IN THE SUPREME COURT OF MISSOURI

No. SC96993

Grain Belt Express Clean Line, LLC, et al.,

Appellants,

v.

Public Service Commission of the State of Missouri,

Respondent.

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

SUBSTITUTE BRIEF OF INTERVENOR MISSOURI LANDOWNERS ALLIANCE IN SUPPORT OF RESPONDENT PSC AND IN RESPONSE TO SUBSTITUTE BRIEF OF APPELLANT GRAIN BELT EXPRESS CLEAN LINE, LLC

Paul A. Agathen
Mo. Bar No. 24756
485 Oak Field Ct.
Washington, MO 63090
636-980-6403
Paa0408@aol.com

Attorney for Missouri
Landowners Alliance

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Supreme Court Rules

PSC Regulations

Other Authorities

INTRODUCTION

Section 386.510 provides in part that "each party to the action or proceeding before the [PSC] shall have the right to intervene and participate fully in the review proceedings [at the Court of Appeals]."[1] (Appendix A1). Pursuant to this provision the MLA filed a Motion to Intervene with the Eastern District in the case below, stating it would be supporting the decision of respondent PSC. (Part 1 of Legal File). By docket entry of October 20, 2017, the Eastern District granted the Motion to Intervene, and allowed the MLA to file intervenor-respondent briefs in response to the other 4 appellants. The MLA's substitute briefs in response to Grain Belt, MJMEUC, and the Sierra Club/Renew Missouri are being filed pursuant to that same statutory provision.

STATEMENT OF FACTS

Grain Belt uses much of its twelve-page Statement of Facts to emphasize the supposed benefits of its proposed line; to summarize the favorable evidence from its own witnesses and its supporters, with no mention that some of that evidence was disputed at the PSC; and to identify other entities which testified on its behalf. (Brief pp. 2-6, 10).

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

The only conceivable acknowledgement from Grain Belt that any of its evidence was challenged by opposing experts, including the Commission Staff, or that other third-party organizations opposed the line, is this single vague sentence in its Statement of Facts: "The PSC also received into evidence written testimony from other witnesses and more than one hundred exhibits." (Brief p. 6) Indeed, based on Grain Belt's Statement of Facts, one might not realize that it faced any opposition at all in the PSC proceedings.

Rule 84.04(c) requires that an appellant's Statement of Facts be "fair", which means that "failing to present material evidence presented by respondent supporting its position is not a fair statement of facts." *Simpson v. Galena R-2 School Dist.*, 809 S.W.2d 457, 458 (Mo. App. 1991). *See also Pillow v. Sayad*, 655 S.W.2d 816, 816 (Mo. App. 1983) (faulting the appellant for failing to include facts supporting the respondent's case).

Here, Grain Belt obviously failed to present a "fair statement of facts." Moreover, some of its factual allegations are simply inaccurate.[2] Furthermore, contrary to Rule 84.04(c), its statement of facts is interspersed with argument.[3]

[2] See discussion of certain factual inaccuracies at Appendix A15-18 hereto.

[3] PSC "wrongly believed" it was bound by the ATXI decision, Brief p. 1-2; the ATXI case reached an "incorrect result", Brief p. 2; PSC wrongly relied on the Western District's "improper interpretation" of the relevant statutes, Brief p. 11; the Eastern District "correctly noted" that the legal issue presented is simple, Brief

Finally, Grain Belt relies quite extensively in its Statement of Facts on the Concurring Opinion of four of the Commissioners. (Brief, p. 8-11) However, as the MLA discussed in its substitute appellant's brief, the Concurring Opinion amounts to no more than an "advisory opinion", and as such is a nullity. (MLA appellant's substitute brief, pp. 57-59).

Nevertheless, given that the legal issues presented to the Court are not dependent on the supposed benefits or lack thereof from the proposed line, the MLA will not further burden the Court with a truly "fair" version of Grain Belt's Statement of Facts.

ARGUMENT

I. THE COUNTY COMMISSION CONSENTS ALLOWING A UTILITY TO USE PUBLIC RIGHT OF WAYS PURSUANT TO § 229.100 CONSTITUTE "FRANCHISES", AND THEREFORE UNDER THE EXPRESS TERMS OF § 393.170.2 THOSE FRANCHISES MUST BE OBTAINED BY THE UTILITY BEFORE THE PUBLIC SERVICE COMMISSION (PSC) MAY GRANT IT A CERTIFICATE OF CONVENIENCE AND NECESSITY (CCN). (This is an additional issue not directly raised by Grain belt; it is included here pursuant to Rule 84.04(f), at Appendix A1).

---

p. 12); and the Eastern District "correctly denied" an MLA Motion to Strike, Brief p. 13, f.n. 7.

The appellants opposing the PSC decision below rely in large part on the notion that subsection 1 of § 393.170 addresses only "line certificates", while subsection 2 addresses only "area certificates."[4] Because Grain Belt applied for a "line certificate" under subsection 1, they reason that Grain Belt's application for the CCN was not subject to subsection 2 of the statute, which requires that municipal consents be obtained by the utility before the CCN may be issued by the PSC. *See*, e.g., Grain Belt's Brief p. 23-24; and Opinion of the Eastern District, ED105932, Slip. Op. pp. 4-7 at Grain Belt' Appendix A44-54).[5]

That issue will be addressed in Argument II below. However, the MLA first submits that the outcome here should not even depend on the distinctions raised by appellants between subsections 1 and 2 of § 393.170. Instead, this case can and should be determined on the basis of an issue which apparently has not yet been addressed by the courts.

The MLA's position here is based on subsection 2 of 393.170, which is included by Grain Belt in its Appendix at A37. However, for the possible convenience of the Court, the first two subsections of the statute state as follows:

[4] Section 393.170 is included at Grain Belt's Appendix A37.

[5] The question of whether "municipal" consents applies to counties and county commissions is addressed in Argument I in the MLA's substitute brief in response to the substitute brief from the Sierra Club and Renew Missouri.

> 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.*

(Emphasis added)

The MLA's Argument I can be summarized as follows: (1) Subsection 2 of §393.170 applies by its very terms to all cases where the CCN from the PSC would allow the utility to exercise any right or privilege under a "franchise;" (2) the permission granted to a utility under § 229.100 to use the county roads and right of ways for utility purposes is itself a franchise, in the normal meaning of that term; and (3) therefore, the second sentence of Subsection 2 of §393.170, *supra,* expressly requires that the county franchises issued under § 229.100 must be secured by the utility *before* the PSC may issue a CCN.[6]

In other words, regardless of whether the utility is applying for a CCN for a single line, or for permission to serve retail customers within a specific geographic

[6] Section 292.100 is included at Grain Belt's Appendix A39.

area, the utility would be exercising a "right or privilege" under a franchise granted to it by the County Commission under § 229.100. Therefore, pursuant to Subsection 2 of § 393.170, the utility must obtain the needed county franchises before the PSC may grant a CCN.

Grain Belt acknowledges that before it may build the line, at some point it must obtain the permission of the eight county commissions under § 229.100 to use the county right of ways for utility purposes. (See Grain Belt's Brief, p. 39, 43-44; Tr. Vol. XX, 1740:24-1741:3; LF Vol. XIV, 2105; and Grain Belt's earlier Application for Transfer to the Supreme Court, SC 96775, p. 9.). And Grain Belt does not dispute the PSC's finding that it does not yet have the needed consents from all eight counties which would be traversed by the line. (PSC's Report and Order, p. 14, LF Part 40, Vol. 16, p. 2670).

Therefore, the only logical defense to the MLA's Argument I is that the permission granted by the County Commissions under § 229.100 to cross the entire length of the county with a high-voltage transmission line and steel support towers somehow does not amount to a "franchise". But based on the normal meaning of that term, that defense has no merit.

Utility franchises, as defined in a case relied upon by Grain Belt, "are no more than local permission to use the public roads and right of ways in a manner

not available to or exercised by the ordinary citizen." *State ex rel. Union Electric Co. v. Pub. Serv. Comm'n,* 770 S.W.2d 282, 285 (Mo. App. 1989).

The permission from a County Commission under § 229.100 to build a transmission line on and across the county's public roads fits precisely within that definition; i.e., it constitutes "local permission to use the public roads and right of ways in a manner not available to or exercised by the ordinary citizen."

The ordinary citizen certainly could not build a high-voltage transmission line and steel support towers across the entire breadth of eight counties in northern Missouri without first obtaining the consent of those eight counties. Accordingly, the permission granted by the county to construct such a line must necessarily constitute a "franchise", as that term is defined in the *Union Electric* decision, *supra*.

Numerous Missouri cases have used similar language to define or explain the meaning of the term "franchise". *See*, e.g., *State ex rel. City of Springfield v. Springfield City Water Co.,* 131 S.W.2d 525, 530 (Mo banc 1939); *State ex rel. City of Sikeston v. Missouri Utilities Co.,* 53 S.W.2d 394, 397 (Mo banc 1932); *City of Poplar Bluff v. Poplar Bluff Loan And Bldg. Assoc.,* 369 S.W.2d 764, 766 (Mo. App. 1963); *Missouri Utilities Co. v. Scott-New Madrid-Mississippi Elec. Coop.,* 475 S.W.2d 25, 29 (Mo banc 1971); and *City of Camdenton v. Sho-Me Power Corp.,* 237 S.W.2d 94, 98 (Mo 1951).

And by its very terms, this definition does not require or imply that a "franchise" must grant the right to serve retail customers within a certain geographic area. It applies equally as well to the permission from a County Commission to build a single transmission line on and over the county's public roads.

In fact, in the *Union Electric* case relied on by Grain Belt, 770 S.W.2d 283, *supra*, the utility had been granted what the court referred to as a "franchise" by St. Charles county. The decision clearly describes this grant as authorizing the right to build transmission lines, with no mention of any right to serve retail customers within a specified geographic area, except for convenience sake those located near the authorized lines. (*Id.* at 284 and 286-287). The only possible conclusion is that the mere authority to build electric lines within the county was deemed to be, in the Court's words, a "franchise."

This Court reached a similar conclusion in *State ex rel. Public Water Supply District No. 2 v. Burton*, 379 S.W. 2d 593 (Mo 1964). Although the factual setting in that case is somewhat complicated, the Court essentially held as follows: that Jackson County had granted the utility permission to lay water mains along 17 specified roads within the county, but with no grant of authority to serve retail customers within the county (*Id.* at 595, 559*)*; that the PSC later granted the utility a CCN which *also* included permission to provide retail water service to certain

areas in the county (*Id*. at 595-96); and that the PSC exceeded its authority in granting a CCN which exceeded the permission from the County to merely use certain county roads for the water mains. (*Id.* at 600)

In reaching that decision, the Court cited with apparent approval the PSC decision in *Re Union Electric Co.*, 3 Mo. P.S.C. (NC) 157, 160 (1951). As quoted by the Court, "the Commission recognized that the permission granted by a county court, pursuant to Section 229.100, RSMo 1959, V.A.M.S., to a public utility to use the county roads is a 'county franchise', supplying the consent required by § 393.170." *State ex rel. Public Water Supply District No. 2 v. Burton, supra, at* 599. That pronouncement is of course directly on point here.

Public Service Commission v. Kansas City Power & Light Co., 31 S.W.2d 67 (Mo banc 1930) involved the question of whether the utility could make a six mile extension of an existing transmission line into territory for which it did not have an area CCN from the PSC. In deciding against the utility, this Court quoted with apparent approval from an earlier PSC decision to the effect that "[c]onsent of the municipality is always required as a condition precedent to the granting of a certificate of permission and approval by this Commission." (*Id.* at 71).

State ex rel. Hagerman v. St. Louis & E. St. L. Electric Ry Co., 216 S.W. 763, 765 (Mo 1919), *affd. a*t 256 U.S. 314, ruled that when the railroad obtained the consent of the state and local authorities to operate its street railway on public

rights of way, it vested in the appellant "a valuable franchise". This case is particularly significant because it was decided only six years after the enactment in 1913 of § 393.170, which somewhat contemporaneously also uses the term "franchise".

Another case relied on by Grain Belt is *Stopaquila.org. v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005). There, the Court specifically referred to the permission granted by a county to a public utility to "set Electric Light Poles for the transmission of light for commercial purposes … " as a franchise. (*Id.* at 40-41).

So case law in Missouri clearly supports the MLA's position that permission from a county commission pursuant to § 229.100 to construct a single transmission line on public right of ways is itself franchise, even if the permission does not grant authority to serve retail customers within a specific geographic area.

In addition to this case law, the MLA's position finds compelling support from a number of other recognized authorities. An unpublished opinion of the Eastern District, *St. Charles County v. Laclede Gas Co.*, ED93983, November 4, 2009, includes a quote in the trial court's decision from the well-recognized work of *McQuillen, Municipal Corporations,* for the following proposition:

> Generally, a franchise is defined as a special privilege conferred by the government on individuals or corporations and that does not belong to the citizens of a country generally by common right. A

> water district's right to lay and maintain pipes under city streets is a franchise….
>
> (*Id*. at Appendix to Court's opinion, p. 3).

Significantly, McQuillen's treatise has been cited with approval in at least 18 other appellate decisions in Missouri.[7]

Other authorities define the term "franchise" in language similar to that used by McQuillen. *See Reynolds, Local Government Law,* 3d Ed., Handbook Series, Sec. 28; Corpus Juris Secundum, quoted in *St. Louis Terminals Corporation v. City of St. Louis*, 535 S.W.2d 593, 595 (Mo. App. 1976); and the multi-volume treatise *Antieau on Local Government,* 2nd Ed., sec. 24.10.

The term "franchise" apparently is not defined by Missouri statutes. But as the Eastern District recently observed, "'[w]hen a term is undefined, the legislat[ive body] is presumed to intend that the term be used in its plain and ordinary meaning according to the dictionary.'"[8]

According to *Webster's New Twentieth Century Dictionary*, unabridged second edition, the word franchise is defined as "a special privilege or right granted by the government, as to be a corporation, operate a public utility, etc; as, a street railway *franchise*."

---

[7] Based on a word search of "McQuillen" through the Fastcase data base made available through the Missouri Bar.

[8] *Bennett v. St. Louis County*, No. ED105470, slip op. at 11 (December 19, 2017) (App. for Transfer pending).

Finally, according to *Black's Law Dictionary*, Revised Fourth Ed. (1968) its two definitions of a "franchise" are in accord with the above authorities. This is particularly true of *Black's* definition of a "secondary franchise": "The franchise of corporate existence being sometimes called the 'primary' franchise of a corporation, its 'secondary franchises' are the special and peculiar rights, privileges, or grants which it may receive under its charter or from a municipal corporation, such as the right to use the public streets …."

Terms of a statute not defined by the legislature are considered in their plain or ordinary and usual sense. *State v. Vaughn*, 366 S.W.3d 513, 517 (Mo banc 2012). Based on the above case law and the other authorities cited, the permission granted by a County Commission under § 229.100 to build a single transmission line is, in its plain, ordinary and usual sense, a franchise. Therefore, by the express terms of § 393.170.2, the PSC may not lawfully grant a CCN to Grain Belt until it has obtained the necessary county franchises.

In its reply brief at the Eastern District, Grain Belt did not even attempt to dispute any of the case law or other authorities cited above for the proposition that the county consents for its transmission line amount to franchises. In fact, it simply ignored them. (Part 43 of LF, Reply Brief of Grain Belt, pp. 7-10)

Instead, Grain Belt's primary defense to this argument was that if county consents to use the public roads are viewed as franchises, then by extension the

same should also apply to the numerous other permits which Grain Belt will need from other governmental agencies. (*Id.*)

One specific example Grain Belt cited is the permit which it will need from the Missouri Department of Natural Resources (DNR) for construction resulting in more than one acre of land disturbance. (*Id.* p. 9 f.n. 3).

The MLA has two answers to this argument from Grain Belt.

First, the only question which the Court apparently would need to decide regarding this issue is whether or not the permission from the County Commission to use public rights of way for utility purposes is or is not a franchise. There is no need to decide here whether a routine permit from the Missouri DNR, for example, would also constitute a franchise. That issue can seemingly wait until the unlikely day that it must actually be addressed.

Second, while the county consents granted under Sec. 229.100 clearly fall within the accepted definition of a franchise, the permits referred to by Grain Belt do not.

As mentioned, the 1989 *Union Electric* case says that franchises "are no more than local permission to use the public roads and right of ways in a manner not available to or exercised by the ordinary citizen." *State ex rel. Union Electric Co. v. Pub. Serv. Comm'n,* 770 S.W.2d 282, 285 (Mo. App. 1989).

The consents from the County Commissions under § 229.100 clearly do grant permission to use the public roads and right of ways for utility purposes. And that permission is granted by the entity which actually owns or controls the public roads.

In contrast, none of the permits cited by Grain Belt actually grants permission to use public roads and right of ways. At best, they enable the utility to utilize an actual franchise granted by the city or county in question. But that does not magically turn those permits into franchises.

In fact, in its reply brief in the Eastern District, Grain Belt did not cite a single case where any of the permits it refers to have ever been said to constitute a franchise. (Part 43 of LF, Reply Brief of Grain Belt, pp. 7-10)

However, in addressing other issues, Grain Belt seems to claim that local consent to use public right of ways for utility facilities can only be a franchise if it grants permission to serve retail customers within a specified area.

For example, Grain Belt contends at page 17 of its brief that a franchise "is authorization given by a local government to a utility provider to provide retail service for a specific territory." The implication appears to be that authorization to merely build a transmission line or other specific electric facilities does not amount to a franchise.

In support of this argument Grain Belt cites *State ex rel. Webb Tri-State Gas Co. v. Pub. Serv. Comm'n,* 452 S.W.2d 586, 588 (Mo. App. 1970), claiming it stands for the proposition that "franchise ordinances would allow a utility 'to serve the entire area shown.'" (Brief, p. 17).

This case involved a number of towns which had asked the utility (the "applicant"), to provide utility service to their residents. The complete sentence from the decision, quoted only in part by Grain Belt, is as follows: "All [the towns] had adopted franchise ordinances and all urged that applicant be permitted to serve the entire area shown on the map filed by applicant." (*Id.* at 587-88; emphasized words are those quoted by Grain Belt).

This case does not begin to say that a franchise must by definition authorize a utility to serve customers within a specified geographic area. A franchise may be granted for that purpose, but that does not logically mean it may not also be granted for construction of a single transmission line.

Grain Belt also supports this notion by reference to the PSC decision in *Re Union Electric Co. of Missouri,* P.S.C. Case No. 12,080 1951 WL 92056, at *1 (Mo. P.S.C. Mar. 12, 1951.[9] (Brief p. 17). However, that case likewise does not

[9] This case is available in the PSC's official publication of its decisions at 3 Mo. P.S.C. (NS) 157 (1951)

state or in any way imply that the grant of permission to build a single transmission line does not constitute a franchise.

In addition, Grain Belt supports this claim with the following statement: "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." (Brief p. 17, f.n. 8). But Grain Belt fails to back that assertion with any support whatsoever.

Finally, Grain Belt repeatedly contends elsewhere in its brief that Subsection 2 of the statute does not apply here because Grain Belt expressly applied for a CCN under Subsection 1. (See, e.g., Brief p. 28) However, if the MLA is correct that Subsection 2 applies whenever the utility is seeking to exercise a right granted by a franchise, then obviously Grain Belt cannot claim immunity from subsection 2 by simply telling the PSC it is applying for the CCN under subsection 1.

The Court has been pointed to absolutely no meaningful authority for the proposition that a county's grant of permission to use its public roads for construction of a transmission line is not a franchise. Grain Belt's half-hearted attempts to show otherwise seemingly reflect their frustration at being unable to find any support for the only logical defense against the theory proposed here by the MLA.

Accordingly, for all of the reasons discussed above, the MLA respectfully submits that the county consents required by § 229.100 for a single transmission

line are indeed franchises. Therefore, pursuant to subsection 2 of § 393.170, those franchises definitely must be obtained by Grain Belt before the PSC is authorized to issue a CCN.

The PSC did not adopt or even address this theory in the case on appeal. However, in reviewing a decision of a trial court, the general rule apparently is that the decision will be affirmed if it is correct on any legal ground, regardless of whether that ground formed the basis for the trial court's decision. *See Swallow v. State of Missouri*, 398 S.W.3d 1, 3 (Mo banc 2013) (holding in the context of a 24.035 motion that "[e]ven if the stated reason for a circuit court's ruling is incorrect, the judgment should be affirmed if the judgment is sustainable on other grounds."; *Wiley v. Daly*, Mo. App. 2015, ED102019, Slip. Op. p. 2 (stating that the appellate court will uphold an order granting summary judgment if it is sustainable on any theory); and *Black River Electrical Cooperative v. People's Community State Bank*, 466 S.W.3d 638, 640 (Mo. App. 2015) (holding that where the trial court made no findings of fact, its judgment will be affirmed if correct under any reasonable theory supported by the record).

While the MLA has found no case law applying that rule to decisions of the PSC, there is no logical basis for not doing so. It would seem rather senseless to find that the PSC's decision here was correct, under the theory advanced by the

MLA, but to reverse its decision because it reached the right conclusion for the wrong or irrelevant reasons.

If the Court accepts the argument advanced here in the MLA's Argument I, that conclusion should be determinative of this case, and the PSC's decision should be affirmed.

II. THE PSC DID NOT ERR IN RELYING UPON THE "ATXI" DECISION FROM THE WESTERN DISTRICT BECAUSE THE ATXI CASE IS DIRECTLY ON POINT HERE, WHEREAS THE STATUTORY LANGUAGE AND THE CASE LAW RELIED ON BY GRAIN BELT DO NOT SUPPORT THE ARGUMENT THAT § 393.170.2 DOES NOT APPLY TO APPLICATIONS FOR A SINGLE TRANSMISSION LINE. (Responds to Grain Belt's Point I)

The ATXI decision

In the PSC case leading to the Western District's "ATXI" decision (discussed in further detail below) the PSC itself rejected the primary argument now being raised by Grain Belt and its supporters in this case. In the PSC's words:

> The Commission understands ATXI's argument that county assent is required for an "area certificate" to serve retail customers, but is not required for a transmission "line certificate" which it seeks. The Commission finds all of the applicable cases distinguishable from the case at bar.
>
> (Report and Order, Part 33, Exh. 375, Exh. to LF Vol. 52, part III, at p. 4467; footnote omitted).

After discussing those applicable cases, the PSC then concluded as follows: "The Commission is loath to allow a novel end run around a statutorily required county commission approval simply because the utility would not serve retail customers." (Id. at p. 4468).

This ruling was consistent with, if not required by, the PSC's own rules regarding the initial filing requirements by a utility for a CCN. As set forth in Rule 4 CSR 240-3.105(1) (D)-(2):

> (D) When approval of the affected governmental bodies is required, evidence must be provided as follows:
>
> 1. When 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…
>
> (2) If 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.*

(See Grain Belt's Appendix A41; emphasis added).

Grain Belt and its supporters contend that the PSC's decision in the ATXI case upsets decades of unbroken judicial precedent. (See, e.g., Grain Belt's Brief, p. 29). The fact is, however, that before the ATXI case was decided, no court had addressed the question of whether or not an applicant for a line CCN under Subsection 1 must first obtain the county or city consents required by Subsection 2.

Here, we are in a rather unique situation where we have a decision in the ATXI case which is exactly on point with regard to the issues being raised in the case at bar.

There are two factors which make these two cases indistinguishable from both a legal and factual standpoint: both ATXI and Grain Belt had filed for Line CCNs at the PSC (as opposed to area CCNs); and both had failed to secure the necessary county consents under § 229.100.

As to the first factor, we know from a number of sources that ATXI did in fact apply to the PSC for a Line certificate (as Grain Belt did in the case below). First, the PSC told us so. In its Report and Order in the case on appeal, the PSC found that "ATXI, in its CCN application case at the Commission, File No. EA-2015-0146, did apply for and receive a line certificate, not an area certificate." (Grain Belt's Appendix A14)

Likewise, in its brief to the Western District in the ATXI case, ATXI specifically confirmed that it had applied to the PSC for a line certificate under Subsection 1 of § 393.170, and did not apply under Subsection 2. (ATXI's brief to the Western District, Part 33, Exh. 377, first full par. p. 22, Exh. Vol. 52, part 3, p. 4500).

The second critical factor which makes this case and ATXI indistinguishable is that in both, the utility failed to secure the necessary consents from the County Commissions at the time the case was concluded at the PSC. (As to ATXI, see PSC's Report and Order in the underlying ATXI case, Part 33 Exh 375 at Exh. Vol. 52, part 3, p. 4460; as to Grain Belt, see Grain Belt's Appendix A9, par. 14).

Given these facts, there is no logical basis for distinguishing the Western District's ATXI decision from the case before this Court. As the PSC's Staff concluded in the case below, "The salient facts here regarding Commission jurisdiction are no different than those in the [ATXI] case." (Staff's Supplemental Brief, p. 2, LF Vol. 15, p. 2552)

The PSC agreed, stating "There are no material factual distinctions between [ATXI] and this [Grain Belt] case that would permit the Commission to reach a different result on the question of statutory authority to grant a CCN in this case." (PSC's Report and Order, Grain Belt's Appendix A13). That being the case, the ATXI decision was binding on the PSC, and provides compelling precedential value in deciding the case on appeal.

Moving to the merits of the ATXI case, the Western District dealt there with two closely related issues. First, the Court found that the PSC did not have the authority to grant the CCN on a *conditional* basis, subject to ATXI later obtaining the necessary county consents. (See Grain Belt Appendix A34-35) However, the conditional nature of the CCN there is for all practical purposes not a consideration on this appeal.

On the issue which is directly on point here, the Western District ruled that under § 393.170.2, the CCN could not be issued by the Commission until after

ATXI had secured the necessary county consents under § 229.100. (See Grain Belt Appendix, A33).

In so ruling, the Western District emphasized the language in the second sentence of Subsection 2 of § 393.170, to the effect that before such certificate shall be issued, the utility must first show that it had secured the needed municipal consents – in that case from the County Commissions. (Grain Belt Appendix, A33).

The Court then cited and relied on the PSC's own rule, mentioned above, which also requires that the county consents be secured *before* a CCN may be issued. As the Court then noted:

> By statute and by rule, the PSC is authorized to issue a CCN only after the applicant has submitted evidence satisfactory to the PSC that the consent or franchise has been secured by the public utility. Neither statute nor rule authorizes the PSC to issue a CCN *before* the applicant has obtained the required consent or franchise.
>
> (*Id.*; emphasis by the Court).
>
> As the Western District went on to say:
>
> > Our interpretation of the statute – that it mandates that the applicant receive the consent of local governmental authorities before the PSC issues a CCN – gives plain meaning to the legislature's use of the mandatory term "shall" when it describes what documents the applicant must submit to the PSC before a CCN will be issued. Accordingly, county commission assents required by section 229.100 and 4CSR240-3.105(1)(D)1 must be submitted to the PSC *before* the PSC grants a CCN.
>
> (See Grain Belt's Appendix, A35; emphasis by the Court).

Accordingly, in a case directly on point, the ATXI decision ruled unequivocally against what amounts to the same arguments being raised here by Grain Belt and its supporters. None of the several dozen cases cited by Grain Belt deals directly with the question at hand. And as discussed above, the ATXI decision from the Western District is strongly supported by the PSC's own decision in that same case.

The Western District did not overlook the argument about the distinction between Subsections 1 and 2 of §393.170.

Grain Belt must try to distinguish the Western District's ATXI decision from the case before this Court. It attempts to do so, in part, by claiming that in the ATXI case, the Western District simply neglected to analyze Subsection 1 of §393.170. (Brief, p. 21-22). In support of that claim, Grain Belt suggests that the Western District's oversight may have resulted from the fact that ATXI did not specifically apply to the PSC for a CCN under Subsection 1 (the Subsection under which Grain Belt applied for its Line Certificate). (Brief, p. 23).

Similarly, MJMEUC suggests that the Western District, either "deliberately or mistakenly", excluded an analysis of Subsection 1 of the statute in reaching its decision. (Brief, p. 20)

While the Western District did not specifically mention Subsection 1 in its ATXI opinion, it was certainly well aware of the arguments raised by ATXI (and

now being raised by Grain Belt and its allies) with respect to the distinction between Subsections 1 and 2 of § 393.170.

In its brief to the Western District, ATXI went to great lengths to make essentially the same argument being raised here by Grain Belt: that there is a well recognized distinction between line and area certificates; and that the language of Subsection 2 requiring county consents should apply only to area certificates, and not to line certificates sought under Subsection 1 of the statute. (Part 33 Exh. to LF, Vol. 52, part 3, pp. 4496-4503). In fact, as mentioned, ATXI specifically told the Western District that it applied to the PSC for a line certificate under Subsection 1 of § 393.170. (*Id.* at 4500).

Moreover, in its own brief to the Western District, the PSC also directed the Court's attention to the arguments being raised there by ATXI about the two types of certificates, and how the line certificate issued under Subsection 1 of § 393.170 did not require prior municipal consents. (Part 33 Exh. 378, Exh. Vol. 52 Part 3, 4505-06). So obviously, the Western District was well aware of the arguments raised in that case by ATXI, and now being resurrected here by Grain Belt.

And as would be expected when making essentially the same argument, AXTI and Grain Belt have relied in large part on the same case law.[10]

[10] In their Initial Briefs to the PSC, both ATXI and Grain Belt rely for example on *Stop Aquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005); *State ex rel. Harline v. PSC*, 343 S.W.2d 177 (Mo. App. 1960); and *State ex rel. Cass Cnty. v.*

It also seems fair to assume that the judges deciding the ATXI case were familiar with the PSC decision which was the subject of their review in that case. And as discussed earlier, the PSC's decision there specifically addressed ATXI's arguments that it did not need to acquire the county consents under § 229.100 before the issuance of a CCN, as well as the distinction between line and area certificates. (Part 33 Exh. 375, Exh. to LF Vol. 52, part III, pp. 35-39).

Significantly, two of the cases relied upon by Grain Belt to support its primary arguments on this issue are *Stopaquila.org. v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005), and *State ex rel. Cass County v. Pub. Serv. Comm'n,* 259 S.W.3d 544 (Mo. App. 2008). (See, e.g., Grain Belt's reliance on *Cass County* for the different application requirements in the PSC's rules for line and area certificates; and the reliance on *Aquila* for the proposition that Section 393.170 is "divided into three distinct sub-sections.)" (Brief, p. 24).

What is significant in this regard is that the Honorable Thomas Newton was on the three-judge panel in both of those cases, each of which was decided unanimously. In fact, he authored the opinion in the *Aquila case*. And the same Judge Newton was also on the panel in the ATXI case, which according to Grain

---

PSC, 259 S.W.3d 544 (Mo. App. 2008) See e.g., ATXI's Initial Post-Hearing Brief, Part 33 LF Vol. 52 part 3, at pages 62, 63 and 68, and Grain Belt's Initial Post-Hearing Brief at Part 38 Vol. 12, pages 14 and 19. And on this Appeal, see Grain Belt's Brief pp. v-vi.

Belt and its supporters somehow overlooked or ignored the distinction between Subsections 1 and 2 of § 393.170.

What all of this demonstrates, at the very least, is that the differences between subsections 1 and 2 of § 393.170 were not mistakenly overlooked by the ATXI court. All of the judges on that panel (and perhaps one in particular) were well aware of the arguments raised by ATXI about Subsection 1 of § 393.170 – despite Grain Belt's contention that the Western District "didn't understand the distinction between construction under point 1 and serving a franchised area under point 2". (Part 34 Tr. Vol. XX, p. 1738:15-17).

Accordingly, there is no basis for believing that in the ATXI case the Western District somehow overlooked or did not understand the identical arguments which Grain Belt and its supporters are making here about the difference between Subsections 1 and 2 of § 393.170.

Although the Western District did not find it necessary to specifically address Subsection 1 in its opinion, it was clearly aware of the arguments regarding that issue. So the Court must necessarily have concluded that Subsection 1 does in fact require approval from the county commissions before a CCN may be issued by the PSC. If it had not reached that conclusion, then it would necessarily have found that the PSC was free to issue the CCN to ATXI before it had secured

the county consents. And if it did so find, the Court's opinion would necessarily have gone in ATXI's favor.

So the only logical conclusion is that the Western District rejected ATXI's argument that it did not need the county consents before issuance of the CCN under subsection 1. Instead, the Court agreed on this issue with the PSC in its ATXI decision. This conclusion is further supported by the general rule, enunciated by this Court, that "what is contemplated in an opinion by necessary implication is equivalent to that which is clearly and expressly stated." *Frost v. Liberty Mutual Ins. Co.*, 813 S.W.2d 302, 305 (Mo banc 1991).

Similarly, an appellate court decision becomes the law of the case not only with respect to matters decided by the court directly, but those decided by implication as well. *Fischer v. Brancato*, 174 S.W.3d 82, 86 (Mo. App. 2005); *Missouri Board of Pharmacy v. Tadrus*, 926 S.W.2d 132, 137 (Mo. App. 1996).

Here, by "necessary implication" the Western District must have rejected ATXI's argument regarding the need for county consents when applying for a line certificate under Subsection 1 of § 393.170. That facet of the decision is therefore just as meaningful and just as binding on the PSC as if the Court had explicitly addressed and rejected ATXI arguments concerning Subsection 1 of the statute.

For the foregoing reasons, the ATXI decision from the Western District is directly on point here, and thus the PSC properly viewed that decision as binding precedent in the case below.

Grain Belt's Analysis

Grain Belt's basic argument for reversing the PSC's decision is as follows: all applications for a CCN for a single transmission line are governed by Subsection 1 of § 393.170, and only by that subsection; and all applications for a CCN to serve retails customers within a designated geographic area are governed by Subsection 2 of that statute, and only by Subsection 2. Therefore, according to Grain Belt, inasmuch as it applied for a "line certificate" under Subsection 1 of § 393.170, it was not bound by the requirement found in Subsection 2 that it obtain permission from the County Commission pursuant to § 229.100 before the CCN could be issued. (Brief pp. 1 f.n.2; 16; 23; and 26-27)

This argument is based primarily on four earlier decisions from the Western District: (1) *State ex rel. Harline v. Pub. Serv. Comm'n,* 343 S.W.2d 177 (Mo App. K.C. 1960); (2) *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n,* 770 S.W.2d 283 (Mo. App. 1989); (3) *Stopaquila.org v. Aquila, inc*., 180 S.W.3d 24 (Mo App. 2005); and (4) *State ex rel. Cass County v. Pub. Serv. Comm'n,* 3d 544 (Mo App. 2008). (See Grain Belt's brief, p. v-vi).

The MLA respectfully suggests that those decisions are faulty in two respects: they are not supported by the statutory language of § 393.170; and the lead case, *Harline*, was based on a misunderstanding of the actual language of that statute.

The Supreme Court apparently has not had occasion to decide a case which involved the basic argument being raised here by Grain Belt. Accordingly, the MLA respectfully asks that the Court take the opportunity here to review those four decisions from the Western District to determine whether they should be allowed to stand. And as a starting point, they cannot be good law if the Court accepts the argument raised by the MLA in Argument I above.

The statutory language of § 393.170 does not support the conclusions of *Harline* and its short progeny.

Chronologically, the first case in question was the 1960 *Harline* decision. The issue there was whether or not the utility needed an additional CCN from the PSC for each additional line it wished to build within a geographic area already allocated to it by the PSC in 1938. (343 S.W.2d at 180). The Court held that it did not, in part on the ground that since 1914 the PSC had allowed utilities to expand within their allocated territories without the need for a CCN for each new line. 343 S.W.2d at 182-83.

The Court then went on to explain its own views regarding Subsections 1 and 2 of § 393.170. It paraphrased Subsection 1 of the statute as follows: "No …

electrical corporation … shall begin construction of a … electric plant … without first having obtained the permission and approval of the commission."

The key finding was then made in the following paragraph at page 183 of the decision:

> Appellants claim that sub-section 1 of Section 393.170 required the company to obtain an additional certificate to construct the transmission line. They say, with no authority except a reference to the statutory definition of "electric plant", that a transmission line is an "electric plant". Hence, it is argued, as no electric plant can be constructed without approval and as a transmission line is an electric plant, therefore a transmission line must have approval. We do not share those views. Sub-section 2 has no application. The record of this case shows that the company's electric plant had been constructed prior to 1938 and operated continuously since.

There are a number of flaws in this ruling. First, the definition of "electric plant", as used in Subsection 1, does in fact include transmission lines. (§ 386.020(14), Appendix to brief in response to Joint Intervenors, A7; Grain Belt's brief, pp. 16-17). Therefore, the appellants in that case were absolutely correct that by its very terms, Subsection 1 of § 393.170 did indeed require commission approval for the construction of its proposed transmission line – regardless of the fact that it was to be built within an area it was already serving.

In ruling against the appellants, the Court stated that "we do not share those views." And its only explanation was that the utility's "electric plant" had been constructed prior to 1938 and operated continuously since. However, in making that statement the Court must have been referring to the utility's power plants,

because the utility had been adding new lines and other facilities within its allocated territory "almost daily since 1938". (343 S.W.2d at 181).

Thus despite what the Court says, Subsection 1 explicitly provides that a utility must obtain permission from the PSC to build a new transmission line. The statute itself does not provide any exception for lines which are to be built in areas already served by the utility.

The Court noted that no cases were cited or found for the proposition that a CCN must be obtained for each new line within the geographical area in which it is serving. 343 S.W.2d at 184. However, the Court similarly did not cite any case law on that issue holding to the contrary.

The Court then addressed Subsection 2, and held that it likewise did not require a new CCN for each transmission line built within the utility's service territory where the utility had already been granted a county franchise for the area in question. Among the reasons given by the court: "If Commission approval were required for all separate acts in the exercise of 'any right or privilege under any franchise', we envisage its ridiculous application to every conceivable detail incident to business operation."

This conclusion seems to be based simply on expediency. In any event, that part of the *Harline* decision does not affect the outcome of this case. Therefore,

the MLA is not looking to disturb the primary holding in *Harline* that a utility does not need a new CCN for each line it builds within its certified service area.

The MLA's objection to *Harline* is this pronouncement, which comes well after the remarks discussed above, and upon which Grain Belt now relies: "Certificate 'authority' is of two kinds and emanates from two classified sources. Sub-section 1 requires 'authority' to construct an electric plant. Sub-section 2 requires 'authority' for an established company to serve a territory by means of an existing plant." *Id.* at 185.

Again, while this may have been the expedient resolution of this issue, the Court's ruling is not supported by the actual language of the statute, or by any applicable case law at the time. The decision in this regard deserves to be reexamined, particularly in light of the manner in which it has been extended by the other three cases from the Western District which are relied on by Grain Belt for its alleged distinction between Subsections 1 and 2 of § 393.170.

The case following H*arline* was the *Union Electric* decision, 770 S.W.2d 283 (Mo. App. 1989).[11] It is relied on by Grain Belt primarily for the following statement:

> 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

[11] This case is not included in Grain Belt's Table of Authorities, but is cited by Grain Belt at pages 24-25 and 27 of its Brief.

> as a line certificate …. Subsection 2 sets out the requirement for authority to serve a territory which is known as an area certificate.

(*Id.* at 285; quoted by Grain Belt at pp. 24-25 of its brief).

The problem is, as with *Harline*, the Court cites no authority for this supposed distinction between Subsections 1 and 2 of § 393.170, other than referencing the statute itself. And the statutory language does not support the proposition that Subsection 1 is devoted exclusively to line certificates, while Subsection 2 is devoted exclusively to area certificates.

The third case relied on by Grain Belt is *Stopaquila.org.*, 180 S.W.3d 24 (Mo. App. 2005). Grain Belt paraphrases this case for the proposition 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. (Citing Stopaquila.org at 32-34; brief p. 23-24; emphasis by Grain Belt).

This statement is presumably derived from the Court's description of the two types of authority which emanate from Subsections 1 and 2 of § 393.170, near the end of page 33 of the decision. But the sole authority cited by the Court for this proposition is the *Harline* case. (*Id.*)

The last of the four cases primarily relied upon by Grain Belt regarding the supposed distinction between the two subsection of § 393.170 is the *Case County* decision, 259 S.W.3d 544 (Mo. App. 2008). Grain Belt quotes from this case at

length at page 24 of its brief. But notably, the only cases cited by the *Case County* court for the proposition relied upon by Grain Belt are *Harline,* as quoted in *Stopaquila.org*. (259 S.W.3d at 548-89)

Case County also cites regulations of the PSC dealing with materials which must be filed by a utility when applying for a CCN. (*Id.; see* Grain Belt's Appendix A41). However, those regulations simply list the different types of information which must be filed by the utility when seeking a CCN for a line certificate and for a certificate to serve customers at retail. The regulations do not state or imply that the former are to be filed pursuant to Subsection 1, while the latter are to be filed pursuant to Subsection 2. They simply provide, quite logically, that the needed information is different for the two types of certificates.

As is apparent, none of the four cases from the Western District relied upon in Point 1 by Grain Belt are grounded in the actual statutory language of § 393.170. They are based in large part upon one another, and on a poorly explained and illogical conclusion that Subsection 1 of § 393.170 is devoted exclusively to applications for "line certificates", while Subsection 2 is devoted solely to applications for "area certificates."

In addressing the key issue before it, the Eastern District relied almost exclusively upon the four primary decisions relied on by Grain Belt. (See Opinion at Grain Belt's Appendix A47-53). Thus the fate of the Eastern District's decision

should logically depend on this Court's view of the four decisions in question from the Western District.

The Eastern District also relies upon the PSC's filing requirements for the two different types of CCNs. However, as discussed with respect to the *Cass County* case, the fact that different information is required when seeking the two different types of CCNs does not imply that in one case the information is governed by Subsection1, and in the other case by Subsection 2.

Finally, unlike the other four cases from the Western District, the Eastern District also relies in deciding this issue upon subsection 3 of the statute, which states in relevant part:

> 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.

(A49, emphasis on "**or"** by the Court).

The MLA respectfully submits that this section is not relevant to the issue at hand. It simply says that the PSC may issue a CCN pursuant to either subsection 1 or subsection and 2, but that does not go to the issue of whether one subsection is devoted exclusively to line certificates while the other is devoted exclusively to area certificates.

For the foregoing reasons, the MLA respectfully submits that the cases relied upon by Grain Belt are not supported by the actual language of § 393.179.

Grain Belt also cites the 2012 PSC decision *In re Missouri-Am. Water Co.*[12] In Grain Belt's words, that case supposedly stands for the following proposition:

> 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."

Brief, p. 18.

Grain Belt has totally distorted the PSC's holding in this case, by stating it stands for the proposition that Line CCNs are granted under Subsection 1 of § 393.170, while Area CCNs are granted pursuant to Subsection 2. Actually, the PSC stated only as follows:

> Section 393.170.3 authorizes the Commission to grant a certificate of convenience and necessity when it determines, after due hearing, that the proposed grant is "necessary or convenient for the public service."
>
> (22 Mo. P.S.C. 3d at 173; footnote omitted)

The PSC said absolutely nothing there, or in the quotations it included in the footnote to this statement, which could possibly justify Grain Belt's quoted claims about the difference between the two subsections of § 393.170.

> The *Harline* case was based on a faulty reading of the version of § 393.170 which was in effect when that decision was rendered.

[12] This case is available in the PSC's official reports at 22 Mo. P.S.C. 3d 173.

The MLA respectfully submits that the foregoing analysis demonstrates that the actual language of § 393.170 does not support the proposition that Subsection 1 applies only to "line certificates", while Subsection 2 applies only to "area certificates."

The reason why the decisions relied on by Grain Belt went astray is therefore not critical to the outcome here. However, for a complete understanding of the four Western District decisions discussed above, it may be useful for the Court to know why *Harline* apparently reached the conclusion it did with respect to the differences between Subsection 1 and Subsection 2 of § 393.170. (See *Harline*, 343 S.W.2d 177 at 185).

In reaching the results relied on by Grain Belt, the Court in *Harline* was influenced to a large extent by the fact that § 393.170 was divided into three numbered subsections, each of which the Court presumed to address different subject matters. (*Id.* at 182-83, and 185).

However, when *Harline* was decided in 1960, the statute was not officially divided into separate numbered subsections. In its original version, still in effect in 1960, what is now § 393.170 was simply one long, continuous paragraph. It was enacted in 1913, as Sec. 10481, Laws 1913, p. 610. A copy is included at page A6 of the Appendix to this brief.

In oral argument at the PSC, Grain Belt contended that the division of the statute into three Subsections was the work of the Legislature, in 1949. (Part 34, Tr. Vol. XX, p. 1734). In support of that proposition Grain Belt distributed a three-page document marked as Exhibit 140, a copy of which is included at Appendix A7-8 of this brief. (Part 33 LF, Exh. Vol. 52 part III, pp. 4426-28; see also Part 34 LF, Tr. Vol. XX, p. 1743:13-25).

But based on the first page of that Exhibit, the 1949 changes to § 393.170 were apparently the work of the Committee on Legislative Research, and not the General Assembly. This fact is verified by the legislative history of § 393.170, as shown at Grain Belt's Appendix A38. The citations there show that no change was made to that statute by the General Assembly in or around 1949. See also the Brief of Grain Belt at p. 25, stating the changes were made in 1967.

The changes to a statute by the Committee on Legislative Research (or the revisers) do not affect the meaning of the statute as enacted by the General Assembly. *In re Marshall*, 478 S.W.2d 1, f.n. 1 (Mo banc 1972); *In the Interest of T. P. S.*, 595 S.W. 2d 320, 321 (Mo. App. 1980) ; and *Protection Mutual Insurance Co. v. Kansas City*, 504 S.W.2d 127, 130 (Mo 1974) (stating that "Absent a legislative act amending the section, statute revisers have no authority to change the substantive meaning and application of a law or its purpose and intent,

and any subsequent revision purporting to effect such a substantive change is ineffective for that purpose.") This rule is expressly adopted in § 3.060.

Unfortunately, *Harline* was grounded on the mistaken belief that § 393.170 was officially divided into three Subsections. As that Court noted, the powers of the PSC to grant CCNs "were created in 1913 by the enactment of present Section 393.170, V.A.M.S., which has since remained in effect, without change." *Harline*, 343 S.W.2d at 182. So the *Harline* decision assumed that the original version of the statute was divided into three subsections, when in fact it was not.

When read in its original version, as shown at Appendix A6 to this Brief, it is apparent that what is now the second sentence of subsection 2 was originally intended by the General Assembly to apply to both of what are now subsection 1 and the first sentence of subsection 2. That being the case, the requirement for prior approval from the local governments applied to applications for a CCN both under what are now Subsections 1 and 2.

As is thus apparent, *Harline* itself was based on a faulty premise, and should therefore hold no sway with the Court in deciding the issue at hand.

In 1967 the General Assembly did reenact § 393.170, along with all or nearly all of the other sections of Chapter 393 dealing with the Public Service Commission. (See Appendix, A10-12). It theoretically did so knowing that the reenacted version included the subsection divisions added to the original law by

the Legislative Committee. However, the 1967 reenactment does not change the fact that the 1960 *Harline* decision was based on a faulty premise, and thus should carry no weight with this Court. Moreover, it is difficult to imagine that the General Assembly actually intended to drastically alter the meaning of § 393.170 by reenacting it (along with other major parts of the Public Service Commission Act) and incorporating the numbered subsections added some 30 years earlier by the revisers.

The three other cases from the Western District relied upon by Grain Belt, as well as the decision below from the Eastern District, were decided after the statutory reenactment in 1967. However, all were largely dependent on *Harline's* views of § 393.170. And that Court may or may not have reached the same conclusions had the it realized at the time that the requirement for prior municipal consents clearly applied to both what are now subsections 1 and 2 of § 393.170.

For the above reasons, including those addressed in Argument I above, the MLA respectfully asks the Court to find that the distinction delineated by the four cases from the Western District between subsections 1 and 2 of § 393.170 are not supported by the language of the statute. Instead, the correct distinction between those two subsections depends on whether or not a utility requesting a CCN would be seeking to exercise a right or privilege granted through a franchise from a city or county.

III. THE ATXI DECISION DID NOT IMPROPERLY OVERRULE DECADS OF UNBROKEN JUDICIAL PRECEDENT AND THE PSC'S INTERPRETATION OF ITS OWN AUTHORITY TO ISSUE A LINE CCN PRIOR TO RECEIVING COUNTY CONSENTS, NOR DOES THAT DECISION IMPROPERLY ELEVATE THE AUTHORITY OF COUNTIES ABOVE THE STATUTORY AUTHORITY OF THE PSC. (Responds to Grain Belt's Point II).

If the Court agrees that the line certificate could not lawfully be issued to Grain Belt until it received the necessary county consents, as discussed in Arguments I and II above, then most of Grain Belt's other arguments fail as well.

For example, in its Point II Grain Belt argues that adopting the ATXI decision here would upset decades of precedent, frustrate the statutory scheme and legislative intent of § 393.170, "and stand the function of the PSC … on its head by giving individual counties preemptive veto authority over the PSC to make decisions about the public interest of the state." (Brief, p. 29; see also p. 39).

Actually, the issue decided by ATXI was one of first impression for the Courts in Missouri. Therefore, that decision could not have upset decades of judicial precedent.

If Grain Belt is referring to decades of precedent by the PSC, that contention is misplaced as well. In *State ex rel. Public Water Supply Dist. No. 2 of Jackson*

County v. Burton, 379 S.W.2 593, 599 (Mo. 1964), the Court quoted the PSC for the following proposition:

> An examination of the findings of this Commission for many years back will show that … consent of the city, town, village, the county court [now the County Commission] or the State Highway Commission … has always been made a *condition precedent* to the granting of such certificate by this Commission. (emphasis added).

And in *Re S.W. Water Co.*, 25 Mo. P.S.C. 637 (1941), under similar conditions the PSC dismissed the utility's application for a CCN because it had not yet secured the necessary local consents. *See also* the PSC's Order in *the matter of the Application of North Missouri Light and Power Company* (1914) where the PSC granted a CCN after noting that the utility had first obtained the consent of the two counties which would be traversed by the proposed line. (Appendix to MLA's brief in response to Joint Intervenors, p. A16)

But even if Grain Belt's claims in this regard were true, the simple answer is that it does not matter. If the PSC was improperly applying § 393.170 in past decisions, that does not justify the continuation of that unauthorized practice.

This principle is borne out by one of the cases relied on by Grain Belt: *Stopaquila.org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005). There, the primary issue was whether the utility needed specific PSC permission under § 393.170 to build a power plant in an area where it already had an area certificate.

Beginning in about 1980, the PSC had been allowing utilities in Missouri to do so without obtaining a CCN. (Id. at 36).

The Court recognized that the PSC's statutory interpretation is entitled to great consideration. (*Id*. at 37). Nevertheless, the Court went on to hold against the utility despite the fact that "it could be argued that we will be disturbing an agency's practice and statutory interpretation that have endured for twenty-five years.…" (*Id*.)

So whatever the PSC may have been doing in the past with respect to the issuance of CCNs without local governmental consents, if that practice is now deemed inappropriate then it obviously should not continue.

At pages 29-32 of its brief, Grain Belt discusses § 229.100, which clearly requires that Grain Belt must obtain the consent of the affected County Commissions before it may build its proposed line. In fact, as mentioned earlier, Grain Belt readily acknowledges that it cannot build the line without obtaining the county consents at some point.

In arguing that § 229.100 should not be viewed as a prerequisite to issuance of a CCN, Grain Belt attempts to marginalize the importance of that statute by arguing that it addresses only the limited issue of safety measures related to county road crossings. (Brief pp. 31-32).

The MLA submits that the County Commissions have significantly greater discretion in granting or withholding approval for construction of utility facilities on its public roads than Great Belt has suggested.

Section 229.100 is included by Grain Belt at page 32 of its substitute brief, and at its Appendix A39. As can be seen, it consists of two separate sentences, separated by a semicolon in the sixth line of the statute.

The second sentence does indeed speak of the need to conform to such reasonable rules as may be prescribed by the county engineer. Standing alone, this sentence might support Grain Belt's argument about the limited scope of that statute.

But to imply that is the only subject addressed by that statute totally ignores the entire first sentence. And doing so in turn ignores a basic tenant of statutory construction: "that each word, clause, sentence, and section of a statute should be given meaning." *Middleton v. Missouri Department of Corrections*, 278 S.W.3d 193, 196 (Mo banc 2009).

As applied to this case, the first sentence says that Grain Belt may not build its transmission line across any county roads "without first having obtained the assent of the county commission…." (See Grain Belt's Brief, p. 30) There is nothing in the language of this first sentence which purports to limit the discretion

of the County Commission to a consideration of the engineering and safety issues mentioned only in the second sentence of the statute.

The extent of the County Commission's discretion under this statute has apparently never been addressed by the courts. However, there is nothing in the language of the first sentence of the statute which would prohibit the County Commission from considering factors other than those mentioned in the second sentence.

In an analogous situation, § 71.520 provides that cities, towns and villages may authorize utilities to build their facilities "along, across or under any of the public roads, streets, alleys, or public places within such city, town, or village…." (See Appendix A14)

The courts have addressed this provision on a number of occasions, and have made it clear that cities have wider discretion in approving or rejecting utility facilities than Grain Belt would attribute to counties under a similar statute. *See City of Bridgeton v. Missouri-American Water Co.*, 219 S.W.3d 226, 231 (Mo banc 2007) (stating that municipalities are vested with the prerogative to grant or refuse permission, in their discretion, to utility companies to build their facilities in the public rights of way); *Missouri Utilities Co. v. Scott-New Madrid-Mississippi Electric Coop.*, 475 S.W.2d 25, 31 (Mo banc 1971) (holding that municipalities not only have the right to regulate the use of its streets through the exercise of its

police power, but also the right in the first instance, in their discretion, to grant or refuse to grant the utility a franchise to operate within the city.)

The extent of the county commissions' discretion is not an issue in this case *per se*, but the MLA is concerned that Grain Belt (and others) have given the Court the wrong impression about the significance and extent of the county's authority under § 229.100.

Grain Belt also argues there is nothing in § 229.100 which purports to set an order of priority between it and the CCN statute. (Brief, p. 32). While that is true, it is the CCN statute, § 393.170.2, which sets that priority. And once the Court decides whether that provision does or does not require county consent as a prerequisite to the issuance of a CCN, all of Grain Belt's arguments regarding § 229.100 are essentially moot.

At pages 36-39 of its Brief, Grain Belt addresses the PSC's requirements regarding what an applicant for a CCN must file with the Commission. Among other things, the Rule provides that the county consents must be obtained *before* the CCN will be granted. (See Grain Belt's brief, p. 36, and the Rule itself at Grain Belt's Appendix p. A41)

But again, this entire line of argument is irrelevant. If the Court finds that § 393.170.2 requires that the county consents must be obtained before the CCN may be issued, as discussed under Points I and II above, then it does not matter what the

PSC Rule says in this regard. On the other hand, if this Court does not accept the findings of the ATXI case, then this issue is simply moot. Either way, Grain Belt's argument about the PSC filing requirements is meaningless in the context of this appeal.

Under point "B" at pages 39-43, Grain Belt essentially argues that the county consent statute, § 229.100, interferes with the ability of the PSC to effectively regulate utilities on a state-wide basis. To the extent that Grain Belt may have a point there, the argument is irrelevant.

As Grain Belt recognizes, *supra*, it will eventually need to obtain the county consents required by § 229.100. So the question is only one of timing: must it obtain the county consents before it may receive the CCN, or may it wait until after it is granted a CCN by the PSC. In either case, if § 229.100 does in fact give the counties a form of "veto power" over the Grain Belt project, the counties will retain that same power whether or not the CCN has already been issued by the PSC,

Also, to the extent that § 229.100 does interfere with the PSC's ability to regulate, that is a matter of concern for the legislature, and not the courts. Neither Grain Belt nor any of its supporters is claiming here that § 229.100 is somehow unconstitutional. Therefore, the clear intent of that statute must be given full effect.

Grain Belt also argues that § 229.100 is inconsistent with other statutes concerning the general subject of utility regulation. (Brief, p. 42-43). To the extent that is true, those statutes at best only indirectly address the question of the need for county consents for construction of transmission lines. On the other hand, § 229.100 specifically states that a utility may not build its lines across county roads without permission from the County Commissions.

Thus Grain Belt's argument in this regard runs afoul of a basic rule of statutory construction: that where one statute deals with a subject in general terms and the other deals with it in a specific way, to the extent they conflict the specific statute prevails over the general statute. *Turner v. School District of Clayton*, 318 S.W.3d 660, 671 (Mo banc 2010); *State ex rel. Cass County v. Pub. Serv. Comm.*, 259 S.W.3d 544, 551 (Mo. App. 2008); and *State ex rel. Taylor v. Russell*, 449 S.W.3d 380, 382 (Mo banc 2014).[13] Thus in this case, § 229.100 must be given effect over the general statutes cited by Grain Belt which do not specifically address the need for county consent.

For the forgoing reasons, there is nothing in Grain Belt's Point II which would merit reversal of the PSC's decision in the case below.

[13] This rule of construction was dealt with in slightly more detail by the MLA in its substitute appellant's brief, pp. 32-33.

IV. THE PSC DID NOT ERR IN REFUSING TO GRANT GRAIN BELT A WAIVER OF ITS RULES REGARDING THE FILING REQUIREMENTS FOR THE COUNTY CONSENTS BECAUSE SUCH A WAIVER IN THIS CASE WOULD HAVE BEEN MEANINGLESS, AND IN ANY EVENT THE REFUSAL TO GRANT THAT WAIVER WAS WITHIN THE SOUND DISCRETION OF THE PSC. (Responds to Grain Belt's Point III).

As Grain Belt concedes, Commission Rule 4 CSR 240-3.105(1)(D)1 requires that the applicant file the necessary city and county consents before the Commission will issue any type of CCN. (Brief, p. 36; see copy of rule at Grain Belt's Appendix, A41).

Grain Belt requested a waiver of this Rule from the PSC. (See Grain Belt's Brief, p. 44). In its final Report and Order the PSC denied this request, finding that in light of its acceptance of the ATXI decision, the waiver request was moot. (Part 40 LF Vol 16, pp. 2670-71).

The gist of Grain Belt's Point III is that the PSC erred in denying its request for a variance or waiver of the PSC's Filing Rule cited in the first paragraph above. This argument is readily disposed of.

If this Court agrees that § 393.170 requires the county consents to be secured before the CCN may be issued, then it would be meaningless for the PSC to have

waived a Rule which the law itself requires. Thus under this scenario, the question of waiving the filing requirements would be moot.

On the other hand, if this Court rejects the holding in the ATXI case, then by law Grain Belt would not be required to obtain the county consents in this case before the PSC could issue the CCN. So under this second scenario, the matter of the request for the variance is irrelevant and/or moot.

Accordingly, there is no logical reason to even argue on this appeal that the PSC somehow erred in refusing to grant the variance from its Filing Rule.

Finally, as Grain Belt recognizes, the PSC has wide discretion in deciding whether or not to grant a variance of its own rules. (Brief, p. 46) Given the circumstances here, including primarily the holding of the ATXI case, Grain Belt has failed to show that the PSC abused that discretion in denying the variance requested by Grain Belt.

For the foregoing reasons, Grain Belt's Point III does not merit reversal of the PSC's decision in the case below.

CONCLUSION

The Court should affirm the PSC's decision because (1) under the terms of Subsection 2 of § 393.170, the PSC may not issue a CCN to Grain Belt until it has obtained all of the necessary franchises pursuant to § 229.100 from the counties to be traversed by the proposed line; and (2) the PSC's decision was based on a

correct analysis of the Western District's ATXI decision regarding the need for county consents before issuance of the CCN to Grain Belt.

In the event the Court does reverse the PSC, even Grain Belt now concedes that the remand may not direct the PSC to issue the requested CCN to Grain Belt. (Suggestions of Grain Belt Express in Support of Motion to Dismiss Appeal Filed by Missouri Landowners Alliance, March 8, 2018, p. 2)

Respectfully submitted,

/s/ Paul A. Agathen
Paul A. Agathen
MO Bar No. 24756
485 Oak Field Ct.
Washington, MO 63090
636-980-6404
Paa0408@aol.com

Attorney for
Missouri Landowners Alliance

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

I certify pursuant to Rule 84.06(c) that this brief includes the information required by Rule 55.03 (except that counsel does not have a facsimile number), and complies with the limitations contained in Rule 84.04(b). I further certify that this entire brief contains 13,022 words, as determined by the word count feature of Microsoft Word.

/s/ Paul A. Agathen
Paul A. Agathen

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2018, the foregoing was filed electronically with the Clerk of the Missouri Supreme Court, to be served by operation of the Court's electronic filing system pursuant to Missouri Supreme Court Rule 103.8.

/s/ Paul A. Agathen
Paul A. Agathen