

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

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

STAFF’S RESPONSE

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its response to the April 16, 2014, *Order Directing Filing*, states:

Introduction

On March 11, 2014, Missouri Landowners Association (“MLA” or “Complainant”) brought this action against Grain Belt Express Line LLC (“Grain Belt Express”), Grain Belt Express Holding LLC, and Clean Line Energy Partners LLC (“Clean Line”) (collectively, “Respondents”), alleging violations of Commission rule 4 CSR 240-4.020 regarding ex parte and extra-record communications (“Ex Parte Rules” or “Rules”). The Respondents are currently seeking from the Commission a certificate of convenience and necessity (“CCN”) to construct a high voltage, direct current (“HVDC”) transmission line across northern Missouri, known as the Grain Belt Express Clean Line Project (“Project”).¹

¹ See Case No. EA-2014-0207 (filed March 26, 2014).

Grain Belt Express and Clean Line both maintain websites and have published materials relating to the Project, and it is here that MLA claims fault by the Respondents. MLA alleges that the Respondents have violated Sections (12) and (14) of the Ex Parte Rules by statements made through these websites and materials. In particular, MLA asserts that Respondents violated Section (12) by making statements that attempt to sway the judgment of the Commission, and that these statements violate Section (14)(F) because they are directly related to a matter proceeding before the Commission.

On April 11, 2014, the Respondents filed their Answer to this complaint, denying the allegations. On April 14, 2014, the Respondents filed their *Motion to Dismiss* for failure to state a claim upon which relief can be granted.

On April 14, 2014, the Commission ordered MLA to respond to the Respondents' motion no later than April 24, 2014. MLA filed its response on April 16, 2014. On that same day, the Commission issued an order directing Staff and permitting the Office of Public Counsel to file a response by no later than April 28, 2014.

Argument

The Commission is tasked here with determining the limitations the Commission's Ex Parte Rules impose on communications interested parties to a case make outside of the official course of the Commission proceedings. The relevant rules are:

4 CSR 240-4.020(12), which states:

It is improper for any person interested in a case before the commission to attempt to sway the judgment of the commission by undertaking, directly or indirectly, outside the hearing process to bring pressure or influence to bear upon the commission, its employees, or the presiding officer assigned to the proceeding.

And 4 CSR 240-4.020(14)(F), which states:

An attorney, or any law firm the attorney is associated with, appearing before the commission shall (F) [d]uring the pendency of an administrative proceeding before the commission, not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to any of the following:

- 1) Evidence regarding the occurrence or transaction involved;
- 2) The character, credibility, or criminal record of a party, witness, or prospective witness;
- 3) Physical evidence, the performance or results of any examination or tests, or the refusal or failure of a party to submit to examinations or tests;
- 4) The attorney's opinions as to the merits of the claims, defenses, or positions of any interested person; and
- 5) Any other matter which is reasonably likely to interfere with a fair hearing...

The primary purpose of rule or statutory construction is to ascertain the intent behind the rule or statute.² The stated purpose of rule 4 CSR 240-4.020 is:

To set forth the standards to promote the *public trust in the commission* with regard to pending filings and cases. This 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 (emphasis added).

The Commission's description of the comments in the Commission's *4 CSR 240-4.020 Order of Rulemaking filed with SOS* ("Order of Rulemaking") for the current version of the Ex Parte Rules also shed light on the Commission's intent.³ Comment 7 in the Order of Rulemaking specifically addresses Sections (12) and (14), and indicates that these sections were included in response to comments filed by the Missouri Energy Development Association (MEDA). MEDA raised concerns about "conduct by parties

² ***State ex rel. Competitive Telecommunications v. Missouri Public Service Comm'n***, 886 S.W.2d 34, 39 (Mo. App., W.D. 1994).

³ File No. AX-2010-0128 (filed April 22, 2010).

having the *conscious object* of putting outside pressure on the Commission” in order to influence a contested case, and also the problem of “dueling press releases” that might create a circus-like atmosphere.⁴ However, MEDA also stressed in the rulemaking hearing that these provisions should follow as a guiding principle that “a vigorous and robust exchange of ideas and information is critical to the formulation of sound public policy.”⁵

The Ex Parte Rules must also be interpreted in light of the statute enabling them. The Commission’s powers are limited to those that are expressly conferred by statute or are given by clear implication as necessary to carry out the duties of the Commission.⁶ The Commission’s enabling legislation for the Ex Parte Rules is § 386.210, RSMo., Supp. 2013, which places limitations on the commissioners’ communication with the public and public utilities, and which states, in part, that nothing in that statute should be “construed as imposing any limitation on the free exchange of ideas, views, and information between any person and the commission or any commissioner...” MEDA and AT&T Missouri both noted in their comments and in the rulemaking hearing that this legislation for the Ex Parte Rules was not meant to exclude communications from the

⁴ Comments of Missouri Energy Development Association, File No. AX-2010-0128 (filed Jan. 21, 2010).

⁵ File No. AX-2010-0128, Proposed Rulemaking Hearing Tr.1: 12, Il. 5-11.

⁶ ***State ex rel. Union Elec. Co. v. Public Service Comm’n of State***, 399 S.W. 467 (Mo. App. W.D. 2013); see also ***State ex rel. Springfield Warehouse & Transfer Co v. Pub. Serv. Comm’n***, 225 S.W.2d 792, 794 (Kansas City Ct. of App. 1949) (“[The Commission] has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature.”).

regulated community altogether, but rather to provide certain safeguards with respect to communications made to the Commission.⁷

When determining the meaning of the language in a statute, the words of one section or statute must be read in the context of other statutes on the same subject.⁸ The commentary submitted in the rulemaking docket, as well as the entirety of 4 CSR 240-4.020 and its enabling legislation, indicates that the concern behind the Ex Parte Rules was not with any and all communications made outside of the hearing process that could possibly reach the ears of the commissioners. Rather, the primary goal of the Commission was transparency. For example, the Rules do not forbid the Commission from discussing substantive matters of an ongoing case outside of the official hearing process altogether; they only mandate that such communications be fully disclosed to all parties involved. Comments filed by the Office of Public Counsel indicate that this need for transparency, and the desire to avoid private meetings behind closed doors, was a driving force in the decision to initiate the revision to the Rules.⁹

Finally, the Rules, and their enabling legislation, must be interpreted in light of the constitutional rights of interested members of the public. When faced with a statute or a Commission rule that is subject to both a constitutional and unconstitutional interpretation, the constitutional interpretation is presumed if it is reasonably possible to

⁷ File No. AX-2010-0128, Proposed Rulemaking Hearing Tr. 1: 17, II. 13-15; and AT&T Missouri's Comments on the Proposed Ex Parte Rules, File No. AX-2010-0128 (filed Jan. 21, 2010).

⁸ *In re KCP&L Greater Missouri Operation Co.*, 408 S.W.3d 175, 185-186 (Mo. App., W.D. 2013).

⁹ Public Counsel Comments, File No. AX-2010-0128 (filed Jan. 21, 2010).

do so.¹⁰ Furthermore, a rule or statute should be construed narrowly to avoid infringing on a constitutional right whenever possible. In **Clark v. Martinez**, the United States Supreme Court stated:

It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation...[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.¹¹

The United States Supreme Court has repeatedly upheld the idea that the First Amendment protects the “marketplace” of ideas, particularly with regard to matters of public interest.¹² The Court recently held in **Snyder v. Phelps** that “speech on matters of public concern is at the heart of the First Amendment’s protection” and, as such, it must be afforded “special protection.”¹³ The Court noted that the reason for this heightened protection is that the First Amendment “reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹⁴ The Court went on to define a matter of public interest as an issue

¹⁰ **State ex rel. Union Elec. Co. v. Pub. Serv. Comm’n of State**, 399 S.W. 467, 481-482 (Mo. App., W.D. 2013) (discussing the rules of interpretation that apply to statutes, tariffs, and Commission rules).

¹¹ 543 U.S. 371, 380-381 (2005); see also **Crowell v. Benson**, 285 U.S. 22, 62 (1932) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is the cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”).

¹² See **N.Y. State Bd. Of Elections v. Lopez Torres**, 552 U.S. 196, 208 (2008) (The First Amendment “creates an open marketplace where ideas...may compete without government interference.”); see also **Citizens United v. Fed. Election Comm’n**, 558 U.S. 310, 354 (referencing the “open marketplace of ideas protected by the First Amendment”) (quotations omitted).

¹³ 131 S.Ct. 1207, 1215 (2011).

¹⁴ *Id.* quoting **New York Times v. Sullivan**, 376 U.S. 254, 270 (1964).

that can be fairly said to relate to “any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest, that is, a subject of general interest and of value and concern to the public.”¹⁵ The Grain Belt Express Clean Line Project is a matter of public concern as it has the potential to affect citizens across the state of Missouri and across the country. Accordingly, the Respondents’ speech regarding the Project should be afforded the special protection upheld by ***Snyder v. Phelps***.

Not only do the Respondents have the constitutional right to contribute to the marketplace of ideas, but the United States Supreme Court also recently held that the public has a right to hear those ideas.¹⁶ MLA has correctly pointed out that this freedom is not unfettered; however, such limitations are upheld in only the most limited of circumstances.¹⁷ As such, the Ex Parte Rules can and should be construed in such a way as to not infringe on the constitutional rights of the Respondents and the public in general.

MLA’s restrictive interpretation of what the Ex Parte Rules allow goes beyond the spirit of those Rules, and beyond what the Commission intended in their creation. The statements at issue here were not directed at the Commission itself; rather, they were directed at the general marketplace of ideas. There is nothing secretive or untoward about these statements. To the contrary, they are put on display for all the world to see.

¹⁵ *Id.* at 1216 (citations and quotations omitted).

¹⁶ ***Citizens United v. Fed. Election Comm’n***, 558 U.S. 310, 356 (2010) (When Government seeks to use its full power...to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.”).

¹⁷ ***Republican Party of Minn. v. White***, 416 F.3d 738, 749 (Stating that any law attempting to curtail freedom of speech will face strict scrutiny, a test so exacting that laws rarely survive it).

Moreover, MLA is welcome to contribute to this pool of ideas if it chooses. As indicated by ***Citizens United***, the public has not only a right to an opinion on this issue, but also the right to be fully informed as a matter of great public interest. It is only natural, even expected, that one source of information would be the company itself.

MLA asserts that the primary purpose of the Respondents' speech is to influence the Commission by garnering public support for the Project. For example, MLA points to the use of form letters, which it believes have been circulated by the Respondents, to bring pressure upon the Commission. However, as MLA concedes, there is nothing inherently wrong with these types of communications. Form letters and comment cards are not novel to the Commission. Indeed, the Commission welcomes public opinion in any form and has, on occasion, explicitly sanctioned their use.¹⁸ Furthermore, consumers are not forced to sign these cards or letters of support; they are merely given the option to use them or, in other words, to adopt the statements of the Respondents if they wish.

Contrary to MLA's assertions, the Respondents' speech may be motivated by any number of factors. To begin with, and as MLA has already pointed out, this Commission is not the only entity from which the Respondents seek approval. The Respondents must also acquire a franchise from the affected municipalities and county commissions. However, the Ex Parte Rules are concerned only with communications made with this Commission, and do not govern the motives or communications with respect to those other entities. Furthermore, the Respondents' will have to work with

¹⁸ See Case Nos. GR-2008-0355 and WR-2011-0337.

and among the public in the completion of this project, and may wish to keep the public informed in an effort to improve and maintain good relations.

The Rules were never intended to act as a vice grip on any company's ability to disseminate information to the public. Furthermore, to give the rules the strict interpretation MLA suggests would place an unnecessary and likely unlawful restriction on the First Amendment rights of both the Respondents and the public. It is clear from the commentary, history, and context of the Rules that their purpose is to promote transparency in Commission proceedings, while still allowing the Commission and the public to be fully informed. As such, it is the Staff's belief that the Respondents have not violated the Commission's Ex Parte Rules.

WHEREFORE, the Staff respectfully submits this *Response* to the Commission.

Respectfully submitted,

/s/ Whitney Hampton

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing was mailed, electronically mailed, or hand-delivered to all parties to this cause on this 28th day of April, 2014.

/s/ Whitney Hampton