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	)))))))	File No. EA-2016-0358

JOINT APPLICATION FOR REHEARING OF
SIERRA CLUB, NRDC AND RENEW MISSOURI

COME NOW the Missouri Chapter of the Sierra Club ("Sierra Club"), the Natural Resources Defense Counsel ("NRDC"), and Renew Missouri Advocates ("Renew Missouri"), (herein referred to as "Joint Applicants") and move the Commission to rehear the case pursuant to Section 386.500.2 RSMo because the Commission's August 16, 2017 Report and Order is unlawful, unjust and unreasonable. Above all, it has the unintended result of permitting counties, or a single county, to derail a multi-county, multi-state transmission project in defiance of state and federal regulatory norms.

1. **The Commission is not bound by the Court of Appeals' *ATXI* decision because the Court did not decide the issue raised in this case, and if so construed it would be contrary to the Court's own precedent and the Commission's longstanding practice.**

Grain Belt Express (GBE) applied for a "line" certificate under § 393.170.1, RSMo. The Court of Appeals' decision in *Neighbors United against Ameren's Power Line v. PSC and Ameren Transmission Co. of Illinois (ATXI),* WD79883 (slip op. March 28, 2017), made no reference to 393.170.1 or the corresponding parts of 4 CSR 240-3.105, nor to "line" certificates or "area" certificates. Instead, the Court relied on 393.170.2 (slip op. 6, 8), 4 CSR 240-3.105(1)(D)1 (slip op. at 3, 4, 6, 8) and 3.105(2) (slip op. at 6), which concern area certificates. It

even refers to "both subdivisions of section 393.170," citing subdivisions .2 and .3 as if .1 did not exist (slip op. 8). We cannot conclude that the Court meant to decide the issue in this case: whether county assents must be obtained before issuance of a line certificate.

A line certificate is given for construction of electric plant, including transmission lines, under § 393.170.1 and 4 CSR 240-3.105(1) (B) ("If the application is for electrical transmission lines, gas transmission lines or electrical production facilities…"). Corresponding to this is 3.105(1)(C): ("When no evidence of approval of the affected governmental bodies is necessary, a statement to that effect").

An area certificate is issued for the exercise of a franchise under 393.170.2 and 4 CSR 240-3.105(1)(A)("If the application is for a service area"). Corresponding to this is 3.105(1)(D), which the Court of Appeals relied on ("When approval of the affected governmental bodies is required, evidence must be provided as follows:").

Section 393.170.3 brings together the two types of CCN for procedural purposes, but it preserves the distinction between them:

> The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction [393.170.1] or such exercise of the right, privilege or franchise [393.170.2] is necessary or convenient for the public service.

There is no mention of local approval in 393.170.3, only in 393.170.2. It is therefore clear that proof of local consent before issuance of a CCN applies only to area certificates.

The Court of Appeals has long observed the distinction between line and area certificates. *State ex rel. Cass County v. PSC*, 259 S.W.3d 544, 549 (Mo.App. W.D. 2008); *Stopaquila.org v. Aquila,* 180 S.W.3d 24, 34 (Mo.App. WD 2005); *State ex rel. Union Electric v. PSC,* 770

S.W.2d 283, 285 (Mo.App. W.D. 1989); *State ex rel. Harline v. PSC,* 343 S.W.2d 177, 182–3 (Mo.App. W.D. 1960). The Commission should not hasten to read the opinion as overruling by mere implication the Court's own line of precedents recognizing the distinction between line and area certificates. The decision to overrule settled precedent is not taken lightly. Overruling upsets the rule of law and the reliance that parties have placed on prior decisions. *Planned Parenthood v. Casey,* 505 U.S. 833, 854, 112 Sup.Ct. 2791, 2808, 120 L.Ed.2d 674 (1992).

Accepting *ATXI* too readily at face value also would upset the Commission's practice of granting line certificates on condition that county assents be obtained later, as it did in *ATXI* itself.

2. **The Commission is surrendering its authority and duty to regulate uniformly as the state's supreme utility regulator.**

The legislative scheme for utility regulation demands uniformity throughout the state, which is ensured by the Commission. As the Missouri Supreme Court said in *Union Electric Co. v. City of Crestwood,* 499 S.W.2d 480, 483 (Mo. 1973):

> If 100 such municipalities each had the right to impose its own requirements with respect to installation of transmission facilities, a hodgepodge of methods of construction could result and costs and resulting capital requirements could mushroom. As a result, the supervision and control by the Public Service Commission with respect to the company, its facilities, its method of operation, its service, its indebtedness, its investment, and its rates which the General Assembly obviously contemplated would be nullified.

The county assent law, if interpreted to give a county its own veto, would effectively nullify the Commission's authority to grant certificates under 393.170. Such an interpretation is invalid.

3. **As long as Clean Line agrees to abide by a county's highway regulations, the county may not deny its assent.**

Clean Line once had the assents of all eight counties along the route. Some counties were sued by the landowners for violation of the open meetings ("Sunshine") law while others succumbed to political pressure. The purpose of the county assent requirement is made plain by the statute, Section 229.100, RSMo:

> 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 of 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, conductors, 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.]

The county's concern is with its roads. The statute is in effect a siting regulation. Once a utility agrees to abide by the highway regulations, denial of assent by the county would run afoul of the state regulatory scheme, as noted above, and of federal law, as noted below.

4. **Denial of the certificate of convenience and necessity for want of county assents would violate the dormant Commerce Clause to the U.S. Constitution.**

The dormant Commerce Clause is a doctrine created by the U.S. Supreme Court holding that state and local governments may not interfere with the free flow of interstate commerce through discrimination, local preferences or other impediments. Some state regulation

necessarily affects interstate commerce, but it may not do so in a manner that is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church,* 397 U.S. 137, 142 (1970). The effect of Sections 393.170 and 229.100, in the interpretation of the Court of Appeals as adopted by the Commission, would clearly impede the vital interstate flow of electricity for a local benefit that is at best dubious and at worst pretextual. It is hard to envision a federal court allowing it to stand.

5. Federal law preempts state authority over interstate transmission.

Missouri, let alone a county, cannot bar its doors to interstate transmission: "the text of the FPA [Federal Power Act] gives FERC [Federal Energy Regulatory Commission] jurisdiction over the 'transmission of electric energy in interstate commerce and ... the sale of electric energy at wholesale in interstate commerce.' 16 U.S.C. § 824(b)." *New York v. FERC,* 535 U.S. 1, 18–9 (2002). The states retain their traditional role in siting and construction of transmission, *MISO Transmission Owners v. FERC,* 819 F.3d 329, 337 (7th Cir. 2016); but that cannot extend to unilateral rejection of an interstate line when reasonable siting regulations have been satisfied.

CONCLUSION

WHEREFORE the Joint Applicants ask the Commission to rehear the case.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct PDF version of the foregoing was filed on EFIS and sent by email on this 14th day of September, 2017, to all counsel of record.

/s/ Henry B. Robertson
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