IN THE SUPREME COURT OF MISSOURI

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

On Transfer from the Missouri Court of Appeals Eastern District
Case No. ED105932
On Appeal from the Missouri Public Service Commission
Case No. EA-2016-0358

SUBSTITUTE BRIEF OF INTERVENORS SIERRA CLUB AND RENEW MISSOURI ADVOCATES IN SUPPORT OF APPELLANT GRAIN BELT EXPRESS

Henry B. Robertson (No. 29502)
Great Rivers Environmental Law Center
319 North Fourth Street, Suite 800
St. Louis, MO 63102
Phone: (314) 231-4181
Fax: (314) 231-4184
hrobertson@greatriverslaw.org

Attorney for Intervenors Sierra Club and Renew Missouri

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JURISDICTIONAL STATEMENT

Appellant Grain Belt Express Clean Line LLC appeals from the denial of a certificate of convenience and necessity by respondent Public Service Commission. Sierra Club and Renew Missouri exercised their right to participate on appeal as intervenors pursuant to § 386.510, RSMo.

By statute, Section 386.510, RSMo, review of the orders of the Commission is within the jurisdiction of the Court of Appeals in the first instance. The Court of Appeals Eastern District, in case No. ED105932, rendered a decision in favor of Appellants on February 27, 2018, but transferring the case to this Court on a question of general interest and importance under Rule 83.02. This Court has jurisdiction under the Missouri Constitution, Article V, § 10.

STATEMENT OF FACTS

Grain Belt Express Clean Line LLC ("GBE") applied to the Missouri Public Service Commission ("PSC" or "the Commission") for a certificate of convenience and necessity ("CCN"), specifically citing Section 393.170.1, RSMo for the type of certificate it sought (L.F. 27, 121).

The background facts may be summarized from the PSC's final Report and Order (L.F. 2656). The proposed Grain Belt Express project is a high-voltage, direct-current (HVDC) transmission line designed to carry wind-generated electricity from Kansas to Indiana, traversing the Missouri counties of Buchanan, Clinton, Caldwell, Carroll, Chariton, Randolph, Monroe and Ralls. It would deliver 500 megawatts ("MW") of electricity to Missouri through a converter station in Ralls County, and 3,500 MW to eastern states (L.F. 2663).

GBE will offer no retail service to Missouri customers (L.F. 2664), but it does offer electricity to Missouri utilities. It offered a favorable "first mover" rate to municipal utilities represented by appellant Missouri Joint Municipal Electric Utility Commission ("MJMEUC," affectionately known as "mudge-muck"). By the time of the evidentiary hearing, these utilities had subscribed to 135 MW (T. vol. II, pp. 22–3).

The line is participant-funded on a "shipper pays" basis by its transmission customers. Missouri ratepayers would not be charged for its construction (L.F. 2663–4).

The evidentiary hearing at the Commission ended on March 24, 2017. Four days later the Court of Appeals Western District handed down its decision in *In the Matter of the Application of Ameren Transmission Company of Illinois v. PSC,* 523 S.W.3d 21

(Mo.App. W.D. 2017)("*ATXI*", sometimes referred to in the record as *Neighbors United*), holding that a CCN could not be granted to an interstate transmission line until all the counties along the line's route had given their assent to its crossing their roads under § 229.100, RSMo. The PSC could not grant a CCN on the condition that the line later obtained the assents. 523 S.W.3d at 26–7.

At the time of the PSC's decision in this case, GBE lacked the assent of at least Caldwell County, where the Circuit Court had held that the county commission violated the Sunshine Law, Chapter 610, RSMo, when it granted assent (L.F. 2664–5). In its Report and Order the PSC could find no material distinction between this case and *ATXI.* It therefore considered itself bound by the Court of Appeals' decision to deny the CCN (L.F. 2669–70).

Four of the five Commissioners signed a concurring opinion (L.F. 2675, 2684) saying that, but for *ATXI,* they would have granted the CCN since GBE had met all the criteria the PSC applies in deciding whether a project is "necessary or convenient for the public service" (L.F. 2676–81). The appeal therefore resolves into the legal question, was *ATXI* correctly decided? The Eastern District determined that it was not.

The County Assents

In 2012 GBE obtained the assent of all eight counties on the route for stringing the line over their roads (L.F. 2664; Exhibits vol. 39, pp. 3104, 3114–30). In 2014, however, five of these assents unraveled.

The Clinton County Commission wrote a letter to GBE, copying the PSC, saying, "It has come to our attention that we acted prematurely in issuing this resolution.

Therefore, on March 4, 2014 we are officially rescinding the resolution issued on 17 July 2012" (Exhs. Vol. 39, p. 3130).

The Chariton County Commission wrote to the PSC:

> After further review of this company we feel that we were premature in our support. Many of our citizens are opposed to this line going through our county. They are concerned about the impact that these high voltage lines may have on their livelihood, health, economy, future land use and the aesthetic beauty of the area. We feel there are many questions that need to be answered such as:…
>
> …we feel very strongly that these and many more questions need to be answered before any approval is granted… (Exhs. Vol. 39, pp. 3131–2)

Caldwell County's letter was phrased in nearly identical terms:

> Many of the citizens of Caldwell County are opposed to this line going through Caldwell County. They are concerned about the impact that these high voltage lines may have on their livelihood, health, economy, future land use and the aesthetic beauty of the area. We feel there are many questions that need to be answered…

Later, on August 4, 2017, the Caldwell commission issued a more formal order rescinding the 2012 assent (Exhs. Vol. 39, p. 3142).

The Ralls County Commission retracted its assent citing "all the conflicting information and overwhelming citizen displeasure" (Exhs. Vol. 39, p. 3137).

The Monroe County Commission determined that its approval had been "premature," and that it could not grant approval until the PSC had granted utility status

to GBE (Exhs. Vol. 39, p. 3139). Litigation over the Monroe County assent was pending at the time of the hearing in this case (T. I, p. 1519).

POINTS RELIED ON

I

The Commission erred in denying the certificate of convenience and necessity because this was unlawful within the meaning of § 386.510, RSMo, in that the Commission was not bound by the decision of the Court of Appeals Western District in *ATXI* since Grain Belt Express explicitly applied for a line certificate under Section 393.170.1, RSMo, whereas the *ATXI* decision disregarded subsection one and only interpreted and harmonized subsections 393.170.2, which concerns area certificates, and 393.170.3.

State ex rel. Cass County v. PSC, 259 S.W.3d 544 (Mo.App. W.D. 2008)

State ex rel. Union Electric v. PSC, 770 S.W.2d 283 (Mo.App. W.D. 1989)

State ex rel. City of Sikeston v. PSC, 336 Mo. 985, 82 S.W.2d 105 (1935)

§ 393.170, RSMo

II

The Commission erred in denying the certificate of convenience and necessity because its decision is unlawful within the meaning of § 386.510, RSMo, in that it gives county commissions general veto power over the project in violation of the terms of Section 229.100, RSMo, which allows counties to deny assent only if the utility refuses to abide by the counties' road regulations, and in violation of the Commission's own authority to ensure uniform utility regulation throughout the state, specifically the Commission's power of general supervision over transmission lines under Section 393.140(1), RSMo.

Union Electric Co. v. City of Crestwood, 499 S.W.2d 480 (Mo. 1973)

Union Electric Co. v. City of Crestwood, 562 S.W.2d 344 (Mo. banc 1978)

§ 393.140(1), RSMo

§ 229.100, RSMo

ARGUMENT

I

The Commission erred in denying the certificate of convenience and necessity because this was unlawful within the meaning of § 386.510, RSMo, in that the Commission was not bound by the decision of the Court of Appeals Western District in *ATXI* since Grain Belt Express explicitly applied for a line certificate under Section 393.170.1, RSMo, whereas the *ATXI* decision disregarded subsection one and only interpreted and harmonized subsections 393.170.2, which concerns area certificates, and 393.170.3.

The decision of this case depends on resolving the conflict between the opinion of the Court of Appeals Eastern District in this case and the opinion of the Court of Appeals Western District in *In the Matter of the Application of Ameren Transmission Company of Illinois v. PSC,* 523 S.W.3d 21 (Mo.App. W.D. 2017)("*ATXI*"). That case concerned a multi-county transmission line proposed by Ameren Transmission Company of Illinois (ATXI). The PSC granted ATXI a certificate of convenience and necessity (CCN) on the condition that the CCN would not become effective until ATXI obtained the county assents required by § 229.100, RSMo (Exhibits vol. 52, p. 4467).

The Western District held, on the authority of § 393.170.2 and 393.170.3, that this condition was unlawful; the assents had to be secured before the CCN could be granted. 523 S.W.3d at 26–7. What happened to 393.170.1? It was under that subsection that GBE explicitly made its application (L.F. 27, 121).

Standard of Review

On review of PSC decisions, error is preserved by means of an application for rehearing. § 386.500.2, RSMo. This issue was preserved in the rehearing applications of appellants GBE (L.F. vol. 17, pp. 2724, 2726–34), MJMEUC (L.F. 17:2739,–44) and intervenors Sierra Club and Renew Missouri Advocates (L.F. 17: 2757–59).

This Court reviews orders of the PSC using a two-part test. First, the court determines whether the order was lawful, *i.e.* did the PSC have the statutory authority to act as it did? The order is presumed valid. The interpretation of a statute by the agency charged with its administration is entitled to great weight. Nonetheless, the Court exercises independent judgment and must correct errors of law. *State ex rel. Sprint Missouri v. PSC*, 165 S.W.3d 160, 164 (Mo. Banc 2005).

Second, if the order was lawful the Court then determines whether it was reasonable, *i.e.* whether it was supported by substantial and competent evidence on the whole record; was arbitrary, capricious or unreasonable; or whether the PSC abused its discretion. *Id*.

This case hinges on the first part of the test: did the Commission commit errors of law that must be corrected by the Court?

The CCN statute

The Commission's authority to grant CCNs comes from § 393.170, RSMo, which is in three parts. Section 393.170.1 concerns preapproval for the building of "electric plant":

No gas corporation, electrical corporation, water corporation or sewer corporation

shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.

There is no mention of county assents in subsection one. Electric plant is defined in Section 386.020(14), RSMo:

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

GBE's HVDC line and converter station are "electric plant" subject to § 393.170.1. Such CCNs are often called "line certificates," although they are not limited to transmission and distribution lines.

The Western District in *ATXI* applied § 393.170.2:

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

has received *the required consent of the proper municipal authorities*. (Emphasis added.) A certificate granted under subsection 2 is called an "area certificate."

A "line certificate" is given for the pre-construction approval of any electric plant, including transmission lines, under Section 393.170.1. *State ex rel. Cass County v. PSC*, 259 S.W.3d 544, 549 (Mo.App. W.D. 2008). A line certificate carries no obligation of general service to the public. *State ex rel. Union Electric v. PSC,* 770 S.W.2d 283, 285 (Mo.App. W.D. 1989). There is no requirement of county consents in Section 393.170.1, although they must still be obtained under the independent authority of Section 229.100, which reads:

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

Even if GBE were seeking an area certificate, there would still be no requirement that county assents first be obtained because § 393.170.2 refers to consent of the "municipal authorities." Within the jurisdiction of the PSC, the definitional statute defines the scope of "municipal" at § 386.020(34): **"'Municipality'** includes a city,

village or town." Moreover, to include county road-crossing assent as a municipal consent is inconsistent with the structure of § 393.170, where 393.170.2 refers to the "franchise" granted to a utility to serve a town as its exclusive electric service provider.

In *State ex rel. Cass County v. PSC*, 259 S.W.3d 544, 549, the court made it clear that Section 393.170.1 covers line certificates to build transmission lines and production facilities, while Section 393.170.2 covers area certificates "to exercise a franchise by serving customers." "Franchise" generally refers to the obligation to serve the public in the area. *State ex rel. Harline v. PSC,* 343 S.W.2d 177, 181 (Mo.App. W.D. 1960). An area certificate is "the principal vehicle for saturating a geographically defined area with retail electric service." *State ex rel. Union Electric v. PSC,* 770 S.W.2d at 285.

GBE does not ask to provide retail service (L.F. 2664). Neither did ATXI. 523 S.W.3d at 23. No one disputes that both lines require county assents, but timing is important. As long as the PSC withholds the certificate, the longer the project is in jeopardy of losing investors and sputtering to a halt. And a conundrum is presented by the Monroe County Commission, which wrote that it could not grant approval until the PSC had granted utility status to GBE (L.F. 3139). If the Commission waits on the county while the county waits on the Commission, the line will be in limbo.

Permission to cross county roads may be a franchise of a kind, but it is not the same as the municipal franchise for which an area certificate is required. County assent has been described as a "license" to use the public roads. *State ex rel. Union Electric v. PSC,* 770 S.W.2d at 286. Such a franchise has also been called a "street easement." *State ex rel. Springfield v. Springfield City Water Co.,* 345 Mo. 6, 131 S.W.2d 525, 530 (Mo.

banc 1939). *Missouri Utilities Co. v. Scott-New Madrid-Mississippi Electric Cooperative,* 475 S.W.2d 25 (Mo. banc 1971), upholds "the distinction between vesting municipalities with authority to grant or refuse to grant a franchise and the **lesser** authority to regulate the use of its streets." 475 S.W.2d at 31 (emphasis added).

The decision by a municipality to choose an electric service provider is far more significant than a license or easement. "In other words, [an area] certificate of the commission is only, where required, an additional condition imposed by the state to the exercise of a privilege which a municipality may give or refuse, and the commission is not to give its certificate to a company until after the city has consented that it may operate within its boundaries." *State ex rel. City of Sikeston v. PSC,* 336 Mo. 985, 82 S.W.2d 105, 108–9 (1935). A franchise is "a necessary condition to the exercise of any rights by an electrical corporation in a city," *id.* at 107.

A city may choose its electric provider and even oust a private company and operate as a municipal utility by buying its plant. 82 S.W.2d at 111. This is a far cry from the county assent of § 229.100, which enforces "such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county commission." It is reasonable to set a higher standard for area certificates than for line certificates. A utility with an area certificate does not even need a CCN to extend transmission lines within its existing service territory. *Harline,* 343 S.W.2d at 183.

Section 393.170.3 brings together the two types of CCN for procedural purposes, but it preserves the distinction between them:

> The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that **such construction** [*i.e.* 393.170.1] or **such exercise of the right, privilege or franchise** [393.170.2] is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void. [Emphasis added.]

The Western District in *ATXI* concluded that "the general provision of section 393.170.3 gives way to the more specific and mandatory language of section 393.170.2," with its requirement that local consents be on file before the CCN may be granted. 523 S.W.3d at 26. "Our harmonization of the statute preserves the integrity of **both** subdivisions of section 393.170 and effectuates the plain meaning of the statute." 523 S.W.3d at 27. (Emphasis added.)

But there are three subdivisions to § 393.170, not two. Subsection 393.170.1 does not contain the requirement of 393.170.2 for local consents, and therefore that requirement is not imported into 393.170.3 when the CCN is for a line certificate. Therefore the PSC has authority under 393.170.3 to grant a line certificate on the condition that the assents be obtained before construction begins.

One divisional opinion of this Court might be read superficially as support for *ATXI. State ex rel. Public Water Supply District No. 2 v. Burton,* 379 S.W.2d 593 (Mo. 1964). In 1925 Raytown, then an unincorporated part of Jackson County, obtained

authority from the Jackson County Court to lay water mains for a water distribution system. In the words of Raytown's application to the PSC, it sought "permission to exercise a franchise granted by the County Court of Jackson County, Missouri, as a public utility." 379 S.W.2d at 595. A dispute later arose over the extent of Raytown's "service area." 379 S.W.2d at 596, 597. The Court cited both § 393.170 and § 229.100, 379 S.W.2d at 598–9, but did not discuss the difference between area certificates and line certificates. Under the facts as stated, the case clearly dealt with an area certificate. The Court deferred to PSC cases that required county consent when "the line or system was to be placed…within the unincorporated area of the county," 379 S.W.2d at 599. The opinion repeatedly refers to this as a franchise with quotation marks: "'county franchise'" or "county 'franchise.'" 379 S.W.2d at 599–600. Since the word franchise appears in 393.170.2 but not in 393.170.1, the holding in *Burton* can only be regarded as applicable to area certificates, and the Court appeared to be in some doubt whether § 229.100 fit the terms "franchise" and "municipal" in § 393.170.2.

As the Court of Appeals in this case pointed out (slip op., p. 6), the difference between line and area certificates is observed in the Commission's CCN rule. For line certificates there is 4 CSR 240-3.105(1) (B) ("If the application is for electrical transmission lines, gas transmission lines or electrical production facilities…"). Corresponding to this is 3.105(1)(C): "When no evidence of approval of the affected governmental bodies is necessary, a statement to that effect [must be provided]."

For area certificates there is 4 CSR 240-3.105(1)(A)("If the application is for a service area"). Corresponding to this is 3.105(1)(D), which the Western District relied on

("When approval of the affected governmental bodies is required, evidence must be provided as follows:"). 523 S.W.3d at 26.

If line certificates require proof of local assent, then 4 CSR 240-3.105(1)(C) is superfluous, since all CCNs would require proof. In order to harmonize all three subsections of 393.170, the Court must preserve the distinction between 393.170.1, which does not require proof of local consent before issuance of a line certificate, and 393.170.2, which does require such proof for an area certificate.

II

The Commission erred in denying the certificate of convenience and necessity because its decision is unlawful within the meaning of § 386.510, RSMo, in that it gives county commissions general veto power over the project in violation of the terms of Section 229.100, RSMo, which allows counties to deny assent only if the utility refuses to abide by the counties' road regulations, and in violation of the Commission's own authority to ensure uniform utility regulation throughout the state, specifically the Commission's power of general supervision over transmission lines under Section 393.140(1), RSMo.

What had been unanimous assent by the eight counties on the route crumbled in the face of an effort that bears the marks of a concerted campaign. Landowners took two counties to court (L.F. 2664–5; T. I, p. 1519). The letters and orders retracting the assents show a common origin. Three counties used the same word, "premature," to describe

their earlier approvals (Exhs. Vol. 39, pp. 3130, 3131, 3139). Three of the five rescinding counties cited local opposition (Exhs. Vol. 39, pp. 3132, 3135, 33137). Two used identical language to describe their citizens' concerns: "They are concerned about the impact that these high voltage lines may have on their livelihood, health, economy, future land use and the aesthetic beauty of the area" (Exhs. vol. 39, pp. 3132, 3135). Concern for road safety is absent from this list.

Such campaigns are a time-honored aspect of American democratic life, but in this case they ran afoul of the law.

Standard of review

An 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 lawfulness of the PSC's order is determined by whether statutory authority for its issuance exists, and all legal issues are reviewed *de novo*. *ATXI,* 523 S.W.3d at 24.

This issue was preserved in Sierra Club and Renew Missouri's application for rehearing (L.F. 2757, 2759–60) and in that of appellant MJMEUC (L.F. 2744-47).

Argument

The counties' attempts to rescind their approvals upset the balance struck by Missouri's regulatory scheme. Under § 393.140, RSMo,

The commission shall:

(1) Have general supervision of all gas corporations, electrical corporations, water corporations and sewer corporations having authority under any special or general

> law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of furnishing or distributing water or gas or of furnishing or transmitting electricity for light, heat or power…

This "general supervision" contrasts with the limited oversight by counties under § 229.100, RSMo:

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

The Commission's power over electric utilities is found in Chapters 386 and 393 of the Revised Statutes. Chapter 229 is titled, "Provisions relating to all roads." By its terms, § 229.100 exists to ensure observance of the county's road regulations. As long as the utility agrees to abide by those regulations — and GBE once satisfied all eight counties that it did — the county would exceed its authority by denying assent. When the county commissions relied on unrelated objections raised by residents, they exceeded their authority and invaded the authority of the PSC.

In *Union Electric Co. v. City of Crestwood,* 499 S.W.2d 480 (Mo. 1973), the utility had a franchise from the city to run transmission lines over and along its roadways and other public places, 499 S.W.2d at 481, but in 1968 the city passed an ordinance forbidding above-ground construction of such lines. *Id.* at 482. The Supreme Court noted that there were 100 municipalities in St. Louis County and City and that if each had the power to enact such ordinances "a hodgepodge of methods of construction could result." *Id.* at 483. Chapter 386 gave the PSC "sweeping" powers of supervision and regulation to be uniformly applied throughout the state. 499 S.W.2d at 482–3. Therefore Crestwood's ordinance "invades the area of regulation vested in the Public Service Commission by the General Assembly" and exceeded the city's authority. *Id.* at 483–4.

Undeterred, Crestwood then sought to use its zoning ordinances to stop the line by failing to act on a special permit application by UE. *Union Electric Co. v. City of Crestwood,* 562 S.W.2d 344, 345 (Mo. banc 1978). The Court en banc upheld the previous decision. "We conclude and hold that by the application of its local zoning ordinances to this intercity transmission line the City invaded the area of regulation and control vested in the Public Service Commission and thereby exceeded its authority." 562 S.W.2d at 346.

The Crestwood cases hold that the field of utility regulation is preempted by state law. *Borron v. Farrenkopf,* 5 S.W.3d 618, 624 (Mo.App. W.D. 1999). The counties have every right to insist that their roads and traffic not be impeded by the Grain Belt Express line. They may not deny GBE its CCN, which is what they have effectively done. When the counties wandered off-road and revoked their assent for reasons of a general nature,

they trampled on the field of regulation reserved to the PSC.

CONCLUSION

WHEREFORE Sierra Club and Renew Missouri pray the Court to reverse the decision of the PSC and remand the case to the Commission.

/s/ Henry B. Robertson
Henry B. Robertson, Bar No. 29502
Great Rivers Environmental Law Center
319 North Fourth Street, Ste. 800
St. Louis, MO 63102
Phone: (314) 231-4181
Fax: (314) 231-4184
hrobertson@greatriverslaw.org
Attorney for Intervenors

CERTIFICATION

This brief complies with the limitations of Rule 84.06(b), containing 4,946 words all-inclusive.

/s/ Henry B. Robertson
Henry B. Robertson, Bar No. 29502
Great Rivers Environmental Law Center
319 North Fourth Street, Ste. 800
St. Louis, MO 63102
Tel: (314)231-4181; Fax (314)231-4184
E-mail: hrobertson@greatriverslaw.org
Attorney for Intervenors

Certificate of Service

Counsel for Intervenors has made service of this brief on all other counsel of record by way of electronic filing on this 8th day of March, 2018.

/s/ Henry B. Robertson