BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Landowners Alliance,	)	
	)	
Complainant,	)	
	)	
v.	)	**Case No. EC-2014-0251**
	)	
Grain Belt Express Clean Line LLC,	)	
Grain Belt Express Holding LLC, and	)	
Clean Line Energy Partners LLC,	)	
	)	
Respondents.	)	

RESPONDENTS' REPLY TO ANSWER OF
MISSOURI LANDOWNERS ALLIANCE TO MOTION TO DISMISS

Respondents Grain Belt Express Clean Line LLC ("Grain Belt Express" or "Company"), Grain Belt Express Holding LLC, and Clean Line Energy Partners LLC (collectively, "Respondents") hereby Reply to the Answer of Missouri Landowners Alliance to the Motion To Dismiss ("MLA Answer") the complaint filed by the Missouri Landowners Alliance ("MLA" or "Complainant").

I. MLA Misreads the Commission's Ex Parte Rules.

MLA continues to acknowledge "that it is not aware of any prohibited ex parte communications." See MLA Answer at 1. Nevertheless, and in a gross misreading of the Missouri Public Service Commission's ("Commission" or "PSC") Ex Parte and Extra-Record Communications Rule, 4 CSR 240-4.020, MLA asserts that the two subsections it alleges Respondents violated "are totally independent of the provisions of the Rule which restrict the ex parte and extra-record communications." See MLA Answer at 2.

Missouri courts and the Commission agree that no portion of a statute or rule is to be read in isolation, "but rather is read in context to the entire statute, harmonizing all provisions."

Aquila Foreign Qualifications Corp. v. Director of Revenue, 362 S.W.3d 1, 4 (Mo. en banc 2012). See Missouri Dep't of Soc. Services v. Brookside Nursing Ctr., Inc., 50 S.W.3d 273, 276 (Mo. en banc 2001) ("The provisions of a legislative act are not read in isolation but construed together and read in harmony with the entire act.").

The purpose of the Ex Parte and Extra-Record Communications Rule is "[t]o set forth the standards to promote the public trust in the commission with regard to pending filings and cases." See Preamble, 4 CSR 240-4.020 ("Ex Parte Rule" or "Rules"). Accordingly, "[t]his rule regulates communication between the commission, technical advisory staff, and presiding officers, and anticipated parties, parties, agents of parties, and interested persons regarding substantive issues that are not part of the evidentiary record." Id.

Reading the sections which MLA alleges Respondents have violated, Sections (12) and (14) of 4 CSR 240-4.020, in harmony with the entire Ex Parte Rule, it is clear that those specific provisions concern regulated communications. Section (12) prohibits a person interested in a case from attempting to sway the judgment of the Commission by bringing pressure or influence to bear upon the Commission. Clearly, the means by which such undue pressure or influence would be brought to bear are the regulated communications. Section (14) explicitly states that an attorney or law firm shall make reasonable efforts to avoid "an ex parte communication prohibited by section (3) or a communication prohibited by section (11)." See 4 CSR 240-4.020(14)(A). MLA is incorrect when it states that Sections (12) and (14) are independent of the regulated ex parte communications.

Taking issue with claims made by Respondents on "the Grain Belt website, the Clean Line website, newspaper interviews, press releases, and press conferences," MLA boils its Complaint down to one "real question": whether "these public, extra-record disseminations of

Grain Belt's position on a key issue in the CCN case violate either of the two provisions of the ex parte rules relied on by the Alliance." See MLA Answer at 3.

MLA alleges that Respondents violated Section (12) by attempting to "win public support for the proposed line." See MLA Answer at 3-4. There is no prohibition on garnering public support in the Rules. Indeed, any "public attempts at winning support for the line" would be a communication between Respondents and the general public, not the Commission or its staff. Id. at 4. Claiming to speak to Respondents' intent, MLA then alleges that "Grain Belt intends for the public support to somehow translate into pressure or influence on the Commission." See MLA Answer at 4. But the evidence MLA cites of alleged influence on the Commission that resulted from Respondents' efforts to garner public support are letters of support that the Company filed with the Commission in its certificate of convenience and necessity application ("CCN Application"), No. EA-2014-0207. See MLA Answer at 4. Such filing did not occur "outside the hearing process" and is not a violation of the Rules. See 4 CSR 240-4.020(12). See also 4 CSR 240-4.020(1)(G)-(H) [defining ex parte and extra record communications].

MLA next alleges a violation of Section (14)(F)-(G), which applies to "[a]n attorney, or any law firm the attorney is associated with, appearing before the commission." But MLA has pleaded no facts showing a violation. Instead, it points only to an economic study posted on the Company's website. A company's posting of an economic study on a website regarding a proposed project is not a prohibited statement by an attorney. Respondents and their attorneys have engaged in no prohibited ex parte communication. The Rules cited by MLA do not apply to the facts of this case, and MLA's Complaint should be dismissed.

MLA similarly misunderstands the Commission's duty to file notice of a prohibited communication. See MLA Answer at 8. MLA asserts that "[t]here is absolutely no duty on the

part of anyone to file a notice of a violation of the two subsections of the Rules which Gain Belt is alleged to have violated." Id. This is incorrect.

Section (14) explicitly references the notice requirements of Sections (3) and (4). See 4 CSR 240-2.040(14)(A)-(D). And Section (3) requires the Commission or its staff to immediately terminate a prohibited communication, or immediately alert the initiating person that the communication is improper, and file notice of that communication. See 4 CSR 240-2.040(3)(B).

Each provision of the Ex Parte Rule must be read in harmony with the entire rule, such that the Commission would file such notice of a communication covered by Section (12). No Commissioner, member of the technical advisory staff, or the presiding officer assigned to this case has filed any notice of an ex parte or extra-record communication with regard to the websites and publications of which MLA complains. No one except MLA considers these public materials to be ex parte communications regarding a contested case or anticipated contested case. Thus, the Commission should dismiss MLA's Complaint.

II. The Provisions of the Ex Parte Rules Cited by MLA Do Not Apply to the Respondents' Websites and Publications.

A. Websites are Public Forums Such That Communications Concerning Substantive Matters Before the Commission Do Not Violate the Rules.

MLA incorrectly criticizes Respondents for failing to discuss limiting language in Section 386.210. See MLA Answer at 5. That statute permits communications which address substantive matters that are the subject of a pending case in which no evidentiary hearing has been scheduled, provided representatives of the affected utility, the Office of the Public Counsel, and any other party to the case are present. Respondents made no such omission. See Motion to Dismiss at 3-4.

Ironically, MLA then attacks Respondents' discussion of Section 386.210.3 to which the allegedly omitted language points. MLA argues that the statute "clearly envisions some form of public gathering, where all the parties are personally present and are able to hear and respond to what is being said." See MLA Answer at 6. It asserts that a website is not a sufficient public forum such that communications made through the website are not ex parte communications. MLA is incorrect.

Section 386.210.4 provides:

> Nothing in this section or any other provision of law shall be construed as imposing any limitation on the free exchange of ideas, views, and information between any person and the commission or any commissioner, provided that such communications relate to matters of general regulatory policy and do not address the merits of the specific facts, evidence, claims, or positions presented or taken in a pending case unless such communications comply with the provisions of subsection 3 of this section.

Section 386.210.3 declares: "Such communications may also address substantive or procedural matters that are the subject of a pending filing or case in which no evidentiary hearing has been scheduled, provided that the communication: … (2) Is made at a forum where representatives of the public utility affected thereby, the office of public counsel, and any other party to the case are present."

The world wide web is such a public forum. In Reno v. ACLU, 521 U.S. 844, 853 (1997), the Supreme Court of the United States held that the internet should be treated as a public forum for discourse, explaining:

> The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services. From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can 'publish' information.

The internet "provides relatively unlimited, low-cost capacity for communication of all kinds." Id. at 870. "Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods." Id. at 851. "It is no exaggeration to conclude that the content on the Internet is as diverse as human thought." Id. at 852.

The freedom to engage in such public discussion is protected by the First and Fourteenth Amendments, which remove "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity ...." Cohen v. California, 403 U.S. 15, 24 (1971).

Furthermore, the "vast democratic forums of the Internet" are not "invasive" like radio or television. "Users seldom encounter content 'by accident.'" Id. at 868-69. Where a single speaker communicates to many listeners, as is the case on a website, the First Amendment does not permit the government to prohibit speech unless the audience is "captive." In Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 541-43 (1980), the Supreme Court found unconstitutional the suppression of billing inserts that discuss the desirability of nuclear power, stating that "all persons are free to send correspondence to private homes through the mails." However, an audience is not captive if it can simply avoid the communication. Here, the

Commissioners and their advisors may avoid the communication "simply by averting their eyes." Id. at 542.

MLA itself operates and maintains a website dedicated to opposing the Grain Belt Express Project ("Project") that is the subject of Case No. EA-2014-0207, http://missourilandownersalliance.org/, and its activities have been covered by the news media. The internet is not a "one-directional 'forum'" as MLA alleges. See MLA Answer at 6. Without citing any evidence that the Commission has visited Respondents' websites or read publications naming Respondents, MLA nevertheless considers the Commission to be present in public forums where websites are viewed and news publications are read such that it alleges a violation of the Rules. If the Commission is so present, however, then other parties to the case are similarly present such that the communication is not prohibited by the Ex Parte Rules or Missouri law.

B. Viewing Websites and Publications Does Not Violate the Rules.

What's more, even if websites and other publications are not public forums for the purposes of Section 386.210.3(2), it is unlikely that the Commission's judgment would be swayed as contemplated by the Rules. An analogy may be drawn between the undue influence that the Ex Parte Rules aim to prevent, and the disqualification of a judge or commissioners who hold an actual bias in the case before them. The Ex Parte Rules "set forth the standards to promote the public trust in the commission," and prohibit undue influence. See Preamble, 4 CSR 240-4.020. By the same token, "[a] presumption exists that administrative decision-makers act honestly and impartially, and a party challenging the partiality of the decision-maker has the burden to overcome that presumption." State ex rel. Ag Processing Inc. v. Thompson, 100 S.W.3d 915, 919 (Mo. App. 2003).

The Supreme Court of the United States has analyzed actual bias on the part of a decision-maker, and found that bias does not arise where decision-makers in administrative adjudication also investigate the case before them, or become familiar with a case outside of their adjudicative role. Withrow v. Larkin, 421 U.S. 35, 47, 52 (1975) ("our cases ... offer no support for the bald proposition applied in this case ... that agency members who participate in an investigation are disqualified from adjudicating").

"Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decision-maker. Nor is a decision-maker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'" Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 493 (1976), quoting United States v. Morgan, 313 U.S. 409, 421 (1941).

MLA has offered no evidence to show any pressure or influence that might sway the judgment of the Commission such that the public trust promoted by the Rules would be violated. It has made no showing that Commissioners were inappropriately exposed to facts that were not later made of record, or that the information they obtained was more than general background information about facts associated with the CCN Application. Cf. State ex rel. Praxair, Inc. v. PSC, 344 S.W.3d 178, 191-93 (Mo. en banc 2011) (no evidence that pre-filing meetings between commissioners and utility executives resulted in actual bias of commissioners).

Speaking directly about limitations on speech, the Supreme Court of the United States has stated that "[t]he State cannot regulate speech that poses no danger to the asserted state interest." Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 565

(1980) (holding that the New York Public Service Commission's ban on promotional advertising by utilities was unconstitutional). In his concurring opinion in Central Hudson, Justice Stevens observed that the "justification for the regulation is nothing more than the expressed fear that the audience may find the utility's message persuasive." Id. at 581. He concluded that a perceived harm of increased electric usage in that case "does not constitute the kind of clear and present danger that can justify the suppression of speech." Id. Justice Blackmun agreed, stating: "If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public." Id. at 575.

No "clear and present danger" of pressure or influence on the Commission exists here. Accordingly, MLA's Complaint should be dismissed.

III. MLA Seeks an Unconstitutional Infringement of Respondents' Rights.

Citing no caselaw or statute, MLA asserts that "Grain Belt's publications constitute what is termed 'commercial speech'" and thus are "not entitled to the same protection as was afforded in cases they cite in their Motion." See MLA Answer at 9.

Commercial speech is an "expression related solely to the economic interests of the speaker and its audience." Central Hudson, 447 U.S. at 561. Respondents' operation and maintenance of websites concerning the Project, as well as news and other publications that discuss the Project or the benefits of transmission and renewable wind energy more generally are not "related solely to the economic interests of the speaker and its audience." Neither do the economic studies, announcements about meetings, brochures, and media coverage of which MLA complains constitute commercial speech, which generally applies to advertising. To the contrary, Respondents' website and its statements to the media clearly address important public

policy issues facing Missouri and the entire country regarding electric transmission infrastructure, wind generation, and renewable energy standards. Such "speech on matters of public concern … is at the heart of the First Amendment's protection." Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985).

Nevertheless, even if the websites and publications of which MLA complains did constitute purely commercial speech, the First Amendment, applied to the states through the Fourteenth Amendment, protects such speech from unwarranted governmental regulation. Id. The Supreme Court of the United States explained that the government's power to limit such speech is restricted because commercial speech provides the public with information:

> In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interests if only they are well enough informed, and ... the best means to that end is to open the channels of communication rather than to close them ...." Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. [Central Hudson, 447 U.S. at 562 (internal citations omitted).]

The Supreme Court concluded: "If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed." Id. at 564. Justice Blackmun noted in his concurring opinion: "Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques. Those designed to deprive consumers of information about products or services that are legally offered for sale consistently have been invalidated." Id. at 574.

MLA claims that certain statements by the Respondents are misleading. In reality, MLA simply disagrees with a quotation regarding the cost of wind energy by a representative of the Company in a newspaper (Compl. at 21-22), the statement on the websites that the Project will carry clean wind generation (Compl. at 22-24), the statement on the websites that some of that wind power will be sold to Missouri customers (Compl. at 24), and the websites' failure to discuss eminent domain and the supposedly adverse effects of electromagnetic fields (Compl. at 25). MLA quarrels with these statements because "once it gets published on the internet, it is virtually impossible to rebut it with everyone who had access to Grain Belt's view of the issues." See Compl. at 25.

None of these statements is misleading. MLA simply doesn't like the fact that they are being asserted. The Company has provided evidence in its CCN Application and prefiled testimony describing the clean energy benefits of the Project. In any event, the Commission cannot regulate the content of a website because it is one-sided. As Justice Blackmun stated: "If the First Amendment guarantee means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public .... Our cases indicate that this guarantee applies even to commercial speech." Central Hudson, 447 U.S. at 575.

Furthermore, utilities enjoy the full panoply of First Amendment protections for their direct comments on public issues. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 544 (1980) (holding that the New York PSC's suppression of bill inserts that promoted nuclear power directly infringed the utility's freedom of speech protected by the First and Fourteenth Amendments).

While MLA concedes no fault with its own website or others that oppose Respondents' Project, it requests that the Commission censor Respondents' websites so as to remove all content that promotes their views of the Project. See Compl. at 4, 30; MLA Answer at 8. Such action would clearly constitute content-based regulation, which requires strict scrutiny of the governmental action. Consolidated Edison, 447 U.S. at 536. Directly quoting the First Amendment, Justice Stevens declared: "A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law abridging the freedom of speech, or of the press.'" Id. at 546.

The Consolidated Edison Court stated that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." Id. at 537. The Court explained that "the First Amendment embraces at the least the liberty to discuss publicly and truthfully all matters of public concern." Id. at 534 (internal quotations and citations omitted).

Justice Blackmun agreed: "No differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information." Central Hudson, 447 U.S. at 578 (Blackmun, J., concurring). Accordingly, "[a]s a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than encourage it." Reno v. ACLU, 521 U.S. 844, 885 (1997).

IV. MLA Seeks An Impermissible Advisory Opinion from the Commission.

Finally, MLA asks the Commission to render an advisory opinion on whether certain activities of parties would violate those rules of conduct. See Compl. at 30. As the Commission has previously stated: "The rules speak for themselves and the Commission has no authority to issue an order of general applicability that would expand upon them outside the established rule-making process." In re Union Electric Co., Order Denying AmerenUE's Request for Clarification Regarding Application of Statutes and Rules, No. ER-2010-0036, 2010 WL 342484 (Jan. 13, 2010) (denying request that Commission determine whether the public relations campaign of opponents to utility rate case would violate Ex Parte Rules).

MLA's request that the Commission issue an order interpreting the Rules according to MLA's criteria "as a general proposition" should be dismissed.

WHEREFORE, Respondents ask that the Complaint be dismissed as it fails to state a claim upon which relief can be granted under Missouri Rule of Civil Procedure 55.27(a)(6), as well as 4 CSR 240-2.070(7) and 4 CSR 240-2.116(4) .

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss was served upon the parties to this Complaint by email or U.S. Mail, postage prepaid, this 25th day of April, 2014.

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