BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Landowners Alliance,	)	
	)	
Complainant,	)	
	)	
v.	)	**Case No. EC-2014-0251**
	)	
Grain Belt Express Clean Line LLC,	)	
Grain Belt Express Holding LLC, and	)	
Clean Line Energy Partners LLC,	)	
	)	
Respondents.	)	

MOTION TO DISMISS

Respondents Grain Belt Express Clean Line LLC ("Grain Belt Express" or "Company"), Grain Belt Express Holding LLC, and Clean Line Energy Partners LLC (collectively, "Respondents"), pursuant to Missouri Rule of Civil Procedure 55.27(a)(6) and Missouri Public Service Commission ("Commission" or "PSC") Rules 4 CSR 240-2.070(7) and 4 CSR 240-2.116(4), move to dismiss the Formal Complaint ("Complaint") filed by Missouri Landowners Alliance ("MLA" or "Complainant") for failure to state a claim upon which relief can be granted.

In support of their Motion, the Respondents state as follows:

I. Introduction.

Without regard for the public's right to know and with utter disregard for the guarantees of freedom of expression under the United States and Missouri Constitutions, MLA asks the Commission to censor Respondents' websites and other publications regarding the Grain Belt Express proposal to construct a high voltage, direct current ("HVDC") transmission line that will originate in Kansas, cross Missouri and Illinois, and terminate near the Illinois-Indiana border.

The Company recently filed its Application to receive a certificate of convenience and necessity ("CCN") from the Commission in Case No. EA-2014-0207 ("CCN Case") for this HVDC transmission line and associated facilities ("Grain Belt Express Project" or "Project").

In the context of this proposed Project, MLA alleges that Respondents have violated and continue to violate two provisions of the Commission's rules governing ex parte communications, Sections (12) and (14) of 4 CSR 240-4.020 ("Ex Parte Rules" or "Rules").

Notably, the Complaint admits that Respondents did not engage in any prohibited, direct ex parte communication with any Commissioners or with members of their staff in Paragraph 3. However, MLA alleges that Respondents have violated the Ex Parte Rules indirectly by operating and maintaining public websites (Compl. Ex. 1-2, 4-5, 12, 14-17, 21-22, 24-25, 28-30), by commissioning an economic study posted on the Company's website (Compl. Ex. 3), and by publishing announcements about upcoming meetings in newspapers regarding the Project (Compl. Ex. 6).

Furthermore, MLA protests and objects to media coverage of the Project and its being discussed in newspaper articles and press releases (Compl. Ex. 7-8, 10-11 and 13). MLA has no objection to publicity that is adverse to the Project (Compl. Ex. 31), and appears to praise a page from Ameren's website on the economic benefits of its resource plan (Compl. Ex. 20).

MLA also complains about Respondents' media releases (Compl. Ex. 9) and a brochure for a conference on transmission siting issues held in Texas that was conducted by an industry educational organization and that Respondents did not support or sponsor (Compl. Ex. 18-19). See Compl. at ¶¶ 4-6.

Complainant alleges that public discussions about the Project and of the transmission of renewable wind energy more generally may expose the Commission and its staff, and county

commissioners and municipal officials to arguments that are made outside of the Company's CCN Case. See Compl. at ¶ 4.

MLA asks the Commission to exercise the censor's blue pencil and issue an order that: (1) declares that a party or anticipated party is in violation of the Ex Parte Rules if it makes a statement contrary to MLA's interpretation of the Rules, as set forth on page 4 of the Complaint; (2) finds Respondents to be in violation of the Rules; (3) directs Respondents to delete information on their websites, consistent with MLA's interpretation of the Rules; and (4) strikes from the record any letters of support that Grain Belt Express filed in the CCN Case.

II. The Provisions of the Ex Parte Rules cited by MLA do not Apply to the Respondents' Websites and Publications.

The Rules cited by MLA do not apply to the facts of this case. First, the Ex Parte Rules only apply to those prohibited communications "between the commission, a commissioner, a member of the technical advisory staff, or the presiding officer assigned to the proceeding and any party or anticipated party, or the agent or representative of a party or anticipated party." See 4 CSR 240-4.020(1)(G). Any communications between Respondents and county or municipal officials are not prohibited by the Rules. MLA has already admitted in Paragraph 3 of the Complaint that Respondents did not engage in any prohibited, direct ex parte communication with any Commissioner or members of a Commissioner's staff.

Furthermore, prohibited ex parte communications "shall not include a communication regarding general regulatory policy allowed under section 386.210.4, RSMo, communications listed in section (3) of this rule, or communications that are de minimis or immaterial." See 4 CSR 240-4.020(1)(G). Section 386.210.4 encourages "the free exchange of ideas, views, and information between any person and the commission or any commissioner" and allows the Commission to confer with members of the public or any public utility regarding substantive

matters that are the subject of a pending case in which no evidentiary hearing has been scheduled, provided that the communication is made in a public forum in which parties to the case are present. See Section 386.201.3-4. If MLA considers the Commission to be sufficiently present in public forums where websites are viewed and news publications are read, then certainly other parties to the case are similarly present such that the communication is not prohibited by the Rules or Missouri law.

With regard to the Ex Parte Rules that MLA alleges were specifically violated, Section (12) prohibits attempts "to sway the judgment of the commission" by any person interested in a case who "bring[s] pressure or influence to bear upon the commission ...." See 4 CSR 240-4.020(12). Maintaining fully transparent, public websites that provide information regarding a proposed project, posting an economic study on a website regarding a proposed project, and being named in news and other publications regarding transmission issues will hardly "sway the judgment of the commission" through improper "pressure or influence."

The Ex Parte Rules and the law in general offer ample opportunities for everyone to participate in open public discourse on the internet and through other social media networks. Indeed, there exist public websites that promote opposition to the Project, such as the "Block Grain Belt Express Missouri" website, www.blockgbemo.com, and a Facebook page, www.facebook.com/blockgrainbeltexpressmo. MLA itself operates and maintains its own website dedicated to opposition to the Project, http://missourilandownersalliance.org/, and its activities have been covered by the news media. Public discussion of a proposed project on websites and in news and other publications is not prohibited by 4 CSR 240-4.020(12).

Section (14) of the Rules requires that an attorney or law firm appearing before the Commission make "reasonable efforts to ensure that the attorney and any person whom the

attorney represents avoid initiating, participating in, or undertaking an ex parte communication prohibited by section (3) or a communication prohibited by section (11)." All of the statements that MLA alleges are improper occurred in a public forum. They are by definition, therefore, not ex parte communications under Section (3) or a communication covered by Section (11) relating to future cases. There is no allegation that any statement was made by an attorney or law firm representing Respondents. Therefore, 4 CSR 240-4.020(14) does not apply to the publications of which Complainant complains.

The Commission's Ex Parte Rules do not apply either to Respondents' operation and maintenance of websites concerning the Project or to news and other publications that discuss the Project or the benefits of electric transmission and wind energy more generally. Accordingly, the Complaint should be dismissed. See Mo. R. Civ. P. 55.27(a)(6); 4 CSR 240-2.116(4).

III. The Ex Parte Rules do not Apply to Public Websites and Publications.

Because the Commission's Ex Parte Rules do not and cannot apply to the public discussion of proposed utility infrastructure projects in forums such as a website and in the news media, the Complaint fails to state a claim upon which relief can be granted and should be dismissed.

The purpose of the Rules is "[t]o set forth the standards to promote the public trust in the commission with regard to pending filings and cases." See Preamble, 4 CSR 240-4.020. Public debate in the form of websites and other publicly available materials cannot be a violation of the Rules. Indeed, the Commission's own website contains links to the websites of public utilities that promote their views of various issues related to their business. The Commission has never limited the news coverage of a proposed project or enjoined a utility from gathering letters of support regarding a proposed project.

To promote public knowledge of such issues, the Rules do not apply to matters such as the "[i]ssuance of public communications regarding utility operations, such as the status of utility programs, billing issues, security issuances, or publicly available information about a utility's finances." See 4 CSR 240-4.020(10)(A)5. They also do not apply to communications notifying the commission of "[i]nformation regarding matters before state or federal agencies and committees" or "[i]nformation regarding a regional transmission organization." See 4 CSR 240-4.020(10)(A)6-7.

As no Commissioner, member of the technical advisory staff, or the presiding officer assigned to this case has filed any notice of an ex parte or extra-record communication with regard to the websites and publications of which MLA complains, it is clear that no one except MLA considers these public materials to be ex parte communications regarding a contested case or anticipated contested case. See 4 CSR 240-4.020(3)-(4).

Respondents' operation and maintenance of websites concerning the Project, as well as news and other publications that discuss the Project or the benefits of transmission and renewable wind energy more generally do not and cannot violate the Commission's Ex Parte Rules. Accordingly, the Complaint should be dismissed as it fails to state a claim upon which relief can be granted. See Mo. R. Civ. P. 55.27(a)(6); 4 CSR 240-2.116(4).

IV. MLA Seeks an Unconstitutional Infringement of Respondents' Right to Freedom of Expression and a Presumptively Invalid Prior Restraint.

Any Commission order prohibiting or limiting the speech of Respondents as MLA requests is an unlawful restriction on their right to freedom of expression under both the First Amendment to the United States Constitution, as applied to the states under the Due Process Clause of the Fourteenth Amendment, as well as Section 8 of Article I of the Missouri Constitution.

MLA requests that the Commission prohibit Respondents from publicizing its position regarding the Project on websites. This is clearly a matter of public concern entitled to First Amendment protection given that the Project is subject to the Commission's approval. The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Accordingly, "speech on public issues occupies the highest rung on the hierarchy of First Amendment values, and is entitled to special protection." Connick v. Myers, 461 U.S. 138, 145 (1983). The Supreme Court of the United States has warned that its principles must be followed "to ensure that courts themselves do not become inadvertent censors." See Snyder v. Phelps, ___ U.S. ___, 131 S. Ct. 1207, 1216 (2011). As the Supreme Court has routinely recognized: "It is speech on matters of public concern that is at the heart of the First Amendment's protection." Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985). at 1215. See Snyder v. Phelps, 131 S. Ct. at 1215.

MLA's request would additionally be a constitutionally prohibited prior restraint on the speech of Respondents. "The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." Alexander v. United States, 509 U.S. 544, 550 (1993). "Temporary restraining orders and permanent injunctions – i.e., court orders that actually forbid speech activities – are classic examples of prior restraints." Id. Similarly, in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975), the Supreme Court declared that "the power to deny use of a forum in advance of actual expression" is an unconstitutional prior restraint. The "danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." Id. That is

what MLA seeks here in the form of a Commission order that directs Respondents to remove content from their websites and forbids them to publish future speech similar to what is to be removed.

The Supreme Court of the United States has repeatedly recognized that prior restraints are "the *most serious and least tolerable* infringement on First Amendment rights" and are "presumptively unconstitutional." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558-59 (1976) (emphasis added). In Vance v. Universal Amusement Co., 445 U.S. 308, 317 (1980), the Court declared that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Given the extremely heavy presumption against the constitutional validity of prior restraints, it is not surprising that "the Supreme Court has *never* upheld a prior restraint, even when faced with the competing interest of national security or the Sixth Amendment right to a fair trial." Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 226-27 (6th Cir. 1996) (emphasis added).

Accordingly, the Supreme Court has continually invalidated prior restraints, no matter the context. For example, in New York Times Co. v. United States, 403 U.S. 713, 714 (1971), the Pentagon Papers case, the Court held that *The New York Times* and other newspapers could not be restrained even during wartime from publishing documents that had been classified top secret and obtained without authorization. Notwithstanding that the source who had provided the documents had obtained them as a result of possible criminal conduct and notwithstanding the government's contention that publication would gravely and irreparably jeopardize national security, the Court refused to uphold the restraint. Id. In his concurring opinion, Justice Stewart stated that a prior restraint upon publication was improper absent proof that publication "will

surely result in direct, immediate, and irreparable damage to our Nation or its people." Id. at 730 (Stewart, J., concurring).

Likewise, in CBS Inc. v. Davis, 510 U.S. 1315, 1317-18 (1994), Justice Blackmun, acting as a Circuit Justice, granted an emergency stay of a prior restraint issued by a trial court that barred CBS from disseminating or broadcasting videotape footage taken inside the factory of a meat packing company by an undercover employee. Justice Blackmun stated that neither the company's prediction of economic harm that might result from broadcasting the videotape, nor the alleged "calculated misdeeds of CBS" justified the imposition of a prior restraint. Id. at 1318. Importantly, this result was consistent with nearly seventy years of Supreme Court precedent. See, e.g., Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979) (state's interest in protecting and rehabilitating juveniles did not justify prior restraint); Oklahoma Publ'g Co. v. District Court, 430 U.S. 308 (1977) (striking down order preventing publication of juvenile's name and picture); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976) (applying prior restraint doctrine to strike down a gag order issued in a criminal trial); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (invalidating prior restraint based on invasion of privacy); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70-71 (1963) (Rhode Island law authorizing commission to list publications as "objectionable" and to recommend prosecution for their sale is "informal censorship" and violates First and Fourteenth Amendments); Near v. Minnesota, 283 U.S. 697, 706 (1931) (seminal case reversing injunction against newspaper that published allegedly defamatory articles about county officials).

This line of cases includes Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 571-72 (1980), which struck down the New York Public Service

Commission's ban on promotional advertising by electric utilities which it found suppressed speech under the First and Fourteenth Amendments.

Lower courts also "consider prior restraints to be particularity abhorrent to the First Amendment in part because they vest in government agencies the power to determine important constitutional questions properly vested in the judiciary." New York Magazine v. Metropolitan Transp. Authority, 136 F.3d 123, 131 (2d Cir. 1998) (First Amendment prevented state agency from refusing to display on the outside of buses an advertisement containing mayor's first name).

Crucially, courts around the country have denied requests to limit speech through a website as Complainant seeks to do here. For example, a manufacturer was permitted to communicate through its website with putative class members and offer free inspections of a purportedly defective product. Payne v. Goodyear Tire & Rubber Co., 207 F.R.D. 16, 20-21 (D. Mass. 2002) (rejected challenges to statements on the defendant's web page concerning hose that it manufactured for use in a floor heating system).

Courts even lack the authority to enjoin potentially defamatory or libelous statements on a website. In Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc., 999 A.2d 184, 196-97 (N.H. 2010), the Supreme Court of New Hampshire held that a preliminary injunction prohibiting a website operator from publishing comments regarding a lender was an impermissible prior restraint. The lender sought the removal of allegedly defamatory material from the internet about its business. Id. at 187-88. The Court, however, concluded "that the injunction effectively functions as a prior restraint that 'freezes' speech at least for a time" and that the lender's "interests in protecting its privacy and reputation do not justify the extraordinary remedy of prior restraint." Id. at 196-97. See Bihari v. Gross, 119 F. Supp. 2d 309, 325-26 (S.D.N.Y. 2000) (injunction denied where websites containing information on business practices

and alleged fraud of well-known interior designer carry "heavy presumption of constitutional protection").

It is important to recognize that courts have refused to censor websites under far more serious circumstances than in the pending matter. In United States v. Carmichael, 326 F. Supp. 2d 1267, 12-9596 (M.D. Ala. 2004), the Court concluded that requiring a website to be taken down or modified because of a pending criminal trial would be an unconstitutional prior restraint. Accused of money laundering, the defendant in Carmichael created a website that identified informants and government agents working on the case and requested information about them. Id. at 1271-73. The prosecution sought to have the website taken down, but the District Court refused, finding that such an order would be an unconstitutional prior restraint. Id. at 1301.

As the Court acknowledged, its "inherent authority or discretion to regulate the actions of trial participants" is "limited by the constitutional rights of the parties." Id. at 1279. It held that the threat of harm to the government agents and informants posed by a website was not sufficient to meet the stringent requirements of a prior restraint. Id. at 1301. MLA's interest in limiting Respondents' freedom of expression in this proceeding pales when compared to the state's interest in a criminal trial.

MLA's Complaint also violates Section 8 of Article I of the Missouri Constitution's Bill of Rights which states: "That no law shall be passed impairing the freedom of speech, no matter by what means communicated" and "that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject …." See State v. Wooden, 388 S.W.3d 522, 525-26 (Mo. 2013) ("ability to criticize the government and public officials are undeniably privileges that are afforded to all citizens under the First Amendment and Missouri's correlative provision").

Any censoring of the transparent public discussion regarding the Project by the Commission would constitute a prior restraint of Respondents' First Amendment and Missouri constitutional rights. Accordingly, the Complaint should be dismissed.

WHEREFORE, Respondents ask that the Complaint be dismissed as it fails to state a claim upon which relief can be granted under Missouri Rule of Civil Procedure 55.27(a)(6), as well as 4 CSR 240-2.070(7) and 4 CSR 240-2.116(4) .

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss was served upon the parties to this Complaint by email or U.S. Mail, postage prepaid, this 14th day of April, 2014.

/s/ Karl Zobrist
Attorney for Respondents