BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Landowners Alliance, and Eastern Missouri Landowners Alliance DBA Show Me Concerned Landowners, and John G. Hobbs, Complainants, V. Grain Belt Express LLC, and Invenergy Transmission LLC, and Invenergy Investment Company, Respondents	))))))))))))))	Case No. ______

FORMAL COMPLAINT

Come now the Missouri Landowners Alliance (MLA), the Eastern Missouri Landowners Alliance DBA Show Me Concerned Landowners (EMLA), and John G. Hobbs, and pursuant to Commission Rule 20 CSR 4240-2.070(4) hereby file this Formal Complaint against the aforementioned Respondents. In support of this filing, the Complainants state as follows:

1. The underlying basis for this Complaint is that Respondents unilaterally changed the standard form easement agreement which they now use in negotiations with landowners, as opposed to the standard easement form which they insured the Commission in the CCN case they would present to landowners as part of the easement negotiations.[1] This new easement agreement (the "revised easement") differs in a number of critical respects from the easement which Grain Belt presented to the Commission in the CCN case (the "original easement").

[1] Commission Case No. EA-2016-0358 will be referred to at times as "the CCN case".

As discussed in more detail below, during the CCN case Grain Belt represented in sworn testimony to the Commission that it would present the original easement to Missouri landowners in their easement negotiations. They have chosen to ignore that commitment, with no apparent notice to or approval from the Commission. And not surprisingly, virtually all of the changes are designed to benefit Grain Belt and Invenergy.

For the reasons discussed below, Complainants contend that in implementing these unilateral changes to the original easement, the Respondents are violating the Commission's Report and Order on Remand issued on March 20, 2019 in the CCN case.

2. The MLA is a non-profit corporation organized in 2014 under the laws of the state of Missouri. The basic purpose of the MLA is to oppose the construction of the Grain Belt transmission line. The organization has over 1,100 members, many of whom live on or near the right-of-way of the proposed transmission line. The MLA has represented Missouri landowners in various proceedings before the Commission and Missouri courts in opposition to the Grain Belt line. The MLA's address is 309 N. Main Street, Cameron, MO 64429.

3. EMLA is a Missouri nonprofit corporation organized in 2014. It does business under the registered name of Show Me Concerned Landowners. EMLA has approximately 400 members, most of whom live on or near the route of Grain Belt's proposed transmission line. Its main purpose is to oppose that line. EMLA's address is 17234 Route M, Madison, MO 65263.

4. Complainant John G. Hobbs owns a parcel of land in Randolph County, Missouri, which is located on the right-of-way of the proposed Grain Belt transmission line. Mr. Hobbs' mailing address is 2095 County Road 2160, Huntsville, MO 65259.

5. In the CCN case, Grain Belt Express Clean Line LLC was granted a Certificate of Convenience and Necessity by the Commission to build an electric transmission line across eight counties in northern Missouri. That company's name was later changed to Grain Belt Express LLC.[2] The mere name change does not affect the status of the corporate entity.[3] For convenience that entity will generally be referred to herein as "Grain Belt".

6. As discussed in Commission Case No. EM-2019-0150, on November 9, 2018, respondent Invenergy Transmission LLC (Invenergy Transmission) entered into a contract to purchase Grain Belt. (Amended Report and Order, p. 7, par. 10). Respondent Invenergy Investment Company is the parent company of Invenergy Transmission. (Amended Report and Order, p. 1). Respondents Invenergy Transmission and its parent are generally referred to herein collectively as "Invenergy".

7. According to a filing made by Invenergy on March 6, 2020 in Case No. EM-2019-0150, Invenergy closed on the contract to purchase Grain Belt on January 28 of this year. (EFIS 82).

8. The address of the registered agent in Missouri for the three Respondents is 120 South Central Ave., Clayton, MO 63105. Respondents' office address is One South Wacker Dr., Suite 1800, Chicago, IL 60606.

9. By email of July 1, 2020, counsel for Complainants notified counsel for Respondents of their intent to file a complaint with the Commission based in large part on the subject matter of this Complaint. Counsel for Respondents replied by email of

[2] The Commission recognized this name change by Order of June 9, 2020 in Case No. EN-2020-0385. And see the reference in footnote 3 below.
[3] See paragraph 2 of Grain Belt's cover letter in EN-2020-0358, stating that "There are no other material changes associated with the name change." EFIS 1.

July 7. Although the parties resolved one of the major issues mentioned in Complainants' email of July 1, the issues set forth in this Formal Complaint have not been resolved.

10. As discussed in more detail below, at the outset of the CCN case Grain Belt filed what it referred to as its standard form for an easement agreement with Missouri landowners. This document was marked as Schedule DKL-4 to what became Exhibit 113, EFIS 372.

11. During the past several months or more, Grain Belt's agents, employed by Contract Land Services ("CLS"), have been soliciting easements from landowners using an entirely different standard form of easement agreement than the original version submitted to the Commission during the CCN case. A copy of the revised easement is attached hereto as Exhibit 2. A copy of a cover letter to Complainant Hobbs from CLS, which accompanied the easement form at Exhibit 2, is shown at Exhibit 1. (See affidavit of Mr. John G. Hobbs, which also accompanies this Complaint).

12. In the revised easement, Grain Belt did not simply change the original document with redactions and insertions. Instead, they in effect began with an entirely new template, making it quite difficult to track all of the changes which have been incorporated into the revised easement. Nevertheless, among the numerous revisions which Grain Belt made to the original easement agreement are the following:

(1) Section 26 of the revised easement introduces an entirely new provision, titled "Waiver of Jury Trial". Printed in all caps, so as to highlight its obvious importance, this section essentially provides that if there is any unresolved dispute regarding any

provision of the easement agreement, the parties automatically forfeit their right to settle the issue in a jury trial.

Surprisingly, the new agreement does not even address how unresolved issues would be settled in the absence of a jury trial. One possibility is that the dispute could be settled by a judge in a bench trial. Perhaps the more obvious intent of this section is that all unresolved disputes would be submitted by some unspecified means to binding arbitration. If so, no mention is even made of which party would select the alternative to a jury trial. Or how the situation would be resolved if the parties did not agree on the appropriate forum.

Regardless of how a dispute might be resolved under this new provision, if a landowner disagrees with the amount which Grain Belt is willing to pay for crop damages, or land damages, or damage to livestock, or any other type of damages which might be incurred during or even after construction of the line, the landowner will have forfeited his or her right to have that matter settled through a jury trial in the State of Missouri.

If arbitration is intended to be the alternative to a jury trial, Grain Belt's revised easement makes no mention of where any such arbitration would be held – leaving open the possibility that the landowner could be forced to arbitrate the issues at Invenergy's home office in Chicago. Or at any other location which may be determined by some process not even addressed in the revised easement. Nor is any mention made in this new section of how any of the costs of arbitration would be allocated between the parties.

And to the Respondents' obvious advantage, the mandatory waiver of a jury trial would apply even if the damages in question were caused by the gross negligence or intentional misconduct of any of Grain Belt's land agents or construction crews.

This waiver of the right to a trial by jury was not included in Grain Belt's original easement agreement. In fact, the original easement included the following provision:

> If Landowner and Grain Belt are unable to resolve amicably any dispute arising out of or in connection with this Agreement, each shall have all remedies available at law or in equity in state and federal courts in the State of Missouri.[4]

In other words, the original agreement reflected the general rule in Missouri that one's right to a trial by jury is generally considered "inviolate".[5]

Finally, to be clear, this new provision is unrelated to the right given to landowners in the CCN case to opt for arbitration of one issue: the amount of compensation to be paid for the easement.[6]

(2) Section 21 of the revised easement includes another new concept, under the heading of "Severability." It essentially states that if any provision of the easement is found to be invalid, the remaining provisions of the document shall remain in full force and effect. There was no similar language in the original easement.

Complainants obviously do not know why Respondents added this new section. But one possible explanation was to guard against a finding that the revised easement, with its mandatory waiver of a jury trial, constitutes a "contract of adhesion." If it does,

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[4] Section 10, pp. 3-4 of Schedule DKL-4.
[5] *Watts v. Lester Cox Medical Centers,* 376 S.W.3d 633, 637, 639 (Mo. banc 2012).
[6] See Report and Order on Remand in CCN case, par. 112, p. 33-34.

then what boarders on a mandatory arbitration provision in the new agreement might not be enforceable under Missouri law.[7]

In any event, it is not clear how this new Section 21 would be applied in light of the proposed Section 23, titled “Applicable Laws.” This latter section would require that if any provision of the easement does not comply with Missouri or federal law, the easement must be amended (in such form as reasonably requested by Grain Belt). That being the case, it is not clear what purpose is served by Section 21.

Whatever Respondents’ actual purpose for adding this new Section 21, it would in effect act to protect the remainder of the easement if the provision for mandatory waiver of a jury trial is at some point invalidated by the courts. However, Complainants contend that Grain Belt should not be allowed to insulate itself from the possibility that its new proposal amounts to a contract of adhesion. Since Grain Belt has seen fit to suggest that landowners must waive their right to a jury trial, it should abide by the consequences of that decision. The new Section 21 should be eliminated.

(3) Section 23 of the revised easement, mentioned in the preceding subsection, attempts to protect Grain Belt from legal defects in a document which was drafted (or at least approved) by the Respondents themselves. It would force the landowner to join with Grain Belt in correcting such defects by either amending the easement or signing a new easement in a form reasonably requested by Grain Belt. Furthermore, the property owners (as well as Grain Belt) would be obligated to waive their rights under any law

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[7] *State ex rel. Vincent v. Schneider,* 194 S.W.3d 853, 857 (Mo. banc 2006), noting that “A contract of adhesion, as opposed to a negotiated contract, is a form contract that is created and imposed by the party with greater bargaining power.” Mandatory arbitration provisions are not enforceable in contracts of adhesion. Section 435.350 RSMo.

which would render any portion of the easement invalid, including any unknown "hereinafter enacted laws."

In contrast, under Section 10 of the original easement, the parties retained "all remedies available at law or in equity in state and federal courts in the State of Missouri."

(4) Section 2.e of the revised easement, titled "Site Plan", could seemingly have the landowner signing the easement as tendered without even knowing the type and number of support structures, if any, which would be installed on his or her property. The "approximate location" of the structures, as referred to in Section 2.e, may or may not mean that those structures will eventually be built on any particular parcel of land. And without that information, the landowner cannot determine what the total easement payment will be, and thus cannot logically decide whether or not the proposed easement is in their best interest.

Complainants are not aware of any provision in the original easement agreement which would have the landowner sign the document before even knowing the number and type of support structures which would ultimately be installed on his or her property.

(5) Section 8 of the revised easement, titled "Cooperation", seemingly gives Grain Belt the right to sign documents in the landowner's name, without the landowner even knowing the specific language in the document being signed.

The closest provision in the original agreement was Section 12, but it included no mention of giving Grain Belt the authority to sign in the landowner's name. As it now stands, this new provision is manifestly unfair and unwarranted.

(6) Section 22 of the revised easement is also new. It provides that the activities of both parties shall be controlled by the Missouri Landowner Protocol, Missouri

Agricultural Impact Mitigation Protocol, and the Code of Conduct -- "as may be amended, supplemented or replaced from time to time…." Based on this quoted language, Grain Belt has apparently given itself the unilateral right at any point in time to revise or replace any of the documents in question. And those revisions would presumably constitute binding provisions of the easement. If the revisions are not intended to be binding on the landowner, then the quoted language is meaningless.

In its CCN order, the Commission directed Grain Belt to comply with the terms of the three documents in question, without leaving open any possibility for unilateral changes by Grain Belt.[8] And even if Grain Belt were to seek permission from the Commission to change any of those documents, the CCN case has long been closed. Therefore, it is doubtful that the Commission has the authority at this point to approve any changes in the terms of the CCN, including those incorporated by reference into the easement.[9]

For the above reasons, Section 22 of the revised easement serves no legitimate purpose. If allowed to remain, it would only serve as bargaining leverage for Grain Belt if it attempts to change any of the three documents referenced therein – or even suggests to the landowner that it might do so.

(7) Under Section 10 of the original easement agreement, Grain Belt was generally given 30 days to cure any monetary breach of the agreement before it could be terminated by the property owner. Under Section 12 of the revised agreement, that

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[8] CCN Report and Order on Remand, p. 52, par. 8.

[9] As noted in *State ex rel. Utility Consumers Council of MO v. Public Serv. Comm'n,* 585 S.W.2d 41, 49 (Mo. banc 1979), "Since it is purely a creature of statute, the Public Service Commission's powers are limited to those conferred by the above statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted." There is no provision in the law which states that the Commission may reopen a case and revise its decision after it has disposed of the original Motions for Rehearing. See, e.g., Sections 386.500-386.515 RSMo. This would seem particularly true after the decision of the Commission has been reviewed and affirmed on appeal.

period has been extended to 60 days. This change is significant, in that it could allow Grain Belt to salvage an easement which could otherwise be terminated. If 30 days was sufficient during the entire course of the CCN proceedings, there is no reason to believe that is still not the case.

(8) In Exhibit C to the new agreement, Grain Belt grants itself a three year Easement Agreement Extension, as opposed to the two years specified in the original easement.[10] Again, this is simply another example of Grain Belt's attempt to unilaterally modify the terms of this important document to its own advantage.

And like most of the other changes, this one could well go unnoticed by the landowner, who could end up conceding the revision without even knowing it.

(9) The Missouri Landowner Protocol, compliance with which is mandatory on Grain Belt's part, provides in part as follows:

> Grain Belt Express will pay landowners for any agricultural-related impacts ("Agricultural Impact Payments") 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. For example, if the landowner experiences a loss in crop yields that is attributed to the operation of the Project, then Grain Belt Express will pay the value of such loss in yield for so long as such losses occur. In other words, the intent is that the landowner be made whole for any damages or losses that occur as a result of the Project for so long as the Project is in operation.[11]

This language clearly means, for example, that Grain Belt would be responsible for crop damages resulting from soil compaction anywhere on the property for as many

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[10] For the comparable provision in the original agreement see Exh. 11 in Case EM-2019-0150, EFIS 62; and Tr. Vol. 2 pp. 53-55, EFIS 44, of that same case.

[11] Par. 3.3, pp. 4-5 of Schedule DKL-1 to Exhibit 113 in the CCN case. EFIS 372. And see Commission's Report and Order on Remand in CCN case, p. 52, par. 8, where the Commission ordered Grain Belt to comply with the provisions of this document.

years as those damages continue. The same would be true for crop losses resulting from damages to drainage systems.

Crop damages are addressed in Section 3 of the revised easement agreement, which is at best confusing. It first echoes the general principles quoted above from the Landowner Protocol. However, it goes on to state that the compensation as computed in Exhibit E to the revised easement "is in satisfaction of all loss in crop yields attributed to construction of the Facilities … throughout the Term of this Agreement and Grantor [the landowner] waives all additional claims for loss in crop yields associated with such construction …."

So one must look to Exhibit E to determine if it preserves all of the rights to compensation provided for in the Landowner Protocol. At best the answer is unclear. At worst, the revised easement can be read as eliminating a potentially significant portion of the compensation for crop damage required under the Landowner Protocol.

The primary purpose of Exhibit E is to calculate an amount of "advance crop compensation" for each type of crop within a 50 foot wide strip of the easement property. The Exhibit then provides as follows: "In the event that Grantor suffers crop damages during construction that are greater than the anticipated 50 feet used in this calculation, Grantor may notify Grantee [Grain Belt], and Grantee shall pay the additional compensation based on the formula described above."[12]

There are two problems with this provision, when read in conjunction with Section 3 of the revised easement. First, the quoted language from Exhibit E only provides for additional compensation for damages beyond the 50 foot strip used to

[12] This paragraph also addresses damages resulting from operations and maintenance of the line, but that point does not go to the damages resulting from the actual construction. That language is therefore irrelevant here.

calculate the "advance crop compensation." Therefore, the revised easement would not provide for any additional compensation for damages within the 50 foot strip which might not be immediately apparent – such as those resulting from soil compaction.

Second, as to land outside the 50 foot easement strip, Exhibit E provides for additional compensation only for crop damages which occur "during construction." A plausible reading of this provision is that it does not cover crop damages which only become apparent after construction is completed, in that those damages were not incurred "during construction."

In contrast to the revised easement, Section 3 of the original easement was straight-forward: "Grain Belt will repair or pay … for any damages to Landowner's or Landowner's tenants' improvements, livestock and/or crops as a result of Grain Belt exercising its rights under this Agreement. And the "Easement Calculation Sheet" from the original easement included nothing remotely similar to the language in the new Exhibit E discussed above.[13]

As is apparent, Section 3 and Exhibit E of the revised easement either totally confuse the issue of crop compensation, or more likely, they would act to reduce by potentially significant amounts the actual compensation to which landowners are entitled under the provisions of the Landowner Protocol. In either case, those provisions of the revised easement agreement should be eliminated.

It appears that after taking control of the Project, Invenergy decided to ignore what Grain Belt had already promised in the landowner Protocol regarding payment for

[13] See Exhibit 11 from Case No. EM-2019-0150, wherein the Commission approved the sale of Grain Belt to Invenergy. EFIS 62.

crop damages. Or more importantly, it decided to ignore what the Commission had directed Grain Belt to do.

If Respondents contend that Complainants have misconstrued the new provisions related to crop damages, it seems fair to assume that of the hundreds of individuals faced with deciphering the revised material, Complainants will not be the only ones to experience that same problem. The fault lies in the Respondents' own inconsistent and ambiguous documents.

(10) Section 6 of the original easement states that if the easement is terminated by Grain Belt, it must remove its facilities within 180 days of the termination. Under Section 11 of the revised agreement, Grain Belt would only be required to remove the facilities "as soon as practicable". Particularly if the termination was due to financial problems, "as soon as practicable" could be a matter of years – even with the decommissioning fund in place. If Grain Belt initially believed that 180 days would be sufficient, there is no reason to allow it to put the landowners in a state of limbo for some indeterminate period of time.

(11) Section 13a requires that if someone purchases the land on which an easement has been granted, the new owner is required to notify Grain Belt in a specific, detailed manner before Grain Belt is required to make any payments to the new property owner. No such provision was included in the original easement, and nothing has occurred in the interim which would warrant this more stringent notification process.

(12) Section 2 of the original easement refers to the grant as being "a perpetual exclusive agreement." The comparable section in the revised easement does not specify that the easement is to be "perpetual". This change could cause needless confusion not

only on the part of landowners, but potentially in any future litigation related to the term of the easement. The original language should be reinstated.

(13) Finally, Paragraph 2.d of the revised easement gives Grain Belt the right to use the property in question "for installation, operation, and maintenance of fiber optic cable …." The problem here is that the CCN does not authorize the installation of fiber optic cable as part of the Grain Belt project.

The controlling provision in the CCN Order on this issue states that "Grain Belt Express Clean LLC's application for a certificate of convenience and necessity filed on August 30, 2016, is granted."[14] However, in describing the scope of the project for which the CCN was sought, that Application made no mention of fiber optic cable or anything else not directly related to the transmission of electrical energy.[15] And in the original easement agreement, Grain Belt was only given the authority to install communication facilities "related to delivering electrical energy."[16]

The addition of fiber optic cable to the project was obviously an afterthought, added well after the CCN was granted. In fact, in his Supplemental Direct Testimony in the CCN case, Invenergy's Senior Vice President Mr. Zadlo testified that they had no plans to make any substantial changes to the project as it was described at the outset of the CCN case in the direct testimony of Grain Belt's witness Dr. Wayne Galli.[17]

Regardless of the reason for seeking to add fiber optic cable to the project, the easement cannot give any rights to Grain Belt which were not conferred in the CCN

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[14] CCN Report and Order on Remand, p. 51, par. 1.
[15] See Grain Belt's Application for a CCN, EFIS 34, at page 1, paragraph 1, and paragraphs 14, 17, 18 and 21.
[16] Schedule DKL-4, p. 2 Sec. 2.b.
[17] Exhibit 145, p. 10. EFIS 661. See also Tr. Vol. 22, lines 4-22; EFIS 707, where Mr. Zadlo testified that other than changes which might be related to their failure to gain approval for the project from the Illinois Commission, they had no plans at all to make any substantial changes to the project.

itself. Thus paragraph 2.d of the revised easement is legally meaningless, and could only cause confusion if at some later date the Respondents do attempt to add fiber optic cable on their project.

Finally, if Grain Belt is allowed to use the project facilities to engage in the fiber optic cable business, it is certainly conceivable they would be doing so in competition with one or more businesses along the 206 mile route of the line in Missouri. However, potential competitors were given no notice of Grain Belt's plans until (if at all) well after the conclusion of the CCN case. Therefore, they have had no opportunity to voice any possible concerns about the project's inclusion of fiber optic cable.

For these reasons, Grain Belt should not be allowed to add fiber optic cable to its project through the back door of the easement agreement. Paragraph 2.d should be deleted.

Grain Belt's use of the revised easement agreement is in violation of the Commission's Report and Order on Remand in the CCN case.

13. In revising the easement which forms the starting point of negotiations with landowners, Grain belt is violating the Commission's final order in the CCN case on three grounds.

First, Section VII.7 of Exhibit 206 in the CCN case sets forth one of the conditions to the CCN agreed to by Grain Belt and Staff, and adopted as a requirement by the Commission.[18] That provision says that "Grain Belt's right-of-way acquisition policies and practices will not change regardless of whether Grain Belt does or does not yet possess a Certificate of Convenience or Necessity from the Commission."

[18] Exhibit 206 was included as Attachment A to the Commission's Report and Order on Remand in the CCN case.

Most if not all of Grain Belt's "right-of-way acquisition policies and practices" are presumably defined and explained in its standard form easement agreement, which includes the Protocols made mandatory by the Commission.[19] Complainants are not aware of any other document of record from Grain Belt which would fall within that category. In fact, one can hardly imagine a document which more obviously includes acquisition policies or practices than the easement itself.

Accordingly, based on the express provisions of Section VII.7 of Exhibit 206, Grain Belt is prohibited from making unilateral changes to the original easement agreement. By doing so, Grain Belt is violating the Commission's mandate that "Grain Belt Express Clean Line LLC is ordered to comply with the conditions in Exhibit 206."[20]

14. Second, Section 2, page 4 of the Missouri Landowner Protocol specifically requires that "Grain Belt Express' approach to landowner negotiations will not change regardless of when these negotiations take place."[21] Complainants submit that making substantial revisions to the very document which is the starting point for such negotiations is indeed a drastic change in Grain Belt's "approach to landowner negotiations." Accordingly, beginning the landowner negotiations with a revised version of the easement constitutes an obvious violation of the Commission's CCN decision.

15. Even in the absence of the two express provisions cited in the two preceding paragraphs, Grain Belt's numerous modifications to the original easement would still violate the Report and Order on Remand.

In her Direct Testimony, filed at the outset of the CCN case, Clean Line's Vice President for Land, Ms. Deann Lanz, testified as follows:

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[19] Report and Order on Remand in the CCN case, p. 52, par. 8.
[20] *Id*, p. 51, par. 2.
[21] Schedule DKL-1 of Exh. 113, EFIS 372.

> Q. Please describe what a typical easement agreement contains.
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> A. Grain Belt Express has a standard form of agreement, the Transmission Line Easement Agreement ("Easement Agreement") that it will present to landowners. It is attached as **Schedule DKL-4.** The Easement Agreement provides for the development, financing and safe construction and operation of the Project, and is broad enough to cover most situations and concerns raised by landowners, without making such Easement Agreement overly burdensome or lengthy.[22]

Ms. Lanz went on to imply that Grain Belt would be willing to negotiate "reasonable modifications" to the standard easement in order to accommodate unique circumstances of an individual landowner.[23] The original easement, however, was still represented to the Commission as the document which Grain Belt "will present to landowners." Invenergy has now chosen to ignore that commitment.

Further, in its brief to the Commission, Grain Belt touted its original easement as one of the documents which "provide a multitude of landowner protections, far more extensive than typically offered by Missouri utilities."[24] Having urged the Commission to issue the CCN in part on the basis of the original easement, it would certainly be inequitable to allow Grain Belt to dilute the very landowner protections it relied upon when seeking the CCN.

And notably, the Commission (not to mention the other parties) was not even afforded the opportunity to review the changes to the document which Grain Belt swore "it will present to landowners."

The MLA and EMLA took Grain Belt at its word, and assumed in the CCN case that the original easement agreement was being offered by Grain Belt as the document it would initially present to landowners in negotiating easements on the right-of-way. And

[22] Exhibit 113, p. 15. EFIS 372. Emphasis added.
[23] Id.
[24] Grain Belt's Reply Brief on Remand, p. 24. EFIS 743.

because Grain Belt's original easement was presented as part of the record in the CCN case, the parties had the opportunity during that case to challenge specific provisions of Grain Belt's proposed easement.[25]

However, at this point the parties to the CCN case have no apparent means of objecting to the changes in the revised easement, except through the complaint process. Therefore, given that the changes to the easement agreement were made by Invenergy after the conclusion of the CCN case, it is all the more imperative that the Commission considers the merits of the points being raised here by Complainants.

The Commission was seemingly under the same impression regarding the original easement as was the MLA and EMLA. Citing Ms. Lanz's Schedule DKL-4 and accompanying testimony, in its final Order in the CCN case the Commission observed that "Grain Belt uses a standard form of agreement when acquiring easement rights from Missouri landowners."[26] Clearly, the Commission had been led to believe by Grain Belt that it would use that same standard easement form as the starting point for negotiations with landowners – not some form which Invenergy decided to unilaterally change well after the close of the case.

The Commission also noted that the original easement "limits the landowner's legal rights and use of the easement property." But if Grain Belt is allowed to subsequently modify that form on its own, then in hindsight the Commission was basing its decision on an easement which Invenergy has now discarded.

Accordingly, based upon Grain Belt's sworn testimony, it is fair to assume that when the Commission granted Grain Belt the CCN, it did so with the understanding that

[25] See Initial Post-Hearing Brief on Remand of the MLA, et al., pp. 36-38 in the CCN case. EFIS 737.
[26] Report and Order on Remand in CCN case, p. 12, par. 19.

the original easement agreement it discussed in its Order would be used as the starting point during the actual easement negotiations with landowners. If indeed that was the Commission's intent, then at least by implication it was directing Grain Belt to use the original easement, shown at Schedule DKL-4, when negotiating with Missouri landowners. Grain Belt's failure to do so would thereby violate an implicit if not express provision in the Order granting the CCN.

16. Grain Belt cannot logically defend against this Complaint on the ground that the added and modified provisions of the new easement are all subject to negotiation with the landowners anyway. First, it is doubtful that most landowners are even aware of the revisions which Grain Belt has made to the document which is handed to them at the outset of the easement discussions. Therefore, such a defense would be meaningless.

Further, it seems unlikely that Grain Belt would bother to make significant alterations to the original agreement if it was truly willing to reverse itself on those issues during the course of negotiations with the landowner. Although minor details unique to a particular parcel of land are no doubt negotiable, it seems unlikely that the same would hold true for major changes for an individual landowner, such as the installation of fiber optic cable.

Finally, Respondents logically increase their chances of incorporating the changes into the final easement agreement simply because they were the ones which drafted the document used as the starting point in the easement negotiations. As one law firm has noted, "There are only so many points that can be raised in a negotiation, and the creator of the first draft will inevitably be at an advantage."[27] While this is true with regard to

[27] "The In-House Guide to Contract Templates", written by Radient Law, and available at https://radientlaw.com/guide-to-contract-templates.

every provision in the easement, Grain Belt should not be allowed to also utilize this inherent advantage with respect to changes made after the CCN was issued.

17. A far more equitable solution here would be for Grain Belt to begin the negotiations on the basis of the original easement agreement at Schedule DKL-4, as it told the Commission it would do, and then seek to negotiate the changes it is now proposing in the revised agreement. If Respondents consider this too onerous a task, imagine the obstacles the landowners are now facing in negotiating an agreement anything similar to the one originally presented to the Commission.

WHEREFORE, for the reasons set forth above, Grain Belt's use of the revised easement as a starting point in landowner negotiations constitutes a violation of the Commission's Report and Order in the CCN case, both by reason of the provisions addressed in paragraphs 13 and 14 above, and (as discussed in paragraph 15), from the fact that Grain Belt is ignoring an implicit if not express assumption in the Order that the negotiations with landowners were to be based on the original easement agreement submitted at Schedule DKL-4.

Accordingly, Complainants respectfully ask the Commission to direct Grain Belt to tender only a copy of the original easement agreement, shown at Schedule DKL-4, when initiating easement negations with Missouri landowners for property on the right-of-way of the proposed line. At that point Grain Belt would of course be free to seek the landowner's consent to the changes it has unilaterally incorporated into the revised easement agreement.

Alternatively, if Grain Belt is permitted to use the revised easement agreement as the starting point for negotiations with landowners, Complainants respectfully ask that

Grain Belt be ordered to remove the specific provisions complained of above in paragraph 12, subsections (1) through (13).

Respectfully submitted

/s/ Paul A. Agathen
Paul A. Agathen
Attorney for Complainants
Mo Bar No. 24756
485 Oak Field Ct.
Washington, MO 63090
636-980-6403
Paa0408@aol.com

Certificate of Service

I certify that a copy of the foregoing was served this 10th day of August, 2020 by email on counsel for Respondents, Andrew O. Schulte and Anne E. Callenbach.

/s/ Paul A. Agathen
Paul A. Agathen