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

MOTION TO DISMISS APPLICATION

Comes now the Missouri Landowners Alliance (MLA), pursuant to Rules 4 CSR 240-2.116(4) and 240-2.080(14), and respectfully asks the Commission to dismiss the Application for a CCN filed by Grain Belt Express (Grain Belt) on August 30, 2016. In support of this Motion, the MLA states as follows:

The opinion from the Western District of the Court of Appeals in the *Neighbors United* case could not be clearer:

> county commission assents required by section 229.100 and 4 CSR 240-3.105(1)(D)(1) must be submitted to the PSC *before* the PSC grants a CCN…. The PSC's issuance of a CCN contingent on ATXI's subsequent provision of required county commission assents was unlawful as it exceeded the PSC's statutory authority. (Emphasis by the Court)[1]

As Grain Belt notes, the Missouri Supreme Court has refused to take transfer of this case from the Western District.[2] Accordingly, the decision by the Western District is now binding on the Commission.

Based on that decision, the Commission may not issue a CCN of any type to Grain Belt until Grain Belt has secured the consent pursuant to Section 229.100 from all

[1] *Neighbors United Against Ameren's Power Line v. PSC,* No. WD79883 (March 28, 2017), slip opin. At 8; applications for transfer denied by Missouri Supreme Court June 27, 2019, SC96427.
[2] Request of Grain Belt Express and Motion For Waiver or Variance of Filing Requirements ("Request of Grain Belt"), filed June 29, 2017, p. 1.

eight county commissions where the proposed line would be located. Grain Belt has failed to do so.[3]

Accordingly, Grain Belt has again failed to meet all of the prerequisites for issuance of a CCN. The lack of county consents is no different in this regard from a failure to meet any of the other established criteria for a CCN, such as demonstrating that the project is needed, or is in the public interest. Given that Grain Belt has again failed to meet its burden of satisfying all of the requirement for the CCN, it has left the Commission with no choice but to dismiss the Application – just as it did in the 2014 Grain Belt case.

Grain Belt attempts to distinguish the *Neighbors United* decision by arguing that it dealt only with subsection 2 of Section 393.170 (which Grain Belt says pertains to "area certificates") whereas its own application in this case was filed pursuant to subsection 1 of Section 393.170 (which it says pertains to "line certificates").[4]

This argument has an obvious flaw: in the commission proceeding leading to the *Neighbors United* decision, ATXI did file for a line certificate. We know this is true on a number of grounds. First, ATXI did not seek permission in that case to serve any retail customers from its proposed line.[5] By definition, this means that ATXI could not have been asking for what is commonly called an "area certificate."[6] Further, ATXI explicitly

[3] Grain Belt clearly lacks the consent from the Caldwell County Commission. See Exhibit 320, which includes an order from the Circuit Court sustaining the MLA's Motion to vacate the earlier consent granted to Grain Belt by that county commission. In addition, a number of the County Commissions have since rescinded the consent given earlier to Grain Belt. See Testimony of Louis Lowenstein at Exh. 300, Schedule LDL4.
[4] Request of Grain Belt, par. 2-3.
[5] See Commission's Report and Order, Case No. EA-2015-0146, p. 2 par. 9.
[6] "A subsection 2 'area certificate' is a granting of permission to exercise a franchise by serving customers." Grain Belt's Initial Post-Hearing Brief in this case, p. 15. EFIS No. 529. And see also the case cited there by Grain Belt, *State ex rel. Cass Cnty v. PSC,* 259 S.W.3d 544, 548-49 (Mo. App. 2008).

told the Commission in that case that it was asking for a "line certificate".[7] And the Commission itself explicitly told the Western District that ATXI was seeking a line certificate in that proceeding.[8]

Thus the *Neighbors United* case and this Grain Belt proceeding both involved applications for line certificates. In both cases, the applicant had failed to secure the needed county consents. The Court of Appeals ruled that under those circumstances, the Commission could not issue a CCN until after ATXI had obtained those county consents. Thus despite Grain Belt's best efforts, there is simply no legitimate ground on which to distinguish these two cases.

Grain Belt's real complaint is that it disagrees with the holding in the *Neighbors United* case, and/or that it believes the Court did not adequately discuss the basis for its decision. But as Grain Belt must concede, like it or not the law is what the courts say it is. Here, the courts have spoken. Thus unless and until the *Neighbors United* decision is reversed in some future proceeding, it stands for the proposition that a line CCN cannot be issued by the Commission until all of the county consents have been secured. Those consents have not been secured by Grain Belt, and so no CCN of any type may be issued in this case.

In addition to its attempt to distinguish the *Neighbors United* decision, Grain Belt also asks the Commission to waive its own rule which requires that the county consents be obtained before issuance of a CCN.[9]

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[7] See ATXI's Initial Brief to the Commission in Case. No. EA-2015-0146, where ATXI stated as follows: "This case is a subsection 1 line certificate case, because ATXI simply seeks authority to construct the line."

[8] See Commission's Motion for Rehearing in the *Neighbors United* appeal, p. 2, filed April 12, 2017 in WD79883.

[9] Request of Grain Belt, p. 5 par. 12.

The first problem with this request is that it assumes the *Neighbors United* decision is inapplicable here. But given that it is exactly on point, a waiver of the Commission's rule cannot waive the requirements of the statute. Thus all of Grain Belt's contentions with respect to the proposed waiver are superfluous.

In any event, Grain Belt notes that Section 393.170 makes reference to consents from the proper "municipal authorities", and then argues that under Missouri law counties are not "municipal authorities."[10] The six statutory provisions relied on in this regard by Grain Belt all simply confirm, at best, that cities are municipalities. But they absolutely do not state or imply that counties are <u>not</u> municipalities.

Actually, the meaning of the term "municipality" varies depending on the context in which it is used. *State ex rel. Regional Justice Information Service Commission v. Saitz,* 798 S.W.2d 705, 707 (Mo banc 1990). Here, in the very rule for which Grain Belt seeks a waiver, the Commission has interpreted the term "municipal authorities" in Section 393.170 to include county commissions. Even if that interpretation is not binding on the Commission, it certainly is highly persuasive as to the proper interpretation of that term.

That interpretation is also in line with the Commission's own case-specific precedent. In the case of *Re S.W. Water Co.*, 25 Mo P.S.C. 637, 638 (1941) (on rehearing of Report and Order at 25 Mo. P.S.C. 463) the Commission dismissed an application because the utility did not have a franchise from the county where the facilities were to be

[10] Id. p. 5 par. 11.

built.[11] As to what entities are included within the statutory term "municipal authorities", the Commission held as follows:

> Consent of the city, town, village, the County Court [now called a County Commission] or the State Highway Commission depending upon whether the line or system was to be placed within the incorporated city, within the unincorporated area of the county, or along a state highway, has always been made a condition precedent to the granting of such certificate by this Commission.

In *State ex rel. Caldwell v. Little River Drainage Dist.,* 236 S.W. 15, 16 (Mo 1921), the Missouri Supreme Court noted that in the ordinarily accepted sense of the term, "municipal corporation" includes any body exercising some function of government, "and hence includes counties…." This case is particularly significant because it was decided only eight years after the enactment of the Public Service Commission Law in 1913, thus providing a somewhat contemporaneous view of what the term "municipality" was then thought to encompass.

And in *Hunt v. St. Louis Housing Authority,* 573 S.W.2d 728, 730 (Mo App. 1978) the Court held that the term "municipality" has a broader meaning than merely "city" or "town", and "presently includes bodies public or essentially governmental in character and function…."

Grain Belt clearly takes a much too narrow view of the term "municipality", as used in Section 393.170.

Grain Belt also argues that until now, the Commission has routinely granted CCNs on the condition that the governmental consents be submitted prior to construction of the facilities in question.[12] If so, as the *Neighbors United* opinion makes clear, that

[11] The MLA is relying here and in other summaries of PSC cases on language from the Staff's Initial Brief in the ATXI case, EA-2015-0146, p. 27 et seq.
[12] Request of Grain Belt, p. 5 par. 13.

practice has routinely been in violation of the law. Yet Grain Belt is essentially asking that the practice be continued, regardless of what the law says.

Grain Belt also claims that requiring county consents for a line certificate "is a change in Missouri law as it has existed since 1913."[13] That statement is untrue. The Commission has in fact required such consents for a line certificate.[14] In a case of first impression at the courts, the *Neighbors United* decision only clarified that the consents must be obtained before the CCN is issued.

Moreover, even in past cases the Commission did not consistently give the utility an unlimited period of time in which to secure the needed consents. Based again on Staff's research, in *Re Saline Sewer Company,* 15 Mo P.S.C (N.S.) 25, (1970) the utility was given three months from the date of the Report and Order to secure the county consent, or the case was to be dismissed.[15]

Similarly, in *Re Bonneville Water,* 20 Mo. P.S.C. (N.S.) (1975) the utility was given 90 days after the Report and Order in which to secure the needed municipal consents.[16]

Here, Grain Belt has had five years in which to secure the required county consents.[17] During that time, the citizens of eight Missouri counties have suffered continuously as Grain Belt attempts to saddle them with over 200 miles of high-voltage line and huge steel towers.

[13] Id. at p. 6, par. 14.
[14] See e.g. *In Re Missouri-Kansas Pipe Line Company,* 17 Mo.P.S.C. (1928), cited in Staffs Initial Brief in the ATXI case, EA-2015-0146, p. 26, par. 2.
[15] Staff's Initial Brief in EA-2015-0146, p. 29.
[16] Id. at p. 30.
[17] Grain Belt first began securing the county consents in the summer of 2012. See initial consents from county commissions at Schedule LDL-3 to testimony of Louis Lowenstein, Exh. 300.

And for over two-and-a-half years now, Grain Belt has been promising that all of the required governmental consents would be submitted "once they have been received."[18] But they provide absolutely no clue as to how long the Commission and the other parties are expected to wait in limbo while Grain Belt endeavors to produce those consents. Presumably, as long as it takes.

What Grain Belt would like is for the Commission to assist them in solving this problem by issuing what amounts to an "advisory opinion" on the merits of this case, which Grain Belt could then use as a lever in seeking the county consents.[19] Of course in making this request, Grain Belt once again takes it for granted that the Commission would rule in its favor on the merits.

This latest Grain Belt case has been pending now for nearly a year. In all fairness, there is no reason for the Commission to grant Grain Belt additional time in which to meet the statutory requirements for a CCN -- even if the Commission had the authority to do so. Let this finally be independence day for the affected landowners.

WHEREFORE, for the reasons stated above, the MLA respectfully asks the Commission to promptly dismiss the Application filed in this case by Grain Belt on August 30, 2016.

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[18] Grain Belt's Initial Post-Hearing Brief in case No. EA-2014-0207, December 8, 2014, p. 54. EFIS No. 470. See also Grain Belt's Initial Post-Hearing Brief in this case, p. 23, EFIS No. 529, where it again promises that all the necessary governmental consents will be provided "once they have been received."
[19] See Request of Grain Belt, p. 4 par. 8.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by electronic mail upon counsel for all parties this 4th day of July, 2017.

/s/ Paul A. Agathen
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