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IN THE SUPREME COURT OF MISSOURI

GRAIN BELT EXPRESS CLEAN LINE, LLC and MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY COMMISSION,	)	
Appellants,	)	
vs.	)	**No. SC96993**
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,	)	
Respondent.	)	

SUBSTITUTE OPENING BRIEF OF MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY COMMISSION

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Jurisdictional Statement

Appellant Missouri Joint Municipal Electric Utility Commission ("MJMEUC") appeals from a final Report and Order issued by the Missouri Public Service Commission ("Commission") on August 16, 2017, with the effective date of September 15, 2017. Pursuant to §386.500 *Revised Statutes of Missouri* and 4 CSR 240-2.160(1), MJMEUC timely filed with the Commission its Application for Rehearing on August 25, 2017. On September 19, 2017, the Commission denied MJMEUC's Application for Rehearing, effective that same date. Pursuant to §386.510, MJMEUC timely filed its Notice of Appeal with the Commission on October 2, 2017, and the Commission subsequently forwarded MJMEUC's Notice of Appeal to the Missouri Court of Appeals Eastern District which assigned Case Number ED105975 to MJMEUC's appeal. On October 10, 2017, on the court's own motion, MJMEUC's appeal was consolidated with an appeal filed by Appellant Grain Belt Express Clean Line, LLC ("Grain Belt"), Case Number ED105932, which was designated the lead case. On October 30, 2017, MJMEUC filed its Application for Transfer of this appeal to this Court, prior to disposition by the Missouri Court of Appeals Eastern District. On December 19, 2017, this Court denied that Application for Transfer. The Missouri Court of Appeals Eastern District issued its Opinion in this appeal on February 27, 2018, and transferred this appeal to this Court pursuant to Rule 83.02. This Court accepted the transfer of the record on appeal on February 28, 2018. This Court has jurisdiction under Article V, §§ 10 and 18 of the Missouri Constitution.

Statement of the Case

All parties to this appeal acknowledge the economic and environmental benefits brought to likely all Missouri citizens by Grain Belt's delivery of the affordable renewable energy that is abundant in western Kansas. All the experts agree that, for MJMEUC alone, hundreds of thousands of customers of its city members will save millions of dollars on their electric bills over the twenty-plus year lifetime of the contracts already in place. Four of the five Commissioners have already ruled on the

merits of the evidence to determine that the benefits of the Grain Belt Project to the many outweigh the objections of the few.

But, a recent opinion by the Missouri Court of Appeals Western District[1] has been utilized by the opponents to the Grain Belt Project and by the Commission to avoid (or at least delay) the result that is compelled by the evidence – the granting of the Certificate of Convenience and Necessity ("CCN") requested by Grain Belt so it can secure its final financing and build the transmission line in time to deliver the renewable energy for which MJMEUC has already contracted. The Missouri Court of Appeals Eastern District correctly held that the "Commission erred in finding it could not lawfully grant a line CCN to Grain Belt under §393.170.1 based upon the decision" issued in *In re Ameren Transmission Co* because that court "improperly requires every CCN applicant to acquire local consent as required for an area CCN under §393.170.2, even if the applicant is solely seeking a line CCN pursuant to §393.170.1."[2]

This Court is thus now called to serve as the final decision-maker – because the Commission's Report and Order has effectively positioned this case such that this Court's ruling on the applicable law will operate as either the green light or the red light for the Grain Belt Project. The hundreds of thousands of customers of MJMEUC's city members earnestly desire the green light.

Statement of Facts

Grain Belt filed its application with the Commission for a CCN pursuant to §393.170.1 *Revised Statutes of Missouri* and 4 CSR 240-3.105 (Appendix A-5; Legal File page 2660) to construct an electric transmission line and associated facilities across eight Missouri counties to deliver 500 megawatts ("MW") of wind-generated electricity from western Kansas to customers in Missouri, and another 3,500 MW to states further east ("Grain Belt Project"). (Appendix A-8; Legal File page 2663). As of August 16, 2017,

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[1] *In re Ameren Transmission Co. v. PSC of Mo.,* 523 S.W.3d 21(Mo. App. W.D. 2017).
[2] *Grain Belt Express Clean Line, LLC, et al. v. Public Service Commission*, No. ED105932, slip op. at 10 (Mo. App. E.D. Feb. 27, 2018) (Appendix A-52).

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the date of the Commission's Report & Order which is the subject of this appeal, Grain Belt had not obtained final §229.100 (Appendix A-28) assents to cross the rights of ways of public roads from each of the county commissions of the eight counties to be crossed by the transmission line. (Appendix A-9, A-10, A-15; Legal File pages 2664, 2665 and 2670).

The MJMEUC is a joint action agency that allows non-profit utilities, such as municipal utilities, to work together to achieve economies of scale in purchasing electricity (or other energy related commodities) that would be difficult for the individual utilities to achieve on their own. (Exhibits page 3718, lines 3-6). MJMEUC intervened in the Commission case on behalf of its sixty-eight Missouri municipal members which, together with its advisory member, a rural electric cooperative with more than 21,000 customers, serve some 347,000 retail customers in Missouri with a combined peak load of approximately 2,600 MW. (Exhibits page 3718, lines 15-18).

MJMEUC often uses transmission service agreements ("TSAs") with other utilities to provide energy to its members. These TSAs are typically subject to a multitude of Regional Transmission Organization ("RTO") costs, such as future transmission expansion, and these increasing future costs are difficult to determine. (Exhibits page 3717, lines 8-13). MJMEUC owns generation that supplies much of its members' energy needs, but has primarily used purchase power agreements ("PPAs") to provide renewable energy to its members. (Exhibits page 3737, lines 5-7). MJMEUC's wholesale customers, particularly a committee consisting of a group of thirty-five Missouri cities, the Missouri Public Energy Pool ("MoPEP"), are leaders within Missouri in providing renewable energy to their customers and those customers are demanding additional affordable renewable energy resources. (Exhibits pages 3720, lines 7-12 and 3732, lines 19-23). The MoPEP cities are: Albany, Ava, Bethany, Butler, Carrollton, Chillicothe, El Dorado Springs, Farmington, Fayette, Fredericktown, Gallatin, Harrisonville, Hermann, Higginsville, Jackson, Lamar, La Plata, Lebanon, Macon, Marshall, Memphis, Monroe City, Odessa, Palmyra, Rock Port, Rolla, Salisbury, Shelbina, St. James, Stanberry, Thayer, Trenton, Unionville, Vandalia and Waynesville –

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and the cities of Carrollton, Salisbury and Vandalia are located in the counties crossed by the Grain Belt transmission line. (Exhibits page 3722). The MoPEP is oversubscribed in its ability to offer its members renewable retail products and cannot meet the needs and demands of its city members until it adds additional renewable resources. (Transcript Vol. 2, page 1112, lines 9-25).

MJMEUC and Grain Belt executed a TSA that gives MJMEUC the option to purchase up to 200 MW of firm transmission capacity at a discounted rate, and will allow predictable, stable cost increases in transmission well into the future. (Exhibits pages 1846-1881, and page 3717 lines 14-16). The corresponding PPA that MJMEUC executed with Infinity Wind will allow Kansas wind energy to flow across the Grain Belt Project and into the RTO where MoPEP and individual MJMEUC members can deliver that low-cost renewable energy to their customers. (HC Exhibits pages 1395-1440, and Exhibits page 3717 lines 16-20). MJMEUC's PPA with Infinity Wind obligates MJMEUC to take that power and pay for it, assuming the Grain Belt Project is built and is available for that service. (Transcript Vol. 2, page 1001, lines 10-23). Infinity Wind is obligated by the PPA to provide Kansas wind energy to MJMEUC or forfeit its payments of significant security which escalate over the 20-year life of the contract. (Secured Transcript Vol. 1, page 1211, line 6 to page 1212, line 16).

In 2021, MoPEP's contract with Illinois Power Marketing Company for 100 MW of coal energy and capacity will expire. (Exhibits page 3717 and 3719). In December 2016, the thirty-five MJMEUC cities which form the MoPEP group committed to replace some of that expiring coal energy by purchasing 60 MW of the affordable Kansas wind energy delivered over the Grain Belt Project. (Exhibits pages 3752-3759 and Transcript Vol. 2, page 1004, line 3 to page 1005, line 3). Additionally, Kirkwood contracted to purchase 25 MW, Hannibal (situated in a county to be crossed by the Grain Belt Project) contracted to purchase 15 MW, Columbia contracted to purchase 35 MW and Centralia contracted to purchase 1 MW – bringing the total current commitments to 136 MW of the 200 MW of Kansas wind energy available to MJMEUC members via the

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Grain Belt Project, and it is anticipated that, if the Grain Belt Project is built, the entire capacity will be committed. (Exhibits pages 3760-3805, and pages 3743, 3744 and 3751).

The early termination options in the TSA, the PPA and the contracts executed by MoPEP, Centralia, Columbia, Hannibal and Kirkwood do not release the parties to those seven contracts from providing, taking and paying for Kansas wind energy delivered to Missourians unless the Grain Belt Project is not built. (Transcript Vol. 2, page 1006, lines 9-25). But, if the Grain Belt Project is not built, MJMEUC's cost of meeting its reserve obligation and its load will likely rise. (Transcript Vol. 2, page 1011, line 23 to page 1012, line 4). If the Grain Belt Project is not built, MJMEUC will have to acquire more expensive resources to address the needs of its city members who take power from the RTO, and these additional costs will be paid by the customers of these cities. (Exhibits, page 3727).

Considering the entire 200 MW potentially provided to MJMEUC by Grain Belt through the TSA, MJMEUC calculated that its wholesale customers would save approximately $10 million annually in transmission charges alone. (Exhibits page 3728, lines 1-6, page 3737, and Transcript Vol. 2, page 998, line 23 to page 999, line 21). For the wind power and transmission service that has been committed, the thirty-five MoPEP cities alone will save just under $11 million annually over the cost of the Illinois Power Marketing contract that expires in 2021. (Transcript Vol. 2, page 999, line 21 to page 1000, line 10 and page 1002, lines15 – 20). MJMEUC is non-profit and its city members receive these savings "dollar for dollar" and are likely to pass on those savings to their residential, commercial and industrial customers through "rate relief" or through updated maintenance in the smallest communities that are otherwise "struggling economically." (Transcript Vol. 2, page 1000, line 14 to page 1001, line 9). The Missouri Landowners Alliance ("MLA") expert Joseph J. Jaskulski testified that the Kansas wind energy delivered to MJMEUC's members by Infinity Wind over the Grain Belt Project is cheaper than any other cost proposal received by MJMEUC. (Transcript Vol. 2, page 1457, lines 7-23). Paul Glenden Justis Jr., the expert for the Eastern Missouri Landowners Alliance d/b/a Show Me Concerned Landowners ("Show Me"), testified that

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Infinity Wind's Kansas wind energy delivered to MJEMEUC's members over the Grain Belt Project is cheaper than Iowa or Missouri wind energy delivered over the RTO. (Transcript Vol. 2, page 1557, line 17 to page 1558, line 5 and page 1566, line 6 to page 1567, line 21).

Other purchasers of renewable energy who cannot take advantage of MJMEUC's first-mover discounted rate are nevertheless likely to choose Kansas wind energy delivered via the Grain Belt Project, because even at the full tariff rate, it will be cheaper than the service offered to them by the RTOs. (Transcript Vol. 2, page 1106, line 12 to page 1110, line 15 and HC Exhibits page 1454).

In its Report & Order, the Commission "conclude[d] that the substantial and competent evidence in the record supports the conclusion that [Grain Belt] 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 [Grain Belt] application…[because] it lacks the statutory authority to issue a CCN…." (Appendix A-15; Legal File page 2670).

However, in the Concurring Opinion, four of the five Commissioners stated "had it not been for the *Matter of Ameren Transmission Co*. opinion, we would have granted the [Grain Belt] application, as the evidence showed that the [Grain Belt] project is 'necessary or convenient for the public service.'" (Appendix A-18; Legal File page 2676). The four Concurring Commissioners found that the Grain Belt "project is needed primarily because of the benefits to the members of [MJMEUC] and their hundreds of thousands of customers, who had committed to purchase at least 100 MW of wind power utilizing transmission service purchased from [Grain Belt]" and that "MJMEUC calculates that their members would have saved approximately $9-11 million annually." (Appendix A-18, A-19; Legal File pages 2676-2677). The four Concurring Commissioners further found that "[t]he evidence in the case demonstrated that the [Grain Belt] project would have created both short-term and long-term benefits to ratepayers and all the citizens of the state. In our view, the broad economic,

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environmental and other benefits of the project to the entire state of Missouri outweigh the interests of the individual landowners." (Appendix A-21; Legal File page 2679).

The Grain Belt Project is planned to cross properties owned by "about 570 unique landowners" and 39 of those landowners in Missouri have already provided Grain Belt with easements on their properties. (Transcript Vol. 1, page 427, line 3 to page 428, line 17). There are fewer than 100 Missouri landowners whose properties are within 100 feet of the Grain Belt Project but will not actually be crossed by the transmission line. (Transcript Vol. 1, page 374, line 18 to page 375, line 8).

Points Relied On

I. The Commission *erred in* denying the requested CCN by construing *In re Ameren Transmission Co. v. PSC of Mo.,* 523 S.W.3d 21(Mo. App. W.D. 2017) to abrogate the Commission's authority to grant the CCN pursuant to §393.170 and 4 CSR 240-3.105 in deference to the authority of one or more county commissions to ensure the safety of the rights of way of its public roads pursuant to §229.100 *because* the Commission's denial of the CCN by virtue of its construction of *In re Ameren Transmission Co*. is both unlawful and unreasonable under §386.510 *in that* the *In re Ameren Transmission Co.* case did not and could not have divested the Commission of its primary authority to grant the CCN as authorized by over 100 years of case law, enabling statutes, the State's administrative law and the Judiciary's Constitutionally-grounded deference to the Commission as an agency of the Executive.

**In re Ameren Transmission Co. v. PSC of Mo.,* 523 S.W.3d 21 (Mo. App. W.D. 2017)

*§393.170, *Revised Statutes of Missouri*

* *Broadwater v. Wabash R. Co.,* 110 S.W. 1084, 1908 Mo. LEXIS 147 (Mo. 1908).

* *State ex rel. Chicago, R.I. & P.R. Co. v. Public Service Commission,* 312 S.W.2d 791 (Mo. 1958).

II. The Commission *erred in* grounding its denial of the requested CCN, in significant part, on two exhibits admitted post-hearing into the Record of Evidence over MJMEUC's timely Due Process objection *because* the Commission's acceptance of and reliance upon those two exhibits in denying the CCN is unlawful under §386.510 *in that* the two exhibits had been created in an unrelated and closed case to which MJMEUC was not a party and so MJMEUC had no opportunity to meet and rebut that evidence and was thus denied the Due Process guaranteed by §536.070 and 4 CSR 240-2.130.

*§536.070(2), *Revised Statutes of Missouri*
*4 CSR 240-2.130(1).

III. The Commission *erred in* denying the requested CCN and the benefits acknowledged by four of the five Commissioners that would have flowed to MJMEUC's members and all Missourians from that CCN *because* denial of the CCN and its related benefits is unreasonable under §386.510 and also confiscatory and unjust in violation of the constitutional protection of property rights *in that* four of the five Commissioners found short-term and long-term economic, environmental and other benefits of the Grain Belt Project to hundreds of thousands of Missouri citizens and the entire state of Missouri as well.

* *State ex rel. Associated Natural Gas Co. v. Public Service Commission,* 706 S.W.2d 870 (Mo. App. W.D. 1985)(*citing St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38 (1936)).

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Standard of Review

The standard of appellate review for the final Report and Order issued by the Commission[3] "is two-pronged: 'first, the reviewing court must determine whether the [Commission's] order is lawful; and second, the court must determine whether the order is reasonable.'" *State ex rel. AG Processing, Inc. v. PSC*, 120 S.W.3d 732, 734 (Mo. 2003)(*See also*, §386.510). This procedure "for judicial review in section 386.510 is exclusive and jurisdictional." *State ex rel. AG Processing, Inc.*, 120 S.W.3d at 735.

Regarding the first prong, the "lawfulness of a [Commission] order is determined by whether statutory authority for its issuance exists, and all legal issues are reviewed *de novo*." *State ex rel. AG Processing, Inc.*, 120 S.W.3d at 734. If the reviewing court finds the Commission's order to be unlawful, the order is overturned and the reviewing court "need not reach the issue of the reasonableness of the [Commission's] order." *Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Office of Public Counsel*, 464 S.W.3d 520, 524 (Mo. 2015).

However, if the Commission's order is determined to be lawful, the reviewing court moves to the second prong to determine whether the order is reasonable, that is whether the order "is supported by substantial, competent evidence on the whole record; the decision is not arbitrary or capricious or where the [Commission] has not abused its discretion." *State ex rel. Praxair, Inc. v. Missouri Public Service Commission,* 344 S.W.3d 178, 184 (Mo. 2011).

[3] This standard for appellate review applies to all Points Relied On and each error claimed and argued by MJMEUC in this brief. Additionally, each error claimed herein by MJMEUC was timely preserved for appellate review pursuant to §386.500 and 4 CSR 240-2.160 by being addressed first in MJMEUC's Application for Rehearing filed with the Commission on August 25, 2017, and denied by the Commission on September 19, 2017 (Legal File, pages 2739 to 2753 and 2804 to 2808).

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Argument

I. The Commission *erred in* denying the requested CCN by construing *In re Ameren Transmission Co. v. PSC of Mo.,* 523 S.W.3d 21(Mo. App. W.D. 2017) to abrogate the Commission's authority to grant the CCN pursuant to §393.170 and 4 CSR 240-3.105 in deference to the authority of one or more county commissions to ensure the safety of the rights of way of its public roads pursuant to §229.100 *because* the Commission's denial of the CCN by virtue of its construction of *In re Ameren Transmission Co*. is both unlawful and unreasonable under §386.510 *in that* the *In re Ameren Transmission Co.* case did not and could not have divested the Commission of its primary authority to grant the CCN as authorized by over 100 years of case law, enabling statutes, the State's administrative law and the Judiciary's Constitutionally-grounded deference to the Commission as an agency of the Executive.

A. The Commission's determination that it now lacks the statutory authority to issue the subject CCN by virtue of the *In re Ameren Transmission Co.* opinion is both unlawful and unreasonable because the Missouri Court of Appeals Western District *did not* so hold.

In its *In re Ameren Transmission Co*. decision, the Missouri Court of Appeals Western District repeatedly articulated its disapproval of the Commission's choice in that underlying case to grant a "contingent" or "non-effective" CCN – but the Court of Appeals *did not* hold that the Commission no longer possesses the primary statutory authority to issue a "line" CCN. The Court found that the Commission had granted the CCN "*contingent* upon ATXI providing certified copies of county assents." *In re Ameren Transmission Co*., 523 S.W.3d at 24 (Appendix, page A-31, emphasis added). The Court further found that "[t]he PSC imposed a condition upon the CCN that ATXI acquire the county assents *before the CCN would become effective*." *Id*. at 25 (Appendix, page A-32, emphasis added). The Court then declared that the Commission "has no statutory authority to grant a preliminary or conditional CCN *contingent* on the required county

commission consents being subsequently obtained." *Id.* at 23 (Appendix, page A-30, emphasis added).

Very specifically, the Court acknowledged the Commission's statutory authority to impose *conditions* on a CCN under Subsection 3 of §393.170, but ruled that the Commission's choice in that case to issue a *contingent* or *non-effective* CCN was without statutory authority:

> While section 393.170.3 grants the PSC statutory authority to impose reasonable and necessary conditions on a CCN, there is no statute authorizing the PSC to grant a preliminary or conditional CCN *contingent* on the required county commission consents being subsequently obtained. The PSC's issuance of a CCN *contingent* on ATXI's subsequent provision of required county commission assents was unlawful as it exceeded the PSC's statutory authority. *Id.*at 27 (Appendix, page A-35, emphasis added).

Thus, the Court's inquiry in *In re Ameren Transmission Co*. focused on whether or not the Commission has the statutory authority to issue a CCN that is contingent or not effective. Stated another way, the Missouri Court of Appeals Western District inquired into the Commission's authority to avoid the consequences of its authority by issuing a CCN that has no effect until some other entity acts. And the Court answered that inquiry with a resounding "no" – the Commission is responsible to exercise its own statutory authority to grant an effective, non-contingent CCN. That fully-effective CCN may include recognition of the independent requirements of certain regulations or statutes, such as §229.100, which are administered by other entities. And the fully-effective CCN may include reasonable and necessary conditions imposed by the Commission under the authority of §393.170.3. But the effectiveness of the CCN may not depend on the fulfillment of those independent requirements or conditions.

Therefore, the Commission's conclusion in the underlying case which is the subject of this appeal, that "[u]nder the Court's direction set forth in *Ameren Transmission Co*, the Commission cannot lawfully issue a CCN to [Grain Belt] until the

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company submits evidence that it has obtained the necessary county assents under Section 229.100," is unlawful because it is contrary to the Commission's statutory authority. (Report and Order, Appendix page A-15, Legal File page 2670).

Further, the Commission's conclusion that it now lacks the statutory authority to issue the subject CCN is unreasonable, arbitrary and capricious because the Commission abused its discretion to misquote *In re Ameren Transmission Co*. in order to support its unlawful conclusion. The large block quotation at page 12 of the Report and Order (Appendix page A-13, Legal file page 2668) contains such selective partial quotations from the *In re Ameren Transmission Co*. opinion as to mislead that Court's actual ruling. Reference to the actual language in the *In re Ameren Transmission Co*. opinion sets the record straight regarding the import of that Court's ruling.

The first paragraph partially quoted by the Commission which begins with "[b]y statute and by rule,…" permitted the Commission to reach the conclusion that it cannot issue any CCN before the applicant has obtained the consents of other entities. However, just one paragraph prior to the Commission's selective quotation, the *In re Ameren Transmission Co*. Court identified the statute to which it was applying both §229.100's (Appendix page A-28) and 4 CSR 240-3.105(1)(D)(1)'s (Appendix page A-26) requirements of "county consents" to be §393.170.2 (regarding area CCNs), not §393.170.1 (regarding line CCNs), which is the only statute relevant to this appeal. *In re Ameren Transmission Co*., 523 S.W.3d at 25-26 (Appendix A-33).

The second paragraph in the Commission's long block quote from the *In re Ameren Transmission Co*. opinion begins with "[o]ur interpretation of the statute…," which the Commission again construed to be the Court of Appeal's interpretation of §393.170.1 regarding line CCNs. However, just one paragraph prior to the Commission's selective quotation, the Court again specifically identified its focus to be area CCNs under §393.170.2 and the "reasonable and necessary conditions" permitted by §393.170.3 – not line CCNs under §393.170.1 which is the only statute relevant to this appeal. *In re Ameren Transmission Co*., 523 S.W.3d at 26-27 (Appendix A-34).

Finally, there is one sentence missing from the *In re Ameren Transmission Co.* opinion between the second and third paragraphs partially quoted in the Commission's Report and Order which, when re-inserted, changes entirely the point of the entire block quotation to clearly prohibit the Commission from issuing non-effective or contingent CCNs, rather than to operate (as the Commission contends) as a prohibition on the Commission's authority to act until some county commissions act. That full and fair quotation from *In re Ameren Transmission Co.* reads as follows (with the *In re Ameren Transmission Co.* sentence missing from the Commission's Report and Order italicized below):

> *While section 393.170.3 grants the PSC statutory authority to impose reasonable and necessary conditions on a CCN, there is no statute authorizing the PSC to grant a preliminary or conditional CCN contingent on the required county commission consents being subsequently obtained.* The PSC's issuance of a CCN contingent on ATXI's subsequent provision of required county commission assents was unlawful as it exceeded the PSC's statutory authority. *Id.* at 27 (Appendix A-35).

Therefore, the *In re Ameren Transmission Co.* opinion does not prohibit the Commission from exercising its authority under §393.170.1 as erroneously declared by the Commission, but instead should have guided the Commission to exercise its statutory authority to grant an effective, non-contingent line CCN to Grain Belt. That fully-effective line CCN may have included a recognition of the independent requirements of certain regulations or statutes, such as §229.100, which are administered by other entities. And the fully-effective line CCN may have included reasonable and necessary conditions imposed by the Commission under the authority of §393.170.3. However, the Commission concluded that the *In re Ameren Transmission Co.* opinion precluded it entirely from issuing the requested line CCN, and that conclusion was unreasonable, arbitrary, capricious and a result of the Commission's abuse of its discretion.

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The Report and Order under review by this Court should be set aside in part regarding the Commission's conclusion of law that it lacked the statutory authority to issue the CCN, thus permitting the findings of fact of four of the five Commissioners that the CCN should be granted because the Grain Belt Project is necessary or convenient for the public service to become the Commission's final ruling on Grain Belt's application for a line CCN.

B. The Commission's determination that it now lacks the statutory authority to issue the Grain Belt CCN by virtue of the *In re Ameren Transmission Co.* opinion is unlawful and unreasonable because that opinion is not binding precedent for this decision by the Commission.

An appellate court's construction of a statute becomes precedent for lower courts (or the Commission) only as to "decisions on points arising and decided" in the appellate court's order, but that decision does not bind or operate as *stare decisis* on statutes or points "that can at most be implied from something that was actually decided." *Broadwater v. Wabash R. Co.,* 110 S.W. 1084, 1908 Mo. LEXIS 147 *9-10 (Mo. 1908).

Grain Belt asked the Commission to grant it a line CCN under §393.170.1 (Appendix A-5; Legal File page 2660). Grain Belt made *no* request of the Commission under §§393.170.2 or 393.170.3 (regarding area CCNs and hearings/conditions, Appendix A-25), so neither of those statutes were at issue before the Commission. Significantly, and as acknowledged by the Commission (Appendix pages A-14, A-15; Legal File pages 2669-2670), *In re Ameren Transmission Co.* did not construe or even address §393.170.1 or a line CCN at any point in its decision. Instead, *In re Ameren Transmission Co.* construed only §§393.170.2 and 393.170.3. (523 S.W.3d at 25-27; Appendix pages A-32 to A-35).

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

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evidence that it has obtained the necessary county assents under Section 229.100." (Appendix A-14, A-15; Legal File pages 2669-2670). The Missouri Court of Appeals Eastern District similarly construed the holding of *In re Ameren Transmission Co*., but found that case "wrongly decided."[4]

Therefore, the Commission's insistence that *In re Ameren Transmission Co*. prevented it from exercising its authority to grant Grain Belt a line CCN under §393.170.1 violates Missouri's long-standing definition of *stare decisis*, and is inconsistent with the actual language of *In re Ameren Transmission Co.* The Missouri Court of Appeals Western District cites only to §§393.170.2 and 393.170.3 and declares that its "harmonization of the statute preserves the integrity of both subdivisions of section 393.170" as though there are only two, and not three, subdivisions of that statute. *In re Ameren Transmission Co*., 523 S.W.3d at 27 (Appendix A-34). Whether that Court deliberately or mistakenly[5] excluded §393.170.1 from its construction of §§393.170.2

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[4] *Grain Belt Express Clean Line, LLC, et al. v. Public Service Commission*, No. ED105932, slip op. at 10 (Mo. App. E.D. Feb. 27, 2018) (Appendix A-50).

[5] The *In re Ameren Transmission Co*. opinion does itself contain error, which could not be reviewed by the Commission, and so MJMEUC duly preserved that error for any appellate review through its Application for Rehearing before the Commission. (Legal File page 2741). Specifically, that Court cited the full text of §229.100 (Appendix A-28), which gives county commissions the authority to provide assents to the placement of utility poles, wires, pipes, etc. in the rights-of-ways of the county's public roads, yet that Court then described this statutory authority to encompass all areas of the county. 523 S.W.3d at 25 (Appendix A-32, A-33). And, in quoting the language of §393.170.2, the *In re Ameren Transmission Co.* Court actually substituted the words "local government" for the statutory language "municipal" authorities. *Id.* at 26 (Appendix A-34). Although – as the Missouri Court of Appeals Eastern District agreed at footnote 4, page 8 of its slip opinion (A-50) – any requirements of §393.170.2 for an area CCN are irrelevant to Grain Belt's application for a §393.170.1 line CCN, MLA and the Commission have argued contrary to statutory definition that the term "municipal" with regard to an authority's assent to a franchise can be expanded to also include "counties." But, per §393.120, the definitions for the terms in Chapter 393 are found in §386.020, and "municipality" is defined by §386.020(34) as a "city, village or town." See Appendix A-54 to A-61 and also A-62 to A-63 for MJMEUC's detailed briefing of this issue before the Missouri Court of Appeals Eastern District.

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and 393.170.3 is both unknown and immaterial here – there is no construction of §393.170.1 in *In re Ameren Transmission Co*. and that opinion is thus not binding precedent to prevent the Commission from granting the line CCN requested by Grain Belt.

Consequently, the Commission erred, and its decision is both unlawful and unreasonable.

C. The Commission's determination that it now lacks the statutory authority to issue the Grain Belt CCN by virtue of the *In re Ameren Transmission Co.* opinion is unlawful and unreasonable because it is contrary to the Commission's enabling statutes and related case law.

"The Public Service Commission Law of the State was enacted on March 17, 1913, and became immediately effective" so that the Commission could "establish[] a public policy for the public good, in the reasonable and nondiscriminatory exercise of delegated police power." *Kansas City Power & Light Co. v. Midland Realty Co*., 93 S.W.2d 954, 955-956, 958 (Mo. 1936). And, "[b]y that law [the Commission] is vested with the powers…necessary and proper to carry out fully and effectually all the purposes of the act." *Columbia v. Public Service Commission*, 43 S.W.2d 813, 815 (Mo. 1931). Missouri's Constitution prevents the police power from being abridged, and so the Commission in possession of the State's police power is "a fact-finding body whose findings and orders, being prima facie reasonable and lawful, are subject to judicial review in that respect only." *Kansas City Power & Light Co*., 93 S.W.2d at 958. The Commission is "intended to have very broad jurisdiction in the field in which it was intended to operate," and regarding electric utilities, the statutes authorize the Commission to approve "any new construction or location even though authorized by municipal franchise" because the statutory scheme is "intended to give the Commission full control over allocation of territory to such utilities, and to authorize either monopoly or regulated competition therein." *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 180 S.W.2d 40, 44 (Mo. 1944).

This historical deference to the statutory authority of the Commission acting in its field is borne out in the current statutory scheme. The "public service commission shall

be vested with and possessed of the powers and duties in [Chapter 386] specified, and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter." §386.040. Additionally, the "jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under [Chapter 386]: (1) To the…sale or distribution of…electricity…within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to…electric plants, and to persons or corporations owning, leasing, operating or controlling the same." §386.250. Further, the Commission is authorized to have "general supervision of all…electrical corporations…having authority under any special or general law or under any charter or franchise to lay down, erect or maintain wires…or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of…furnishing or transmitting electricity…." §393.140(1).

Based upon the plain language of these statutes, our Legislature clearly intended the Commission, as opposed to any other entity including county commissions, to be the decision-maker regarding the construction and location of a line to transmit electricity across the state. The Missouri Court of Appeals Eastern District agreed, holding that *In re Ameren Transmission Co.* "empowers a local entity to withhold its consent and prevent the Commission from issuing a CCN. The delegation of this power effectively nullifies §393.170.1, by conflating its provisions with those in §393.170.2…[and] renders the use of the disjunctive 'or' in §393.170.3 meaningless."[6]

"The primary rule of statutory interpretation is to give effect to the legislative intent as reflected in the plain language of the statute…and by considering the context of the entire statute in which it appears." *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. 2007). In the context of the statutory scheme which originated and continues to enable the Commission, the authority to grant an effective line CCN to Grain Belt remains primarily vested in the Commission and could not have been abridged by the Missouri Court of Appeals Western District in the *In re Ameren Transmission Co.*

[6] *Grain Belt Express Clean Line, LLC, et al. v. Public Service Commission*, No. ED105932, slip op. at 10 (Mo. App. E.D. Feb. 27, 2018) (Appendix A-51).

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opinion, as determined by the Commission. Consequently, the Commission erred, and its decision is both unlawful and unreasonable.

D. The Commission's determination that it now lacks the statutory authority to issue the Grain Belt CCN by virtue of the *In re Ameren Transmission Co.* opinion is unlawful and unreasonable because it violates the State's administrative process to ensure uniform and non-parochial regulation of utilities for the public benefit.

The Commission is "a fact-finding body, exclusively entrusted and charged by the Legislature to deal with and determine the specialized problems arising out of the operation of public utilities. It has a staff of technical and professional experts to aid it in the accomplishment of its statutory powers" and it alone is able "to meet changing conditions, as [it] in its discretion, may deem to be in the public interest." *State ex rel. Chicago, R.I. & P.R. Co. v. Public Service Commission,* 312 S.W.2d 791, 796 (Mo. 1958). Even an appellate court's review of Commission orders is "confined to the question of their lawfulness and reasonableness" because any judicial weighing of the evidence already considered by the Commission would "substitute…the judgment of the court and it becomes the administering body [which would] destroy administration." *State ex rel. Chicago, R.I. & P.R. Co*., 312 S.W.2d at 793-794. A decision regarding the grant of a CCN for construction of an electric transmission line is "wholly an administrative matter peculiarly within the discretion of the Commission." *State ex rel. Kansas City Power & Light Co. v. Public Service Commission,* 76 S.W.2d 343, 354 (Mo. 1934). Indeed, a reviewing court will not "substitute its discretion for discretion legally vested in the [Commission]" because it "oversteps the boundaries of its jurisdiction when it attempts to tell the [C]ommission what the action should be." *State ex rel. Chicago, R.I. & P.R. Co*., 312 S.W.2d at 795.

Given that an appellate court reviewing the Commission's orders will not violate its administrative expertise, the Commission's finding that the *In re Ameren Transmission Co*. Court elevated a single county commission over that expert administrative process is contrary to decades of appellate case law and is thus unlawful and unreasonable. Both the Commission and the *In re Ameren Transmission Co*. Court

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should have been aware that "the very purpose of regulation by state agencies…is to secure uniformity of operating conditions among similar utilities and to save the economic waste that…impairs the public service." *State ex rel. Detroit-Chicago Motor Bus Co. v. Public Service Commission,* 23 S.W.2d 115, 117 (Mo. 1929)(internal citations omitted).

E. The Commission's determination that it now lacks the statutory authority to issue the Grain Belt CCN by virtue of the *In re Ameren Transmission Co.* opinion is unlawful and unreasonable because it violates the Judiciary's Constitutionally-grounded deference to the Commission as an agency of the Executive.

The Missouri Constitution decrees that the powers of our government shall be separated:

> The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.
>
> *Missouri Constitution*, Article II §1.[7]

The doctrine of the separation of powers is "vital to our form of government…because it prevents the abuses that can flow from centralization of power." *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules,* 948 S.W.2d 125, 132 (Mo. 1997). If a court's order interferes with the lawful authority of an agency of the Executive, then "we should have the singular spectacle of a government run by the courts, instead of the officers provided by the Constitution…and our safety…is

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

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largely dependent upon the preservation of the distribution of power and authority made by the Constitution, and the laws made in pursuance thereof." *Albright v. Fisher*, 64 S.W. 106, 108-109 (Mo. 1901).

In its Report and Order, stopping just short of an explicit declaration, the Commission essentially found that the *In re Ameren Transmission Co*. Court's ruling operates to subordinate the Commission's authority, discretion and expertise regarding §393.170.1 line CCNs to one or more county commissions. (Appendix A-15; Legal File page 2670). This unlawful and unreasonable construction of *In re Ameren Transmission Co*. imputes to the Missouri Court of Appeals Western District an intent to broaden and elevate the §229.100 authority of a county commission over the safety of the rights-of-way of its public roads to primary authority over public property, private property and public utility projects as well. The Commission's construction of the *In re Ameren Transmission Co*. opinion is contrary to Missouri's Constitution and related case law because it describes a judicial action (by the Missouri Court of Appeals Western District) against an executive agency in violation of the doctrine of Separation of Powers, and is therefore both unlawful and unreasonable.

II. The Commission *erred in* grounding its denial of the requested CCN, in significant part, on two exhibits admitted post-hearing into the Record of Evidence over MJMEUC's timely Due Process objection *because* the Commission's acceptance of and reliance upon those two exhibits in denying the CCN is unlawful under §386.510 *in that* the two exhibits had been created in an unrelated and closed case to which MJMEUC was not a party and so MJMEUC had no opportunity to meet and rebut that evidence and was thus denied the Due Process guaranteed by §536.070 and 4 CSR 240-2.130.

The law of evidence that governs the Commission's proceedings is found at §536.070 and 4 CSR 240-2.130. (Appendix A-36 to A-39 and A-40 to A-42). That law of evidence provided MJMEUC, as a party intervenor in the underlying case before the Commission, with the right to meet and rebut all evidence offered in the case.

§536.070(2) and 4 CSR 240-2.130(1). But, the two exhibits cited in the Commission's final Report and Order as grounds for its Findings of Fact numbered 15 and 16 (Appendix A-10; Legal File page 2665) were offered post-hearing and had been created in an unrelated and closed case to which MJMEUC was never a party. As acknowledged by the Commission, the exhibits originated "[i]n a prior and separate case." (Appendix A-10; Legal File 2665).

Although the Commission conducted the week-long evidentiary hearing in the underlying case in March of 2017, it requested post-hearing briefing and eventually set oral argument for August 3, 2017. On July 23, 2017, the MLA notified all parties that it intended to offer the exhibits into the record of evidence during that August 3rd oral argument. Thus, on July 28, 2017, MJMEUC timely filed its written objection to the post-hearing admission of the exhibits into the record of evidence. (Legal File pages 2646-2652). MJMEUC additionally made its oral, on-the-record objection to the admission of the exhibits at the commencement of the August 3, 2017 oral argument. (Transcript Vol. 2, page 1645, line 23 to page 1646, line 18). However, MJMEUC's objections were overruled and the exhibits were accepted into the record of evidence. (Transcript Vol. 2, page 1646, line 22 to page 1647, line 8; Legal File pages 2653-2655).

The MLA, a strident opponent of the Grain Belt Project, admitted that it offered the exhibits into the Commission's Record of Evidence so that it would be positioned to later argue to this Court on appeal regarding "the precedential value" of the *In re Ameren Transmission Co.* opinion by providing this Court (through the post-hearing exhibits) "the factual background for the ATXI decision." (Legal File page 2639). MLA wants to negate the fact that the *In re Ameren Transmission Co.* opinion is not precedential because it does not address line CCNs or §393.170.1 by arguing that the *In re Ameren Transmission Co.* Court was nevertheless aware that the appellant arguing before it made the same "distinction between subsections 1 and 2 of Section 393.170." (Legal File page 2639).

The Commission erred by admitting the exhibits into the post-hearing record of evidence in violation of §536.070's and 4 CSR 240-2.130's guarantees of MJMEUC's

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right to Due Process. The Commission additionally erred by then relying on the two exhibits to find as a fact in *this* case that ATXI had "applied to the Commission for a line certificate under Section 393.170.1 and not an area certificate under Section 393.170.2." (Appendix A-10; Legal File page 2665). The Commission further erred by then concluding, as a matter of law, that "*Ameren Transmission Co*. and its plain language regarding the necessity of obtaining prior county assents apply to the [Grain Belt] application even though that opinion did not specifically cite to subsection 1 of Section 393.170, the subsection under which [Grain Belt] requested a CCN." (Appendix A-14, A-15, Legal File pages 2669-2670). The Commission finally erred by denying the CCN requested by Grain Belt via its determination that the *In re Ameren Transmission Co*. opinion divested it of its statutory authority to grant the CCN. (Appendix A-15, Legal File page 2670).

The Commission's decision in the Report and Order on appeal here results from a Conclusion of Law that is based on a Finding of Fact that is grounded only on two documents accepted into the record of evidence in violation of MJMEUC's right to Due Process. The Commission's errors are unlawful, and also unreasonable, because the challenged actions are arbitrary, capricious and an abuse of the Commission's discretion. The Report and Order under review by this Court should be set aside in part regarding the Commission's conclusion of law that it lacked the statutory authority to issue the CCN, thus permitting the findings of fact of four of the five Commissioners that the CCN should be granted because the Grain Belt Project is necessary or convenient for the public service to become the Commission's final ruling on Grain Belt's application for a line CCN.

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III. The Commission *erred in* denying the requested CCN and the benefits acknowledged by four of the five Commissioners that would have flowed to MJMEUC's members and all Missourians from that CCN *because* denial of the CCN and its related benefits is unreasonable under §386.510 and also confiscatory and unjust in violation of the constitutional protection of property rights *in that* four of the five Commissioners found short-term and long-term economic, environmental and other benefits of the Grain Belt Project to hundreds of thousands of Missouri citizens and the entire state of Missouri as well.

The thirty-five MJMEUC cities which form the MoPEP group have committed to purchase 60 MW of the affordable Kansas wind energy delivered over the Grain Belt Project. (Exhibits pages 3752-3759 and Transcript Vol. 2, page 1004, line 3 to page 1005, line 3). Additionally, Kirkwood contracted to purchase 25 MW, Hannibal contracted to purchase 15 MW, Columbia contracted to purchase 35 WM and Centralia contracted to purchase 1 MW – bringing the total current commitments to 136 MW of the 200 MW of Kansas wind energy available to MJMEUC members via the Grain Belt Project, and it is anticipated that, if the Grain Belt Project is built, the entire capacity will be committed. (Exhibits pages 3760-3805, and pages 3743, 3744 and 3751).

If the Grain Belt Project is built, the thirty-five MoPEP cities will save just under $11 million annually for wind power and transmission service combined. (Transcript Vol. 2, page 999, line 21 to page 1000, line 10 and page 1002, lines 15-20). MJMEUC is non-profit and its city members receive these savings "dollar for dollar" and so can pass along the savings to their customers through rate relief, or through updated maintenance in the smallest communities that struggle economically. (Transcript Vol. 2, page 1000, line 14 to page 1001, line 9). Even the experts who testified for MLA and Show Me in opposition to the Grain Belt Project admitted that MJMEUC's deal with Grain Belt and Infinity Wind will provide renewable energy to its members' citizens more cheaply than any other option. (Transcript Vol. 2, page 1457, lines 7-23; page 1557, line 17 to page 1558, line 5; and page 1566, line 6 to page 1567, line 21).

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But, if the Grain Belt Project is not built, MJMEUC's cost of meeting its reserve obligation and its load will likely rise. (Transcript Vol. 2, page 1011, line 23 to page 1012, line 4). Further, MJMEUC will have to acquire more expensive resources to address the needs of its city members who take power from the RTO, and these additional costs will be paid by the customers of these cities. (Exhibits, page 3727).

Given the evidence of the benefits of the Grain Belt Project, four of the five Commissioners declared in their Concurring Opinion that, "had it not been for the *Matter of Ameren Transmission Co.* opinion, we would have granted the [Grain Belt] application, as the evidence showed that the [Grain Belt] project is 'necessary or convenient for the public service.'" (Appendix A-18; Legal File page 2676). Specifically, the four Concurring Commissioners found the "project is needed primarily because of the benefits to the members of [MJMEUC] and their hundreds of thousands of customers, who had committed to purchase at least 100 MW of wind power utilizing transmission service purchased from [Grain Belt]" and that "MJMEUC calculates that their members would have saved approximately $9-11 million annually." (Appendix A-18, A-19; Legal File pages 2676-2677). The four Concurring Commissioners further found that "[t]he evidence in the case demonstrated that the [Grain Belt] project would have created both short-term and long-term benefits to ratepayers and all the citizens of the state. In our view, the broad economic, environmental and other benefits of the project to the entire state of Missouri outweigh the interests of the individual landowners." (Appendix A-21; Legal File page 2679).

The four Commissioners thus clearly balanced the interests of those advocating for with those advocating against the Grain Belt Project. The number of individual landowners who would be affected by and also object to the Grain Belt Project was never quantified. However, the evidence did show that the entire Grain Belt Project is planned to cross properties owned by "about 570 unique landowners" and 39 of those landowners in Missouri have already granted easements on their property. (Transcript Vol. 1, page 427, line 3 to page 428, line 17).

But the Report and Order is unlawful and unreasonable, and must thus be subjected to appellate review, and the months or years that will be consumed in that process are likely to cause failure of the Grain Belt Project and denial of the hundreds of millions of dollars of acknowledged benefit to the hundreds of thousands of MJMEUC's customers, and all Missouri citizens, over the planned life of the Grain Belt Project. Therefore, the Report and Order violates Constitutional protections for property rights[8] because it operates to confiscate the benefit to MJMEUC's members that is acknowledged in the Concurring Opinion – and it is unreasonable and unjust for the Commission to acknowledge a benefit and then act to deprive the intended recipient of that benefit. *State ex rel. Associated Natural Gas Co. v. Public Service Commission,* 706 S.W.2d 870, 881 (Mo. App. W.D. 1985)(*citing St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 53 (1936)).

Conclusion

WHEREFORE, on behalf of no less than Centralia, Columbia, Hannibal, Kirkwood, the thirty-five MoPEP cities, and these cities' hundreds of thousands of citizens, MJMEUC respectfully requests that this Court order the Report and Order under review be set aside in part regarding the Commission's erroneous conclusion of law that it lacked the statutory authority to issue the CCN; declare that the Commission is authorized under §393.170.1 to issue Grain Belt an effective line CCN which may also recognize the independent requirements of certain regulations or statutes, such as §229.100, which are administered by other entities, and which may include reasonable and necessary conditions imposed by the Commission under the authority of §393.170.3, but which may not be contingent on the fulfillment of those regulations, statutes or conditions; and remand this case to the Commission for further action so that it may ground its new order on the findings of fact of four of the five Commissioners that Grain Belt's application for a line CCN should be granted because the Grain Belt Project is necessary or convenient for the public service.

[8] Article I §10 of Missouri's Constitution provides for "Due process of law. – That no person shall be deprived of life, liberty or property without due process of law."

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Respectfully Submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify that the Substitute Opening Brief and the Appendix to Substitute Opening Brief of Missouri Joint Municipal Electric Utility Commission were filed electronically and served via Missouri Case.Net and by emailing a copy to the parties and interested persons listed below on this 8th day of March, 2018.

I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 9,655 words exclusive of cover, signature block and certificates.

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