appellant or Attorney for Appellant

**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) Case No. EA-2016-0358
Voltage, Direct Current Transmission Line)
and an Associated Converter Station)
Providing an Interconnection on the)
Maywood-Montgomery 345 kV)
Transmission Line.)

**MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY COMMISSION'S
APPLICATION FOR REHEARING**

Pursuant to §386.500 Revised Statutes of Missouri and 4 CSR 240-2.160(1), the members of the Missouri Joint Municipal Electric Utility Commission (“MJMEUC”)¹ respectfully submit this Application for Rehearing on the Report and Order issued in this matter on August 16, 2017 by the Missouri Public Service Commission (“Commission”). Rehearing is appropriate under §386.500.2 because the Report and Order is both “unlawful” and “unreasonable,” and thus will be subject to reversal on appeal.² Rehearing is further appropriate under §386.500.2 because the Report and Order is “unjust” – the delay that will inevitably occur during the appellate courts’ reviews of this Report and Order could unjustly deprive MJMEUC’s

¹ MJMEUC’s members include here, at a minimum, the cities of Centralia, Columbia, Hannibal, Kirkwood and the 35 MoPEP cities: Albany, Ava, Bethany, Butler, Carrollton, Chillicothe, El Dorado Springs, Farmington, Fayette, Fredericktown, Gallatin, Harrisonville, Hermann, Higginsville, Jackson, Lamar, La Plata, Lebanon, Macon, Marshall, Memphis, Monroe City, Odessa, Palmyra, Rock Port, Rolla, Salisbury, Shelbina, St. James, Stanberry, Thayer, Trenton, Unionville, Vandalia and Waynesville (and the hundreds of thousands of citizens of these cities). The cities of Carrollton, Salisbury and Vandalia are located in the counties crossed by the Grain Belt Project. Exhibit 475, Schedule DK-1.

² *State ex rel. AG Processing, Inc. v. PSC*, 120 S.W.3d 732, 734-735 (Mo. 2003) (Internal citations omitted).

members of the significant benefits of the Grain Belt Express Clean Line, LLC's ("Grain Belt's") Project, which benefits were found to exist by four of the five Commissioners who determined the Project necessary or convenient for the public service.³

I. The Report and Order is unlawful and unreasonable because the *Ameren Transmission Co.* decision⁴ is not binding precedent to prevent this Commission from issuing Grain Belt's line CCN.

In its Report and Order, the Commission erred when it found that "*Ameren Transmission Co.* and its plain language regarding the necessity of obtaining prior county assents apply to the [Grain Belt] application even though that opinion did not specifically cite to subsection 1 of Section 393.170, the subsection under which [Grain Belt] requested a CCN...[and] [u]nder the Court's direction set forth in *Ameren Transmission Co.*, the Commission cannot lawfully issue a CCN to [Grain Belt] until the company submits evidence that it has obtained the necessary county assents under Section 229.100."⁵

But, the *Ameren Transmission Co.* decision did not set binding precedent for the Commission and it did not prevent this Commission from exercising its statutory authority. An appellate court's construction of a statute becomes precedent for lower courts (or this Commission) only as to "decisions on points arising and decided" in the appellate court's order, but that decision does *not* bind or operate as *stare decisis* on lower courts on statutes or points "that can at most be implied from something that was actually decided."⁶

³ *Concurring Opinion of Commissioners Hall, Kenney, Rupp and Coleman in the Report and Order*, EA-2016-0358, Dated: August 16, 2017.

⁴ *In re Ameren Transmission Co. v. PSC of Mo.*, No. WD 79883, 2017 Mo. App. LEXIS 244* (Mar. 28, 2017), *applications for transfer denied*, No. SC96427, 2017 Mo. LEXIS 266* (June 27, 2017).

⁵ *Report and Order*, EA-2016-0358, Issue Date: August 16, 2017, Pages 13-14.

⁶ *Broadwater v. Wabash R. Co.*, 110 S.W. 1084, 1908 Mo. LEXIS 147 *9-10 (Mo. 1908).

Grain Belt asked the Commission to grant it a “line” CCN under §393.170.1, Revised Statutes of Missouri. Grain Belt made *no* request of this Commission under §§393.170.2 or 393.170.3 (regarding area certificates and hearings), so neither of those statutes were at issue before this Commission. Significantly, and as acknowledged by this Commission in its Report and Order, the *Ameren Transmission Co.* Court did not construe or even address §393.170.1 or a line CCN at any point in its decision. Instead, that court construed only §§393.170.2 and 393.170.3.⁷

This Commission’s insistence that the *Ameren Transmission Co.* case prevents it from exercising its authority under §393.170.1 here not only violates the Missouri Supreme Court’s long-standing definition of *stare decisis*,⁸ it also defies the plain language of *Ameren Transmission Co.* That court cites only to §§393.170.2 and 393.170.3 and declares that its “harmonization of the statute preserves the integrity of *both* subdivisions of section 393.170” as though there are only two, and not three, subdivisions of that statute.⁹ Whether the court deliberately or mistakenly¹⁰ excluded §393.170.1 from its construction of §§393.170.2 and 393.170.3 is both unknown and immaterial here – there is no construction of §393.170.1 in *Ameren Transmission Co.* and that decision is thus not binding precedent to prevent this Commission from granting Grain Belt’s §393.170.1 application for a line CCN.

⁷ *In re Ameren Transmission Co.*, 2017 Mo. App. LEXIS 244 *7-11.

⁸ *Broadwater*, 1908 Mo. LEXIS 147 *9-10.

⁹ *In re Ameren Transmission Co.*, 2017 Mo. App. LEXIS 244 *11(emphasis added).

¹⁰ The *Ameren Transmission Co.* decision does contain evidence of error. For example, the court provided the full text of §229.100, which gives county commissions the authority to provide assents to the placement of utility poles, wires, pipes, etc. in the rights-of-ways of the county’s roads, yet the court then described this statutory authority to encompass all areas of the county (*7). And, in quoting the language of §393.170.2, the court actually substituted the words “local government” authorities for the statutory language “municipal authorities” (*11).

II. The Report and Order is unlawful and unreasonable because its conclusion that the Commission has been prevented from exercising its authority to issue Grain Belt's line CCN is grounded on incomplete and misleading citations from the *Ameren Transmission Co.* case.

In the *Ameren Transmission Co.* decision, the Western District Court of Appeals repeatedly and specifically articulated its disapproval of this Commission's choice to grant a "contingent" or "preliminary" CCN in EA-2015-0146.¹¹ The Court criticized the Commission for imposing "a condition upon the CCN that ATXI acquire the county assents *before the CCN would become effective.*"¹² Thus, the court's inquiry in *Ameren Transmission Co.* focused on whether or not this Commission has the statutory authority to issue a CCN that is *not effective*. Stated another way, the Western District Court of Appeals inquired into this Commission's authority to give away its authority by issuing a CCN that has no effect until some other entity acts.¹³

The *Ameren Transmission Co.* Court construed only §§393.170.2 and 393.170.3 (regarding area CCNs and hearings), and ruled that "there is no statute authorizing the PSC to grant a *preliminary* or conditional CCN *contingent* on the required county commission consents being subsequently obtained."¹⁴ Thus, the *Ameren Transmission Co.* Court's ruling was that this Commission has no statutory authority to issue a *non-effective* CCN – *not* that this Commission

¹¹ *In re Ameren Transmission Co.*, 2017 Mo. App. LEXIS 244 *1,*4 and *11.

¹² *In re Ameren Transmission Co.*, 2017 Mo. App. LEXIS 244 *6 (emphasis added).

¹³ This Commission's *Report and Order* in EA-2015-0146 contains two partial and thus misleading citations to the 2005 *StopAquila.org v. Aquila, Inc.* decision that lead to two erroneous conclusions of law and possibly this Commission's decision to issue a CCN that had *no effect*. Paragraphs 25 and 26 include partial quotes from the *StopAquila* case which infer the court's focus at the cited pages to be on the Commission's authority to issue a CCN. But the full cited quotations from the *StopAquila* case reveal the focus of that court's inquiry to be on the statutory limitations on the authority of public utilities to act. Certainly, our statutes will more fully constrain the actions of public utilities than the authority and actions of this Commission.

¹⁴ *In re Ameren Transmission Co.*, 2017 Mo. App. LEXIS 244 *11-12 (emphasis added).

is now prevented from issuing line CCNS under §393.170.1 unless and until county commissions exercise their road crossing authority under §229.100.

The large block quotation from the *Ameren Transmission Co.* decision found at page 12 of the Report and Order contains selective omissions of significant portions of the *Ameren Transmission Co.* Court’s analysis which mislead the Commission to its erroneous conclusion. Prior to the first quoted paragraph which begins with “By statute and by rule,…” but reaches the conclusion that the PSC cannot issue a CCN before the applicant has obtained the consents of other entities, the *Ameren Transmission Co.* Court identified the statute it was construing to be §393.170.2, *not* §393.170.1, which is the only statute relevant here.¹⁵ Prior to the second quoted paragraph which begins with “Our interpretation of the statute – …” but reaches the conclusion that county road crossing assents must be submitted to the PSC before it can issue a line CCN, the *Ameren Transmission Co.* Court identified the statutes it was construing to be §393.170.2 and §393.170.3, *not* §393.170.1, which is – again – the only statute relevant here.¹⁶ And, there is one sentence missing between the second and third paragraphs of the large block quotation which, when re-inserted, changes entirely the point of the entire block quotation to actually prohibit the Commission from issuing non-effective or “contingent” CCNs, rather than to operate as a prohibition on the Commission’s authority to act until county commissions act. That full and fair quotation reads as follows:

While §393.170.3 grants the PSC statutory authority to impose reasonable and necessary conditions on a CCN, there is no statute authorizing the PSC to grant a preliminary or conditional CCN *contingent* on the required county commission consents being subsequently obtained. The PSC’s issuance of a CCN *contingent* on ATXI’s subsequent provision of required county commission assents was unlawful as it exceeded the PSC’s authority.¹⁷

¹⁵ *In re Ameren Transmission Co.*, 2017 Mo. App. LEXIS 244 *7-8.

¹⁶ *In re Ameren Transmission Co.*, 2017 Mo. App. LEXIS 244 *10-11.

¹⁷ *In re Ameren Transmission Co.*, 2017 Mo. App. LEXIS 244 *11-12 (emphasis added).

Therefore, the *Ameren Transmission Co.* case does not prohibit the Commission from exercising its authority under §393.170.1 as erroneously declared by the Commission at pages 12, 13, 14 and 15 of its Report and Order. Instead, the court’s full and actual analysis can guide this Commission to exercise its own statutory authority to grant an effective CCN. That fully-effective line CCN may include recognition of the independent requirements of certain regulations or statutes, such as §229.100, which are administered by other entities. And the fully-effective line CCN may include reasonable and necessary conditions imposed by this Commission under the authority of §393.170.3. But the effectiveness of the CCN may not depend on the fulfillment of those independent requirements or conditions.

III. The Commission’s reading of the *Ameren Transmission Co.* decision is unlawful and unreasonable because it violates Missouri’s statutory scheme, its specialized administrative process and the separation of powers mandated by its Constitution.

A. The statutory scheme that created and continues to authorize this Commission belies its finding that the *Ameren Transmission Co.* case limits its power to lawfully grant Grain Belt’s §393.170.1 line CCN.

“The Public Service Commission Law of the State was enacted on March 17, 1913, and became immediately effective” so that the Commission could “establish[] a public policy for the public good, in the reasonable and nondiscriminatory exercise of delegated police power.”¹⁸ And, “[b]y that law [the Commission] is vested with the powers...necessary and proper to carry out fully and effectually all the purposes of the act.”¹⁹ Missouri’s Constitution prevents the police power from being abridged, and so the Commission in possession of the State’s police power is “a fact-finding body whose findings and orders, being prima facie reasonable and

¹⁸ *Kansas City Power & Light Co. v. Midland Realty Co.*, 93 S.W.2d 954, 955-956, 958 (Mo. 1936).

¹⁹ *Columbia v. Public Service Commission*, 43 S.W.2d 813, 815 (Mo. 1931).

lawful, are subject to judicial review in that respect only.”²⁰ The Commission is “intended to have very broad jurisdiction in the field in which it was intended to operate,” and regarding electric utilities, the statutes authorize the Commission to approve “any new construction or location even though authorized by municipal franchise” because the statutory scheme is “intended to give the Commission full control over allocation of territory to such utilities, and to authorize either monopoly or regulated competition therein.”²¹

This historical deference to the statutory authority of the Commission acting in its field is borne out in the current statutory scheme. The “public service commission shall be vested with and possessed of the powers and duties in [Chapter 386] specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter.”²² Additionally, the “jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under [Chapter 386]: (1) To the...sale or distribution of...electricity...within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to...electric plants, and to persons or corporations owning, leasing, operating or controlling the same.”²³ Further, the Commission is authorized to have “general supervision of all...electrical corporations...having authority under any special or general law or under any charter or franchise to lay down, erect or maintain wires...or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of...furnishing or transmitting electricity....”²⁴

²⁰ *Kansas City Power & Light Co.*, 93 S.W.2d at 958.

²¹ *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 180 S.W.2d 40, 44 (Mo. 1944).

²² §386.040, Revised Statutes of Missouri.

²³ §386.250, Revised Statutes of Missouri.

²⁴ §393.140(1), Revised Statutes of Missouri.

Based upon the plain language of these statutes, our Legislature clearly intended this Commission, as opposed to any other entity including county commissions, to be the decision-maker regarding the construction and location of a line to transmit electricity across the state. “The primary rule of statutory interpretation is to give effect to the legislative intent as reflected in the plain language of the statute...and by considering the context of the entire statute in which it appears.”²⁵ In the context of the statutory scheme which originated and continues to enable this Commission, the authority to grant an effective line CCN to Grain Belt is vested in this Commission and was not abridged by the Missouri Court of Appeals-Western District in its *Ameren Transmission Co.* decision.

B. The *Ameren Transmission Co.* decision cannot lawfully or reasonably be read to prevent this Commission from applying the specialized knowledge, experience and administrative process necessary to ensure uniform and non-parochial regulation of utilities for the public benefit.

This Commission is “a fact-finding body, exclusively entrusted and charged by the Legislature to deal with and determine the specialized problems arising out of the operation of public utilities. It has a staff of technical and professional experts to aid it in the accomplishment of its statutory powers” and it alone is able “to meet changing conditions, as [it] in its discretion, may deem to be in the public interest.”²⁶ Even an appellate court’s review of Commission orders is “confined to the question of their lawfulness and reasonableness” because any judicial weighing of the evidence already considered by the Commission would “substitute...the judgment of the court and it becomes the administering body [which would] destroy

²⁵ *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. 2007).

²⁶ *State ex rel. Chicago, R.I. & P.R. Co. v. Public Service Commission*, 312 S.W.2d 791, 796 (Mo. 1958).

administration.”²⁷ Indeed, a reviewing court will not “substitute its discretion for discretion legally vested in the [Commission]” because it “oversteps the boundaries of its jurisdiction when it attempts to tell the [C]ommission what the action should be.”²⁸

Given that an appellate court reviewing this Commission’s orders will not violate its administrative expertise, the Commission’s finding that the *Ameren Transmission Co.* Court elevated a single county commission over that expert administrative process is simply unlawful and unreasonable. The *Ameren Transmission Co.* Court would have been aware of “the very purpose of regulation by state agencies [which] is to secure uniformity of operating conditions among similar utilities and to save the economic waste that...impairs the public service.”²⁹

C. The *Ameren Transmission Co.* case cannot lawfully or reasonably be read to violate the judiciary’s Constitutionally-grounded deference to this Commission as an agency of the Executive.

The Missouri Constitution decrees that:

The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.³⁰

The doctrine of separation of powers, set out above in our state Constitution, is “vital to our form of government...because it prevents the abuses that can flow from centralization of

²⁷ *State ex rel. Chicago, R.I. & P.R. Co.*, 312 S.W.2d at 793-794. See also, *State ex rel. Kansas City Power & Light Co. v. Public Service Commission*, 76 S.W.2d 343, 354 (Mo. 1934)(The ruling as to which of two electric companies would be granted the CCN to construct an electric transmission line “was wholly an administrative matter peculiarly within the discretion of the Commission.”)

²⁸ *State ex rel. Chicago, R.I. & P.R. Co.*, 312 S.W.2d at 795.

²⁹ *State ex rel. Detroit-Chicago Motor Bus Co. v. Public Service Commission*, 23 S.W.2d 115, 117 (Mo. 1929)(internal citations omitted).

³⁰ Missouri Constitution, Article II §1. See also, *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125, 132 (Mo. 1997)(“This provision has appeared in the Missouri Constitution in substantially the same form since 1820.”)

power.”³¹ If a court’s order interferes with the lawful authority of an agency of the Executive, then “we should have the singular spectacle of a government run by the courts, instead of the officers provided by the Constitution...and our safety...is largely dependent upon the preservation of the distribution of power and authority made by the Constitution, and the laws made in pursuance thereof.”³²

In its Report and Order, this Commission found that the *Ameren Transmission Co.* Court’s ruling operates to transfer this Commission’s authority, discretion and expertise regarding §393.170.1 line CCNs to one or more county commissions. This Commission found that the Western District Court of Appeals broadened and elevated the §229.100 authority of a county commission over the rights-of-way of its public roads to primary authority over public property, private property and public utility projects as well. Such reading of the *Ameren Transmission Co.* case is unlawful and unreasonable because it describes a judicial action against an executive agency in violation of the doctrine of Separation of Powers.

IV. The Report and Order is unlawful and unreasonable because it is grounded, in part, on two Exhibits admitted into the Record of Evidence over MJMEUC’s timely Due Process objection.

The law of evidence that governs the Commission’s proceedings is found at 4 CSR 240-2.130 and §536.070, Revised Statutes of Missouri. That law of evidence provides MJMEUC, as a party intervenor in this case, with the right to meet and rebut all evidence offered in this case.³³ But, the two documents cited by the Commission at Paragraphs 15 and 16 of its Findings of Fact (Exhibits 375 and 376) were created in an unrelated and closed case to which MJMEUC was

³¹ *Missouri Coalition for the Environment*, 948 S.W.2d at 132.

³² *Albright v. Fisher*, 64 S.W. 106, 108-109 (Mo. 1901).

³³ §536.070(2), Revised Statutes of Missouri.

never a party (EA-2015-0146). Thus, MJMEUC's right to Due Process was violated here as it had no opportunity to meet and rebut the evidence contained within Exhibits 375 and 376.

MJMEUC timely filed its written objection to the admission of these Exhibits into the Record of Evidence on July 28, 2017 (EFIS Docket No. 598). MJMEUC timely made its oral, on-the-record objection to the admission of these Exhibits into the Record of Evidence on August 3, 2017 (Transcript Page 1645, Line 23 to Page 1646, Line 18). The Commission overruled MJMEUC's objections, accepted these Exhibits into the Record of Evidence and violated MJMEUC's right to Due Process by unlawfully and unreasonably grounding its Report and Order on these Exhibits.

V. The Report and Order is unjust because MJMEUC's members could be deprived, by the delay that will inevitably occur during the appellate courts' reviews of this Report and Order, of the significant benefits four of the five Commissioners found to exist.

Four of the five Commissioners found the Grain Belt Project to be "necessary or convenient for the public service."³⁴ Specifically, the four Commissioners found the Project "is needed primarily because of the benefits to the members of the Missouri Joint Municipal Electric Utility Commission ("MJMEUC") and their hundreds of thousands of customers...[who] would have saved approximately \$9-11 million annually."³⁵

But the Report and Order is unlawful and unreasonable, and must thus be subjected to appellate review, and the months or years that will be consumed in that process are likely to cause failure of the Project and denial of the hundreds of millions of dollars of acknowledged benefit to MJMEUC's members over the planned life of the Project. Therefore, the Report and Order operates to confiscate the benefit to MJMEUC that is acknowledged in the Concurring

³⁴ *Concurring Opinion of Commissioners Hall, Kenney, Rupp and Coleman in the Report and Order*, EA-2016-0358, Dated: August 16, 2017 ("Concurring Opinion").

³⁵ *Concurring Opinion*, Pages 2-3.

Opinion – it is unjust for the Commission to acknowledge a benefit and then act to deprive the intended recipient of that benefit.³⁶ The Report and Order is unjust, as well as unlawful and unreasonable, and rehearing is necessary.

Conclusion

The Commission's findings of fact and conclusions of law are not supported by substantial and competent evidence on the record as a whole and are grounded in legal error, rendering its Report and Order unlawful, unreasonable, unjust, arbitrary and capricious. On behalf of no less than Centralia, Columbia, Hannibal, Kirkwood, the 35 MoPEP cities, and these cities' hundreds of thousands of citizens, MJMEUC respectfully requests that this Commission grant rehearing of this matter, timely find (as it did in the Concurring Opinion of Commissioners Hall, Kenney, Rupp and Coleman) that the Grain Belt Project is necessary and convenient for the public service and issue to Grain Belt the requested and fully-effective certificate of convenience and necessity.

Respectfully Submitted,

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³⁶ See, *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 706 S.W.2d 870, 881 (Citing *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936)).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Missouri Joint Municipal Electric Utility Commission's Application for Rehearing was served by electronically filing with EFIS and emailing a copy to the following interested persons on this 25th day of August, 2017:

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/s/ Peggy A. Whipple
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**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 19th day of
September, 2017.

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,) **File No. EA-2016-0358**
Control, Manage and Maintain a High Voltage, Direct)
Current Transmission Line and an Associated Converter)
Station Providing an Interconnection on the Maywood -)
Montgomery 345kV Transmission Line)

ORDER DENYING APPLICATIONS FOR REHEARING

Issue Date: September 19, 2017

Effective Date: September 19, 2017

On August 16, 2017, the Missouri Public Service Commission issued a Report and Order effective September 15, 2017, regarding Grain Belt Express Clean Line LLC's ("GBE") application for a certificate of convenience and necessity. On August 25, 2017, GBE and the Missouri Joint Municipal Electric Utility Commission each filed an Application for Rehearing. On the same day, the Missouri Landowners Alliance, Matthew and Christina Reichert, Charles and Robyn Henke, Randall and Roseanne Meyer, and R. Kenneth Hutchinson ("collectively, "MLA") also filed an Application for Rehearing. It is unclear whether MLA's filing is truly an application for rehearing because MLA states that the sole purpose of the filing is to preserve certain issues in the event the Commission significantly revises the Report and Order or the case is remanded following an appeal.¹ On

¹These applicants also included a separate request that the concurring opinion issued by four Commissioners be withdrawn, alleging that, that concurring opinion is an unlawful advisory opinion. This request is not appropriate because the concurring opinion is not a Report and Order of the Commission, but rather a separate opinion delivered by individual Commissioners agreeing with the Report and Order but offering their own reasoning concerning disputed issues in the case. The Commission cannot withdraw the concurring opinion because it is not an order of the Commission.

September 14, 2017, Sierra Club, the Natural Resources Defense Council, and Renew Missouri Advocates jointly filed an Application for Rehearing.

Section 386.500.1, RSMo 2016, states that the Commission shall grant an application for rehearing if “in its judgment sufficient reason therefor be made to appear.” In the judgment of the Commission, none of the applications demonstrate sufficient reason to rehear the matter. The Commission will deny the Applications for Rehearing.

THE COMMISSION ORDERS THAT:

1. The Missouri Landowners Alliance, Matthew and Christina Reichert, Charles and Robyn Henke, Randall and Roseanne Meyer, and R. Kenneth Hutchinson’s Application for Rehearing is denied.
2. Grain Belt Express Clean Line LLC’s Application for Rehearing is denied.
3. The Missouri Joint Municipal Electric Utility Commission’s Application for Rehearing is denied.
4. Sierra Club, Natural Resources Defense Council, and Renew Missouri Advocates’ Application for Rehearing is denied.
5. This order shall be effective when issued.



BY THE COMMISSION

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

Morris L. Woodruff
Secretary

Hall, Chm., Stoll, Kenney,
Rupp, and Coleman, CC., concur.

Bushmann, Senior Regulatory Law Judge

**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)
Current Transmission Line and an Associated Converter)
Station Providing an Interconnection on the Maywood –)
Montgomery 345kV Transmission Line)

File No. EA-2016-0358

REPORT AND ORDER

Issue Date: August 16, 2017

Effective Date: September 15, 2017

**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) **File No. EA-2016-0358**
Current Transmission Line and an Associated Converter)
Station Providing an Interconnection on the Maywood –)
Montgomery 345kV Transmission Line)

APPEARANCES

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STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:

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**MISSOURI LANDOWNERS ALLIANCE, CHARLES AND ROBYN HENKE,
R. KENNETH HUTCHINSON, MATTHEW AND CHRISTINA REICHERT and
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**EASTERN MISSOURI LANDOWNERS ALLIANCE d/b/a SHOW ME CONCERNED
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SENIOR REGULATORY LAW JUDGE: Michael Bushmann

REPORT AND ORDER

I. Procedural History

On August 30, 2016, Grain Belt Express Clean Line LLC (“GBE”) filed an application with the Missouri Public Service Commission (“Commission”), pursuant to Section 393.170.1, RSMo¹, 4 CSR 240-2.060 and 4 CSR 240-3.105(1)(B), for a certificate of convenience and necessity (“CCN”) to 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.

The Commission issued notice of the application and provided an opportunity for interested persons to intervene. The Commission granted intervention to the following parties: Missouri Landowners Alliance (“MLA”); Eastern Missouri Landowners Alliance d/b/a Show Me Concerned Landowners; Missouri Joint Municipal Electric Utility Commission (“MJMEUC”); Missouri Farm Bureau Federation; Missouri Department of Economic Development; Matthew and Christina Reichert; Randall and Roseanne Meyer; Charles and Robyn Henke; R. Kenneth Hutchinson; Rockies Express Pipeline LLC; Sierra Club; Natural Resources Defense Council; The Wind Coalition; Wind on the Wires; Infinity Wind Power; Walmart Stores, Inc.; Missouri Industrial Energy Consumers; Renew Missouri; International Brotherhood of Electrical Workers Locals 2 and 53; Consumers Council of Missouri; Missouri Retailers Association; and Missouri AFL-CIO. The Commission granted the petitions of Energy for Generations, LLC and SSM Health Care Corporation to file amicus curiae briefs.

¹ All statutory references are to the Missouri Revised Statutes (2016), unless otherwise noted.

The Commission held a prehearing conference and established a procedural schedule. The Commission conducted local public hearings for members of the general public in each of the eight counties where the proposed transmission line would be located.² The Commission held an evidentiary hearing on March 20-24, 2017.³ During the evidentiary hearing, the parties presented evidence relating to the following unresolved issues previously identified by the parties:

1. Does the evidence establish that the Commission may lawfully issue to GBE the certificate of convenience and necessity it is seeking for the high-voltage direct current transmission line and converter station with an associated AC switching station and other AC interconnecting facilities?
2. Does the evidence establish that the high-voltage direct current transmission line and converter station for which GBE is seeking a certificate of convenience and necessity are necessary or convenient for the public service, within the meaning of that phrase in Section 393.170, RSMo 2016?
3. If the Commission grants the CCN, what conditions, if any, should the Commission impose?
4. If the Commission grants the CCN, should the Commission exempt GBE from complying with the reporting requirements of Commission rules 4 CSR 240-3.145, 4 CSR 240-3.165, 4 CSR 240-3.175, and 4 CSR 240-3.190(1), (2) and (3) (A)-(D)?

² Transcript, Vols. 2-9.

³ Transcript, Vols. 10-19. The Commission admitted the testimony of 54 witnesses and 135 exhibits into evidence during the evidentiary hearing.

The parties submitted initial, reply, and supplemental post-hearing briefs. After the filing of two post-hearing motions⁴, oral arguments were conducted on August 3, 2017,⁵ and the case was deemed submitted for the Commission's decision on that date when the Commission closed the record.⁶

II. Findings of Fact

Any finding of fact for which it appears that the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.

1. GBE is a limited liability company organized under the laws of the State of Indiana. GBE is a wholly-owned subsidiary of Grain Belt Express Holding LLC, a Delaware limited liability company, which is a wholly-owned subsidiary of Clean Line Energy Partners LLC ("Clean Line").⁷

2. GBE filed its application for a CCN pursuant to Section 393.170.1, RSMo, and Commission administrative rules.⁸

3. The Staff of the Missouri Public Service Commission ("Staff") is a party in all Commission investigations, contested cases and other proceedings, unless it files a

⁴ MLA's Motion to Dismiss Application filed on July 4, 2017 and GBE's Motion for Waiver or Variance of Filing Requirements filed on June 29, 2017.

⁵ Transcript, Vol. 20. At the oral arguments, the Commission admitted four additional exhibits into the record and took official notice of Section 393.170, RSMo 1949.

⁶ "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

⁷ Ex.100, Skelly Direct, p. 3.

⁸ Ex. 100, Skelly Direct, p. 4.

notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.⁹ Staff participated in this proceeding.

4. The transmission line proposed to be constructed by GBE in the application is an approximately 780-mile, overhead, multi-terminal +600 kilovolt (“kV”) high-voltage, direct current (“HVDC”) transmission line and associated facilities (collectively, the “Project”).¹⁰

5. The Project would traverse the states of Kansas, Missouri, Illinois and Indiana, including approximately 206 miles in Missouri.¹¹ The Project would deliver 500 megawatts (“MW”) of wind-generated electricity from western Kansas to customers in Missouri, and another 3,500 MW to states further east.¹²

6. The Project would have three converter stations. One converter station would be located in western Kansas, where wind generating facilities would connect to the Project via alternating current (“AC”) lines. The two other converter stations in eastern Missouri and eastern Illinois would deliver electricity to the AC grid through interconnections with transmission owners in the systems of Midcontinent Independent System Operator, Inc. (“MISO”) and PJM Interconnection, LLC (“PJM”), respectively.¹³

7. The Missouri portion of the Project would be located in the Missouri counties of Buchanan, Clinton, Caldwell, Carroll, Chariton, Randolph, Monroe, and Ralls.¹⁴

8. The Project’s development, construction, and operations costs would be borne by the investors in Clean Line and the transmission customers. The Project’s costs

⁹ Commission Rules 4 CSR 240-2.010(10) and (21) and 2.040(1).

¹⁰ Ex. 100, Skelly Direct, p. 3.

¹¹ Ex. 100, Skelly Direct, p. 4.

¹² Ex. 108, Galli Direct, p. 4.

¹³ Ex. 108, Galli Direct, p. 4-7; Ex. 104, Berry Direct, p. 4-5.

¹⁴ Ex. 100, Skelly Direct, p. 4.

would not be recovered through the cost allocation process of any regional transmission organization approved by the Federal Energy Regulatory Commission ("FERC").¹⁵

9. The Project is a participant-funded, "shipper pays" transmission line. GBE would recover its capital costs by entering into voluntary, market-driven contracts with entities that want to become transmission customers of the Project.¹⁶

10. GBE would offer transmission service through an open access transmission tariff that would be filed with and subject to the jurisdiction of the FERC under the Federal Power Act and FERC regulations. GBE customers would consist principally of wind energy producers in western Kansas and wholesale buyers of electricity, such as utilities, competitive retail energy suppliers, brokers, and marketers.¹⁷

11. The Project would not provide service to end-use customers or provide retail service in Missouri, so the Project would not be rate-regulated by the Commission.¹⁸

12. In 2012, GBE received assent from the county commissions of Buchanan, Caldwell, Carroll, Chariton, Clinton, Monroe, Ralls, and Randolph counties authorizing GBE to construct and operate poles, lines, conduits, and conductors for utility purposes through, along, and across the public roads and highways of those counties.¹⁹

13. In 2014, the county commissions of Clinton, Chariton, Caldwell, Ralls, and Monroe counties attempted to rescind the county assents previously granted in 2012.²⁰

14. GBE does not have an assent at this time from the Caldwell County Commission to cross the public roads and highways of that county. By judgment dated

¹⁵ Ex. 100, Skelly Direct, p. 7; Ex. 104, Berry Direct, p. 8.

¹⁶ Ex. 100, Skelly Direct, p. 12; Ex. 104, Berry Direct, p. 8; Ex. 111, Kelly Direct, p. 4.

¹⁷ Ex. 100, Skelly Direct, p. 23-24; Ex. 104, Berry Direct, p. 6; Ex. 111, Kelly Direct, p. 4-5.

¹⁸ Ex. 100, Skelly Direct, p. 24.

¹⁹ Ex. 300, Lowenstein Rebuttal, p. 33, Schedule LDL-3.

²⁰ Ex. 300, Lowenstein Rebuttal, p. 33, Schedule LDL-4.

October 7, 2015, entered in Case No. 14CL-CV00222, the Caldwell County Circuit Court held that the Caldwell County Commission violated the Missouri Sunshine Law when it gave its assent, rendering that assent invalid and void.²¹

15. In a prior and separate case, Ameren Transmission Company of Illinois (“ATXI”) requested a CCN from the Commission to construct and operate an interstate electric transmission line running through several counties in Missouri that would not serve retail customers. ATXI did not have assent from any of the counties through which the proposed transmission line would traverse. In granting the CCN, the Commission concluded that such assents were required by its rules and by Section 229.100, RSMo and imposed a condition that ATXI must obtain the assent from each such county before the CCN became effective.²²

16. ATXI had argued to the Commission, in part, that it need not obtain county assents because ATXI applied to the Commission for a line certificate under Section 393.170.1 and not an area certificate under Section 393.170.2, RSMo.²³ ATXI claimed that line certificates do not require such county assents.²⁴

²¹ Ex. 320; Ex. 200, Dietrich Rebuttal, p. 3; Ex. 201, Staff Rebuttal Report, p. 2.

²² Ex. 375, Report and Order, *In the Matter of the Application of Ameren Transmission Co. of Illinois for Other Relief or, in the Alternative, A Certificate of Pub. Convenience & Necessity Authorizing It to Construct, Install, Own, Operate, Maintain & Otherwise Control & Manage A 345,000-Volt Elec. Transmission Line from Palmyra, Missouri, to the Iowa Border & Associated Substation Near Kirksville, Missouri*, EA-2015-0146, 2016 WL 1730118 (Apr. 27, 2016).

²³ Ex. 376, Initial Post-hearing Brief of Ameren Transmission Co. of Illinois, *In the Matter of the Application of Ameren Transmission Co. of Illinois for Other Relief or, in the Alternative, A Certificate of Pub. Convenience & Necessity Authorizing It to Construct, Install, Own, Operate, Maintain & Otherwise Control & Manage A 345,000-Volt Elec. Transmission Line from Palmyra, Missouri, to the Iowa Border & Associated Substation Near Kirksville, Missouri*, EA-2015-0146, p. 60-74.

²⁴ *Id.*

III. Conclusions of Law

The authority for the Commission to approve the Project when necessary or convenient for the public service, including the authority to impose reasonable conditions, is stated in Section 393.170, RSMo.²⁵ GBE is subject to the jurisdiction of the Commission because it is an “electrical corporation”²⁶ and “public utility”²⁷ owning, operating, controlling or managing “electric plant”²⁸. While the Commission only has authority over facilities that are devoted to public use²⁹, an entity that constructs and operates a transmission line bringing electrical energy from electrical power generators to public utilities that serve consumers is a necessary and important link in the distribution of electricity and qualifies as

²⁵ 1. 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.

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.

3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

²⁶ “Electrical corporation” includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, other than a railroad, light rail or street railroad corporation generating electricity solely for railroad, light rail or street railroad purposes or for the use of its tenants and not for sale to others, owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or for its own use or the use of its tenants and not for sale to others. (emphasis added).

²⁷ “Public utility” includes every pipeline corporation, gas corporation, electrical corporation, telecommunications company, water corporation, heat or refrigerating corporation, and sewer corporation, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter.

²⁸ “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)

²⁹ *State ex rel. M.O. Danciger & Co. v. Pub. Serv. Commission of Missouri*, 275 Mo. 483, 205 S.W. 36, 39 (1918); *State ex rel. Buchanan County Power Transmission Co. v. Baker*, 320 Mo. 1146, 1153, 9 S.W.2d 589, 591 (1928).

a public utility.³⁰ Since GBE brought the application, it bears the burden of proof.³¹ The burden of proof is the preponderance of the evidence standard.³² In order to meet this standard, GBE must convince the Commission it is “more likely than not” that its allegations are true.³³

The threshold issue for determination is whether the Commission may lawfully issue to GBE the certificate of convenience and necessity it seeks. The arguments of the parties involve whether proof of county assents under Section 229.100, RSMo,³⁴ affects the Commission’s statutory authority to grant a CCN in this case. Section 229.100 requires assent of the county commission before a company may erect poles for the suspension of electric light or power wires under or across the public roads or highways of that county.

The most recent guidance from the courts on this issue is in the *Matter of Ameren Transmission Co. of Illinois*³⁵. ATXI sought a certificate for an interstate electric transmission line under Section 393.170, as GBE has also requested. ATXI proposed an

³⁰ *State ex rel. Buchanan County Power Transmission Co. v. Baker*, 9 S.W.2d at 592. While the Buchanan County transmission company was determined not to be a public utility because it transmitted electricity to a private company for private use, the court clearly implied that if the electricity had been transmitted to a public utility for public use the transmission company would also be considered to be a public utility. *The Empire District Electric Company v. Progressive Industries, Inc.*, Report and Order, 13 Mo.P.S.C. (N.S.) 659, 668-669 (April 2, 1968).

³¹ “The burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue”. *Clapper v. Lakin*, 343 Mo. 710, 723, 123 S.W.2d 27, 33 (1938).

³² *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 Mo. banc 1996).

³³ *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez*, 936 S.W.2d at 109 -111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

³⁴ “No person or persons, association, companies or corporations shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public roads or highways of any county of this state, without first having obtained the assent of the county commission of such county therefor; and 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.”

³⁵ *Matter of Ameren Transmission Co. of Illinois*, No. WD 79883, 2017 WL 1149139 (Mo. Ct. App. Mar. 28, 2017), reh’g denied (Apr. 27, 2017), transfer denied (Apr. 27, 2017), transfer denied (June 27, 2017).

interstate transmission line that “does not generate, distribute, or sell electricity to the general public or serve any retail service territory.”³⁶ ATXI had not yet received approval from the relevant county commissions under Section 229.100 at the time the Commission issued its Order, but the Commission granted a CCN with the condition that ATXI obtain all necessary county assents before exercising the authority in the CCN. On appeal, the Western District Court of Appeals determined that the Commission lacked authority to grant a CCN without evidence that ATXI had received those county assents, even if the Commission made the CCN conditional on ATXI obtaining the assents in the future. The Court stated:

By statute and by rule, the PSC is authorized to issue a CCN only after the applicant has submitted evidence satisfactory to the PSC that the consent or franchise has been secured by the public utility. Neither statute nor rule authorizes the PSC to issue a CCN *before* the applicant has obtained the required consent or franchise.

Our interpretation of the statute—that it mandates that the applicant receive the consent of local government authorities before the PSC issues a CCN—gives plain meaning to the legislature’s use of the mandatory term “shall” when it describes what documents the applicant must submit to the PSC before a CCN will be issued. Accordingly, county commission assents required by section 229.100 and 4 CSR 240-3.105(1)(D)1 must be submitted to the PSC *before* the PSC grants a CCN.

The PSC’s issuance of a CCN contingent on ATXI’s subsequent provision of required county commission assents was unlawful as it exceeded the PSC’s statutory authority.³⁷

The Western District Court of Appeals vacated the Commission’s Report and Order issuing a CCN to ATXI. While the Commission disagreed with the legal analysis and conclusions in that opinion and asked the Supreme Court of Missouri to accept transfer of

³⁶ *Matter of Ameren Transmission Co. of Illinois*, No. WD 79883, 2017 WL 1149139, *2 (Mo. Ct. App. Mar. 28, 2017).

³⁷ *Matter of Ameren Transmission Co. of Illinois*, No. WD 79883, 2017 WL 1149139, *6, 8 (Mo. Ct. App. Mar. 28, 2017).

the case³⁸, that Court declined. The Western District ATXI opinion is now final and binding on the Commission.

ATXI, in its CCN application case at the Commission, File No. EA-2015-0146, did apply for and receive a line certificate, not an area certificate. The issue of prior county assents for line versus area CCNs was argued extensively at the Commission. ATXI proposed to build an interstate transmission line to transmit electricity for the public use, but that line would not generate, distribute, or sell electricity to the general public or serve any retail service territory, so by definition it could not result in an area certificate. ATXI had not yet obtained the assents required from all the county commissions through which the transmission line would be located.

In this GBE case, as in *Ameren Transmission Co.*, there is a disputed issue as to whether the Commission has the statutory authority to grant a line certificate to GBE without it having filed the required county assents. However, *Ameren Transmission Co.* clearly states that “county commission assents required by section 229.100 and 4 CSR 240-3.105(1)(D)1 must be submitted to the PSC *before* the PSC grants a CCN.”³⁹ (emphasis by the Court).

There are no material factual distinctions between *Ameren Transmission Co.* and this GBE case that would permit the Commission to reach a different result on the question of statutory authority to grant a CCN in this case. Accordingly, *Ameren Transmission Co.* and its plain language regarding the necessity of obtaining prior county assents apply to the

³⁸ The Commission asserted that transfer is appropriate because the Court of Appeals interpreted Section 393.170 contrary to the existing case law interpreting that statute; the roles the legislature intended for the Public Service Commission under Section 393.170 and for the county commissions under Section 229.100 should be clearly delineated to ensure that both the Public Service Commission and the county commissions can fulfill their appointed roles; and the Commission is not authorized to decide the validity or legal effect of a county assent under Section 229.100 in the course of a hearing under Section 393.170.

³⁹ *Matter of Ameren Transmission Co. of Illinois*, No. WD 79883, 2017 WL 1149139, at *8 (Mo. Ct. App. Mar. 28, 2017).

GBE application even though that opinion did not specifically cite to subsection 1 of Section 393.170, the subsection under which GBE requested a CCN. GBE did not submit evidence of county assents in this case. There is clear evidence in the record that GBE lacks a county assent from at least one county, Caldwell County. Under the Court's direction set forth in *Ameren Transmission Co.*, the Commission cannot lawfully issue a CCN to GBE until the company submits evidence that it has obtained the necessary county assents under Section 229.100.

IV. Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts to the law to reach its conclusions, the Commission concludes that the substantial and competent evidence in the record supports the conclusion that GBE has failed to meet, by a preponderance of the evidence, its burden of proof to demonstrate that it has obtained all county assents under Section 229.100 necessary for a certificate of convenience and necessity as required by *Ameren Transmission Co.*. Therefore, the Commission will deny the GBE application. Since the Commission's determination that it lacks the statutory authority to issue a CCN at this time resolves the case, it is unnecessary for the Commission to consider and decide the remaining disputed issues.

There are several motions that are currently pending a determination, as follows:

1. MLA's Motion to Dismiss Application filed on July 4, 2017;
2. GBE's Motion for Waiver or Variance of Filing Requirements filed on June 29, 2017;
3. MLA's Motion to Strike MJMEUC's Supplementation of Hearing Exhibit 479 filed on June 14, 2017;
4. GBE's Motion to Supplement the Record filed on May 2, 2017; and
5. MLA's Motion to Strike Certain Material in Reply Brief of GBE filed on April 27, 2017.

Since the Commission has concluded that under *Ameren Transmission Co.* the GBE application must be denied, the pending motions are rendered moot and will be denied.

THE COMMISSION ORDERS THAT:

1. Grain Belt Express Clean Line LLC's application for a certificate of convenience and necessity filed on August 30, 2016, is denied.
2. All pending motions described in the body of this order are denied.
3. This order shall become effective on September 15, 2017.



BY THE COMMISSION

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

Morris L. Woodruff
Secretary

Stoll, C., concurs.
Hall, Chm., Kenney, Rupp, and
Coleman, CC., concur, with separate
concurring opinion attached;
and certify compliance with the provisions
of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 16th day of August, 2017.

**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)
Current Transmission Line and an Associated Converter)
Station Providing an Interconnection on the Maywood -)
Montgomery 345kV Transmission Line)

File No. EA-2016-0358

**CONCURRING OPINION OF COMMISSIONERS HALL, KENNEY, RUPP,
AND COLEMAN IN THE REPORT AND ORDER**

We concur with the Report and Order issued on August 16, 2017, which denied the application of Grain Belt Express Clean Line LLC (“GBE”) for a certificate of convenience and necessity (“CCN”). The Commission concluded in that Report and Order that GBE failed to meet its burden of proof to demonstrate it had obtained all county assents under Section 229.100, RSMo 2016, necessary for a CCN as required by Section 393.170, RSMo. The Report and Order reached the correct legal conclusion that GBE’s application must be denied, based on direction from the Missouri Western District Court of Appeals in the *Matter of Ameren Transmission Co. of Illinois*¹, which was a separate but similar case. While the Commission disagreed with the legal analysis and conclusions in that opinion and asked the Supreme Court of Missouri to accept transfer of the case², that Court

¹ *Matter of Ameren Transmission Co. of Illinois*, No. WD 79883, 2017 WL 1149139 (Mo. Ct. App. Mar. 28, 2017), reh’g denied (Apr. 27, 2017), transfer denied (Apr. 27, 2017), transfer denied (June 27, 2017).

² The Commission asserted that transfer is appropriate because the Court of Appeals interpreted Section 393.170 contrary to the existing case law interpreting that statute; the roles the legislature intended for the Public Service Commission under Section 393.170 and for the county commissions under Section 229.100 should be clearly delineated to ensure that both the Public Service Commission and the county commissions can fulfill their appointed roles; and the Commission is not authorized to decide the validity or legal effect of a county assent under Section 229.100 in the course of a hearing under Section 393.170.

declined. That Western District opinion is binding on the Commission, and gave the Commission no choice but to deny the GBE application.

However, had it not been for the *Matter of Ameren Transmission Co.* opinion, we would have granted the GBE application, as the evidence showed that the GBE project is “necessary or convenient for the public service”.³ When making a determination of whether an applicant or project is convenient or necessary, the Commission has traditionally applied five criteria, commonly known as the Tartan factors, which follow:

- a) There must be a need for the service;
- b) The applicant must be qualified to provide the proposed service;
- c) The applicant must have the financial ability to provide the service;
- d) The applicant’s proposal must be economically feasible; and
- e) The service must promote the public interest.⁴

The parties have not disputed that GBE is qualified or has the financial ability to provide the service, and in our view the evidence in the record shows that GBE also meets the remaining three factors that were in dispute– need, economic feasibility, and public interest.

Need for the service

The GBE project is needed primarily because of the benefits to the members of the Missouri Joint Municipal Electric Utility Commission (“MJMEUC”)⁵ and their hundreds of

³ Section 393.170, RSMo 2016.

⁴ *In re Tartan Energy*, Report and Order, 3 Mo.P.S.C. 3d 173, Case No. GA-94-127, 1994 WL 762882 (September 16, 1994).

⁵ MJMEUC’s members include the cities of Centralia, Columbia, Hannibal, Kirkwood and the 35 MoPEP cities: Albany, Ava, Bethany, Butler, Carrollton, Chillicothe, El Dorado Springs, Farmington, Fayette, Fredericktown, Gallatin, Harrisonville, Hermann, Higginsville, Jackson, Lamar, La Plata, Lebanon, Macon, Marshall, Memphis, Monroe City, Odessa, Palmyra, Rock Port, Rolla, Salisbury, Shelbina, St. James, Stanberry, Thayer, Trenton, Unionville, Vandalia and Waynesville.

thousands of customers, who had committed to purchase at least 100 MW of wind power utilizing transmission service purchased from GBE. MJMEUC planned to use cheaper wind power from GBE to replace the 100 MW of energy and capacity it currently purchases from Illinois Power Marketing, through a contract set to expire in 2021. MJMEUC's power purchase agreement with Infinity Wind obligated MJMEUC take that GBE power and pay for it, assuming the GBE line was built, and Infinity was contractually obligated to provide that wind energy or forfeit security payments. There was some dispute about the amount of savings that MJMEUC and its customers would have received by purchasing the cheaper wind power through GBE, but MJMEUC calculates that their members would have saved approximately \$9-11 million annually. Evidently, the elected decision makers for MJMEUC's member cities recognized a need for these savings, and there was also evidence that wind power transmitted to Missouri would have been of interest to commercial and industrial customers, such as Walmart, Missouri Industrial Energy Consumers, and the Missouri Retailers Association.

Of course, MJMEUC and Missouri industrial customers are not the only energy customers we must consider in this analysis. In a state whose regulated utilities participate in two regional transmission organizations, it is appropriate to consider the project's effect on other market participants. There was substantial evidence of demand for this project, both on the production and delivery side, within the relevant regional markets. For instance, GBE presented evidence of a commitment by an Illinois load-serving entity to purchase 50 MW of the project's transmission service. On the production side, during open solicitations in 2015 and 2016, transmission service requests for the line far exceeded the

total available capacity of the project. Clearly, there is a demonstrable need for the service the GBE project offered both in Missouri and in the regions that affect Missouri energy markets.

Economic feasibility

The GBE project is economically feasible because it links customers in Missouri who desire to purchase low-cost wind power from western Kansas with wind generation companies like Infinity Wind who propose to supply that energy, all under a business model under which GBE assumed the financial risk of building and operating the transmission line. Moreover, the cost of the project would not have been recovered from Missouri ratepayers through either Southwest Power Pool (SPP) or Midcontinent Independent System Operator, Inc. (MISO) regional cost allocation tariffs but rather by the entities contracting to transmit energy over the line.

GBE also presented a credible levelized cost of energy analysis from witness David Berry to show that the cost to bring wind energy from western Kansas to Missouri and eastward using the GBE project is the lowest-cost resource option compared to Missouri wind, combined cycle gas, and Missouri utility-scale solar generation. While the MJMEUC/Infinity contracts demonstrate the economic feasibility of the GBE project compared to MISO wind, it is the 3500 MW portion of the project to be sold in PJM that demonstrates the financial viability of the project overall, since power prices for PJM are generally \$10/MWh higher than prices paid for the energy sold into the MISO market in Missouri. When GBE conducted its open solicitation, it offered a price that was higher than both the MJMEUC “first-mover” price and the normal Missouri rate, and it received bids that

were 6½ times the capacity available on the project, which is a solid indication of economic feasibility.

Public interest

It is the Commission's responsibility to balance the interests of all stakeholders, including the affected landowners, to determine what is in the best interest of the general public as a whole. The evidence in the case demonstrated that the GBE project would have created both short-term and long-term benefits to ratepayers and all the citizens of the state. In our view, the broad economic, environmental, and other benefits of the project to the entire state of Missouri outweigh the interests of the individual landowners.

The GBE project would have lowered energy production costs in Missouri by \$40 million or more under future energy scenarios developed by MISO and would have had a substantial and favorable effect on the reliability of electric service in Missouri, particularly through its effect on wind diversity in the region. Geographic diversity in wind resources inevitably helps to reduce system variability and uncertainty in regional energy systems. In addition, the project would have provided positive environmental impacts, since displacement of fossil fuels for wind power would reduce emissions of carbon dioxide, sulfur dioxide, nitrogen oxide, particulates and organic compounds, reduce waste by-products, and reduce water usage in Missouri.

The Missouri Department of Economic Development estimated that the construction phase of the project would have supported 1,527 total jobs over three years, created \$246 million in personal income, \$476 million in GDP, and \$9.6 million in state general revenue for the state of Missouri, and \$249 million in Missouri-specific manufacturing and

professional service contracting spending. The project would also have resulted in significant property tax benefits to affected counties, a total of approximately \$7.2 million in the first year of operation. In that first year, Randolph County alone would have received more than \$720,000 in additional tax revenue. In the first year of operation, the project would have resulted in approximately \$14.97 million in easement payments and created 91 jobs, \$17.9 million worth of personal income, and \$9.1 million in gross domestic product.

Public policy for a state must be found in a constitutional provision, a statute, a regulation promulgated pursuant to statute, or a rule, policy, or initiative created by a governmental body. In Missouri, state energy policy can be found in laws such as the Renewable Energy Standard, established by vote of the Missouri public in 2008, and the Energy Efficiency Investment Act, promulgated by our legislature in 2013, as well as the Comprehensive State Energy Plan, an initiative implemented by the Missouri Division of Energy in 2015. The public benefits described above – low cost, reliable energy with positive environmental impacts – could not in one fell swoop address all the energy policy needs of Missouri, but it would have been a solid step forward and could have served as a bridge to our energy future.

There can be no debate that our energy future will require more diversity in energy resources, particularly renewable resources. We are witnessing a worldwide, long-term and comprehensive movement towards renewable energy in general and wind energy specifically. Wind energy provides great promise as a source for affordable, reliable, safe,

and environmentally-friendly energy. The GBE project would facilitate this movement in Missouri, would thereby benefit Missouri citizens, and is therefore in the public interest.

Finally, we are sympathetic to the sincere concerns expressed by the landowners who appeared before the Commission during local public hearings in this case. However, many of those concerns could have been addressed through carefully considered conditions placed on the CCN. We would have voted to include many conditions on granting the CCN that would have provided necessary protections for Missouri landowners, ratepayers, and citizens. These conditions were proposed by the parties to the case, many of which were agreed to by GBE. Some of the proposed conditions included financing, interconnection studies and safety, protection of nearby utility facilities, emergency restoration plans, construction and clearing, maintenance and reporting, landowner interactions and right-of-way acquisition, agricultural mitigation protocols, and establishment of a decommissioning fund, the first such fund for a transmission line in the United States. This Commission's ability to impose such protections for Missouri citizens would be lost if GBE must now bypass Missouri and obtain approval for the project from the U.S. government based on federal law. We would have preferred to grant the application and retain those necessary protections.

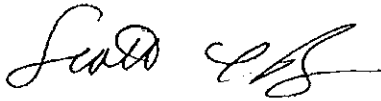
With the concerns set forth above, we concur with the Report and Order issued in this case on August 16, 2017.



Daniel Y. Hall
Chairman



William P. Kenney
Commissioner



Scott T. Rupp
Commissioner



Maida J. Coleman
Commissioner

Dated at Jefferson City, Missouri
On this 16th day of August, 2017

CONCISE STATEMENT OF ISSUES BEING APPEALED

- a. The PSC's Report and Order is unlawful and unreasonable because the PSC incorrectly concluded that *In re Ameren Transmission Co. v. PSC of Mo.*, No. WD 79883, 2017 Mo. App. LEXIS 244* (Mar. 28, 2017), *applications for transfer denied*, No. SC96427, 2017 Mo. LEXIS 266* (June 27, 2017) precluded it from exercising its authority to issue a Line Certificate of Convenience and Necessity to Grain Belt Express Clean Line, LLC.
- b. The PSC's Report and Order is unlawful and unreasonable because its conclusion violates the statutory scheme that authorizes the PSC to lawfully grant the Line Certificate of Convenience and Necessity to Grain Belt Express Clean Line, LLC.
- c. The PSC's Report and Order is unlawful and unreasonable because its conclusion precluded the PSC from applying the specialized knowledge, experience and administrative process necessary for uniform and non-parochial regulation of utilities for the public benefit.
- d. The PSC's Report and Order is unlawful and unreasonable because its conclusion violates the Judiciary's Constitutionally-grounded deference to the PSC as an agency of the Executive.
- e. The PSC's Report and Order is unlawful and unreasonable because it is grounded, in part, on two Exhibits admitted into the Record of Evidence over MJMEUC's timely Due Process objection.
- f. The PSC's Report and Order is unjust because MJMEUC's members could be deprived, by the delay of appellate review, of the significant benefits four of the five Commissioners found to exist.

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