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 )

**UNITED FOR MISSOURI’S RESPONSE**

**TO GRAIN BELT EXPRESS CLEAN LINE LLC’S MOTION IN LIMINE**

COMES NOW United for Missouri, Inc. (“UFM”), and for its response to Grain Belt Express Clean Line LLC’s (“Grain Belt”) Motion in Limine, states as follows:

1. Grain Belt seeks an order in limine prohibiting any evidence or discussion of eminent domain. Grain belt argues that any evidence or discussion of eminent domain is irrelevant to the issue of whether its proposed project “is necessary or convenient for the public service.”
2. To make its argument, Grain Belt claims that the Commission has stated that it will apply five and only five criteria in cases regarding applications for Certificates of Convenience and Necessity (“CCN”) (“Tartan factors”), criteria stated in *In re Tartan Energy Co*., No. GA-94-127, *Order Granting Certificate of Convenience and Necessity* (September 16, 1994). Evidence that does not relate to any such factors is therefore irrelevant and must be excluded.
3. Grain Belt further argues that the Commission has declared that it cannot decide any questions about eminent domain, as it declared in its many public hearings in this case. Therefore, such evidence is irrelevant.
4. Grain Belt has over-stated the usefulness of Tartan factors and has misconstrued the purpose of the Commission’s declaration on its ability to decide questions about eminent domain.
5. The Commission’s inquiry into what “is necessary or convenient for the public service” in an application for a CCN is not limited to the five factors expressed in *Tartan*, and it is a disservice to the public to so limit the Commission’s inquiry. The Tartan factors are a helpful tool but not a legislated exclusive standard. In *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*,[[1]](#footnote-1) the Court declared that, “The determination of what is necessary and convenient has long been, and continues to be, a matter of debate.”[[2]](#footnote-2) The Court referred, with approval, to an observation that,

The controlling factor is the public interest and such interest is a matter of policy to be determined by the Commission. It is suggested that such an approach applies a balancing process, giving weight to adequacy of service and desirability of competition. It is suggested by such an approach that adequacy or inadequacy of a facility alone is not determinative . . . .[[3]](#footnote-3)

The Commission is not limited in its deliberations to the straight jacket of the five Tartan factors as suggested by Grain Belt.

1. While the Commission is not called upon to condemn land in this proceeding, the issue of eminent domain is of significant relevance. The issuance of a CCN is a precursor to the condemnation of private property. The right of eminent domain is granted to electrical corporations pursuant to section 523.010 of the Revised Statues of Missouri. However, Article 1, Section 28, of the Missouri Constitution prohibits the taking of private property for private use under any circumstances.[[4]](#footnote-4) Section 28 also provides, “when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.” Inasmuch as a core issue in this proceeding is the character of service provided by the project, the necessity and convenience of the project to the “public service,” as opposed to a private use, the potential use of eminent domain is of utmost relevance to these proceedings. The Commission has recognized that it must address potential legal issues arising from its actions as one of the many factors inherent in a public interest determination.[[5]](#footnote-5) This is one such relevant issue.
2. Further, the possibility that Grain Belt will use eminent domain to take private property rights is at the very core of the “public interest” determination expressed in the Tartan factors. Land rights and use are legitimate factors in any public interest determination.[[6]](#footnote-6)
3. Grain Belt itself introduced evidence on eminent domain in its own direct testimony. Grain Belt witness Lawlor states, at page 21 of his Direct Testimony:

Grain Belt Express prefers to acquire all of the rights-of-way through voluntary transactions negotiated in good faith. Grain Belt Express will not seek to exercise eminent domain authority on a parcel of property unless and until it has exhausted reasonable efforts to acquire transmission line easements through voluntarily negotiated agreements.

By submitting this evidence, Grain Belt itself clearly indicated that it believes the issue of eminent domain is relevant to this proceeding and waived its right to argue otherwise.

1. Regarding Judge Bushman’s statements on the scope of the public hearing, it was clearly appropriate for the judge to advise the audience that the Commission is not the proper authority to decide particular issues of eminent domain, i.e. what property might be taken or what compensation would be due. Such determinations must be left to the court on a case by case basis. That does not mean that the proposed use of eminent domain is not a factor in determining whether the grant of a CCN is in the public interest. Whether eminent domain will be used for this project and how such use will compromise private property rights are clearly issues relevant to the determination of the public interest in this case.
2. The Commission has a unique case before it with this application for a CCN. Grain Belt is not a typical electrical corporation, if it is an electrical corporation at all. Grain Belt seeks to build a “merchant” transmission project. It does not propose to serve the general public in that it will not provide service to any customers that seeks retail electric services. Rather, it seeks to sell its services to a select few wind generators and/or wholesale customers. This is not the paradigm for which the CCN was designed and certainly not the paradigm for which the Tartan factors were developed. The Commission has been placed in the position of balancing the rights of this new endeavor against private property rights in land that have resided with families for generations. The Constitution of the state of Missouri protects private property rights against takings for private use. The Commission must tread lightly when its actions regarding services it may have no authority to authorize potentially threaten private property rights of individuals it has no authority to regulate. Evidence regarding property rights and the taking away of those rights is relevant and must be considered.

WHEREFORE, for the reasons stated above, UFM requests the Commission deny Grain Belt’s motion in limine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

 I hereby certify that a true copy of the foregoing pleading was sent to all parties of record in File No. EA-2014-0207 via electronic transmission this 3rd day of November, 2014.

 /s/ David C. Linton

1. 600 S.W.2d 147 (Mo. App. W.D. 1980). [↑](#footnote-ref-1)
2. Id. at 154. [↑](#footnote-ref-2)
3. Id. at 155. [↑](#footnote-ref-3)
4. “except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes,” which circumstances are not under consideration here. [↑](#footnote-ref-4)
5. *In Re Union Electric Company*, Case Nos. EA-87-159, EA-88-124, EA-89-80, *Report and Order*, (April 27, 1990), p. 11. [↑](#footnote-ref-5)
6. *Stopaquila.Org v. Aquila, Inc*., 180 S.W.3d 24 (Mo, 2005). [↑](#footnote-ref-6)