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 Current Transmission Line and an Associated Converter Station Providing an Interconnection on the Maywood-Montgomery 345 kV Transmission Line.	))))))))))	Case No. EA-2016-0358

MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY COMMISSION'S SUPPLEMENTAL BRIEF

Over one hundred years ago, this Commission was vested with the authority to permit the construction of electric transmission lines, and nothing in the recently-final decision in the *Ameren Transmission Co*. case[1] changes that law or fact.

The members of the Missouri Joint Municipal Electric Utility Commission ("MJMEUC")[2] respectfully submit that the *Ameren Transmission Co.* case does not limit or even necessarily affect this Commission's authority to lawfully issue to Grain Belt Express Clean Line LLC ("Grain Belt") the certificate of convenience and necessity ("CCN") it seeks, for *three* reasons: (1) the *Ameren Transmission Co.* decision is distinguishable on the law and the facts

[1] *In re Ameren Transmission Co. v. PSC of Mo.*, No. WD 79883, 2017 Mo. App. LEXIS 244* (Mar. 28, 2017), *applications for transfer denied*, No. SC96427, 2017 Mo. LEXIS 266* (June 27, 2017).

[2] MJMEUC's members include here, at a minimum, the cities of Centralia, Columbia, Hannibal, Kirkwood and the 35 MoPEP cities: Albany, Ava, Bethany, Butler, Carrollton, Chillicothe, El Dorado Springs, Farmington, Fayette, Fredericktown, Gallatin, Harrisonville, Hermann, Higginsville, Jackson, Lamar, La Plata, Lebanon, Macon, Marshall, Memphis, Monroe City, Odessa, Palmyra, Rock Port, Rolla, Salisbury, Shelbina, St. James, Stanberry, Thayer, Trenton, Unionville, Vandalia and Waynesville (and the hundreds of thousands of citizens of these cities). The cities of Carrollton, Salisbury and Vandalia are located in the counties crossed by the Grain Belt Project. Exhibit 475, Schedule DK-1.

and is thus not precedent to bind this Commission's authority to act; (2) even if this Commission chooses to consider the *Ameren Transmission Co.* decision, it does not limit this Commission's statutory authority to grant the requested CCN but rather may provide guidance for lawfully exercising that authority; and (3) any reading of the *Ameren Transmission Co.* decision as a limitation on this Commission's power to grant the requested CCN violates the statutory scheme that created and continues to authorize this Commission, the administrative process established to ensure uniform and non-parochial resolution of the specialized problems that arise in utility regulation, and the Constitutionally-grounded judicial deference to this Commission as an agency of the Executive.

I. The *Ameren Transmission Co*. decision is legally and factually distinguishable from this case and is thus not binding precedent for this Commission's ruling on Grain Belt's pending application for a CCN.

An appellate court's construction of a statute becomes precedent for lower courts only as to "decisions on points arising and decided" in the appellate court's order, but that decision is *not* binding on lower courts on statutes or points "that can at most be implied from something that was actually decided."[3]

Grain Belt has asked the Commission to grant it a "line" CCN under §393.170.1, Revised Statutes of Missouri. Grain Belt made *no* request of this Commission under §§393.170.2 or 393.170.3 (regarding area certificates and hearings), and neither of those statutes are at issue before this Commission. The *Ameren Transmission Co*. Court did not construe or even address §393.170.1 or a line CCN at any point in its decision. Instead, that court construed only

[3] *Broadwater v. Wabash R. Co*., 110 S.W. 1084, 1908 Mo. LEXIS 147 *9-10 (Mo. 1908).

§§393.170.2 and 393.170.3.[4] Therefore, under long-established Missouri Supreme Court law, the *Ameren Transmission Co*. decision is neither binding nor applicable here.[5]

However, the Missouri Landowners Alliance ("MLA"), Show Me Concerned Landowners ("Show Me") and Staff have all represented to this Commission that the *Ameren Transmission Co*. decision is binding precedent which requires this Commission to deny the requested CCN.[6] Staff's reason for advocating for curtailment of its own Commission's authority is enigmatic, but such curtailment of Commission authority clearly furthers the interests of MLA and Show Me. All three brush past the fact that the *Ameren Transmission Co*. Court never construed or even mentioned §393.170.1 (which must have occurred for the decision to have *stare decisis* effect here[7]), and all three argue that this Commission is nevertheless bound by *an implication* they draw from the *Ameren Transmission Co*. decision. Because they know from sources other than that court's decision that the CCN sought in the *Ameren Transmission Co*. case was a line CCN, MLA, Show Me and Staff would have this Commission simply assume that the Western District Court of Appeals intended to also construe §393.170.1 along with §§393.170.2 and 393.170.3.[8]

MLA's, Show Me's and Staff's request that this Commission imply binding precedent not only violates the Missouri Supreme Court's long-standing definition of *stare decisis*,[9] it also defies the plain language of *Ameren Transmission Co*. That court cites only to §§393.170.2 and

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[4] *In re Ameren Transmission Co*., 2017 Mo. App. LEXIS 244 *7-11.
[5] *Broadwater*, 1908 Mo. LEXIS 147 *9-10.
[6] MLA Motion to Dismiss Application, page 1("MLA Motion"); Show Me Concerned Landowners' Comments Supporting a Prompt Report and Order Denying a Certificate of Convenience and Necessity, pages 3-4 ("Show Me Comments") and Show Me Concerned Landowner's Supplemental Brief, pages 2-6 ("Show Me Supplemental Brief"); Staff's Supplemental Brief, pages 2-4 ("Staff Brief").
[7] *Broadwater*, 1908 Mo. LEXIS 147 *9-10.
[8] MLA Motion, pages 2-3; Show Me Comments, page 4; Staff Brief, pages 2-3.
[9] *Broadwater*, 1908 Mo. LEXIS 147 *9-10.

393.170.3 and declares that its "harmonization of the statute preserves the integrity of *both* subdivisions of section 393.170" as though there are only two, and not three, subdivisions of that statute.[10] Whether the court deliberately or mistakenly[11] excluded §393.170.1 from its construction of §§393.170.2 and 393.170.3 is both unknown and immaterial here – there is no construction of §393.170.1 in *Ameren Transmission Co*. and that decision is thus not precedent binding upon this Commission which has before it a §393.170.1 application for a line CCN.

II. This Commission may choose to examine the *Ameren Transmission Co*. case for guidance in the lawful issuance of the CCN sought in this case.

In the *Ameren Transmission Co*. decision, the Western District Court of Appeals repeatedly and specifically articulated its disapproval of this Commission's choice to grant a "contingent" or "preliminary" CCN in EA-2015-0146.[12] Indeed, in its April 27, 2016 Report and Order, this Commission had granted a "contingent" CCN.[13]

The *Ameren Transmission Co*. Court declared that "the PSC imposed a condition upon the CCN that ATXI acquire the county assents *before the CCN would become effective.*"[14] And, it is true that this Commission had found that "ATXI has shown it is entitled to a CCN," but then ruled that "ATXI must get assent from each county through which Mark Twain would run *before the certificate becomes effective*."[15]

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[10] *In re Ameren Transmission Co.*, 2017 Mo. App. LEXIS 244 *11(emphasis added).
[11] The *Ameren Transmission Co*. decision does contain evidence of error. For example, the court provided the full text of §229.100, which gives county commissions the authority to provide assents to the placement of utility poles, wires, pipes, etc. in the rights-of-ways of the county's roads, yet the court then described this statutory authority to encompass all areas of the county (*7). And, in quoting the language of §393.170.2, the court actually substituted the words "local government" authorities for the statutory language "municipal authorities" (*11).
[12] *In re Ameren Transmission Co.*, 2017 Mo. App. LEXIS 244 *1,*4 and *11.
[13] EA-2015-0146, *Report and Order*, Issue Date: April 27, 2016, Page 40.
[14] *In re Ameren Transmission Co.*, 2017 Mo. App. LEXIS 244 *6 (emphasis added).
[15] EA-2015-0146, Report and Order, Issue Date: April 27, 2016, Pages 37-38 (emphasis added).

Thus, the court's inquiry in *Ameren Transmission Co*. focused on whether or not this Commission has the statutory authority to issue a CCN that is *not effective*. Stated another way, the Western District Court of Appeals inquired into this Commission's authority to give away its authority by issuing a CCN that has no effect until some other entity acts.[16] The *Ameren Transmission Co*. Court construed only §§393.170.2 and 393.170.3 (regarding area CCNs and hearings), and ruled that "there is no statute authorizing the PSC to grant a *preliminary* or conditional CCN *contingent* on the required county commission consents being subsequently obtained."[17] Of potential significance here is the *Ameren Transmission Co*. Court's ruling that this Commission has no statutory authority to issue a *non-effective* CCN.

Therefore, the *Ameren Transmission Co*. case can guide this Commission as it rules on Grain Belt's pending §393.170.1 application for a line CCN – this Commission must itself exercise its own statutory authority and grant an effective CCN. That fully-effective line CCN may include recognition of the independent requirements of certain regulations or statutes, such as §229.100, which are administered by other entities. And the fully-effective line CCN may include reasonable and necessary conditions imposed by this Commission under the authority of §393.170.3. But the effectiveness of the CCN may not depend on the fulfillment of those independent requirements or conditions.

[16] This Commission's *Report and Order* in EA-2015-0146 contains two partial and thus misleading citations to the 2005 *StopAquila.org v. Aquila, Inc*. decision that lead to two erroneous conclusions of law and possibly this Commission's decision to issue a CCN that had *no effect*. Paragraphs 25 and 26 include partial quotes from the *StopAquila* case which infer the court's focus at the cited pages to be on the Commission's authority to issue a CCN. But the full cited quotations from the *StopAquila* case reveal the focus of that court's inquiry to be on the statutory limitations on the authority of public utilities to act. Certainly, our statutes will more fully constrain the actions of public utilities than the authority and actions of this Commission.

[17] *In re Ameren Transmission Co*., 2017 Mo. App. LEXIS 244 *11-12 (emphasis added).

III. The *Ameren Transmission Co.* decision must not be read to limit this Commission's authority to grant the CCN requested by Grain Belt.

A. The statutory scheme that created and continues to authorize this Commission belies all arguments that the *Ameren Transmission Co*. case limits this Commission's power to lawfully grant the pending §393.170.1 line CCN.

"The Public Service Commission Law of the State was enacted on March 17, 1913, and became immediately effective" so that the Commission could "establish[] a public policy for the public good, in the reasonable and nondiscriminatory exercise of delegated police power."[18] And, "[b]y that law [the Commission] is vested with the powers…necessary and proper to carry out fully and effectually all the purposes of the act."[19] Missouri's Constitution prevents the police power from being abridged, and so the Commission in possession of the State's police power is "a fact-finding body whose findings and orders, being prima facie reasonable and lawful, are subject to judicial review in that respect only."[20] The Commission is "intended to have very broad jurisdiction in the field in which it was intended to operate," and regarding electric utilities, the statutes authorize the Commission to approve "any new construction or location even though authorized by municipal franchise" because the statutory scheme is "intended to give the Commission full control over allocation of territory to such utilities, and to authorize either monopoly or regulated competition therein."[21]

This historical deference to the statutory authority of the Commission acting in its field is borne out in the current statutory scheme. The "public service commission shall be vested with and possessed of the powers and duties in [Chapter 386] specified, and also all powers necessary

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[18] *Kansas City Power & Light Co. v. Midland Realty Co.*, 93 S.W.2d 954, 955-956, 958 (Mo. 1936).
[19] *Columbia v. Public Service Commission*, 43 S.W.2d 813, 815 (Mo. 1931).
[20] *Kansas City Power & Light Co.*, 93 S.W.2d at 958.
[21] *State ex rel. Consumers Public Service Co. v. Public Service Commission,* 180 S.W.2d 40, 44 (Mo. 1944).

or proper to enable it to carry out fully and effectually all the purposes of this chapter."[22] Additionally, the "jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under [Chapter 386]: (1) To the…sale or distribution of…electricity…within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to…electric plants, and to persons or corporations owning, leasing, operating or controlling the same."[23] Further, the Commission is authorized to have "general supervision of all…electrical corporations…having authority under any special or general law or under any charter or franchise to lay down, erect or maintain wires…or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of…furnishing or transmitting electricity…."[24]

Based upon the plain language of these statutes, our Legislature clearly intended this Commission, as opposed to any other entity including county commissions, to be the decision-maker regarding the construction and location of a line to transmit electricity across the state. "The primary rule of statutory interpretation is to give effect to the legislative intent as reflected in the plain language of the statute…and by considering the context of the entire statute in which it appears."[25] In the context of the statutory scheme which originated and continues to enable this Commission, the authority to grant an effective line CCN to Grain Belt is vested in this Commission.

[22] §386.040, Revised Statutes of Missouri.
[23] §386.250, Revised Statutes of Missouri.
[24] §393.140(1), Revised Statutes of Missouri.
[25] *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. 2007).

B. The *Ameren Transmission Co*. case cannot be read to limit this Commission's power to grant the requested line CCN because only this Commission possesses the specialized knowledge, experience and administrative process necessary to ensure uniform and non-parochial regulation of utilities for the public benefit.

This Commission is "a fact-finding body, exclusively entrusted and charged by the Legislature to deal with and determine the specialized problems arising out of the operation of public utilities. It has a staff of technical and professional experts to aid it in the accomplishment of its statutory powers" and it alone is able "to meet changing conditions, as [it] in its discretion, may deem to be in the public interest."[26] Even an appellate court's review of Commission orders is "confined to the question of their lawfulness and reasonableness" because any judicial weighing of the evidence already considered by the Commission would "substitute…the judgment of the court and it becomes the administering body [which would] destroy administration."[27] Indeed, a reviewing court will not "substitute its discretion for discretion legally vested in the [Commission]" because it "oversteps the boundaries of its jurisdiction when it attempts to tell the [C]ommission what the action should be."[28]

Given that an appellate court reviewing this Commission's orders will not violate its administrative expertise, an argument that an appellate court would elevate a single county commission over that expert administrative process is simply not credible. The *Ameren Transmission Co*. Court would have been aware of "the very purpose of regulation by state

[26] *State ex rel. Chicago, R.I. & P.R. Co. v. Public Service Commission*, 312 S.W.2d 791, 796 (Mo. 1958).
[27] *State ex rel. Chicago, R.I. & P.R. Co*., 312 S.W.2d at 793-794. *See also, State ex rel. Kansas City Power & Light Co. v. Public Service Commission,* 76 S.W.2d 343, 354 (Mo. 1934)(The ruling as to which of two electric companies would be granted the CCN to construct an electric transmission line "was wholly an administrative matter peculiarly within the discretion of the Commission.")
[28] *State ex rel. Chicago, R.I. & P.R. Co*., 312 S.W.2d at 795.

agencies [which] is to secure uniformity of operating conditions among similar utilities and to save the economic waste that…impairs the public service."[29]

C. The *Ameren Transmission Co*. case cannot be read to violate the judiciary's Constitutionally-grounded deference to this Commission as an agency of the Executive.

The Missouri Constitution decrees that:

> The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.[30]

The doctrine of separation of powers, set out above in our state Constitution, is "vital to our form of government…because it prevents the abuses that can flow from centralization of power."[31] If a court's order interferes with the lawful authority of an agency of the Executive, then "we should have the singular spectacle of a government run by the courts, instead of the officers provided by the Constitution…and our safety…is largely dependent upon the preservation of the distribution of power and authority made by the Constitution, and the laws made in pursuance thereof."[32]

MLA, Show Me and Staff would have this Commission believe that the *Ameren Transmission Co*. Court's ruling operates to transfer this Commission's authority, discretion and expertise regarding §393.170.1 line CCNs to one or more county commissions. All three argue that the Western District Court of Appeals broadened and elevated the §229.100 authority of a

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[29] *State ex rel. Detroit-Chicago Motor Bus Co. v. Public Service Commission,* 23 S.W.2d 115, 117 (Mo. 1929)(internal citations omitted).
[30] Missouri Constitution, Article II §1. *See also, Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125, 132 (Mo. 1997)("This provision has appeared in the Missouri Constitution in substantially the same form since 1820.")
[31] *Missouri Coalition for the Environment*, 948 S.W.2d at 132.
[32] *Albright v. Fisher*, 64 S.W. 106, 108-109 (Mo. 1901).

county commission over the rights-of-way of its public roads to primary authority over public property, private property and public utility projects as well. Such reading of the *Ameren Transmission Co*. case describes a judicial action against an executive agency in violation of the doctrine of separation of powers. This cannot be.

IV. MJMEUC's response to additional arguments raised by MLA and Show Me:

MLA argues at pages 4 - 5 of its Motion that the reference to "municipal authorities" in §393.170.2 does not exclude counties as also municipalities. MLA supports its argument that counties are also municipalities with assorted case law[33], but disregards the clear statutory definition of "municipality." Chapter 393 incorporates the definitions set forth in §386.020.[34] And, §386.020(34) provides the following definition: "'Municipality' includes a city, village or town."

Show Me argues at page 2 of its Comments and at pages 9-10 of its Supplemental Brief that this Commission lacks authority or jurisdiction to rule on the pending request for a line CCN because it lacks authority over the applicant which is only a "private business." Show Me forgets pages 18-19 of this Commission's July 1, 2015 Report and Order issued in EA-2014-0207 in which this Commission found Grain Belt to be an electrical corporation and a public utility owning, operating, controlling or managing electric plant.

[33] The case law cited by MLA is also not persuasive here. In *State ex rel. Regional Justice Information Service Commission v. Saitz*, 798 S.W.2d 705 (Mo. Banc 1990), the court reviewed the definition of "municipality" in the context of sovereign immunity, not in the context of Chapter 393. In *State ex rel. Caldwell v. Little River Drainage District*, 236 S.W. 15 (Mo. 1921), the court simply inquired into whether the Missouri Constitution exempted certain property from state taxation. And, *Hunt v. St. Louis Housing Authority*, 573 S.W.2d 728 (Mo. App. 1978) is no longer good law as it was superseded by statute as stated in *State ex rel. Deering v. Corcoran*, 652 S.W.2d 228 (Mo. Ct. App. 1983).

[34] *See*, §393.120, Revised Statutes of Missouri.

Show Me additionally argues at pages 2-3 of its Comments and at page 9 of its Supplemental Brief that the pending application is "detrimental to the public interest" because the "investments of Missouri landowners, other electric utility companies, and the two RTO systems will be diminished in value." Show Me forgets that (1) it does not represent other electric utility companies or any RTO systems and therefore has no standing or authority to make arguments purportedly on their behalf, and (2) that no other electric utility companies or any RTO systems chose to intervene in this matter to state objections if they had any, and (3) that there is no evidence in the record of this matter of any diminishment of value of any investments of any other electric utility company or RTO system.

Show Me finally argues at pages 2-3 of its Comments that MJMEUC is not the "public" for whose interest this Commission should be concerned, and this argument fails on the law and the facts. The case Show Me cites in support of this argument, *State ex rel. Missouri Pacific Freight Transport Co. v. Public Service Commission,* was overruled by *State ex rel. Lee American Freight System, Inc. v. Public Service Commission,* 411 S.W.2d 190 (Mo. 1966). As for the facts, it is undisputed that MJMEUC's 68 Missouri municipal members and its rural electric cooperative together serve some 347,000 retail customers in Missouri with a combined peak load of approximately 2,600 MW.[35]

V. Conclusion

On behalf of no less than Centralia, Columbia, Hannibal, Kirkwood, the 35 MoPEP cities, and these cities' hundreds of thousands of citizens, MJMEUC respectfully requests that this Commission timely find that the Grain Belt Project is necessary and convenient for the

[35] Exhibit 475, page 3, lines 15 – 18.

public service and issue to Grain Belt the requested and fully-effective certificate of convenience and necessity.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Missouri Joint Municipal Electric Utility Commission's Supplemental Brief was served by electronically filing with EFIS and emailing a copy to the following interested persons on this 18th day of July, 2017:

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