

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

Missouri Landowners Alliance, and Eastern )  
Missouri Landowners Alliance DBA Show Me )  
Concerned Landowners, and John G. Hobbs, )  
 )  
Complainants, )  
 )  
v. )  
 )  
Grain Belt Express LLC, and Invenergy )  
Transmission LLC, )  
 )  
Respondents. )

**File No. EC-2021-0059**

**BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION**

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), through the undersigned counsel, and for its *Brief of the Staff of the Missouri Public Service Commission* respectfully states:

**INTRODUCTION**

Missouri Landowners Alliance, Eastern Missouri Landowners Alliance d/b/a Show Me Concerned Landowners, and John G. Hobbs (“MLA” or “Complainants”) filed a formal complaint per Commission Rule 20 CSR 4240-2.070 against Grain Belt Express LLC, and Invenergy Transmission LLC (“Grain Belt” or “Respondents”) on September 2, 2020, alleging noncompliance with the Certificate of Convenience and Necessity (“CCN”) granted by the Commission to Grain Belt in Case No. EA-2016-0358 (“CCN case”). Complainants allege, via press release on August 25, 2020<sup>1</sup> as well as announcements on its website, that Grain Belt has shown “that they no longer plan to build the project for which the CCN was granted, [and] at this

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<sup>1</sup> Exhibit 1, EFIS item number 52, August 25, 2020 Press Release.

point Grain Belt does not have a valid CCN to build anything in Missouri.”<sup>2</sup> Complainants base this allegation on the proposed changes listed below:

- An increase in the project’s delivery capacity to Kansas and Missouri to up to 2,500 megawatts of the line’s 4,000 megawatt capacity;<sup>3</sup>
- Grain Belt’s intention to provide broadband expansion for rural communities along the line route in Missouri;<sup>4</sup> and
- Grain Belt’s intention to begin construction of the Missouri portion of the line before obtaining approval from the Illinois Commerce Commission.<sup>5</sup>

Complainants further allege that, because Grain Belt no longer has a valid CCN to operate in Missouri, Grain Belt is no longer able to exercise the right of eminent domain in negotiations with landowners.<sup>6</sup> Complainants have requested that the Commission (1) declare Grain Belt’s CCN no longer valid, and (2) that Grain Belt no longer has the right to exercise eminent domain.<sup>7</sup>

Complainants, Grain Belt, and Staff (collectively, “the Parties”) initially agreed to forego the process outlined in Commission Rule 20 CSR 4240-2.070 in favor of a briefing schedule.<sup>8</sup> The Parties agreed that:

“[T]he issue in this Complaint is limited to whether Respondents’ contemplated changes to the Project invalidate the CCN granted to Grain Belt in the CCN case.”<sup>9</sup>

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<sup>2</sup> *Formal Complaint*, pg. 3, ¶ 7.

<sup>3</sup> *Id.*, pg. 3, ¶ 8, citing Exhibit 1, EFIS item number 52, pg. 1.

<sup>4</sup> *Id.*, pg. 4, ¶ 12.

<sup>5</sup> *Id.*, pg. 4, ¶ 13, citing Exhibit 1, EFIS item number 52, pg. 1.

<sup>6</sup> *Id.*, pg. 5, ¶ 14.

<sup>7</sup> *Id.*, pg. 5-6.

<sup>8</sup> *Joint Motion to Suspend Current Deadlines and Establish a Briefing Schedule* (September 29, 2020).

<sup>9</sup> *Id.*, pg. 3, ¶ 4(g).

The Commission agreed to suspend the formal complaint schedule, and ordered the Parties to file simultaneous briefs limited to the above issue no later than October 23, 2020.<sup>10</sup> However, the Commission ordered the Parties to limit briefs to the following issue:

“[W]hether a Complaint that Grain Belt published a plan not authorized by its current CCN states a cause of action for the invalidation of its CCN.”<sup>11</sup>

The Parties filed initial briefs on October 23, 2020, and reply briefs were filed on October 30, 2020. On December 16, 2020, the Commission issued its *Order Directing Additional Briefing*, in which the Commission outlined three additional issues for the Parties to brief and submit by January 7, 2021.

On December 17, 2020, Complainants filed *Complainants’ Motion to Revise Procedural Schedule*, in which MLA outlined that it believed additional evidence was needed, through a set of nine data requests addressed to Respondents, to show that Grain Belt had abandoned its original CCN. Respondents objected to Complainants’ request on December 22, 2020, at which point the Commission issued its *Order Canceling Briefing Schedule and Directing Filing*, ordering the Parties to put forward a procedural schedule due to the Commission’s belief that it was “unlikely that the current procedural proposals would lead to disposition of the case on briefs without an evidentiary hearing.”<sup>12</sup>

Following a request for clarification and suspension that was overruled by the Commission, the Parties filed a *Joint Motion for Procedural Schedule* on January 11, 2021. On January 25, 2021, following a series of discovery conferences, Complainants filed its *Motion to Compel Answers to Data Requests*. Following an exchange of filings between Complainants and

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<sup>10</sup> *Order Partially Granting Motion to Suspend Deadlines and Establish a Briefing Schedule* (October 5, 2020).

<sup>11</sup> *Id.*, pg. 3, ¶ 4.

<sup>12</sup> *Order Canceling Briefing Schedule and Directing Filing*, pg. 2 (December 23, 2020).

Respondents, the Commission issued its *Order Granting in Part and Denying in Part Motion to Compel* on February 24, 2021.

The Parties agreed to pre-file testimony, and Complainants filed the public and confidential portion of its direct case on March 10, 2021. Complainants' direct case lacked any pre-filed testimony, and instead consisted solely of Respondents' responses to MLA's data requests. Respondents filed its *Motion to Dismiss Complaint, or, in the Alternative, Motion to Waive Filing of Rebuttal Testimony, Cancel Evidentiary Hearing, and Proceed to Briefing; and Motion for Expedited Treatment* on March 12, 2021.

Following another extensive exchange of filings between Complainants and Respondents, the Commission issued its *Order Directing the Filing of Direct Testimony and Modifying the Procedural Schedule* on March 19, 2021. In response, Complainants' requested a waiver of the Commission's order to file direct testimony, stating that its direct case "consisted of exhibits generated by Respondents, [and] that the addition of testimony from Complainants was unnecessary in that it would have served no useful purpose."<sup>13</sup> The Commission then ordered the Parties to dispense with pre-filed testimony and instead present testimony live at the evidentiary hearing, pursuant to Commission Rule 20 CSR 4240-2.130(9).<sup>14</sup>

An evidentiary hearing was scheduled and held on April 15, 2021. Per agreement amongst the Parties, the evidentiary hearing was held to resolve the following issues:

1. Does the evidence show that Grain Belt's website and press release demonstrate the Project's design and engineering is materially different from

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<sup>13</sup> *Complainants' Motion for Waiver of Commission Requirement for Filing of Direct Testimony, or Alternatively, for Extension of Current Procedural Schedule*, pg. 2 (March 21, 2021).

<sup>14</sup> *Order Regarding Complainants' Motion for Waiver of the Rule Requiring the Filing of Direct Testimony or, Alternatively, to Extend the Procedural Schedule*, pg. 3 (March 24, 2021).

what was approved in the *Report and Order on Remand* issued in File No. EA-2016-0358?

2. Did the public announcement of those contemplated changes violate the Commission's *Report and Order on Remand* granting Grain Belt a certificate of convenience and necessity in File No. EA-2016-0358?

### **STATEMENT OF FACTS<sup>15</sup>**

1. Grain Belt issued a Press Release on August 25, 2020, in which it detailed plans to increase the project's delivery capacity to Kansas and Missouri to up to 2,500 Mw of the line's 4,000 Mw capacity and begin construction of the first phase of the Project prior to regulatory approval in Illinois.<sup>16</sup>

2. On September 24 and 25, 2020, Grain Belt mailed a letter to Missouri landowners who were mailed form easement agreements but had not yet signed them.<sup>17</sup>

3. Grain Belt has not yet sought Commission permission to make changes to the Project as it was approved in the CCN case. The Press Release states "Grain Belt Express will seek approvals to the extent necessary for expanded delivery to Kansas and Missouri as well as for beginning the first phase of project construction prior to Illinois regulatory approval."<sup>18</sup>

4. The sample landowner letter posted on Grain Belt's website states that Grain Belt is working to add broadband infrastructure along the route to support rural high-speed internet access.

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<sup>15</sup> See also Exhibit 1, EFIS item number 51, *9/29/20 Joint Stipulation (limited to A through C and E, does not include E, F, and G)*.

<sup>16</sup> Exhibit 1, EFIS item number 52, pg. 1.

<sup>17</sup> This letter was not entered on the record during the evidentiary hearing.

<sup>18</sup> Exhibit 1, EFIS item number 52, pg. 1.

## ARGUMENT

Section 386.390.1, RSMo (2018) authorizes the Commission to hear and determine complaints brought against utilities under the Commission's jurisdiction.

The basis for formal complaints brought before the Commission is outlined under Commission Rule 20 CSR 4240-2.070(4), which states:

A formal complaint may be made by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any person, corporation, or public utility, including any rule or charge established or fixed by or for any person, corporation, or public utility, in violation or claimed to be in violation of any provision of law or of any rule or order or decision of the commission.

This Complaint involves the issuance of a CCN to Respondents. The Commission is the sole state authority to issue CCNs, as outlined in Section 393.170, RSMo (2018). Section 393.170.1, RSMo (2018) prohibits a utility from beginning the construction of an electric plant without prior approval from the Commission. The statute further empowers the Commission to impose conditions on the granting of a CCN that it deems reasonable and necessary.

In cases where a “complainant alleges that a regulated utility is violating the law, its own tariff, or is otherwise engaging in unjust or unreasonable actions, . . . the burden of proof at hearing rests with the complainant.”<sup>19</sup> To meet the burden, Complainants must show by a preponderance of the evidence that their assertions are true. In order to do that, the Commission follows a two part test outlined in File No. EC-2008-0329, *Peter B. Howard v. Union Electric Company d/b/a Ameren UE*: the burden of proof and the burden of persuasion.<sup>20</sup>

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<sup>19</sup> *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Comm'n*, 116 S.W.3d 680, 693 (Mo. App. 2003).

<sup>20</sup> *Report and Order*, File No. EC-2008-0329, pg. 11 (December 11, 2008).

In order to clear the burden of proof, the Complainants must produce enough evidence on the material issues to have that issue decided by the Commission.<sup>21</sup> In order to clear the burden of persuasion, the Complainants must convince the Commission that their position is correct.<sup>22</sup>

**1. The evidence does not show that Grain Belt’s website and press release demonstrate the Project’s design and engineering is materially different from what was approved in the *Report and Order on Remand* issued in File No. EA-2016-0358.**

Complainants attach to their complaint a press release, issued on August 25, 2020,<sup>23</sup> detailing a list of changes to the project approved by the Commission in the CCN Case. Complainants allege that these changes, which are also listed on Respondents website, are “materially different”<sup>24</sup> enough that the CCN as issued is no longer valid, and that, per the Commission’s order in the CCN case, Grain Belt “must file an updated application with the Commission for further Commission review and determination.”<sup>25</sup>

In addition to the press release, Complainants presented seven other exhibits during the hearing, comprising material received from Respondents through discovery. Complainants admitted that their only witness, Lewis Donald Lowenstein, was not needed to testify on the contents of the exhibits,<sup>26</sup> or even the implementation of the changes listed out via website and press release. Instead, Mr. Lowenstein only testified as to Respondents claim to the right of eminent domain,<sup>27</sup> an issue that the Commission does not have jurisdiction over.

The issue here is whether the testimony of Mr. Lowenstein, as well as the exhibits entered on the record, meet the Complainants’ burden of proof, by a preponderance of the evidence, that

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Exhibit 1, EFIS item number 52.

<sup>24</sup> *Formal Complaint*, pg. 2-3.

<sup>25</sup> *Id.*, pg 2, citing *Report and Order on Remand* issued on March 20, 2019 in the CCN case, pg. 52, ¶ 6.

<sup>26</sup> Transcript, Vol. 1, pg. 50, ln. 17-20.

<sup>27</sup> *Id.*, pg. 43, ln. 1-15.

the Project currently being pursued by Respondents is materially different from what was previously approved by the Commission. The answer here is simple: no. Contemplation is not equivalent to implementation, and the Commission should rule that the evidence does not show that Grain Belt's website and press release demonstrate the Project's design and engineering is materially different from what was approved in the *Report and Order on Remand* issued in File No. EA-2016-0358.

When dealing with complaint cases, the Commission looks to see if a complainant has carried its burden through both proof and persuasion. Here, regarding the burden of proof, Complainants produced the direct testimony of Mr. Lowenstein and the eight exhibits entered on to the record. Neither the direct testimony of Mr. Lowenstein, nor the exhibits offered by Complainants, detailed the design and engineering of the current Project, let alone the design and engineering of a different project.

Instead of hearing about material changes to the design and engineering of the Project as approved by the Commission in the CCN case, the Commission only heard a very brief bit of direct testimony from Mr. Lowenstein regarding eminent domain.<sup>28</sup> Mr. Lowenstein's testimony carries no weight, and failed to prove or persuade as to whether the Project had undergone any kind of material change in its design and engineering. As Staff witness Shawn Lange detailed, Complainants never submitted any blueprints, engineering documents, or engineering studies for Staff to review.<sup>29</sup> Mr. Lange further elaborated that, without that kind of documentation, Staff cannot reasonably conclude that there has been a material change to the design and engineering of the Project.<sup>30</sup>

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Id.*, pg. 115, ln. 3-15.

<sup>30</sup> *Id.*, ln. 16-19.



The Complainants did not produce any documentation that could lead one to reasonably conclude that the design and engineering of the Project approved in the CCN Case has been materially changed by Respondents. The Complainants failed to produce relevant testimony through Mr. Lowenstein, or produce documentation containing the relevant data for Staff to determine whether even one material change has been implemented. Instead, Complainants simply produced evidence showing that Respondents are, indeed, contemplating changes, a charge Respondents have not denied.

Respondents' witness Kris Zadlow went so far as to describe Grain Belt's thinking involving the release of the press release in the first place:

The press release was a marketing exercise to indicate our openness to exploring the potential to drop off more power in Missouri...These assumptions were part of a theoretical analysis. Design and engineering is not theoretical. Design and engineering of the Grain Belt Express project is an extremely complex endeavor and does not change overnight. We have not stopped and are continuing to pursue the certificated version of the project. That design and engineering is still very much in place.<sup>31</sup>

That being said, assumptions and contemplation are not equivalent to implementation, and the Commission should rule that the evidence does not show that Grain Belt's website and press release demonstrate the Project's design and engineering is materially different from what was approved in the *Report and Order on Remand* issued in File No. EA-2016-0358. Without any evidence to show that even one material change has been actually implemented by Grain Belt, Complainants in turn have also failed to carry the burden of persuasion, as well as production.

**2. The public announcement of those contemplated changes did not violate the Commission's *Report and Order on Remand* granting Grain Belt a certificate of convenience and necessity in File No. EA-2016-0358.**

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<sup>31</sup> *Id.*, pg. 76-77, ln. 21-23 and ln. 1-9.

The power of the Commission to issue CCNs is derived from statute, under Section 393.170, RSMo (2018). CCNs issued by the Commission must be “necessary and or convenient for the public service.”<sup>32</sup> Further, the statute states that a CCN must be “exercised within a period of two years from the grant thereof,” or else it becomes “null and void.”<sup>33</sup>

The statute further authorizes the Commission to “impose such condition or conditions as it may deem reasonable and necessary.”<sup>34</sup> In the CCN Case, the Commission chose to do just that, by including the following condition on its approval of Respondents’ CCN:

“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, Grain Belt Express Clean Line LLC must file an updated application with the Commission for further Commission review and determination.”<sup>35</sup>

To Staff’s knowledge, the changes proposed by Respondents are being contemplated, not implemented. When asked whether the design and engineering of the project had been materially changed, Respondents’ witness Kris Zadow replied, “Absolutely not.”<sup>36</sup>

The design and engineering of the Project as is has not been materially changed from that approved by the Commission in the CCN Case. In fact, at this time, it is unclear which, if any, of the changes would require further approval from the Commission. A simple press release and letter to landowners does not contain the specific technical data required for a proper analysis by Staff to determine if these changes are materially different.<sup>37</sup>

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<sup>32</sup> Section 393.170(3), RSMo, 2018.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Report and Order on Remand* issued on March 20, 2019 in the CCN case, pg. 52, ¶ 6

<sup>36</sup> Transcript Vol. 1, pg. 76, ln. 19-21.

<sup>37</sup> *Id.*, pg. 102, ln. 16-21 and pg. 115, ln. 3-15.

Further, the Commission's powers, while comprehensive and extensive to combat corporate malfeasance, are not absolute. As held in *State ex rel. Harline v. Public Service Commission of Mo.*, the court stated:

“Those powers do not, however, clothe the Commission with the general power of management incident to ownership. The utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation and does no harm to public welfare.”<sup>38</sup>

That said, the simple act of issuing a press release detailing proposed changes to Grain Belt's current project can hardly be seen as corporate malfeasance upon which the Commission is empowered to act upon.

There is also a glaring omission from the complaint filed by Complainants. Within the body of the press release, in addition to the proposed changes, Grain Belt includes the following language:

“Building upon the unanimous regulatory approvals from Kansas and Missouri in 2019, **Grain Belt Express will seek approvals to the extent necessary for expanded delivery to Kansas and Missouri as well as for beginning the first phase of project construction prior to Illinois regulatory approval.** This will accelerate and enhance substantial economic development for Kansas and Missouri at a critical time for both states' economies (emphasis added).”<sup>39</sup>

Grain Belt has explicitly acknowledged, within the press release attached to the complaint and throughout the evidentiary hearing, that it will seek approvals as needed for the proposed changes to its CCN.<sup>40</sup> Once Grain Belt has decided to come before the Commission to put the proposed changes into effect, Staff will have a chance to thoroughly analyze and review any

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<sup>38</sup> *State ex rel. Harline v. Public Service Commission of Mo.*, 343 S.W.2d 177, 182 (Mo.App. 1960), citing *State ex rel. City of St. Joseph v. Public Service Com'n*, 325 Mo. 209 (Mo.1930) & *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (U.S. 1923).

<sup>39</sup> *Formal Complaint*, Exhibit 1, pg. 1.

<sup>40</sup> Transcript Vol. 1, pg. 97, ln. 1-8. See also Exhibit 1, EFIS item number 52, pg. 1.

applications, and better determine if these proposals are materially different from the project approved in the CCN Case.

For the reasons stated above, it is Staff's conclusion that Complainants have not shown that the public announcement of those contemplated changes is a violation of the Commission's *Report and Order on Remand* granting Respondents a CCN in File No. EA-2016-0358.

### **CONCLUSION**

Staff concludes that (1) the evidence does not show that that Grain Belt's website and press release demonstrate the Project's design and engineering is materially different from what was approved in the *Report and Order on Remand* issued in File No. EA-2016-0358, and (2) the public announcement of those contemplated changes did not violate the Commission's *Report and Order on Remand* granting Grain Belt a certificate of convenience and necessity in File No. EA-2016-0358. Mere contemplation is not equivalent to implementation, and the Commission should rule that the evidence does not show that Grain Belt's website and press release demonstrate the Project's design and engineering is materially different from what was approved in the *Report and Order on Remand* issued in File No. EA-2016-0358, and thus there was no violation of that Commission order.

**WHEREFORE**, Staff submits this *Brief of the Staff of the Missouri Public Service Commission* for the Commission's consideration and information.

**/s/ Travis J. Pringle**

Travis J. Pringle

Missouri Bar No. 71128

Associate Counsel for the Staff of the  
Missouri Public Service Commission

P.O. Box 360

Jefferson City, MO 65102

573-751-4140 (Voice)

573-751-9285 (Fax)

[travis.pringle@psc.mo.gov](mailto:travis.pringle@psc.mo.gov)

**CERTIFICATE OF SERVICE**

I certify that copies of the foregoing have been emailed to all parties and/or counsel of record on this 18th day of May, 2021.

**/s/ Travis J. Pringle**