

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

**In the Matter of the Application of Grain)
Belt Express Clean Line LLC for Certificate)
of Convenience and Necessity Authorizing it) Case No. EA-2016-0358
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.)**

**REQUEST OF GRAIN BELT EXPRESS
AND MOTION FOR WAIVER OR VARIANCE OF FILING REQUIREMENTS**

Grain Belt Express Clean Line LLC (“Grain Belt Express” or “Company”) requests that the Commission take up the Company’s Application for a Certificate of Convenience and Necessity (“CCN”) under Section 393.170.1¹ and issue it a “line” CCN as requested. As discussed below, the recent order by the Missouri Supreme Court denying transfer in the Neighbors United case does not prevent such action by the Commission.

Grain Belt Express also moves for a waiver or variance regarding certain filing requirements of 4 CSR 240-3.105(1)(D)1 and 240-3.105(2), pursuant to 4 CSR 240-2.060(4) and 240-3.015, to the extent that the Commission believes the Court of Appeals opinion in Neighbors United requires the filing of Section 229.100 county assents prior to the Commission issuing a “line” CCN.

In support of its Request and Motion, the Company states as follows:

1. On June 27, 2017 the Supreme Court of Missouri denied the applications for transfer of both this Commission and Ameren Transmission Company of Illinois (“ATXI”) in Neighbors United Against Ameren’s Power Line v. PSC, No. SC96427. Unless the Commission

¹ All statutory citations are to the Missouri Revised Statues (2016) unless otherwise noted.

or ATXI files an application for a writ of certiorari of the denial order to the Supreme Court of the United States, the opinion in Neighbors United Against Ameren's Power Line v. PSC, No. WD79883 (Mo. App. W.D., Mar. 28, 2017) ("Neighbors United"), will become final in 90 days. See 28 U.S.C. § 2101(c).

2. Regardless of the finality of Neighbors United, that Court of Appeals decision presents no impediment to the Commission issuing a CCN to Grain Belt Express in this proceeding. The holding of Neighbors United is based upon an analysis of Section 393.170.3, which authorizes the Commission to impose "reasonable and necessary" conditions on a CCN, and the specific and mandatory language of Section 393.170.2 that calls upon an electrical corporation to show "that it has received the required consent of the proper municipal authorities." See Neighbors United, slip opin. 6-8 (holding "the general provision of section 393.170.3 gives way to the more specific and mandatory language of section 393.170.2"). After analyzing the language of Section 393.170.2, the Court of Appeals declared that the county commission assents required by Section 229.100 and the Commission's regulations at 4 CSR 240-3.105(1)(D)1 "must be submitted to the PSC *before* the PSC grants a CCN." Id., slip opin. at 8.

3. However, Grain Belt Express does not rely on Section 393.170.2 which pertains to "area" CCNs. To the contrary, it explicitly sought a "line" CCN under Section 393.170.1 to construct the Grain Belt Express Project, as stated in the Preamble to and Paragraph 1 of its Application, filed on August 30, 2016.² Section 393.170.1 contains no requirement that county

² The Company has previously set forth its arguments pointing out the important substantive distinctions between the Neighbors United case and this proceeding. See Response of Grain Belt Express to Agenda Discussion of Notice Regarding Case Status at 2-4 (June 1, 2017); Reply Brief of Applicant at 7-10 (Apr. 24, 2017); Opposition of Grain Belt Express to Motion of Mo. Landowners Alliance for Expedited Treatment and Motion to Dismiss Application or To Hold Case in Abeyance at 2-6 (Mar. 31, 2017).

assents or the approval of any other governmental authority be obtained, unlike Section 393.170.2.

4. Grain Belt Express has not sought a CCN from this Commission under any provision other than Section 393.170.1, of which there is no discussion or analysis contained in the Neighbors United case. Section 393.170.2 regarding the granting of an “area” certificate to provide retail service has nothing to do with this proceeding. Accordingly, there is no reason for the Commission to delay issuing a decision in this case.

5. The Commission’s Application for Transfer in Neighbors United properly noted the important distinction between a Section 393.170.1 line certificate to construct a plant or a transmission line, and a Section 393.170.2 certificate to provide service to a geographic area. “The two types of authority available under Section 393.170 are not the same and may not be used interchangeably. ... The distinction between the two kinds of authority is often blurred, but the courts have found that the distinction must be maintained.” See Application for Transfer at 4, *citing* Union Elec. Co. v. PSC, 770 S.W.2d 283, 285 (Mo. App. W.D. 1989). Accord State ex rel. Cass County v. PSC, 259 S.W.3d 544, 549 (Mo. App. W.D. 2008) (Section 393.170.1 line certificates grant permission “to build transmission lines or production facilities”).

6. The Commission rightly concluded that where a construction certificate is requested under subsection 1, a county’s assent to cross roads under Section 229.100 is not a prerequisite to granting a CCN application. See Application for Transfer at 5, 9-10, No. SC96427, Neighbors United (May 16, 2017). The Company agrees with the Commission that it

The Company has also briefed the well-recognized and long-standing distinction between subsection 1 (line CCN) and subsection 2 (area CCN) of Section 393.170, and has explained why neither the plain reading nor any reasonable statutory construction of Section 393.170.1 requires the Company to obtain Section 229.100 assents prior to obtaining a subsection 1 line CCN. See Initial Post-Hearing Brief of Applicant at 13-22 (Apr. 10, 2017); Reply Brief of Applicant at 7-10 (Apr. 24, 2017).

may condition the CCN upon a utility obtaining such county assents before beginning construction. Id. at 5.

7. Given the Commission’s correct view of Section 393.170.1 line CCNs, and the distinctions between this proceeding and the Neighbors United case, there is no basis for the Commission to delay action here.

8. The public interest will also be served by the Commission issuing a decision that sets forth its findings with regard to the five Tartan factors under which public convenience and necessity are judged. Any county commission that has not yet issued its assent under Section 229.100 or has taken action regarding a previously issued assent would benefit from hearing the views of the Commission regarding the public convenience and necessity of the Grain Belt Express Project. Several of the county commissions have stated that they now believe their granting Section 229.100 assents was “premature” and that they are awaiting action by the Commission. See Sched. LDL-4 at 1-3 (Clinton and Chariton Counties), 8-10 (Ralls and Monroe Counties), Ex. 300 (Lowenstein Direct Testimony).

MOTION FOR WAIVER OR VARIANCE OF FILING REQUIREMENTS

9. Despite the fact that Neighbors United did not construe Section 393.170.1 and there is nothing in this statute that mentions county road-crossing assents under Section 229.100,³ the Company recognizes that the Commission’s regulations at 4 CSR 240-3.105(1)(D)1 state that “evidence must be provided ... [w]hen consent or franchise by a city or county is required” The regulations also provide: “If any of the items required under this rule

³ Section 229.100 states no corporation or company “shall erect poles for the suspension of electric light, or power wires ... through, on, under or across the public roads of highways of any county ... without first having obtained the assent of the county commission of such county,” and that such infrastructure must be erected “under such reasonable rules and regulations ... [of] the county highway engineer, with the approval of the county commission.”

are unavailable at the time the application is filed, they shall be furnished prior to the granting of the authority sought.” See 4 CSR 240-3.105(2).

10. The Commission’s regulations also permit an applicant request a waiver or variance from any of its requirements. See 4 CSR 240-2.060(4); 4 CSR 240-3.015.

11. There is no mention of county assents in Section 393.170.1 under which the Company submitted its Application. Nor is there any requirement for an applicant to file with the Commission a Section 229.100 county assent under any other provision of Section 393.170. The only reference to a consent or franchise concerns “proper municipal authorities.” See § 393.170.2. A “municipality” or “municipal authorities” are not counties under Missouri law. See, e.g. §§ 86.513, 87.010, 351.040, 386.020(34), 393.010, 393.025(2).

12. However, given the reference to a county consent in 4 CSR 240-3.105(1)(D)1, and to the extent the Commission believes the Neighbors United decision requires the Company to file Section 229.100 county assents in this line CCN case, the Company hereby moves that the Commission grant a waiver or variance of that requirement. The Commission’s rules permit a waiver or variance of its rules where the applicant indicates the “reasons for the proposed variance or waiver and a complete justification setting out the good cause for granting the variance or waiver” See 4 CSR 240.060(4)(B).

13. Until this point in history, the Commission has routinely granted CCNs on the condition that any required approval by an affected governmental body may be submitted to the Commission prior to the beginning of construction of a gas or electric plant, water system or sewer system under Section 393.170.1. See In re Ameren Transmission Co. of Illinois, Report and Order at 31, 34-40, No. EA-2015-0146 (Apr. 27, 2016); In re Transource Missouri LLC,

Report and Order, No. EA-2013-0098 (Aug. 7, 2013)⁴; In re IES Utilities, Inc. and ITC Midwest LLC, Order Granting Certificate of Convenience and Necessity, No. EO-2007-0485 (Aug. 30, 2007); In re IES Utilities, Inc., Order Granting Certificate of Public Convenience and Necessity, No. EA-2002-296 (Apr. 18, 2002). In none of these orders did the Commission require the applicant to provide Section 229.100 assents prior to issuing a line CCN.

14. To the extent the Commission finds the Court of Appeals decision in Neighbors United to require an applicant for a line CCN to submit Section 229.100 county assents, this is a change in Missouri law as it has existed since 1913 when the Public Service Commission Law was enacted.

15. Such a change creates good cause to grant a waiver or a variance of the Commission's regulations that require the applicant to provide Section 229.100 county assents prior to the issuance of a CCN. The Company agrees that prior to beginning construction of the Grain Belt Express Project under Section 393.170.1, it will submit such county assents to the Commission.

16. Under these unique circumstances the Commission should exercise its sound discretion to grant a waiver or a variance. See Kansas City Power & Light Co. v. PSC, 509 S.W.3d 757, 767, 770, 778-79 (Mo. App. W.D. 2016) (noting "wide discretion" granted to the Commission in making decisions within its "area of expertise"). The granting of such a waiver or variance would be consistent with the public interest and with public safety since construction of the Grain Belt Express Project cannot begin until the county assents under the road-crossing provisions of Section 229.100 are issued. The Commission has stated that "good cause for a

⁴ The county consents issued to Transource Missouri LLC were filed with the Commission in a status report on October 30, 2015, over two years after the Commission issued its Report and Order granting the CCN in August 2013.

waiver of the rule” regarding the filing requirements of 4 CSR 240-3.105 exists in line CCN cases where “all the required information will be provided before construction” of the proposed facilities. In re Application of Union Elec. Co. for a Certificate of Public Convenience and Necessity, Report & Order at 12-15, No. EA-2016-0208 (Dec. 21, 2016).

17. Because nothing in Section 229.100 or Section 393.170.1 requires the filing of county assents with the Commission prior to its issuing a CCN, to the extent the Commission finds Neighbors United relevant to this line CCN case, good cause exists to grant a waiver or variance from the filing requirements of 4 CSR 240-3.105(1)(D)1 and 240-3.105(2) .

WHEREFORE, Grain Belt Express Clean Line LLC requests that the Commission proceed to determine the issues in this case and issue a line CCN to the Company under Section 393.170.1. Furthermore, to the extent the Commission believes that the Neighbors United decision requires the Company in this line CCN case to file Section 229.100 county assents with the Commission under the filing requirements of 4 CSR 240-3.105(1)(D)1 and 240-3.105(2), Grain Belt Express Clean Line LLC moves that the Commission grant a waiver or variance of those filing requirements, pursuant to 4 CSR 240-2.060(4) and 4 CSR 240-3.015.

Respectfully submitted,

/s/ Karl Zobrist

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all counsel of record in this case on June 29, 2017.

/s/ Karl Zobrist _____
Attorney for Grain Belt Express Clean Line LLC