

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Grain Belt Express)
Clean Line LLC for a Certificate of Convenience and)
Necessity Authorizing it to Construct, Own, Operate,)
Control, Manage, and Maintain a High Voltage, Direct) Case No. EA-2014-0207
Current Transmission Line and an Associated Converter)
Station Providing an interconnection on the Maywood-)
Montgomery 345 kV Transmission Line)

RECOMMENDATION OF UNITED FOR MISSOURI, INC.

Comes Now United for Missouri, Inc. (“UFM”) and, in response to the Missouri Public Service Commission’s *Order Directing Filing of Recommendations for Supplemental Procedural Schedule*, makes the following recommendation:

Introduction

1. On March 26, 2014, Grain Belt Express Clean Line, LLC (“Grain Belt Express”) filed its application with the Missouri Public Service Commission (“Commission”) for a certificate of convenience and necessity in the above referenced File. Pursuant to an order establishing a procedural schedule, the Commission held an evidentiary hearing on the application on November 10, 12, 13, 14, and 21. Initial and Reply Briefs of the Parties were filed on December 8 and 22, respectively.

2. On February 11, 2015, the Commission issued its *Order Directing Filing of Additional Information* (“February 11 Order”), in which it determined “that it requires additional information and analysis before determining whether to grant or deny Grain Belt Express’ application.”¹ The *February 11 Order* directed Grain Belt to provide additional

¹ *February 11 Order*, p. 1.

information, specifying an extensive and detailed list, under 13 separate categories, of studies, models, reports, documentation, agreements, and other such documents and analyses.

3. On February 19, 2015, UFM filed a timely motion pursuant to Commission Rule 4 CSR 240-2.160(2) requesting that the Commission reconsider and rescind that order. Among other things, UFM's motion argued that the Commission rules provide, at section 4 CSR 240-2.150, as follows:

(1) The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument.

(2) The commission's orders shall be in writing and shall be issued as soon as practicable after the record has been submitted for consideration.

UFM argued in its motion that the rule is a mandatory rule that specifies that once briefs are filed the record of the case is submitted to the Commission, and once the record has been submitted, the Commission must issue an order in writing as soon as practicable. In addition, MO. REV. STAT. § 386.410.1 provides that, "All hearings before the commission or a commissioner shall be governed by rules to be adopted and prescribed by the commission." The Commission has no authority to deviate from its own rules. See *State ex rel. Fischer v. Public Service Commission of Missouri*, 645 S.W.2d 39, 42 (Mo. App., 1982).

4. On March 11, 2015, the Commission issued an order denying UFM's motion for reconsideration ("*March 11 Order*"). In its *March 11 Order*, the Commission simply stated, "Commission rules specifically provide that the Commission may require the production of further evidence upon any issue and admit post-hearing exhibits into the Commission record of the hearing." The order cited Commission rule 4 CSR 240-2.130(16) as the basis for its authority.

5. On April 16, after Grain Belt Express filed its *Response to Order Directing Filing of Addition Information* (“*Grain Belt Express Response*”), the Commission issued its *Order Directing Filing of Recommendations for Supplemental Procedural Schedule*, seeking comment or recommendation of an appropriate procedure for addressing the information filed by Grain Belt Express.

Recommendation

6. UFM recommends that the Commission reject the *Grain Belt Express Response* and deny Grain Belt Express’ application because the Commission misapplied its rules in its *March 11 Order*. The Commission’s order, therefore, was unlawful, arbitrary and capricious. Further, a review of the *Grain Belt Express Response* shows that there is very little additional relevant evidence to be adduced in additional proceedings. As a result, further proceedings would be inappropriate and a useless exercise. Finally, a review of the *Grain Belt Express Response* confirms UFM’s argument in its briefs previously filed in this case, that the proposed facilities are a private enterprise not devoted to the public convenience or necessity, and therefore are not qualified to receive a certificate of convenience and necessity.

Explanation - The Commission Misapplied its Rules

7. In its *March 11 Order*, the Commission simply stated, “Commission rules specifically provide that the Commission may require the production of further evidence upon any issue and admit post-hearing exhibits into the Commission record of the hearing.” The *March 11 Order* cited Commission rule 4 CSR 240-2.130(16) as the basis for its authority.

Commission Rule 4 CSR 240-2.130(16) states as follows:

The presiding officer may require the production of further evidence upon an issue. The presiding officer may authorize the filing of specific evidence as a part of the record within a fixed time after submission, reserving exhibit numbers, and setting other conditions for such production.

However, this rule does not authorize the Commission to request additional information after the case is submitted pursuant to 4 CSR 240-2.150(1) and (2).

8. As applied by the Commission in its *March 11 Order*, 4 CSR 240-2.130(16) would make 4 CSR 240-2.150(1) and (2) of no effect. If the Commission can at any time after briefs are submitted request additional information and reopen the record, the case does not stand submitted for consideration and the Commission need not issue an order as soon as practicable as required in 4 CSR 240-2.150. Inasmuch as there is an apparent conflict in these two of rules, they must be harmonized.

9. UFM respectfully suggests that 4 CSR 240-2.130(16) applies only until such time as 4 CSR 240-2.150(1) becomes binding, after (in the present case) the filing of briefs. This interpretation is clear from the context and the actual language of 4 CSR 240-2.130(16). 4 CSR 240-2.130 applies to the conduct of hearings and the submission of evidence. As described in the purpose statement thereto, it prescribes the rules of evidence in any hearing before the commission. It explicitly provides the presiding officer, not the Commission, the authority to require the production of further evidence. A “presiding officer” is defined as the one “appointed by the commission to preside over the case.”² The presiding officer is not the same as the Commission itself. The rule is consistent with Commission Rule 4 CSR 240-2.120(1), giving the presiding officer the authority to conduct a full, fair and impartial hearing. During the course of a hearing, it is common to request and obtain the right to file late filed exhibits in order to obtain a full and complete record. Such evidence is necessary in order to prepare the case for briefing. But once the case is briefed, it must be decided as required by 4 CSR 240-2.150.

² 4 CSR 240-2.010(14).

10. As UFM argued in its motion for reconsideration, the Commission must follow its own rules. In light of the fact that the Commission found in its *February 11 Order* that it required additional information and analysis before determining whether to grant or deny Grain Belt Express' application and the presiding officer had not previously secured such additional information from the applicant prior to submittal of the case to the Commission, the Commission's only recourse was to deny the application. As a result, the Commission must now reject the additional information and deny the application.

Explanation - The New Evidence is Not Sufficient for a New Proceeding.

11. The decisions of the Commission must be based upon the record before it. By rejecting the record before it and seeking additional evidence in a new proceeding, the Commission is in essence seeking a "new trial." But, "New trials based on newly discovered evidence are disfavored." *State v. Smith*, 181 S.W3d 634, 638 (Mo. App. E.D. 2006). New proceedings are warranted in only very limited circumstances, specifically when the evidence is so material that it would probably produce a different result; such evidence may not be merely cumulative in nature. *Wilson v. ANR Freight Systems, Inc.*, 892 S.W.2d 658 (Mo. App.W.D., 1994). A review of the *Grain Belt Express Response* reveals that the information adduced is merely cumulative of evidence previously entered into the record. Therefore, additional proceedings are not appropriate or justified.

12. Finally, the *Grain Belt Express Response* confirms that Grain Belt Express' services are being marketed to wind generators.³ They are not being offered to the public. There is no public demand for the services that the present system is unable to fulfill. Such services do not comport with the requirement that the service must be necessary or convenient for the public

³ See *Grain Belt Express Response*, pp. 9-11.

service. UFM's prior briefs have covered this issue in great detail. UFM will not duplicate its argument here.

WHEREFORE, UFM respectfully recommends that the Commission reject the *Grain Belt Express Response* and deny its application.

Respectfully submitted,

/s/ David C. Linton

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Dated: April 22, 2015

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent to all parties of record via electronic transmission this 22nd day of April, 2015.

By: /s/ David C. Linton