STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held by telephone and internet audio conference on the 24th day of February, 2021.

Missouri Landowners Alliance, Eastern Missouri Landowners Alliance d/b/a Show Me Concerned Landowners, and John G. Hobbs, Complainants,	)	
v.	)	**File No. EC-2021-0059**
Grain Belt Express, LLC, and Invenergy Transmission, LLC, Respondents.	)	

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL

Issue Date: February 24, 2021 Effective Date: February 24, 2021

On September 2, 2020, Missouri Landowners Alliance, Eastern Missouri Landowners Alliance d/b/a Show Me Concerned Landowners, and John G. Hobbs (Complainants) filed a complaint with the Commission, alleging that Grain Belt Express, LLC, and Invenergy Transmission, LLC (Respondents) have publically announced plans for changes to the Grain Belt Express Project (Project) in a press release and website, which will make it materially different from the one approved by the Commission in File No. EA-2016-0358 (the CCN case). This, Complainants allege, violates the Commission's order granting a Certificate of Convenience and Necessity (CCN), therefore Respondents do not have a valid CCN to build anything in Missouri.

The Commission issued a procedural schedule setting an evidentiary hearing for April 1, 2021, and a deadline of February 2, 2021, for any motions to compel on existing discovery requests. Complainants contacted the Regulatory Law Judge about a discovery dispute with Respondents. A discovery conference failed to resolve the dispute, and the Regulatory Law Judge authorized Complainants to file a motion to compel finding that Complainants had fulfilled the requirements of Commission Rule 20 CSR 4240-2.090(8). Complainants filed their Motion to Compel on January 25, 2021. Respondents timely filed a response to the Motion to Compel on January 29, 2021. This order will address the discovery dispute.

Commission Rule 20 CSR 4240-2.090(1) provides that discovery in matters before the Commission may be obtained by the same means and under the same conditions as in civil actions in the circuit court. Hence, the Commission will examine the Missouri rules of civil procedure.

Missouri Supreme Court Rule 56.01(b)(1), provides in part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party…. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Therefore, when evaluating whether Complainants' Motion to Compel should be granted, the Commission will evaluate whether the information sought is relevant to the

subject matter at issue in this case or is reasonably calculated to lead to the discovery of admissible evidence. To do that, the Commission must consider the contested issues that will be the subject of the upcoming evidentiary hearing.

The subject matter of the Complaint

Complainants and Respondents filed a stipulated issue on September 29, 2020. Their stipulated issue stated: "[Complainants and Respondents] agree that the issue in this complaint is limited to whether Respondents' contemplated changes[1] to the Project invalidate the CCN granted to Grain Belt in the CCN case." Neither the Commission nor the subject matter of this complaint is bound by Complainants and Respondents' stipulated issue.

Complaints before the Commission are governed by Section 386.390, RSMo, which provides in part:

> Complaint may be made by … any corporation or person … by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility in violation, or claimed to be in violation, of any provision of law subject to the commission's authority, of any rule promulgated by the commission, of any utility tariff, or of any order or decision of the commission

The Commission's statutory jurisdiction is to determine whether Respondents violated a Commission order. In their Formal Complaint, Complainants specifically refer to a condition in the Commission's CCN Order that stated, "[i]f the design and engineering

[1] The material changes that Complainants alleged in their complaint are: [a]n increase the Project's delivery capacity to Kansas and Missouri to up to 2,500 megawatts, that the Project will provide broadband expansion for rural communities along the line route in Missouri, and that the construction of the Missouri portion will begin prior to getting approval from the Illinois Commerce Commission.

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."[2]

The first issue the Commission will have to resolve in this complaint is whether Respondents' website and press release demonstrate the Project's design and engineering is materially different from what was approved in the CCN Order. If the Commission finds that the changes announced in the website and press release are materially different, the second issue the Commission must determine is whether that public announcement of those changes violated the Commission's order granting the CCN. The second issue fundamentally asks when Respondents must file an updated application with the Commission for further review. Therefore, the matter of this complaint is whether Respondents website and press release announcing changes that the Commission did not authorize violated the Commission's order granting Respondents a CCN.

Therefore, the Commission will evaluate whether the information requested in Complainants' Motion to Compel is relevant or likely to lead to admissible evidence on the issue of whether Respondents' website and press release demonstrate the Project's design and engineering is materially different from what was approved in the CCN Order.

The Data Requests

Complainants' Motion to Compel identified the following five data requests (DRs):

[2] File No. EA-2016-0358, *Report and Order on Remand*, issued March 20, 2019, page 52, ordered paragraph 6.

DR1. Please provide a copy of all correspondence between either or both of the Respondents on the one hand, and Kansas Governor Laura Kelly and/or any member of her staff on the other, which address (1) any of the changes to the proposed Grain Belt transmission project as referred to in the press release included as Exhibit 1 to the Complaint in this case; or (2) the content of the press release itself.

DR2. Please provide a copy of all correspondence between either or both of the Respondents on the one hand, and Kansas Secretary of Commerce David Toland and/or any member of his staff on the other, which address (1) any of the changes to the proposed Grain Belt transmission project as referred to in the press release included as Exhibit 1 to the Complaint in this case; or (2) the content of the press release itself.

DR3. Please provide a copy of all correspondence between either or both of the Respondents on the one hand, and Mr. James Owen of Renew Missouri on the other, dealing with (1) the changes announced in the press release included as Exhibit 1 to the Complaint in this case; or (2) the content of the press release itself.

DR4. Please provide a copy of all correspondence between either or both of the Respondents on the one hand, and Mr. John Coffman of the Consumers Council of Missouri on the other, dealing with (1) the changes announced in the press release included as Exhibit 1 to the Complaint in this case; or (2) the content of the press release itself.

DR23. Please provide a copy of all correspondence between Mr. Kris Zadlo of Invenergy Transmission on the one hand, and officers, employees or agents of Invenergy Transmission or its affiliated companies on the other, expressly addressing the language to be included in or excluded from the press release attached as Exhibit 1 to the Complaint in this case.

Complainants have defined "correspondence" to include all forms of written communication including letters, emails, text messages, and other written communication.

Respondents' Objections

In their Response to the Motion to Compel, Respondents include general objections to be incorporated with the specific objections to each DR. The general objection is that the information sought is not within the personal knowledge of Respondents, or in the possession, custody, or control of Respondents. Respondents also generally object to these five DRs, stating that they are overly broad, intrusive, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

In addition, Respondents raise specific objections to each of the five DRs. The objections to DR1 and DR2 are identical. Since these two DRs seek Respondents' correspondence with the Kansas Governor, the Kansas Secretary of Commerce, and/or their staff, Respondents oppose the two DRs to the extent they call for confidential business information. Respondents also suggest that the Complainants could more easily obtain the through a Kansas Open Records Act request.

Respondents also object to DR3 and DR4, (seeking correspondence between Respondents and specific individuals at both Renew Missouri and the Consumers Counsel of Missouri) by asserting the requests are not proportional to the needs of the case. Respondents further object to DR3 and DR4 to the extent the requests seek confidential business information.

For DR23 (seeking correspondence between Kris Zadlo of Invenergy and officers, employees or agents of Invenergy Transmission or its affiliated companies dealing with the language to be used in the press release). Respondents object on grounds that it will require the review of hundreds of documents. Respondents argue that this review will involve many documents that are irrelevant to the issue of whether Respondents violated the terms of the CCN through actual design and engineering changes to the project, and is therefore not proportional to the needs of the case. Respondents further claim that DR23 asks for information beyond what was said in the press release, and is outside the allegations in this case. Respondents also object to the extent the request calls for confidential business information and information protected under attorney-client privilege and work product privilege.

Complainants' Argument to Compel Production

Complainants contend that the general objections are invalid. They state that the Missouri Supreme Court Rules 57.01(c)(2), regarding the form of responses to interrogatories, and 58.019(c)(2), regarding the form of responses to document production requests, both require that responses to questions (or objections) be listed immediately below the question. Complainants argue that because the general objections fail to follow this form they are invalid as devoid of context. Complainants' arguments

regarding the form and format of Respondents' objections are not persuasive. Commission Rule 20 CSR 4240-2.090(2)(B) provides that answers to data requests need not be under oath or be in any particular format, but shall be signed by a person who is able to attest to the truthfulness and correctness of the answers. Respondents' answers and objections to questions were easily understood and for DR1 through DR4, bore the electronic signatures of Kris Zadlo and Andrew Shulte, and DR23, bore the electronic signature of Andrew Shulte.

Complainants argue that Respondents' general objection's that the items are not in the possession of Respondents is without merit because Rule 58.01(a) does not limit production to items in possession, but items that "are in the possession, custody, or control of the party upon whom the request is served[.]" Complainants cite *Hancock v. Shook*, 100 S.W.3d 786 (Mo. banc. 2003) for the proposition that, "[t]he basic test of the rule is "control" rather than custody or possession" and "[d]ocuments are considered to be under a party's control when that party has the right, authority, or practical ability, to obtain the documents from a nonparty to the action."

The *Hancock* case involved a request for Hancock to produce records from his veterinarian. There was no objection to the request and Hancock and his veterinarian provided a number of documents. The Missouri Supreme Court determined that, "Mr. Hancock had practical control over his treating veterinarian and designated expert witness, Dr. Mozier, at least to the extent of production of documents maintained by Dr. Mozier that related to Mr. Hancock's dairy herd."

Complainants' motion states that DR1 through DR4 seek copies of correspondence between Respondents and four individuals quoted in the press release.

The press release announced that the Grain Belt Project would now deliver power to Kansas, and the Kansas Governor was quoted in the press release regarding that delivery of power. Concerning DR1, Complainants assert that for the governor to comment regarding the delivery of power, there logically would have to be some communication with Respondents around the time of the press release. Complainants arguments regarding the other individuals in DR2, DR3, and DR4 are similar in that those individuals were also quoted in the press release implying communication proximate to the press release.

Complainants counter Respondents' claim that some of the correspondence would be more easily obtained by the use of Kansas Open Records Act by stating that Rule 57.01(c) specifically provides that "The party answering the interrogatories shall furnish such information as is available to the party."

Complainants assert that Data Request 23, seeking correspondence between Kris Zadlo of Invenergy and officers, employees or agents of Invenergy or its affiliated companies, concerns correspondence expressly addressing the language to be included or excluded from the press release. Complainants argue that Zadlo is the key person from Invenergy with respect to any proposed revisions to the original Grain Belt project and is the only person from Invenergy quoted in the press release announcing the changes to the Grain Belt project. Complainants assert that it is reasonable to assume that Zadlo would have first-hand knowledge of the extent to which Respondents have already abandoned the project approved in the CCN case.

Complainants also take issue with Respondents' assertion of confidential business information and the attorney-client privilege. Complainants rely on Missouri Supreme

Court Rule 57.01(c)(3), for the proposition that, "[i]f a privilege or the work product doctrine is asserted as a reason for withholding information, then without revealing the protected information, the objecting party shall state information that will permit others to assess the applicability of the privilege or work product doctrine." Complainants state that they were provided no information sufficient to assess the applicability of either privilege.

However, Respondents state that if the Commission compels Respondents to produce documents for any or all of the Requests, Respondents will provide a privilege log for each responsive but privileged document in line with applicable law.

Discussion

Complainants' DR1 through DR4 seek all correspondence between Respondents and four individuals quoted in the press release regarding (1) any of the changes to the proposed Grain Belt transmission project as referred to in the press release and (2) the content of the press release itself.

Correspondence with third parties regarding any of the changes proposed to the Grain Belt Project referred to in the press release would be relevant to the subject matter of this complaint because the request is probative of commitments made to the individuals mentioned in the press release to make the announced changes. DR1 through DR4 appear reasonably calculated to lead to admissible evidence regarding whether Respondents have made statements committing to make the changes announced in the press release. The information sought has a direct link to the content of the press release and would provide context for Respondents alleged conduct. The Commission finds that the correspondence sought in DR1 through DR4 are relevant to the subject matter of the complaint and appears reasonably calculated to lead to admissible evidence.

However, Complainants' DR1 through DR4 ask for all correspondence between Respondents and four individuals (and their staff) quoted in the press release, this would be inclusive of correspondence in the possession and control of third parties. Complainants' request, while relevant to the subject matter and reasonably calculated to lead to the discovery of admissible evidence, seeks some correspondence that are not in the possession, custody, or control of Respondents.

Complainants cite *Hancock,* for the proposition that Respondents should have to provide correspondence in the possession of third parties, but unlike the *Hancock* case, Respondents have not partially acquiesced to that request, and the information sought is not in the possession, control, or custody of Respondents' retained expert. The Commission finds that it is not appropriate to compel Respondents to provide correspondence not in their possession, custody, or control.

It is worth noting that Respondents' suggestion that it would be easier for Complaints to use the Kansas Open Records Act is not persuasive because it places the burden on the requesting party.

Complainant's Data Request 23 differs from the other data requests in that it asks for correspondence within and among Respondents or their affiliates expressly addressing the language to be included in or excluded from the press release. The information sought is relevant to the subject matter of this complaint because it seeks information regarding decisions made in formulating the press release. This data request appears to be reasonably calculated to lead to the discovery of admissible evidence because it is narrowly drafted to include correspondences between individuals with authority to make decisions regarding the changes announced. The request is for

correspondence within the possession, custody, or control of Respondents. Kris Zadlo's internal correspondence could clarify changes mentioned in the press release. Internal correspondence between him and officers, employees, agents, and affiliates regarding what language was to be included or excluded in the press release bears a direct relationship to interpreting any ambiguities that may be present in the language of the press release. The Commission finds that the correspondences sought in Data Request 23 are relevant to the subject matter of the complaint and the requests appear reasonably calculated to lead to admissible evidence.

The Commission finds Complainants' argument persuasive concerning Respondents' assertions of work product and privilege and Missouri Supreme Court Rule 57.01(c)(3). Accordingly, Respondents will be ordered to provide sufficient information to assess whether the privilege is applicable. Commission Rule 20 CSR-2.135 controls how confidential information is to be handled before the Commission.

The Commission will partially grant and partially deny Complainants' motion to compel.

THE COMMISSION ORDERS THAT:

1. Complainant's motion to compel is granted in part. Respondents shall provide all correspondence requested in the motion to compel, DR1 through DR4, and DR23, within Respondents' possession, custody, or control. Respondent need not provide information in the possession, custody, or control of unaffiliated third parties.

2. If Respondents claim privilege or work product as to any of the granted correspondence, Respondents shall provide sufficient information to assess whether the privilege is applicable.

3. This order is effective when issued.

BY THE COMMISSION

Morris L. Woodruff
Secretary

Silvey, Chm., Kenney, Rupp, Coleman, and Holsman CC., concur.

Clark, Senior Regulatory Judge

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 24th day of February, 2021.

Morris L. Woodruff
Secretary

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Digitally signed by MOPSC
Date: 2021.02.24 12:25:07 -06'00'

MISSOURI PUBLIC SERVICE COMMISSION

February 24, 2021

File/Case No. EC-2021-0059

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Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,

Morris L. Woodruff
Secretary

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.