

**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,) **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 MOTION TO COMPEL REGARDING JOINT
PROSECUTION AND DEFENSE AGREEMENT**

Issue Date: February 17, 2017

Effective Date: February 17, 2017

On August 30, 2016, Grain Belt Express Clean Line LLC (“Grain Belt Express”) filed an application with the Missouri Public Service Commission (“Commission”) for a Certificate of Convenience and Necessity 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. In its *Order Setting Procedural Schedule and Other Procedural Requirements* issued on October 19, 2016, the Commission ordered that any pending written discovery motion may be ruled upon by the presiding regulatory law judge either on the record or in a written order.

On January 30, 2017, the Missouri Landowners Alliance (“MLA”) filed a motion seeking to compel Grain Belt Express and the Missouri Joint Municipal Electric Utility Commission (“MJMEUC”, and collectively, the “Respondents”) to respond to certain data requests submitted to them by MLA relating to the Transmission Service Agreement between those two parties. While Respondents provided some information in response to

MLA's data requests, including a copy of the Transmission Service Agreement, other data requests were denied on the basis of attorney-client privilege and attorney work product. Specifically, Respondents assert the common interest doctrine, as memorialized in a Joint Prosecution and Defense Agreement ("Agreement") executed by those two parties on June 1, 2016, as the reason for refusing to respond to MLA's data requests.

MLA requests that the Commission compel Respondents to fully answer its data requests for the following reasons:

1. MLA alleges that Respondents have improperly asserted attorney-client privilege through the common interest doctrine as a shield to prevent inquiries regarding the Transmission Service Agreement and "throw a protective blanket over" Respondents' communications;
2. The common interest doctrine does not apply in this case because Respondents' common interest is merely commercial, rather than a common legal interest;
3. Even if the Agreement does properly assert privilege through a common interest, Respondents' communications prior to the date the Agreement was executed are not protected by any such privilege and are discoverable by MLA; and
4. If MLA is denied access to the information it is seeking, MLA would be deprived of its right to due process of law under the United States and Missouri Constitutions.

"The attorney-client privilege prohibits the discovery of confidential communications, oral or written, between an attorney and his client with reference to litigation pending or

contemplated.”¹ A client waives the attorney-client privilege when he or she voluntarily shares the communication with a third party, but there is no waiver where the third party shares a common interest in the outcome of the litigation and where the communication was made in confidence.² “The common interest doctrine extends the attorney-client privilege to two separate clients, who are represented by separate attorneys, who share an identical legal interest, and who agree to exchange information regarding the matter.”³ The common interest may be “either legal, factual, or strategic in character”⁴, but “must be an identical interest and a legal interest, as opposed to a merely commercial interest”.⁵

Based on the terms of the Agreement and the information provided by MLA and Respondents, Respondents have established that attorney-client privilege or attorney work product apply to their communications; that they share a common interest in Grain Belt Express obtaining a certificate of convenience and necessity from the Commission; that Respondents have shared communications in confidence regarding that interest; and that Respondents have not waived the privilege, as they have both objected to MLA’s data requests.

While MLA characterizes the Agreement and assertion of attorney-client privilege by Respondents as an improper attempt to avoid discovery, there is no evidence of bad faith on the part of Respondents. Respondents have only invoked a privilege that is provided by

¹ *Ayers Oil Co. v. Am. Bus. Brokers, Inc.*, No. 2:09 CV 02 DDN, 2009 WL 4725297, at *1 (E.D. Mo. Dec. 2, 2009). See also, Section 491.060(4), RSMo 2000.

² *Lipton Realty, Inc. v. St. Louis Housing Authority*, 705 S.W.2d 565, 570 (Mo. App. 1986).

³ *Ayers Oil Co.* at p. 2.; *John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, AFL-CIO*, 913 F.2d 544, 556 (8th Cir. 1990).

⁴ *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997).

⁵ *Ayers Oil Co.*, at p. 2.

law.⁶ Since Respondents are both parties to this proceeding, the common interest between Respondents is a legal interest, not merely commercial⁷, so the common interest doctrine does apply in this case.

MLA argues that Respondents' communications prior to the date the Agreement was executed are not protected by any such privilege and are discoverable by MLA. While a written agreement, such as the Agreement executed by Respondents, is the most effective method of establishing the existence of a common interest agreement, an oral agreement may also establish such a common interest.⁸ Representations by Grain Belt Express indicate that Grain Belt Express and MJMEUC have been exchanging information covered by attorney-client privilege and attorney work product long before the Agreement was executed. This information related to working drafts of the Agreement and the Transmission Service Agreement and coordination of legal strategy in preparation for another attempt at obtaining approval for the transmission line project from the Commission. The terms of the Agreement support this position, stating that it is Respondents' intent that "past and future communications" among Respondents and their counsel remain confidential and protected from disclosure to any third party. The Commission concludes that Respondents' common interest pre-dates the Agreement, so any privileged communications prior to the Agreement may not be disclosed to MLA.

⁶ Courts have stated that the rationale for the common interest privilege is to encourage persons who share a common interest in litigation to communicate with their respective attorneys and with each other to effectively prosecute or defend their claims. *In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990); Jeffery McPherson & Brian E. Kaveney, *The Common Interest Rule: May Parties Whose Interests Are Aligned Protect Their Coordinated Legal Strategy from Adversaries?*, 66 J. Mo. B. 20 (2010).

⁷ Persons with merely commercial interests are usually not parties to the litigation. See, *Ayers Oil Co. v. Am. Bus. Brokers, Inc.*, No. 2:09 CV 02 DDN, 2009 WL 4725297, at *2 (E.D. Mo. Dec. 2, 2009).

⁸ *Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F. Supp. 2d 11, 16 (D.D.C. 2007); See also, *Lipton Realty, Inc.*, 705 S.W.2d at 570, where the common interest did not involve a written agreement.

MLA argues that if it cannot obtain access to the information it is seeking, it will be denied due process of law. However, once the privilege is established, the privilege is absolute. “[E]ven if an adversary can show a need for the material and hardship in acquiring it, discovery of the privileged communication is not authorized”.⁹ Allowing discovery of matters which are privileged or work product would constitute an abuse of discretion by the Commission.¹⁰ Therefore, based on all of the reasons stated above, the Commission will deny MLA’s motion to compel against Grain Belt Express and MJMEUC.

THE COMMISSION ORDERS THAT:

1. The Missouri Landowners Alliance’s motion to compel against Grain Belt Express Clean Line LLC and the Missouri Joint Municipal Electric Utility Commission filed on January 30, 2017, is denied.
2. This order shall be effective when issued.



BY THE COMMISSION

A handwritten signature in cursive script that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Michael Bushmann, Senior Regulatory Law
Judge by delegation of authority pursuant to
Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 17th day of February, 2017.

⁹ *State ex rel. Tillman v. Copeland*, 271 S.W.3d 42, 45 (Mo. App. 2008).

¹⁰ *St. Louis Little Rock Hosp., Inc. v. Gaertner*, 682 S.W.2d 146, 148 (Mo. App. 1984).

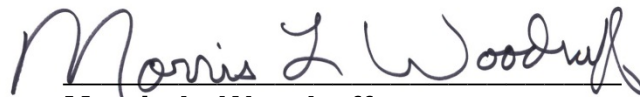
STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 17th day of February 2017.




Morris L. Woodruff
Secretary

MISSOURI PUBLIC SERVICE COMMISSION

February 17, 2017

File/Case No. EA-2016-0358

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Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,

A handwritten signature in black ink that reads "Morris L. Woodruff". The signature is written in a cursive, flowing style.

**Morris L. Woodruff
Secretary**

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.