

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

In the Matter of the Application of Grain Belt)
Express LLC for an Amendment to its Certificate)
of Convenience and Necessity Authorizing it to)
Construct, Own, Operate, Control, Manage, and)
Maintain a High Voltage, Direct Current)
Transmission Line and Associated Converter)
Station.)

Case No. EA-2023-0017

**STAFF’S RESPONSE TO THE MISSOURI LANDOWNERS’
ALLIANCE’S MOTION FOR SUMMARY DISPOSITION**

COMES NOW the Staff of the Missouri Public Service Commission, and for its *Response to the Missouri Landowners’ Alliance’s Motion for Summary Disposition*, urges the Commission to **DENY** the same. In support whereof, Staff states as follows:

1. On July 12, 2022, Grain Belt Express filed in Case No. EA-2016-0358 a *Notice of Intended Amendment Filing*, providing notice that it would in 60 days file its *Application to Amend* its existing Certificate of Convenience and Necessity (“CCN”).
2. On July 13, 2022, the Commission opened the present case as a vehicle for Grain Belt’s amendment application and proceedings thereupon.
3. On October 28, 2022, the Missouri Landowners’ Alliance (“MLA”) filed its *Motion for Summary Disposition*.
4. On October 31, 2022, the Commission by order set November 28, 2022, as the deadline for responses to MLA’s motion.
5. Staff admits the allegations set out in Paragraphs 1-30 of MLA’s motion.
6. Staff suggests that the public interest requires that an evidentiary hearing be held in this matter, to establish the material facts and to permit the Commission and all parties to explore all relevant factors.

LEGAL MEMORANDUM

MLA's *Motion for Summary Disposition* is without merit and must, therefore, be denied, as further explained below.

A.

Summary Determination

Commission Rule 20 CSR 4240-2.117 authorizes summary disposition where the Commission concludes that (1) there is no genuine dispute as to any material fact, (2) any party is entitled to relief as a matter of law as to all or any part of the case, and (3) the Commission determines that summary disposition is in the public interest. Rule 20 CSR 4240-2.117(1)(E).

In the present case, is any party entitled to relief as a matter of law? MLA is "requesting the Commission to summarily dismiss the Application filed in this case by Grain Belt Express LLC on August 24, 2022" Because MLA seeks dismissal as a remedy, its motion for summary disposition is in the nature of a motion to dismiss for failure to state a claim on which relief can be granted. MLA summarized its theory as follows:

The basic theory behind this Motion is that once Grain Belt filed for major modifications to the CCN granted by the Commission in Case No. EA-2016-0358, it abandoned that CCN. Accordingly, Grain Belt no longer has a valid CCN which might be amended in this proceeding.

MLA's *Motion for Summary Disposition*, p. 1.

A motion to dismiss for failure to state a claim is solely a test of the adequacy of the petition. ***Mitchell v. Phillips***, 596 S.W.3d 120, 122-23 (Mo. banc 2020). "[To avoid dismissal,] the claimant merely must allege facts sufficient to state a cognizable cause of action." ***Mo. State Conf. of Nat'l Ass'n for Advancement of Colored People v.***

State, 601 S.W.3d 241, 246 (Mo. banc 2020) (per curiam). The question, then, is whether Grain Belt has stated a cognizable cause of action?

B.

Certificate of Convenience and Necessity (“CCN”)

Grain Belt’s *Application*, “under authority of and in accordance with Section 393.170.1 RSMo., 20 CSR 4240-2.060, 20 CSR 4240-20.045, and the Commission’s March 20, 2019, *Report & Order on Remand*,” requests that the Commission “amend its existing certificate of public convenience and necessity (“CCN”)” regarding “an approximately 800-mile, overhead, multi-terminal ±600 kilovolt (“kV”) high-voltage, direct current (“HVDC”) transmission line and associated facilities including converter stations and alternating current (“AC”) connector lines (the “Project”).” Grain Belt’s *Application*, p. 1.

The Commission is authorized to grant CCNs at Section 393.170, RSMo., as follows:

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.

There are two varieties of CCN. ***Grain Belt Express Clean Line, LLC v. Public Service Comm’n***, 555 S.W.3d 469, 471 (Mo. banc 2018); ***State ex rel. Cass County v. P.S.C.***, 259 S.W.3d 544, 549 (Mo. App., W.D., 2008).

Certificate ‘authority’ is of two kinds and emanates from two classified sources. Sub-section 1 requires ‘authority’ to construct an electric plant. Sub-section 2 requires ‘authority’ for an established company to serve a territory by means of an existing plant.

State ex rel. Harline v. P.S.C., 343 S.W.2d 177, 185 (Mo. App. 1960). Section 393.170.2, RSMo., describes the “area certificate,” which authorizes the provision of utility services within a certain defined territory, generally on a monopoly basis. ***Grain Belt***, *supra*, 555 S.W.3d at 471-2. Section 393.170.1, RSMo., describes the “line certificate” or “plant certificate,” ***Cass County***, *supra*, at 549,¹ which authorizes the construction of a utility plant at a particular location or the construction and operation of a transmission line or pipeline along a prescribed route. ***Grain Belt***, *supra*, 555 S.W.3d at 471.

The Commission may grant a CCN whenever it determines, after “a hearing more or less contemporaneous with the request,”² ***StopAquila.Org v. Aquila, Inc.***, 180 S.W.3d 24, 34 (Mo. App., W.D. 2005), that “such . . . is necessary or convenient for the public service.” Section 393.170.3, RSMo. Missouri courts have explained the meaning

¹ “Permission to build transmission lines or production facilities is generally granted in the form of a ‘line certificate.’”

² “[T]he regulatory powers accorded the Commission, which ultimately answer to the public interest, must of necessity address conditions existing at the time the power is exercised because such interest is not static and changes over time.” *Id.*, at 35.

of “necessary or convenient”:

The PSC has authority to grant certificates of convenience and necessity when it is determined after due hearing that construction is “necessary or convenient for the public service.” § 393.170.3. The term “necessity” does not mean “essential” or “absolutely indispensable”, but that an additional service would be an improvement justifying its cost. ***State ex rel. Beaufort Transfer Co. v. Clark***, 504 S.W.2d 216, 219 (Mo. App., K.C.D. 1973). Additionally, what is necessary and convenient encompasses regulation of monopoly for destructive competition, prevention of undesirable competition, and prevention of duplication of service. ***State ex rel. Public Water Supply Dist. No. 8 v. Public Serv. Comm'n***, 600 S.W.2d 147, 154 (Mo. App. 1980). The safety and adequacy of facilities are proper criteria in evaluating necessity and convenience as are the relative experience and reliability of competing suppliers. ***State ex rel. Ozark Elec. Coop. v. Public Serv. Comm'n***, 527 S.W.2d 390, 394 (Mo. App. 1975). Furthermore, it is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served in the award of the certificate. *Id.* at 392.

State ex rel. Intercon Gas, Inc. v. P.S.C., 848 S.W.2d 593, 597-598 (Mo. App., W.D. 1993).

When determining an application for a CCN, the Commission considers the five so-called Tartan Factors: (1) whether there is a need for the service; (2) whether the applicant is qualified to provide the service; (3) whether the applicant has the financial ability to provide the service; (4) whether the applicant’s proposal is economically feasible; and (5) whether the service will promote the public interest. ***In the Matter of Tartan Energy Company***, 3 Mo.P.S.C.3d 173, 177 (1994).

Effective April 19, 2019, The Commission’s *Report and Order on Remand* granted a line certificate to Grain Belt authorizing it to construct and operate its proposed 206-mile long HVDC transmission line across eight counties in northern Missouri.³ All of the Tartan Factors were considered and resolved in Grain Belt’s favor

³ ***In the Matter of the Application of Grain Belt Express Clean Line LLC for a Certificate of***

at that time. The CCN is subject to a number of conditions, one of which requires Grain Belt to file an updated application and return to the Commission for further review and determination “if the design and engineering of the project is materially different from how the Project is presented in Grain Belt Express Clean Line LLC’s Application[.]” *Report and Order on Remand*, p. 52, Ordered Paragraph 6.

There are limitations to the Commission’s authority over CCNs. In the case of a line certificate, a utility must request authorization to build a plant or line before construction actually begins and the Commission has no authority to grant a plant or line certificate after construction has begun. **Cass County**, *supra*, 259 S.W.3d at 550. An area certificate includes authority to construct transmission and distribution lines within the service territory as necessary, **StopAquila.Org**, *supra*, 180 S.W.3d at 36,⁴ but “[u]tilities must, nonetheless, obtain line certificates to extend transmission lines beyond their certificated areas.” **Cass County**, *supra*, 259 S.W.3d at 549, n. 6. A line certificate is also necessary to build new utility plant, even within a certificated service area. *Id.* Although the Commission cannot grant a line certificate authorizing construction of utility plant after it has already been built, or even started, it can grant an area certificate authorizing operation of the plant. **Cass County**, *supra*, 259 S.W.3d at 546. Once granted, an unexercised CCN expires after two years by operation of law. Section 393.170.3, RSMo. The Commission may not revoke a CCN once granted. **State ex rel. City of Sikeston v. Public Service Com’n of Missouri**, 336 Mo. 985,

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, Case No. EA-2016-0358, (*Report and Order on Remand*, iss’d Mar. 20, 2019).

⁴ “**Harline** appropriately ruled that transmission line extensions do not need additional authorization from the Commission, because such authority already comes within the franchise granted by a county, and territorial authority is based on the franchise.”

997-98, 82 S.W.2d 105, 109-10 (1935).

Can the Commission amend a CCN? Perhaps not, where the utility in question opposes the amendment. But where, as here, the utility requests the amendment, it is legally indistinguishable from a request for a new CCN. Necessarily, the same standards and processual requirements apply.

The conclusion must be that Grain Belt has stated a cognizable cause of action and therefore summary disposition, or dismissal for failure to state a claim, does not lie.

C.

MLA's Theory

The MLA presents anew the theory already denied by the Commission in its *Report and Order* in Case No. EC-2021-0059 (iss'd Aug. 4, 2021), that the CCN previously granted to Grain Belt has been abandoned and thus there is now nothing to amend. Evidently, MLA did not carefully read the Commission's cited order, which analysis is still controlling:

Section 393.170, RSMo gives the Commission the authority to grant CCNs, and provides that no electrical corporation shall begin construction of an electric plant without first having obtained the permission and approval of the Commission. Section 393.170, RSMo does not provide a mechanism for the Commission to revoke a CCN once it has been granted. The Supreme Court of Missouri has also determined that the Commission does not have the authority to revoke a CCN. Likewise, there is no statutory provision for a public utility to abandon a CCN. A CCN is only a grant of authority. Complainants claim that because Respondents announced plans to build something different from the authority granted, Respondents have abandoned their CCN. Since there is no provision for Respondents to affirmatively relinquish their CCN, prior to a two-year expiration due for inaction, the CCN Order's original grant of authority continues. The authority conferred in the CCN Order for the originally certificated Project remains valid. Therefore, Respondents have a valid CCN.⁵

⁵ *Missouri Landowners Alliance, Eastern Missouri Landowners Alliance d/b/a Show Me Concerned Landowners, and John G. Hobbs, Complainants, v. Grain Belt Express, LLC, and*

The Commission may not revoke a CCN, *Sikeston, op. cit.*, 336 Mo. at 997-98, 82 S.W.2d at 109-10, and it follows that it is equally without authority to declare one to be abandoned or void. *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. banc 1979) (“[The Commission] has no authority to declare or enforce principles of law or equity.”) and see *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982) (administrative tribunals may not issue declaratory judgments). Only if a CCN is not exercised within two years, the Commission pointed out in its *Report and Order* in Case No. EC-2021-0059, does it expire as a matter of law.

WHEREFORE, Staff urges the Commission to **DENY** MLA’s *Motion for Summary Disposition*, set this matter for evidentiary hearing; and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

/s/ Kevin A. Thompson
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Certificate of Service

I affirm that a true and correct copy of the foregoing was served electronically upon all parties of record pursuant to the Service List maintained by the Commission's Data Center **on this 28th day of November, 2022.**

/s/ Kevin A. Thompson