

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) Case No. EA-2014-0207
Current Transmission Line and an Associated Converter)
Station Providing an interconnection on the Maywood-)
Montgomery 345 kV Transmission Line)

**RESPONSE OF THE SHOW ME CONCERNED LANDOWNERS
TO GRAIN BELT EXPRESS'S APPLICATION FOR REHEARING**

Show Me Concerned Landowners (Show Me), pursuant to 4 CSR 240-2.080(13), respectfully submits the following response to Grain Belt Express's (GBE) Application for Rehearing.

1. On July 1, 2015, the Commission issued its Report and Order in the above-captioned docket. On July 29, 2015, GBE filed its Application for Rehearing. In that Application, GBE asks that the Commission rehear and reverse its decision on the issues of: (1) the RTO Planning Process; (2) Cost Effectiveness and Alternatives; and (3) Production Cost Modeling. Further, as a fourth issue, GBE argues that the Commission violated the Dormant Commerce Clause.

2. As to all issues alleged and argued by GBE, the Application for Rehearing is without merit. On the first three issues, in large part GBE simply rehashes arguments that have been thoroughly considered by the Commission and rejected. In other words, GBE is saying that the Commission should have believed the evidence it presented, rather than the evidence presented by other parties. The fact that the Commission found that the evidence supporting denial of GBE's Application for a Certificate of Convenience and

Necessity was more persuasive and substantial than GBE's evidence in support is not a valid reason to grant rehearing. As to GBE's Dormant Commerce Clause argument, the Dormant Commerce Clause does not apply in this case, and, in any event, the Commission did not violate the Dormant Commerce Clause, as explained in more detail below.

RTO PLANNING PROCESS

3. GBE requested that "the Commission rehear the following conclusion found at paragraph 30 of the Report and Order". Paragraph 30 stated as follows:

GBE did not submit the Project to the MISO regional planning process for evaluation of need and effectiveness. This process identifies high-voltage transmission projects that will provide value in excess of cost under a variety of future policy and economic conditions. Since GBE elected not to participate, the Project has not been evaluated for need and effectiveness in the MISO footprint.

4. GBE mischaracterizes this paragraph as a "conclusion," when actually it is a finding of fact. And, GBE also mischaracterizes how the Commission used this fact in analyzing the need for the project. GBE argues that it does not have to submit to the MISO regional planning process. This is true, but it was not precluded from doing so. GBE could have submitted its project into MISO's MTEP process for review, where the project would have been reviewed for need, but GBE made a conscious decision to exclude itself from that process.

5. Furthermore, GBE's argument is irrelevant in the context that the Commission used this fact in coming to a conclusion. In the Conclusions of Law section of the Report and Order, on page 22, the Commission explained why the finding of fact in paragraph 30 was important in finding that there was no need for the project:

The Project is not needed for grid reliability because GBE did not submit the Project to the regional planning process, has not identified any existing deficiency

or inadequacy in the grid that the project addresses, and has not shown that the project is the best or least cost way to achieve more reliability. Although GBE elected not to submit the Project to the MISO regional transmission process, MISO has an effective planning process to enable states in the MISO footprint, which includes portions of Missouri, to meet RES requirements using renewable wind resources. Since areas of MISO have some of the best wind energy resources in the United States, it is more likely that the large amount of available MISO wind can satisfy the needs of Missouri utilities for wind energy compared to the smaller amount of Kansas wind that GBE proposes to inject into MISO at the Missouri converter station. The Commission concludes that GBE has failed to meet its burden of proof to demonstrate that the service it proposes in its application for a certificate of convenience and necessity is needed in Missouri.

The fact that GBE did not submit its project to the MISO regional planning process, when it could have done so, was just one piece of many facts that the Commission relied on to determine that GBE did not meet its burden of proof. There was competent and substantial evidence in the record for the Commission to conclude that GBE did not carry its burden of proof to show that the project was needed.

COST EFFECTIVENESS AND ALTERNATIVES

6. Next, GBE requests that “the Commission rehear the following conclusion found at paragraph 32 of the Report and Order”. Paragraph 32 stated as follows:

Illinois and the parts of MISO to the west of that state have some of the best wind energy resources in the United States. North Dakota, South Dakota, Minnesota, Missouri, and Iowa, combined, have enough wind resources (2.838 million MWs) to meet the current electricity needs of the United States at least two times over.⁴³

7. As with the previous issue, GBE mischaracterized this paragraph as a “conclusion” when it is a finding of fact. GBE argues that there is no competent and substantial evidence in the record to support this fact. The record proves otherwise.

8. The cited testimony was provided by Wind on the Wires and the Wind Coalition witness Michael Goggin during cross-examination. The actual information relied on by the Commission for this finding is completely accurate.

9. The testimony arose under cross-examination in the form of Mr. Goggin's sworn testimony in the Illinois Commerce Commission, Case Docket Number 12-0560. (Transcript, Vol. 14, p. 960, lines 13-14). The actual quotes of Mr. Goggin relied on for the finding of fact in paragraph 32 of the Report and Order begin at Transcript, Vol. 14, p. 962, line 22-25, to p. 963, lines 1-2:

Q: You testify there as follows:

"As indicated in the wind resource map in WOW Exhibits 1.1 and 1.2, Illinois and the parts of MISO to the west of Illinois have some of the best wind energy in the United States." (Emphasis added).

A. That's correct.

Mr. Goggin's testimony continues at Transcript, Vol. 14, p. 963, lines 3-12:

Q. And then page 3, beginning at line 61. You testify:

NREL's data indicates that North Dakota, South Dakota, Minnesota, Missouri, and Iowa, combined, have a wind energy potential of 2,838,000 megawatts, around 34 percent of the total onshore potential in the lower 48 U.S. states, or enough to meet the current electricity needs of the U.S. at least two times over. (Emphasis added).

A: That's correct.

10. The information contained in the finding of fact in paragraph 32 is entirely accurate and supported in the record. It was well within the Commission's sound discretion to find this evidence credible, competent, and substantial.

PRODUCTION COST MODELING

11. On this issue, as noted by Show Me above, GBE simply rehashes arguments that have been thoroughly considered by the Commission and rejected. In other words, GBE is saying that the Commission should have believed the evidence it presented, rather than the evidence presented by other parties. The Commission made

clear in its Report and Order that it found Show Me witness Dr. Proctor and Staff witnesses more credible and persuasive than GBE's witnesses. There was competent and substantial evidence for the Commission to rely on in making its decision. GBE is not entitled to rehearing on this issue.

DORMANT COMMERCE CLAUSE

12. As an initial response, Show Me asserts that the Dormant Commerce Clause does not apply at all. In order for the Dormant Commerce Clause to apply, there must be an absence of express Congressional regulation of interstate commerce.¹ That is not the case here, because Congress has expressly regulated in this arena. The Federal Power Act, 16 U.S.C. §791 *et seq.*, regulates many aspects of the electric power sector, including the interstate transmission of electricity. As such, the Dormant Commerce Clause does not apply in this case.

13. Furthermore, there is no Commerce Clause violation of any kind. The Federal Power Act establishes a program of cooperative federalism that allows States to enact and administer their own regulatory programs, structured to meet their own particular needs. For example, 16 U.S.C. § 824(a) provides:

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. (Emphasis added).

Clearly, Congress recognized that the State of Missouri had the right to enact legislation allowing the Commission to regulate public utilities in this State, and to determine

¹ See, *Merrion v. Jacarilla Apache Tribe*, 455 U.S. 130, 154 (1982).

whether a company should be granted a Certificate of Convenience and Necessity to operate as a public utility in Missouri.

14. Even assuming, for purposes of argument only, that the Dormant Commerce Clause does somehow apply, the Commission did not violate it. Article I of the Constitution gives Congress the power to regulate commerce “among the several States.”² In the absence of express congressional regulation of interstate commerce, the Supreme Court has long invoked the “Dormant Commerce Clause” as a basis for judicial preemption of state law that unduly burdens interstate commerce. The Court has developed two tests to evaluate alleged violations of the Dormant Commerce Clause. The Clause’s principal prohibition is on protectionist state legislation that discriminates against out-of-state interests.³ If a state law discriminates against out-of-staters, it is subject to “the strictest scrutiny of any purported legitimate social purpose and of the absence of nondiscriminatory alternatives.”⁴

15. A second Dormant Commerce clause test applies when a state law is non-discriminatory on its face but nevertheless encroaches on interstate commerce. In this situation the Court applies a balancing test: “Where the statute regulates evenhandedly to effectuate a legitimate state interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”⁵

16. GBE argues that the Commission’s application of the Tartan factors violated the Dormant Commerce Clause. The Tartan test has been long-used by the

² U.S. Const. Art. I, sec. 8, cl. 3.

³ See *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987).

⁴ *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

⁵ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Commission to determine whether an entity like GBE merits approval to become a public utility and receive a Certificate of Convenience and Necessity to operate in Missouri.

The Tartan test is not overtly protectionist or discriminatory on its face, so the second Dormant Clause test applies as set out above: “Where the statute [here, the Tartan test] regulates evenhandedly to effectuate a legitimate state interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”⁶

17. Based on the competent and substantial evidence in the record, the Commission acted evenhandedly to effectuate a legitimate state interest—that is, determining whether GBE should become a public utility in this state and be allowed to use the powers given to such entities, such as the power of eminent domain to condemn land in Missouri. The test then becomes whether the Commission imposed a burden on interstate commerce that is “clearly excessive” in relation to the putative local benefits.

18. The Commission found that GBE failed to meet its burden of proof on three of the five Tartan criteria:

- GBE failed to meet its burden of proof to demonstrate that the service it proposes in its application for a certificate of convenience and necessity is needed;
- GBE failed to meet its burden of proof to demonstrate that the project was economically feasible;
- GBE failed to meet its burden of proof to demonstrate that the project promotes the public interest.

⁶ *Id.*

19. GBE has not shown that the Commission’s decision to deny its Application for a CCN imposed a clearly excessive burden on interstate commerce. In the Report and Order, based on competent and substantial evidence, the Commission did not identify any local benefits of the project, but identified many local detriments.

20. Indeed, the Commission found, and described in its Report and Order, how woefully incomplete GBE’s Application for a CCN was.⁷ It is not the Commission’s fault that GBE did not provide enough information to carry its burden of proof. That fault falls squarely on GBE’s own shoulders.

21. Finally, GBE admits in its Application for Rehearing that the Commission has approved several transmission projects that provide benefits beyond Missouri’s borders, thus destroying its claim that the Commission does not apply the Tartan test evenhandedly or that it discriminates against out-of-staters. Here, it is not a problem of discriminating against out-of-state interests—it is a problem of GBE not meeting the necessary evidentiary standard. GBE simply did not meet its burden of proof that the project was needed, or economically feasible, or in the public interest. There has been no “clearly excessive” burden imposed on interstate commerce by the Commission’s decision. The Commission did not violate the Dormant Commerce Clause.

22. Show Me takes issue with GBE’s assessment that “any burden to local landowners would be small compared to the hundreds of millions of dollars of savings to

⁷ See, e.g., Report and Order, paragraph 26, p. 11 (GBE did not submit evidence comparing the rate impact of the Project to an alternative resource plan to demonstrate that the project meets the requirements of the RES 1% rate cap); paragraph 30, pp. 12-13 (GBE failed to submit evidence from any RTO of the need for the project); paragraphs 33-37, pp. 13-14 (GBE failed to provide all of the RTO studies necessary to provide a complete estimate of the expenditures necessary to construct the project; failed to provide updates to studies that GBE did provide but because of changes to the project were rendered insufficient; failed to provide the costs of transmission upgrades that would be necessary; failed to provide operational, maintenance, or emergency restoration plans; and failed to provide sufficient production modeling studies); and paragraphs 54-55, p. 17 (GBE did not provide a complete economic benefits study because it did not include an analysis of any negative economic impacts that the project would cause).

Missouri and other states.”⁸ In the Report and Order, the Commission sets out significant burdens that the project would place on landowners.⁹ While GBE may consider these burdens small or insignificant, they are large and very significant burdens to the landowners. And, in any event, GBE never proved by a preponderance of the evidence that its project would result in hundreds of millions of dollars in savings to Missouri and other states.

CONCLUSION

23. For the reasons stated above, GBE’s arguments are without merit, and the Commission should deny GBE’s Application for Rehearing.

Respectfully submitted,
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ATTORNEY FOR SHOW ME
CONCERNED LANDOWNERS

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all parties on the official service list for this case on this 7th day of August, 2015.



Terry M. Jarrett

⁸ Application for Rehearing, paragraph 45, p. 23.

⁹ Report and Order, paragraphs 52-53, p. 17.