BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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.[1]	)	File No. EA-2015-0146

ATXI'S RESPONSE IN OPPOSITION TO
NEIGHBORS UNITED'S MOTION TO DISMISS

COMES NOW Ameren Transmission Company of Illinois ("ATXI" or the "Company"), by and through counsel, and for its response in opposition to Neighbors United's (the "Neighbors") Motion to Dismiss ("Motion"), states as follows:

This case concerns the Commission's consideration of the merits of the MISO[2]-approved Multi-Value Projects ("MVP") that comprise the "Mark Twain Project."[3] The Motion improperly seeks dismissal because (a) it violates the standards governing motions to dismiss which require the Commission to accept the allegations of the Company's application as true without consideration of any of the documents attached to the Motion or the factual assertions/opinions reflected in the Motion or those documents (*this reason alone requires that the Motion be denied*); (b) it incorrectly argues that the Commission cannot make legal determinations regarding matters within its jurisdiction when in fact the Commission can and must make such determinations in the first instance, subject to proper (and exclusive) judicial

[1] The project for which the CCN is sought in this case also includes a 161,000-volt line connecting to the associated substation to allow interconnection with the existing transmission system in the area.
[2] Midcontinent Independent System Operator, Inc.
[3] Alternatively, the Company has asked the Commission to determine that it lacks jurisdiction, but it appears clear, given the Commission's Report and Order in File No. EA-2015-0145 and its Staff's position on the issue, that the Commission believes it can and should consider whether a CCN should be issued and should do so on the merits.

review under the process outlined in sections 386.500, .510, RSMo. (Cum. Supp. 2013)[4], (c) it blatantly misinterprets the so-called "right-to-farm" amendment to the Missouri Constitution[5], and (d) it misunderstands the law governing requests for line certificates by assuming that assents to cross over county roads are required under Section 229.100, RSMo., as part of the Commission's line certificate process. As a result, the Neighbors' Motion to Dismiss should be denied.

1. Standards Governing Motions to Dismiss.

While not articulated in the Neighbors' Motion, the legal standards governing motions to dismiss are well known. A motion to dismiss is solely a test of the adequacy of the plaintiff's petition (in this context, the Company's application). *Nazeri v. Missouri Valley College,* 860 S.W.2d 303, 306 (Mo. *banc* 1993). The petition is liberally construed and all alleged facts are accepted as true. *Hedrick v. Jay Wolfe Imports*, 404 S.W.3d 454, 457 (Mo. App. W.D. 2013). The tribunal is not allowed to consider the validity of the applicant's allegations or to consider evidence outside the four corners of the application that might challenge their validity. *Id.* "If the petition [application] sets forth any set of facts that, if proven, would entitle the plaintiff to relief, then the petition states a claim." The Commission recognizes the applicability of these standards to its determinations on motions to dismiss. *See, e.g., Order Regarding Ameren Missouri's Motion to Dismiss*, File No. EC-2014-0223 (April 16, 2014) (*citing Nazeri,* 860 S.W.2d at 306, for the proposition that all averments are taken as true for purposes of ruling on a motion to dismiss).

[4] All statutory references are to the Revised Statutes of Missouri (2000), unless otherwise noted.
[5] Art. I, § 35, adopted in 2014.

2. The Commission cannot consider the form affidavits, or other alleged factual information and opinions, submitted by the Neighbors in support of the Motion.

As noted, the law prohibits consideration of information outside the four corners of the application in determining a motion to dismiss. Consequently, the untested factual allegations reflected in the form affidavits or other factual allegations/opinions included with the Neighbors' Motion are irrelevant. Instead, the only question is whether the allegations in the Company's application, taken as true, would justify the Commission's approval of a CCN (in this case, a line certificate) under section 393.170.1. Indeed, the Neighbors do not claim that the presumptively true allegations fail to support issuance of a line certificate for the Mark Twain Project if the Commission determines the same to be appropriate. *For that reason alone, the Motion must fail*, and the Company's application must be decided on the merits after evidence has been adduced in the evidentiary hearings that are scheduled to occur in December of this year.

3. The Commission must, in the first instance, decide the legal and factual questions raised in this CCN proceeding.

The Neighbors claim that because they have raised the issue of whether a provision of the Missouri Constitution precludes the new construction of an electric line on farmland, the Commission has become powerless to decide whether issuance of the line certificate sought in this case is necessary or convenient for the public service.[6] Motion, ¶ 11. In their Motion, the Neighbors attempt to support this claim with an argument that because the Commission is not the final arbiter of questions of constitutionality, it cannot make any determination in the case whatsoever. This argument strains logic. Not only do the Neighbors misapprehend the law, their position would create a "catch-22" by which the answer to the question they have injected into

[6] As we discuss in Section 4 below, logically their argument would preclude the new construction of all electric, water, gas and sewer lines as well as many other items of critical infrastructure.

this case could never be judicially resolved because it would never become an issue ripe for judicial review as there would be no Commission order on the issue to appeal.

It is undisputed that if ATXI is subject to the Commission's jurisdiction, ATXI must obtain a line certificate from the Commission before it can begin to construct the proposed transmission line. Whether ATXI is subject to the Commission's jurisdiction is a question of law because the Commission must decide what legislative authority the General Assembly did, or did not, confer on it in order to determine its jurisdiction. The Commission has to decide that question in this case,[7] and it must do so before that question of law will be addressed by the courts. *Ameren Transmission Co. of Illinois v. Pub. Serv. Comm'n*, 2015 Mo. App. LEXIS 807 (Mo. App. W.D. Aug. 11, 2015) (affirming the circuit court's summary judgment in favor of the Commission on the grounds that the legal question of the Commission's jurisdiction must first be decided by the Commission, and that only then will judicial review lie). There is no question but that the Commission's legal determinations will be reviewed by the courts *de novo*, but judicial review of those legal determinations is not possible until the determinations have been made[8] by the Commission itself.[9]

Moreover, under Missouri law there is only one, exclusive means to obtain judicial review of any matter that must first be determined by the Commission: pursuit of an appeal of the Commission order or decision at issue under sections 386.500, 386.510. *Union Electric*

[7] Although it decided this issue in File No. EA-2015-0145, the Commission is not bound by *stare decisis* and, therefore, must decide the question again since ATXI has once again raised it in its CCN application, which seeks a line certificate or, alternatively, dismissal for lack of Commission jurisdiction.

[8] Under Missouri law the Commission must first make legal determinations pertinent to the matters before it is reflected in the requirements of sections 386.420.2 and 536.090 which, for decades, have been construed as requiring that all Commission decisions must be in writing and must include findings of fact and *separate conclusions of law*. *See, e.g., State ex rel. Nixon v. Pub. Serv. Comm'n*, 264 S.W.3d 569, 576-77 (Mo. App. W.D. 2009).

[9] The only exception to this principle occurred in *State ex rel. Public Serv. Comm'n v. Blair,* 146 S.W.2d 865 (Mo. *banc* 1940). The Court of Appeals in *Ameren Transmission* determined that *Blair* was distinguishable.

Company v. Clark, 511 S.W.2d 822, 825 (Mo. 1974), *affirmed by State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n*, 103 S.W.3d 753, 758-59 (Mo. *banc* 2003) (confirming that even though the literal terms of Chapter 536 might suggest that judicial review of Commission rulemaking orders can occur under Chapter 536, this is not the case because sections 386.500 and 386.510 provide the exclusive means to obtain judicial review of *all* orders and decisions of the Commission). For this reason, Neighbors couldn't go to circuit court now and claim the right-to-farm amendment precludes the Commission from granting a line certificate because the courts would say that the process at the Commission must first play out.[10]

Assuming arguendo that the Neighbors argument, that because the Commission is not a court it can't decide constitutional questions in the first instance, was an accurate assertion of law, then all any litigant in a Commission case would have to do is raise some claimed constitutional impediment to the relief sought in the matter before the Commission in order to have the Commission dismiss the case entirely; indeed, litigants would have a great incentive to do so whenever they opposed the relief sought and wanted to delay Commission action as much as possible.[11] This would require the dismissed applicant to then seek rehearing and appeal, and then have the appeal of the constitutional question decided in its favor before it could then return to the Commission in order to seek the relief it sought in the first place. And this would be true even if the Commission would have ruled that there was no such legal impediment to the granting of the CCN and the court of appeals rejected the constitutional challenge. The absurd position of the Neighbors likely would also result in at least one additional appeal (if not more)

[10] After all, Neighbors are also asking the Commission to deny the line certificate request entirely for reasons other than the right-to-farm amendment; if that happened, neither the Commission nor the courts would have to decide the right-to-farm question at all.

[11] Recall Neighbor United's goal in this case, as evidenced by the "Ways to Make the Project More Expensive for ATXI" slide, which we included in our response in opposition to the longer procedural schedule Neighbors proposed in this case. EFIS Item 32, pp. 3-4.

once the Commission actually determined the application on the merits. This is not, and never has been, the law. Moreover the strain on judicial resources that acceptance of the Neighbors' unsupportable argument would create is palpable.

The cases cited by Neighbors to support its position are inapposite to its argument. Both cases, cited in footnote 10 of the Motion, stand for the proposition that because an administrative agency lacks authority to decide if a statute is *constitutional at all*, a litigant need not raise the question of the constitutionality of a statute before the administrative agency in order to preserve that question on appeal. The Neighbors' invocation of the right-to-farm amendment is not a claim that a particular statute is unconstitutional. To the contrary, it calls for application of the right-to-farm amendment to a set of facts--namely, the facts relating to the line certificate application at issue here—in order to prove that granting the requested CCN would constitute a violation of certain members' constitutional right-to-farm. The Commission has to apply that law first to determine whether a CCN is otherwise warranted. If it awards a CCN to ATXI, the Neighbors can seek rehearing and, ultimately, an appeal raising that constitutional question. What they can't do is avoid this line certificate case before this Commission simply by raising a constitutional issue that they claim would ultimately prevent construction of the proposed transmission line.

In summary, the Neighbor's argument is without merit and wrong. While the courts may have the final say, the Commission first gets to decide these legal questions.

4. The "right-to-farm" amendment to the Missouri Constitution does not preclude the construction of infrastructure on, under, over or across Missouri farm or ranch land.

The totality of the Neighbors' argument is that if *any* land will be "permanently removed" from production by new infrastructure, then the right-to-farm amendment precludes

the construction (unless, apparently, the landowner consents). We refer to "new infrastructure" in general because the logical extension of the Neighbors' argument would not just prevent this particular ATXI transmission line, but it would prevent every single new electric line, gas line, water line, sewer line, etc. that any electric,[12] gas,[13] water[14] or sewer company (including any rural electric cooperative or water or sewer district) needs to install after August 5, 2014, if the installation will take *any* farm land whatsoever out of production. It would similarly prevent the construction of new roads unless every farmer or rancher along the path was willing to agree. This is patently absurd. Applying that claim to the facts in this case, for example, would mean that even though *less than one acre* of land (*on the entire 100 mile route*) will be "taken out of production" the entire project could not be built, regardless of the need for or benefits of the Project.[15]

Not only does the Neighbors' interpretation of the right-to-farm amendment mean that the only way infrastructure could ever be built on a farm or ranch again is with landowner consent, such an interpretation would result in inequitable treatment of Missouri landowners by completly relieving farmers and ranchers of any responsibility for the infrastructure we all depend upon, leaving that responsibility to everyone else. Such a result defies common sense, is absurd and works mischief that could never have been intended.

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[12] Including Ameren Missouri, KCP&L, KCP&L-GMO, Empire.
[13] Laclede (and its MGE division), Summit, Liberty, Ameren Missouri.
[14] Missouri-American.
[15] Direct Testimony of Douglas J. Brown, EFIS Item No. 4, p. 6. Some of the land "taken out of production" may not be farmland, as not all of the tracts to be crossed are farms or ranches but, given the rural nature of northeast Missouri, most of the less than one acre at issue is farmland. Less than an acre will be taken "out of production" because even though the permanent easement area will encompass about 1,754 acres, the use of steel monopoles with concrete foundations means that only less than an acre of land will actually be occupied, and livestock can graze and crops can be planted literally right up to foundations. *Id.* The Neighbors' rebuttal testimony attempts to take issue with these facts, which ATXI will properly address in its surrebuttal testimony. These facts are also outside the scope of a ruling on a motion to dismiss, but since Neighbors has raised the issue and injected its own facts, ATXI believes it must, briefly, address the facts as they apply to the arguments Neighbors are making.

As the Neighbors point out in their Motion, constitutional provisions are interpreted like statutes. Statutes, and constitutional provisions, are to be given a "common sense and practical" interpretation. *Concord Publishing House v. Dir. of Revenue,* 916 S.W.2d 186, (194 (Mo. *banc* 1986). It reflects neither common sense nor practicality to apply the right-to-farm amendment in a manner that cedes to one group – farmers and ranchers -- total and final control over whether infrastructure that this Commission may find to be necessary or convenient for the public service can be constructed over farm or ranch land in this state.

The Neighbors also completely "miss the forest for the trees" in arguing that the "plain meaning" of "farming" and "ranching" essentially precludes *any* impact by infrastructure on any farm or ranch. The right-to-farm amendment, by its plain terms, does one thing and one thing alone: it guarantees the right to *engage* in farming and ranching practices. Do farmers and ranchers "engage"[16] in farming and ranching on land encumbered by electric, gas, water and sewer line easements? Absolutely. The co-existence of utility and farming/ranching activities (particularly overhead power lines) is readily confirmed simply by driving on virtually any road or highway in Missouri. Indeed, farmers and ranchers have already testified at local public hearings in this case that they farm and ranch their land although that same land in some instances has on it power lines or pipelines.

The Neighbors state that *Black's Law Dictionary* does not define "farming." While true, where the Neighbors ought to first be looking for the meaning of words is the dictionary. *Merriam-Webster's* defines the adjective "farming" as "the business of operating a farm."[17] A corn or soybean farmer in Shelby County whose land would be crossed by the proposed

[16] "Engage" is a transitive verb, meaning to "undertake" or to "take part." *Webster's Collegiate Dictionary* (4th ed.) In this context, to undertake to plant corn, raise cattle, bale hay, harvest crops. For example, if Mr. Smith owns a farm, one could say that "Mr. Smith is engaged in farming as his occupation."
[17] *Id.*

transmission line will still be able to engage in the "business of operating a farm," and a cattle rancher in Knox County whose pasture is crossed by the line will still be able to engage in ranching because the rancher will still have, and still be able to use, the rancher's "farm . . . primarily to raise one kind of crop or animal."[18] It is simply not true that the "plain language" of the right-to-farm amendment "leads to a finding that any action other than dismissal of the Application violates the constitutional provision." Motion, ¶12. To the contrary, it is obvious that farmers and ranchers do today, and can tomorrow, engage in farming and ranching even though the farm or the ranch has an electric line on it.

5. The lack of assents from the counties provide no basis for dismissal.

Neighbors contend the Commission is powerless to grant the line certificate requested in this case because the assents covered by Section 229.100 cannot be obtained from the county commissions in the five counties where the line will be located. As support for their argument, the Neighbors have attached four recent "resolutions," purportedly adopted by county commissions and expressing identical objections to and criticisms of the Mark Twain Project.[19] The Neighbors' theory is that because of this purported opposition to the Project, the assents that they contend are required for the Project will never be obtained; consequently, they argue that there is no sense in proceeding with the line certificate case. The Neighbors theory is legally and factually flawed.

First, none of these resolutions can properly support the Motion as they are outside the four corners of the application. Consequently, the Neighbors speculation about whether the

[18] See the definition of "ranch" cited by the Neighbors and the definition of "ranch" in *Webster's*, which defines it in essentially the same terms.
[19] There is also a short, fifth resolution passed in 2014 from Marion County.

assents are required and whether they can be obtained notwithstanding, the resolutions provide no authority to dismiss this case.

Second, a resolution prepared and presented by citizens organized against the Project to a county commission without notice to ATXI is a far different matter than a formal request for an assent presented to the county commission with notice to all parties. Even if a county commission has passed a resolution "against" the Project that does not mean that it would, or even can, refuse to grant an assent under Section 229.100 if the Company meets the very basic requirements to obtain an assent.[20] County clerks in Kentucky or other places may oppose same-sex marriage, but we know that they must follow the law and issue marriage certificates when proper request is made.

Third, the resolutions, which were prepared by the Neighbors and provided by the Neighbors to the counties, are self-serving and replete with inaccuracies. The counties were presented with them (in at least one instance on the day of the county commission meeting) by the Neighbors and, without any proof of their accuracy or evidence to support the statements in them, were simply signed by at least two county commissioners in four of the five counties. ATXI had no prior notice of them, nor did it have any opportunity to rebut the inaccuracies in them. In fact, ATXI has confirmed that in at least two of the cases, the resolutions were signed in violation of Chapter 610, RSMo. (a/k/a, "Missouri's Sunshine Law") because there was no notice whatsoever that such resolutions would be taken up, as required by the notice

[20] Whether county commissions are truly "against" the project is far from clear, particularly given that no real evidence has been presented to them and that all they have had before them are *ex parte* resolutions, not supported by any facts and for which notice, in at least some cases, was not properly given. We address this more, below.

requirements of section 610.020. Consequently, at a minimum those two resolutions can be voided. Section 610.027.5.

Fourth, although ATXI intends to proceed as if it is subject to municipal or county statutes or requirements such as section 229.100 (consistent with longstanding practices of those who construct Ameren transmission lines), it is not clear if county assents are required at all. That assents may not be required is called into question by the language of section 229.100 itself (below) and the particular facts related to the proposed transmission line. The statute reads:

> No person or persons, association, companies or corporations shall *erect* *poles* for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, *on*, under or across the public roads or highways of any county in this state, without first having obtained the assent of the county commission of such county therefor; and no poles shall be erected or such pipes, conducts, mains and conduits be laid or maintained, *except under such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer*, with the approval of the county commission [emphasis added].

Because there will be no poles located on the public road right-of-way and because one can only erect a pole on the right-of-way (one can't lay a pole, nor can a pole go through, under or across a road), there is a good argument that on the facts of this project section 229.100 does not apply at all. If at the proper time and upon proper request, the assents are obtained, whether or not the statute applies will be irrelevant; but if assents are not obtained, the ultimate determination will be up to the courts.[21]

One last point bears noting about the resolutions relied upon by the Neighbors. Notwithstanding what they purport to reflect, the facts are the Company has not appeared before any county commission on an assent request. At such time as such an appearance

[21] A county commission decision regarding an assent request, like all administrative decisions, is subject to judicial review. MO. CONST. art. V, §18; Section 536.150.

(which will be properly noticed in accordance with the law) occurs, the counties will be presented with accurate, factual information pertinent to the assent request and will then (and only then) be in a position to make a decision on an assent. That has not happened, notwithstanding the Neighbors' speculation about what the county commissions would (or could) do if an assent request was presented at the county commission agenda. Consequently, Neighbors rely on mere speculation, and this speculation is an utterly insufficient reason for dismissal of ATXI's application.[22]

6. Assents are not required for a line certificate request under Section 393.170.1.

The Neighbors essentially claim that that assents are a precondition to the Commission's ability to grant a line certificate in this case. This claim reflects a misunderstanding of the terms of the statute governing ATXI's request for a line certificate and Missouri case law.

While it appears to be true that a local "franchise" permission or some other municipal consent is required when a public utility comes to the Commission for an *area* certificate that would give it authority (and an obligation) to provide retail service to end use customers in a defined area (e.g., in a municipality; in a county or a part thereof),[23] there is no such requirement when a line certificate is sought, as here. This is because the Missouri Court of Appeals has long

[22] And even if an assent request is made and denied, the Company can exercise its legal right to obtain judicial review of such a denial and, given the terms of section 229.100, is confident the courts will conclude that counties cannot withhold an assent based upon perceived popular opposition to the project. This is because none of the "grounds" in the resolutions that were presented to the county commissions by the Neighbors would constitute lawful grounds for a county commission to deny an assent to an electrical corporation, gas corporation, water corporation, etc., to cross over a county road. It is clear that when it applies, section 229.100 only gives counties the ability to assent so that the county (through its county engineer) can, if needed, impose conditions that are necessary to prevent interference with the construction, operation or maintenance of the roads. That there is no such interference for the proposed transmission line at issue here is even clearer than it may be with other power lines or pipelines, which as the Commission knows routinely cross over (or are built within) public road rights-of-way. As testimony in this case will make clear, not a single structure of any kind that is part of the proposed transmission line will be located within any public road right-of-way. Instead, all structures will be located on private land pursuant to easements to be obtained. This is in stark contrast to the situation that often exists where poles (and often guy wires) are located within the road right-of-way, as are pipelines for water, sewer, gas, oil, etc.

[23] *See* 4 CSR 240.3.015(D).1, indicating that when a franchise is "required," a certified copy must be provided.

recognized that under section 393.170 (the CCN statute) the permission and approval that may be granted is "of two types":

> The PSC may grant CCNs for the construction of power plants, as described in subsection 1, or for the exercise of rights and privileges under a franchise, as described in subsection 2. *See Harline*, 343 S.W.2d at 185 * * * Traditionally, the PSC has exercised this authority by granting two different types of CCN, roughly corresponding to the permission and approval required under the first two subsections of section 393.170. Permission to build transmission lines or production facilities is generally granted in the form of a "line certificate." See 4 CSR 240-3.105(l)(B). A line certificate thus functions as PSC approval for the construction described in subsection 1 of section 393.170. Permission to exercise a franchise by serving customers is generally granted in the form of an "area certificate." See 4 CSR 240-3.105(1)(A). Area certificates thus provide approval of the sort contemplated in subsection 2 of section 393.170.

State ex rel. Cass County v. Pub. Serv. Comm'n, 259 S.W.3d 544, 549 (Mo. App. W.D. 2008) (emphasis added; footnotes omitted).

Because the statute does not require municipal consent hereunder subsection (1), it is not required for a line certificate, and failure to obtain section 229.100 assents does not preclude the Commission from granting a CCN.[24] Indeed, any separate requirement to obtain an assent to cross over county roads has nothing to do with the Commission's determination of whether a line certificate should be granted after determining that the line is necessary or convenient for the public service within the contemplation of section 393.170.1.

The bottom line is that neither section 393.170.1 nor the Commission's own rules require that county assents (or other county permissions, if any were required under some other source of law) be obtained before the Commission can grant a line certificate. The Commission's authority to grant the certificate is separate and apart from other permissions

[24] The Commission's CCN rules reflect the distinction between an area certificate and a line certificate. *Cf.* 4 CSR 240-3.105(1)(**A**), applicable to area certificates, and 4 CSR 240.3.105(1)(**B**), applicable to line certificates.

that might be required, and whether they are required is a question of the applicability of, and adherence to, such other authority.

Conclusion

The Neighbors' Motion provides no legal basis for this Commission to dismiss ATXI's Application. Instead, it asks this Commission to ignore the standards governing motions to dismiss; to apply the right-to-farm amendment in a manner not supported by its language, its purpose or common sense; to condition the Commission's own process and authority to act on an assent statute that may not apply and that is irrelevant to the determination to be made by this Commission; and further asks the Commission to speculate about what county commissions would or would not do when presented with a proper assent request. The Commission can do none of these things.

WHEREFORE, ATXI respectfully requests that the Commission deny the Neighbors' Motion.

Respectfully submitted,
/s/ James B. Lowery

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the public version of the foregoing Motion to Compel Discovery has been e-mailed, this 28th day of October, 2015, to counsel for all parties of record.

/s/ James B. Lowery
An Attorney for Ameren Transmission Company of Illinois