BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Grain Belt Express Clean Line LLC for Approval of its Acquisition by Invenergy Transmission LLC	)))	No. EM-2019-0150

JOINT APPLICATION FOR REHEARING OF THE EASTERN MISSOURI LANDOWNERS ALLIANCE D/B/A SHOW ME CONCERNED LANDOWNERS, AND JOSEPH AND ROSE KRONER

Come now the Eastern Missouri Landowners Alliance D/B/A Show Me Concerned Landowners, and Joseph and Rose Kroner, (collectively, "the Landowners") pursuant to Section 386.500 RSMo[1] and 4 CSR 240-2.160, and for the reasons set forth below respectfully apply for rehearing of the Commission's Report and Order issued in this case on June 5, 2019 ("Report and Order"). For each of the reasons set forth below, the Landowners contend that the Report and Order was unlawful and unreasonable.

1. The Commission lacks subject matter jurisdiction and statutory authority to approve the sale of Grain Belt to Invenergy because Grain Belt is not an electrical corporation.

Grain Belt and Invenergy (the "Applicants", as defined at page 3 of the Report and Order) are asking the Commission to approve the sale of Grain Belt to Invenergy pursuant to Section 393.190 RSMo. Under that statute, the Commission is authorized to approve the sale only if Grain Belt is an "electrical corporation".

Accordingly, if Grain Belt is not an electrical corporation, the Commission has no authority under this statute (or any other statute cited by any of the parties) to approve the proposed sale.

[1] All statutory references are to the Revised Statutes of Missouri (2016).

And if the Commission is not authorized by statute to approve the sale, then it lacks subject matter jurisdiction to do so. As stated in *Tetzner v. Department of Soc. Servs.*, 446 S.W.3d 689, 692 (Mo. App. 2014), "[a]s a basic tenet of administrative law, an administrative agency has only such jurisdiction as may be granted by the legislature. If the agency lacks statutory authority to consider a matter, it is without subject matter jurisdiction." (citation and internal quotation marks omitted).[2]

The Landowners have two related lines of argument for why Grain Belt is not an "electrical corporation." The first is based on case law; the second is based on the statutory definition of an electrical corporation.

(1) Arguments based on case law.

Based on case law, Grain Belt does not qualify as an electrical corporation for two reasons: (1) it is not subject to all of the statutes which govern electric utilities under the Public Service Commission laws, particularly those statutes dealing with how electric rates are determined; and (2) Grain Belt's line will not be devoted to the "public use", in that it will establish its rates on the basis of special, negotiated contracts with individual customers of its own choosing, as opposed to providing service to the whole public, or to all of the public within a given service area.

For years the courts in Missouri have found that in order to qualify as an "electrical corporation", the facility in question must not only meet the statutory

[2] See also *Overman v. Southwestern Bell Telephone Co.,* 706 S.W.2d 244, 252 (Mo. App. 1986) (finding that "Our Supreme Court has consistently adhered to the rule or principle that the Public Service Commission is a body of limited jurisdiction and has only such powers as are conferred upon it by statute…."); *State ex rel. Smithco Transport Co. v. Pub. Serv' Comm',* 307 S.W.2d 361, 374 (Mo. App. 1957 (stating that the Commission is a creature of statute, and its jurisdiction is controlled by statute.); *State ex rel. Utility Consumers Council of MO v. Pub. Serv. Comm'n,* 585 S.W.2d 41, 54 (Mo banc 1979) (noting that the PSC's jurisdiction is set by statutes enacted by the legislature).

definition of an electrical corporation, but in addition it must also be devoted to the "public use." Under Missouri case law, the Grain Belt project fails to meet this test.

Grain Belt will not be selling any transmission service to retail customers in Missouri.[3] Instead, it will sell the capacity on its line both to wind generators on the Kansas end of the line, and to load-serving entities (e.g., Ameren or municipal systems) which will take delivery at the converter stations in Missouri and Illinois.[4] So the project will provide only wholesale electric transmission service in Missouri – as opposed to retail service.

In addition, Grain Belt's rates will be subject to regulation by the FERC, not the Missouri Commission. The FERC has granted Grain Belt the authority to set its rates through bilateral negotiations with potential customers, for up to 100% of the line's capacity.[5] Thus the line will never be subject to rate regulation by this or any other state commission.

The Landowners are not attacking the legality or rationality of the FERC rate-making guidelines applied to merchant transmission lines. The point, instead, is that the process of negotiating individual rates for individual customers, without regard to the cost of providing the service, is totally at odds with the statutory procedures mandated for setting rates for electrical corporations in Missouri.

The first case to address the issue being raised here was decided just 5 years after passage of the Public Service Commission Act in 1913: *State ex rel. M. O. Danciger &*

[3] Direct Testimony of Mr. Michael Skelly in Case EA-2016-0358, p. 24 lines 15-18 at Exh. 8, Schedule JK-3, p. 2. *See also* Grain Belt's Application in that case, at p. 29, par. 76, at Exh. 8, Sch. JK-4, p. 4.
[4] *See, e.g.,* Direct Testimony of Mr. Michael Skelly in Case EA-2016-0358, p. 24 lines 10-14 at Exh. 8, Schedule JK-3, p. 2.
[5] Before the line begins operation, Invenergy would be required to file an open access tariff with the FERC which would affect its terms of service. However, even after that tariff is filed, Invenergy would continue to have the authority to sell any unsold capacity at that point through the negotiated rate process. Thus 100 % of the capacity charges are subject to negotiation. Tr. 107 line 15 – Tr. 108 line 13.

Co. v. Pub. Serv. Comm'n of Mo., 205 S.W. 36 (Mo. 1918).[6] The defendant in that case, Danciger, was a close affiliate of a brewing company in Weston, MO, which had installed electric generation to light its facilities and to operate a large part of the machinery used in its brewing process.[7]

The brewery found that it had excess capacity from its generating facilities, and through its affiliate Danciger began selling electricity to customers within a three block radius of the brewery. Eventually, Danciger was selling electricity at varying rates to the town of Weston; to between 20 and 30 other businesses; and to some 10 individual residences.[8]

Defendant Danciger later discontinued service to several of its customers, who filed a complaint with the Public Service Commission. The Commission found that by reason of its operations, Danciger was a regulated public utility, and ordered that the service be restored.[9]

On appeal, the state Supreme Court reversed that decision. The key issue was whether the company in question was or was not an "electrical corporation", as that term is defined in what is now Section 386.020(15).[10]

The Supreme Court first found that although the statutory definition of an "electrical corporation" includes no specific reference to public use, or to the necessity that the sale of the electricity be to the public, "it is apparent that the words 'for public use' are to be understood and to be read therein."[11]

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[6] As to the date of the passage of the Public Service Commission Act, see *Danciger* at 39.
[7] *Danciger* at 37.
[8] Id. at *37-38*.
[9] Id. at 39-40.
[10] The current version of that statute is essentially unchanged from that at issue in *Danciger,* Id. at 39.
[11] *Danciger,* at 40,

The question, then, was what constitutes the supply of electricity to the public, for "public use", thereby qualifying the entity as an "electrical corporation." In answering that question, the Court began with an obvious but critical point: a company either is or is not a public utility. There is no middle ground. To be deemed a public utility, the entity must be subject to the entire purview and regulation of the Commission, including the obligation to provide service to all residences and businesses within its service territory.[12]

Here, because Grain Belt's rates are to be regulated by the FERC, by definition Grain Belt will not be subject to the entire purview and regulation of the Commission. For instance, Section 393.130.2 states as follows:

> No … electrical corporation … shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for … electricity … except as authorized in this chapter, than it charges demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

By exercising the authority conferred by FERC to negotiate different rates with different customers, Grain Belt will not be subject to the rate-making requirements of Section 393.130.2. So based on Danciger, Grain Belt will not be subject to the entire purview and regulation of the Commission. Accordingly, for this reason alone it does not constitute an electrical corporation under Missouri law.

As to the Landowners' second point, the Dancigar court also concluded that the nature of the business in question did not make Danciger a "public utility", because state regulation of private property is bottomed on and wholly dependent upon the devotion of that property to a public use. Because the property was not devoted to a public use, the

[12] Id.

entity could not be subject to any form of regulation by the Commission.[13] Or as the Supreme Court stated, "there is in this case no explicit professing of public service, or undertaking to furnish lights or power to the whole public, or even to all persons in that restricted portion thereof who reside within three blocks of the Company's plant…."[14] Similarly, Grain Belt may choose which customers it will sell its capacity to, based in part at least on who is willing to pay the highest price. Accordingly, Grain Belt is not undertaking to furnish service to the whole public.

The Court went on to find that its decision on this issue was supported by a majority of appellate court decisions from other states which had addressed the issue.[15] It then punctuated its ruling by relying upon this passage from what it called an "excellent work on Public Service Corporations":[16]

> That the business of supplying gas is public in character is now universally recognized, provided that the company supplying is committed to supplying gas to the community in general. But the case can be imagined of an institution with a generating plant for its own supply, which might even supply one neighbor, without being obliged to sell to all others. In the same way the business of supplying electrical energy has generally been recognized as public in character. <u>There are, however, several cases where the company supplying electricity has not professed to sell to the public indiscriminately at regular rates, but has from the beginning adopted the policy of entering into special contracts upon its own terms; such companies are plainly engaged in private business.</u> (emphasis added)

This last sentence precisely describes the proposed operation of the Grain Belt line. According to the Missouri Supreme Court, Grain Belt is therefore not an electrical corporation.

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[13] <u>Id.</u> at 40.
[14] <u>Id.</u>
[15] <u>Id.</u>
[16] <u>Id.</u> at 41.

A second case on point is *State ex rel. Buchanan County Power Transmission v. Baker*, 9 S.W.2d 589 (Mo. banc 1928). There, the relator operated a single transmission line between a generation source and the purchaser of the electricity: the St. Joseph Railway Light, Heat and Power Co. The fundamental issue was which state taxing authority had the right to tax the transmission line, which in turn depended upon whether or not the line was a "public utility."[17]

One of the taxing authorities argued that while the line did not serve the public individually, "it is certainly an important link in the distribution of electric energy to the people of St. Joseph, Missouri."

But relying extensively upon *Danciger*, the court found as follows: "the mere purchase, transmission and sale of electric energy, a commercial product, without more, contains no implication of public service. On the showing made it must be held that relator is not a public utility."[18]

The service being provided there was closely akin to what Grain Belt is proposing here: the mere transmission of electric energy from a generator to a wholesale customer.

Another case on point is *Palmer v. City of Liberal*, 64 S.W.2d 265 (Mo. 1933). There, a generating company (the Cardin Company) supplied electricity to the city of Liberal, and the city in turn sold the power to its individual citizens. The Court ruled that under these circumstances the generating facility was not an electrical corporation which required a CCN from the Commission. As the Court stated: "The Cardin Company does not propose to deal with the public, but only to furnish the city of Liberal with electric current. It is not dealing with the public and it would not be necessary for the Public

[17] Id. at 591.
[18] Id. at 592.

Service Commission to give a certificate of convenience and necessity before it can start operating in this State."[19]

Similarly, while Grain Belt might be selling some of its capacity to MJMEUC, which in turn sells to its member utilities, which in turn sell to the end-use customers, Grain Belt itself "is not dealing with the public." Accordingly, as in *Palmer,* Grain Belt is not authorized by Missouri law to obtain a CCN from the Commission.

While the above three cases are not of recent vintage, they certainly have not been overruled or criticized on the basic principles underlying those decisions. In fact, a 2009 decision from the Western District stated that "The statutory provisions on which *Danciger* relied remain largely unchanged today, and more recent decisions continue to cite and follow *Danciger's* holding…."[20] Those who criticize these decisions as "ancient" are ignoring the basic rationale of stare decisis.

In a more recent case, the issue was whether the Southwestern Bell Yellow Pages in and of itself constituted a public utility.[21] Relying in part on *Danciger,* the crucial factor the court relied upon in determining that the Yellow Pages was not a public utility was that it used "private contracts" to publish its advertising, thereby removing it from the realm of public utility status.[22]

The 8th Circuit of the U.S. Court of Appeals has also weighed in decisively on the side of the appellants. In *City of St. Louis v. Mississippi River Fuel Corp.,* 97 F.2d 726 (8th Cir. 1938), the utility (Mississippi River) sold natural gas in St. Louis to one

[19] Id. at 268.
[20] *Hurrican Deck Holding v. Pub. Serv. Comm.,* 289 S.W.3d 260, 264 (Mo. App. 2009).
[21] *Khulusi v. Southwestern Bell Yellow Pages, Inc.,* 916 S.W.2d 227 (Mo. App. 1995).
[22] As summarized in *Osage Water Co. v. Miller County Water Authority,* 950 S.W.2d 569, 574 (Mo App. 1997)

wholesale customer, Laclede Gas, and to 14 industrial customers at retail.[23] The retail sales were all "by special contracts, entered into after negotiations with the customer."[24] The question for decision was whether the utility's operations were "for public use", within the meaning of the *Dancigar* case.

Quoting extensively from that decision, the 8th Circuit held that the utility's operations in St. Louis were not for public use. Among the findings and conclusions made by the 8th Circuit in reaching that decision were the following:

> We conclude that under Missouri law the term "for public use" as used in the ordinance under consideration, means the sale of gas to the public generally and indiscriminately, and not to particular persons upon special contract. This construction of the phrase is the one generally understood and applied.[25]
>
> To constitute a public use all persons must have an equal right to the use, and it must be in common, upon the same terms, however few the number who avail themselves of it.[26] (internal quotations marks omitted.)
>
> The sale to the Laclede Company alone is not sufficient to transform what is otherwise a private business into a public business any more than would the sale of a locomotive to a railroad company make the seller a common carrier.[27]

Under this same logic, given that Grain Belt is not selling its capacity to customers "upon the same terms", its wholesale contract with MJMEUC does not turn its business into one "of public use."

Perhaps the closest decision on point here is from Illinois. That case involved the question of whether the Rock Island Clean Line (a sister line of Grain Belt) was or was not a "public utility" under Illinois law. *Illinois Landowners Alliance v. Illinois Comm.*

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[23] Id. at 728.
[24] Id.
[25] Id. at 730
[26] Id.
[27] Id.

Comm'n, 60 N.E.3d 150 2016).[28] In finding that the proposed line was not a public utility, the Court held that "A private company that provides public utility services according to its own terms and conditions does not meet the statutory definition of a public utility."[29]

Furthermore, the court found that in order to qualify as a public utility, the entity must offer its assets for public use without discrimination. But as the court concluded, the Rock Island line "is not for public use without discrimination."[30]

Finally, in reaching its decision, the Illinois appellate court relied in part on an earlier case which had found that the Mississippi River Fuel company did not qualify as a public utility in Illinois. That company sold natural gas through individual contracts with 23 private industrial retail customers, as well as to 2 public utilities which resold the gas to its retail customers. In relying on the *Mississippi River Fuel* case, the Court noted the following: the company's contracts were not based on fixed rates, and instead varied as to terms and conditions; and that the company's act of selling gas to a limited group of customers could not be characterized as "public use."[31]

Based upon these decisions, Grain Belt does not qualify as an electrical corporation under Missouri law.

(2) Arguments based on statutory interpretation. In addition to case law, the Landowners contend that Grain Belt does not own, operate, control or manage any "electric plant", as that term is defined in Section 386.020(14). That statute states that

[28] This case was subsequently transferred to the Illinois Supreme Court which agreed, on the basis of a second theory embraced by the Appellate Court, that the Rock Island line was not a "public utility". *Illinois Landowners Alliance v. Illinois Comm. Comm.*, 90 N.E.3d 448 (2017). The Illinois Supreme Court did not find it necessary at that time to address the question of whether the proposed line served a public use. Id. at 463, par. 51.
[29] Id. at 60 N.E.3d 159.
[30] Id.
[31] Id.

electric plant consists of the following items: real estate, fixtures, personal property, conduits, ducts or other devices, materials, and apparatus or property for containing, holding or carrying conductors used for transmission of electricity. If Grain Belt does not own or control any item of electric plant, then under Section 386.020(15), it does not qualify as an electrical corporation.

At page 12 of its Report and Order, the Commission found that Grain Belt qualifies as an electrical corporation because it held two categories of assets which the Commission viewed as "electric plant". One was cash. The second was the 39 easements which Grain Belt had secured on property to be used for the proposed line's right-of-way.

First, the Landowners contend that cash is not the type of asset which the General Assembly intended to include within the definition of "electric plant."

To the contrary, the Landowners contend that the list of items constituting electric plant is intended to include only assets which will become a part of the facility itself. Cash, of course, will not become a part of the physical project, nor does it fit within the type of assets which are specifically listed by the General Assembly in delineating what does qualify as "electric plant."

In analyzing this issue, the maximum "noscitur a sociis" is directly on point. It is an aid in statutory construction, and means that words coupled together "are to be understood in the same general sense and are to be regarded as of the same nature." *State ex rel. Crutcher v. Koeln,* 61 S.W.2d 750, 754 (Mo banc 1933). *See also Standard Operations, Inc. v. Montague,* 758 S.W.2d 442, 444 (Mo. banc 1988) where the court

employed that maxim in finding that a list of involuntary assignments should not be read to as to include a merger –which is a voluntary assignment.

Here, cash is clearly not of the "same nature" as real estate, fixtures, conduits, ducts or other devices, materials, and apparatus or property for containing, holding or carrying conductors used for transmission of electricity. While the term "personal property" is also included in the definition, the only logical conclusion is that this item was intended there to encompass property such as transmission cables and components of steel support towers – items of the same nature as those expressly included in the list of electric plant.

Furthermore, the inclusion of cash within the definition of electric plant would lead to some strange results, no doubt beyond what the General Assembly had in mind when deciding what entities would be subject to Commission regulation as "electrical corporations." For instance, under the Applicants' definition of electric plant, $10 in a checking account for a down-payment on a small back-up generator for one's home would in and of itself constitute "electric plant" under Section 386.020(14). That $10 alone certainly does not square with the common understanding of electric plant.

And based upon the Applicants' logic, if the person using that $10 for the back-up generator agreed to sell emergency power to his or her neighbor for say a share of the cost of the fuel, that individual would automatically become an "electrical corporation" under the terms of subsection (15) of that statute, even before the generator had been purchased. This in turn would make that unsuspecting individual subject to all of the Commission reporting requirements applicable to other electrical corporations. In addition, the new one-person electrical corporation would seemingly be subject to all

other statutes not even in the Public Service Commission laws which make reference to public utilities – such as those dealing with tax assessments.

Contrary to the assertions of the Commission and the Applicants, it is difficult to imagine that the General Assembly envisioned people unwittingly walking around with "electric plant" in their in their wallets and purses.

As to the 39 easements, the Landowners contend they do not constitute electric plant for two reasons. First, by definition, Grain Belt does not "own" the property on which it has an easement. *Southern Star Central Gas Pipeline v. Murray,* 190 S.W.3d 423, 430 (Mo. App. 2006) (stating that "As a general rule a party holding an easement with a right to use the land for a particular purpose does not hold title to the property affected by that easement. An easement, strictly speaking, does not carry any title to the land over which it is exercised.") (Internal quotation marks and citation omitted).

Therefore, the only real issue is whether Grain Belt "controls" the real estate on which it has those easements. The standard form easement agreement used by Grain Belt generally gives it the right to build and repair the proposed transmission line, including support structures, on the property for which it has the easement. Specifically, "The Easement will be used for the transmission of electric energy, whether existing now or in the future, in order to deliver electrical energy and for all communication purposes related to delivering electrical energy." (See par. 2.b of the standard easement agreement used by Grain Belt at Schedule DKL-4 to the direct testimony of Deann Lanz, EA-2016-0358, included at Exhibit 10 in this case).

So Grain Belt has no control over the property on which it has an easement until it actually begins to construct the proposed transmission line in Missouri. It has not done

so at this point, and thus the easement agreement used by Grain Belt gives it no present control over how the property may be used by the landowner. Therefore, the 39 easements cannot qualify Grain Belt as an Electrical Corporation until, at best, it actually begins construction of the proposed line.

In fact, theoretically there is nothing in the easement which would prohibit the landowner from building a new home tomorrow on the middle of the easement, because at this point the structure would not interfere with Grain Belt's use of the easement.[32]

Moreover, the 39 easements relied upon by the Applicants and the Commission do not include the Missouri Landowner Protocol, which must be incorporated in landowner easements under the terms of the Commission's Final Report and Order on Remand in Case No. EA-2016-0358.

Because those 39 easements are not in compliance with the conditions in the Commission's Final Report and Order in that case, they are not enforceable at this point by Grain Belt against the landowners granting those easements. Those landowners would be perfectly within their rights in simply ignoring any request by Grain Belt based on any of the 39 easements which do not comply with the Commission's Final Report and Order in EA-2016-0358. In short, those easements are meaningless documents, and are of no value to Grain Belt in the construction of its proposed line. As such, the easements cannot possibly be used "for or in connection with" the transmission of electricity, and hence do not qualify as electric plant.

For the foregoing reasons, Grain Belt does not own or control any property encompassed within the term "electric plant". Therefore, it does not qualify as an electrical corporation under the CCN statute, Section 393.170.

[32] See paragraph 4 of the easement, at Exhibit 10.

Grain Belt itself clearly recognized throughout the 2014 and 2016 CCN proceedings that it was not an electrical corporation or a public utility. This contention is based on the fact that a number of Commission rules require that electrical utilities file certain reports and other information with the Commission on a regular basis.

As just one example, as mandated by Section 393.140(6) RSMo, Commission Rule 4 CSR 240-10.145[33] requires every "electric utility" to file an "annual report" with the Commission.[34] There are no exceptions in that rule for electrical corporations which are not yet operational. By its very terms, it applies to all entities which meet the definition of an electrical corporation. (See rule itself at 240-10.145).

Grain Belt's own financial statements include information which, according to Staff witness Ms. Dietrich, would normally appear in an electric utility's annual report to the Commission.[35] However, over the past 5 years or so Grain Belt did not once file an Annual Report.[36]

Similarly, Rule 4 CSR 240-3.175(1) states that each electric utility (i.e., each electrical corporation) must file a detailed depreciation study with the Commission Staff and the Office of Public Counsel. Again, there is no exception to this rule for utilities which are not yet operational. It applies by its terms to all electrical corporations. But again, Grain Belt never submitted such a study during the years it was applying for the CCN.[37]

[33] This rule has since been renumbered as 240-10.145. See GBE's response to Show Me data requests G1 at fourth page of Exhibit 9.
[34] "Electric utility", as used in Chapter 3, means "an electrical corporation as defined in section 386.020(15) RSMo." See 4 CSR 240-3.010(10).
[35] Tr. 133 line 21 – Tr. 134 line 17.
[36] See Grain Belt's response to data request G1 at fourth page of Exhibit 9.
[37] Id. at response to data request G9.

The data requests at Exhibit 9 inquired about Grain Belt's compliance with other reporting rules of the Commission as well. In general, the response from Grain Belt was similar to its response to the two data requests already discussed above: that the referenced rules do not apply to Grain Belt, and that the information was therefore not filed.[38] And Grain Belt concedes it did not receive a waiver, variance or exemption for any of these reporting requirements.[39]

So by not filing the materials required to be filed by electrical corporations, Grain Belt implicitly conceded that throughout the course of the 2014 and 2016 CCN proceedings it was not an electrical corporation as that term is used in the CCN statute.[40] And if Grain Belt was not an electrical corporation at the time the Commission issued its Report and Order on Remand in EA-2016-0358, the Landowners respectfully contend that the Commission had no authority to grant the CCN to Grain Belt.

The Commission ruled that Grain Belt was not required to file its annual report until after the CCN was issued in the Report and Order in EA-2016-0358. (Report and Order, p. 13). With all due respect, this misses the point. By not filing any of the necessary materials in the years before that Order was issued, Grain Belt was conceding it was not an electrical corporation. And if Grain Belt was not an electrical corporation before issuance of that Report and Order, then the Commission had no authority to grant the CCN.

Grain Belt provided an even more explicit expression of its support for the Landowners' position in this case during the CCN proceeding, EA-2016-0358. In the

[38] See Grain Belt's responses to the data requests, beginning at the fourth page of Exhibit 9; and Tr. 49 line 23 – Tr. 50, line 3.
[39] Exhibit 9, response to data request G28.
[40] Section 393.170.

initial phase of that case, the Missouri Landowners Alliance proposed a condition to the CCN which involved Commission approval for any subsequent sale of the Grain Belt line.[41]

In response, Grain Belt emphatically and unambiguously stated as follows: "there is also no basis for this Commission to approve the sale of assets under Section 393.190 for a company like Grain Belt Express which will provide wholesale transmission service by means of an interstate transmission line pursuant to market-based rates overseen by FERC."[42]

With this statement, Grain Belt has expressly conceded the point being made here by the Landowners: that the Commission has "no basis" under Section 393.190 to approve the proposed sale.

Having taken that position in EA-2016-0358, Grain Belt is now precluded here by the principle of judicial estoppel from arguing that the Commission does have jurisdiction over the sale of the Grain Belt project. (*Vacca v. Missouri Dept. of Labor and Industrial Relations*, SC96911, slip op. at 24 (Mo. banc March 19, 2019) (the only prerequisite for application of that principle is that a party's later position is "clearly inconsistent" with its earlier position.)

2. <u>Even if Grain Belt is an electrical corporation, the Commission still lacks the subject matter jurisdiction and statutory authority to approve the sale under Section 393.190 because the sale does not transfer any assets of Grain Belt which are "necessary or useful in the performance of its duties to the public."</u>

As it is relevant to the point at issue, Section 393.190.1 reads as follows:

> No … electrical corporation … shall hereafter sell … or otherwise dispose of or encumber the whole or any part of its franchise, works or system,

[41] MLA's Initial Post-Hearing Brief, EFIS 537, p. 82; also noted in Grain Belt's Brief at Exh. 15C, Schedule 3, p. 43.
[42] Reply Brief of Grain Belt, p. 43, included at Exhibit 15C, Schedule 3, p. 43.

> necessary or useful in the performance of its duties to the public … without having first secured from the commission an order authorizing it so to do. (emphasis added)

As is readily apparent, and as Mr. Zadlo testified in this case, none of Grain Belt's assets are necessary or useful in currently supplying electric service to the public. Instead, as he conceded, those assets are only intended to provide service sometime in the future.[43]

Therefore, by definition, Grain Belt has no assets which are "necessary or useful in the performance of its duties to the public." In fact, it has no duties to the public. Accordingly, the proposed sale of Grain Belt to Invenergy does not fall within the Commission's jurisdiction or statutory authority under Section 393.190.

As the Court of Appeals has said, Commission approval under Section 393.190 must be obtained "before a utility can sell assets that are necessary or useful in the performance of its duties to the public…."[44] Since there are no such assets in this case, no such approval is needed or authorized.

And as the Court went on to note, "The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility."[45] Accordingly, the very purpose of Section 393.190 cannot be effectuated where there is no service which would be continued after the sale. The very meaning of the word "continuation" implies that the service is currently being offered and in use.

Support for this position is also found in *State ex rel. Martigney Creek Sewer Co. v. Pub. Serv. Comm'n,* 537 S.W.2d 388, 399 (Mo banc 1976), where the court stated as follows: "The sale, transfer, or disposition of a sewer utility's franchise, works, or

[43] Tr. 100 line 2 – Tr. 101 line 1,
[44] *State of Missouri ex rel. Fee Fee Trunk Sewer, Inc. v. Litz,* 596 S.W.2d 466, 468 (Mo. App. 1980)
[45] Id.

system … used or useful in the performance of its duties to the public is subject to control by the PSC (sec. 393.190) ….” By implication, the sale of a utility’s system not used or useful in the performance of its duties to the public is not subject to control by the Commission.

Similarly, in *Spire Missouri, Inc. v. Pub. Serv. Comm’n,* No. SD35549, (Mo. App. March 15, 2019), slip op. p. 27, f.n. 9, the Court stated as follows: “Utilities are required to obtain PSC approval for the sale of assets that are necessary to the provision of the service they provide.” (emphasis added, but emphasis was added by the Court to the comparable language in the actual statute. Slip Op. p. 21) Again, it follows that no such consent is authorized by the statute for the sale of facilities not used in providing service to the public.

Furthermore, if the statute obligates the Commission to authorize the sale or transfer of assets not currently used by a utility in the performance of its duties to the public, the result would be unmanageable. It would mean, for example, that every time a regulated utility wished to sell or even donate a piece of obsolete equipment, the utility would be obligated to apply to the Commission for permission to do so. That certainly cannot be what the General Assembly contemplated here.

The bottom line is that there is no statute in Missouri which authorizes the Commission to approve the sale of utility facilities which are not necessary or useful in the performance of a utility’s duties to the public. Accordingly, on this ground alone the Joint Application must be dismissed for lack of subject matter jurisdiction and statutory authority on the part of the Commission.

WHEREFORE, the Eastern Missouri Landowners Alliance D/B/A Show Me Concerned Landowners, and Joseph and Rose Kroner, respectfully request that the Commission make and enter its order granting rehearing of its Report and Order of June 5, 2019, with respect to each of the grounds set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by electronic mail upon counsel for all parties this 11th day of June, 2019.

/s/ Paul A. Agathen
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