

**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 345kV Transmission Line)

File No. EA-2016-0358

REPORT AND ORDER

Issue Date: August 16, 2017

Effective Date: September 15, 2017

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Montgomery 345kV Transmission Line)

APPEARANCES

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SENIOR REGULATORY LAW JUDGE: Michael Bushmann

REPORT AND ORDER

I. Procedural History

On August 30, 2016, Grain Belt Express Clean Line LLC (“GBE”) filed an application with the Missouri Public Service Commission (“Commission”), pursuant to Section 393.170.1, RSMo¹, 4 CSR 240-2.060 and 4 CSR 240-3.105(1)(B), for a certificate of convenience and necessity (“CCN”) to construct, own, operate, control, manage and maintain a high voltage, direct current transmission line and associated facilities within Buchanan, Clinton, Caldwell, Carroll, Chariton, Randolph, Monroe and Ralls Counties, Missouri, as well as an associated converter station in Ralls County.

The Commission issued notice of the application and provided an opportunity for interested persons to intervene. The Commission granted intervention to the following parties: Missouri Landowners Alliance (“MLA”); Eastern Missouri Landowners Alliance d/b/a Show Me Concerned Landowners; Missouri Joint Municipal Electric Utility Commission (“MJMEUC”); Missouri Farm Bureau Federation; Missouri Department of Economic Development; Matthew and Christina Reichert; Randall and Roseanne Meyer; Charles and Robyn Henke; R. Kenneth Hutchinson; Rockies Express Pipeline LLC; Sierra Club; Natural Resources Defense Council; The Wind Coalition; Wind on the Wires; Infinity Wind Power; Walmart Stores, Inc.; Missouri Industrial Energy Consumers; Renew Missouri; International Brotherhood of Electrical Workers Locals 2 and 53; Consumers Council of Missouri; Missouri Retailers Association; and Missouri AFL-CIO. The Commission granted the petitions of Energy for Generations, LLC and SSM Health Care Corporation to file amicus curiae briefs.

¹ All statutory references are to the Missouri Revised Statutes (2016), unless otherwise noted.

The Commission held a prehearing conference and established a procedural schedule. The Commission conducted local public hearings for members of the general public in each of the eight counties where the proposed transmission line would be located.² The Commission held an evidentiary hearing on March 20-24, 2017.³ During the evidentiary hearing, the parties presented evidence relating to the following unresolved issues previously identified by the parties:

1. Does the evidence establish that the Commission may lawfully issue to GBE the certificate of convenience and necessity it is seeking for the high-voltage direct current transmission line and converter station with an associated AC switching station and other AC interconnecting facilities?
2. Does the evidence establish that the high-voltage direct current transmission line and converter station for which GBE is seeking a certificate of convenience and necessity are necessary or convenient for the public service, within the meaning of that phrase in Section 393.170, RSMo 2016?
3. If the Commission grants the CCN, what conditions, if any, should the Commission impose?
4. If the Commission grants the CCN, should the Commission exempt GBE from complying with the reporting requirements of Commission rules 4 CSR 240-3.145, 4 CSR 240-3.165, 4 CSR 240-3.175, and 4 CSR 240-3.190(1), (2) and (3) (A)-(D)?

² Transcript, Vols. 2-9.

³ Transcript, Vols. 10-19. The Commission admitted the testimony of 54 witnesses and 135 exhibits into evidence during the evidentiary hearing.

The parties submitted initial, reply, and supplemental post-hearing briefs. After the filing of two post-hearing motions⁴, oral arguments were conducted on August 3, 2017,⁵ and the case was deemed submitted for the Commission's decision on that date when the Commission closed the record.⁶

II. Findings of Fact

Any finding of fact for which it appears that the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.

1. GBE is a limited liability company organized under the laws of the State of Indiana. GBE is a wholly-owned subsidiary of Grain Belt Express Holding LLC, a Delaware limited liability company, which is a wholly-owned subsidiary of Clean Line Energy Partners LLC ("Clean Line").⁷

2. GBE filed its application for a CCN pursuant to Section 393.170.1, RSMo, and Commission administrative rules.⁸

3. The Staff of the Missouri Public Service Commission ("Staff") is a party in all Commission investigations, contested cases and other proceedings, unless it files a

⁴ MLA's Motion to Dismiss Application filed on July 4, 2017 and GBE's Motion for Waiver or Variance of Filing Requirements filed on June 29, 2017.

⁵ Transcript, Vol. 20. At the oral arguments, the Commission admitted four additional exhibits into the record and took official notice of Section 393.170, RSMo 1949.

⁶ "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

⁷ Ex.100, Skelly Direct, p. 3.

⁸ Ex. 100, Skelly Direct, p. 4.

notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.⁹ Staff participated in this proceeding.

4. The transmission line proposed to be constructed by GBE in the application is an approximately 780-mile, overhead, multi-terminal +600 kilovolt (“kV”) high-voltage, direct current (“HVDC”) transmission line and associated facilities (collectively, the “Project”).¹⁰

5. The Project would traverse the states of Kansas, Missouri, Illinois and Indiana, including approximately 206 miles in Missouri.¹¹ The Project would deliver 500 megawatts (“MW”) of wind-generated electricity from western Kansas to customers in Missouri, and another 3,500 MW to states further east.¹²

6. The Project would have three converter stations. One converter station would be located in western Kansas, where wind generating facilities would connect to the Project via alternating current (“AC”) lines. The two other converter stations in eastern Missouri and eastern Illinois would deliver electricity to the AC grid through interconnections with transmission owners in the systems of Midcontinent Independent System Operator, Inc. (“MISO”) and PJM Interconnection, LLC (“PJM”), respectively.¹³

7. The Missouri portion of the Project would be located in the Missouri counties of Buchanan, Clinton, Caldwell, Carroll, Chariton, Randolph, Monroe, and Ralls.¹⁴

8. The Project’s development, construction, and operations costs would be borne by the investors in Clean Line and the transmission customers. The Project’s costs

⁹ Commission Rules 4 CSR 240-2.010(10) and (21) and 2.040(1).

¹⁰ Ex. 100, Skelly Direct, p. 3.

¹¹ Ex. 100, Skelly Direct, p. 4.

¹² Ex. 108, Galli Direct, p. 4.

¹³ Ex. 108, Galli Direct, p. 4-7; Ex. 104, Berry Direct, p. 4-5.

¹⁴ Ex. 100, Skelly Direct, p. 4.

would not be recovered through the cost allocation process of any regional transmission organization approved by the Federal Energy Regulatory Commission (“FERC”).¹⁵

9. The Project is a participant-funded, “shipper pays” transmission line. GBE would recover its capital costs by entering into voluntary, market-driven contracts with entities that want to become transmission customers of the Project.¹⁶

10. GBE would offer transmission service through an open access transmission tariff that would be filed with and subject to the jurisdiction of the FERC under the Federal Power Act and FERC regulations. GBE customers would consist principally of wind energy producers in western Kansas and wholesale buyers of electricity, such as utilities, competitive retail energy suppliers, brokers, and marketers.¹⁷

11. The Project would not provide service to end-use customers or provide retail service in Missouri, so the Project would not be rate-regulated by the Commission.¹⁸

12. In 2012, GBE received assent from the county commissions of Buchanan, Caldwell, Carroll, Chariton, Clinton, Monroe, Ralls, and Randolph counties authorizing GBE to construct and operate poles, lines, conduits, and conductors for utility purposes through, along, and across the public roads and highways of those counties.¹⁹

13. In 2014, the county commissions of Clinton, Chariton, Caldwell, Ralls, and Monroe counties attempted to rescind the county assents previously granted in 2012.²⁰

14. GBE does not have an assent at this time from the Caldwell County Commission to cross the public roads and highways of that county. By judgment dated

¹⁵ Ex. 100, Skelly Direct, p. 7; Ex. 104, Berry Direct, p. 8.

¹⁶ Ex. 100, Skelly Direct, p. 12; Ex. 104, Berry Direct, p. 8; Ex. 111, Kelly Direct, p. 4.

¹⁷ Ex. 100, Skelly Direct, p. 23-24; Ex. 104, Berry Direct, p. 6; Ex. 111, Kelly Direct, p. 4-5.

¹⁸ Ex. 100, Skelly Direct, p. 24.

¹⁹ Ex. 300, Lowenstein Rebuttal, p. 33, Schedule LDL-3.

²⁰ Ex. 300, Lowenstein Rebuttal, p. 33, Schedule LDL-4.

October 7, 2015, entered in Case No. 14CL-CV00222, the Caldwell County Circuit Court held that the Caldwell County Commission violated the Missouri Sunshine Law when it gave its assent, rendering that assent invalid and void.²¹

15. In a prior and separate case, Ameren Transmission Company of Illinois (“ATXI”) requested a CCN from the Commission to construct and operate an interstate electric transmission line running through several counties in Missouri that would not serve retail customers. ATXI did not have assent from any of the counties through which the proposed transmission line would traverse. In granting the CCN, the Commission concluded that such assents were required by its rules and by Section 229.100, RSMo and imposed a condition that ATXI must obtain the assent from each such county before the CCN became effective.²²

16. ATXI had argued to the Commission, in part, that it need not obtain county assents because ATXI applied to the Commission for a line certificate under Section 393.170.1 and not an area certificate under Section 393.170.2, RSMo.²³ ATXI claimed that line certificates do not require such county assents.²⁴

²¹ Ex. 320; Ex. 200, Dietrich Rebuttal, p. 3; Ex. 201, Staff Rebuttal Report, p. 2.

²² Ex. 375, Report and Order, *In the Matter of the Application of Ameren Transmission Co. of Illinois for Other Relief or, in the Alternative, A Certificate of Pub. Convenience & Necessity Authorizing It to Construct, Install, Own, Operate, Maintain & Otherwise Control & Manage A 345,000-Volt Elec. Transmission Line from Palmyra, Missouri, to the Iowa Border & Associated Substation Near Kirksville, Missouri*, EA-2015-0146, 2016 WL 1730118 (Apr. 27, 2016).

²³ Ex. 376, Initial Post-hearing Brief of Ameren Transmission Co. of Illinois, *In the Matter of the Application of Ameren Transmission Co. of Illinois for Other Relief or, in the Alternative, A Certificate of Pub. Convenience & Necessity Authorizing It to Construct, Install, Own, Operate, Maintain & Otherwise Control & Manage A 345,000-Volt Elec. Transmission Line from Palmyra, Missouri, to the Iowa Border & Associated Substation Near Kirksville, Missouri*, EA-2015-0146, p. 60-74.

²⁴ *Id.*

III. Conclusions of Law

The authority for the Commission to approve the Project when necessary or convenient for the public service, including the authority to impose reasonable conditions, is stated in Section 393.170, RSMo.²⁵ GBE is subject to the jurisdiction of the Commission because it is an “electrical corporation”²⁶ and “public utility”²⁷ owning, operating, controlling or managing “electric plant”²⁸. While the Commission only has authority over facilities that are devoted to public use²⁹, an entity that constructs and operates a transmission line bringing electrical energy from electrical power generators to public utilities that serve consumers is a necessary and important link in the distribution of electricity and qualifies as

²⁵ 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.

2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

²⁶ “Electrical corporation” includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, other than a railroad, light rail or street railroad corporation generating electricity solely for railroad, light rail or street railroad purposes or for the use of its tenants and not for sale to others, owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or for its own use or the use of its tenants and not for sale to others. (emphasis added).

²⁷ “Public utility” includes every pipeline corporation, gas corporation, electrical corporation, telecommunications company, water corporation, heat or refrigerating corporation, and sewer corporation, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter.

²⁸ “Electric plant” includes all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power. (emphasis added)

²⁹ *State ex rel. M.O. Danciger & Co. v. Pub. Serv. Commission of Missouri*, 275 Mo. 483, 205 S.W. 36, 39 (1918); *State ex rel. Buchanan County Power Transmission Co. v. Baker*, 320 Mo. 1146, 1153, 9 S.W.2d 589, 591 (1928).

a public utility.³⁰ Since GBE brought the application, it bears the burden of proof.³¹ The burden of proof is the preponderance of the evidence standard.³² In order to meet this standard, GBE must convince the Commission it is “more likely than not” that its allegations are true.³³

The threshold issue for determination is whether the Commission may lawfully issue to GBE the certificate of convenience and necessity it seeks. The arguments of the parties involve whether proof of county assents under Section 229.100, RSMo,³⁴ affects the Commission’s statutory authority to grant a CCN in this case. Section 229.100 requires assent of the county commission before a company may erect poles for the suspension of electric light or power wires under or across the public roads or highways of that county.

The most recent guidance from the courts on this issue is in the *Matter of Ameren Transmission Co. of Illinois*³⁵. ATXI sought a certificate for an interstate electric transmission line under Section 393.170, as GBE has also requested. ATXI proposed an

³⁰ *State ex rel. Buchanan County Power Transmission Co. v. Baker*, 9 S.W.2d at 592. While the Buchanan County transmission company was determined not to be a public utility because it transmitted electricity to a private company for private use, the court clearly implied that if the electricity had been transmitted to a public utility for public use the transmission company would also be considered to be a public utility. *The Empire District Electric Company v. Progressive Industries, Inc.*, Report and Order, 13 Mo.P.S.C. (N.S.) 659, 668-669 (April 2, 1968).

³¹ “The burden of proof, meaning the obligation to establish the truth of the claim by preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue”. *Clapper v. Lakin*, 343 Mo. 710, 723, 123 S.W.2d 27, 33 (1938).

³² *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 Mo. banc 1996).

³³ *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez*, 936 S.W.2d at 109 -111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

³⁴ “No person or persons, association, companies or corporations shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public roads or highways of any county of this state, without first having obtained the assent of the county commission of such county therefor; and no poles shall be erected or such pipes, conductors, mains and conduits be laid or maintained, except under such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county commission.”

³⁵ *Matter of Ameren Transmission Co. of Illinois*, No. WD 79883, 2017 WL 1149139 (Mo. Ct. App. Mar. 28, 2017), reh’g denied (Apr. 27, 2017), transfer denied (Apr. 27, 2017), transfer denied (June 27, 2017).

interstate transmission line that “does not generate, distribute, or sell electricity to the general public or serve any retail service territory.”³⁶ ATXI had not yet received approval from the relevant county commissions under Section 229.100 at the time the Commission issued its Order, but the Commission granted a CCN with the condition that ATXI obtain all necessary county assents before exercising the authority in the CCN. On appeal, the Western District Court of Appeals determined that the Commission lacked authority to grant a CCN without evidence that ATXI had received those county assents, even if the Commission made the CCN conditional on ATXI obtaining the assents in the future. The Court stated:

By statute and by rule, the PSC is authorized to issue a CCN only after the applicant has submitted evidence satisfactory to the PSC that the consent or franchise has been secured by the public utility. Neither statute nor rule authorizes the PSC to issue a CCN *before* the applicant has obtained the required consent or franchise.

Our interpretation of the statute—that it mandates that the applicant receive the consent of local government authorities before the PSC issues a CCN—gives plain meaning to the legislature’s use of the mandatory term “shall” when it describes what documents the applicant must submit to the PSC before a CCN will be issued. Accordingly, county commission assents required by section 229.100 and 4 CSR 240-3.105(1)(D)1 must be submitted to the PSC *before* the PSC grants a CCN.

The PSC’s issuance of a CCN contingent on ATXI’s subsequent provision of required county commission assents was unlawful as it exceeded the PSC’s statutory authority.³⁷

The Western District Court of Appeals vacated the Commission’s Report and Order issuing a CCN to ATXI. While the Commission disagreed with the legal analysis and conclusions in that opinion and asked the Supreme Court of Missouri to accept transfer of

³⁶ *Matter of Ameren Transmission Co. of Illinois*, No. WD 79883, 2017 WL 1149139, *2 (Mo. Ct. App. Mar. 28, 2017).

³⁷ *Matter of Ameren Transmission Co. of Illinois*, No. WD 79883, 2017 WL 1149139, *6, 8 (Mo. Ct. App. Mar. 28, 2017).

the case³⁸, that Court declined. The Western District ATXI opinion is now final and binding on the Commission.

ATXI, in its CCN application case at the Commission, File No. EA-2015-0146, did apply for and receive a line certificate, not an area certificate. The issue of prior county assents for line versus area CCNs was argued extensively at the Commission. ATXI proposed to build an interstate transmission line to transmit electricity for the public use, but that line would not generate, distribute, or sell electricity to the general public or serve any retail service territory, so by definition it could not result in an area certificate. ATXI had not yet obtained the assents required from all the county commissions through which the transmission line would be located.

In this GBE case, as in *Ameren Transmission Co.*, there is a disputed issue as to whether the Commission has the statutory authority to grant a line certificate to GBE without it having filed the required county assents. However, *Ameren Transmission Co.* clearly states that “county commission assents required by section 229.100 and 4 CSR 240-3.105(1)(D)1 must be submitted to the PSC *before* the PSC grants a CCN.”³⁹ (emphasis by the Court).

There are no material factual distinctions between *Ameren Transmission Co.* and this GBE case that would permit the Commission to reach a different result on the question of statutory authority to grant a CCN in this case. Accordingly, *Ameren Transmission Co.* and its plain language regarding the necessity of obtaining prior county assents apply to the

³⁸ The Commission asserted that transfer is appropriate because the Court of Appeals interpreted Section 393.170 contrary to the existing case law interpreting that statute; the roles the legislature intended for the Public Service Commission under Section 393.170 and for the county commissions under Section 229.100 should be clearly delineated to ensure that both the Public Service Commission and the county commissions can fulfill their appointed roles; and the Commission is not authorized to decide the validity or legal effect of a county assent under Section 229.100 in the course of a hearing under Section 393.170.

³⁹ *Matter of Ameren Transmission Co. of Illinois*, No. WD 79883, 2017 WL 1149139, at *8 (Mo. Ct. App. Mar. 28, 2017).

GBE application even though that opinion did not specifically cite to subsection 1 of Section 393.170, the subsection under which GBE requested a CCN. GBE did not submit evidence of county assents in this case. There is clear evidence in the record that GBE lacks a county assent from at least one county, Caldwell County. Under the Court's direction set forth in *Ameren Transmission Co.*, the Commission cannot lawfully issue a CCN to GBE until the company submits evidence that it has obtained the necessary county assents under Section 229.100.

IV. Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts to the law to reach its conclusions, the Commission concludes that the substantial and competent evidence in the record supports the conclusion that GBE has failed to meet, by a preponderance of the evidence, its burden of proof to demonstrate that it has obtained all county assents under Section 229.100 necessary for a certificate of convenience and necessity as required by *Ameren Transmission Co.*. Therefore, the Commission will deny the GBE application. Since the Commission's determination that it lacks the statutory authority to issue a CCN at this time resolves the case, it is unnecessary for the Commission to consider and decide the remaining disputed issues.

There are several motions that are currently pending a determination, as follows:

1. MLA's Motion to Dismiss Application filed on July 4, 2017;
2. GBE's Motion for Waiver or Variance of Filing Requirements filed on June 29, 2017;
3. MLA's Motion to Strike MJMEUC's Supplementation of Hearing Exhibit 479 filed on June 14, 2017;
4. GBE's Motion to Supplement the Record filed on May 2, 2017; and
5. MLA's Motion to Strike Certain Material in Reply Brief of GBE filed on April 27, 2017.

Since the Commission has concluded that under *Ameren Transmission Co.* the GBE application must be denied, the pending motions are rendered moot and will be denied.

THE COMMISSION ORDERS THAT:

1. Grain Belt Express Clean Line LLC's application for a certificate of convenience and necessity filed on August 30, 2016, is denied.
2. All pending motions described in the body of this order are denied.
3. This order shall become effective on September 15, 2017.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Stoll, C., concurs.
Hall, Chm., Kenney, Rupp, and
Coleman, CC., concur, with separate
concurring opinion attached;
and certify compliance with the provisions
of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 16th day of August, 2017.