BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Joint Application of Invenergy Transmission LLC, Invenergy Investment Company LLC, Grain Belt Express Clean Line LLC and Grain Belt Express Holding LLC for an Order Approving the Acquisition by Invenergy Transmission LLC of Grain Belt Express Clean Line LLC.	))))))))	**Case No. EM-2019-0150**

STAFF'S REPLY BRIEF

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Reply Brief,* states as follows:

Introduction:

The purpose of a reply brief is to respond to the arguments made by opposing counsel.[1] It should leave the tribunal with a clear understanding of the reasons that the writer's client should win.[2] Five parties filed initial briefs in this case. In addition to the Joint Applicants, Staff, Renew Missouri, and the Missouri Joint Municipal Electric Utility Commission ("MJMEUC") wrote in support of the proposed transaction. Only the several parties represented by Mr. Agathen wrote in opposition to the proposed transaction.[3]

[1] *"How to Write An Effective Reply Brief,"* American Bar Association Section on Litigation (Winter 2012).

[2] R.C. Kraus, *"Crafting an Influential and Effective Reply Brief,"* Appellate Issues, Council of Appellate Lawyers (August 2012).

[3] Missouri Landowners' Alliance, Show Me Concerned Landowners, and Joseph and Rose Kroner, herein referred to as the "Landowners."

Argument

I.

The proposed transaction should be approved, subject to the conditions described by Staff, because the evidence adduced shows that it will not be detrimental to the public interest.

Four parties filed briefs that explain to the Commission that the proposed transaction not only will not be a detriment to the public interest, but will further it. There is no need to recite the pertinent evidentiary points here; they are unchallenged and Staff recited them in its initial brief.

In its *Initial Brief,* Staff stated:

> On the issue of the public interest, the evidence adduced shows that Invenergy is qualified to own GBE, is adequately financed, and that the transaction will significantly benefit the people of this state. No evidence of detriments was adduced. On the issue of appropriate conditions, Staff advises the Commission to impose all of the same conditions it imposed on GBE's CCN in Case No. EA-2016-0358.[4]

In its *Initial Post-Hearing Brief,* MJMEUC explained, "There were no witnesses in this case that argued that Invenergy Transmission's acquisition of Grain Belt would be a public detriment; instead the evidence was overwhelming that the acquisition would make the completion of the Grain Belt project more likely, which would then deliver the benefits found in the CCN Case to the public."[5]

Likewise, Renew Missouri stated:

> The Grain Belt Express Clean Line LLC ("Grain Belt") transmission line will bring economic, market, policy, and environmental benefits to Missouri and the surrounding region. When this Commission granted Grain Belt a Certificate of Convenience and Necessity ("CCN"), it recognized the

[4] *Staff's Initial Brief,* p. 18.

[5] *MJMEUC's Initial Post-Hearing Brief,* p. 3.

> myriad of benefits the project will bring, considered the relationship Invenergy will play in Grain Belt's development, and ultimately determined the project served the public interest.[6]

Finally, the Joint Applicants point out that "[t]he Transaction promotes the public interest because it will facilitate the continued development of the GBE Project, which will deliver low-cost wind energy to Missouri wholesale customers, who will, in turn, provide that low-cost energy to their Missouri retail customers. The Commission has found that the GBE Project is in the public interest and the Transaction facilitates the fulfillment of that public interest."[7]

These conclusory statements accurately summarize the weight of the evidence adduced in this case: the proposed transaction, if approved, will confer significant benefits upon the people of Missouri; its opponents have failed to show any potential detriments.

As in all Commission proceedings, the decisional lodestar in this case is the public interest. Here, the public interest is opposed by the purely private interests of the Landowners. Our nation is one in which private interests are protected. However, that protection does not extend to preventing the realization of a public benefit. Any landowners ultimately subject to eminent domain will receive appropriate monetary compensation. The conditions proposed by Staff, and accepted by the Joint Applicants, will provide additional valuable protections. That is sufficient.

The evidence shows that the proposed transaction will not be a detriment to the public interest and it should therefore be approved.

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[6] *Renew Missouri's Post-Hearing Brief,* p. 1.

[7] *Joint Applicants' Initial Brief,* p. 11.

II.

The arguments the Landowners raise in opposition to the proposed transaction are without merit.

The Landowners raise three arguments, which Staff will take up in order:

1. The Commission lacks the jurisdiction and statutory authority to approve the sale of Grain Belt to Invenergy because Grain Belt is not an electrical corporation.[8]

2. Even if Grain Belt is an electrical corporation, the Commission lacks the 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."[9]

3. The Landowners jurisdictional arguments under Section 2 above do not constitute an impermissible collateral attack on the Commission's Report and Order On Remand in EA-2016-0358.[10]

A.

The Commission has both jurisdiction and statutory authority to approve the proposed transaction because Grain Belt is an electrical corporation.

The Commission has twice determined that Grain Belt is an electrical corporation, in cases EA-2016-0358 and EA-2014-0207.[11] Those orders are final and Case No. EA-

[8] *Landowners' Initial Brief,* p. 2.

[9] *Id.*

[10] *Id.*

[11] ***In the Matter of Grain Belt Express Clean Line LLC,*** Case No. EA-2016-0358 (***Report & Order on Remand,*** eff. April 19, 2019); and ***In the Matter of Grain Belt Express Clean Line LLC,*** Case No. EA-2014-0207 (***Report & Order,*** iss'd July 1, 2015).

2014-0207 was not appealed. Section 386.550, RSMo, provides that "[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." In the absence of showing of a significant change of conditions since the Commission's order, the Landowners' argument is barred.

This situation was addressed by the Western District in ***State ex rel. Ozark Border Electric Cooperative v. Public Service Commission of Missouri,***[12] the Western District held that a complaint brought under § 394.312.6, which authorizes complaints attacking territorial agreements previously approved by the Commission, must include an allegation of a substantial change in circumstances in order to avoid the bar imposed by § 386.550, despite the fact that § 394.312 does not expressly require such an allegation.[13] Reading ***Ozark Border*** together with another appellate case applying § 386.550, ***State ex rel. Licata v. Public Service Commission of the State of Missouri,***[14] the Commission concluded, "it is clear that a complaint seeking to re- examine any matter already determined by the Commission must include an allegation of a substantial change of circumstances; otherwise, Section 386.550 bars the complaint."[15] This prohibition applies with equal strength to the Landowners' argument in this case.

Grain Belt is an electrical corporation within the intendments of § 386.020(15), RSMo., and the Commission therefore has jurisdiction to take up and approve the proposed transaction.

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[12] 924 S.W.2d 597 (Mo. App., W.D. 1996).

[13] 924 S.W.2d at 600-601.

[14] 829 S.W.2d 515 (Mo. App., W.D. 1992). In ***Licata,*** the Western District held that § 386.550 barred a complaint challenging as unlawful a utility company rule that had been approved by the Commission.

[15] ***Christ v. Southwestern Bell Telephone Co., LP, et al.,*** (Case No. TC-2003-0066), 12 Mo.P.S.C.3d 70, 83 (Mo. P.S.C., Jan. 9, 2003).

B.

The Commission has both jurisdiction and statutory authority to approve the proposed transaction because the sale involves the transfer of assets "necessary or useful in the performance of [Grain Belt's] duties to the public."

As Staff pointed out in its initial brief, the proposed transaction will transfer to Invenergy the 39 easements already acquired by Grain Belt for use in the transmission line project.[16] Pursuant to § 386.020(14), RSMo., these easements constitute "electric plant" when combined with Grain Belt's intent to use them in its transmission project; the evidence further shows that they are both "necessary" and "useful" in providing service to the public. Therefore, pursuant to §393.170.1, RSMo., the transaction cannot go forward without prior authorization by the Commission.

In their brief, the Landowners assert that "the 39 easements relied upon by the Commission in the CCN case are no longer valid or enforceable."[17] This statement appears to refer to the following comments made by Mr, Agathen in his opening statement:

> We could contend that those 39 easements do not qualify as electric plant for two separate reasons. First, they do not include the provisions which the Commission required be included in an easement in its recent CCN decision; therefore, they are not binding on the landowner. They're basically just a nullity at this point and have no effect and do not qualify as electric plant.[18]
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> Second, the easements do not confer control of the property to Grain Belt at this time. They confer control only once Grain Belt starts construction of the project. Up till that point, the landowners are free to

[16] *Staff's Initial Brief,* p. 4.

[17] *Landowners' Post-Hearing Brief,* p. 25.

[18] Tr. vol. 2, p. 39.

> use the property as they see fit up until the point at which Grain Belt begins construction. So reliance on those 39 easements by Grain Belt we believe is misplaced.[19]

The evidence shows that the easements in question were acquired before the Commission required the inclusion of the Missouri Landowner Protocol, therefore, that protocol is not included.[20] But that fact does not make the easements invalid as the Landowners argue.[21]

"An easement is a non-possessory interest in the real estate of another. ***Burg v. Dampier,*** 346 S.W.3d 343, 353 (Mo. App., W.D. 2011). "The interest is not an interest in title, but confers a right of one person to use the real estate of another for a general or specific purpose." *Id.* "Though the right conferred by an easement is not a possessory right, it is nonetheless a right that can be enforced at law or in equity." *Id.* "Although an easement does not vest title, an easement is a form of private property that can be taken only upon payment of just compensation." ***St. Charles County v. Laclede Gas Co.,*** 356 S.W.3d 137, 139 (Mo. banc 2011). The jurisprudence of easements is voluminous and well-developed. While the Commission perhaps, in a proper case, can regulate the use that a public utility makes of an easement that it owns and its relationship to the owners of the underlying land,[22] the Commission cannot determine whether an easement is valid or invalid. ***State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service***

[19] Tr. vol. 2, pp. 39-40.

[20] Tr. vol. 2, pp. 51-52; Landowners' Ex. 10.

[21] *Landowners' Post-Hearing Brief,* pp. 17-18.

[22] *See* ***State ex rel. Kansas City v. Public Service Commission of Missouri,*** 301 Mo. 179, 192, 257 S.W. 462, 463 (Mo. banc 1923): "To that end the statutes provided regulation which seeks to correct the abuse of any property right of a public utility, not to direct its use. Exercise of the latter function would involve a property right in the utility. The law has conferred no such power upon the Commission."

Commission, 585 S.W.2d 41, 47 (Mo. banc 1979).[23] The testimony at the hearing was, "So the easements today are – are – are fully in effect on the basis of the payments that have been made."[24] Nothing in the record suggests otherwise.

Landowners also rely upon the fact that Grain Belt does not "own" the land encompassed by the easements and that its right to use the easements in question has not yet matured.[25] That reliance is misplaced. Section 386.020(14), RSMo., refers to "real estate . . . operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power[.]" Nothing in § 386.020(14), RSMo., requires that the "real estate" in question be either presently owned or controlled by the public utility in order to be considered "electric plant." Here, the real estate interests in question are in the category of "to be used" for the transmission of electricity. That is enough.

The primary object of statutory interpretation is to ascertain the intent of the legislature from the language used. ***United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy,*** 208 S.W.3d 907, 909 (Mo. banc 2006). In doing so, the tribunal considers the words used in the statute plain and ordinary meaning. *Id.* at 910. The ordinary meaning of a word is found in the dictionary. ***Preston v. State,*** 33 S.W.3d 574, 578 (Mo. App., W.D. 2000). "Real estate" is defined as "land and anything growing on, attached to, or erected on it … [r]eal property can be either corporeal (soil and buildings) or incorporeal (easements)." **Black's Law Dictionary,** p. 1337 (9th ed., 2009). Therefore, the statute's terse reference to "real estate" is satisfied by easements, such as those at

[23] "The Commission lacks the power to declare or enforce any principle of law or equity."

[24] Tr. vol. 2, p. 55.

[25] *Landowners' Brief,* pp. 16-18, 26.

issue here, that are intended to be used for utility purposes.

Elsewhere in their brief, the Landowners contend that Grain Belt is not a public utility because its assets have not been dedicated to the public service.[26] Whether or not a business is a public utility depends upon what the business actually does. ***State ex rel. and to the use of Cirese v. Public Service Comm'n of Missouri,*** 178 S.W.2d 788, 790 (Mo. App., W.D. 1944); ***State ex rel. M. O. Danciger & Company v. Public Service Commission,*** 275 Mo. 483, 205 S.W. 36, 39 (1918). The ***Danciger*** case, relied upon by the Landowners, requires that a public utility act as a "common carrier," undertaking to serve the public indiscriminately. Because Grain Belt does not serve the general public at all, the Landowners contend it cannot be a public utility.

The Commission has encountered just this situation before.[27] Entergy Arkansas, Inc. ("EAI"), certificated by the Commission, operated electric transmission and distribution facilities in Missouri.[28] The facilities were used to furnish electricity at wholesale to various Missouri regulated utilities, municipalities and cooperatives under rates set by the Federal Energy Regulatory Commission ("FERC") and to furnish electricity at retail to customers in northern Arkansas under rates set by the Arkansas Public Service Commission.[29] Like Grain Belt, EAI had no retail customers in Missouri.[30]

[26] *Landowners' Post-Hearing Brief,* pp. 4-14.

[27] *See* ***In the Matter of Entergy Arkansas, Inc.*** (Case No. EO-2013-0431), 23 Mo.P.S.C.3d 226 (2013).

[28] *Id.*

[29] *Id.*

[30] *Id.*

The Commission nonetheless concluded that EAI was a Missouri public utility over its strenuous protestations to the contrary.[31]

The arguments raised by EAI were the same arguments that the Landowners make here. The Commission evidently accepted staff's argument that ***Danciger*** did not disqualify EAI:

> ***Danciger*** is still good law in Missouri but perhaps would be decided differently today. Staff suggests that it does not stand for the proposition that an electric corporation must sell electricity at retail to be subject to regulation by the Commission because it expressly states that "[t]he electric plant must . . . be devoted to a public use before it is subject to public regulation." On the present record, while the electric plant in question is not used to make retail sales in Missouri, they [*sic*] are unquestionably devoted to a public use and are coupled with a public interest. In an Ohio case, the court stated: "it is not a controlling factor that the corporation supplying service does not hold itself out to serve the public generally.[32] * * * Regardless of the right of the public to demand and receive service in a particular instance, the question whether a business enterprise constitutes a public utility is determined by the nature of its operations." The operations of the electric plant at issue here are necessarily a matter of sufficient public interest to support the imposition of regulation by the state of Missouri to protect that interest, to the extent that state regulation is not displaced by federal regulation.[33]

Like EAI, Grain Belt intends to transmit electricity across Missouri using facilities physically located in Missouri. Although it will be subject to regulation by the FERC, its physical presence in Missouri necessarily means that Missouri's police power extends to it.[34] Again like EAI, a portion of the power Grain Belt intends to transmit will be delivered

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[31] *Id.,* at 231 (Conclusion of Law No. 9). Unfortunately, the Commission did not discuss its reasoning.

[32] ***Industrial Gas Co. v. Public Utilities Commission,*** 135 Ohio St. 408, ___, 21 N.E.2d 166, 168 (1939), *and see* ***Iowa State Commerce Commission v. Northern Natural Gas,*** 161 N.W.2d 111 (Iowa 1968).

[33] ***In the Matter of Entergy Arkansas, Inc.,*** Case Nos. EO-2013-0396 and EO-2013-0431 (***Staff's Brief,*** filed July 15, 2013), pp. 7-8.

[34] ***New York v. FERC,*** 535 U.S. 1, 17-18, 122 S.Ct. 1012, 1023, 152 L.Ed.2d 47, ___ (2002).

in Missouri and ultimately distributed to retail end users for light, heat and power.[35] As with EAI, the Commission correctly determined that the Grain Belt project is "a matter of sufficient public interest to support the imposition of regulation by the state of Missouri to protect that interest, to the extent that state regulation is not displaced by federal regulation."[36]

None of the Landowners' arguments have merit. The Commission should therefore approve the proposed transaction, subject to the conditions described by Staff and agreed by Grain Belt and Invenergy.

C.

The argument made by the Landowners in Section 2 of its Brief is an impermissible collateral attack on a final Commission decision and therefore cannot be heard.

The Landowners' contend that their challenge to the Commission's determination that Grain Belt is an electrical corporation is not an impermissible collateral attack because "the Landowners are not questioning the actual validity of the decision in the CCN case. That would be done, if at all, in a different forum. Instead, they are seeking here to dissuade the Commission from once again "sidestepping" the statutory requirements of Section 393.170. … The Landowners are simply asking that the jurisdictional issue there be reconsidered and reinterpreted in this case, in light of the arguments made herein."

[35] Zadlo Direct, p. 11.

[36] ***In the Matter of Entergy Arkansas, Inc.,*** Case Nos. EO-2013-0396 and EO-2013-0431 (***Staff's Brief,*** filed July 15, 2013), pp. 7-8.

Taking the validity of the certificate of convenience and necessity ("CCN") as given, the Landowners' argument must fail. Because Grain Belt possesses a certificate issued by the Commission, it is necessarily subject to the Commission's authority and supervision.[37]

The Landowners also note that:

> First, it is established law that the lack of subject matter jurisdiction may be challenged at any time, even on an appeal. So it makes little sense to argue that the Landowners may not raise the jurisdictional issue in this case before the Commission, but could do so if the issue here is taken up on appeal.[38]
>
> Second, it is also settled law that the Commission is not bound by its own prior decisions. The logical and perhaps only means for a party to ask the Commission to reexamine an earlier position is to question that ruling in a subsequent case. That is exactly what the Landowners are doing here: asking the Commission to reconsider its findings in the CCN case to the effect that Grain Belt was an electrical corporation before the CCN was issued.[39]

The Landowners are correct that these are well-established legal principles. *Stare decisis* does not apply to the Commission.[40] Subject matter jurisdiction may be raised at any time, even for the first time on appeal.[41] But while the Landowners may *raise* the issue of subject matter jurisdiction at any stage of the proceeding, they cannot *re-litigate* it. To the question, "Does the Commission have jurisdiction over Grain Belt?" the answer is simply, "Yes; see Case Nos. EA-2016-0358 and EA-2014-0207." There the inquiry ends.

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[37] Section 386.250, RSMo.

[38] *Landowners' Post-Hearing Brief,* pp. 25-26.

[39] *Id.,* p. 26.

[40] ***State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n of State,*** 392 S.W.3d 24, 36 (Mo. App., W.D. 2012).

[41] ***Vance Bros., Inc. v. Obermiller Const. Services, Inc.,*** 181 S.W.3d 562, 564 (Mo. banc 2006).

Conclusion:

The evidence adduced shows that Invenergy is qualified to own GBE, is adequately financed, and that the transaction will significantly benefit the people of this state. No evidence of detriments was adduced. The arguments raised by the Landowners are without merit. The Commission should approve the proposed transaction, imposing all of the same conditions imposed on Grain Belt's CCN in Case No. EA-2016-0358.

WHEREFORE, on account of all the foregoing, Staff prays that the Commission will approve the *Joint Application,* with a finding that it is not detrimental to the public interest, subject to the conditions ordered in its March 20, 2019, *Report and Order on Remand* in Case No. EA-2016-0358.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 15th day of May, 2019.

/s/ Kevin A. Thompson