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

RESPONSE OF MISSOURI LANDOWNERS ALLIANCE TO FILINGS FROM MJMEUC and GRAIN BELT EXPRESS REGARDING THE COMMISSION'S DISCUSSION AT THE MAY 24, 2017 AGENDA SESSION

Comes now the Missouri Landowners Alliance (MLA), pursuant to Rule 4 CSR 240-2.080(13), and respectfully submits the following response to the pleadings from MJMEUC and Grain Belt regarding the comments of the Commissioners at the May 24 agenda session.[1] Both parties apparently are asking the Commission to grant Grain Belt's request for a CCN, presumably conditioned on receiving all necessary county consents, but without waiting for a final resolution of the appeal in the *Neighbors United* case.[2]

As a reminder, the key conclusion from the Court of Appeals in *Neighbors United* was as follows:

[1] Hereafter "Response of MJMEUC" and "Response of Grain Belt", respectively. Infinity Wind and Renew Missouri also filed responses to the Commission's agenda session. However, neither raised any substantive points or arguments not raised by MJMEUC and/or Grain Belt, and so there is no reason to directly address their pleadings here.

[2] *Neighbors United Against Ameren's Power Line v. PSC,* No. WD79883 (March 28, 2017), *applications for transfer filed* with MO Supreme Court, No. SC96427 (May 16, 20127) (hereafter *Neighbors United* case)

> By statue and by rule, the PSC is authorized to issue a CCN only after the applicant has submitted evidence satisfactory to the PSC that the consent or franchise [from the County Commissions] has been secured by the public utility. Neither statute nor rule authorizes the PSC to issue a CCN *before* the applicant has obtained the required consent or franchise.[3]

In deciding how to proceed from here, the first logical question (which was totally ignored by MJMEUC and Grain Belt) is this: does a majority of the Commission believe that Grain Belt has met its burden of proof with regard to all of the *Tartan* criteria, or does a majority believe it has not done so?

If a majority has decided that Grain Belt again failed in this regard, then it makes perfect sense to issue a final decision as promptly as practicable. The issue of whether or not Grain Belt has secured the needed county consents, and/or whether those consents are prerequisites to the issuance of the CCN, become moot points if the CCN is denied on the basis of one or more of the *Tartan* criteria. There would then be no logical reason to postpone a decision until after the *Neighbors United* case is resolved. The situation would be comparable to the 2014 case. The Commission noted in its final Report and Order there that because it was ruling against Grain Belt on the merits of its Application, it need not address the issue of the possible lack of county consents under Section 229.100. [4]

Assuming a majority would hold in Grain Belt's favor on the merits, as MJMEUC and Grain Belt obviously do, they essentially argue that for various reasons the opinion in the *Neighbors United* case should be ignored by the Commission. The substance of the argument from both parties is the same. MJMEUC says that the Court of Appeals never

[3] Id., slip opinion p. 6. (emphasis in original)
[4] Report and Order, EA-2014-0207, July 1, 2015, pp. 19-20.

addressed the requirements for a "line certificate" under the first subsection of Section 393.170, and thus the *Neighbors United* opinion is simply inapplicable here.[5]

Grain Belt makes essentially the same argument.[6] It further contends that the ATXI Application was filed pursuant to what Grain Belt calls "the general authority" of Section 393.170, whereas its own Application was made pursuant to subsection 1 of that statute.[7]

Both parties ignore key elements of the ATXI case and the appeal thereof in the *Neighbors United* decision.

First, despite what MJMEUC and Grain Belt argue, it is quite apparent that the ATXI Application at the Commission was in substance a request for a line certificate. As the Commission noted in its Report and Order, ATXI was not proposing to serve any retail customers from its proposed line.[8] This of course is what distinguishes a line certificate from an area certificate.

Moreover, ATXI has explicitly stated that it was asking for a line certificate.[9] And the Commission has also stated that ATXI was asking for a line certificate.[10] There is no basis for finding otherwise, and thus no legitimate reason to find that the *Neighbors United* decision is inapplicable because it involved a request for an area certificate and not a line certificate.

As far as the MLA is aware, those are the only two types of CCNs which may be issued under Section 393.170. Thus Grain Belt's contention that ATXI filed its

[5] Response of MJMEUC, last par. of p. 2.
[6] Response of Grain Belt, par. 7.
[7] *Id*. at par. 6.
[8] Report and Order, case No. EA-2015-0146, p. 42 par. 9.
[9] See MLA's Post-Hearing Reply Brief, p. 17.
[10] See Commission's Motion for Rehearing in the *Neighbors United* appeal, p. 2, filed April 12, 2017.

application pursuant to the "general authority" of Section 393.170 is baffling. ATXI filed either for a line certificate, or an area certificate. Both ATXI and the Commission say it was the former, and there is no reason to ignore what they say in favor of the arguments raised by two non-participants to that case.

Nor is it true that the Court of Appeals simply overlooked the argument about the differing requirements for an area certificate and a line certificate under Section 393.170. As the MLA pointed out previously, ATXI raised this supposed distinction both at the Commission and at the Court of Appeals.[11] And in its Motion for Rehearing of the *Neighbors United* decision, the Commission went to great lengths to make this same point as well.[12] The Court of Appeals may not have specifically addressed the merits of the argument made by the Commission and ATXI. However, the Court was clearly made aware of this issue, and implicitly rejected the argument by ruling in favor of appellant Neighbors United.

Even assuming hypothetically that the Court of Appeals somehow misapplied the statute in question, MJMEUC and Grain Belt simply ignore the second of the two grounds relied on by the Court of Appeals: the Commission's rule 4 CSR 240-3.105(1)(D)(1). As the Court noted, this rule specifically provides that if county consents are required by the applicant (and Grain Belt recognizes that they are[13]), then proof of those consents must be provided to the Commission *prior* to granting the CCN.[14]

The bottom line is that the decision by the Court of Appeals in the *Neighbors United* case explicitly prohibits the Commission from doing what Grain Belt and

[11] MLA's Post-Hearing Reply Brief, p. 17
[12] Commission's Motion for Rehearing in the Neighbors United appeal, pp. 2-8, filed April 12, 2017.
[13] The Commission "may condition the CCN upon a utility obtaining such county assents before beginning construction." Response of Grain Belt, p. 4 par. 8.
[14] *Neighbors United* slip opinion p. 6.

MJMEUC are urging them to do here: issue a CCN conditioned on subsequent receipt of the necessary county consents.

Technically that decision may not yet be legally binding, because the appellate process is not yet finalized. But at this point the opinion from the Court of appeals is the only authoritative guidance that the Commission has on this issue. And clearly, if the Commission does issue the conditional CCN at this point, unless the *Neighbors United* decision is reversed by the state Supreme Court, it seems highly likely that the Court of Appeals would also vacate a comparable Order in this case.

If the Commission nevertheless grants the conditional CCN here before the *Neighbors United* appeal is finalized, then given the favorable decision for the land owners in that case, and recognizing what is at stake for the property owners near the proposed Grain Belt line, it seems only fair to assume that one or more of the parties opposed to the CCN in this case would appeal such an Order. If that chain of events comes to pass, it would appear there are three possible outcomes.

First, the Missouri Supreme Court could thereafter decline to accept transfer of the *Neighbors United decision*, leaving the opinion of the Court of Appeals as controlling. In that case, for the reasons discussed above, the MLA submits it is likely that he Commission decision granting the conditional CCN would be vacated on appeal. Based on the procedural history of the ATXT/*Neighbors United* case, under this first possibility the Order in this case would likely be vacated roughly a year after it was issued.[15]

[15] The Commission's Report and Order in the underlying ATXI case, No. EA-2015-0146, was issued on April 27, 2016. The Western District finally disposed of the Motions for Transfer and Motions for Rehearing on May 2, 2017.

And assuming again that a decision granting a conditional CCN to Grain Belt is appealed, the Commission would presumably lose jurisdiction of this case as soon as the appeal is filed. Thus if the opinion of the Court of Appeals is left intact, then even if the Commission wished to do so it could not revise its ruling in the Grain Belt case to conform to the dictates of that decision. The Commission and the parties would seemingly be left with no option but to wait for the outcome of the appeal.

A second possibility is that the Missouri Supreme Court eventually takes transfer of the *Neighbors United* case, and in essence affirms the decision of the Court of Appeals. That process would presumably run concurrently with the appeal of this case. So again, if the Commission decides to issue a conditional CCN to Grain Belt, under this second possibility that decision would likely be vacated roughly a year from now.

The third possibility is that the Supreme Court does transfer the case, and rules in favor of ATXI for the reasons being suggested here by Grain Belt and MJMEUC. While this does not purport to be a scientific survey, based on the most recent cases where the Missouri Supreme Court accepted transfer of a case from a Court of Appeals, a decision could be expected from the Supreme Court roughly 9 to 12 months after it accepted transfer.[16]

Based on the above analysis, if a majority of the Commission is inclined to rule in Grain Belt's favor at this point, and proceeds to issue a conditional CCN before the

[16] Based on information from Case.Net, during the month of June the Missouri Supreme Court issued a decision in four cases where it had accepted transfer from the Court of Appeals. In Case No. SC95906, transfer was accepted on 8/29/16, and a decision issued on 5/16/17. In Case No. SC95890, transfer was accepted on 8/17/16, and a decision issued on 5/16/17. In Case No. SC95538, transfer was accepted on 2/17/16, and a decision issued on 6/16/17. In Case No. SC95665, transfer was accepted on 4/27/16, and a decision issued on 5/2/17. The average time between acceptance of transfer and issuance of an opinion was approximately 11 months.

Supreme Court decides whether or not to take transfer, the outcome of that decision would remain in question for roughly another year.

No one can be certain at this point of how the issues in question will ultimately be decided. However, it seems clear that the course with the shortest possible delay is where the Commission refrains from issuing the CCN at this point, and the Supreme Court declines transfer of the *Neighbors United* case. That scenario would likely allow the Commission to issue a decision in the Grain Belt case within the next several months, with firm guidance from the appellate courts regarding the issuance of a conditional CCN.

On the other hand, if the Commission decides instead to issue the conditional CCN before the Supreme Court acts on the transfer, the final outcome would not be determined for quite some time.

MJMEUC and Grain Belt argue on a number of grounds that they could be harmed by a delay in the Commission's decision. MJMEUC says delay could act as a de facto denial of Grain Belt's Application, and "impede development of the Project."[17] They offer absolutely no rationale for those assertions.

In support of comparable claims, Grain Belt argues that its ability to invest in the project is being impeded by the lack of a Commission decision, and that if the Commission does promptly grant the conditional CCN, "that uncertainty will disappear."[18]

Although giving MJMEUC and Grain Belt what they ask for here could eliminate the doubt about the Commission's thinking, it would not eliminate the doubt about the

[17] Response of MJMEUC, pp. 1 and 2 respectively.
[18] Response of Grain Belt, p. 4 par. 11.

legality of such an order, or about the pending appeal of the Grain Belt decision by the Illinois Commerce Commission, or the doubt about whether Grain Belt will subsequently be able to secure the needed County Commission consents. As is thus apparent, a questionable grant of a conditional CCN here would of itself not eliminate the doubt about whether Grain Belt will ultimately secure the needed authorizations to build the proposed line.

Grain Belt also contends that a prompt decision is needed because if wind generators cannot make substantial capital commitments in calendar year 2017, the value of their subsidies from taxpayers (i.e., the ITC) will decline by 20%.[19] There are two problems with this assertion.

First, it seems highly unlikely that wind developers would rush to make significant investments in projects which would utilize the Grain Belt line while the very legality of the Commission Order is still subject to serious question – which seemingly would be the case until after the end of 2017.

And second, Infinity Wind has assured the Commission that with respect to its service to MJMEUC, and other potential buyers as well, the supposed problem raised by Grain Belt is not a problem at all. As Infinity Wind stated in its Initial Brief in this case:

> Infinity has taken steps to ensure that at least 2,000 MW of its development projects that can use the 4,500 MW transmission capacity available via that Grain Belt Express Project, has been qualified for 100% of the PTC. It is logical to assume that other wind developers have similarly qualified projects that will be able to transmit power of [sic] the Grain Belt Express Project.[20]

Thus Infinity is in no danger of losing any of the value of the PTC on the wind farms which would supply the 100-200 MW of power to MJMEUC, as well as at least

[19] Response of Grain Belt, p. 5 par. 12
[20] Initial Post-Hearing Brief of Infinity Wind Power, p. 16. Citation to Mr. Langley's testimony omitted.

1,800 MWs to other customers as well. And as Infinity stated, it is logical to assume the same applies to other developers which would use the Grain Belt line. Thus there is no reason to believe that any customer in Missouri will be negatively impacted from a loss in value of the PTC, regardless of how the Commission proceeds from here.

Grain Belt also says that further delay will jeopardize the commitments that it has made with Missouri suppliers such as ABB and PAR Electrical Contractors.[21] This statement confirms the MLA's contention that those supposed "commitments" are basically meaningless.

MJMEUC has also taken this opportunity to rehash arguments already made in its briefs to the Commission. In particular, they point out that if the CCN is not granted, their customers will lose the benefit of what amounts to a below-cost, discriminatory rate provided by Grain Belt, essentially as a means of gaining access to the PJM market. Once again, however, MJMEUC makes no attempt to compare or balance its potential monetary loss against the myriad of losses which would be suffered by nearby landowners.

Using MJMEUC's figures, if the $3 million of savings identified by Mr. Jaskulski is allocated among its 347,000 retail customers, the average monthly savings for all of MJMEUC's retail customers would amount to 72 cents.[22] Even assuming that all of the damages to property owners could be expressed in monetary terms, the MLA respectfully submits that those damages far outweigh the benefits to MJMEUC.

[21] Response, p. 5 par 12.
[22] MJMEUC's Response, pp. 2 and 3; $3,000,000/347,000 customers/12 months = $.72. Given typical usage patterns, the average savings for residential customers would no doubt be even less than that, while the savings to large commercial and industrial customers would presumable be more.

Finally, while Grain Belt says it is entitled to a timely decision in this matter, the Commission should bear in mind that much of the "delay" experienced by Grain Belt comes of its own doing: i.e., its failure to meet its burden of proof in the 2014 case; its failure to provide the 60 day notice of its initial filing in the current case; and its failure to secure the needed county consents on a timely basis. In fact, if Grain Belt had already secured those consents, there would be no need today to be arguing about the legality or illegality of a conditional CCN. And had it done so, the Commission may well have issued its final Order in this case already.

The landowners in the vicinity of the proposed line are as anxious as anyone to have this four-year ordeal resolved as promptly as possible. However, that objective may ultimately be accomplished by temporarily holding this case in abeyance.

WHEREFOR, for the reasons set forth above, the MLA respectfully requests the Commission to take the following steps in this case: (1) if the majority of the Commission has determined at this point that Grain Belt has failed to prove its case on the merits of the *Tartan* criteria, that it issue a final order as promptly as practicable; or (2) if the majority would rule in Grain Belt's favor on the *Tartan* criteria, that the Commission delay issuing a final decision in this case until it receives a mandate from the Court of Appeals or the state Supreme Court in the *Neighbors United* case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by electronic mail upon counsel for all parties this 9th day of June, 2017.

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