

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-2016-0358
Current Transmission Line and an Associated Converter)
Station Providing an interconnection on the Maywood-)
Montgomery 345 kV Transmission Line)

OPPOSITION OF GRAIN BELT EXPRESS CLEAN LINE LLC
TO MOTION OF MISSOURI LANDOWNERS ALLIANCE
TO STRIKE CERTAIN PRE-FILED EVIDENCE ON THE BASIS OF SECTION 536.070(11)

Grain Belt Express Clean Line LLC (“Grain Belt Express” or “Company”) states the following in opposition to the motion of Missouri Landowners Alliance (“MLA”) to strike certain expert testimony on the basis of Section 536.070(11) (“MLA Motion”):

1. As MLA acknowledges in paragraph 12 of its Motion, it is here making an attempt to strike documents and testimony that is nearly identical to its unsuccessful attempt to strike documents and testimony in the Company’s 2014 certificate of convenience and necessity case. See Motion of Missouri Landowners Alliance To Strike Certain Pre-Filed Evidence on the Basis of Section 536.070(11) RSMo, Case No. EA-2014-0207 (Nov. 4, 2014) (“MLA’s 2014 Motion”). As the Commission did in that case, the Commission should dismiss MLA’s Motion in this proceeding as well.

2. MLA’s Motion is, as it was in 2014, based on an improper reading of the Missouri Administrative Procedure Act’s Section 536.070(11)¹ which states that the “results of statistical examinations or studies, or of audits, compilations of figures, or surveys” “or of a large number of figures, or involving the ascertainment of many related facts” is admissible if “such examination, study, audit, compilation of figures, or survey was made by or under the

¹ All statutory citations are to the Missouri Revised Statutes (2000), as amended.

supervision of a witness, who is present at the hearing” MLA takes this relatively straightforward provision regarding the presentation of audits or surveys and twists it into a weapon that seeks to prohibit the admission of expert testimony that relies upon data and information compiled by government and government-regulated institutions that are relied upon by every energy company in the United States, including every public utility.

3. However, the Missouri Legislature foresaw such objections years ago, and wisely stated in Section 386.410.1: “And in all investigations, inquiries or hearings the commission or commissioner shall not be bound by the technical rules of evidence [emphasis added].” To make clear its point, the General Assembly stated in Section 386.410.2: “No formality in any proceeding nor in the manner of taking testimony before the commission or any commissioner shall invalidate any order, decision, rule or regulation made, approved or confirmed by the Commission.” Accordingly, the Commission “has broad discretion in evidentiary determinations.” Deaconess Manor Ass’n v. PSC, 994 S.W.2d 602, 611 (Mo. App. W.D. 1999).

4. Furthermore, even if Section 536.070(11) were applicable to the facts of this case, MLA’s interpretation of that provision is entirely illogical. MLA would have this Commission prohibit any witness from relying on data originally prepared by others. But that is the precisely nature of expert testimony. “Usually, an expert witness’ opinion testimony is based upon facts that the expert did not personally observe and of which the expert did not have personal knowledge.” CADCO, Inc. v. Fleetwood Enterprises, Inc., 220 S.W.3d 426, 434 (Mo. App. E.D. 2007).

5. The Commission acknowledged this in denying MLA’s 2014 Motion when it stated, “[t]he attachments to Mr. Berry’s testimony were not created by him, but there are other provisions besides 536.070.11 that support their admission, such as exceptions for public governmental records and reports and reliable market reports and commercial publications. So

the motion is denied as to all those documents.” See Tr. Vol. 10 at 25:12-17, Case No. EA-2014-0207 (Nov. 10, 2014).

6. Because testifying experts routinely rely on data prepared by others, under Missouri law “facts or data on which experts rely in forming their opinions need not be independently admissible as long as the evidence satisfies the two requirements of Section 490.065.3.” CADCO, 220 S.W.3d at 434 (emphasis added). Those requirements are that the facts or data (1) “be of a type reasonably relied upon by experts in the field,” and (2) “be otherwise reasonably reliable.” Id.

7. When determining whether the facts and data are reasonably relied upon by experts in the field, courts are generally expected to defer to the expert’s assessment of which data is reasonably reliable. CADCO, 220 S.W.3d at 434. “If the facts and data are shown to be reasonably relied upon by experts in the field, they are necessarily relevant to the issue the expert is addressing. The only way to attack the admissibility of that information is to show that the facts and data are not the type experts in the field are relying on or are not reliable.” Murrell v. State, 215 S.W.3d 96, 112 (Mo. en banc 2007). MLA has not made such a showing.

8. When determining whether the facts and data otherwise are reasonably reliable, courts look beyond the testimony itself. CADCO, 220 S.W.3d at 434. However, “[i]t is only in those cases where the source upon which the expert relies for opinion is so slight as to be fundamentally unsupported, that the finder of fact may not receive the opinion.” Keyser v. Keyser, 81 S.W.3d 164, 169 (Mo. App. W.D. 2002). Again, MLA does not challenge the credibility of the data upon which the Grain Belt Express witnesses rely. It merely challenges its admissibility.

9. Thus, in the analogous statutory provisions concerning the admissibility of expert testimony, “where expert opinion rests in part on factual information not in evidence, the

standard objection such as that there is no opportunity to test the credibility of its sources at the trial or to cross-examine the witness as to the extrajudicial facts no longer avails, either as to the reasonableness of the foundation for the opinion or to the opinion itself.” Wulfin v. Kansas City S. Indus., Inc., 842 S.W.2d 133, 152 (Mo. App. W.D. 1992) (emphasis added), *overruled on other grounds*, Executive Bd. of Missouri Baptist Convention v. Carnahan, 170 S.W.3d 437 (Mo. App. W.D. 2005). Clearly, the testimony of the Company’s witnesses cannot be challenged on the grounds that it is based upon data that the witnesses did not personally observe and of which the witnesses did not have personal knowledge.

10. Crucially, questions as to the sources of the facts and data upon which the witness relies affect the weight, not the admissibility, of the opinion. Doe v. McFarlane, 207 S.W.3d 52, 62 (Mo. App. E.D. 2006). The Commission acknowledged this when it denied MLA’s 2014 Motion, stating that “[a]ny complaints about the sources of the facts and data upon which the witnesses rely will go to the weight, not the admissibility of their testimony, so the motion is denied as to the testimony.” See Tr. Vol. 10 at 25:4-7, Case No. EA-2014-0207 (Nov. 10, 2014).

11. The case MLA cites bolsters this point. In Big River Tel. Co. v. Southwestern Bell Tel., L.P., 440 S.W.3d 503 (Mo. App. W.D. 2014), appellant Big River Telephone Company argued that the only evidence supporting the Commission’s determination that it owed \$352,123.48 in access charges to respondent AT&T Missouri -- Exhibit 33 -- was inadmissible pursuant to Section 536.070(11). As does MLA here, the Big River Court noted that the appellant “misses the mark” with this argument. Id. at 511.

12. Citing Section 386.410.1 favorably, the Big River Court determined that the appropriate foundation had indeed been laid for Exhibit 33, and that the challenged witness proffering that Exhibit, William Greenlaw, was qualified to present this evidence. Id. at 511-12. While Greenlaw had no role in creating the underlying data, Exhibit 33 was a compilation of

figures billed by ATT to Big River for the traffic at issue in the dispute and created either by Greenlaw or under his authority. Id. at 511. Furthermore, Greenlaw was present at the hearing and available for cross-examination. Id.

13. Citing Section 536.070(11), the court found that Big River's complaints about Greenlaw's qualifications go only to "the weight of such evidence" and "shall not affect its admissibility." Id. at 512. Accordingly, Exhibit 33 was admissible. Id.

14. Here, MLA primarily challenges the schedules and related testimony of witnesses on the grounds that those schedules were prepared by others. However, as explained above, Section 536.070(11) does not and cannot encompass the underlying data upon which a witness relies in his analysis. Nevertheless, MLA challenges: (1) wind speed maps prepared by AWS Truepower and related testimony of Grain Belt Express witness David Berry; (2) Mr. Berry's summarization of the results of a highly technical study conducted by the Brattle Group; (3) a Regional Market Report and a Leidos Report relied upon and related testimony by MJMEUC witness John Grotzinger; (4) an Economic Impact Study authored by Drs. Loomis and Carlson of Strategic Economic Research, LLC that was attached to the testimony of Department of Economic Development ("DED") witness Alan Spell, relied upon in the Missouri Economic Research and Information Center schedule attached to the testimony of Grain Belt Express witness Mark Lawlor, and referenced in the testimony of DED witnesses Barbara Meisenheimer and Company witnesses Mark Lawlor and Michael Skelly; and (5) maps and technical documents prepared by other sources and related testimony by Wind on the Wires witness Michael Goggin. While each of these documents and related testimony is admissible, the Company addresses herein those portions of MLA's Motion relevant to its witnesses.

15. Taking the AWS Truepower map first, upon which MLA challenges the schedules and testimony of both Mr. Berry and Mr. Goggin, Mr. Berry does have direct knowledge of wind

speeds in many parts of the country that are summarized in the map. And as demonstrated by Mr. Berry's data request response to which MLA cites, he is familiar with the methodologies used in preparing the map. See MLA Motion Exhibit A. The testimony that MLA seeks to strike as allegedly related to this map either is based on Mr. Berry's personal knowledge or is not even related to the map. Furthermore, Show Me Concerned Landowners witness Glen Justis relies on the same map at page 9 of his Rebuttal Testimony. What's more, MLA does not challenge the credibility of the data or methodology upon which Mr. Berry relies. Accordingly, the wind map and related testimony are admissible under Section 536.070(11).

16. Similarly, Mr. Berry's summarization of the results of a highly technical study conducted by the Brattle Group is admissible because he oversaw and was involved in preparing that study, and is familiar with the data and methodology used in that study. Nowhere does MLA challenge the credibility of this data or methodology. As a result, Mr. Berry's Direct Testimony on this study is admissible under Section 536.070(11).

17. Each of the remaining documents and the related testimony is admissible under Section 490.065 and cannot be challenged under Section 536.070(11), which plainly does not encompass the underlying data upon which a witness relies in his analysis. Indeed, an expert witness's opinion testimony usually is based upon facts that the expert did not personally observe and of which the expert did not have personal knowledge. As testifying witnesses routinely rely on data prepared by others, "facts or data on which experts rely in forming their opinions need not be independently admissible as long as the evidence satisfies the two requirements of Section 490.065.3." CADCO, 220 S.W.3d at 434.

18. Consequently, and as explained above, the relevant question is not whether these documents are independently admissible, but rather whether they are of a type reasonably relied upon by experts in the field, and is otherwise reasonably reliable. Id. See Section 490.065.3.

And questions as to the sources of the facts and data upon which the witness relies affect the weight, not the admissibility, of the opinion. Doe v. McFarlane, 207 S.W.3d 52, 62 (Mo. App. E.D. 2006). See also Tr. Vol. 10 at 25:4-7, Case No. EA-2014-0207 (Nov. 10, 2014).

19. The Commission is plainly capable of answering such questions, as it 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, and the commission has a staff of technical and professional experts to aid it in the accomplishment of its statutory powers.” State ex rel. Chicago, Rock Island & Pac. R.R. v. PSC, 312 S.W.2d 791, 796 (Mo. 1958).

20. As a result, Grain Belt Express may rely on the Economic Impact Study authored by Drs. Loomis and Carlson of Strategic Economic Research, LLC. Such study is reasonably relied upon by experts in the field, and indeed was relied upon by DED witnesses Spell and Meisenheimer. The Commission should defer to Mr. Lawlor’s assessment of which data is reasonably reliable. CADCO, 220 S.W.3d at 434. And in any event, MLA has not challenged the credibility of the data upon which Mr. Lawlor’s Schedule MOL-7 and related testimony relies, but only challenges its admissibility. Schedule MOL-7 and Mr. Lawlor’s related testimony are plainly admissible.

21. Finally, MLA moves to strike on the basis of hearsay those portions of Mr. Lawlor’s testimony concerning MJMEUC’s estimation that the Project will allow it to save \$10 million annually compared to an existing contract for fossil fuel generation. However, the principal reason for the exclusion of hearsay testimony is lacking here. MLA will have full opportunity to confront and cross-examine witnesses at the hearing to determine the credibility of Mr. Lawlor’s statement. Indeed, two MJMEUC witnesses will be available to testify to this estimated annual savings. MJMEUC witnesses Duncan Kincheloe and John Grotzinger already have testified to this savings. See Kincheloe Rebuttal at 4:9-11; Grotzinger Rebuttal at 4:25, 5:1-

6, 8:16-18, 9:12-16, Sch. JG-3, Sch. JG-6, Sch. JG-7. These witnesses will be available at the hearing and subject to cross-examination on the estimated annual savings the Project will provide.

22. Accordingly, Mr. Lawlor's testimony regarding MJMEUC's savings falls under the "residual exception" to the rule against hearsay. See Federal Rule of Evidence 807. Mr. Lawlor's testimony has "circumstantial guarantees of trustworthiness" in that he, along with MJMEUC's own witnesses, will all be subject to cross-examination. See United States v. Peneaux, 432 F.3d 882, 892 (8th Cir. 2005) ("The fact that T.P. testified at trial and was subject to cross-examination vitiates the main concern of the hearsay rule The jury was able to weigh her statements and accord them whatever weight they deemed appropriate [internal quotation omitted])." MJMEUC's estimation that the Project will allow it to save \$10 million annually compared to an existing contract for fossil fuel generation is indisputably "offered as evidence of a material fact" in this proceeding, and it is more probative on the point of MJMEUC's savings than any other evidence available to Grain Belt Express through reasonable efforts. Further, MLA has indisputably had "reasonable notice of [Grain Belt Express's] intent to offer the statement and its particulars, including the declarant's name and address," so that MLA "has a fair opportunity to meet it." Thus, admitting Mr. Lawlor's testimony on this point will "best serve the purposes of" evidentiary rules and the interests of justice. Mr. Lawlor's testimony that referenced MJMEUC's cost savings estimates should not be stricken.

23. Because the Missouri General Assembly recognized years ago that utility regulation was a complicated process that would require consideration of a wide array of evidence and associated expert testimony, it declared that in Section 386.410.1 that the Public Service Commission "shall not be bound by the technical rules of evidence." That specific

directive to this Commission and to all those who practice before it makes clear that the evidence that MLA seeks to exclude from evidence is entirely proper for the Commission to consider.

WHEREFORE, Grain Belt Express Clean Line LLC requests that the MLA motion to strike be denied.

Respectfully submitted,

/s/ Karl Zobrist

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**ATTORNEYS FOR GRAIN BELT EXPRESS
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all parties of record by email or U.S. mail, postage prepaid, this 15th day of March 2017.

/s/ Karl Zobrist

Attorney for Grain Belt Express Clean Line LLC