IN THE SUPREME COURT OF MISSOURI

SC96993

GRAIN BELT EXPRESS CLEAN LINE LLC, et al.
Appellants

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,
Respondent

Appeal from the Public Service Commission of the State of Missouri
Case No. EA-2016-0358

SUBSTITUTE BRIEF OF APPELLANT MISSOURI LANDOWNERS ALLIANCE

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INTRODUCTION

As explained in more detail in the Suggestions of the MLA in Opposition to the Motion of the PSC to Dismiss Appeal, filed in this case on March 6, 2018, the Missouri Landowners Alliance ("MLA") filed this contingent appeal in order to insure to the extent possible that it would not permanently waive the issues raised in the Points Relied On herein.[1]

However, unless this Court reverses the order of the Public Service Commission ("PSC") and directs the PSC to issue a Certificate of Convenience and Necessity to Grain Belt (which the Eastern District said was beyond a court's lawful authority)[2], the MLA would agree with the PSC that this contingent appeal should be dismissed as premature. (See Brief of PSC in the Eastern District in Response to brief of the MLA and others, Part 43, p. 52).

Moreover, unless the Court does decide to reverse the PSC's Order and directs it to issue the Certificate of Convenience and Necessity to Grain Belt, the MLA would suggest there is no compelling reason for the Court to read the remainder of this brief.

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[1] On March 6, 2018, the Court ordered that the PSC's Motion to Dismiss the MLA's appeal is to be taken with the case.

[2] Slip. Op., p. 10, f.n. 5, LF Part 44.

The addition of this Introduction, the removal of the section of the brief at the Eastern District under the Jurisdictional Statement captioned Response to the Order of the Eastern District, dated October 30, 2017, and several non-substantive changes are the only revisions made in this Substitute Brief from that submitted to the Eastern District in Case No. ED105932.

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this case because it was transferred here by the Eastern District of the Court of Appeals, pursuant to Rule 83.02. (Slip. Op. p. 10-11, LF Part 44; *see also* Art. V § 10 of the Constitution of Missouri).

STATEMENT OF FACTS

These proceedings began on August 30, 2016, when Grain Belt filed an Application with the PSC for a CCN, asking for authorization to build an electric transmission line across eight counties in northern Missouri. (Part 34, LF Vol. I p. 121-164.)

The Missouri segment of the proposed line would run for approximately 206 miles, and is one portion of a proposed line which would run for approximately 780 miles from western Kansas to Indiana. (*Id.* at 121-22, 127). Grain Belt is proposing to collect approximately 4,000 megawatts of renewable wind generation from wind farms in western Kansas, 500 MW of which would be delivered into

Missouri, and the other 3,500 MW into Illinois, Indiana and states further east. (*Id. at* 127).

As Grain Belt noted in its Application, the general test for granting a CCN under the applicable statute, § 393.170, is whether the proposed line is "necessary or convenient for the public service." (*Id. at* 130; statute at A-28 – A-29).

As Grain Belt further stated, in making this determination the PSC generally applies these five criteria derived from an earlier PSC decision commonly referred to as the *Tartan* case: (1) there must be a need for the service which the applicant is proposing to provide; (2) the proposal must be economically feasible; (3) the applicant must have the financial ability to provide the proposed service; (4) the applicant must be qualified to provide the service; and (5) the proposed service must be in the public interest. (*Id. at* 130).

All of the parties seemingly agreed that these five criteria were applicable in this case, and most of the testimony and much of the post-hearing briefs from all of the parties were devoted to demonstrating that Grain Belt did or did not meet one or more of the five *Tartan* criteria. However, no party alleged that Grain Belt did not meet the third or fourth of these criteria. (Based on a review of all of the testimony and the briefs of all the parties to the PSC case; and *see* Reply Brief of Applicant Grain Belt Express Clean Line LLC to the PSC, first full par. of p. 2; Part 39, LF Vol. XIV p. 2099.)

To perhaps clarify a procedural matter here, all of the parties were required to prepare their direct testimony, rebuttal testimony and surrebuttal testimony, as the case may be, in written form, and to distribute that written testimony to the PSC and all other parties to the case in advance of the evidentiary hearings at the PSC. (Commission Order of October 19, 2016; Part 36, LF Vol. V, p. 649-50). This process of pre-filing the testimony was consistent with the PSC's Rules of Practice and Procedure, Rule 4 CSR 240-2.130(6)-(10); Appendix A-30 – A-31.

In accordance with this Rule, many of the witnesses attached "Schedules" to their pre-filed written testimony. (Rule 4 CSR 240-2.130 (6)(E), Appendix A-30). See, e.g., direct testimony of Grain Belt witness Dr. Anthony Wayne Galli, Exh. 108, Part 15, Exh. to LF Vol. XXV, p. 1426 *et seq*., Schedules AWG-1 thru AWG-6, pp. 1471-1543. The Schedules attached to written testimony generally amounted in most instances to what might be considered supporting "exhibits" in civil court cases. (See, e.g., *Id*., Schedules of Dr. Galli).

Pre-filed written testimony (with Schedules, where applicable) was submitted by 54 different witnesses. (See Lists of Issues and Witnesses, filed March 7, 2017, Part 28, LF Vol. X, p. 1308 *et seq*.) Evidentiary hearings were held at the PSC Offices in Jefferson City, Missouri on five days, from March 20-24, 2017. (See PSC's Report and Order, Appendix A-6, LF Vol. XVI p. 2661.) Given that the parties' testimony and Schedules had been distributed in advance,

the great majority of the hearings were devoted to cross-examination of the witnesses on his or her pre-filed written testimony and Schedules. (See, Part 34, hearing transcript Vols. 10, 12, 13, 16 and 18).

Some of Grain Belt's testimony on issues dealing with three of the *Tatran* criteria was challenged by other witnesses. For example, one of those contested issues involved Grain Belt's evidence on the relative cost of wind generation from western Kansas compared to other alternatives. (See testimony of Grain Belt witness David Berry, Exh. 104, Highly Confidential ("H.C.") Exh. Vol. III at pp. 288-294 and the testimony of Show Me Concerned Landowners' witness Paul Justis, Exh. 400, H.C. Exh. Vol. VIII at pp. 800-806.)

Despite the challenges to parts of Grain Belt's evidence, in the Concurring Opinion four of the five Commissioners stated they believed that Grain Belt had met all five of the *Tartan* criteria. (Part 40, LF Vol. XVI, p. 2676; Appendix A-18).

Facts related to the claimed errors.

Pursuant to Rule 84.04(c) (Appendix A-32 – A-33), the following is a summary of the facts relevant to the questions presented by appellant MLA for determination on this appeal.

I. The MLA's Motion to Strike seven documents. On March 6, 2017, after all the pre-filed testimony had been distributed, the MLA filed a Motion to Strike certain documents submitted by opposing parties, on the ground that the

documents were inadmissible under the terms of § 536.070(11). (Motion at Part 37, LF Vol. IX, at 1269-1305; § 536.070(11) at Appendix A-34 – A-37). (The Motion to Strike also addressed a number of other documents which are not being contested on this appeal).

According to the MLA, a document of the type enumerated in § 536.070(11) is admissible in a PSC proceeding only if the author of the document testifies at the hearing to its accuracy, and is subject to cross-examination thereon. None of the authors of the seven documents in question here submitted any pre-filed written testimony of any kind, so there was no testimony submitted to the PSC from the authors of the studies in question to support their accuracy. (See Lists of Issues and Witnesses, *supra*, Part 38, LF Vol. X, p. 1308 *et seq*.) Inasmuch as the authors of the studies did not testify, they were not subject to cross-examination.

Grain Belt and three other parties filed suggestions in opposition to the MLA's Motion to Strike the documents in question (as well as the testimony addressed in Point II below). (Part 38, LF Vol. X at 1419; Part 38 LF Vol. XI at 1519, 1531 and 1564).

None of these parties argued that the documents in question did not fall within one or more of the categories of materials enumerated in § 536.070(11). They generally argued, instead, that this statute was not applicable to the situation at hand, that other statutes made the documents admissible, and that the documents in

question were all of the type which may form the basis for expert opinion testimony. (Part 38, LF Vol. X at 1419; Part 38, LF Vol. XI at 1519, 1531 and 1564).

Near the outset of the evidentiary hearings in Jefferson City, the Administrative Law Judge orally denied the MLA's Motion to Strike. (Part 34, Tr. Vol. X, 28:25-29:20). After addressing the testimony which is the subject of Point II below, the decision with respect to the admissibility of the documents in question under this Point I was explained as follows:

> With regard to the attached documents, either the schedules were created by the witness himself [which is not the case with respect to the seven documents complained of on appeal] or there's no indication that the documents are not of a type reasonably relied upon by the witnesses, or excuse me, by experts in those fields or there are other hearsay exceptions that independently support their admission. So the Missouri Landowners' motion is denied. (Id. at 29:13-20)

II. The MLA's Motion to Strike testimony which relied on the documents addressed in Point I. As a part of the MLA's March 16, 2017 Motion to Strike, addressed in Point I above, the MLA also moved to strike portions of the testimony of several witnesses which relied on the seven documents which are the subject of

Point I on this appeal. In general, the MLA argued that if the documents themselves were not admissible, then any testimony based on or relying on those inadmissible documents would also be inadmissible as the fruit of a poisonous tree. (Part 37, LF Vol. IX, p. 1270, par. 3)

In overruling the MLA's Motion to Strike the testimony and other material complained of, the Administrative Law Judge stated as follows:

> In regards to the witness's testimony, it is proper for expert witnesses to cite to reference information that forms the basis for their opinions. Any complaints about the sources of the facts and the data upon which the witnesses rely will go to the weight not the admissibility of the testimony. (Part 34, Tr. Vol. X, 29:6-12)

III. Denial of access to "proprietary" information which Grain Belt relied upon to support its contention that the cost of wind generation from western Kansas was relatively inexpensive. One of the major points made by Grain Belt in support of its request for the CCN was the supposedly low cost of the energy which it proposed to supply from the wind farms in western Kansas. (See, e.g., direct testimony of Grain Belt's president, Mr. Michael Skelly, Part 14, Exh. to LF Vol. XXI 1227:12-13, 1236:16-1237:2, 1237:14-18; 1253:15-16; direct testimony of Grain Belt's Chief Financial Officer Mr. David Berry, HC Exh. 104 to Legal

File, Vol. III, 284:20-285:15, 288:14-290:1; and Grain Belt's Application to the PSC for the CCN, Part 34, LF Vol. I, p. 127, par. 14, p. 131; par. 25).

The Grain Belt testimony supporting that assertion came primarily from its CFO Mr. David Berry. Among other things, Mr. Berry submitted testimony to the effect that Kansas Wind generation was substantially less costly to produce than potential alternatives, including Missouri wind generation, Missouri solar generation, and combined cycle gas generation. (Exh. 104, H.C. Exh. Vol. III, pp. 288-294).

In support of the general contention regarding the relatively low cost of Kansas wind generation, in his direct testimony Mr. Berry included the following question and answer:

> Q. Have you independently confirmed the price of generating wind energy in Western Kansas?
>
> A. Yes. In January 2014, the Company completed a Request for Information ("RFI") to wind generators in western Kansas. The response to the RFI included 14 wind developers developing 26 wind farms totaling more than 13,500 MW. As part of their responses, generators provided indicative PPA ["Power Purchase Agreements"] pricing, which is their own calculation of their levelized cost of energy. The lowest-priced 4,000 MW [the

> approximate capacity of the proposed line] of new wind generation was an average of 2.0 cents per kWh flat for 25 years. (Exh. 104, H.C. Exh. Vol. III, 285:8-15; emphasis added).

After this testimony was filed, on October 12, 2016 the MLA submitted two related "data requests" to Grain Belt and Mr. Berry: DB.40 and DB.41. (MLA's Motion to Compel, November 30, 2016, Part 36, LF Vol. V, p. 703) (Data requests are the typical form of discovery in PSC cases, and can basically ask for any information which could legitimately be requested in written interrogatories or requests for production in civil cases). (See PSC Rule 4 CSR 240-2.090(1)-(2); Appendix A-38 – A-39).

The two data requests at issue here were as follows:

> DB.40 With reference to page 24 lines 10-15 of your testimony, please provide a copy of the complete unredacted responses to the RFI [Request for Information] completed in January, 2014.

> DB.41 With reference to page 24 lines 14-15 of your testimony, please provide the work papers and documentation which support the figure of 2.0 cents per kWh flat for 25 years for the lowest-priced 4,000 MW, including the name of each wind farm

included in that calculation. (MLA's Motion to Compel, November 30, 2016; Part 36, LF Vol. V, p. 703).

On this appeal, the MLA is only challenging Grain Belt's response (or rather what it sees as a lack of response) to DB.41. The MLA is providing information here regarding DB.40 only because the two issues were closely related, and were treated together in the pleadings regarding these discovery disputes.

After receiving Grain Belt's response to these data requests, the MLA filed a Motion to Compel, asking that Grain Belt be required to provide full and complete answers to DB.40 and 41. (MLA's Motion to Compel, November 30, 2016; Part 36, LF Vol. V, p. 703 *et seq.*).

In that Motion, the MLA listed the information which Grain Belt had provided in response to DB.40, including the responses to the RFI, but with certain of the information redacted by Grain Belt from each RFI response. (*Id.* at p. 704, par. 3).

In that same Motion, the MLA noted that "No information has been provided by GBE [Grain Belt] in response to Data Request No. DB.41." (*Id.* at p. 704, par. 4)

In support of its need for the information requested in DB.41, the MLA stated in its Motion as follows:

> The material requested in DB.41 is essential if the MLA is to analyze Mr. Berry's claim that the responses to the RFI demonstrate "the lowest-priced 4,000 MW of new wind generation was an average of 2.0 cents per kWh flat for 25 years." (*Id.* at p. 705, par. 7; footnote omitted)

In response to this Motion, on December 12, 2016, Grain Belt filed its Opposition to the MLA's Motion to Compel Discovery. (Part 36, LF vol. V, p. 718 *et seq.)* Among the points made there by Grain Belt were the following: that the MLA was seeking information submitted to Grain Belt from prospective wind generators, some of which is "extremely confidential because it reveals specific pricing and wind speed information of specific generators and wind farms which are industry trade secrets"; that the RFI is relevant because it provides information on the quality, cost, and abundance of wind resources in western Kansas; that the dispute does not concern what information is to be produced but rather how it is to be produced; that Grain Belt has already provided the MLA with a list of information related to the data requests in dispute. (*Id.)*

In its Opposition, Grain Belt's listed the information it had provided in responses to the two data requests in question. (*Id.* at 722). It did not allege there (or elsewhere in its Opposition) that it had provided the specific information requested in DB.41.

On December 21, 2016, the Commission issued an Order which (among other things) denied the MLA's Motion to compel the information requested in DB.41 (as well as DB.40). (Part 36, LF Vol. VI p. 762 *et seq.*) The Commission first ruled that the information being sought by the MLA is in fact "logically relevant" to the issues in this case. (*Id.* at 764).

It then went on to address the question of whether the information being sought by the MLA is also "legally relevant." In finding that it was not, the Commission ruled as follows:

> In this case the prejudicial effect of disclosure to Grain Belt Express and the wind farm generators is great, as pricing and wind speed information is the most valuable trade secret of a wind generator. Disclosure of this information would cause Grain Belt Express to violate confidentiality agreements with the RFI respondents. Requiring violation of these agreements will subject Grain Belt Express to the risk of litigation and harm the wind generators' ability to negotiate power purchase agreements with potential customers. Disclosure of such confidential information could result in wind generators and their contractors declining to provide any RFI information for future projects, which would

prevent future applicants from obtaining this type of information. (*Id.* at 765).

The Commission further stated that the probative value of the additional information sought by the MLA is low; that Grain Belt had already provided considerable information to the MLA which should allow them to develop close estimates of the wind speed and pricing information necessary to verify or challenge the energy cost estimates presented by Grain Belt; the value of the additional information is outweighed by the prejudicial effects to Grain Belt and the wind farms which responded to the RFI; and that the Commission's classification of this information as "highly confidential" would not adequately protect these parties from disclosure to their competitors' attorneys and experts. (*Id.*)

The PSC's Order did not specifically address the issue of how the MLA could possibly verify Grain Belt's claim about the 2 cents per kWh cost for the lowest cost 4,000 MW of power without the information it had sought in DB.41.

IV. The Concurring Opinion of the Four Commissioners. On the same day that the Commission issued the Report and Order which is the subject of these appeals, four of the five commissioners also issued an eight-page Concurring Opinion. (Part 40, LF Vol. XVI pp. 267502682; See Appendix at A-17 – A-24).

The Concurring Opinion began by agreeing that the Commission properly denied Grain Belt's request for a CCN, in that Grain Belt failed to show it had obtained all the necessary County Commission consents required by § 229.100. (Appendix A-17 -18).[3] As further explained in the Concurring Opinion, the decision to dismiss the request for the CCN was based on a recent case from the Western District: in the *Matter of the Application of Ameren Transmission Co. of Illinois*, 523 S.W.3d 21 (Mo. App. W.D. 2017), Motion for Transfer denied by Mo. Supreme Court, June 27, 2017. (*Id.*) This case is commonly referred to as the "ATXI" decision, an abbreviated form of the name of the applicant in that case.

Having agreed that the PSC properly dismissed Grain Belt's Application, the Concurring Opinion went on to state that had it not been for the ATXI, the four commissioners would have voted to grant Grain Belt's Application. In their view, the evidence demonstrated that Grain Belt had met the ultimate requirement of showing that the proposed line is "necessary or convenient for the public service." (Appendix, A-18). The four concurring commissioners also found that Grain Belt

[3] As the Commission stated, Grain Belt lacks the consent of the County Commission of Caldwell County. In addition, four other County Commissions have attempted to rescind the assents previously given to Grain Belt. See PSC's Report and Order, Appendix A-9.

had met all five of the *Tartan* criteria used to evaluate an application for a CCN. (*Id.*)

Among the specific observations of the concurring commissioners were the following: the proposed line is needed primarily because of the economic benefits it would provide to MJMEUC and its hundreds of thousands of customers (Appendix, A-18 - 19); there was substantial evidence of demand for the line by others within regional markets in and near Missouri (Appendix A-19); the cost of the project would not have been recovered from Missouri customers through various cost allocation methodologies used by the relevant independent transmission authorities (Appendix A-20); the testimony of David Berry established that the cost of wind generation from western Kansas is the lowest-cost resource option among those evaluated (Appendix A-21); in balancing the interests of all stakeholders, the benefits of the project outweigh the interests of the affected landowners (Appendix A-21); under future energy scenarios developed by one of the independent transmission operators, the project could lower energy production costs in Missouri by at least $40 million (Appendix A-21); the line would have a positive effect on the reliability of electric service in Missouri (Appendix A-21); replacement of fossil generation by wind generation would have positive environmental impacts (Appendix A-21); the construction of the line would produce hundreds of millions of dollars of benefits by creating new construction

jobs, as well as producing additional tax revenues (Appendix A-21-22); the Grain Belt project would appropriately move Missouri in the direction of promoting renewable energy (Appendix A-22-23) ; and had the PSC issued the CCN, they would have included many conditions on that grant of authority which would have provided necessary protections for Missouri landowners (Appendix A-23).

STANDARD OF REVIEW

The standard of review in PSC cases, as described in the recent ATXI decision, Appendix A-40 – A-45, is as follows:

> An original order or decision of the PSC is subject to judicial review to determine : first, whether the order is lawful; and second, whether the order is reasonable. § 386.510. The PSC's order is presumed valid. The party challenging the order has the burden "to show by clear and satisfactory evidence that the determination, requirement, direction or order of the [PSC] complained of is unreasonable or unlawful." § 386.430. "The lawfulness of the PSC's order is determined by whether statutory authority for its issuance exists, and all legal issues are reviewed *de novo."* (Case

citation and footnote omitted; bracketed letters in original).

(Appendix A-41)

This last point regarding *de novo* review of legal issues was also addressed in *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm.*, 103 S.W.3d 753, 759 (Mo. banc 2003), where the Court stated that "[t]here is no presumption in favor of the Commission's resolution of legal issues."

POINTS RELIED ON

I. THE PUPLIC SERVICE COMMISSION ("PSC) ERRED IN ACCEPTING SEVEN DOCUMENTS INTO EVIDENCE OVER THE OBJECTION OF THE MISSOURI LANDOWNERS ALLIANCE ("MLA") BECAUSE THE DOCUMENTS IN QUESTION WERE INADMISSIBLE UNDER THE TERMS OF § 536.070(11) RSMO, IN THAT THE DOCUMENTS CONSISTED OF STATISTICAL EXAMINATIONS OR STUDIES, OR COMPILATIONS OF FIGURES, OR EXAMINATION OF MANY RECORDS, OR OF LONG OR COMPLICATED ACCOUNTS OR A LARGE NUMBER OF FIGURES, OR INVOLVED THE ASCERTAINMENT OF MANY RELATED FACTS, BUT THE AUTHORS OF THE DOCUMENTS IN QUESTION

DID NOT TESTIFY TO THE ACCURACY OF SUCH MATERIAL AND WERE NOT SUBJECT TO CROSS-EXAMINATION THEREON, AS IS REQUIRED FOR ADMISSIBILITY UNDER § 536.070(11).

§ 536.070(11)

Big River Telephone Company v. Southwestern Bell Telephone Company, 440 S.W.3d 503 (Mo App 2014).

Lenzini v. Columbia Foods, 829 S.W.2d 482 (Mo. App. 1992).

Turner v. School District of Clayton, 318 S.W.3d 660, (Mo banc 2010).

II. THE PSC ERRED IN RECEIVING OTHER TESTIMONY BASED ON OR RELYING ON THE DOCUMENTS COMPLAINED OF IN POINT I BECAUSE SUCH TESTIMONY WAS INADMISSIBLE IN THAT IT AMOUNTED TO FRUIT OF A POISONOUS TREE AND THUS LACKED FOUNDATION.

In the Matter of the Care and Treatment of Michael Sohn, 473 S.W.3d 225 (Mo. App. 2015).

Khan v. Gutsgell, 55 S.W.3d 440 (Mo. App. 2001).

III. THE PSC ERRED IN DENYING THE MLA ACCESS DURING DISCOVERY TO THE WORK PAPERS AND OTHER DOCUMENTS

WHICH ALLEGEDLY SUPPORTED THE CLAIM BY GRAIN BELT EXPRESS CLEAN LINE, LLC ("GRAIN BELT") IN ITS DIRECT TESTIMONY CONCERNING THE LOW PRICE AT WHICH IT COULD SELL POWER FROM ITS PROPOSED LINE BECAUSE THE DENIAL OF ACCESS TO THIS MATERIAL DEPRIVED THE MLA OF ITS RIGHT TO DUE PROCESS UNDER AMENDMENTS V AND XIV TO THE UNITED STATES CONSTITUTION, AND ARTICLE 1 SECTION 10 TO THE MISSOURI CONSTITUTION, IN THAT THE LACK OF ACCESS TO THIS MATERIAL PRECLUDED THE MLA FROM EFFECTIVELY PREPARING ITS TESTIMONY AND CROSS-EXAMINING THE GRAIN BELT WITNESSES WITH RESPECT TO GRAIN BELT'S CLAIM OF THE PRICE AT WHICH IT COULD SELL POWER FROM ITS LINE.

State ex rel. Utility Consumers Council v. Pub. Serv. Comm., 562 S.W.2d 688 (Mo. App. 1978).

PSC Rule 4 CSR 240-2.135.

IV. THE "CONCURRING OPINION" ISSUED BY THE FOUR COMMISSIONERS WAS UNLAWFUL AND UNREASONABLE BECAUSE IT AMOUNTED TO AN ILLEGAL "ADVISORY OPINION",

IN THAT THE COMMISSION'S FINAL REPORT AND ORDER LEFT NO REMAINING DISPUTES AMONG THE PARTIES WHICH NEEDED TO BE ADDRESSED IN ORDER TO FINALLY DISPOSE OF THE CASE, THUS LEAVING THE CONCURRING OPINION WITH NO PRACTICAL EFFECT AND PROVIDING NO SPECIFIC RELIEF TO ANY OF THE PARTIES.

State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n of Mo., 392 S.W.3d 24 (Mo. App. 2013).

Gartner v. Missouri Ethics Commission, 323 S.W.3d 439 (Mo. App. 2010).

Ameren Transmission Co. of Illinois v. Pub. Serv. Comm., 467 S.W.3d 875 (Mo. App. 2015).

Adams v. King, 312 S.W.3d 432 (Mo. App. 2010) .

ARGUMENT

I. THE PUPLIC SERVICE COMMISSION ("PSC) ERRED IN ACCEPTING SEVEN DOCUMENTS INTO EVIDENCE OVER THE OBJECTION OF THE MISSOURI LANDOWNERS ALLIANCE ("MLA") BECAUSE THE DOCUMENTS IN QUESTION WERE INADMISSIBLE UNDER THE TERMS OF § 536.070(11) RSMO, IN THAT THE DOCUMENTS CONSISTED OF STATISTICAL EXAMINATIONS OR STUDIES, OR COMPILATIONS OF FIGURES,

OR EXAMINATION OF MANY RECORDS, OR OF LONG OR COMPLICATED ACCOUNTS OR A LARGE NUMBER OF FIGURES, OR INVOLVED THE ASCERTAINMENT OF MANY RELATED FACTS, BUT THE AUTHORS OF THE DOCUMENTS IN QUESTION DID NOT TESTIFY TO THE ACCURACY OF SUCH MATERIAL AND WERE NOT SUBJECT TO CROSS-EXAMINATION THEREON, AS IS REQUIRED FOR ADMISSIBILITY UNDER § 536.070(11).

Errors Were Preserved for Appellate Review.

Prior to the evidentiary hearings in the PSC case, the MLA filed a Motion to Strike the materials complained of here under Point I, on the ground that the documents were not admissible under § 536.070(11) . (Part 37, LF Vol. IX, pp. 1269-1305.) That Motion was thereafter denied by the PSC. (Part 34, TR Vol. X 28:25-29:20).

In addition, when the seven documents were offered into evidence at the hearings, the MLA objected again, on the same grounds relied on it its Motion to Strike. With the concurrence of the Administrative Law Judge, and without objection from any of the parties, the legal objections made at the evidentiary hearings were compiled in advance by the MLA in written form, labeled as "Exhibits", and distributed at the outset of the hearings. (Part 34, Transcript Vol. X, hearings on March 20, 2017, pp. 30-31)

When the seven documents complained of were offered in evidence, the MLA's objections were then raised by reference to those written "Exhibits." (See Exhibits at Part 38, LF Vol. XII, pp. 1677-1687; Appendix A-57-67)

As something of an aside, the Administrative Law Judge determined that the Exhibits should properly be referred to as "MLA Objections". (Part 34, Transcript Vol. X, pp. 163-64). So, e.g., what the MLA had labeled as Exhibit 380 is at times referred to in the record as MLA Objections No. 380.)

The specific documents complained of here, and the references to the transcript where the written Objections were raised, are as follows:

1. Schedule AES-2 to the rebuttal testimony of Mr. Alan Spell (the "Loomis Study"); Objections No. 386, raised at Part 34, Tr. Vol. XVI, p. 1234.

2. The wind map at Schedule DAB-4 to Mr. David Berry's direct testimony; Objections No. 382, raised at Part 34, Tr. Vol. XIV, p. 773.

3. Schedule MG-2 to the rebuttal testimony of Mr. Michael Goggin, at Part 29, Exhibits Vol. 48, page 3973; Objections No. 384 raised at Part 34, Tr. Vol. 16, p. 1124.

4. Schedule MG-3 to the rebuttal testimony of Mr. Michael Goggin, at Part 29, Exhibits Vol. 48, page 3974; Objections No. 384 raised at Part 34, Tr. Vol. 16, p. 1124.

5. Schedule MG-4 to the rebuttal testimony of Mr. Michael Goggin, at Part 29, Exhibits Vol. 48, page 3975; Objections No. 384 raised at Part 34, Tr. Vol. 16, p. 1124.

6. Schedule MG-6 to the rebuttal testimony of Mr. Michael Goggin, at Part 29, Exhibits Vol. 48, page 3977; Objections No. 384 raised at Part 34, Tr. Vol. 16, p. 1124.

7. Schedule MG-7 to the rebuttal testimony of Mr. Michael Goggin, at Part 29, Exhibits Vol. 48, page 3978; Objections No. 384 raised at Part 34, Tr. Vol. 16, p. 1124.

Finally, the MLA raised this same point regarding the inadmissibility of the documents in question in its Application for Rehearing with the PSC, by incorporating therein and attaching thereto its earlier Motion to Strike these documents. (MLA's Application for Rehearing, Part 40, LF Vol. XVI, at 2683-84).

Argument

Section 536.070(11) (at Appendix A-35-36) provides in relevant part as follows:

> The results of statistical examinations or studies, or of …
>
> compilations of figures … or examination of many records, or of long or complicated accounts, or of a large number of figures, or involving the ascertainment of many related facts, shall be admissible as

> evidence of such results, if it shall appear that such examination, study, audit, compilation of figures, or survey was made by or under the supervision of a witness, who is present at the hearing, who testifies to the accuracy of such results, and who is subject to cross-examination, and if it shall further appear by evidence adduced that the witness making or under whose supervision such examination, study, audit, compilation of figures, or survey was made was basically qualified to make it. All the circumstances relating to the making of such an examination, study, audit, compilation of figures or survey, including the nature and extent of the qualifications of the maker, may be shown to affect the weight of such evidence but such showing shall not affect its admissibility;

This statute is part of the Missouri Administrative Procedure Act, and § 536.070(11) is thus applicable to proceedings at the PSC. *Big River Telephone Company v. Southwestern Bell Telephone Company,* 440 S.W.3d 503, 511 (Mo. App. 2014).

The clear implication of the statute is that if the evidence in question falls within any of the categories enumerated therein, then that evidence is not admissible unless the author testifies to its accuracy, and is available at the hearing for cross-examination. *Lenzini v. Columbia Foods*, 829 S.W.2d 482, 486 (Mo.

App. 1992) (holding that in order to meet the requirements of § 536.070(11) "it is necessary that the person compiling the figures be present at the hearing and testify as to the accuracy of the figures.)"

Notably, when the PSC rejected the MLA's Motion to Strike the documents in question, it did not do so on the ground that any of those documents did not fall within the categories enumerated in § 536.070(11). (Part 34, Tr. Vol. X, 28:25-29:20). Nor did any of the parties opposing the Motion to Strike, including Grain Belt, allege that the documents did not fall within the categories listed in that statute. (Part 38, LF Vol. X at 1419; Part 38, Vol. XI at 1519, 1531 and 1564).

The documents discussed in paragraphs (1) through (7) below fail to meet the criteria for admissibility set forth in § 536.070(11), *supra*, because they all clearly fall within one or more of the enumerated categories set forth in that statute, and the person who authored the material, or supervised in the writing of that material, did not testify to its accuracy and was not available at the PSC hearing for cross-examination.

The next sections of this brief will demonstrate to the Court that that the seven documents in question do indeed fall within one or more of the categories enumerated in § 536.070(11) (Appendix A-35-36).

(1) The Loomis study submitted with the testimony of Mr. Alan Spell.

Mr. Spell is employed by and submitted testimony on behalf of the Missouri Department of Economic Development. (Part 29, Exh. to LF Vol. XLVIII Part 1, p. 3828-29). Mr. Spell was responsible for the compilation of the Economic Impact Study which purported to quantify the economic benefits (in terms of wages, taxes, etc.) which would be produced by the proposed Grain Belt line. (*Id.* at p. 3832:2-20).

For reasons which are not clear, his actual study was included as Schedule MOL-7 to Mr. Lawlor's direct testimony, instead of being included as a Schedule to Mr. Spell's own testimony. (Part 17, Exh. to LF Vol. XXVIII p. 1842). Mr. Lawlor is an employee of Grain Belt, and testified on a variety of different subjects. (*Id.* at 1827-28).

In compiling and writing the Economic Impact Study (Schedule MOL-7), Mr. Spell made reference to and relied upon on his own Schedule AES-2, which is a document co-authored by a Dr. Loomis and another individual, and attached to Mr. Spell's testimony as support for his own analysis. (Part 29, Exh. to LF Vol. XLVIII part 1 at p. 3836; Part 34, Tr. Vol. 16, Vol. 2 in LF, p. 1251:1-10).

As a matter of clarification, the study by Dr. Loomis was apparently mistakenly labeled by Mr. Spell as "Schedule DGL-2", instead of "Schedule AES-2". The reference to "DGL-2" no doubt refers to Dr. David G. Loomis, who had testified on behalf of Grain Belt in an earlier Application to the PSC for a CCN,

Case No. EA-2014-0207. (See PSC's Report and Order in that case, Part 21, Exh. to LF Vol. XXXII at p. 2485, par. 54-55.)

In any event, based on Mr. Spell's own testimony, it is clear that the Loomis study was intended to be submitted and marked as his Schedule AES-2. (Part 29, Exh. to LF, vol. 48 part 1, 3836:15-17.) Accordingly, it will be referred to here as Schedule AES-2.

The document at Schedule AES-2 is a complete copy of a 46 page independent, complex economic study which indicates on its cover page that it was compiled by Drs. Loomis and Carlson in June of 2013. (Parts 29 & 30, Exh. to LF Vol. XLVIII Part 1 p. 3890 – Part 3 p. 3935).

A cursory review of Mr. Spell's Schedule AES-2 will demonstrate that the 46 page Loomis study comes within one or more of the categories of studies and analyses listed in § 536.010(11). (See Part 29, Exh. to LF, Vol. XLVIII, Part I, p. 3890 *et seq*.)

(2) Wind Speed Map submitted with the testimony of Mr. David Berry.

Mr. David Berry is employed by and was a witness for Grain Belt. Schedule DAB-4 to Mr. Berry's direct testimony is a color-coded map of the United States, depicting wind speeds in different regions of the country. (Sealed Exhibits, HC Exh. to LF, Vol. III, p. 318.) A copy of the map is included at Appendix A-46 to

this brief. As indicated on the face of Schedule DAB-4, the map was prepared by a company named AWS Truepower.

As Mr. Berry explained, the map is compiled using numerous individual data points which represent wind speed for a particular area, which are then combined with weather data in a computer model to produce the map. (Part 34, TR. Vol. XV 843:21-844:20).

The process whereby AWS Truepower generates its wind maps is highly complex, using a wide array of data gathered from various sources. The process is described in more detail in a four page document prepared by AWS Truepower shown at Appendix A-47 – A-50; Part 26, Exhibit 344, Exh. to LF Vol. XLI p. 3342 *et seq*.) See Mr. Berry's testimony at Part 34, TR Vol. XV 844:22-845:14.

As is apparent from the document at Appendix A-47- A-50, the wind map itself involves the type of compilation and manipulation of data which brings it within the parameters of Section 536.070(11).

Notably, the wind map was one of the key elements of Grain Belt's case with respect to demonstrating that western Kansas included some of the least expensive wind power in the country, which was a key element in Grain Belt's arguments regarding the viability and public benefits of its transmission project. (See Mr. Berry's discussions of the importance of the data depicted on the wind map, and the conclusions he draws from that data, at the following pages of his

direct testimony, Sealed Exhibits, HC Exhibit 104, HC Exh. Vol. 3: 25:17-26:5; 27:9-12; 32:7-14; and 41:12-13.)

(3) Schedules to the Rebuttal Testimony of Mr. Michael Goggin.

In support of Grain Belt's proposed line, Mr. Michael Goggin testified on behalf of two trade groups: Wind on the Wires, and the Wind Coalition. (Part 30, Exh. to LF, Vol. XLIIX, Part 3, p. 3938) His testimony included attached Schedules and numerous footnotes which reference studies supporting his own testimony, but which were written or compiled by others. The MLA contends here that five of the Schedules in particular are inadmissible on their face under the terms of Section 536.070(11). Those five Schedules are as follows:

1. Schedule MG-2 is a color-coded wind map of the United States, comparable to the map at Mr. David Barry's Schedule DAB-4 discussed above. A copy is shown at Appendix A-51. It was also prepared by AWS Truepower. (Part 30, Exh. to LF Vol. 48, part 3, p. 3973) This document is inadmissible for the same reasons discussed with respect to Mr. Berry's wind map at his Schedule DAB-4.

2. Schedule MG-3 is a copy of a statistical analysis of capacity factors of wind generators by region of the country. (*Id.* at 3974). A copy is included at Appendix A-52. As noted on the face of the document, it was excerpted from a publication of the Lawrence Berkeley National Laboratories. This document

clearly falls within one or more of the categories of documents enumerated in § 536.070(11)

3. Schedule MG-4 generally compares the renewable generation and transmission infrastructure costs to the proximity of the end user. (*Id.* p. 3975). A copy is included at Appendix A-53. As noted on the face of the document, this graph was taken from a document referred to as the "MVP Report." Again, by its very nature this document falls within one or more of the categories of documents enumerated in § 536.070(11).

4. Schedule MG-6 depicts in graphic form the decline in market prices as additional wind capacity is added. (*Id.* p. 3977*)*. A copy of this Schedule is shown at Appendix A-54. As indicated on the document, the data was taken from a publication called *Synapse Energy Economics, Inc.* Like the previously discussed Schedules submitted by Mr. Goggin, by its very nature this one also falls within one or more of the categories of documents enumerated in § 536.070(11).

5. Finally, Schedule MG-7 is a detailed chart which compares the projected price of wind generation with the price of natural gas generation for the period 2017 to 2014. (*Id.* at p. 3978). A copy of Schedule MG-7 is included at Appendix A-55. As shown on the face of this document, it was taken from a forecast from the Berkeley National Laboratories. Again, by its very nature this document also

falls within one or more of the categories of documents enumerated in § 536.070(11).

In the PSC proceedings below, Grain Belt raised at least one argument common to all seven of the documents complained of here. In response to the MLA's Motion to Strike on the basis of § 536.070(11), Grain Belt argued in part that this statute is in effect over-ridden by § 386.410.1, which states in part that the Commission "shall not be bound by the technical rules of evidence." (Part 38, LF Vol. XI, at 1520.) (Statute at Appendix A-56).

There are two problems with this argument. First, compliance with an applicable statute can hardly be considered a "technical rule of evidence" which may be ignored by the PSC.

Second, § 536.070(11) addresses a specific evidentiary rule which is applicable to the admissibility of certain designated types of documents in PSC and other administrative proceedings. In contrast, § 386.410.1, relied upon by Grain Belt, is merely a general rule, which is not specific to any particular evidentiary rule, let alone the admissibility of documents addressed by § 536.070(11).

The law is clear that "statutes relating to the same subject matter should be read together, but where one statute deals with the subject in general terms and the other deals in a specific way, to the extent they conflict, the specific statute

prevails over the general statute." *Turner v. School District of Clayton,* 318 S.W.3d 660, 671 (Mo banc 2010).

To the same effect *see State ex rel. Cass County v. Pub. Serv. Comm.,* 259 S.W.3d 544, 551 (Mo. App. 2008) (holding that "where one statute deals with a particular subject in a general way, and a second statute treats a part of the same subject in a more detailed way, the more general should give way to the more specific."); and *State ex rel. Taylor v. Russell,* 449 S.W.3d 380, 382 (Mo banc 2014) (holding that a warden's statutory authority to make rules for the management of the prison was superseded by a specific statute allowing a person being executed to name up to five individuals of his choosing to witness the execution).

Accordingly, in assessing the admissibility of the documents in question here, the statute specific to this subject matter, § 536.070(11), must prevail over the statute of general applicability relied on by Grain Belt.

Based on the foregoing, the MLA submits that all seven of the documents in question failed to meet the specified criteria for admissibility set forth in § 536.070(11).

II. THE PSC ERRED IN RECEIVING OTHER TESTIMONY BASED ON OR RELYING ON THE DOCUMENTS COMPLAINED OF IN POINT I BECAUSE SUCH TESTIMONY WAS INADMISSIBLE IN THAT IT

AMOUNTED TO FRUIT OF A POISONOUS TREE AND THUS LACKED FOUNDATION.

By way of introduction to this issue, to the extent that the Court agrees that any or all of the documents addressed in Point 1 above are inadmissible, the MLA contends that all testimony and other documents which rely on the inadmissible documents are also inadmissible.

It would make little sense to find, for example, that if Mr. Berry's wind map is stricken, that he is nevertheless free to discuss the conclusions which he drew from the inadmissible document. The argument here is akin to the "fruit of the poisonous tree" theory, in that anything derived from or dependent on inadmissible evidence should also be deemed inadmissible. It simply lacks any foundation.

In the following sections, the MLA will address the testimony and other material which is based on or relies on the documents addressed above in Point I.

Errors Were Preserved for Appellate Review. When the MLA submitted its Motion to Strike the documents which were the subject of Point I, and its Motion to Compel with respect to a response to Data Request DB.41, it also moved to strike the testimony and other material which was based on or relied on those documents; i.e., the testimony complained of in this Point II. (Part 37, Motion to Strike, LF Vol. IX p. 1269-1305; Motion to Compel, Part 36, LF Vol. V, p. 703 *et seq.*)

In addition, the MLA's written objections in the form of "Exhibits", discussed under Point I above, also included objections to the testimony and other material which relied on the documents claimed to be inadmissible under § 536.070(11), as well as the testimony related to data request DB.41. (See Objections/Exhibits at Part 38, LF Vol. XII, pp. 1677-1687; Appendix A-57-67).

Finally, these issue were raised by the MLA in its Application For Rehearing to the PSC. (Part 40, LF Vol. XVI, pp. 2690-96, which was a part of the Motion to Strike which was included with the Application For Rehearing; and Part 40, LF Vol. XVI, p. 2685 regarding DB.41.)

Argument. The specific testimony and other material complained of under this Point II, as they related to and relied on the documents complained of under Point 1, are as follows:

1. Material related to Mr. Spell's Schedule AES-2 (the Loomis Study).

The primary point here is that if the Loomis Study at Mr. Spell's Schedule AES-2 is deemed inadmissible (as argued in Point I), then because that study formed a major basis for the Economic Study submitted in this case as Mr. Lawlor's Schedule MOL-7, then the study at MOL-7 should also be deemed inadmissible. MOL-7 is, in every sense of the term, the fruit of a poisonous tree.

The Loomis study was provided to Mr. Alan by Grain Belt, and was used to supply key input data to Mr. Alan's own economic study. (Part 29, Exh. to LF

Vol. 48, part 1, p. 3836:15-17). And as Mr. Alan conceded, if he were to remove the data supplied to him by Grain Belt, he would not have been able to run his own computerized economic model (which became Schedule MOL-7). (Part 34, TR Vol. 16 p. 1287:19-1288:8).

Other than one telephone conversation with Mr. Lawlor from Grain Belt, the data supplied to Mr. Alan by Grain Belt consisted solely of the Loomis study; i.e., his Schedule AES-2. (Part 34, TR Vol. 16 p. 1250:6 – 1251:5). Mr. Alan was not even aware of the source of the data in the Loomis study, other than to say "I know that – I'm sure he discussed that – those inputs with Clean Line as well to understand his impact." (*Id.* at p. 1251:6-10)

The output of the Economic Study presented at Schedule MOL-7 is obviously dependent on the input data supplied in the Loomis study to Mr. Alan by Grain Belt. Therefore, if the Loomis study at Schedule AES-2 is stricken, then the fruit of that study, i.e., Schedule MOL-7, is logically inadmissible as well.

Furthermore, if the study at Schedule MOL-7 is inadmissible, then all of the testimony from the various witness who cite to and rely on the study at Schedule MOL-7 should also be stricken. This would include the following: Skelly testimony listed at Objections/Exhibit 380, Appendix A-57; Lawlor testimony listed in par. 1 of Objections/Exhibit 381, Appendix A-58; Meisenheimer

testimony listed at par. 1 of Objections/Exhibit 385, Appendix A-66; and Spell testimony listed in the last three lines of Objections/Exhibit 386, Appendix A-67.

2. Material related to Mr. Berry's wind map (Schedule DAB-4) If Mr. Berry's wind map at Schedule DAB-4 is stricken, as discussed in Point 1, then so too should all of Mr. Berry's testimony which discusses the conclusions he draws from the data depicted on that wind map. As indicated in the MLA's Motion to Strike, the portions of his pre-filed direct testimony which the MLA asks to be stricken on this basis appear at the following pages of his testimony: Sealed Exhibits, HC Exhibits to LF, Vol. III, pp 286:17; 286:21 – 287:5; 288:9-12; 293:7-14; and 302:12-13. (See Objections/Exhibit 382, par. 1, Appendix A-61)

3. Material related to Mr. Goggin's Schedule MG-2. If Mr. Goggin's wind map at Schedule MG-2 is stricken (Appendix A-51), then the favorable conclusions he draws in his testimony from that Schedule should also be stricken. The testimony in question is at Part 30, Exh. to LF, Vol. XLIIX, Part 3, p. 3942:90-95; 3944:130-139; and 3946:178-182; Objections/Exhibit 384, Appendix A-63).

4. Material related to Mr. Goggin's Schedule MG-3. A copy of this Schedule is included at Appendix A-52. If that Schedule is deemed inadmissible, then Mr. Goggin's testimony regarding the conclusions he draws from that Schedule should also be deemed inadmissible. That testimony appears at *Id.* page

3944:143-147; 3961:499-501; and 3961:510-512. See Objections/Exhibit 384, Appendix A-63).

5. Material related to Mr. Goggin's Schedule MG-4. A copy of Schedule MG-4 is included at Appendix A-53. If that Schedule is stricken, then the MLA contends that the following testimony regarding Mr. Goggin's conclusions based on MG-4 should also be stricken: *Id.* at p. 3945:152-157; Objections/Exhibit 384 Appendix A-63).

6. Material related to Mr. Goggin's Schedule MG-6. A copy of Schedule MG-6 appears at Appendix A-54. If that Schedule is stricken, then the conclusions which Mr. Goggin draws in his testimony from that Schedule should also be stricken. That testimony is at *Id.*, p. 3959:461 – 3960:466; Objections/Exhibit 384, Appendix A-63).

7. Material related to Mr. Goggin's Schedule MG-7. Finally, a copy of Mr. Goggin's Schedule MG-7 is included at Appendix A-55. If that Schedule is stricken, then the conclusions which Mr. Goggin draws in his testimony from MG-7 should also be stricken. That testimony is at *Id.* p. 3963:538-544; Objections/Exhibit 384, Appendix A-63).

Even if the testimony based on the inadmissible documents was governed by rules applicable in civil cases (which of course it is not) the testimony addressed here in Point II would still be inadmissible. "The facts or data in a particular case

upon which an expert bases an opinion or inference … must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable." *In the Matter of the Care and Treatment of Michael Sohn*, 473 S.W.3d 225, 229 (Mo. App. 2015).

However, with respect to the testimony in each of the above cases, the witness did not testify that the documents in question were of the type reasonably relied upon by experts in their field. The MLA therefore submits that the Administrative Law Judge had no basis for concluding that the witnesses were relying on material reasonably relied upon by experts in their field. (Part 34, TR Vol. X at 29:6-20). And there was certainly no basis for concluding that the documents upon which they relied were "reasonably reliable" if they are stricken from the record.

The MLA has found no Missouri case law where the theory of the fruit of the poisonous tree has been applied to civil cases. So perhaps the objection to the material covered in Point II would have better been phrased in terms of a lack of foundation with respect to the testimony relying on inadmissible documents.

However, the MLA suggests that its objections regarding the material in question put everyone on notice as to the rationale behind that objection: that a witness cannot testify to matters which are dependent on a study or analysis which has been stricken from the record.

This position is supported by *Khan v. Gutsgell*, 55 S.W. 3d 440 (Mo. App. 2001) where this Court stated as follows:

> Missouri courts have utilized different language in establishing the level of precision with which an objection must be stated. For instance, some courts have stated that an objection is adequate for preservation purposes if it is "sufficiently clear and definite." Others have held that the objecting party must make the basis of their objection "reasonably apparent." Yet another formulation is whether the objection as stated was sufficient to make the court "cognizant" of the basis for the objection. We note that none of these tests requires counsel to state the basis for their objection with mathematical precision. Instead, the focus is on whether the stated objection gives opposing counsel and the trial court reasonable grounds upon which to either rephrase the question or correctly rule on the objection. (*Id.* at Par. A of decision; citations omitted).

Notably, none of the four parties which responded to the MLA's motion to strike the material in question raised any issue regarding the fact that the objections were based on the theory of the poisonous tree. (Part 38, LF Vol. X at 1419-1425; Part 38, Vol. XI at 1519-1527; Part 38, Vol. XI at 1531-41; and Part 38, Vol. XI at

1564-66). In fact, Grain Belt and the other three parties made no mention at all of the MLA's analogy to the fruit of the poisonous tree.

Nor did the Administrative Law Judge mention when ruling on the Motion to Strike that the MLA's analogy caused any problem in his ability to rule on the issue. (Part 34, Tr. Vol. X, 29:6-12).

Accordingly, the MLA submits that the claims in Point II were adequately preserved, based on the readily-understood objection regarding the fruit of the poisonous tree.

For the above reasons, none of the testimony addressed here in Point II should have been admissible.

III. THE PSC ERRED IN DENYING THE MLA ACCESS DURING DISCOVERY TO THE WORK PAPERS AND OTHER DOCUMENTS WHICH ALLEGEDLY SUPPORTED THE CLAIM BY GRAIN BELT EXPRESS CLEAN LINE, LLC ("GRAIN BELT") IN ITS DIRECT TESTIMONY CONCERNING THE LOW PRICE AT WHICH IT COULD SELL POWER FROM ITS PROPOSED LINE BECAUSE THE DENIAL OF ACCESS TO THIS MATERIAL DEPRIVED THE MLA OF ITS RIGHT TO DUE PROCESS UNDER AMENDMENTS V AND XIV TO THE UNITED STATES CONSTITUTION, AND ARTICLE 1 SECTION 10 TO THE MISSOURI CONSTITUTION, IN THAT THE LACK OF ACCESS TO THIS MATERIAL

PRECLUDED THE MLA FROM EFFECTIVELY PREPARING ITS TESTIMONY AND CROSS-EXAMINING THE GRAIN BELT WITNESSES WITH RESPECT TO GRAIN BELT'S CLAIM OF THE PRICE AT WHICH IT COULD SELL POWER FROM ITS LINE.

Claim of error preserved for appellate review. This point concerns the MLA's allegation that Grain Belt improperly refused to provide the information requested of Mr. David Berry and Grain Belt in data request No. DB.41.

This issue was first raised with the Commission by the MLA in a Motion to Compel, filed November 30, 2016. The Motion included the claim that the failure to provide the information in question would result in a denial of the MLA's right to due process. (Part 36, LF Vol. V, p. 703 *et seq*.) The MLA also raised the inadequate response to DB.41via a written objection at the time that Mr. Berry's testimony was offered in evidence. (MLA Objections/Exhibit 382, Appendix A-61-62; Part 39, LF Vol. XIII, pp. 1861-62, raised at Part 34, TR Vol. XIV, p. 773). Finally, the objection and the constitutional issue regarding data request DB.41 were raised by the MLA in its Application For Rehearing with the Commission. (Part 40, LF Vol. XVI, p. 2685, par. 3).

Argument. Data Request DB.41 was submitted as part of the MLA's response to the repeated claims from Grain Belt about the supposedly low cost of the energy it proposed to supply from the wind farms in western Kansas. (See, e.g.,

direct testimony of Grain Belt's president, Mr. Michael Skelly, Part 14, Exh. to LF Vol. XXI 1227:12-13, 1236:16-1237:2, 1237:14-18; 1253:15-16; direct testimony of Grain Belt's Chief Financial Officer Mr. David Berry, Sealed Exhibits HC Exh. 104 to Legal File, Vol. III, 284:20-285:15, 288:14-290:1; and Grain Belt's Application to the PSC for the CCN, Part 34, LF Vol. I, p. 127, par. 14, and p. 131, par. 25).

The Grain Belt testimony supporting that claim came primarily from its witness Mr. David Berry. Among other things, Mr. Berry submitted testimony to the effect that Kansas Wind generation was substantially less costly to produce than alternatives, including Missouri wind generation, Missouri solar generation, and combined cycle gas generation. (Sealed Exhibits, Exh. 104, H.C. Exh. Vol. III, pp. 288-294).

In support of the allegation about the relatively low cost of Kansas wind generation, in his direct testimony Mr. Berry included the following question and answer:

> Q. Have you independently confirmed the price of generating wind energy in Western Kansas?
>
> A. Yes. In January 2014, the Company completed a Request for Information ("RFI") to wind generators in western Kansas. The response to the RFI included 14 wind developers developing 26

> wind farms totaling more than 13,500 MW. As part of their responses, generators provided indicative PPA ["Power Purchase Agreements"] pricing, which is their own calculation of their levelized cost of energy. The lowest-priced 4,000 MW [the approximate capacity of the proposed line] of new wind generation was an average of 2.0 cents per kWh flat for 25 years. (Sealed Exhibits, Exh. 104, H.C. Exh. Vol. III, 285:8-15) (emphasis added).

Without the work papers, it is impossible to say exactly how the 2.0 cents per kWh figure was derived. Intuitively, however, the alleged cost of 2.0 cents for the lowest-priced 4,000 MW must have been calculated by taking the lowest priced block of power, say 500 MW, and then adding in the next lowest-priced block of power, say 1,000 MW, until Mr. Berry reached the sum of 4,000 MW – the approximate capacity of its proposed line. He then simply averaged the price of the blocks of power included in the 4,000 MW, and came up with a figure of 2.0 cents per kWh. (See testimony of Mr. Berry at Part 34, Tr. Vol. XV, p. 832:8-18).

As is apparent, the MLA had absolutely no means of confirming or challenging this alleged cost for the lowest-cost 4,000 MW without the work papers showing how that figure was derived.

After Mr. Berry's testimony was filed, on October 12, 2016 the MLA submitted two related "data requests to " to Grain Belt and Mr. Berry: DB.40 and

DB.41. (See MLA's Motion to Compel, November 30, 2016, Part 36, LF Vol. V, p. 703) Data Request DB.41 was as follows:

> DB.41 With reference to page 24 lines 14-15 of your testimony, please provide the work papers and documentation which support the figure of 2.0 cents per kWh flat for 25 years for the lowest-priced 4,000 MW, including the name of each wind farm included in that calculation. (MLA's Motion to Compel, November 30, 2016, Part 36, LF Vol. V, p. 703).

As indicated above, the PSC's explanation for rejecting the MLA's Motion to compel answers to DB.40 and 41 was as follows:

> In this case the prejudicial effect of disclosure to Grain Belt Express and the wind farm generators is great, as pricing and wind speed information is the most valuable trade secret of a wind generator. Disclosure of this information would cause Grain Belt Express to violate confidentiality agreements with the RFI respondents. Requiring violation of these agreements will subject Grain Belt Express to the risk of litigation and harm the wind generators' ability to negotiate power purchase agreements with potential customers. Disclosure of such confidential information could result in wind generators and their contractors declining to

provide any RFI information for future projects, which would prevent future applicants from obtaining this type of information. (Part 36, LF Vol. VI, p. 765).

The Commission further stated that the probative value of the additional information sought by the MLA is low; that Grain Belt had already provided considerable information to the MLA which should allow them to develop close estimates of the wind speed and pricing information necessary to verify or challenge the energy cost estimates presented by Grain Belt; the value of the additional information is outweighed by the prejudicial effects to Grain Belt and the wind farms which responded to the RFI; and that the Commission's classification of this information as "highly confidential" would not adequately protect these parties from disclosure to their competitors' attorneys and experts. (*Id.*)

Most of this explanation clearly applied to the response to DB.40, and not DB.41, inasmuch as there is no evidence that Grain Belt provided any kind of direct response to DB.41.

In any event, this Court has made it clear that when a party deliberately chooses to bolster its case in a PSC proceeding through the use of highly confidential or proprietary information, it may not then refuse to disclose that

information on the ground that it is confidential – even if disclosure might harm the third party from which the information was obtained.

The case on point is *State ex rel. Utility Consumers Council v. Pub. Serv. Comm.*, 562 S.W.2d 688 (Mo. App. 1978). The underlying PSC proceeding involved a challenge to Union Electric's proposal to build the Callaway nuclear units. One of the main issues before the PSC in that case was the relative cost of building a nuclear plant, versus the cost of building a new coal-fired plant.

The appellant, which opposed the nuclear option, claimed it was denied the right to effective cross-examination regarding key costs of the nuclear alternative, such as the cost of the turbines and the cost of uranium, because Union Electric refused to provide that information to them. (*Id.* at 693). Union Electric justified its position on the ground "that the information sought by appellant was proprietary." (*Id.*)

In rejecting Union Electric's position, the Court first noted that the PSC hearings must be conducted consistently with fundamental principles of due process, which include the right of cross-examination. (*Id.* at 693-94).

This Court then provided an example of the treatment of confidential information from a federal appellate decision, which had stated as follows:

> In a situation where an agency had compiled data from coal purchasers but refused to disclose the names of the producers it is

> difficult to see how the accuracy, authenticity and relevancy of these tabulations could be tested in any way without the disclosure of the names of the code members (coal producers) who reported the data upon which the tabulations are based. (*Id.* at 694*)* (internal quotation marks omitted).

In effect, this Court then went on to explain why the PSC erred in this case when it rejected the MLA's Motion to obtain proprietary information in data request DB.41:

> We conclude that the appellant's right to cross-examine was improperly restricted. The Company contends that the proprietary nature of the information sought by appellant's cross-examination protected that information from discovery. This contention cannot stand. The Company did not present any law at the hearings nor to this Court which would indicate that there was an evidentiary privilege because of the proprietary nature of the contracts. We do find cases which recognize the proprietary interest and we are not unmindful of the problem. Though the court acknowledges that in some circumstances the proprietary nature of information may shelter it from examination, the Company here cannot hide behind the proprietary nature of the information. <u>The Company proffered</u>

> testimony and exhibits based on proprietary information. If it seeks to rely on proprietary information to carry its burden of proof and, thereby, benefit from the use of such information, then it may not protect that information from scrutiny by claiming it need not disclose. (*Id.* at 694; case citation and footnote omitted; emphasis added).

Just like in the Callaway nuclear case, in this proceeding Grain Belt knowingly relied in its testimony on what it now claims to be highly confidential information. They clearly did so in an effort to bolster their claim regarding the relatively low cost of the Kansas wind generation. Although it may be true that public disclosure could be harmful to the wind generators, the same was no doubt true with respect to the proprietary information supplied to Union Electric from its own third-party contractors Bechtel Power Corp., Westinghouse Corp. and General Electric. *Id.* at 693. In any event, this is a risk which Grain Belt knowingly took when it filed the testimony based on proprietary information.

The obvious lesson from *State ex rel. Utility Consumers Council, supra,* is that if a party is in possession of proprietary information, either they should not use it in support of their case at the PSC, or they should be prepared to disclose it when needed by opposing parties in the preparation of their own case.

As Mr. Berry conceded, they did not provide the MLA with the names of the wind farms which were used to calculate the lowest cost 4,000 MW. Nor did they indicate how many wind farms were included in that calculation. Nor did they provide the prices per MW which were included in the calculation of the lowest cost 4,000 MW. (Part 34, Tr. Vol. XV, 823:6-18) In effect, they neglected to provide the very information needed to challenge Grain Belt's claim of the 2.0 cents price for the lowest-cost 4,000 MW of power from the Kansas wind farms.

And as is evident from the attempted cross-examination of Mr. Berry on this issue, the lack of this information led to unanswered questions, and a general lack of any basis for challenging him on his alleged 2.0 cents cost for the lowest-cost 4,000 MW of generation. (See Part 34, Tr. Vol. XV, pp. 831:22 – 838:21.

In denying the MLA's Motion to Compel, the PSC justified the decision, in part, on the ground that the classification of this information as "highly confidential" would not adequately protect these parties from disclosure to their competitors' attorneys and experts. (Part 36, LF Vol. VI, p. 765.) The MLA finds this explanation to be somewhat surprising under the circumstances.

In *State ex rel. Utility Consumers Council, supra*, 562 S.W.2d 688, fn 13 (Mo. App. 1978), this Court noted that the Nuclear Regulatory Commission has a rule providing for disclosure of proprietary information. It then went on to recommend that the PSC "should take steps to promulgate a similar rule for the

examination of proprietary information and for the presentation of evidence or cross-examination involving proprietary data by means of an in camera proceeding."

The PSC thereafter did promulgate a very detailed rule regarding two levels of proprietary information, providing, as suggested by the Court, for in camera proceedings as may be necessary. (Rule 4 CSR 240-2.135; Appendix A-68-70). And in fact, the in camera process provided for in that Rule was utilized frequently in the PSC case below. (See Sealed Transcripts, Tr. Vols. XI and XV).

The MLA contends it is simply not credible for the PSC to now decide that Grain Belt is not subject to this rule, when there is no reason to believe that the PSC's own rules could not effectively do what they were intended to do. If nothing else, the PSC could have secured the safety of the information by requiring that it be provided only to the MLA's counsel, and that any mention of that data be discussed in a closed in camera hearing restricted as the PSC felt was necessary.

In addition, the PSC asserted that the disclosure of the confidential information sought in data request DB.41 would cause Grain Belt Express to violate confidentiality agreements with the RFI respondents, and subject Grain Belt Express to the risk of litigation. Those statement are speculative at best.

The standard Request for Information ("RFI") form which Grain Belt sent to prospective wind farms is shown at Part 25, Exhibit 341, at Exh. to LF, Vol. XL,

pp. 3317-3334. (See Part 34, Tr. Vol. XV, 823:19 – 824:6). That standard form included the following provision:

> 3. Legally Required Disclosures. In the event that Clean Line or any of its Representatives in whom Clean Line transmits Confidential Information pursuant to this Agreement is requested or required pursuant to applicable law, or by any governmental body, regulatory agency or court to of competent jurisdiction … to disclose any Confidential Information or other information regarding the RFI, Clean Line [Grain Belt's parent company] will, if permitted by law, provide Generator with notice, prior to disclosing such information, so that Generator may seek an appropriate protective order and/or waive compliance with this paragraph. If, in the absence of a protective order or the receipt of a waiver hereunder, Clean Line or its Representatives is nonetheless legally compelled to disclose such information, it may, without liability hereunder, furnish that portion of such Confidential Information that is legally required and will exercise its reasonable efforts to obtain reliable assurance that confidential treatment will be accorded to such Confidential Information. (Part 25, Exh. to LF, Vol. XL, p. 3331)

So if the PSC had ordered Grain Belt to produce the information requested in data request DB.41, the PSC could have eliminated one of the very problems they then relied on in refusing to direct Grain Belt to provide the confidential information requested by the MLA.

In its Initial Brief to the PSC in the case below, Grain Belt supported its position on the merits of the *Tartan* criteria with the following claim to the PSC: "The low cost to produce wind energy in western Kansas is the most significant factor in Mr. Berry's [cost] analysis, given that the lowest-priced 4000 MW of new generation averaged $20/MWh (2,0 cents/kWh) flat for 25 years." (Part 39, LF Vol. XIII, p. 1837-38).

To make that claim, after the MLA was left with no means of disputing it, most surely violated the MLA's basic right to due process.

In summary, under *State ex rel. Utility Consumers Council v. Pub. Serv. Comm., supra*, the MLA was denied its right to due process of law by being refused access to the documents supposedly supporting Grain Belt's claim regarding the cost of the Kansas wind generation.

IV. THE "CONCURRING OPINION" ISSUED BY THE FOUR COMMISSIONERS WAS UNLAWFUL AND UNREASONABLE BECAUSE IT AMOUNTED TO AN ILLEGAL "ADVISORY OPINION", IN THAT THE COMMISSION'S FINAL REPORT AND ORDER LEFT NO REMAINING

DISPUTES AMONG THE PARTIES WHICH NEEDED TO BE ADDRESSED IN ORDER TO FINALLY DISPOSE OF THE CASE, THUS LEAVING THE CONCURRING OPINION WITH NO PRACTICAL EFFECT AND PROVIDING NO SPECIFIC RELIEF TO ANY OF THE PARTIES.

Claim of error preserved for appellate review. There was of course no opportunity for the MLA to object to the Concurring Opinion until after it was issued. However, this point was raised by the MLA in its Application for Rehearing with the Commission, thereby preserving it for review on this appeal. (Part 40, LF Vol. XVI p. 2683, 2687-88)

Argument. Courts are generally barred from issuing what are called "advisory opinions." *Adams v. King*, 312 S.W.3d 432, 435 (Mo. App. 2010) That same rule applies to the PSC. *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n of Mo.,* 392 S.W.3d 24, 38 (Mo. App. 2013).

One factor which makes for an advisory opinion is that it is based on a mere hypothetical. *Adams v. King*, 312 S.W.3d 432, 435, *supra*. A decision is also said to be a mere advisory opinion if it will not have any practical effect on an existing controversy. *Gartner v. Missouri Ethics Commission*, 323 S.W.3d 439, 441-42 (Mo. App. 2010).

Here, the Concurring Opinion had no practical effect whatsoever, and was only advisory as to a future, hypothetical situation; i.e., what the four

Commissioners would have done if the ATXI decision had not been issued, or was later reversed). *See Ameren Transmission Co. of Illinois v. Pub. Serv. Comm.*, 467 S.W.3d 875, 880 (Mo. App. 2015).

Further, The official PSC Report and Order of August 16, 2017 had already denied Grain Belt's Application for a CCN, and thus totally resolved the case, leaving no remaining disputes among the parties which needed to be addressed in order to finally dispose of the case. So the Concurring Opinion had no practical effect on any remaining controversy, nor did it provide any relief to any party to the case.

For these reasons, the concurring opinion amounted to a mere advisory opinion.

An unauthorized advisory opinion has no binding result, and is a nullity. *Wasinger v. Labor and Industrial Relations Commission,* 701 S.W.2d 793, 794 (Mo. App. 1985) Accordingly, the Concurring Opinion of August 16, 2017 should be dismissed or withdrawn by the Court as a nullity.

CONCLUSION

If the Court would otherwise be inclined to rule in Grain Belt's favor on the merits of its appeal, and remand this case to the PSC with directions to approve Grain Belt's Application for the CCN, then the MLA respectfully asks the Court to instead rule in the MLA's favor on the issues raised herein, and remand to the PSC

with instructions to rehear the case in light of its rulings on the issues in the MLA's appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

I certify pursuant to Rule 84.06(c) that this brief includes the information required by Rule 55.03 (except that counsel does not have a facsimile number), and complies with the limitations contained in Rule 84.06(b). I further certify that this brief contains 12,968 words in total, as determined by the word count feature of Microsoft Word.

/s/ Paul A. Agathen
Paul A. Agathen

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2018, the foregoing was filed electronically with the Clerk of the Supreme Court of Missouri, to be served by operation of the Court's electronic filing system pursuant to Missouri Supreme Court Rule 103.8.

/s/ Paul A. Agathen
Paul A. Agathen