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

SHOW ME CONCERNED LANDOWNERS' SUPPLEMENTAL BRIEF

Now that the *Neighbors United*[1] decision is final, Show Me Concerned Landowners ("Show Me") appreciates the Missouri Public Service Commission ("Commission") is now willing to discuss the impact of the decision on this case and move to a prompt determination. As Show Me cited in its *Comments Supporting a Prompt Report and Order Denying a Certificate of Convenience and Necessity*, Commission rule 4 CSR 240-2.140(2) states that, "The commission's orders shall be in writing and shall be issued as soon as practicable after the record has been submitted for consideration." As the Commission's *Order Directing Filing and Setting Oral Arguments* now suggests, it is now time for a decision.

There are two matters presented in the Commission's recent *Order Directing Filing and Setting Oral Arguments*. The first is Grain Belt Express Clean Line LLC's *Request of Grain Belt Express and Motion for Waiver or Variance of Filing Requirements ("Request")*, a matter of substance, and the second is Missouri

[1] *In the Matter of the Application of Ameren Transmission Company of Illinois for Other Relief or, in the alternative, a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Maintain and Otherwise Control and Manage a 345,000-Volt Electric Transmission Line from Palmyra, Missouri, to the Iowa Border and Associated Substation Near Kirksville, Missouri v. Public Service Commission of Missouri*, No. WD79883, slip op. (Mo. App. W.D. March 28, 2017).

Landowners Alliance's *Motion to Dismiss Application*, a matter of procedure. Show Me will address both.

I. Grain Belt Express Clean Line LLC's Request.

Grain Belt Express Clean Line LLC ("GBE") requests that the Commission issue a Certificate of Convenience and Necessity ("CCN") to it under Section 393.170.1 and grant a waiver or variance of the filing requirements of 4 CSR 240-3.105(1)(D)1 and 240-3.105(2). The substantive issue here is whether the Commission has the legal authority to grant the line CCN. While the Commission may grant a variance to its rules, it cannot grant a variance from the law. "If a power is not granted to the PSC by Missouri statute, then the PSC does not have that power."[2] The Commission cannot do something that it is not authorized by law to do. It is not authorized to deviate from the legal requirements set down by the *Neighbors United* opinion.

As the Commission is aware, GBE desires the waiver and seeks the issuance of the CCN despite its failure to obtain the county assents necessary to build its proposed line. The Commission now knows it has no authority to issue the CCN under such circumstances. Sections 229.100 and 393.170, RSMo 2016 have always required an applicant to obtain county assents to cross public roads and highways prior to the issuance of a CCN. The Western District Court of Appeals simply stated what the law has been and made it abundantly clear:

> Accordingly, 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. While section 393.170.3 grants the PSC statutory authority to impose reasonable and necessary conditions on a CCN, there is no statute authorizing the PSC to grant a preliminary or conditional CCN contingent on the required county commission consents being subsequently obtained. The PSC's issuance of a CCN

[2] *State ex rel. Mogas Pipeline, LLC v. Mo. Pub. Serv. Comm'n,*, 366 S.W.3d 493, 496 (Mo. 2012).

> contingent on ATXI's subsequent provision of required county commission assents was unlawful as it exceeded the PSC's statutory authority. (Footnote omitted; emphasis in original.)[3]

The Commission's action of granting a conditional CCN to ATXI was unlawful in *Neighbors United* case. It would be unlawful for the Commission to grant a CCN to GBE in this case without evidence of all the county commission assents being previously granted to GBE.

Since GBE has not provided the required evidence, the Commission may not grant GBE the CCN it seeks. GBE has failed to prove that it has the assent of Caldwell County. Randolph County has rescinded its prior assent.[4] In total, six of eight counties have rescinded their assents. Without these county assents, per *Neighbors United*, the Commission has no legal authority to grant GBE a CCN.

Try as it might, GBE cannot distinguish this case from the *Neighbors United* case and thereby relieve itself of the obligation to show that it has the county assents. Show Me has repeatedly pointed out, and Staff has also recently observed,[5] both cases were for CCNs for transmission lines. Both applicants, GBE and ATXI, argued that their requests were made in reliance on section 393.170.1, RSMo. The law declared in the *Neighbors United* case applies to this GBE.

Further, there is no justification in statutory interpretation or policy to distinguish between an "area" certificate and a "line" certificate when recognizing a county commission's governing authority to grant a company the right to build across the County's public roads and highways as GBE tries to do. GBE's attempt to slice and dice section 393.170 is simply inappropriate. The *Neighbors United* Court made that clear.

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[3] *Neighbors United,* WD79883 (March 28, 2017), slip op., p. 8.
[4] Tr. Vol. 12, 646.
[5] Staff's *Supplemental Brief*, p. 2.

> Our harmonization of the statute preserves the integrity of both subdivisions of section 393.170 and effectuates the plain meaning of the statute. Our interpretation of the statute—that it mandates that the applicant receive the consent of local government authorities before the PSC issues a CCN—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. Accordingly, 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. (Footnote omitted; emphasis in original.)[6]

When interpreting a statute, a court must give meaning to every word of the legislative enactment. *State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 144 (Mo., 2002). The Commission must now preserve the integrity of the legislative policy and legal system embodied in sections 393.170 and 229.100. The county commissions have authority over public roads within their counties. The Commission does not. In *State ex rel. Harline v. Public Service Commission of Mo.*, 343 S.W.2d 177 (Mo. App., 1960), the Court laid down the Commission's authority and the relationship of that authority to the authority of the counties.

> The certificate of convenience and necessity granted no new powers. It simply permitted the company to exercise the rights and privileges already conferred upon it by state charter and municipal consent. State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co., 331 Mo. 337, 53 S.W.2d 394, 89 A.L.R. 607. The certificate was a license or sanction, prerequisite to the use of existing corporate privileges.[7]

The local municipal assents are prior to the Commission's authority in principle as well as time. The local assents are foundational to the utility's right to act in the construction of transmission lines across public roads in that locality. The Commission's CCN is merely supplemental.

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[6] *Neighbors United*, p. 8.
[7] 343 S.W.2d at 181.

The Commission must respect the authority of the local governing entities and preserve the integrity of the governmental system the state constitution has established. In *State ex rel. Lane v. Pankey*, the Missouri Supreme Court recognized that the "establishment and maintenance of public roads, properly fall within the term 'county business' as used in the Constitution."[8] Failure to give the ultimate consideration to the county assents, as required by the *Neighbors United* opinion, is an abuse of discretion and exceeds the Commission's authority. The Commission must grant the county commission's the respect they are due and not grant a CCN without evidence of their assent.

GBE's attempt to slice and dice the statute as it does, by making the prior county assents applicable only to "area" certificates, would make section 229.100 meaningless. For the so called "line" certificate, it would eliminate the primary county commission authority over the public roads in the county as enshrined in section 229.100 and replace it with the Commission's authority. The structure of section 393.170 guards against such a result. The "construction" of a line, i.e. a "line" certificate, under subsection 1, requires the Commission's "permission and approval." The "area" certificate under subsection 2 also requires the Commission's "permission and approval." The word "certificate" first appears in the critical sentence of the *Neighbors United* Court's analysis, the second sentence of subsection 2. It states, "Before *such certificate* shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal

[8] 221 S.W.2d 195, 196, 359 Mo. 118 (Mo., 1949).

authorities." (emphasis added) There is no rational reason to make the "such certificate" language describe the "permission and approval" of subsection 2 and not the "permission and approval" of subsection 1. Subsection 3 reinforces the harmony of subsections 1 and 2 by returning to the language of "permission and approval," again, for both "construction" as used in subsection 1 and "right, privilege or franchise" as used in subsection 2. It requires that the "permission and approval" be granted after a finding of public convenience and necessity after due hearing. Finally, it specifies that a certificate not exercised within 2 years of the grant thereof shall be null and void.

To apply the word "certificate" in the second sentence of subsection 2 only to an "area" certificate, as GBE does, makes a shambles of any interpretation of section 393.170 as a whole. Does the Commission issue a certificate for a line or not? What is the standard by which the Commission adjudicates the line certificate? Is it "public convenience and necessity? What is the term of a CCN for a line certificate if not 2 years? The only way to harmonize section 393.170 is to make the second sentence of subsection 2 and the "such certificate" language applicable to both the "line" as well as the "area" certificate.

II. MLA's Motion to Dismiss Application.

MLA requests the Commission dismiss this case based on the holding in the *Neighbors United* case. While Show Me does not oppose MLA's *Motion to Dismiss Application* ("*Motion to Dismiss*") and supports it in principle, Show Me proposes that the dismissal of this case as contemplated by the *Motion to Dismiss* is not the most appropriate procedural mechanism now. Show Me agrees with MLA that, "Based on the [*Neighbors United*] 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 eight county commissions where the proposed line would be located." However, utilizing a preliminary procedural order at this stage of the proceeding is problematic.

A motion to dismiss is generally considered a preliminary motion to terminate a proceeding at an early stage. Black's Law Dictionary defines "Motion to dismiss" as, "One which is generally interposed before trial to attack the action on the basis of insufficiency of the pleading, of process, venue, joinder, etc." The Missouri Rules of Civil Procedure recognize the preliminary nature of the motion to dismiss. Rule 55.27(a) state that, "If, on a motion asserting the defense . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgement." See also the Commission's rule 4 CSR 240-2.116 and 4 CSR 240-2.117 for the distinctions between dispositions in the nature of summary judgment and judgment on the pleadings.

This case has gone well beyond the stage of even a summary judgment. The Commission has not only some matters outside the pleadings, the Commission has the entire record before it. The entire record has been briefed and submitted. To dispose of this case by dismissing it would do a disservice to the efforts of the Missouri landowners in presenting their case to defend their land. 4 CSR 240-2.150(1) provides that, "The record of a case ***shall*** stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or presentation of oral argument." (emphasis added.) Having heard all the evidence, the Commission should

consider all the facts and circumstances and issue a report and order denying the application.

A motion to dismiss provides for judicial and administrative economy. It provides a mechanism for truncating a proceeding that clearly cannot be maintained on the pleadings. There is no administrative economy to be achieved now when the evidentiary hearing and briefing schedule are complete. As a matter of fact, dismissing the case now may thwart administrative economy. Inasmuch as the Commission has heard all the evidence, if the Commission gives now only a partial justification for its decision, i.e. the lack of county assents, it may fail to identify much deeper, more significant flaws in the project.[9] Failure to identify these flaws in a report and order may send a wrong signal to the applicant that encourages it to seek to undertake yet a third application without considering all the significant flaws in the project.

As they did in GBE's prior case, Case No. 2014-0207, Missouri landowners, including Show Me, have invested significant resources in defending their rights to their land. They have pursued this case all the way to the end. They have submitted testimony, attended hearings, and briefed the legal and evidentiary issues. They deserve a report and order enumerating the grounds for the failure of the applicants to make their case. They deserve a statement that the Commission continues to recognize the significant rights implicated in this case, the right to property, which the Commission made in the prior case, Case No. EA-2014-0207.

[9] As Show Me has previously argued in its *Show Me Concerned Landowners' Comments Supporting a Prompt Report and Order Denying Certificate of Convenience and Necessity*, this Commission lacks the authority to grant the CCN because the application proposes a project not devoted to the public service and is actually detrimental to the public interest and harmful to the existing investments in the state.

Show Me will highlight two specific issues that are of critical import. Show Me has briefed both of these issues extensively, so it will not address them again in detail. First, the GBE project is not needed and is detrimental to the public interest. In sum, this Commission has fostered the development of the RTO systems in this state. Utilities have made investments to facilitate that development. RTOs and their member utilities can effectively provide the transmission services proposed by GBE. The GBE project would be a mere duplication of service, a duplication that unnecessarily burdens the land in the state of Missouri. Property rights are a significant public interest in the state of Missouri. The taking of such rights is a significant harm to the public interest. These rights and interests should not be diminished for the benefit of one or more favored customers in a merchant transaction.

Second, the Commission should make a clear declaration of its recognition of the limits of its authority under law. The Commission exists to regulate monopoly services proffered for sale to the public indiscriminately. It does not exist to regulate private merchant initiatives. "There are, however, several cases where the company supplying electricity has not professed to sell to the public indiscriminately at regular rates, but has from the beginning adopted the policy of entering into special contracts upon its own terms; such companies are plainly engaged in private business."[10] GBE's contract with MJMEUC is a special contract. And GBE proposes to enter into special contracts with all of its other customers. GBE does not intend to be a rate regulated utility under the laws of the state. It does not intend to provide service to the public indiscriminately. As GBE witness Kelly testified there is really no need for the Commission's regulation of

[10] *State ex rel. M. O. Danciger & Co. v. Public Service Commission*, 275 Mo. 483, 205 S.W. 36; 18 A.L.R. 754 (Mo. 1918). 205 S.W. at 41.

GBE. See *Show Me's Initial Post Hearing Brief* for a further detailed discussion. The landowners of the state deserve a declaration that this Commission recognizes the limits of its authority in not fostering a private business at the expense of other private business interests. This case is beyond the Commission's jurisdiction to act, and the Commission should say so.

If the Commission is so inclined to grant the *Motion to Dismiss*, Show Me requests that the Commission include its recognition of its lack of jurisdiction in its order granting the *Motion to Dismiss*. Missouri Rule of Civil Procedure 55.27(g)(3) provides that, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Show Me has shown that the GBE is a company engaged in a private business as described in *Danciger*. Therefore, the Commission lacks jurisdiction over the GBE project, and it would be proper to include the Commission's lack of jurisdiction over merchant transmission projects in any order granting the *Motion to Dismiss*.

III. Conclusion

This second case of GBE's application for a CCN to construct a merchant transmission line across northern Missouri has now come to an end. The project is not needed and is detrimental to the public interest. It is a merchant line that is not intended to be subject to the jurisdiction of this Commission. The finality of the Western District Court of Appeals opinion in *Neighbors United* provides one additional roadblock to the granting of GBE's application. For all these reasons, the Commission should issue a report and order denying GBE's Application. If the Commission desires to dismiss this case in the alternative, it should so grant the *Motion to Dismiss* based on its lack of

jurisdiction over the GBE Application and the failure of GBE to obtain the required county commission assents.

Respectfully submitted,

By: /s/ *David C. Linton*

David C. Linton, #32198
314 Romaine Spring View
Fenton, MO 63026
Telephone: 314-341-5769
Email: jdlinton@reagan.com

Attorney for Show Me Concerned Landowners

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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 18th day of July 2017.

/s/ *David C. Linton*