

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-2014-0207
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. MLA’s motion to strike is 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 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.

2. 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

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

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).

3. 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).

4. 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. See Section 490.065.3.

5. 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. 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). “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.

6. 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.

7. 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.” Wulfing 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.

8. 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.

9. 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.

10. 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.

11. Here, MLA primarily challenges an hourly wind profile for western Kansas which was compiled by Grain Belt Express witness David Berry and which is relied upon by witnesses Gary Moland, Robert Zavadil, and Robert Cleveland. While the basis for MLA's challenge supposedly lies in Section 536.070(11), the wind profile in question is a “compilation of figures . . . made by or under the supervision of a witness [Mr. Berry],” who will be present at the hearing. MLA even admits that Mr. Berry compiled this wind profile. See MLA Motion at 4-5. Accordingly, the wind profile is admissible under Section 536.070(11).

12. Nevertheless, MLA attempts to exclude that wind profile by claiming that “[i]nasmuch as no one involved in developing that data is a witness in this case, and thus is not subject to cross-examination, the use of this data clearly runs afoul of § 536.070(11).” See MLA Motion at 6. But, as is made clear above, Section 536.070(11) does not and cannot encompass

the underlying data upon which a witness relies in his analysis. 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. 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).

13. The same is true of the weather map attached to the testimony of Mr. Berry, which MLA challenges. That map was generated by the same company, AWS Truepower, that prepared the data Mr. Berry compiled for the wind profile. As 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, the relevant question is not whether the map is independently admissible, but rather whether it is of a type reasonably relied upon by experts in the field, and is otherwise reasonably reliable. CADCO, 220 S.W.3d at 434. See also Section 490.065.3.

14. 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).

15. As a result, Grain Belt Express witness David Berry may rely upon the wind speed maps produced by AWS Truepower, LLC and the U.S. Department of Energy’s National Renewable Energy Laboratory found at Schedule DAB-2 of his direct testimony and Schedule DAB-13 of his surrebuttal testimony. Similarly, Company witness Robert Cleveland (who has adopted the direct testimony and schedules of Gary Moland) may rely on the highly regarded

Eastern Wind Integration and Transmission Study, as well as the almost universally used PROMOD production cost model developed by Ventyx. Finally, the testimony and schedules of Grain Belt Express witness Robert M. Zavadil, which also relied upon the wind profile data developed by the Department of Energy and AWS Truepower, is a proper basis of his Loss of Load Expectation (“LOLE”) analysis, which was used to demonstrate the improved reliability of the bulk power system in Missouri if the Grain Belt Express Project becomes operational.

16. 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 experts to rely upon and for the Commission to consider.

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

/s/ Karl Zobrist

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