BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Grain Belt Express Clean Line LLC for 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

OPPOSITION OF GRAIN BELT EXPRESS TO MOTION OF MISSOURI LANDOWNERS ALLIANCE FOR EXPEDITED TREATMENT AND MOTION TO DISMISS APPLICATION OR TO HOLD CASE IN ABEYANCE

Grain Belt Express Clean Line LLC ("Grain Belt Express" or "Company") states the following in Opposition to the Missouri Landowners Alliance's ("MLA") Motion for Expedited Treatment and Motion to Dismiss Application, or Alternatively, To Hold Case in Abeyance ("MLA Motion")[1]:

1. MLA filed its hasty Motion based upon a non-final decision that is not applicable to this proceeding and that was issued three days ago by the Missouri Court of Appeals on an appeal from the Public Service Commission's ("Commission" or "PSC") Report and Order granting Ameren Transmission Company of Illinois ("ATXI") a conditional certificate of convenience and necessity ("CCN"). Neighbors United Against Ameren's Power Line v. PSC, No. WD79883 (Mar. 28, 2017) ("Neighbors United"). The Court found that the Commission exceeded its authority under Section 393.170.2[2] by granting ATXI a conditional CCN prior to

[1] This Opposition also addresses the "Comments in Support Motion for Expedited Treatment" filed by Show Me Concerned Landowners ("Show Me"), which support the MLA Motion.
[2] All statutory citations are to the Missouri Revised Statutes (2000), as amended.

ATXI obtaining all necessary county road-crossing assents under Section 229.100. Neighbors United, slip opin. at 7-8.

2. This non-final decision provides no reason for the Commission to halt its proceedings in this case. To the contrary, the Court's holding is inapplicable to the Application of Grain Belt Express which is based on Section 393.170.1. The Commission has ample basis to evaluate the Company's Application, the substantial evidence offered by its 16 witnesses in 26 pieces of pre-filed testimony, as well as the evidence offered by all other parties over the past seven months and during the five-day evidentiary hearing that concluded last week. Accordingly, Grain Belt Express opposes the Motion.

3. First and foremost, the specific holding of Neighbors United is based on a statutory provision of no relevance to the Grain Belt Express Application in this matter. The Court of Appeals only analyzed the mandatory language of the second subsection of Section 393.170, which requires that an applicant file with the Commission "the required consent of the proper municipal authorities,"[3] in light of the permissive language of the third subsection of Section 393.170, which permits the Commission to "impose such condition or conditions as it may deem reasonable and necessary." The Court held that "the general provision of section 393.170.3 gives way to the more specific and mandatory language of section 393.170.2." Neighbors United, slip opin. 7-8. The Court reasoned that its harmonization of the second and third subsections of Section 393.170 "gives plain meaning to the legislature's use of the mandatory term 'shall' when it describes what documents the applicant must submit to the PSC before a CCN will be issued." Id. at 8.

[3] Section 393.170.2 (emphasis added).

4. However, Grain Belt Express submitted its Application under the first subsection of Section 393.170, which does not contain this mandatory language. Indeed, Section 393.170.1 contains no language at all regarding what municipal or other consents the applicant must submit to the Commission before a CCN will be issued. See Application at 1 ("Grain Belt Express Clean Line LLC … pursuant to Section 393.170.1 … submits this Application … for a certificate of convenience and necessity ..."). The Neighbors United decision makes no mention of and its holding does not affect applications submitted under Section 393.170.1.

5. Missouri courts long have recognized the distinction between the first and second subsections of Section 393.170. Section 393.170.1 concerns "line" certificates where a company seeks permission to construct an electric plant or a transmission line, which Grain Belt Express seeks to do here. State ex rel. Union Elec. Co. v. PSC, 770 S.W.2d 283, 285 (Mo. App. W.D. 1989) ("Two types of certificate authority are contemplated under Missouri statutes"); State ex rel. Harline v. PSC, 343 S.W.2d 177, 182-83 (Mo. App. K.C. 1960). By contrast, Section 393.170.2 relates to "area" certificates sought by a utility to serve a particular territory, which is not relevant to this case. As the Court of Appeals observed in StopAquila.org v. Aquila, Inc., 180 S.W.3d 24, 33 (Mo. App. W.D. 2005), Section 393.170 is "divided into three distinct sub-sections." Subsection 2 requires "authority" for "an established company to serve a territory by means of an existing plant." Id., citing Harline, 343 S.W.2d at 185.[4]

[4] In distinguishing Section 393.170.2 from Section 393.170.1, the Harline Court stated: "Certificate 'authority' is of two kinds and emanates from two classified sources. Sub-section 1 requires 'authority' to construct an electric plant." 343 S.W.2d at 185. More importantly, Harline rejected the argument apparently advanced in Neighbors United that subsection 2 dealt with the construction of a transmission line. Id. at 183 ("We do not read the statute with that understanding"). Accord State ex rel. Union Elec. Co. v. PSC, 770 S.W.2d 283, 285 (Mo. App. W.D. 1989) (rejecting argument that "the two types of authority should be considered interchangeable").

6. Consequently, there is no basis for the Commission to deviate from its current schedule. Indeed, the Commission must *not* apply the reasoning of the Neighbors United decision regarding Section 393.170.2 to Section 393.170.1, an entirely different statute, as MLA urges the Commission to do. Following that course would adversely affect all utility infrastructure projects in Missouri going forward.

7. Second, the Commission should neither dismiss nor delay this case on the basis of the Neighbors United opinion, which is far from being a final, non-appealable decision. It is highly likely that motions for rehearing will be filed under Rule 84.17(a)(1), Mo. R. Civ. P., including a request that the decision be reheard en banc, given its uncertain implications for Missouri infrastructure projects. It is also very probable that applications will be filed requesting that the Court of Appeals transfer the case to the Missouri Supreme Court under Rule 83.02, given the "general interest or importance" of the questions involved in Neighbors United and its failure to appreciate the distinctions between subsections 1 and 2 of Section 393.170. Even if the Court of Appeals (either Division IV that issued the decision or the Court of Appeals en banc) fails to act, the parties are likely to file applications to transfer to the Missouri Supreme Court, seeking review under Rule 83.04.

8. Given the Court of Appeals' clear failure to grasp the long-standing distinction between "line" certificates granted under 393.170.1 and "area" certificates granted under 393.170.2, rehearing or transfer is likely. Upon such rehearing or transfer, "the case stands here as if it had not been previously heard and submitted." In re Thomasson's Estate, 192 S.W.2d 867, 870 (Mo. en banc 1946). Accordingly, the Neighbors United opinion is not final and the ATXI case is not resolved. At the most, it is perhaps one step closer to final resolution.

9. The Commission rightfully conducted an evidentiary hearing during the appeal of its ATXI Report and Order, and it may continue to consider the Grain Belt Express case during the course of future appellate proceedings. Doing so is in the interest of administrative efficiency. Contrary to the assertions of MLA and Show Me, it would be pointless for the Commission to fail to consider the evidence provided in three rounds of testimony, at eight local public hearings conducted over two weeks, and at the evidentiary hearing (March 20-24, 2017) when there is ***nothing*** in the Neighbors United opinion that prevents the Commission from doing so. Dismissing this case would do nothing more than give rise to the filing of another case entirely, either during or after the pendency of the ATXI appeal. Prolonged consideration of the line certificate the Company seeks is in no one's interest.

10. Third, there is nothing in the Neighbors United opinion that precludes the Commission from considering the Grain Belt Express Application and the evidence submitted in this case, and rendering a decision on whether a CCN should be granted under the Tartan factors. Furthermore, there is no prejudice to any party by continuing with the briefing schedule while the evidence and the issues are fresh in everyone's mind.

11. MLA, with Show Me's concurrence, suggests that proceeding in any fashion would cause the Commission to render an advisory opinion. Nothing could be further from the truth. This case involves "real parties in interest with existing adversary positions," where the parties have presented a "real, substantial, presently existing controversy" as contrasted with "an advisory or hypothetical situation." State ex rel. Laclede Gas Co. v. PSC, 392 S.W.3d 24, 38

(Mo. App. W.D. 2012) (dismissing Laclede's counter-claim alleging that Staff failed to comply with certain rules in an unrelated actual cost adjustment (ACA) proceeding).[5]

12. To the contrary, it is MLA's motion that is premised on a hypothetical situation. It postulates that (a) the ATXI appeal is exhausted (which it is not), *and* (b) the Neighbors United decision stands as is, *and* (c) that decision applies to the Grain Belt Express Application (which was filed under a different provision than the one interpreted in Neighbors United). All of these premises are highly doubtful at this point. There is nothing in the Neighbors United opinion that holds that the Grain Belt Express Application and the evidence admitted into the record is not ripe for consideration under the Tartan factors and any other relevant considerations. Clearly, the issues before the Commission are appropriate for resolution, and the hardship to Grain Belt Express and its supporters (including the customers of the member utilities of the Missouri Joint Municipal Electric Utility Commission) would be manifest if the case were dismissed. How the Commission chooses to proceed once it renders its decision on these issues is a different matter, and the parties should be permitted to offer their recommendations in the briefs contemplated by the procedural schedule.

13. Abandoning the procedural schedule, let alone dismissing the case, would be a premature and irrational reaction to an appeal that is far from final. Such a reaction would result in a colossal waste of time and resources for all parties and the Commission. Neither MLA nor Show Me has offered any argument that the Commission would not be within its statutory authority to proceed as scheduled until the final resolution of the Neighbors United appeal.

[5] MLA's Motion at page 4 cites a proceeding where Staff and the utility asked the PSC "to review" its customer opt-out of demand-side management programs. Clearly, that portion of the case was not contested and did not require the resolution of a dispute. See Notice of Contested Case and Procedural Schedule, In re Kansas City Power & Light Co.'s Practices Regarding Customer Opt-Out of Demand-Side Management Programs, No. EO-2013-0359 (Mar. 27, 2013).

14. Grain Belt Express encourages the Commission to resist any impulsive reaction to a non-final and non-applicable decision in another case that will disrupt the procedural schedule that was crafted with the input of all parties in this case. Rather, this case should proceed as scheduled, with the Commission exercising its lawful authority under Sections 393.170.1 and 393.170.3.

WHEREFORE, Grain Belt Express Clean Line LLC requests that the Commission deny the Missouri Landowners Alliance Motion for Expedited Treatment and Motion to Dismiss Application, Or Alternatively, To Hold Case In Abeyance.

Respectfully submitted,

/s/ Karl Zobrist

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all counsel of record in this case on this 31st day of March 2017.

/s/ Karl Zobrist
Attorney for Grain Belt Express Clean Line LLC