BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Landowners Alliance, and Eastern Missouri Landowners Alliance DBA Show Me Concerned Landowners, and John G. Hobbs, Complainants, V. Grain Belt Express LLC, and Invenergy Transmission LLC, Respondents	)	Case No. EC-2021-0059

INITIAL BRIEF OF COMPLAINANTS

Pursuant to the Commission's Order of October 5, 2020, Complainants respectfully submit this Initial Brief on the issue of whether the Complaint in this case states a cause of action for the invalidation of the CCN for the Grain Belt project.

Background. In Case No. EA-2016-0358 (the "CCN case") the Commission granted Grain Belt permission to build the Missouri portion of an interstate transmission line which would cover approximately 780 miles from Kansas to Indiana.[1] This "original project" was described in detail in the Application filed by Grain Belt which initiated the CCN case.[2]

Grain Belt and its current owner, Invenergy, recently announced plans to build a "revised project", which would incorporate major changes to the original project.

On September 2, 2020, Complainants filed a formal Complaint with the Commission, in essence alleging that Respondents' decision to replace the original

[1] CNN case, p. 9, pars. 4-5. EFIS 758
[2] See Application filed in the CCN case on April 30, 2016, at EFIS 34.

project with the revised project acted to invalidate the CCN granted by the Commission for the original project.

By order of October 5, 2020, the Commission directed the parties to file briefs addressing the sole issue of "whether a Complaint that Grain Belt published a plan not authorized by its current CCN states a cause of action for the invalidation of its CCN."

Applicable legal principles. Complainants are essentially being asked here to defend against a motion to dismiss their Complaint for failure to state a claim upon which relief can be granted. Several of the legal principles applicable to this issue were mentioned in the Commission's Order of October 5, 2020. In addressing some of those same pronouncements, the Western District described the general principles which are applicable here as follows:

> A motion to dismiss for failure to state a claim upon which relief can be granted is solely a test of the adequacy of the petition. When we consider whether a petition fails to state a claim upon which relief can be granted, we accept all properly pleaded facts as true, giving the pleadings their broadest intendment, and we construe all allegations favorably to the pleader. We do not weigh the factual allegations to determine whether they are credible or persuasive. Instead, we review the petition in an almost academic manner to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case. The determination of factual questions is not appropriate on a motion to dismiss. It is not the trial court's function on a motion to dismiss, or our function on review of a judgment of dismissal for failure to state a claim, to determine whether an appellant is entitled to relief on the merits. (citations omitted).[3]

[3] *Chochorowski v. Home Depot,* 295 S.W.3d 194, 197 (Mo. App. 2009). *See also Spurgeon v. Missouri Consolidated Health Care Plan,* 481 S.W.3d 604, 606 (Mo. App. 2016).

Argument. Grain Belt applied for and was granted a "line CCN" pursuant to subsection 1 of § 393.170 RSMo, as opposed to an "area CCN" pursuant to subsection 2 of that statute.[4]

Section 393.170.1 merely prohibits an electrical corporation from building its proposed facilities unless it first obtains Commission permission to do so. There is nothing in that statute which states expressly or by implication that if a line CCN is granted, then the utility is legally obligated to actually build the line authorized by the CCN.

Even if the Commission had the authority to do so, there is nothing in its Order in the CCN case which purports to obligate Grain Belt to build the proposed line. The Commission simply granted Grain Belt's Application to build a designated transmission line and related facilities, subject to certain conditions.[5]

And Grain Belt's Application only sought authorization from the Commission to build the proposed project.[6] Nowhere in the Application did Grain Belt indicate that it was obligating itself to build the proposed line if the CCN was granted.

So based on the applicable statutory provision dealing with a line CCN, the Commission's CCN order, and Grain Belt's Application for the CCN, Grain Belt is free at this point to abandon the original project without any approval from the Commission.

This would not be the first instance where a utility abandoned a project for which it had been granted a CCN. As discussed in an opinion from the state Supreme Court, Union Electric was granted a CCN in 1975 for the construction of two nuclear generating

[4] Order in CCN case, pp. 5 and 50; *Grain Belt Express Clean Line, LLC v. Public Serv. Comm'n,* 555 S.W.3d 469, 473-74 (Mo. banc 2018).
[5] Order in CCN case, p. 50.
[6] See Grain Belt's Application for the CCN, filed April 30, 2016, pp. 1, 30-31. EFIS 34.

units in Callaway County, Missouri. Due to changing circumstances, in 1981 the utility decided to abandon the second of the two units. No mention was made in the court's decision of Union Electric asking for or receiving the Commission's permission to walk away from unit number two.[7] It simply abandoned the second unit on its own volition. This case reinforces the proposition that a utility may abandon a project for which it has been granted a CCN. And it logically follows that if the project itself is abandoned by the utility, with no intent that it be revived, the CCN necessarily becomes a meaningless nullity.

Here, the major changes to the revised project, or at least those which Respondents have announced thus far, consist of the following:

- The revised project would deliver power directly to Kansas.[8] The original project was to deliver power only to converter stations in Missouri and eastern Illinois.[9]

- The original project was to deliver only 500 MW of power to Missouri, with 3,500 MW going to the Illinois converter station for delivery to the PJM market.[10] The revised project will deliver up to 2,500 MW to Kansas and Missouri, presumably leaving only about 1,500 MW for delivery to PJM (assuming the Illinois segment of the line is actually built).[11]

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[7] *State ex rel. Union Electric Co. v. Public Serv. Comm'n,* 687 S.W.2d 162, 163-64 (Mo. banc 1985). There does not appear to be a separate Commission case in which it approved the abandonment of the second nuclear unit.

See also State ex rel. Transport Delivery Co. v. Public Serv. Comm'n, 382 S.W.2d 823, 827 (Mo. App. 1964) where the appellants argued that a transportation CCN issued by the Commission had been abandoned. The court found there was no showing that the CCN had actually been abandoned, but in addressing the argument the court obviously recognized the possibility that a CCN could be abandoned.

[8] Invenergy's Press Release attached as Exhibit 1 to the Complaint, p. 1 (the "Press Release").

[9] CCN Order, p. 9, par. 7.

[10] CCN Order, p. 9, par. 7, p. 25, par. 75, and page 44.

[11] See Press Release, p. 1.

- In contrast to the original project, Respondents are proposing to begin construction of the revised project in Missouri prior to receiving approval for the line in Illinois.[12]

- Respondents are planning to add broadband infrastructure to the revised project, to facilitate high-speed internet service in the area near the line.[13] Grain Belt's Application did not seek authority to include such facilities as part of the original project, and no such authority was granted by the Commission in the CCN case.

Respondents make no mention of building two separate Grain Belt transmission projects. In any event, doing so would not appear to be feasible at this point, particularly with approval having already been given for a single, detailed route for the line. So assuming that Grain Belt is still planning at this point to build only one high-voltage transmission project across the state of Missouri, it must necessarily choose between the original project and the revised project.

Even from what we know at this point, the two options are distinctly different projects. In fact, because the revised project is "materially different" from the original version, the revised project would undoubtedly require Commission approval before it could be built.[14] Given that Respondents must make a choice between the two projects, the key issue in this proceeding is to determine the intent of the Respondents in making that decision.

The only available, objective means of determining the Respondents' intent in that regard is from what Respondents themselves have publically said on the subject.

[12] *Id.*; p. 1 of Exhibit A to "Joint Motion to Suspend Current Deadlines and Establish a Briefing Schedule", filed Sept. 29, 2020 ("Joint Motion").
[13] Page 2 of Exhibit B to Joint Motion.
[14] CCN Order, p. 52, par. 6.

Based upon that evidence, they clearly intend to build the revised project in lieu of the original project.

Respondents' decision in this regard is evident from the very outset of their recent press release, which begins with the following announcement of how they intend to proceed: "Grain Belt Express to Increase Local Access to Low-Cost, Homegrown Clean Energy, Adding up to $7B in Energy Savings for Kansas and Missouri Consumers." (emphasis added).

Among other indications that Grain Belt now intends to replace the original project with the revised version are these additional statements from their press release:

- "Invenergy Transmission, the owner and developer of the Grain Belt Express transmission line project ('Grain Belt') today announced plans to increase local clean energy access and accelerate billions of dollars in economic investment in Kansas and Missouri."[15]

- "Economic recovery and long-term economic competitiveness in Kansas and Missouri depend on new investment, more jobs, and tapping into low-cost, homegrown clean energy, which Grain Belt is moving full speed ahead to deliver, said Kris Zadlo, SVP [with Invenergy] …. Grain Belt is proud to increase our investment in Kansas and Missouri to rebuild the economy, deliver billions of dollars in energy cost savings, and meet growing renewable energy demand."[16] (emphasis added).

[15] Press Release, p. 1.
[16] *Id.*

- "As the new owner of Grain Belt, Invenergy Transmission plans to increase the project's delivery capacity to Kansas and Missouri to up to 2,500 megawatts of the line's 4,000 megawatt capacity."[17]

- "Grain Belt will provide critical power infastructure to the region benefiting residents for decades to come."[18]

- Governor Laura Kelly of Kansas is quoted in the press release as stating that "[t]his impressive project is the latest example of Kansas' place as a wind energy leader in our region and beyond."[19]

- According to the Kansas Secretary of Commerce, "the unwavering commitment from Governor Kelly to further support renewable sources is paying off in many ways, including this tremendous step forward in the Grain Belt Express." He is further quoted as saying that the revised project "will deliver a significant economic boost to our rural communities in particular. The news couldn't come at a better time."[20]

These statements from the two Kansas officials are meaningful only if they have been led to believe that the revised project will be built in lieu of the original project.

- "With increased delivery to Missouri … Grain Belt will double its overall economic investment in Missouri to $1 billion …. Grain Belt will now make available as much as half or more of the project's total capacity for Missourians."[21]

- A representative of Renew Missouri is quoted as saying that "the benefits of Grain Belt have only grown with billions of dollars of added savings …."[22] Again, this

[17] *Id.*
[18] *Id.*
[19] Press release, p. 2.
[20] *Id.*
[21] *Id.*
[22] *Id.*

statement is only meaningful if the speaker was led to believe that the revised project has already replaced the original project.

If Grain Belt does not fully intend at this point to build the revised project in lieu of the original project, then its press release on this subject constitutes a deliberate misrepresentation of their plans to the general public and to public officials. However, there is absolutely no reason to believe that is the case. Therefore, the only other conclusion is that Respondents mean every word they have said in the press release about intending to build the revised project instead of the original version.

The press release mentions that Grain Belt will seek regulatory approvals "to the extent necessary" for the revised project. That of course is a given. Respondents have no choice but to seek regulatory approval for what amounts to a new transmission project. But that fact has no bearing on the question of whether they currently intend, as they have said, to move "full speed ahead" with the revised project.

And what is notably absent from the press release is any kind of commitment to build the original project if Respondents do not secure the regulatory approvals for the revised project. As noted earlier, Grain Belt may simply walk away from the original project if the economics of delivering only 500 MW to Missouri no longer make the project financially inviting. If Respondents did intend to go forward with the original project if the revised project is not approved, such an important piece of information would surely have been included in their press release. Its absence is telling.

It is fair to assume that Grain Belt's change in plans was dictated by changing conditions in the cost of wholesale energy in different parts of the country and/or the cost of constructing the two versions of the project. There is no other logical explanation.

And Grain Belt certainly cannot be faulted for seeking to adjust its plans so as to maximize its profits. In fact, it did so earlier.

Before the "original project" was fully developed, Grain Belt intended that the line would have a capacity of only 3,500 MW, instead of 4,000 MW. When the additional 500 MW of capacity was added, none of it was allocated to Missouri. Instead, according to Grain Belt, it was all to be delivered to the PJM market. This decision was based, at least for the most part, "on our understanding of the markets and what the markets would bear."[23]

The point is that Respondents logically seek to design the Grain Belt project so as to maximize profits. The most recent change of plans was undoubtedly a rational response to changing economic conditions. This desire to maximize their profits reinforces the conclusion that Respondents do in fact intend to build the revised project in lieu of the original project. Again, there is no other rational explanation for the change in plans.

Whatever Respondents may have decided internally with respect to the proposed changes, the only available, objective evidence of their intent demonstrates that at this point they definitely plan to move forward with the revised project. Because they cannot build both at this point, it follows that the original design has now been abandoned. And if the original project itself has been abandoned, then the CCN for that project is nothing but a meaningless nullity.

If Respondents had confirmed in the press release that they intend to complete the original project if the revised project is not approved, the issue here might be different.

[23] Testimony of Grain Belt witness Dr. Galli, transcript Vol. 12, pp. 617-19, from the first Grain Belt CCN case: No. EA-2014-0207, EFIS 323.

They did not do so, and thus the available evidence shows only that Respondents have no intention of going forward with the original project.

In any event, Respondents' actual intent with respect to abandoning the original project is a question of fact.[24] And "the determination of factual questions is not appropriate on a motion to dismiss."[25]

WHEREFORE, Complainants respectfully submit that their Complaint is not subject to dismissal on the ground that it does not state a cause of action.

Respectfully submitted

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Certificate of Service

I certify that a copy of the foregoing was served this 23rd day of October, 2020 by email on counsel for all parties of record.

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[24] *Savannah Place, Ltd. v. Heidelberg,* 122 S.W.3d 74, 84 (Mo. App. 2003) (holding that "[t]he parties' intention to effectuate a merger is a question of fact"); *Boden v. Boden,* 229 S.W.3d 169, 173 (Mo. App. 2007) (stating that when an ambiguity exists, the intent of the parties is a question of fact).
[25] *Chochorowski v. Home Depot, supra,* 295 S.W.3d at 197.