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	)	Case No. EA-2016-0358

PUBLIC VERSION

** Indicates confidential information has been removed**

INITIAL POST-HEARING BRIEF ON REMAND OF THE MISSOURI LANDOWNWERS ALLIANCE, SHOW ME CONCERNED LANDOWNERS, CHARLES AND ROBYN HENKE, R. KENNETH HUTCHINSON, RANDALL AND ROSEANNE MEYER, And MATTHEW AND CHRISTINA REICHERT

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1. <u>Introduction.</u> For the reasons discussed below, the Eastern Missouri Landowners Alliance d/b/a Show Me Concerned Landowners ("Show Me") and the Missouri Landowners Alliance ("MLA") respectfully ask the Commission to deny the Certificate of Convenience and Necessity ("CCN") being sought in this proceeding by Grain Belt Express Clean Line LLC ("Grain Belt").[1]

2. <u>Commission's authority to issue the CCN</u>. From the outset of this case, Show Me has argued that the Commission does not have the statutory authority to issue a CCN to Grain Belt.[2] The basic argument is that the Grain Belt project is not an "electrical corporation" as defined in Section 386.020(15) RSMo, and therefore may not be issued a CCN as an "electrical corporation" under Section 393.170.[3]

Show Me's argument is based on Missouri case law, which for years has consistently found that in order to qualify as an "electrical corporation" under the Public Service Commission statutes, the facilities in question must be devoted to the "public use." Under Missouri case law, the Grain Belt project fails to meet this test. And because the Commission does not have the statutory authority to issue the CCN to Grain Belt, it lacks the jurisdiction to do so.[4]

[1] This brief is being filed on behalf of all of the parties named on the cover page. For convenience, all of the individual interveners (which does not include Show Me) will be referred to collectively in this brief under the name MLA.
[2] Show Me's original Position Statement, p. 1 (EFIS 306); Show Me's Initial Post-Hearing Brief, pp. 4-9 (EFIS 528).
[3] All statutory references are to the Missouri Revised Statutes (2016) as amended.
[4] *Overman v. Southwestern Bell Telephone Co.,* 706 S.W.2d 244, 252 (Mo. App. 1986) ("Our Supreme Court has consistently adhered to the rule or principle that the Public Service Commission is a body of limited jurisdiction and has only such powers as are conferred upon it by statute….")

One component of Show Me's argument is that Grain Belt will not be selling any service to retail customers in Missouri.[5] Instead, it will sell the capacity on its line both to wind generators on the Kansas end of the line, and to load-serving entities (e.g., Ameren or municipal systems) which will take capacity at or near the converter stations in Missouri and Illinois.[6] So the project will provide only wholesale electric transmission service in Missouri – as opposed to retail service.

In addition, Grain Belt's rates will be subject to regulation by the FERC, which has already granted Grain Belt the authority to enter into bilateral negotiations with potential customers for its capacity charges, for up to 100% of the line's capacity. If the project is completed, the line would then be subject to an RTO's FERC-approved rate schedule filed under an Open Access Transmission Tariff.[7] Thus the line will never be subject to rate regulation by this or any other state commission.[8]

And in its Application to this Commission for the CCN, Grain Belt confirmed its position that its "services will be provided to the wholesale energy market at freely negotiated rates."[9] Mr. Zadlo testified that until the Open Access Transmission Tariff is eventually filed, Invenergy likewise plans to set its capacity charges through negotiations with individual customers.[10]

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[5] Direct Testimony of Mr. Michael Skelly, Ex. 100, p. 24 lines 15-18 (EFIS 35). *See also* Grain Belt's Application in this case (EFIS 34) at p. 29, par. 76 and p. 30 par. 78. In addition, inasmuch as Grain Belt has made it clear it is not applying for an area certificate in this case, it could not sell at retail in this state even if it desired to do so.
[6] *See* Application (EFIS 34) p. 8, pars 15, 16 and 18.
[7] *See* par. 3 of FERC Order cited by Mr. Skelly at Exh. 100, p. 24, f.n. 7 & 9.
[8] *Id.* at p. 8, par. 16.
[9] Application (EFIS 34) p. 18 par. 47.
[10] Supplemental Direct, Exh. 145, p. 8 lines 6-11. *See also* Tr. Vol. 22, p. 2040 line 16 – p. 2041 line 1, and p. 2044 lines 4-12.

As the words imply, bilateral negotiations simply mean a one-on-one negotiation between the transmission company and an interested customer.[11]

For example, as the projected in-service date of the line began to slip, in July of 2018 MJMEUC approached Grain Belt about a reduction in the rates they had negotiated earlier. As a result of further negotiations between the two parties, MJMEUC received a 30% reduction in its second 100 MW of capacity.[12]

And as would be expected when a utility is allowed to negotiate individual rates with its customers, the rates for those customers are bound to differ. As Mr. Zadlo explained, under FERC regulation, two somewhat similar, nearly identical customers, could end up with two different rates as a result of the negotiating process.[13] One cause for the differences in rates, in Mr. Skelly's words: "if you get in early, you often get a better deal."[14]

In addition, in its application to the FERC Grain Belt noted that the criteria used in its selection of customers would include the amount of capacity and the minimum term of service for which the customer would be willing to sign.[15] On its face these criteria provide inherent advantages to larger customers over smaller customers, without regard to the actual cost of serving each category.

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[11] Testimony of Grain Belt witness Suedeen Kelly, Tr. Vol. XII, p. 517, lines 7-11.
[12] Tr. Vol. 24, December 19, 2018, p. 2115 line 1 – p. 2116, line 19.
[13] Tr. Vol. 22, page 2038 line 222 – page 2039 line 9.
[14] Tr. Vol. 10, p. 204, lines 6-7.
[15] Application from Grain Belt to the FERC, p. 18, cited by Mr. Skelly at Exh. 100, p. 24 f.n. 7.

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Based on the foregoing, these truths are self-evident. First, the Grain Belt line will not be selling its services to retail customers in Missouri. Second, Grain Belt has been authorized by the FERC to sell 100% of its capacity at wholesale to buyers (such as wind farms or load-serving utilities) at rates which are to be negotiated between the buyer and seller. Third, as an expected outcome of establishing rates through bilateral negotiation, Grain Belt's customers will be paying different rates for capacity on the line – even for service from the same beginning and end points. Based on these facts, case law in Missouri tells us that the Grain Belt project is not an "electrical utility" in the sense that term is used in the CCN statute, Section 393.170.

The first case to address this matter was issued just 5 years after passage of the Public Service Commission Act in 1913: *State ex rel. M. O. Danciger & Co. v. Pub. Serv. Comm'n of Mo.*, 205 S.W. 36 (Mo. 1918).[17] The defendant in that case, Danciger, was a close affiliate of a brewing company, in Weston, MO, which had installed electric generation to light its facilities and to operate a large part of the machinery used in its brewing process.[18]

The brewery found that it had excess capacity from its generating facilities, and through its affiliate Danciger began selling electricity to customers within a three block radius from the brewery. Eventually, Danciger was selling electricity at varying rates to

[16] *See* Revised Staff Supplemental Rebuttal Report, Exh. 208, p. 12.
[17] As to the date of the passage of the Public Service Commission Act, see *Danciger* at 39.
[18] *Danciger* at 37.

the town of Weston, to between 20 and 30 other businesses, and to some 10 individual residences.[19]

Defendant Danciger later discontinued service to several of its customers, who filed a complaint with the Commission. The Commission found that by reason of its operations, Danciger was a regulated public utility, and ordered that the service be restored.[20]

On appeal, the state Supreme Court reversed that decision. There, as with Grain Belt, the key issue was whether the company in question was or was not an "electrical corporation", as that term is defined in what is now Section 386.020(15).[21]

In perhaps the key finding by the Court, it ruled that although the statutory definition of an "electrical corporation" includes no specific reference to public use, or to the necessity that the sale of the electricity be to the public, "it is apparent that the words 'for public use' are to be understood and to be read therein."[22]

The question, then, was what constitutes the supply of electricity for "public use", thereby qualifying the entity as an "electrical corporation." In answering that question, the Court began with an obvious but critical point: a company either is or is not a public utility. If it is, then it is subject to the entire purview and regulation of the Commission, including the authority of the Commission to compel the company to provide service to all residences and businesses in the area where it provided service.

Similarly, if Grain Belt is an "electrical corporation" under the definitional provision of Section 386.020(15), and under the CCN Section 393.170, then it must

[19] *Id. at 37-38.*
[20] *Id.* at 39-40.
[21] The current version of that statute is essentially unchanged from that at issue in *Danciger, Id.* at 39.
[22] *Id.* at 40.

necessarily be an "electrical corporation" as well for purposes of say Section 393.130.2. That statute states as follows:

> No … electrical corporation … shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for … electricity … except as authorized in this chapter, than it charges demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

Thus if Grain Belt is indeed an "electrical corporation", its negotiation of different rates for similarly situated customers would certainly be in violation of this statute, and no doubt others as well.

But for Danciger, the court found no need to even address such hypothetical violations. Instead, it concluded that Danciger's business did not make it a "public utility", because state regulation of private property can be had only pursuant to the police power. And that power is bottomed on and wholly dependent upon the devotion of private property to a public use. Because there (as here) the property was not devoted to a public use, the entity could not be subject to any regulation by the Commission.[23] Or as the Court stated, "there is in this case no explicit professing of public service, or undertaking to furnish lights or power to the whole public, or even to all persons in that restricted portion thereof who reside within three blocks of the Company's plant….[24]

The Court went on to find that its decision on this issue was supported by a majority of appellate court decisions from other states. It then punctuated its ruling by

[23] *Id.* at 40.
[24] *Id.*

relying upon this passage from what it called an "excellent work on Public Service Corporations":[25]

> That the business of supplying gas is public in character is now universally recognized, provided that the company supplying is committed to supplying gas to the community in general. But the case can be imagined of an institution with a generating plant for its own supply, which might even supply one neighbor, without being obliged to sell to all others. In the same way the business of supplying electrical energy has generally been recognized as public in character. <u>There are, however, several cases where the company supplying electricity has not professed to sell to the public indiscriminately at regular rates, but has from the beginning adopted the policy of entering into special contracts upon its own terms; such companies are plainly engaged in private business.</u> (emphasis added)

The last sentence precisely describes the proposed operation of the Grain Belt line.

A second case on point is *State ex rel. Buchanan County Power Transmission v. Baker,* 9 S.W.2d 589 (Mo. banc 1928). There, the relator operated a single transmission line between a generation source and the purchaser of the electricity: the St. Joseph Railway Light, Heat and Power Co. The relevant issue was which state taxing authority had the right to tax the transmission line, which in turn depended upon whether or not the line was a "public utility."[26]

One of the taxing authorities argued that while the line did not serve the public individually, "it is certainly an important link in the distribution of electric energy to the people of St. Joseph, Missouri." Relying extensively upon *Danciger,* the court disagreed, finding as follows: "the mere purchase, transmission and sale of electric energy, a

[25] *Id.* at 41.
[26] *State ex rel. Buchanan County Power Transmission Co.,* at 591.

commercial product, without more, contains no implication of public service. On the showing made it must be held that relator is not a public utility."[27]

Another case on point is *Palmer v. City of Liberal*, 64 S.W.2d 265 (Mo. 1933). There, a generating company (the Cardin Company) supplied electricity to the city of Liberal, and the city in turn sold the power to its individual citizens. The Court ruled that under these circumstances the generating facility was not an electrical corporation which required a CCN from the Commission. As the Court stated: "The Cardin Company does not propose to deal with the public, but only to furnish the city of Liberal with electric current. It is not dealing with the public and it would not be necessary for the Public Service Commission to give a certificate of convenience and necessity before it can start operating in this State."[28]

Similarly, while Grain Belt might be selling some of its capacity to MJMEUC, which in turn sells to its member utilities, which in turn sell to the end-use customers, Grain Belt itself is not dealing with those end-use customers. Accordingly, as in *Palmer,* Grain Belt is not authorized to obtain a CCN from the Commission.

While the above three cases are not of recent vintage, they certainly have not been overruled or criticized on the basic principles underlying those decisions. In fact, a 2009 decision from the Western District stated that "The statutory provisions on which *Danciger* relied remain largely unchanged today, and more recent decisions continue to cite and follow *Danciger's* holding…."[29]

Perhaps the closest judicial decision on point is from Illinois, in a case which involved the question of whether the Rock Island Clean Line (a sister line of Grain Belt)

[27] *Id.* at 592.
[28] *Palmer,supra,* at 268.
[29] *Hurrican Deck Holding v. Pub. Serv. Comm.,* 289 S.W.3d 260, 264 (Mo. App. 2009).

was or was not a "public utility" under Illinois law. *Illinois Landowners Alliance v. Illinois Comm. Comm'n,* 60 N.E.3d 150 2016).[30] In finding that the proposed line was not a "public utility", the Court held that "A private company that provides public utility services according to its own terms and conditions does not meet the statutory definition of a public utility."[31]

Furthermore, the court found that in order to qualify as a public utility, the entity must offer its assets for public use without discrimination. The Rock Island line "is not for public use without discrimination."[32]

Finally, in reaching its decision, the Court relied in part on an earlier case which had found that the Mississippi River Fuel company did not qualify as a public utility. That company sold natural gas through individual contracts with 23 private industrial retail customers, as well as to 2 public utilities which resold the gas to its retail customers. In relying on the *Mississippi River Fuel* case, the Court noted the following: the company's contracts were not based on fixed rates, and instead varied as to terms and conditions; and that the company's act of selling gas to a limited group of customers could not be characterized as "public use."[33]

Perhaps the strongest support for Show Me's position on this issue comes from Grain Belt itself. In the 2016 proceedings, the MLA proposed a condition to the CCN which would require that Grain Belt voluntarily submit to the Commission's jurisdiction before selling or otherwise disposing of its assets.[34] According to the MLA, it was not

[30] This case was subsequently transferred to the Illinois Supreme Court, which agreed, on the basis of a second theory embraced by the Appellate Court, that the Rock Island line was not a "public utility". *Illinois Landowners Alliance v. Illinois Comm. Comm.,* 90 N.E.3d 448 (2017)
[31] *Id*. at 60 N.E.3d 159.
[32] *Id.*
[33] *Id.*
[34] MLA's Initial Post-Hearing Brief, EFIS 537, p. 82.

entirely clear whether Grain Belt was or was not subject to Section 393.190, which requires Commission approval for the sale of facilities by "electrical corporations".[35]

Grain Belt rejected the MLA's proposal. Although Section 393.190 specifically applies to the sale of assets by an "electrical corporation", Grain Belt's position was stated, unambiguously, as follows: "there is also no basis for this Commission to approve the sale of assets under Section 393.190 for a company like Grain Belt Express which will provide wholesale transmission service by means of an interstate transmission line pursuant to market-based rates overseen by FERC."[36]

If Grain Belt is not an "electrical corporation" for purposes of Section 393.190, as it so adamantly claimed, then obviously it cannot be an "electrical corporation" under the statute providing for the grant of a CCN – Section 393.170. Accordingly, Grain Belt has explicitly conceded the point being raised here by Show Me.

In addition to the rationale of *Danciger* and the other cases cited above, Grain Belt does not come within the jurisdiction of the Commission for a second reason as well. Because Grain Belt will be engaged in the interstate transmission of electricity, from Kansas to Indiana, it is not subject to the Commission's jurisdiction for any purpose, including the grant of a CCN.

On this point, Section 386.250(1) provides, in part, that the jurisdiction of the Commission extends only to the manufacture, sale or distribution of electricity "within the state."

And Section 386.030 also provides as follows:

> Neither this chapter, nor any provision of this chapter, except when specifically so stated, shall apply to or be construed to apply to commerce

[35] *Id.* 82-83.
[36] Reply Brief of Grain Belt, EFIS 545, p. 43.

> with foreign nations or commerce among the several states of this union, except insofar as the same may be permitted under the provisions of the Constitution of the United States and acts of Congress.

Instead, jurisdiction over Grain Belt's interstate transmission facilities has been delegated to the FERC under the Federal Power Act. See 16 U.S.C. § 824(b), stating that "The provisions of this subchapter shall apply to the transmission of electricity in interstate commerce and to the sale of electric energy at wholesale in interstate commerce …. The [FERC] shall have jurisdiction over all facilities for such transmission or sale of electric energy…."

And as the U.S. Supreme Court has stated, "transmission on the interconnected national grids constitute transmissions in interstate commerce."[37] The Court further noted that the FERC has exclusive jurisdiction over unbundled transmission of electricity under the Federal Power Act, and that such transmissions have "never been subject to regulation by the states."[38]

Inasmuch as Grain Belt would clearly be engaging in interstate commerce,[39] the Commission has no authority or jurisdiction over Grain Belt's interstate operations unless such authority has been specifically granted to it by state law.[40]

Show Me is unaware of any state law which purports to confer such authority. In fact, Sections 386.030 and 386.250(1), *supra,* demonstrate just the opposite intent on the part of the Missouri legislature. This is in accord with the accepted rule regarding

[37] *New York v. Federal Energy Regulatory Commission,* 535 U.S. 1, 16 (2002).
[38] *Id.* p. 21.
[39] See, e.g., the handout of slides distributed by counsel for Grain Belt during opening statement at the hearing on December 18, 2018, page 2: CCN seeks authority to build the Missouri portion "of an interstate transmission project." See also Grain Belt's response, quoted above, regarding the lack of Commission jurisdiction over the sale of its interstate transmission line.
[40] See *State ex rel. MoGas Pipeline, LLC v. Pub. Serv. Comm'n,* 366 S.W.3d 493, 498 (Mo. 2012).

interstate transmission of natural gas: that this Commission has no authority to regulate such pipelines.[41]

This jurisdictional issue was also raised in the courts by Ameren (ATXI) in conjunction with its proposal to build the Mark Twain line.[42] Because the Commission had not yet asserted jurisdiction over the line or over ATXI, the Court of Appeals dismissed Ameren's petition on the ground that it was not ripe for review.[43] Thus the Court never reached the merits of the issue raised there by ATXI, and here by Show Me. And by the time the Court of Appeals issued its decision (on August 11, 2015), ATXI had already filed its Application for the line with the Commission.[44]

Accordingly, the merits of Show Me's jurisdictional issue have never been resolved by the courts or the Commission in a litigated issue involving either Grain Belt or ATXI.

Based on the foregoing arguments, Show Me respectfully asks the Commission to reject Grain Belt's request for the CCN on the ground that it lacks the statutory authority and thus the jurisdiction to do so.

3. **The five Tartan Criteria**. The headings for the five criteria used below are identical to those used in the Tartan case itself.[45]

(1) Need for Service. In its Initial Brief in the 2016 proceedings, the MLA addressed at length the first of the Tartan criteria: the need for the Grain Belt service.[46]

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[41] *State ex rel. Mo. Pub. Serv. Comm. v. Missouri Gas Co.,* 311 S.W.3d 368, f.n.3 (Mo. App. 2010).
[42] *See Ameren Transmission Company of Illinois v. Pub. Serv. Comm.,* WD78141, (Mo. App. August 11, 2015). (slip op. at 2)
[43] *Id.* at 6-7.
[44] *In re Application of ATXI,* Case No. EA-2015-0146 (April 27, 2016) indicating at page 4 of the Report and Order that the Application was filed with the Commission by ATXI on May 29, 2015.
[45] *In Re Tartan Energy,* GA-94-127, 3 Mo.P.S.C.3d 173 (1994), slip op. at pp. 10, 12, 14, 16 and 23 (hereafter the "*Tartan* Case").
[46] Initial Brief at EFIS 537, pp. 5-35.

However, in the Concurring Opinion of August 16, 2017, four of the sitting Commissioners disagreed with the MLA's analysis on this point.[47] That Concurring Opinion is of course not binding on any of those Commissioners in reaching their final decision after the remand. Nevertheless, rather than reiterate arguments which apparently have already been rejected, the MLA will only address matters here which have strengthened its position since the 2016 proceedings.

In these past two years, Grain Belt has not managed to secure even one additional contract for the purchase of one additional MW of capacity on its line. This applies not only to the KS-MO segment of the line, but the KS-PJM section as well.[48] In addition, it has not even secured a single non-binding MOU for any portion of its line.[49]

Further, the other two major Clean Line projects designed to move wind generation to load centers in the east (the Plains and Eastern Line and the Rock Island Line) both collapsed without any evidence that any party had signed a contract or even an MOE for capacity on those lines.[50] As is readily apparent, the Clean Line business model is failing in large part because it is unable to attract any customers except at below-cost, discounted rates, which cannot possibly sustain the construction of the project.

Based on the evidence from the last two years, the MLA respectfully suggests that potential customers (such as Ameren) continue to shown no interest in buying capacity on the Grain Belt line at rates which would sustain the project. And without additional customers, paying at above-cost rates, there is no meaningful need for the line.

[47] Concurring Opinion at EFIS 606, p. 2-4.
[48] Tr. Vol. 22 p. 1858 lines 15-18.
[49] *Id.* at p. 1858 line 19 – page 1859 line 2.
[50] Tr. Vol. 22 p. 1839 line 23 – p. 1841 line 10; p. 1843 line 1 – page 1844 line 13.

(2) Applicant's Qualifications. The second criterion concerns the Applicant's qualifications to build the line. And of course the Applicant here is Grain Belt Express. However, with Clean Line as its ultimate parent, throughout this case all of the parties have in essence looked to Clean Line's qualifications to build the project in addressing this issue.

With the contingent sale of the line to Invenergy, the question is whether to continue to look to the qualifications of Grain Belt and Clean Line, or look instead to those of Invenergy.

In deciding this second issue in the *Tartan* case, the Commission looked to the qualifications of three individuals with partial ownership of Tartan Energy, as well as the qualifications and experience of various companies with an ownership interest in the Tartan project.[51] That analysis would be consistent with analyzing the qualifications of the Clean Line employees when deciding the issue of Grain Belt's qualifications. In both cases, the actual Applicant clearly had the resources of its parent companies and affiliates at their disposal.

However, it is another matter altogether to decide this issue on the basis of the qualifications of Invenergy. That company is not the Applicant here. Nor does it have any ownership interest in the Grain Belt project at this point. And as discussed later under criterion (4), it would be speculative to assume that Invenergy will ever own the Grain Belt project – at least in the form it has been described to the Commission over the past 5 years or so. Therefore, the people at Invenergy may or may not be available to see the project through to completion. Moreover, to look to the qualifications of a party which is not the Applicant, and does not even have an ownership interest in the

[51] *Tartan* case, slip op. p. 12-14.

Applicant, would be contrary to the very rationale behind this issue as established twenty-five years ago in the *Tartan* case.

In his direct testimony in the 2016 proceedings, Mr. Skelly presented what appeared on paper at least to be an impressive list of the top fourteen people on Clean Line's management team.[52] In fact, no party seriously challenged the qualifications of Clean Line to complete the project. But that reluctance has disappeared over the past two years, just as Clean Line's own qualifications have faded dramatically over that same time period.

At one point, according to Mr. Skelly, Clean Line had approximately 50 employees.[53] Now it has none.[54] Likewise, neither of Clean Line's Grain Belt subsidiaries has any employees either.[55] Mr. Skelly has resigned as CEO of Clean Line, meaning that as Chairman of the Board he is only officer left in the company.[56]

Given that Clean Line no longer has any employees, gone also are the 14 top members of the Clean Line management team touted by Mr. Skelly in the 2016 proceedings. Mr. Detweiler originally told the MLA in answer to a data request that Clean Line had an arrangement with five of these former employees (including himself) to come back to assist Clean Line if so called upon.[57] That answer, however, was later revised in a supplemental response to the MLA data request. As Mr. Detweiler testified,

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[52] Exhibit 100, Schedule MPS-2.
[53] Tr. Vol. 22, p. 1837, lines 9-11.
[54] *Id.* p. 1836, lines 17-19.
[55] *Id.* p. 1837 lines 17-22.
[56] *Id.* p. 1838, lines 16-22.
[57] Tr. Vol. 23, p. 1987 unnumbered line 18 – page 1988 line 14.

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It is of course speculative as to how much help Clean Line would actually receive, given that these individuals now have positions elsewhere, and that it could be years before this issue ever comes into play. In any event, the potential for assistance at some later date from four former employees hardly constitutes a qualified Applicant.

Finally, Clean Line has conceded that it is not even looking at this point to hire any new employees.[60] It is obviously content to leave everything in the hands of Invenergy.

If the Commission follows its precedent from the *Tartan* case, inasmuch as the Applicant and its parent company have no employees at all, the Applicant obviously cannot have employees who are qualified to complete the Grain Belt project.

(3) Applicant's Financial Ability. For the reasons discussed in the preceding section, the MLA contends that this criterion should be decided on the basis of the

[58] *Id.* at 1988 lines 4-14. Mr. Detweiler went on to say he is presently under contract to Invenergy, but that the two parties are discussing whether or not he will stay on in some capacity. Tr. Vol. 24, p. 2148, lines 7-12.
[59] *Id.* at p. 1989 line 19 – p. 1990 line 13.
[60] Tr. Vol. 22, p. 1839, lines 10-12.

financial ability of the Applicant (Grain Belt and Clean Line) as opposed to Invenergy. This would again follow the precedent set in the *Tartan* case, where the Commission looked only to the financial ability of the Applicant and its parent companies.[61]

If the Commission agrees, then resolution of this issue is quite simple. The two witnesses from Invenergy estimated that the cost of getting through the remainder of the development phase of the project (i.e., to the point at which the project owner could reasonably expect to approach institutional investors for construction loans) will amount to an additional $50 to $100 million.[62]

** [63] [64] [65] **[66] So as Mr. Berry acknowledged, Clean Line simply does not have the cash to complete the development phase of the project.[67]

We do not know why Clean Line did not or could not raise the additional money to complete the development phase from existing or new investors, as opposed to selling

[61] *Tartan* case, slip op. pp. 14-15.
[62] Testimony of Ms. Andrea Hoffman, Tr. Vol. 22, page 2011 line 19 – page 2012 line 2; testimony of Mr. Kris Zadlo, *Id.* at p. 2067 lines 19-24. This figure should not be confused with the $2 million estimate for development costs up to the point when Invenergy/Grain Belt secure Kansas and Missouri approvals. See Tr. Vol. 22 page 2074 lines 12-21.
[63] Tr. Vol. 23 p. 1872, lines 2-14.
[64] *Id.* at p. 1872 line 22 – p. 1873 line 5.
[65] ** **.
[66] See Tr. Vol. 23 p. 1871 lines 2-9; and Tr. Vol. 24, p. 2096, line 19.
[67] Tr. Vol. 22, p. 1922 lines 1-3.

the entire project. However, any reluctance to further invest in Clean Line on the investors' part would be understandable. ** _____

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The MLA respectfully contends that the dramatic downturn in Clean Line's financial situation means the Applicant no longer meets the third of the *Tartan* criteria.

(4) Economic Feasibility of Proposal. The question here is whether the proposed project makes sense from an economic standpoint; i.e., will it generate enough revenue to make the project worthwhile.[71]

In the 2016 proceeding the MLA demonstrated that the Missouri portion of the project, standing on its own, was in all likelihood not economically feasible. For example, ** _____

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[68] Tr. Vol. 11 p. 249 lines 5-15.
[69] Tr. Vol. 23, page 1872, lines 15-21; *Id.* at p. 1869, lines 21-22.
[70] *Id.* at p. 1869, lines 5-11.
[71] See Tartan Case, slip op. pp. 16-23; *In re Application of Transource Missouri,* EA-2013-0098, 23 Mo. P.S.C. 3d 160, 164 (2013) (stating that in CCN cases, public convenience and necessity "means that an additional service would be an improvement that justifies the cost.")
[72] Tr. 857 line 16 – 859 line 13.

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And these numbers have deteriorated even further since the 2016 proceeding. MJMEUC was able to negotiate a reduction in the cost of the second 100 MW, such that the total revenue paid to Grain Belt will now be 17.6% lower than under the original contract.[74] In addition, ** _____

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_____**[75] Accordingly, as Staff concluded, "the MJMEUC or Realgy contracts are not sufficient demonstration of participant funding to satisfy the economic feasibility Tartan Criteria."[76]

The Concurring Opinion of August 16, 2017 seemingly did not dispute the idea that the Missouri portion of line, by itself, was not economically feasible. The Commissioners found, instead, that "it is the 3500 MW portion of the project to be sold in PJM that demonstrates the financial viability of the project overall…."[77]

Based on the then-current status of the project, that conclusion seemed logical at the time. In particular, at the time of the 2016 proceedings Grain Belt had secured permission to build the line from the regulatory authorities in Kansas, Illinois and

[73] Tr. 860 line 14 – 862 line 2.
[74] Testimony of Mr. Grotzinger, Exh. 480, p. 1 line 25 – page 2 line 14.
[75] Revised Staff Supplemental Rebuttal Report, Exh. 208, p. 12.
[76] Id.
[77] Concurring Opinion (EFIS 606) p. 4.

Indiana, leaving Missouri as the only state holding up access to the PJM market.[78] But that is no longer the case.

The Kansas proceedings. Permission to build the line in Kansas was initially granted by the Kansas Corporation Commission (KCC) on November 7, 2013.[79] However, this permission was granted on the condition that Grain Belt would begin construction of the line within five years.[80] As the deadline of November 7, 2018 approached, with no construction in sight, Grain Belt filed a motion to extend the 5 year sunset provision.[81]

In his Supplemental Direct testimony, Mr. Detweiler informed this Commission that the KCC had issued an order on October 4, 2018 which extended the term of the original siting permit to March 1, 2019, and that Grain Belt was seeking a further extension until November 7, 2023.[82]

While Mr. Detweiler mentioned the short extension granted by the KCC in its order of October 4, 2018, he did not provide an actual copy of that order with his testimony. Nor did he mention in his testimony that in that Order the KCC made the following "findings": that intervener Matthew Stallbaumer filed a protest to Grain Belt's application for the extension of the sunset date; that Mr. Stallbaumer alleged Grain Belt's financial ability to build the line and its managerial ability to run the line need to be reevaluated; that despite Grain Belt's rebuttal to those claims, the KCC also found "Stallbaumer's concerns regarding Grain Belt's financial, managerial and technical ability to compete the Project compelling based on Stallbaumer alleging: (1) many of

[78] Direct Testimony of Mr. Skelly, Exh. 100, p. 22 lines 5-7.
[79] Id. at lines 14-16.
[80] Tr. Vol. 22, p. 1971, lines 6-9.
[81] See *Id.* lines 13-20.
[82] Exh. 144, p. 3 lines 1-6.

Grain Belt's employees have left the Company and (2) Grain Belt has recently sold its non-transmission assets to ConnectGen."[83] Accordingly, the KCC directed its staff to file a Report and Recommendations evaluating Grain Belt's financial, managerial and technical ability to complete the project.[84]

Approximately a month after Mr. Detweiler filed his testimony with this Commission, the KCC issued an Order suspending the procedural schedule established in its Order of October 4, 2018. This latest Order extended the sunset date until November 2, 2019 in order to allow the KCC to consider the proposed acquisition by Invenergy.[85] However, this Order did nothing to revoke or modify the KCC's earlier findings concerning the compelling claims of Mr. Stallbaumer about Grain Belt's ability to complete the project.

The bottom line is that Grain Belt and Invenergy now have until December 2 of this year to make their case with the KCC, which is looking into questions similar to those raised in this case by the MLA. And of course the Grain Belt project cannot possibly be economically feasible unless it gains the approval of the KCC.

The Illinois proceedings. The situation for Grain Belt in Illinois involves obvious uncertainty on a number of levels. Although the Illinois Commerce Commission (ICC) gave Grain Belt permission in 2015 to build the line in that state, that decision was reversed on March 13, 2018 by the Fifth District of the Appellate Court of Illinois.[86]

The basis for the ruling was that Grain Belt did not meet the state's definition of a "public utility", in that it did not own, control, operate, or manage any utility facilities in

[83] Supplemental Rebuttal Testimony of Julia Kisser, Exh. 379, Sch. JK-1 par. 9, 10, 15, & 16.
[84] *Id.* at par. 19.
[85] Exh. 148; and see Tr. Vol. 22 p. 1966 line 14 – page 1967 line 6.
[86] *Concerned Citizens & Property Owners v. Illinois Commerce Comm'n*, 2018 IL App. (5th) 150551 (April 17, 2018)

Illinois.[87] Mr. Detweiler seems to believe that this problem can be cured by simply purchasing utility assets, such as the land for the Illinois converter station.[88]

That may or may not satisfy the ICC, much less the Illinois courts. As discussed under issue number 1 above, in overturning an ICC certificate to the Rock Island line, the Third District of the Appellate Court ruled that the project could not be granted a certificate on two separate grounds, one being that the project did not propose to offer its services for public use without discrimination.[89]

So even if the ICC does grant the requested certificate on Grain Belt's second try, there clearly is a distinct possibility that the Fifth District (which ruled on the earlier Grain Belt case) would follow the same reasoning applied earlier by the Third District in the Rock Island case. If it does, it is logical to assume that the Grain Belt line would suffer the same fate as the Rock Island line, in that both operated in accordance with the Clean Line model: as a private company that provides services according to its own terms and conditions.[90]

If Grain Belt/Invenergy can somehow overcome these legal problems, it is not likely to do so in the immediate future. In its last case at the ICC, Grain Belt filed its Application on April 10, 2015.[91] And even with an expedited schedule at the ICC, the final decision from the Appellate Court was not issued in that case until about three years later. [92] As Mr. Skelly observed, "it is impossible to predict how long regulatory processes will take."[93]

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[87] See e.g. *Id.* at ¶ 19.
[88] Exh. 144, p. 3 lines 11-p. 4 line 2.
[89] *Illinois Landowners Alliance v. Illinois Comm. Comm'n,* 60 N.E.3d 150 (2016).
[90] See *Id.* at 159.
[91] *Concerned Citizens, supra,* slip op. p. 2 ¶ 3.
[92] *Id.* at p. 1.
[93] Tr. Vol. 22, p. 1861 lines 15-16.

And that statement is based on experience. In its Application to the FERC to sell at negotiated rates, Docket ER14-409, Grain Belt told the FERC that it expected to have the project completed and in service by as soon as 2018; i.e., sometime last year.[94]

It is not clear when Grain Belt will even file a new Application in Illinois. And if they do eventually succeed there, it is certainly not clear when the year or so of additional development, and the projected four years of construction, might finally come to an end.[95] If all goes well for Invenergy, they might have the line completed in another eight years or so. In the meantime, changing circumstances will continue to challenge the viability of the project.

And at this point, the final acquisition of a certificate from the ICC is far from the only uncertainty involving the project in Illinois. Only two conditions must be met before Invenergy is obligated to purchase the Grain Belt project: approvals of the Kansas Commission and this Commission. Closing is not dependent upon approval by the Commission in Illinois.[96] So Invenergy could well end up owning the Grain Belt project, yet never receive permission to build the section of the line providing access to the PJM market. What happens then?

According to Mr. Zadlo, Invenergy would need to come back to this Commission with a new plan, which most likely would mean the line would terminate somewhere in Missouri.[97] And of course without the ability to reach the PJM market, Grain Belt has provided no evidence to prove that the line is economically feasible.

[94] See Grain Belt's Application to FERC p. 5, cited by Mr. Skelly at Exh. 100 p. 24 f.n. 7.
[95] *See* Supplemental Direct of Mr. Zadlo, Exh. 145, p. 12 lines 6-8.
[96] Tr. Vol. 22, p. 2035 lines 6-21.
[97] Tr. Vol. 22, p. 2035 line 22 – p. 2036 line 5.

Mr. Zadlo seemed to suggest that instead of terminating the line in Missouri, they could take it north or south, presumably meaning north or south of Illinois, and presumably terminating the line somewhere near the proposed converter station in Clark County Illinois, near the Indiana boarder.[98] If Mr. Zadlo really intended to present those scenarios as potential alternatives to terminating the line in Missouri, they would have little chance of success.

In order to go north of Illinois, the line would presumably be rerouted north in Missouri, then pass through Iowa, Wisconsin and even Lake Michigan, necessitating numerous additional consents and routing studies along the way.

Going south of Illinois presumably would mean rerouting the line south within the state of Missouri to a point somewhere near Cairo, Illinois, then going north through Kentucky and Indiana, until finally reaching a point near the converter station in Clark County, Illinois – a total distance of roughly 450 miles.[99] And without a certificate from Illinois, presumably the converter station would need to be redesigned, and moved out of that state. And that in turn would seemingly require starting anew with the process of gaining permission for the interconnection with PJM.

So Mr. Zadlo's initial response is likely what we would see if they cannot obtain approval from the Illinois Commission: termination of the line somewhere in Missouri. Actually, even aside from the problems of certification in Illinois, Mr. Zadlo testified there could be additional circumstances as well where they would not extend the line beyond Missouri.[100] In fact, the possibility of not extending the line into Illinois was

[98] *Concerned Citizens, supra, p. 2* ¶ 3.
[99] Based on data from Google maps, assuming the line is rerouted from Ralls County, Missouri, where it is to cross the river into Illinois, to Cairo, IL, and then north to the county seat of Clark County.
[100] *Id.* page 2045 lines 8-15.

already discussed "in passing" during this past year or so by Grain Belt and Invenergy.[101] And if the line cannot reach the PJM market, under present circumstances the economic feasibility of the project is unproven.

Given that fact, it seems fair to assume that Invenergy must have a more realistic "Plan B" in mind in the event it cannot obtain consent to build the line in Illinois. For example, it must have crossed their minds that if Invenergy cancels its contract with MJMEUC, it could try to sell that 200 MW at a rate which might exceed any damages it could owe to MJMEUC.

Another possibility would be for Invenergy to develop its own wind farms in Kansas, and use the Grain Belt line to move its energy into the MISO market. There are certainly inviting possibilities for combining the generation and transmission functions on the Grain Belt line for Invenergy's own benefit.

While the MLA does not claim that either scenario is being considered by Invenergy, it has unveiled no logical plan of its own if it is denied entry into Illinois. And Invenergy appears much too sophisticated an organization not to have already developed a realistic plan to deal with that possibility. If it has, we have been given no clue as to what to expect.

So what we are left with is a distinct possibility that the project ends up terminating in Missouri, resulting in 200 miles of an economically unfeasible line which will continue to cause the types of hardships to landowners of which the Commission is quite aware. To hopefully prevent this possibility, if the Commission does grant the CCN, the MLA suggests adding two additional, related conditions to the certificate: (1) that the owner of the Grain Belt project may not begin construction of the line in

[101] Tr. Vol. 22 p. 1925 line 16 - p. 1926 line 2..

Missouri until it has a final non-appealable order from the Illinois Commerce Commission allowing it to build the Illinois section of the line; and (2) that if the owner of the Project has not obtained such an order within four years after this Commission's Final Report and Order in this case, that the owner of the project must return to this Commission for a review of the economic feasibility of the line.

The first suggestion is based on the logical assumption that without access to the PJM market, the line cannot meet the fourth Tartan criterion. And until the Commission is assured that the line will reach the PJM market, it ought not to allow 200 miles of an economically questionable line to be built across this state.

The second suggestion is intended to prevent the process of obtaining approval from the Illinois Commission from lingering for an indefinite period of time, meanwhile keeping the landowners in Missouri in the state of limbo they have languished in for some five years already.

These proposed conditions are addressed further in **Section 4** below.

(5) Promotion of the Public Interest. In the Tartan Case, the Commission summarized the appropriate analysis of this last criterion as follows:

> The requirement that an applicant's proposal promote the public interest is in essence a conclusory finding as there is no specific definition of what constitutes the public interest. Generally speaking, positive findings with respect to the other four standards will in most instances support a finding that an application for a certificate of convenience and necessity will promote the public interest.[102]

Conversely, it stands to reason that if the Grain Belt proposal fails most if not all of the other four Tartan criteria, the project could hardly be in the public interest.

[102] Tartan Case, slip op. p. 23-24.

That being said, several additional points have arisen since the 2016 proceeding regarding this issue. In his direct testimony in the earlier proceedings, Mr. Skelly said that their partnerships with Missouri manufacturers such as ABB Inc., Hubbell Power Systems, Inc. and General Cable Industries would produce even added benefits for the state of Missouri.[103]

But in his supplemental direct testimony on remand, Mr. Zadlo testified that "Upon acquisition of the GBE Project, Invenergy plans to evaluate any existing contracts GBE has in place and determine how they may align with Invenergy's plan to advance the GBE project."[104]

When reminded of the fact that Invenergy would have the authority to amend or cancel the contracts he had been touting,[105] Mr. Skelly's response was to the effect that each of Grain Belt's contracts had terms and conditions, such as cancellation fees, which would act as a deterrent for rejection by Invenergy.[106]

But in the 2016 proceeding, Grain Belt submitted into evidence only the MOUs it had signed with General Cable, ABB Inc. and Hubbell Power Systems.[107] It is clear from each of those documents that the parties are only required to bargain in good faith to potentially sign supply agreements. And there is clearly no possibility of any potential liability on the part of Grain Belt (or Invenergy) if it does cancel the MOU with any of those suppliers. Clean Line has made no mention of any changes in those agreements since the 2016 proceedings.

[103] Exhibit 100, EFIS 35, p. 6.
[104] Exh. 145, p. 12, lines 6-8.
[105] Tr. Vol. 22, p. 1853 line 25 – p. 1854 line 4.
[106] Id. p. 1854 line 22 – p. 1855 line 21.
[107] Schedules MOL-8, 9 and 10 to Direct Testimony of Mark Lawlor, EFIS 38.

Nor has it produced a single supplier contract, either during or after the 2016 proceedings, with penalty provisions which might deter Grain Belt or Invenergy from cancelling the contract.

Further, both Mr. Skelly and Mr. Zadlo testified that Invenergy would also be reevaluating Grain Belt's contract with Quanta Services.[108] So whatever agreement that company had with Grain Belt may prove to be collateral damage as well.

Accordingly, the MLA submits there is no basis for the Commission to assume, as it may have in the past, that Grain Belt's original supplier contracts will provide anything of value to Missouri.

Another factor to consider is who will actually be owning and managing the line several years down the road, and thus dealing with the landowners most affected by this project. Of the list of projects involving transmission lines which Invenergy has developed and constructed, it still owns only about half of them.[109] And as a possible omen of things to come, the longest transmission line it owns "could be over 20 miles."[110] It is clearly conceivable that neither the Commission nor the landowners have any idea at this point with whom they may be dealing even a few short years from now. For these reasons, the MLA respectfully asks the four Commissioners to reevaluate the position they took on this fifth criteria in the Concurring Opinion.

For all of the above reasons, Grain Belt has failed to satisfy its burden of proving that it has met any or all of the five Tartan Criteria.

[108] Exh. 141 p. 3 lines 13-17; Exh. 145, p. 11 line 11 – p. 12 line 5.
[109] Tr. Vol. 22, p. 2008 line 6 – p. 2009 line 3.
[110] Id. p. 2011 lines 9-24.

4. **Recommended Conditions to the CCN**

First, the MLA supports all of the conditions to which Staff and Grain Belt have agreed, as set forth in Exhibits 206 and 207, and during the course of the proceedings this past December 18 and 19.

Based in part on information from those proceedings, the MLA is now recommending five conditions which were not agreed upon by Grain Belt/Invenergy and Staff, or at least not agreed upon in language which the MLA views as prudent.

Condition 1: Decommissioning Fund. Staff is proposing that some form of decommissioning fund should be established, in order to insure that the Project facilities are removed from the Missouri right-of-way when they are no longer being utilized. Staff and Grain Belt apparently disagree as to when Grain Belt should begin contributing to such a fund.[111]

The problem with both proposals, however, is that they result in virtually no funds being available to remove the cables and towers if for some reason the project is abandoned during construction, or within several years after construction is completed.

Those scenarios may be unlikely, but as Staff notes, they are certainly a possibility.[112]

So the question then becomes, who should bear the risk that the project facilities must be removed from the landowners' property at some early stage in the process: Grain Belt/Invenergy, or the landowners?

Even if the risk of decommissioning in the early years is low, there is no reason why that risk should be borne by the landowners. And if forced to do so, the

[111] See comparison at page 12 of Schedule DAB-9 to Mr. David Berry's Surrebuttal testimony, Exh. 105.
[112] Exh. 201, Staff Rebuttal Report, p. 45.

consequences could be devastating. According to Grain Belt's study, ** _____ _____ _____[113] _____ _____ _____**

Grain Belt argues that no decommissioning fund has ever been required for a transmission line. However, as they are fond of pointing out, their Project is unique in many ways. In particular, it appears that no single-asset merchant transmission line has ever been built in this state. Thus in all previous cases involving the construction of a new transmission line, the landowners and the Commission could rely on the incumbent utility to remove any decommissioned transmission facilities, in the unlikely event that was needed.

Here, the surviving owner of the Grain Belt project (e.g. the Invenergy subsidiary which will own the project, or some unknown third party) will likely have no assets of any consequence, other than the line itself. So if the Grain Belt facilities are no longer needed, for whatever reason, there will be no entity left with the resources to remove the unwanted facilities from the right-of-way. In short, the Grain Belt project is not like other transmission lines in this state, and there is a compelling reason to recognize that difference with regard to the decommissioning fund.

Therefore, the MLA believes it is essential that the decommissioning fund in this case be capable of paying for the removal of the Project facilities from the beginning of construction. Neither the Grain Belt nor the Staff proposal would cover that possibility.

[113] The study was based on the Plains and Eastern Line, but Dr. Galli confirmed that the numbers would be comparable for the Grain Belt line. Tr. Vol. 13, page 497 line 14 – page 498 line 18.

Accordingly, in order to protect the landowners from the responsibility of paying themselves for any abandoned lines and towers, the MLA proposes that the Commission condition any CCN on Grain Belt providing from the outset of construction for the funds necessary to decommission the Project facilities.

Grain Belt would seemingly have at least two options for doing so. It could establish a decommissioning trust fund before construction begins in an amount which would fully decommission the Project facilities, and on which Grain Belt would be entitled to all interest payments while the Project remained in operation. Grain Belt would thus recover the time value of the money contributed at the outset to the decommissioning fund.

Or alternatively, as Staff notes, Grain Belt could be directed to secure insurance, a letter of credit, escrowed funds, or a bond in an amount sufficient to cover the full cost of the decommissioning.[114]

Grain Belt seems to think that if the terms of the decommissioning fund are made part of the Commission's Order in this case, that the Commission and individual landowners would then have the ability to enforce the terms of that document.[115] The problem is, Grain Belt has yet to produce a single cohesive document encompassing the terms of a proposed decommissioning fund.[116] Thus there will be no such document for the Commission to make part of its final Order in this case.

In summary, all the MLA is seeking here is to protect the landowners from having to either absorb the very significant costs of removing the unneeded project facilities from the right-of-way, or to accept a liability, a nuisance and an eyesore on their property

[114] Exh. 201, Staff Rebuttal Report, p. 45.
[115] Tr. 422 line 8 – 423 line 2.
[116] Tr. Vol. 22, p. 1981 line 21 – p. 1982 line 4.

on a permanent basis. The risk of decommissioning the project in the early years may indeed be small. But it is a risk that should not be borne by the property owners.

For the foregoing reasons, the MLA respectfully suggests that the following condition be added to any grant of a CCN to Grain Belt: "That at least six months before construction of the project begins in Missouri, Grain Belt shall submit to the Commission a detailed proposal for a decommissioning fund for its facilities on Missouri right-of-way. Said decommissioning fund shall be sufficiently funded so as to allow the complete decommissioning of all project facilities build in Missouri, from and after the time those facilities are built. The proposed decommissioning fund shall be subject to Commission approval and/or any changes which the Commission may order so as to effectuate the purpose of the fund as stated herein."

While Grain Belt may be correct that the risk of decommission the facilities may be small, the cost of doing so is quite high. There is no equitable reason why the landowners should be forced to bear that risk. They will not be paid for that possibility as part of any easement. Furthermore, Grain Belt has assured the Commission that it bears all of the financial risks of this project.[117] There is no logical reason why they should not be made to do so.

Condition 2: Incorporation of documents into the Easement Agreements. Ms. Deann Lanz has agreed in testimony that the following documents should be incorporated into the Grain Belt easement agreements with landowners, and made binding upon Grain Belt: the Missouri Agricultural Impact Mitigation Protocol; the Missouri Landowner Protocol; and the Grain Belt Code of Conduct.[118]

[117] Direct testimony of Mr. Skelly, exh. 100, p. 7 lines 9-13 and p. 15 lines 8-9.
[118] Surrebuttal of Ms. Lanz, Exh. 114, p. 5 lines 12-18.

Grain Belt agrees it has thus committed to doing so.[119] Therefore, it should have no objection to formalizing that commitment as a condition of the CCN.

Condition 3: No reduction to highest and best offer. Grain Belt is making much of the fact that it is offering to pay landowners 110% of the value of the underlying property when acquiring easements for the line's right-of-way.[120] However, in answer to a data request, Grain Belt said it has made no commitment not to reduce the amount of an easement offer if the matter later goes to arbitration or to court.[121]

Ms. Lanz seemed to believe that is no longer Grain Belt's position, and that they have now agreed with Staff not to reduce their offer if the matter goes to arbitration or to court.[122] However, that does not appear to be the case. Based on Exhibit 206, the closest agreement on point seems to be item VII.7. That provision simply says that Grain Belt will not change its policies and practices regarding right-of-way acquisition after it obtains a CCN. But if Grain Belt currently has no practice against reducing an offer to a landowner, and we have no reason to believe they do, then the agreement at Section VII.7 affords no protection at all from what the MLA is seeking to guard against.

Given that Grain Belt is touting the standard 110% price to the Commission as one inducement to securing the CCN, it is only fair that Grain Belt should not be allowed to ultimately pay a lower amount if the matter of compensation goes to arbitration or to court.

Accordingly, the MLA proposes the following condition on any CCN which is issued in this case: "that Grain Belt must pay landowners at least the amount of its

[119] Grain Belt Reply Brief, EFIS 545, p. 44.
[120] See e.g. Direct Testimony of Deann K. Lanz, Exh. 113, p. 6 lines 19-21.
[121] Tr. 417, lines 2 – 12.
[122] Tr. 417 line 13 – 418 line 21.

highest and best offer for a right-of-way easement if the matter of compensation is later taken to arbitration or to court." This provision would have the added advantage of eliminating Grain Belt's obvious leverage if it should attempt to steer the landowner away from taking the matter to arbitration or to court.

Grain Belt has agreed that it will not change its "structure" for calculating compensation in arbitration or court proceeding.[123] However, whether or not the structure is changed during the process leaves room for debate. Therefore, while there may be agreement here in principle, the MLA suggests that its own language is less likely to cause confusion if the situation does arise in the future.

Condition 4: Modifications to Grain Belt's standard form Easement Agreement. In addition to proposed Condition 2, discussed above, the MLA suggests that the Commission condition the CCN on Grain Belt's agreement to make two additional modifications to its standard form Easement Agreement with landowners.

The standard form Easement Agreement which Grain Belt proposes to use as a starting point in negotiations with landowners is set forth at Schedule DKL-4 to the direct testimony of Ms. Lanz.[124]

The MLA suggests that the following statement be added to the Easement, perhaps at the conclusion of existing paragraph 3: "Grain Belt Express will pay landowners for any agricultural-related impact ('Agricultural Impact Payment') resulting from the construction, maintenance or operation of the Project, regardless of when they occur and without any cap on the amount of such damages." This provision already

[123] Grain Belt Reply Brief, EFIS 545, p. 44.
[124] Exhibit 113.

reflects Grain Belt's existing policy.[125] However, to insure that the policy is not later revised to the detriment of the landowners, its addition to the easement should be made a condition to the CCN.

Second, the standard easement presently includes the following provision: "Grain Belt agrees that it shall not pursue, and hereby waives, any Claims against Landowner, except to the extent caused by Landowner's breach of this Agreement, gross negligence or intentional misconduct …." [126]

Under the terms of this provision, landowners would be liable, with no monetary limits, if for example the landowner damaged a pole with farming equipment, and his conduct was deemed to be "gross negligence", as opposed to ordinary negligence.

Grain Belt (or its successors) would of course be the party in the first instance to decide if they considered the actions of the landowner to be "gross negligence", and not mere negligence. If the landowner disagrees with Grain Belt's determination of this complex legal question, then his or her only recourse apparently would be to take the matter to court.

The MLA does not disagree with the easement provision making the landowner liable for intentional wrongdoing. However, the distinction created in the easement between gross negligence and mere negligence simply invites allegations of "gross negligence" by Grain Belt (or its successors) which could ultimately be reversed by the landowner only through litigation.

Many of the landowners obviously do not want the Grain Belt poles on their property in the first place. They should not be subject to unlimited liability for damages

[125] Direct testimony of Deann Lanz, Exhibit 113, page 7 lines 19-22.
Schedule DKL-4, p. 4, Section 11.c to Direct Testimony of Deann K. Lanz, Exh. 113.

to the Project facilities which Grain Belt seeks to impose with this provision. Accordingly, the MLA proposes that as a condition to the CCN, the Commission require that Grain Belt remove the words "gross negligence" from Section 11.c of the Easement Agreement appearing at Schedule DKL-4.

Condition 5: addressing the uncertainty in Illinois. For the reasons discussed under Tartan criteria number 4, the MLA suggests these two related additional condition: (1) that the owner of the Grain Belt project may not begin construction of the line in Missouri until it has a final non-appealable order from the Illinois Commerce Commission allowing it to build the Illinois section of the line; and (2) that if the owner of the Project has not obtained such an order within four years after this Commission's Final Report and Order on remand of this case, that the owner of the project must return to this Commission for a determination of the economic feasibility of the line.

5. **Waiver of Reporting Requirements**. Neither Show Me nor the MLA take any position on this issue.

6. **Conclusion**. Based on Show Me's argument under section 1 of this brief, the Commission should dismiss or reject the Grain Belt Application on the ground that the Commission does not have the authority or jurisdiction to grant the requested CCN.

If the Commission does not do so, then the MLA respectfully asks that the Application be dismissed for failure to meet the five Tartan criteria.

If the Commission nevertheless does grant the CCN, then Show Me and the MLA respectfully ask that the certificate be conditioned not only on the conditions agreed upon by Grain Belt and Staff, but also on the 5 other conditions recommended in this brief in Section 4 above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by electronic mail upon counsel for all parties this 9th day of January, 2019.

/s/ Paul A. Agathen
Paul A. Agathen