IN THE MISSOURI SUPREME COURT

No. SC 96993

GRAIN BELT EXPRESS CLEAN LINE, LLC and MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY COMMISSION,

Appellants,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,

Respondent.

Appeal from the Public Service Commission – File No. EA-2016-0358
On Transfer from the Missouri Court of Appeals – Eastern District
Appeal Number ED 105932

APPELLANT GRAIN BELT EXPRESS CLEAN LINE, LLC'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

JURISDICTIONAL STATEMENT

Grain Belt Express Clean Line, LLC ("Grain Belt Express") appeals a Report and Order issued by the Missouri Public Service Commission ("PSC") on August 16, 2017, in case number EA-2016-0358. On February 27, 2018, following expedited consideration, the Missouri Court of Appeals, Eastern District, issued an opinion holding that the PSC erred in finding that it could not lawfully grant Grain Belt Express a line certificate of convenience and necessity requested under § 393.170.1.[1] Pursuant to Rule 83.02, the Eastern District transferred the case to this Court. This Court has jurisdiction to hear this case pursuant to Article V, Sec. 10 of the Missouri Constitution.

STATEMENT OF FACTS

This case is about the statutory authority of the PSC to grant Grain Belt Express' application pursuant to § 393.170.1 for a Certificate of Convenience and Necessity ("CCN") to construct and maintain an inter-state electrical transmission line and associated facilities, which four out of five Commissioners concluded is necessary or convenient for the public service in Missouri. A21; LF 2676. Despite a majority of Commissioners issuing a written opinion finding that Grain Belt Express met the requirements to obtain a Line CCN,[2] the PSC denied Grain Belt Express' application

[1] All statutory references are to the Revised Statutes of Missouri, 2016, unless otherwise stated.

[2] An applicant can apply for, and the PSC may grant, either a Line CCN under § 393.170.1 for the construction of power lines and related facilities or an Area CCN under § 393.170.2 for retail service to customers. See A37. As discussed herein, the difference is legally significant in this case.

wrongly believing it was bound by an erroneous decision from the Western District Missouri Court of Appeals in Neighbors United Against Ameren's Power Line v. Pub. Serv. Comm'n, 523 S.W.3d 21 (Mo. App. W.D. 2017) ("ATXI"). A14-15; LF 2669-70. ATXI is a separate case, involving separate parties, which analyzed a different statutory section. See A28-36. ATXI also reached an incorrect result by requiring proof of each individual county assent to a project under PSC jurisdiction before allowing the PSC to engage in its state-wide regulatory function of determining whether a project is necessary or convenient for the public service. A35.

Grain Belt Express and co-Appellant Missouri Joint Municipal Electric Utility Commission (the "Joint Municipalities" or "MJMEUC") moved to expedite this appeal due to the state-wide and national import of this case. Joint Mot. to Expedite, Feb. 28, 2018. In Missouri, Grain Belt Express has already entered into contracts that will enable dozens of municipalities throughout Missouri to access dramatically cheaper, wind-generated power, saving Missouri ratepayers approximately $10 million annually upon completion of the Project. A22; LF 1827-28; HC Ex. 1319:11-14. Central to ensuring that the Project delivers to Missouri ratepayers on these contracts is the federal Renewable Electricity Production Tax Credit ("PTC"). LF 2016-2017. The expiration of this federal tax credit is fast approaching and is set to expire altogether in 2019.[3]

[3] U.S. Dep't of Energy, Renewable Electricity Production Tax Credit (2017), https://energy.gov/savings/renewable-electricity-production-tax-credit-ptc.

A. Grain Belt Express and the Project

This case arises from Grain Belt Express' proposed construction and operation of an inter-state electrical transmission line to move clean, low-cost, wind-generated energy from western Kansas to Missouri and other states farther east. LF 28. This would result in hundreds of millions of dollars of revenue for the state, personal income for landowners, dramatically lower energy costs, and other benefits to Missouri and its residents. A24, A25. Grain Belt Express is a wholly owned subsidiary held by Clean Line Energy Partners, LLC ("Clean Line"), which is owned in part by one of the largest investor-owned utility companies in the world. LF 32. The Grain Belt Express Clean Line Project (the "Project") is an approximately 780-mile overhead, high voltage direct current ("DC") transmission line and associated facilities that would traverse the states of Kansas, Missouri, Illinois, and Indiana delivering 4,000 megawatts ("MW") of wind-generated electricity to those states and beyond. LF 33.

The route of the Project through Missouri was designed over the course of more than two years by a multidisciplinary team from Clean Line and an outside engineering, environmental and construction management firm. LF 1803; Ex. 115 at 11. The routing team performed extensive public outreach, including holding dozens of roundtables with hundreds of community leaders and elected officials from more than 40 Missouri counties and more than a thousand members of the general public. Id. The routing team also coordinated with state and federal agencies. Id. The routing team compared at least nine alternative routes and made revisions based on public feedback and input from individual landowners before settling on a proposed route for the Project. LF 1804. There

were no objections to the identified route by various stakeholders involved in the routing process, which included federal, state, and local agencies, environmental NGOs, and conservation groups. LF 51. Nor did the PSC Commissioners or Commission Staff object to the proposed route. See generally A1-16; LF 2656-74.

In Missouri, the Project would span approximately 206 miles, on a route that crosses the Missouri River south of St. Joseph and continues east across eight Missouri counties until it crosses the Mississippi River just south of Hannibal into Illinois.[4] LF 1801. The Project would have a converter station in Ralls County (in addition to converter stations in western Kansas and eastern Illinois) to deliver 500 MW of wind-generated electricity to the large and growing market in Missouri for cost-effective, renewable energy. Id.

The Project would not provide retail service directly to end-use customers in Missouri, but rather would connect to the grid in Missouri through Missouri transmission owners, such as Ameren Missouri. LF 1870. Grain Belt Express' customers would primarily be wholesale buyers of electricity, such as utilities, competitive retail energy suppliers, municipalities, brokers, and marketers. A9; LF 2664.

For example, Grain Belt Express has already entered a transmission service agreement with the Joint Municipalities to purchase up to 250 MW of capacity from the Project. Ex. 100 at 5, 8, 13-14. In turn, the Joint Municipalities has already entered into contracts with dozens of cities throughout Missouri to supply the energy it will purchase

[4] The Project would cross the counties of Buchanan, Clinton, Caldwell, Carroll, Chariton, Randolph, Monroe, and Ralls. A8; LF 2663.

from the Project. LF 1826, 2462-2507; Ex Vol. 46 at 3760-3805. These cities range from large cities such as Centralia, Columbia, Hannibal and Kirkwood to the cities in the Missouri Public Energy Pool, a group of 35 smaller cities spanning the state. See, e.g., Ex. Vol. 46, p. 3722. Grain Belt Express' service agreement with the Joint Municipalities is projected to generate approximately $10 million in annual energy cost savings to Missouri electrical consumers. LF 1827-28; HC Ex. 1319:11-14.

The Project also includes a converter station and associated alternating current interconnecting facilities that will allow up to 500 MW of bi-directional service, providing Missouri utilities an additional means to earn revenue by selling excess power into the energy market. Ex. 100 at 4, 8. This additional revenue can be used to reduce the cost of electricity for end-use customers of Missouri utilities. Ex. 100 at 4.

Importantly, Missouri ratepayers will bear no costs or risks related to the construction of the Project. LF 1802; Ex. 100 at 15, 31-32. The Project's costs will not be recovered through the cost allocation process of other regional transmission organizations approved by FERC. [5] A8-9; LF 2663-64. Grain Belt Express will pay for the costs of development, construction, and operation of the Project, and will recover its costs by selling transmission service to wind generators and entering market driven contracts with load-serving entities that use the line, such as the Joint Municipalities. A9; LF 1802-03, 2664.

[5] The traditional cost recovery process for transmission organizations approved by FERC is a "beneficiary pays" approach where the cost of a utility project is borne by the beneficiaries of the utility. See FERC Order 1000 at 441, 473-74. In contrast, the Project is a participant funded, "shipper pays" transmission line. A9; LF 2664.

B. Grain Belt Express' application for a Line CCN

On August 30, 2016, Grain Belt Express filed its application for a Line CCN pursuant to § 393.170.1, 4 CSR 240-2.060 and 4 CSR 240-3.105(1)(B), authorizing it to construct, own, operate, control, manage and maintain the Project. A5; LF 2660. The PSC conducted local hearings for members of the general public in each of the eight counties where the Project would be located. A6; LF 2661. The PSC also held a five-day evidentiary hearing on March 20-24, 2017. Id. During the evidentiary hearing, the PSC heard live testimony from dozens of witnesses in support of the Project. Id.; LF 1808-09. In addition to members of Clean Line and its affiliates responsible for the Project, the PSC heard testimony from major Missouri companies, retail and energy associations, trade unions, scientists, environmentalists, and the Missouri Department of Economic Development, among other groups that support the Project. Id. The PSC also received into evidence written testimony from other witnesses and more than one hundred exhibits. Id.

Grain Belt Express presented evidence that the Project had already received regulatory approval from the relevant commissions in Kansas, Illinois, and Indiana. LF 1810. Each state independently determined the Project is in the public interest and issued certificates for construction of the Project. LF 1811. Missouri is the final state in which regulatory approval is needed for the Project to proceed. LF 1810.

FERC has also granted Grain Belt Express negotiated rate authority to charge transmission service rates to direct users of the Project. EX 104 at 9. This authorization allows Grain Belt Express to subscribe 100% of the Project's capacity through an open

solicitation process, which has already been completed with requests from shippers that exceed fivefold the capacity of the Project. Id. As a result, the evidence before the PSC was that the Project will offer broad benefits to the public but will impose costs only on shippers who use the Project. Id.

C. Grain Belt Express' application for a Line CCN meets the governing standard but the PSC concludes that ATXI prevents it from acting.

On August 16, 2017, the PSC issued its Report and Order on Grain Belt Express' application for an inter-state Line CCN. A1; LF 2656. The Report and Order concluded that the Project is "necessary or convenient for the public service" such that Grain Belt Express would be entitled to a Line CCN. A6; LF 2661. However, the PSC did not grant Grain Belt Express a Line CCN because it believed it was prevented from doing so by ATXI. The PSC's decision turned on the threshold issue of "whether proof of county assents under Section 229.100, RSMo. affects the Commission's statutory authority to grant a CCN in this case." A12; LF 2667.

In determining whether county assents under § 229.100 were required prior to issuing a Line CCN to Grain Belt Express for construction of its inter-state Project, the PSC considered the ATXI case. A10; LF 2665. In its Findings of Fact, the PSC recognized that in ATXI, "a prior and separate case," it had granted Ameren Transmission Company of Illinois ("Ameren") a CCN to construct its intra-state project with a condition that Ameren subsequently obtain county assents under § 229.100. Id. In its Conclusions of Law, however, the PSC noted that its decision in ATXI was reversed by the Missouri Court of Appeals, Western District, which "determined that the

Commission lacked authority to grant a CCN without evidence that [Ameren] had received those county assents" under § 229.100. A13; LF 2668.

In Grain Belt Express' case, the PSC concluded that "while the Commission disagreed with the legal analysis in [ATXI]," based on its holding that county assents under § 229.100 are a prerequisite to the PSC exercising its jurisdiction, "the Commission cannot lawfully issue a CCN to [Grain Belt Express] until . . . it has obtained the necessary county assents under Section 229.100." A14-15; LF 2669-70.

D. Majority of Commissioners find Grain Belt Express entitled to Line CCN but for ATXI.

Nevertheless, four out of five PSC Commissioners took the extraordinary measure of filing a concurring opinion in which they found "the evidence showed that the GBE project is 'necessary or convenient for the public service'" such that "we would have granted the GBE application" but for the perceived binding effect of the ATXI decision. A21; LF 2676 (emphasis added). The Commissioners reached this conclusion after engaging in a detailed application of the traditional five factor Tartan test to determine whether a project is "convenient or necessary."[6] Id. The Tartan test was developed by the PSC as a means of carrying out its proper role of ensuring CCNs are only granted where a project is convenient or necessary for the public interest.

[6] In applying the Tartan Factors, the PSC determines whether 1) the applicant is qualified to provide the service; 2) the applicant has the financial ability to provide the service; 3) there is a need for the proposed service; 4) the proposal is economically feasible; and 5) the service promotes the public interest. In re Tartan, GA-94-127, 1994 WL 762882 (Mo. P.S.C. Sept. 16, 1994).

With respect to the first two Tartan factors, the parties did not dispute that Grain Belt Express was both qualified and has the financial ability to provide the service offered by the Project. Id.

Next, the Commissioners considered the need for the service. The Commissioners found the Project "is needed primarily because of the benefits to the members of . . . MJMEUC [Joint Municipalities] and their hundreds of thousands of customers, who had committed to purchase at least 100 MW of wind power" from the Project. A21-22; LF 2676-77. The Joint Municipalities plan to use Grain Belt Express' less expensive wind power to replace 100 MW of energy and capacity it currently purchases from another supplier through contracts set to expire in 2021. Id. This alone would provide approximately $9-11 million in annual savings to the Joint Municipalities' members. Id.; H'rg Vol. XVI, Tr. Mar. 23, 2017, 999:21-1000:10, 1002:15-20. This is in addition to "substantial evidence of demand for this project" from other energy customers. A21-22; LF 2676-77. "Clearly, there is demonstrable need for the service the GBE project offered both in Missouri and in the regions that affect Missouri energy markets." Id.

Then, the Commissioners looked at the economic feasibility. The Commissioners concluded:

> The GBE project is economically feasible because it links customers in Missouri who desire to purchase low-cost wind power from western Kansas with wind generation companies like Infinity Wind who propose to supply that energy, all under a business model under which GBE assumed the financial risk of building and operating the transmission line. Moreover, the cost of the project would not have been recovered from Missouri ratepayers through . . . regional cost allocation tariffs but rather by the entities contracting to transmit energy over the line.

A23; LF 2678.

Grain Belt Express' cost to bring wind energy from western Kansas is also "the lowest cost-resource option compared to Missouri wind, combined cycle gas, and Missouri utility-scale solar generation." Id. The Commissioners determined this evidence "is a solid indication of economic feasibility." A24; LF 2679.

Finally, the Commissioners examined the public interest. They agreed, "[t]he evidence in the case demonstrated that the GBE project would have created both short-term and long-term benefits to the ratepayers and all the citizens of the state." Id. Moreover, these "broad economic, environmental, and other benefits . . . to the entire state of Missouri outweigh the interests of individual landowners." Id. Among other benefits in the public interest, the Project would have:

- "lowered energy production costs in Missouri by $40 million or more";
- "had a substantial and favorable effect on the reliability of electric service in Missouri";
- "provided positive environmental impacts";
- "supported 1,527 total jobs over three years, created $246 million in personal income, $476 million in GDP, and $9.6 million in state general revenue for the state of Missouri, and $249 million in Missouri-specific manufacturing and personal service contract spending"; and
- rendered "a total of approximately $7.2 million" in personal property tax benefits annually.

A24-25; LF 2679-2680; see also Ex. Vol. 48, Part I p. 3833 (Missouri Department of Economic Development testimony regarding property tax benefits). In just the first year of operation, "the project would have resulted in approximately $14.97 million in easement payments." A25; LF 2680.

The Commissioners found that these public benefits, particularly those that relate to promoting diverse energy resources through low-cost, reliable renewables, support the energy policy of the state of Missouri found in the Renewable Energy Standard (which was overwhelmingly approved by Missouri voters in 2008), the Energy Efficiency Investment Act, and the Comprehensive State Energy Plan, each established in the last ten years. Id. The Commissioners further concluded that any concerns of local landowners could be addressed by imposing conditions on the Line CCN, which the Commissioners articulated in detail in their concurrence. A26; LF 2681.

As a result, a majority of bipartisan Commissioners held: "[H]ad it not been for the Matter of Ameren Transmission Co. [ATXI] opinion, we would have granted the GBE application, as the evidence showed that the GBE project is 'necessary or convenient for the public service.'" A21; LF 2676 (emphasis added). But despite proving public interest and the tremendous economic benefits to the State of Missouri, this valuable infrastructure project has been halted due to the PSC wrongly relying on the Western District's improper interpretation of the relevant statutory scheme.

E. Court of Appeals, Eastern District decision.

Grain Belt Express and the Joint Municipalities appealed the PSC's denial of the Line CCN to the Missouri Court of Appeals, Eastern District. The Eastern District expedited consideration of the case. On February 27, 2018, just nineteen days after oral argument, the Eastern District ruled that the PSC erred in denying Grain Belt Express' application for a Line CCN based on the Western District's ATXI decision. See A44-A54, E.D. Op. While acknowledging that "the underlying project is incredibly complex,"

the court correctly noted, "[t]he legal issue presented in this matter is simple." A45, E.D. Op. 2. The plain language of § 393.170.1, the PSC's presumptively valid interpretations of its own statutory authority, and years of previously uninterrupted judicial interpretations make clear that an electric corporation seeking a Line CCN for construction under § 393.170.1—like Grain Belt Express—does not need to fulfill the requirements for an Area CCN to provide service found in § 393.170.2. A54, E.D. Op. 10. Accordingly, the court held that the PSC may exercise its statewide regulatory jurisdiction and lawfully grant a Line CCN before any necessary and appropriate county assents are obtained. Id.

The court acknowledged multiple flaws in the ATXI decision. ATXI "focused solely on the language in § 393.170.2, thereby overlooking the clear legislative purpose of the Commission." A52, E.D. Op. 9. ATXI "fail[ed] to cite any authority to justify its interpretation of Section 393.170 and abrogates precedent setting forth a distinction between a line CCN and an area CCN." Id. As a result, "the ATXI court improperly requires every CCN applicant to acquire local consent as required for an area CCN under Section 393.170.2, even if the applicant is solely seeking a line CCN pursuant to Section 393.170.1." A53, E.D. Op. 10.

After identifying why ATXI's flawed reasoning should not be adopted and stating that it "would reverse the Commission's order denying Grain Belt's application for a line CCN under Section 393.170.1 and remand to the Commission for further proceedings consistent with this opinion," id., the court transferred the case to this Court pursuant to

Rule 83.02 in light of the acknowledged general interest or importance of the question raised in the present case, A54, E.D. Op. 11.[7]

STANDARD OF REVIEW

"This Court reviews the decision of the PSC rather than that of the [appellate] court." State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n, 344 S.W.3d 178, 184 (Mo. banc 2011). Review of a PSC order is two pronged: "first, the reviewing court must determine whether the PSC's order is lawful; and second, the court must determine whether the order is reasonable." State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n, 120 S.W.3d 732, 734 (Mo. 2003). Lawfulness is a threshold issue. State ex rel. MoGas Pipeline, LLC v. Pub. Serv. Comm'n, 366 S.W.3d 493, 496 (Mo. banc 2012). An order is lawful if statutory authority for the order exists. AG Processing, 120 S.W.3d at 734. In determining whether the PSC's order is lawful, the "interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." State ex

[7] Additional briefing on ancillary issues also occurred before the Eastern District, which is addressed as appropriate herein. MLA moved to strike portions of Grain Belt Express' reply brief, which the Eastern District correctly denied. See A54, E.D. Op. 11 n.6. Two citations in Grain Belt Express' Reply Brief merit clarification, however. On page five, the citation to State ex rel. Beisly v. Perigo, 469 S.W.3d 434, 454 (Mo. 2015) is accurate, but the quoted language is attributable to the underlying opinion of the Missouri Court of Appeals, Southern District, that was included in the appendix to the Supreme Court's decision in that case. The proposition cited is further supported by Al-Hawarey v. Al-Hawarey, 460 S.W.3d 40, 42 (Mo. App. E.D. 2015) among other authority. Grain Belt Express informed the Eastern District of this via letter before oral argument. See A203. Additionally, Grain Belt Express' citation to Templemire v. W & M Welding, Inc., 433 S.W.3d 371, 387-88 (Mo. banc 2014) on page 11 of its Reply Brief is to the dissent written by Judge Fisher and joined by Judge Wilson. That proposition is also supported by other authority. See e.g., State ex rel. Howard Elect. Co-op v. Riney, 490 S.W.2d 1, 9 (Mo. 1973) ("[T]he General Assembly must be presumed to have accepted the judicial and administrative construction of its enactments.").

rel. Sprint Missouri, Inc. v. Pub. Serv. Comm'n, 165 S.W.3d 160, 164 (Mo. 2005). No such deference is afforded to an agency's interpretation or construction of a statute which it is not charged with administering, however. Id. at 164.

In reviewing the PSC's decision, appellate courts exercise unrestricted, independent judgment and correct erroneous interpretations of the law. State ex rel. Alma Tel. Co. v. Pub. Serv. Comm'n, 40 S.W.3d 381, 388 (Mo. App. W.D. 2001); see also Burlington N. R.R. v. Dir. of Revenue, 785 S.W.2d 272, 273 (Mo. 1990) (An administrative agency's decision must be reversed if "the result is clearly erroneous to the reasonable expectations of the General Assembly"). Ultimately, all purely legal issues are reviewed *de novo*. AG Processing, 120 S.W.3d at 734. If a court finds an order to be unlawful, it need not reach the question of reasonableness. Id.

POINTS RELIED ON

I. The PSC erred in denying Grain Belt Express' application for a Line CCN based on the Western District's decision in ATXI because ATXI was wrongly decided in that the Western District overlaid a separate requirement for obtaining an Area CCN under § 393.170.2 on the PSC's authority to grant a Line CCN under § 393.170.1.

State ex rel. Harline v. Pub. Serv. Comm'n, 343 S.W.2d 177, 185 (Mo. App. K.C. 1960

State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n, 770 S.W.2d 283, 285 (Mo. App. W.D. 1989).

Stopaquila.org v. Aquila, Inc., 180 S.W. 3d 24 (Mo. App. W.D. 2005).

State ex rel. Cass County v. Pub. Serv. Comm'n, 259 S.W.3d 544, 549 (Mo. App. W.D. 2008).

Section 393.170, RSMo.

4 CSR 240-3.105

II. **The PSC erred in denying Grain Belt Express' application for a Line CCN based on ATXI because ATXI was wrongly decided in that the Western District's holding implicitly overruled decades of unbroken judicial precedent and the PSC's presumptively valid interpretation of its own authority to issue a Line CCN prior to receiving county assents and contravenes the legislative intent and function of the PSC to regulate and facilitate necessary state-wide energy infrastructure.**

In re KCP&L Greater Missouri Operations Co., 328 P.U.R.4th 157 (Mo. P.S.C. Mar. 2, 2016), aff'd 515 S.W.3d 754 (Mo. App. W.D. 2016)

Office of Pub. Counsel v. Pub. Serv. Comm'n, 409 S.W.3d 371, 375 (Mo. 2013).

State ex rel. Pub. Water Supply Dist. No. 8 of Jefferson County v. Pub. Serv. Comm'n, 600 S.W.2d 147 (Mo. App. W.D. 1980)

State ex rel. Sprint Missouri, Inc. v. Pub. Serv. Comm'n, 165 S.W.3d 160, 164 (Mo. 2005).

Section 229.100, RSMo.

Section 393.170, RSMo.

4 CSR 240-3.105

III. **The PSC erred in denying Grain Belt Express' application for a Line CCN based on ATXI because ATXI is distinguishable in that pursuant to 4 CSR 240-3.105(2) the PSC may grant Grain Belt Express a waiver or variance of the timely filing requirements of the county assents addressed by ATXI.**

Kansas City Power & Light Co. v. Pub. Serv. Comm'n, 509 S.W.3d 757, 767 (Mo. App. W.D. 2016).

American Family Ins. v. Hilden, 936 S.W.2d 207, 210 (Mo. App. W.D. 1996).

In re Union Electric Company d/b/a Ameren Missouri, EA-2016-0208, (Dec. 21, 2016).

4 CSR 240-2.060

4 CSR 240-3.105

ARGUMENT

Introduction to statutory scheme

Primarily at issue in this appeal are two statutes and an internal PSC rule: § 393.170 (the "CCN Statute"), § 229.100 (the "County Road Provision") and Commission Rule 4 CSR 240-3.105 (the "Administrative Filing Rule"), which sets forth administrative filing requirements for all CCNs.

The CCN Statute is broken down into three sections, and the difference between Section 1 and Section 2 is an essential aspect of this case. The CCN Statute "empowers the Public Service Commission to issue a certificate of convenience and necessity, or to refuse it." In re Tartan, GA-94-127, 1994 WL 762882 (Mo. P.S.C. Sept. 16, 1994). Missouri courts and the PSC have long recognized that the PSC may grant two types of CCNs under this statute that correspond with the first two sections of the statute. State ex rel. Cass County, 259 S.W.3d 544, 549 (Mo. App. W.D. 2008) (citing State ex rel. Harline v. Pub. Serv. Comm'n, 343 S.W.2d 177, 185 (Mo. App. K.C. 1960)). The PSC may grant CCNs for the "construction" of production or transmission facilities, commonly referred to as a Line CCN and described in Section 1, or for the exercise of "rights or privileges under a franchise," commonly referred to as an Area CCN and described in Section 2. Id.

Electric transmission consists of three distinct processes: production, transmission, and distribution. Utilicorp United, Inc. v. Dir. of Revenue, 75 S.W.3d 725, 726 (Mo. 2001). To produce or transmit electricity, an electric utility must build or operate an "electric plant." An electric plant, however, is not limited to actual power plants. Instead,

it "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." § 386.020(14). In contrast, to distribute electricity to retail customers, an electric utility must have a franchise, which, in this context is authorization given by a local government to a utility provider to provide retail service for a specific territory. See In re Union Elec. Co. of Missouri, P.S.C. Case No. 12,080, 1951 WL 92056, at *1 (Mo. P.S.C. Mar. 12, 1951) ("Union Elec. 1") (stating that a franchise grants a utility the right to serve a specific area);[8] State ex rel. Webb Tri-State Gas Co. v. Pub. Serv. Comm'n, 452 S.W.2d 586, 588 (Mo. App. 1970) (franchise ordinances would allow a utility "to serve the entire area shown").

Before an electric utility can begin construction of a transmission line or start providing utility service to customers under a franchise, the utility must receive the appropriate CCN from the PSC under the CCN Statute. Cass County, 259 S.W.3d at 549. The full text of the CCN Statute reads:

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8 In its reply brief, which Grain Belt Express will not have an opportunity to substitute under the Court's expedited schedule, Grain Belt Express incorrectly cites Union Elec. 1 for the proposition that a franchise is granted by the PSC and not a county. Grain Belt Express acknowledges a franchise as used in Section 2 is granted by the local government served by the utility. But where a utility does not "serve an area" – such as when a Line CCN is issued under Section 1 – a franchise is not required. In taking the opposite view, MLA cites only Area CCN cases that arise under Section 2, which are inapt to this case involving a Line CCN under Section 1.

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

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

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

§ 393.170, A37 (emphasis added).

Section 3 of the CCN Statute authorizes the PSC to grant either a Line CCN under Section 1 "or" an Area CCN under Section 2 "when it determines, after due hearing, that the proposed grant is 'necessary or convenient for the public service.'" In re Missouri-Am. Water Co., WA-2012-0066, 2012 WL 2992477, at *2 (Mo. P.S.C. July 11, 2012) (quoting § 393.170.3). In determining whether an application is "necessary or convenient for the public service," the PSC applies a five-factor test, commonly referred to as the Tartan Factors. Id. n.11. In applying the Tartan Factors, the PSC determines whether 1) there is a need for the proposed service; 2) the applicant is qualified to provide the service; 3) the applicant has the financial ability to provide the service; 4) the proposal is

economically feasible; and 5) the service promotes the public interest. Id. (citing In re Tartan, GA-94-127, 1994 WL 762882 (Mo. P.S.C. Sept. 16, 1994) and In re Intercon Gas, Inc., GA-90-280, 1991 WL 639125 (Mo. P.S.C. June 28, 1991) ("Intercon 1")). In this matter, four out of five PSC Commissioners found that Grain Belt Express met all five of these factors.

Grain Belt Express applied for a Line CCN under Section 1 to transmit wind-generated energy through Missouri. LF 27. Grain Belt Express did not apply for an Area CCN under Section 2 because it will not be providing retail service to electric consumers. Id. Nevertheless, as discussed in Section I of this brief, Grain Belt Express was denied its Line CCN based solely on ATXI's improper application of the Area CCN section of the CCN Statute (Section 2). See A15-16, LF 2670-71. In ATXI, the court further held that the County Road Provision – a non-PSC-related requirement – was an additional prerequisite incorporated solely by way of the Administrative Filing Rule. A34-35; ATXI, 523 S.W.3d at 26-27.

ATXI was wrong to rely on the County Road Provision to support its erroneous holding. In contrast to the CCN Statute's broad purpose of ensuring utility projects fulfill the state-wide public service, the County Road Provision is narrowly intended to ensure construction preserves the safety and usefulness of county roads. Indeed, an earlier version of this statute states that its purpose is to ensure road crossings, whether public or private, would not "interfere with the ordinary traffic and public use of such road and highway." § 10515, RSMo. (1909). The plain language of the current version of this

provision accomplishes this same purpose by requiring compliance with reasonable rules and regulations of the county highway engineer. It states in full:

> 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.

§ 229.100, A39 (emphasis added).

The county highway engineer has "general supervision over construction, maintenance, repair and reconstruction of all public highways, roads, bridges and culverts." § 230.240(2). The plain language of the County Road Provision allows the county highway engineer to be involved in construction involving county roads in a supervisory capacity to ensure that county road crossings are safe, structurally sound, and do not interfere with public use. § 229.100, A39.

This provision does not purport to give counties the authority to stand in the shoes of the PSC in determining whether a proposed utility project is in the public interest of the state or whether a utility should be granted a CCN. That is particularly true where, as here, the Project is inter-state and involves important financial and public policy issues of both state-wide and national import. The County Road Provision, however, requires a utility to obtain assent of the county prior to beginning construction "through, on, under, or across" the county roads. See Stopaquila.org v. Aquila, Inc., 180 S.W.3d 24, 40 (Mo. App. W.D. 2005) ("Section 229.100 simply prohibits public utilities from erecting power

lines without first having obtained the assent of the county commission of such county therefore."). Other than providing that assent must be obtained prior to beginning construction, the County Road Provision is silent as to timing, order of priority, or any other reference to the CCN Statute. Prior to the recent ATXI decision, neither the PSC nor Missouri courts have held that these assents were a prerequisite for the PSC to issue a Line CCN under Section 1. That is because the County Road Provision is a matter of county safety resolutions and not relevant to the PSC's determination of state-wide public interest. Indeed, until the Western District's erroneous interpretation in ATXI, § 229.100 assents were never even mentioned in Line CCN cases.

Grain Belt Express does not, and has not, challenged the proper role of counties to maintain their county roads under the County Road Provision. Rather, the crux of this appeal is the proper sequence – confirmed by decades of practice, precedence, and a clear statutory scheme – of the PSC's CCN process to approve a project that is in the public interest of the state, logically followed by individual counties' rightful involvement in ensuring county road crossings meet engineering requirements.

I. The PSC erred in denying Grain Belt Express' application for a Line CCN based on the Western District's decision in ATXI because ATXI was wrongly decided in that the Western District overlaid a separate requirement for obtaining an Area CCN under § 393.170.2 on the PSC's authority to grant a Line CCN under § 393.170.1.

The PSC's denial of Grain Belt Express' application for a Line CCN, based solely on the Western District's decision in ATXI, is erroneous because ATXI analyzed the wrong statutory section. It should not be adopted as the law of Missouri. The three-judge panel in ATXI did not analyze the proper section of the CCN Statute for Line CCNs:

Section 1. ATXI, 523 S.W.3d at 25-27; A31-35. Indeed, the court in ATXI did not even address Ameren's argument on this point and omitted any discussion whatsoever of the significant distinctions – procedurally, legislatively, and functionally – between a Line and an Area CCN. [9] Instead, ATXI was decided based on the court's analysis and application of Section 2. Id. It held that Section 2's prerequisite of assent from "municipal authorities" included county assents under the County Road Provision. Id. at 27, A35. But this analysis ignored the long-standing distinction between Line CCNs under Section 1 and Area CCNs under Section 2, which the PSC has readily acknowledged.

In its brief before the Eastern District, the PSC admitted ATXI "misinterpreted Section 393.170 by imposing the municipal consent requirement from section 2 of the statute on an application for construction authority under section 1." A71, Br. Resp't PSC 8. The PSC further acknowledged that "[t]he second section of Section 393.170 primarily addresses certificates for the provision of retail service," which Grain Belt Express does not seek. Id. at 18 (emphasis added). And, as the PSC noted, "[t]here is case law that differentiates the construction authority (or line certificate) granted under Section

[9] Before the PSC in this case, intervenors argued that ATXI "implicitly" overruled any distinction between a Line and Area CCN. Tr. 1729-30. But that is wrong. It is well-settled that an appellate court's order is only precedential regarding "decisions on points arising and decided" – not for future decisions on points "that can at most be implied from something that was actually decided." Broadwater v. Wabash R. Co., 212 Mo. 437 (1908); see also Al-Hawarey, 460 S.W.3d at 42. Because the distinction between Line and Area CCNs and the application of Section 1 to Line CCNs were not addressed in the ATXI order, ATXI could not have implicitly overruled by omission such an established principle.

393.170.1 from the service authority (or area certificate) granted under Section 393.170.2." Id. at 23.

This mirrors the PSC's position when it sought transfer of the ATXI decision to this Court because "the [ATXI] Court's opinion does not acknowledge the differences between line certificates and area certificates. Without expressly stating that it did so, the opinion . . . treated ATXI's application for a line certificate as an application for an area certificate." A185, PSC App. Transfer ATXI at 10, SC 96427 (Mo.). The PSC deemed this improper because it "disregards the burden that [Ameren] carried" under section 1 to obtain a Line CCN and added additional requirements under section 2 to obtain an Area CCN, for which Ameren (and Grain Belt Express) did not apply and are inapplicable. Id.

The PSC has authority to grant a Line CCN under Section 1 with a condition requiring subsequent county assents. And the PSC erred in relying on ATXI to deny Grain Belt Express its Line CCN because ATXI does not analyze or address the requirements of Section 1, applicable to Line CCNs, as distinct from the requirements of Section 2, applicable to Area CCNs. In fact, ATXI fails to analyze Section 1 at all; perhaps because in the ATXI case Ameren did not specifically apply for a CCN under Section 1, which is another distinguishing fact the PSC failed to acknowledge. See ATXI, 523 S.W.3d at 25-27, A31-35; see also LF 1812-21. Thus, it was unlawful for the PSC to deny Grain Belt Express its Line CCN under Section 1 based solely on ATXI.

The PSC and Missouri courts have recognized for more than five decades that an applicant for a CCN may apply for a Line CCN under Section 1 to begin construction of a transmission line or an Area CCN under Section 2 for a franchise to provide retail

service to an area within the state. See Aquila, 180 S.W.3d at 32-34; see also Harline, 343 S.W.2d at 182-85. Further, the PSC rules contain separate and distinct filing requirements for Line CCN applications and for Area CCN applications. Compare 4 CSR 240.3-105(1)(B) (setting forth filing requirements "[i]f the application is for electrical transmission lines, gas transmission lines or electrical production facilities . . .") with 4 CSR 240.3-105(1)(A) (setting forth filing requirements "[i]f the application is for a service area . . .").

Indeed, courts have repeatedly acknowledged the significant difference between a Section 1 Line CCN and a Section 2 Area CCN:

> The permission and approval that may be granted pursuant to section 393.170 is of two types: The PSC may grant CCNs for the construction of power plants, as described in section 1, or for the exercise of rights and privileges under a franchise, as described in section 2. Traditionally, the PSC has exercised this authority by granting two different types of CCN, roughly corresponding to the permission and approval required under the first two sections of section 393.170. Permission to build transmission lines or production facilities is generally granted in the form of a "line certificate." A line certificate thus functions as PSC approval for the construction described in section 1 of section 393.170. Permission to exercise a franchise by serving customers is generally granted in the form of an "area certificate." Area certificates thus provide approval of the sort contemplated in section 2 of section 393.170.

Cass County, 259 S.W.3d at 548-49 (citing the different application requirements in 4 CSR 240-3.105(1)(A) and (B)); see also Aquila, 180 S.W.3d at 33 (observing that Section 393.170 is "divided into three distinct sub-sections"); State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n, 770 S.W.2d 283, 285 (Mo. App. W.D. 1989) ("Union Elec. 2") ("Two types of certificate authority are contemplated in Missouri statutes. Section 393.170.1, RSMo. 1986 sets out the requirement for authority to construct electrical

plants. This is commonly referred to as a line certificate . . . . Subsection 2 sets out the requirement for authority to serve a territory which is known as an area certificate."); Harline, 343 S.W.2d at 185 ("Certificate 'authority' is of two kinds and emanates from two classified sources.").

The MLA, in its Response brief filed in the Eastern District, suggested that this long line of authority should be ignored solely because the seminal case, Harline, was decided before the General Assembly divided the CCN Statute into its current three-section format. A154, MLA Resp. 30. But MLA's argument ignores the dispositive effect of the General Assembly's 1967 amendment of the CCN Statute to its current three-section format identical to that interpreted in Harline. This amendment came seven years after Harline and many years before other cases decided consistent with Harline. See Stopaquila.org v. Aquila, Inc., 180 S.W.3d 24 (Mo. App. W.D. 2005); State ex rel. Cass County v. Pub. Serv. Comm'n, 259 S.W.3d 547 (Mo. App. W.D. 2008). When the General Assembly enacted the current three-section version of the CCN Statute, "it is presumed that the legislature adopted the construction given to it by the court." State v. Clark, 490 S.W.3d 704, 708 n.3 (Mo. 2016) ("[W]here a court of last resort[10] construes a statute, and that statute is afterwards re-enacted, or continued in force, without any change in its terms, it is presumed that the legislature adopted the construction given to it

[10] Lest there be any doubt, Missouri courts have long held that "Courts of Appeals are courts of last resort, and, acting within their jurisdiction and not in violation of our decisions, determine litigated issues as their judgment dictates with as great a freedom as [the Supreme Court]." State ex rel. Appel v. Hughes, 351 Mo. 488, 499 (1943).

by the court"); see also, Templemire v. W & M Welding, Inc., 433 S.W.3d 371, 387–88 (Mo. 2014), as modified (May 27, 2014) (Fischer, J., dissenting).

In this case, the statutory history bolsters the conclusion that the distinction between section 1 Line CCNs and section 2 Area CCNs is significant. The General Assembly's enactment of the current three-section version of the CCN statute is legislative confirmation of the Harline opinion and the only version of the statute that controls. Had Harline been contrary to the legislative intent of the CCN Statute, the General Assembly could have taken the opportunity in 1967 to correct that interpretation rather than codify it.

The CCN Statute and case law are clear – line and area certificates are distinct. And each has different prerequisites. To construct transmission lines, a utility must secure a Line CCN and need only obtain "the permission and approval of the commission" after the PSC determines a Line CCN is "necessary or convenient for the public service." §§ 393.170.1, 393.170.3; A37. Whether a line is necessary or convenient for the public service does not depend on county assents. See e.g., In re Tartan (local government assent is not one of enumerated factors considered in reviewing whether a project is "necessary or convenient"); State ex rel. Intercon Gas Co. v. Pub. Serv. Comm'n, 848 S.W.2d 593, 597-98 (Mo. App. W.D. 1993) ("Intercon 2") (local government assent is not included as a criteria considered in reviewing whether a project is "necessary or convenient" and "it is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served in the award of the certificate."). Notably, Section 1 does not include any requirement that a utility provide proof of

municipal or county assent prior to the PSC exercising its statutory authority to issue a Line CCN.

An Area CCN, in contrast, is required when a utility will provide retail utility service to electrical consumers. Cass County, 259 S.W.3d at 549. It "typically has been the principal vehicle for saturating a geographically defined area with retail electric service." Union Elec. 2, 770 S.W.2d at 285. In other words, the granting of an Area CCN under Section 2 serves as the grant of a territorial authority by which a utility is authorized to extend its services and is obligated to provide such services in that area. Id. Unlike a Line CCN under Section 1, for a utility to receive an Area CCN under Section 2, the utility must "show[] that it has received the required consent of the proper municipal authorities." § 393.170.2.

Missouri courts have soundly rejected the notion that the requirements for a Line CCN under Section 1 and an Area CCN under Section 2 are interchangeable. See e.g. Union Elec. 2, 770 S.W.2d at 285 ("Two types of certificate authority are contemplated in Missouri statutes. [Section 1] sets out the requirement for authority to construct electrical plants [and] Section 2 sets out the requirements for authority to serve a territory."); see also A47, E.D. Op. 4 ("Due to the different needs being balanced by the Commission the Missouri legislature specifically created two separate subsections that contemplate two distinct types of certificates of convenience and necessity."). Specifically, Missouri courts have rejected the argument that Section 2 is related to the construction of a transmission line. See Harline, 343 S.W.2d at 183 ("We do not read the statute with that understanding.").

Despite the clear differences in purpose and function between a Line and Area CCN, the Western District in ATXI repeatedly relied on the requirement for municipal assents under Section 2 for an Area CCN. See ATXI, 523 S.W.3d at 25-27, A31-35. The court justified its decision by stating that to construe the CCN Statute as not requiring prior county assents before issuing a CCN (generally) "would render the language of section 393.170.2 meaningless by allowing the PSC to grant a CCN without having received the required documentation." Id. at 27, A35. But it is ATXI's conflated analysis of the CCN Statute that has rendered the clear legal distinctions and separate requirements of Line and Area CCNs meaningless. For example, as the Eastern District noted below, the ATXI decision "empowers a local entity to withhold its consent and prevent the Commission from issuing a CCN," which "effectively nullifies Section 393.170.1." A52, E.D. Op. 9. The court in ATXI incorrectly tied the requirements of Section 2 to Section 1 despite decades of case law specifically holding the two sections cannot be interchanged. There are no assent requirements as a statutory prerequisite to the PSC granting a Line CCN under Section 1. See A52, E.D. Op. 9 ("The ATXI decision focuses solely on the language contained in Section 393.170.2 concerning an area CCN.").

Here, Section 2 is not at issue. Grain Belt Express did not apply for an Area CCN. Grain Belt Express applied for a Line CCN under Section 1. LF 27. After extensive review, public hearings, an evidentiary hearing, and witness testimony, a majority of PSC commissioners found that the Project meets the Tartan factors for issuance of a Line CCN. LF 2666-2681. This is a decision the PSC is empowered to make, but it has refused

to act in this matter only because of the erroneous decision in ATXI. The PSC's reliance on ATXI and its interpretation of inapplicable statutes is in error.

II. The PSC erred in denying Grain Belt Express' application for a Line CCN based on ATXI because ATXI was wrongly decided in that the Western District's holding implicitly overruled decades of unbroken judicial precedent and the PSC's presumptively valid interpretation of its own authority to issue a Line CCN prior to receiving county assents and contravenes the legislative intent and function of the PSC to regulate and facilitate necessary state-wide energy infrastructure.

In addition to incorrectly applying the requirements for an Area CCN to a Line CCN application, the decision in ATXI improperly divested the well-established authority and responsibility that is exclusively delegated to the PSC to regulate and facilitate necessary state-wide energy infrastructure. Expanding the ATXI decision to this case and making it the law of the state would upset decades of precedent, frustrate the statutory scheme and clear legislative intent of § 393.170 et seq., and stand the function of the PSC as a state-wide regulatory body on its head by giving individual counties preemptive veto authority over the PSC to make decisions about the public interest of the state. This transfer of power from the PSC to individual county commissions is improper and unsupported.

The PSC erred in expanding to this case such an unjustifiable and outlier deviation from decades of judicially sanctioned practice consistent with legislative authority and intent. As a result, Grain Belt Express was erroneously denied its application for a Line CCN and the public interest of Missouri was thwarted.

A. ATXI implicitly overrules the PSC's presumptively valid interpretation of its own authority to issue a Line CCN prior to receiving evidence of county assents.

The PSC has long interpreted its authority under the CCN Statute as allowing it to grant a CCN prior to an applicant fulfilling filing requirements under the Administrative Filing Rule. See, e.g., In re KCP&L Greater Missouri Operations Co., EA-2015-0256, 2016 WL 946579, at *12 (Mo. P.S.C. Mar. 2, 2016), aff'd 515 S.W.3d 754 (Mo. App. W.D. 2016) ("KCP&L 1") (PSC granted a CCN prior to Administrative Filing Rule requirements—specifically including section (1)(D) requirements for county assents—being met.). And the PSC's interpretation of its authority to issue a CCN is presumptively valid. See Office of Pub. Counsel v. Pub. Serv. Comm'n, 409 S.W.3d 371, 375 (Mo. 2013). This presumption is especially strong where the interpretation involves an area within the PSC's expertise and statutory responsibility, as is the case here. See Sprint, 165 S.W.3d at 164 ("reviewing court will not substitute its judgment for that of the PSC on issues within the realm of the agency's expertise"). In these instances, it is well-recognized that a reviewing court must give "great weight" to the PSC's own interpretation and construction of the statutes that it is charged with administering. See id.; Burlington N. R.R., 785 S.W.2d at 273. Indeed, an agency's decision is generally "upheld if authorized by law and supported by competent and substantial evidence upon the record, unless the result is clearly erroneous to the reasonable expectations of the General Assembly." Id.

Nevertheless, the three-judge panel in ATXI "substitute[d] its judgment for that of the PSC on [this] issue[] within the realm of the agency's expertise," despite the

admonition from the Supreme Court to give deference to the PSC in such a situation. See Sprint, 165 S.W.3d at 164. ATXI ignored the PSC's interpretation and construction of the CCN Statute and its applicability to an application for a Line CCN under Section 1. Instead, it held that "[b]y statute [the County Road Provision] and by rule [the Administrative Filing Rule]" the PSC may only grant a CCN "after the applicant has submitted evidence satisfactory to the PSC that the consent or franchise [required by § 229.100] has been secured by the public utility." ATXI, 523 S.W.3d at 26, A33. In so holding, ATXI implicitly overturned decades of practice and precedent authorizing the PSC to issue a Line CCN prior to an applicant fulfilling the requirements of the Administrative Filing Rule, and also abandoned long-standing PSC practice of managing compliance with this Rule by attaching reasonable conditions to CCNs that must be met after the issuance of the CCN.

1. *The County Road Provision – a law the PSC is not charged with administering – does not bar the PSC from issuing a CCN prior to county assents.*

The source of the PSC's state-wide regulatory authority and jurisdiction to issue CCNs is found in the CCN Statute. As discussed above, Section 1 of the CCN Statute details the requirements necessary for the PSC to grant a Line CCN. The only requirement mandated by the legislature is for a utility to obtain "the permission and approval of the [public service] commission"—not approval from local county commissioners. § 393.170.1, A37.

In contrast to the statutory requirements under Section 1, the County Road Provision is not a law the PSC is charged with administering. It is found in an entirely

separate chapter, in an entirely separate title, of the Missouri Revised Statutes titled "Provisions Relating to All Roads." Unlike the CCN Statute and Chapters 386 and 393 generally, Chapter 229 is not PSC or utility specific. Instead, it captures a host of topics relating to the construction and regulation of public roads. It merely requires those who wish to erect poles and power wires, or lay pipes across public roads of any county to obtain the assent of county commissioners under reasonable rules established by the county highway engineer. § 229.100, A39. It provides:

> 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.

Id. (emphasis added).

The County Road Provision allows the county highway engineer and the county commission to work together to provide assent for county road crossings. Id. The county highway engineer may pass reasonable rules and regulations in a supervisory capacity over the "construction, maintenance, repair and reconstruction of all public highways, roads, bridges and culverts." § 230.240(2). County commissions then ensure that county road crossings will adhere to these reasonable rules and regulations before providing assent. § 229.100, A39.

The plain language of the County Road Provision only requires county assent as a prerequisite to construction or maintenance activities through, on, under, or across county

roads. Id. The court's role in interpreting a statute is to "effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language." State v. Barraza, 238 S.W.3d 187, 192 (Mo. App. W.D. 2007). Whenever a statute is clear, the court "need not resort to statutory construction and must give effect to the statute as written." State v. Graham, 149 S.W.3d 465, 467 (Mo. App. E.D. 2004). As written, the County Road Provision does not require a utility to obtain county assents before it can petition the PSC to exercise its state-wide authority in granting a Line CCN. Because the statute is clear, there is no need to stray from the statute's plain language. Indeed, the Western District has acknowledged that "Section 229.100 simply prohibits public utilities from erecting power lines without first having obtained the assent of the county commission of such county therefore." Aquila, 180 S.W.3d at 40.

Given the purpose of the County Road Provision – and its limited application to county road crossings – it makes little sense to require such assent prior to the PSC's exercise of its statutory jurisdiction to determine whether a project is in the public interest of the state such that a Line CCN should be issued. Indeed, an applicant commonly applies for, and receives, a CCN prior to finalizing project plans. In re Union Elec. Co. d/b/a Ameren Missouri, EA-2016-0208, 2016 WL 7441690 *14 (Mo. P.S.C. Dec. 21, 2016) ("Union Elec. 3") (granting a CCN prior to finalized project plans).

An applicant cannot be expected to obtain assent from a county before actually finalizing its route during the CCN process. In fact, in this case several county commissions have indicated that they were withholding their assent until the CCN process is finalized with the PSC. Tr. Vol. II at 1674 ("[S]everal county commissions

said we want to hear from the Public Service Commission before we issue the county consent. So this is the Catch 22. If we have to provide these [county assents] beforehand but they [county commissions] want to hear from you [the PSC]."); A189, Ex. Vol. 39, p. 3137 (Ralls County Commission letter refusing § 229 assent "[u]ntil such time that Grain Belt Express Clean Line LLC has utility status in the State of Missouri and approval from the Missouri Public Service Commission."); A191, Ex. Vol. 39, p. 3139 (Monroe County Commission letter refusing § 229 assent "until such time that Grain Belt Express Clean Line LLC has utility status in the State of Missouri by receiving the official approval of the Missouri Public Service Commission."); A194, Ex. Vol. 39, p. 3135 (Caldwell County Commission letter refusing §229 assent in favor of PSC consideration of Grain Belt Express' Line CCN application); A198, Ex. Vol. 39, p. 3132 (Chariton County Commission letter refusing §229 assent until a number of public interest questions, which are vested exclusively to the PSC's jurisdiction, can be answered.); see also A196 Ex. Vol. 39, p. 3130 (Clinton County Commission letter revoking §229 assent as "premature").

MLA, in its brief in response to Grain Belt Express's opening brief before the Eastern District, disputed Grain Belt Express' argument on this point, citing State ex rel. Public Water Supply Dist. No. 2 of Jackson County v. Burton, 379 S.W.2d 593 (Mo. 1964).[11] A161; MLA Br. in Response 37. MLA twists language from a Section 2 case to

[11] MLA also cites Burton in support of its novel argument that county assents under § 229.100 are "franchises" within the meaning of word in § 393.170.2. This argument is addressed in Grain Belt Express' Reply Brief filed in the Eastern District.

suggest that "consent of the city, town, village, the county court, or the State Highway Commission . . . has always been made a condition precedent to the granting of such certificate by this Commission." Id. at 599. MLA ignores, however, that Burton is a Section 2 case where the CCN sought was an Area CCN. Indeed, in Burton, the appellants took the position that the "sole matter of contention is whether or not Raytown Water Company has a right to service the area in dispute." Id. at 594 (emphasis added). It is not disputed in this case that Area CCNs require the necessary approvals of municipal authorities as a condition precedent.[12] This application at issue in this case, however is for a Section 1, Line CCN. Accordingly, the language in Burton has no bearing on this case.

There is nothing in the County Road Provision that purports to supersede the CCN Statute or set an order of priority. § 229.100, A39. Likewise, nothing in the CCN Statute purports to incorporate or even reference the County Road Provision. § 393.170, A37. These are two independent statutes from different chapters that serve completely separate purposes and functions.

[12] The parties disagree as to whether "municipal authorities" as used in § 393.170.2 includes county commissions. This point was addressed at oral argument in the Eastern District and the court accepted supplemental filings on this point. See A201-02. Ultimately, the Eastern District correctly concluded that "this issue is irrelevant in the present case because Grain Belt specifically applied for a line CCN under Section 393.170.1." A51, E.D. Op. 8 n.4.

2. *The Administrative Filing Rule does not bar the PSC from issuing a CCN prior to county assents.*

The only relationship the court in ATXI could find between the County Road Provision and a PSC proceeding is through a strained interpretation of the Administrative Filing Rule – an internal PSC rule that, by its own terms, relates to "filing requirements." A41; 4 CSR 240-3.105. The Administrative Filing Rule provides that "[w]hen consent or franchise by a city or county is required, approval shall be shown by a certified copy of the document granting the consent or franchise, or an affidavit of the applicant that consent has been acquired." A41; 4 CSR 240-3.105(1)(D)2. The Administrative Filing Rule further provides that "[i]f any of the items required under this rule are unavailable at the time the application is filed, they shall be furnished prior to the granting of the authority sought." 4 CSR 240-3.105(2), A41.

The Administrative Filing Rule does not elevate the filing of county assents (or any other administrative filing requirement) above the PSC's statutory authority to determine whether an energy project is in the public interest such that the applicant is entitled to a CCN. It has nothing to do with the regulatory authority the General Assembly vested exclusively in the PSC. It does not (and cannot) limit the PSC's statutorily conferred jurisdiction. Even if it could be read as jurisdictional, the PSC has the authority to grant a variance or waive its requirements altogether. See infra Section III; 4 CSR 240-2.060(4)(1)(B), A42-43; Commission Rule 4 CSR 240-3.105(2), A41.

In reaching the opposite conclusion, the Western District in ATXI emphasized the language of the Administrative Filing Rule stating that required items "*shall be furnished*

prior to the granting of the authority sought." ATXI, 523 S.W.3d at 26, A33 (quoting Commission Rule 4 CSR 240-3.105(2)) (emphasis in original). But the PSC has consistently interpreted the "authority sought" referenced in the rule as distinct from the CCN sought by an applicant. For example, in Union Elec. 3, the PSC rejected the Office of the Public Counsel's recommendation to deny a CCN based on the applicant's failure to strictly meet all filing requirements under the Administrative Filing Rule. Union Elec. 3, 2016 WL 7441690 *9. Instead, the PSC held that it was sufficient that the applicant "ha[d] either already provided the information required [under the Administrative Filing Rule] or will provide that information prior to constructing the proposed facilities." Id. Thus, the condition in Union Elec. 3 was a condition required to be subsequently fulfilled after the issuance of a CCN. That is precisely the result Grain Belt Express seeks in this case.

Likewise, in KCP&L 1, the PSC again granted a CCN prior to the Administrative Filing Rule's requirements being met. In addition to county assents not being filed, also missing from the application were "complete plans and specifications for construction . . . as required by Commission Rule 4 CSR 240-3.105(1)(B)2" and "a list of all [utility lines], railroad tracks, or any underground facility the proposed construction will cross as required by Commission Rule 4 CSR 240-3.105(1)(B)1." KCP&L 1, 2016 WL 946579 at *12. (emphasis added). Nevertheless, the PSC granted the CCN. Id.; see also In re Transource Missouri, EA-2016-0188, 2016 WL 1533958, at *3 (Mo. P.S.C. Apr. 6, 2016) ("Transource 1") (granting a CCN with condition that applicant submit partial plans and specifications as the project is completed because of the fact that plans were not finalized

at time of application); In re Transource Missouri, EA-2016-0190, 2015 WL 12645739, at *4 (Mo. P.S.C. Oct. 5, 2015) ("Transource 2") (granting a CCN with condition that the applicant "shall provide Staff with final engineering deliverables, including design packages, procurement delivery schedules, and construction contract bid technical specifications as soon as they are available"). In each of these cases, the PSC granted a CCN conditioned on the applicant subsequently fulfilling certain administrative filing requirements.

Notably, the conditions imposed by the PSC in these cases did not impact the effectiveness of the CCN or the PSC's authority to make determinations in the public interest, but rather created conditions to be met after receiving a fully effective CCN and before taking certain specific actions (e.g., running an approved transmission line across a county road in an affected county). In this case, for the first time, the PSC is doing the opposite. It is erroneously conditioning its exercise of state-wide regulatory authority on the prerequisite issuance of county road crossing assents based solely on an expansion of the wrongly-decided ATXI decision. The result is unlawful.

The Western District's holding in ATXI created a nonexistent Line CCN prerequisite of obtaining county assents that is not found in the CCN Statute and that has never been interpreted as such before the ATXI case. While Grain Belt Express must ultimately satisfy the reasonable local engineer road-crossing requirements under the County Road Provision in due course, those local decisions may be made later. They do not take priority over the threshold state-wide policy determinations resulting from application of the CCN Statute. Nothing in these laws or prior judicial decisions suggest

otherwise. ATXI incorrectly ignored the presumption of validity afforded to the PSC in interpreting its own authority by ignoring the "great weight" that is afforded to an agency's interpretation of a statute it is charged with administering. See Sprint, 165 S.W.3d at 164. Accordingly, the Western District's decision in ATXI is legally incorrect and the PSC erred in denying Grain Belt Express its Line CCN based solely on that single outlying decision. ATXI's mistaken reasoning should be rejected by this Court just as it was by the Eastern District below, and it should not become the law of Missouri.

B. The General Assembly established the PSC to exclusively regulate and facilitate necessary state-wide energy infrastructure and to exclusively determine whether utility projects further the public interest.

The Western District's decision in ATXI frustrates the statutory scheme and legislative intent of the CCN Statute and has stood the function of the PSC as the state-wide energy regulatory body on its head by giving individual counties preemptive veto authority over the PSC to make decisions about the public interest of the state. Allowing an individual county commission exercising its power under the County Road Provision to stand in the way of the PSC approving projects that are in the best interest of the state is "clearly erroneous to the reasonable expectations of the General Assembly." See Burlington N. R.R., 785 S.W.2d at 273.

To be sure, county commissions may enforce the County Road Provision to ensure safe road crossings before construction of a PSC authorized project begins "through, or, under or across the public roads or highways" in the affected area. But the County Road Provision does not preempt the PSC's exercise of its jurisdiction to determine as a threshold matter whether a proposed energy project is in the state-wide public interest,

such that the utility may proceed with complying with other legal requirements, like exercising eminent domain and obtaining assents to cross county roads. Tr. Vol. XX at 1646. The importance of the state-wide regulatory function of the PSC is especially significant for inter-state projects, like this one. Expansion of the erroneous ATXI decision will result in individual Missouri counties having the ability to veto a project that has met the regulatory requirements to cross multiple states, including Missouri, thus preventing these vital inter-state projects.

"The General Assembly of the State of Missouri many years ago, by enactment of the Public Service Commission Law (now Chapter 386), wisely concluded that the public interest would best be served by regulating public utilities [and] delegated the task of determining the public interest in relation to the regulation of public utilities to the Commission." In re KCP&L Greater Missouri Operations Co., EA-2009-0118, 2009 WL 762539 (Mo. P.S.C. Mar. 18, 2009) ("KCP&L 2"). Nevertheless, the Western District in ATXI improperly elevated county commissions and their general assents required under the County Road Provision above the PSC as the gate-keeping body for a utility seeking to invest in Missouri. Tr. Vol. XX at 1662-1663. In so doing, ATXI put individual counties' ability to review where utility lines cross county rights-of-way before the state-wide public interests the PSC was established to protect. Elevating individual counties in this way improperly places local interests before the larger public interest and divests the PSC of its authority to exclusively determine whether a utility project is in the best interest of the public.

It is well established that "[t]he public interest . . . is a matter of policy to be determined by the Commission." State ex rel. Pub. Water Supply Dist. No. 8 of Jefferson Cnty. v. Pub. Serv. Comm'n, 600 S.W.2d 147, 155 (Mo. App. W.D. 1980). Indeed, the dominant purpose in the creation of the PSC is public welfare. State ex rel. Mo. Pac. Freight Transport Co. v. Pub. Serv. Comm'n, 288 S.W.2d 679, 682 (Mo. App. 1956). Determining what is in the interest of the public is a balancing process that the PSC routinely undertakes. In re Sho-Me Power Corp., EO-93-0259, 1993 WL 719871 (Mo. P.S.C. Sept. 17, 1993). "In making such a determination, the total interests of the public served must be assessed." Id. This necessarily means that some of the public may suffer adverse consequences for the total public interest. Id. But, when evaluating the public interest, "the rights of individual groups are subservient to the rights of the public in general." Mo. Pac. Freight Transport Co., 299 S.W.2d at 682. Likewise, individual counties' interests are subservient to the rights of the state and its people as a whole.

The holding in ATXI requiring county assents prior to granting a Line CCN under Section 1 is in direct conflict with numerous Missouri statutes governing the relationship between local governments and the PSC. Yet, the court in ATXI addressed none of them. Missouri law recognizes that while local governments play a role in the development of utility projects, their authority cannot be used to subvert or overrule the exclusive jurisdiction granted to the PSC. For example, a political subdivision is authorized to manage its public rights-of-way through the reasonable exercise of its police power, provided that it not do so in any way inconsistent with the rules and regulations of the PSC. See § 67.1832.1 ("[A] political subdivision shall grant its consent to a public utility

right-of-way user authorized to do business pursuant to the laws of this state . . .; provided that, no political subdivision shall require any conditions that are inconsistent with the rules and regulations of . . . the Missouri public service commission.") (emphasis added); § 67.1844.1 ("Nothing in sections 67.1830 to 67.1846 shall be construed as limiting the authority of the political subdivision to require public utility right-of-way users to comply with national safety codes and all other applicable zoning and safety ordinances, to the extent not inconsistent with public services commission laws or administrative rules.") (emphasis added).

Furthermore, the law intends for local governments to be subordinate to the PSC in any area under the PSC's jurisdiction. See e.g., § 67.1836.1(4) ("A political subdivision may deny an application for a right-of-way permit if . . . [t]he political subdivision determines that denial is necessary to protect the public health and safety, provided that the authority of the political subdivision does not extend to those items under the jurisdiction of the public service commission."). Indeed, the law expressly prohibits local governments from interfering with utilities acting under authorization of a CCN or PSC order. See e.g., § 64.090.3 ("nor shall anything [in a first class county's planning and zoning authority] . . . interfere with such public utility services as may have been or may hereafter be specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service commission"); §64.235.1 (in developing a county plan, nothing shall "interfere with such development or public improvement as may have been, or may hereafter be, specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the public service

commission"); § 64.620.3 (a second and third class county's planning and zoning powers "shall not be construed . . . [t]o authorize interference with such public utility services as may have been or may hereafter be authorized or ordered by the public service commission").

The majority of PSC Commissioners have determined that the Grain Belt Express Project is in the best interest of the state. A21; LF 2676. And dozens of municipalities have already entered into contracts allowing them to benefit from the low-cost, renewable energy that will be transmitted over the Grain Belt Express line. But the PSC's reliance on ATXI, which improperly elevates individual counties' interest in maintaining roads above the state-wide public interests that the PSC was legislatively created to protect, has delayed this Project and has put the state in jeopardy of losing the countless benefits identified by the PSC itself.[13] This must be corrected so that Grain Belt Express and other utilities can continue to invest in Missouri and develop beneficial projects that are in the public interest of all Missourians as a whole.

The County Road Provision and the CCN Statute are separate, distinct statutes in unrelated chapters of the Missouri Revised Statutes which define the functions of two different administrative bodies, both of which have equally important jurisdiction over very different matters. There is no doubt that Grain Belt Express is required to secure

[13] As mentioned on page 2, a driving factor behind the current growth of wind-power development across the country is the Production Tax Credit ("PTC"), which is set to expire in 2019. Grain Belt Express, like many other industry members, is relying on the availability of PTCs to complete the Project as cost effectively as possible to deliver maximum cost-savings to energy consumers. Without the benefit of the PTCs, the completion of the Project is in jeopardy and the savings to Missourians at risk.

county assents prior to erecting lines across county roads. But requiring these assents prior to the PSC granting a Line CCN under Section 1 would improperly, and unjustifiably elevate county commissions' authority to review road crossings above the PSC's authority to exclusively determine whether a proposed utility development project is in the best interest of Missouri such that a Line CCN should be issued. ATXI is wrongly decided and the PSC's reliance on it in this case is erroneous.

III. The PSC erred in denying Grain Belt Express' application for a Line CCN based on ATXI because ATXI is distinguishable in that pursuant to 4 CSR 240-3.105(2) the PSC may grant Grain Belt Express a waiver or variance of the timely filing requirements of the county assents addressed by ATXI.

In its Report and Order, the PSC incorrectly stated that "[t]here are no material factual distinctions between [ATXI] and this GBE case that would permit the Commission to reach a different result on the question of statutory authority to grant a CCN in this case." LF 2669. In this case, unlike in ATXI, Grain Belt Express requested a variance or waiver of the filing requirement in the Administrative Filing Rule that requires assents from local governments. Even in light of the flawed analysis in ATXI of the interplay between the Administrative Filing Rule and the County Road Provision, the PSC has the authority to waive or grant variances from its own internal rules.

In ATXI, Ameren applied for and received a CCN for its intra-state project conditioned on Ameren subsequently obtaining county assents required by § 229.100. Ex. Vol. 52, Part III at 4467. In its order granting Ameren a CCN conditioned on subsequently obtaining county assents, the PSC analyzed whether the CCN Statute and 229.100 required evidence that the applicant had received county consent to cross the

county roads prior to issuing a Line CCN. Ex. Vol. 52, Part III at 4434 (emphasis added). In its Findings of Fact, the PSC noted that Ameren did not have any county commission permissions for its proposed project to cross public roads and highways. Ex. Vol. 52, Part III at 4460. In its Conclusions of Law, the PSC acknowledged that its Administrative Filing Rule generally requires an applicant for a CCN to file certain documents, including county consents, with its application. Ex. Vol. 52, Part III at 4464. However, the PSC also noted that "[i]f any of the items required under this rule are unavailable at the time the application is filed" it is sufficient for them to "be furnished prior to the granting of the authority sought." Ex. Vol. 52, Part III at 4465 (emphasis added). Accordingly, the PSC correctly concluded that "Section 229.100 simply prohibits public utilities from erecting power lines without first having obtained the assent of the county commission of such county therefore." Id. (quoting Stopaquila.org v. Aquila, Inc., 180 S.W.3d 24, 40 (Mo. App. W.D. 2005) (emphasis added)). The PSC also acknowledged that it "may impose conditions on the certificate of convenience and necessity that it finds reasonable and necessary." Ex. Vol. 52, Part III at 4463. Having rightly found that it had the authority to grant Ameren the CCN it sought, that such CCN was "necessary or convenient for the public service," and that county assents could properly be obtained after the granting of a CCN, the PSC granted Ameren a CCN with "a condition of acquiring county assents." Ex. Vol. 52, Part III at 4467.

ATXI is distinguishable from this case. Unlike in ATXI, Grain Belt Express filed a motion requesting the PSC to waive the requirements under the Administrative Filing

Rule.[14] LF 2519. In its motion, Grain Belt Express noted the PSC's wide discretion to make "decisions within its area of expertise," includes granting variances of its own rules. Id. (citing Kansas City Power & Light Co. v. Pub. Serv. Comm'n, 509 S.W.3d 757, 767 (Mo. App. W.D. 2016)). Grain Belt Express argued that a waiver could be granted to avoid the perceived impact of ATXI. LF 2519 (Grain Belt Express stated that it "moves for a waiver or variance regarding certain filing requirements of 4 CSR 240-3.105(1)(D)1 and 240-3.105(2), to the extent that the Commission believes that Court of Appeals opinion in [ATXI] requires the filing of Section 229.100 county assents prior to the Commission issuing a Line CCN.").

Contrary to the PSC's conclusion, nothing in ATXI prohibited the PSC from granting a waiver or variance to Grain Belt Express and issuing it a Line CCN upon concluding the Project was in the public interest. A21; LF 2676 (The Commissioners determined that "GBE is qualified or has the financial ability to provide the service, and in our view the evidence in the record shows that GBE also meets the remaining three factors that were in dispute – need, economic feasibility, and public interest."). It was within the PSC's discretion to either condition the CCN on subsequent filing of county assents prior to crossing county roads, or to omit any such condition (as has been historical practice) understanding that § 229.100 is a separately enforceable statute that Grain Belt Express will ultimately have to comply with in order to construct the Project

[14] Grain Belt Express filed a motion for waiver or variance of filing requirements on June 29, 2017.

safely across county roads. The PSC's conclusion that it was bound by ATXI, when it could have granted a variance, is therefore in error.

Neighbors United appealed the ATXI CCN to the Western District arguing that the PSC did not have the authority to issue a CCN conditioned on Ameren subsequently obtaining the required county assents. ATXI, 523 S.W.3d at 24, A29. Accordingly, the court in ATXI only considered whether the PSC had authority to grant a CCN to an applicant conditioned on subsequently obtaining assents required by Section 2 (which is not applicable here). Id. at 26-27, A33-35 (noting "the specific language of section 393.170.2" requires county consents and "county commission assents required by [the County Road Provision] . . . must be submitted."). The court in ATXI vacated the PSC's Report and Order granting ATXI a conditional Line CCN holding that "county commission assents required by section 229.100 and 4 CSR 240–3.105(1)(D)1 must be submitted to the PSC before the PSC grants a CCN." ATXI, 523 S.W.3d at 27, A35. The court did not, however, address whether the PSC had the statutory or regulatory authority to grant a variance from, or altogether waive, its internal filing requirements for CCN applications.

As Grain Belt Express highlighted to the PSC, the requirements in the Administrative Filing Rule are not absolute prerequisites to the PSC's grant of a Line CCN. Rather, the rule's requirements are general requirements from which the PSC has the authority to grant a waiver or variance pursuant to 4 CSR 240-2.060(4). This rule reads:

> In addition to the requirements of section (1), applications for variances or waivers from commission rules and tariff provisions, as well as those statutory provisions which may be waived shall contain information as follows: (A) Specific indication of the statute, rule or tariff from which the variance or waiver is sought; (B) The reasons for the proposed variance or waiver and a complete justification setting out the good cause for granting the variance or waiver; and (C) The name of any public utility affected by the variance or waiver.

Commission Rule 4 CSR 240-2.060(4), A42-43.

Pursuant to 4 CSR 240-2.060(4), the PSC may waive commission rules for good cause. "Good cause means a good faith request for reasonable relief." In re Transource Missouri, EA- 2013-0098, 2013 WL 4478909 (Mo. P.S.C. Aug. 7, 2013) ("Transource 3") (citing American Family Ins. v. Hilden, 936 S.W.2d 207, 210 (Mo. App. W.D. 1996)). The PSC's latitude under 4 CSR 240-2.060(4) is logical and practical in that it provides the PSC with the ability to lessen the impact of regulatory provisions that may otherwise stymie requests that are in the public interest; especially for projects that are time sensitive, such as this one. Under the circumstances of this case, the PSC could have granted a waiver of its timely filing requirements due to its determination that the Grain Belt Express Project met all five Tartan factors and was in the best interest of Missourians – an option that was not addressed in ATXI. This is a material, factual distinction between this case and ATXI.

The PSC has recently found waivers to be appropriate in several cases. For example, in 2016 the PSC issued a Line CCN to Ameren Missouri to construct a solar pilot program and noted that "good cause would exist to support a waiver." Union Elec. 3 at 10. In that case, the PSC found "good cause" because the "practical effect of requiring

project plans before granting a CCN would effectively kill the program before it started." Id. (reasoning that "[r]equiring the company to complete all negotiations with host customers and finalize all engineering and construction plans before applying for a CCN would effectively kill the pilot program because potential partners would be unlikely to invest time and resources before Commission approval has been granted.").[15]

In another recent case, the PSC determined a waiver pursuant to 4 CSR 240-2.060(4) was proper "because the application was filed as soon as possible due to the nature of this particular transaction." In re Missouri-American Water Co., SA-2018-0019, 2017 WL 4407770 (Mo. P.S.C. Sept. 27, 2017) (waived the 60-day notice requirement under 4 CSR 240-4.020(2)); see also Transource 3, at 13, 26 (PSC waived the 60-day notice requirement of Commission rule 4 CSR 240-4.020(2) because Transource's application was "filed as quickly as circumstances would allow to avoid any material delay in the construction and operation of the Rock Creek Wind Project.").

In this matter, Grain Belt Express requested the PSC to waive the administrative filing requirements under 4 CSR 240-3.105. LF 2519. Because ATXI did not address the PSC's well-established, and routinely exercised authority to grant waivers or variances from its own internal rules, ATXI did not prohibit the PSC from reaching "a different result on the question of statutory authority to grant a CCN in this case." LF 2669. It was an erroneous interpretation of the law for the PSC to hold otherwise.

[15] The PSC ultimately determined it was unnecessary to outright waive its requirements under the Administrative Filing Rule because, as discussed above, the historical practice of the PSC is to allow such administrative filing requirements to be met after granting a CCN.

CONCLUSION

Based upon the foregoing, Grain Belt Express respectfully submits that the PSC's decision in the Report and Order should be reversed and remanded for further action so that the PSC may ground its new order on the findings and conclusions of the majority of Commissioners that Grain Belt Express is entitled to a Line CCN because the Project is necessary or convenient for the public service.[16]

[16] Remand with these proposed instructions would comply with § 386.510, which provides, "The court may, in its discretion, remand any cause which is reversed by it to the commission for further action." See State ex rel. Fee Fee Trunk Sewer, Inc. v. Pub. Serv. Comm'n, 522 S.W.2d 67, 72 (Mo. Ct. App. 1975) ("If an [PSC] order was set aside, the court could then remand the cause for such further action as the Commission might desire to take.").

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Rule 55.03. This brief complies with the type-volume limitations of Missouri Supreme Court Rule 83.08(b) and Rule 84.04. This brief complies with the typeface and the type style requirements of Rule 84.06 because this brief has been prepared in a proportionally styled typeface using Microsoft Word in 13-point font size and Times New Roman type style.

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2018, a true and correct copy of the foregoing brief was filed electronically with the Clerk of the Court using the Missouri e-filing system, which will automatically send email notification to counsel of record.

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