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

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| 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. | ) | Case No. EA-2016-0358 |

# MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY COMMISSION'S APPLICATION FOR REHEARING

Pursuant to §386.500 Revised Statutes of Missouri and 4 CSR 240-2.160(1), the members of the Missouri Joint Municipal Electric Utility Commission ("MJMEUC")[1] respectfully submit this Application for Rehearing on the Report and Order issued in this matter on August 16, 2017 by the Missouri Public Service Commission ("Commission"). Rehearing is appropriate under §386.500.2 because the Report and Order is both "unlawful" and "unreasonable," and thus will be subject to reversal on appeal.[2] Rehearing is further appropriate under §386.500.2 because the Report and Order is "unjust" – the delay that will inevitably occur during the appellate courts' reviews of this Report and Order could unjustly deprive MJMEUC's

[1] MJMEUC's members include here, at a minimum, the cities of Centralia, Columbia, Hannibal, Kirkwood and the 35 MoPEP cities: Albany, Ava, Bethany, Butler, Carrollton, Chillicothe, El Dorado Springs, Farmington, Fayette, Fredericktown, Gallatin, Harrisonville, Hermann, Higginsville, Jackson, Lamar, La Plata, Lebanon, Macon, Marshall, Memphis, Monroe City, Odessa, Palmyra, Rock Port, Rolla, Salisbury, Shelbina, St. James, Stanberry, Thayer, Trenton, Unionville, Vandalia and Waynesville (and the hundreds of thousands of citizens of these cities). The cities of Carrollton, Salisbury and Vandalia are located in the counties crossed by the Grain Belt Project. Exhibit 475, Schedule DK-1.

[2] *State ex rel. AG Processing, Inc. v. PSC*, 120 S.W.3d 732, 734-735 (Mo. 2003) (Internal citations omitted).

members of the significant benefits of the Grain Belt Express Clean Line, LLC's ("Grain Belt's") Project, which benefits were found to exist by four of the five Commissioners who determined the Project necessary or convenient for the public service.[3]

## I. The Report and Order is unlawful and unreasonable because the *Ameren Transmission Co.* decision[4] is not binding precedent to prevent this Commission from issuing Grain Belt's line CCN.

In its Report and Order, the Commission erred when it found that "*Ameren Transmission Co.* and its plain language regarding the necessity of obtaining prior county assents apply to the [Grain Belt] application even though that opinion did not specifically cite to subsection 1 of Section 393.170, the subsection under which [Grain Belt] requested a CCN…[and] [u]nder the Court's direction set forth in *Ameren Transmission Co*., the Commission cannot lawfully issue a CCN to [Grain Belt] until the company submits evidence that it has obtained the necessary county assents under Section 229.100."[5]

But, the *Ameren Transmission Co.* decision did not set binding precedent for the Commission and it did not prevent this Commission from exercising its statutory authority. An appellate court's construction of a statute becomes precedent for lower courts (or this Commission) only as to "decisions on points arising and decided" in the appellate court's order, but that decision does *not* bind or operate as *stare decisis* on lower courts on statutes or points "that can at most be implied from something that was actually decided."[6]

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[3] *Concurring Opinion of Commissioners Hall, Kenney, Rupp and Coleman in the Report and Order*, EA-2016-0358, Dated: August 16, 2017.
[4] *In re Ameren Transmission Co. v. PSC of Mo.*, No. WD 79883, 2017 Mo. App. LEXIS 244* (Mar. 28, 2017), *applications for transfer denied*, No. SC96427, 2017 Mo. LEXIS 266* (June 27, 2017).
[5] *Report and Order*, EA-2016-0358, Issue Date: August 16, 2017, Pages 13-14.
[6] *Broadwater v. Wabash R. Co*., 110 S.W. 1084, 1908 Mo. LEXIS 147 *9-10 (Mo. 1908).

Grain Belt asked the Commission to grant it a "line" CCN under §393.170.1, Revised Statutes of Missouri. Grain Belt made *no* request of this Commission under §§393.170.2 or 393.170.3 (regarding area certificates and hearings), so neither of those statutes were at issue before this Commission. Significantly, and as acknowledged by this Commission in its Report and Order, the *Ameren Transmission Co*. Court did not construe or even address §393.170.1 or a line CCN at any point in its decision. Instead, that court construed only §§393.170.2 and 393.170.3.[7]

This Commission's insistence that the *Ameren Transmission Co*. case prevents it from exercising its authority under §393.170.1 here not only violates the Missouri Supreme Court's long-standing definition of *stare decisis,*[8] it also defies the plain language of *Ameren Transmission Co*. That court cites only to §§393.170.2 and 393.170.3 and declares that its "harmonization of the statute preserves the integrity of *both* subdivisions of section 393.170" as though there are only two, and not three, subdivisions of that statute.[9] Whether the court deliberately or mistakenly[10] excluded §393.170.1 from its construction of §§393.170.2 and 393.170.3 is both unknown and immaterial here – there is no construction of §393.170.1 in *Ameren Transmission Co*. and that decision is thus not binding precedent to prevent this Commission from granting Grain Belt's §393.170.1 application for a line CCN.

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[7] *In re Ameren Transmission Co*., 2017 Mo. App. LEXIS 244 *7-11.
[8] *Broadwater*, 1908 Mo. LEXIS 147 *9-10.
[9] *In re Ameren Transmission Co*., 2017 Mo. App. LEXIS 244 *11(emphasis added).
[10] The *Ameren Transmission Co*. decision does contain evidence of error. For example, the court provided the full text of §229.100, which gives county commissions the authority to provide assents to the placement of utility poles, wires, pipes, etc. in the rights-of-ways of the county's roads, yet the court then described this statutory authority to encompass all areas of the county (*7). And, in quoting the language of §393.170.2, the court actually substituted the words "local government" authorities for the statutory language "municipal authorities" (*11).

## II. The Report and Order is unlawful and unreasonable because its conclusion that the Commission has been prevented from exercising its authority to issue Grain Belt's line CCN is grounded on incomplete and misleading citations from the *Ameren Transmission Co*. case.

In the *Ameren Transmission Co*. decision, the Western District Court of Appeals repeatedly and specifically articulated its disapproval of this Commission's choice to grant a "contingent" or "preliminary" CCN in EA-2015-0146.[11] The Court criticized the Commission for imposing "a condition upon the CCN that ATXI acquire the county assents *before the CCN would become effective.*"[12] Thus, the court's inquiry in *Ameren Transmission Co*. focused on whether or not this Commission has the statutory authority to issue a CCN that is *not effective*. Stated another way, the Western District Court of Appeals inquired into this Commission's authority to give away its authority by issuing a CCN that has no effect until some other entity acts.[13]

The *Ameren Transmission Co*. Court construed only §§393.170.2 and 393.170.3 (regarding area CCNs and hearings), and ruled that "there is no statute authorizing the PSC to grant a *preliminary* or conditional CCN *contingent* on the required county commission consents being subsequently obtained."[14] Thus, the *Ameren Transmission Co*. Court's ruling was that this Commission has no statutory authority to issue a *non-effective* CCN – *not* that this Commission

[11] *In re Ameren Transmission Co*., 2017 Mo. App. LEXIS 244 *1,*4 and *11.
[12] *In re Ameren Transmission Co*., 2017 Mo. App. LEXIS 244 *6 (emphasis added).
[13] This Commission's *Report and Order* in EA-2015-0146 contains two partial and thus misleading citations to the 2005 *StopAquila.org v. Aquila, Inc*. decision that lead to two erroneous conclusions of law and possibly this Commission's decision to issue a CCN that had *no effect*. Paragraphs 25 and 26 include partial quotes from the *StopAquila* case which infer the court's focus at the cited pages to be on the Commission's authority to issue a CCN. But the full cited quotations from the *StopAquila* case reveal the focus of that court's inquiry to be on the statutory limitations on the authority of public utilities to act. Certainly, our statutes will more fully constrain the actions of public utilities than the authority and actions of this Commission.
[14] *In re Ameren Transmission Co*., 2017 Mo. App. LEXIS 244 *11-12 (emphasis added).

is now prevented from issuing line CCNS under §393.170.1 unless and until county commissions exercise their road crossing authority under §229.100.

The large block quotation from the *Ameren Transmission Co*. decision found at page 12 of the Report and Order contains selective omissions of significant portions of the *Ameren Transmission Co*. Court's analysis which mislead the Commission to its erroneous conclusion. Prior to the first quoted paragraph which begins with "By statute and by rule,…" but reaches the conclusion that the PSC cannot issue a CCN before the applicant has obtained the consents of other entities, the *Ameren Transmission Co*. Court identified the statute it was construing to be §393.170.2, *not* §393.170.1,which is the only statute relevant here.[15] Prior to the second quoted paragraph which begins with "Our interpretation of the statute – ..." but reaches the conclusion that county road crossing assents must be submitted to the PSC before it can issue a line CCN, the *Ameren Transmission Co*. Court identified the statutes it was construing to be §393.170.2 and §393.170.3, *not* §393.170.1, which is – again – the only statute relevant here.[16] And, there is one sentence missing between the second and third paragraphs of the large block quotation which, when re-inserted, changes entirely the point of the entire block quotation to actually prohibit the Commission from issuing non-effective or "contingent" CCNs, rather than to operate as a prohibition on the Commission's authority to act until county commissions act. That full and fair quotation reads as follows:

> While §393.170.3 grants the PSC statutory authority to impose reasonable and necessary conditions on a CCN, there is no statute authorizing the PSC to grant a preliminary or conditional CCN *contingent* on the required county commission consents being subsequently obtained. The PSC's issuance of a CCN *contingent* on ATXI's subsequent provision of required county commission assents was unlawful as it exceeded the PSC's authority.[17]

[15] *In re Ameren Transmission Co*., 2017 Mo. App. LEXIS 244 *7-8.
[16] *In re Ameren Transmission Co.*, 2017 Mo. App. LEXIS 244 *10-11.
[17] *In re Ameren Transmission Co*., 2017 Mo. App. LEXIS 244 *11-12 (emphasis added).

Therefore, the *Ameren Transmission Co*. case does not prohibit the Commission from exercising its authority under §393.170.1 as erroneously declared by the Commission at pages 12, 13, 14 and 15 of its Report and Order. Instead, the court's full and actual analysis can guide this Commission to exercise its own statutory authority to grant an effective CCN. That fully-effective line CCN may include recognition of the independent requirements of certain regulations or statutes, such as §229.100, which are administered by other entities. And the fully-effective line CCN may include reasonable and necessary conditions imposed by this Commission under the authority of §393.170.3. But the effectiveness of the CCN may not depend on the fulfillment of those independent requirements or conditions.

## III. The Commission's reading of the *Ameren Transmission Co.* decision is unlawful and unreasonable because it violates Missouri's statutory scheme, its specialized administrative process and the separation of powers mandated by its Constitution.

### A. The statutory scheme that created and continues to authorize this Commission belies its finding that the *Ameren Transmission Co*. case limits its power to lawfully grant Grain Belt's §393.170.1 line CCN.

"The Public Service Commission Law of the State was enacted on March 17, 1913, and became immediately effective" so that the Commission could "establish[] a public policy for the public good, in the reasonable and nondiscriminatory exercise of delegated police power."[18] And, "[b]y that law [the Commission] is vested with the powers…necessary and proper to carry out fully and effectually all the purposes of the act."[19] Missouri's Constitution prevents the police power from being abridged, and so the Commission in possession of the State's police power is "a fact-finding body whose findings and orders, being prima facie reasonable and

[18] *Kansas City Power & Light Co. v. Midland Realty Co.*, 93 S.W.2d 954, 955-956, 958 (Mo. 1936).
[19] *Columbia v. Public Service Commission*, 43 S.W.2d 813, 815 (Mo. 1931).

lawful, are subject to judicial review in that respect only."[20] The Commission is "intended to have very broad jurisdiction in the field in which it was intended to operate," and regarding electric utilities, the statutes authorize the Commission to approve "any new construction or location even though authorized by municipal franchise" because the statutory scheme is "intended to give the Commission full control over allocation of territory to such utilities, and to authorize either monopoly or regulated competition therein."[21]

This historical deference to the statutory authority of the Commission acting in its field is borne out in the current statutory scheme. The "public service commission shall be vested with and possessed of the powers and duties in [Chapter 386] specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter."[22] Additionally, the "jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under [Chapter 386]: (1) To the…sale or distribution of…electricity…within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to…electric plants, and to persons or corporations owning, leasing, operating or controlling the same."[23] Further, the Commission is authorized to have "general supervision of all…electrical corporations…having authority under any special or general law or under any charter or franchise to lay down, erect or maintain wires…or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of…furnishing or transmitting electricity…."[24]

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[20] *Kansas City Power & Light Co.*, 93 S.W.2d at 958.
[21] *State ex rel. Consumers Public Service Co. v. Public Service Commission,* 180 S.W.2d 40, 44 (Mo. 1944).
[22] §386.040, Revised Statutes of Missouri.
[23] §386.250, Revised Statutes of Missouri.
[24] §393.140(1), Revised Statutes of Missouri.

Based upon the plain language of these statutes, our Legislature clearly intended this Commission, as opposed to any other entity including county commissions, to be the decision-maker regarding the construction and location of a line to transmit electricity across the state. "The primary rule of statutory interpretation is to give effect to the legislative intent as reflected in the plain language of the statute…and by considering the context of the entire statute in which it appears."[25] In the context of the statutory scheme which originated and continues to enable this Commission, the authority to grant an effective line CCN to Grain Belt is vested in this Commission and was not abridged by the Missouri Court of Appeals-Western District in its *Ameren Transmission* Co. decision.

**B. The *Ameren Transmission Co.* decision cannot lawfully or reasonably be read to prevent this Commission from applying the specialized knowledge, experience and administrative process necessary to ensure uniform and non-parochial regulation of utilities for the public benefit.**

This Commission is "a fact-finding body, exclusively entrusted and charged by the Legislature to deal with and determine the specialized problems arising out of the operation of public utilities. It has a staff of technical and professional experts to aid it in the accomplishment of its statutory powers" and it alone is able "to meet changing conditions, as [it] in its discretion, may deem to be in the public interest."[26] Even an appellate court's review of Commission orders is "confined to the question of their lawfulness and reasonableness" because any judicial weighing of the evidence already considered by the Commission would "substitute…the judgment of the court and it becomes the administering body [which would] destroy

[25] *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. 2007).
[26] *State ex rel. Chicago, R.I. & P.R. Co. v. Public Service Commission*, 312 S.W.2d 791, 796 (Mo. 1958).

administration."[27] Indeed, a reviewing court will not "substitute its discretion for discretion legally vested in the [Commission]" because it "oversteps the boundaries of its jurisdiction when it attempts to tell the [C]ommission what the action should be."[28]

Given that an appellate court reviewing this Commission's orders will not violate its administrative expertise, the Commission's finding that the *Ameren Transmission Co*. Court elevated a single county commission over that expert administrative process is simply unlawful and unreasonable. The *Ameren Transmission Co*. Court would have been aware of "the very purpose of regulation by state agencies [which] is to secure uniformity of operating conditions among similar utilities and to save the economic waste that…impairs the public service."[29]

### C. The *Ameren Transmission Co*. case cannot lawfully or reasonably be read to violate the judiciary's Constitutionally-grounded deference to this Commission as an agency of the Executive.

The Missouri Constitution decrees that:

> The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.[30]

The doctrine of separation of powers, set out above in our state Constitution, is "vital to our form of government…because it prevents the abuses that can flow from centralization of

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[27] *State ex rel. Chicago, R.I. & P.R. Co*., 312 S.W.2d at 793-794. *See also, State ex rel. Kansas City Power & Light Co. v. Public Service Commission,* 76 S.W.2d 343, 354 (Mo. 1934)(The ruling as to which of two electric companies would be granted the CCN to construct an electric transmission line "was wholly an administrative matter peculiarly within the discretion of the Commission.")

[28] *State ex rel. Chicago, R.I. & P.R. Co*., 312 S.W.2d at 795.

[29] *State ex rel. Detroit-Chicago Motor Bus Co. v. Public Service Commission,* 23 S.W.2d 115, 117 (Mo. 1929)(internal citations omitted).

[30] Missouri Constitution, Article II §1. *See also, Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125, 132 (Mo. 1997)("This provision has appeared in the Missouri Constitution in substantially the same form since 1820.")

power."[31] If a court's order interferes with the lawful authority of an agency of the Executive, then "we should have the singular spectacle of a government run by the courts, instead of the officers provided by the Constitution…and our safety…is largely dependent upon the preservation of the distribution of power and authority made by the Constitution, and the laws made in pursuance thereof."[32]

In its Report and Order, this Commission found that the *Ameren Transmission Co*. Court's ruling operates to transfer this Commission's authority, discretion and expertise regarding §393.170.1 line CCNs to one or more county commissions. This Commission found that the Western District Court of Appeals broadened and elevated the §229.100 authority of a county commission over the rights-of-way of its public roads to primary authority over public property, private property and public utility projects as well. Such reading of the *Ameren Transmission Co*. case is unlawful and unreasonable because it describes a judicial action against an executive agency in violation of the doctrine of Separation of Powers.

## IV. The Report and Order is unlawful and unreasonable because it is grounded, in part, on two Exhibits admitted into the Record of Evidence over MJMEUC's timely Due Process objection.

The law of evidence that governs the Commission's proceedings is found at 4 CSR 240-2.130 and §536.070, Revised Statutes of Missouri. That law of evidence provides MJMEUC, as a party intervenor in this case, with the right to meet and rebut all evidence offered in this case.[33] But, the two documents cited by the Commission at Paragraphs 15 and 16 of its Findings of Fact (Exhibits 375 and 376) were created in an unrelated and closed case to which MJMEUC was

[31] *Missouri Coalition for the Environment*, 948 S.W.2d at 132.
[32] *Albright v. Fisher*, 64 S.W. 106, 108-109 (Mo. 1901).
[33] §536.070(2), Revised Statutes of Missouri.

never a party (EA-2015-0146). Thus, MJMEUC's right to Due Process was violated here as it had no opportunity to meet and rebut the evidence contained within Exhibits 375 and 376.

MJMEUC timely filed its written objection to the admission of these Exhibits into the Record of Evidence on July 28, 2017 (EFIS Docket No. 598). MJMEUC timely made its oral, on-the-record objection to the admission of these Exhibits into the Record of Evidence on August 3, 2017 (Transcript Page 1645, Line 23 to Page 1646, Line 18). The Commission overruled MJMEUC's objections, accepted these Exhibits into the Record of Evidence and violated MJMEUC's right to Due Process by unlawfully and unreasonably grounding its Report and Order on these Exhibits.

## V. The Report and Order is unjust because MJMEUC's members could be deprived, by the delay that will inevitably occur during the appellate courts' reviews of this Report and Order, of the significant benefits four of the five Commissioners found to exist.

Four of the five Commissioners found the Grain Belt Project to be "necessary or convenient for the public service."[34] Specifically, the four Commissioners found the Project "is needed primarily because of the benefits to the members of the Missouri Joint Municipal Electric Utility Commission ("MJMEUC") and their hundreds of thousands of customers…[who] would have saved approximately $9-11 million annually."[35]

But the Report and Order is unlawful and unreasonable, and must thus be subjected to appellate review, and the months or years that will be consumed in that process are likely to cause failure of the Project and denial of the hundreds of millions of dollars of acknowledged benefit to MJMEUC's members over the planned life of the Project. Therefore, the Report and Order operates to confiscate the benefit to MJMEUC that is acknowledged in the Concurring

[34] *Concurring Opinion of Commissioners Hall, Kenney, Rupp and Coleman in the Report and Order*, EA-2016-0358, Dated: August 16, 2017 ("Concurring Opinion").
[35] *Concurring Opinion*, Pages 2-3.

Opinion – it is unjust for the Commission to acknowledge a benefit and then act to deprive the intended recipient of that benefit.[36] The Report and Order is unjust, as well as unlawful and unreasonable, and rehearing is necessary.

**Conclusion**

The Commission's findings of fact and conclusions of law are not supported by substantial and competent evidence on the record as a whole and are grounded in legal error, rendering its Report and Order unlawful, unreasonable, unjust, arbitrary and capricious. On behalf of no less than Centralia, Columbia, Hannibal, Kirkwood, the 35 MoPEP cities, and these cities' hundreds of thousands of citizens, MJMEUC respectfully requests that this Commission grant rehearing of this matter, timely find (as it did in the Concurring Opinion of Commissioners Hall, Kenney, Rupp and Coleman) that the Grain Belt Project is necessary and convenient for the public service and issue to Grain Belt the requested and fully-effective certificate of convenience and necessity.

Respectfully Submitted,

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[36] *See, State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 706 S.W.2d 870, 881 (*Citing St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936)).

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Missouri Joint Municipal Electric Utility Commission's Application for Rehearing was served by electronically filing with EFIS and emailing a copy to the following interested persons on this 25th day of August, 2017:

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