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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 SUPSTITUTE BRIEF OF APPELLANT MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY COMMISSION

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JURISDICTIONAL STATEMENT

The MLA disagrees with MJMEUC's Jurisdictional Statement to the extent it implies that MJMEUC's Application for Rehearing with the PSC addressed all of the issues it is raising on this appeal. (MJMEUC also makes this claim at footnote 3, page 14 of its brief, under the heading of "Standard of Review.") As discussed below, MJMEUC failed to preserve the Constitutional issue which it raises in its Point III on this appeal.

ARGUMENT

I THE PSC DID NOT ERR IN REFUSING THE REQUEST FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY ("CCN") FROM GRAIN BELT EXPRESS CLEAN LINE LLC ("GRAIN BELT") BECAUSE NEITHER THE PSC'S DECISION NOR THE WESTERN DISTRICT'S HOLDING IN THE "ATXI" CASE RESULTED IN SECTION 229.100 OR ANY OTHER STATUTE DIVESTING THE PSC OF ITS LAWFUL AUTHORITY TO ISSUE A CCN. (Responds to MJMEUC's Point I)

The MLA would initially note that the first of MJMEUC's Points Relied On, as set forth at page 12 of its brief, is intended to encompass five independent reasons why the PSC supposedly erred. However, this fact can only be discerned

by resort to MJMEUC's Argument section under Point I, at pages 1-2 and 15-25 of its Brief.

But "separate errors should be stated in separate points. When an appellant makes the entire judgment one error and lists multiple grounds therefor, the result is that the point contains multiple legal issues. Multifarious points preserve nothing for review." *Fritz v. Fritz,* 243 S.W.3d 484, 487 (Mo. App. 2007) (citations and internal quotation marks omitted).

And compounding this problem, the *only* argument clearly raised by MJMEC's Point I is that the Western District's ATXI decision did not and could not divest the PSC of its primary authority to grant the CCN to Grain Belt, as authorized by over 100 years of various precedents. (Brief, p. 15) But in its Argument under Point 1, only perhaps point C relates directly to the issue as described under its Point I. (See Brief, p. 1-2, and 15). On these grounds alone, the Court would be justified in entirely rejecting MJMEUC's Point I.

In any event, it would appear that the Court in all likelihood will not need to address the diverse arguments raised by MJMEUC in Point I (except perhaps Argument E). If the Court decides that the PSC's decision below should be sustained (as discussed in the MLA's Reply Brief to Grain Belt's Point I), then MJMEUC's Arguments A-D clearly have no merit. And if the Court finds that the PSC's decision was in error, then MJMEUC's Arguments A-E are all moot.

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As a final introductory matter, because MJMEUC included five separate arguments under its Point I, with the Court's indulgence the MLA will designate the specific subsection of MJMEUC's *Argument* to which it is responding, rather than simply stating it is responding to MJMEUC's Point I.

Argument A: Contrary to MJMEUC's claim, the ATXI opinion did indeed decide that a line certificate may not be issued by the PSC until the utility first obtained the necessary county consents.

The gist of MJMEUC's Argument A is stated at pages 16-17 of its Brief as follows:

> Therefore, the Commission's conclusion in the underlying case which is the subject of this appeal, that "[u]nder the Court's direction set forth in *Ameren Transmission Co*,[1] the Commission cannot lawfully issue a CCN to [Grain Belt] until the company submits evidence that it has obtained the necessary county assents under Section 229.100," is unlawful because it is contrary to the Commission's statutory authority. (Bracketed words by MJMEUC).

The MLA respectfully submits that this argument was covered at length by the MLA in its Brief responding to Point I of Grain Belt's Brief. And as Grain

[1] Generally referred to as the ATXI case.

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Belt observed after the initial briefs were filed with the Eastern District, MJMEUC merely raises "the same or similar issues to those raised by Grain Belt Express."[2]

Accordingly, the MLA believes that nothing could be gained by repeating those same arguments here, and so respectfully refers the court to the MLA's response to Grain Belt's point I with respect to the point raised here by MJMEUC.

Under its Argument A, MJMEUC also accuses the PSC of misquoting the ATXI decision in a number of instances. (Brief, pp. 17-18). The MLA submits that this point is irrelevant. Although it is the PSC's decision which is on appeal here, the outcome most assuredly will depend on this Court's interpretation of subsections 1 and 2 of § 393.170. Accordingly, the decision here is not likely to be determined by whether or not the PSC deliberately misquoted the ATXI decision "in order to support its unlawful conclusion." (MJMEUC's Brief, p. 17)

Argument B: Contrary to MJMEUC's claim, the ATXI decision was in fact binding precedent when the PSC issued its decision in the Grain Belt case.

The MLA submits that this point was also fully addressed in the MLA's reply to Grain Belt's Point I, including MJMEUC's claim that the ATXI court either "deliberately or mistakenly" omitted a discussion of Subsection 1 of §

[2] Response to the PSC's Motion For Leave to Exceed Word Limitations and Cross Motion For Clarification of Briefing and Oral Argument. (Part 42, p. 2, filed December 18, 2017.

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393.170 from its decision.[3] (Brief, p. 20). Again, rather than repeat those arguments here, the MLA respectfully refers the court to its response to Grain Belt's Point I, in particular pages 23-27 of that brief).

Argument C: Contrary to MJMEUC's claim, the PSC's decision in this case is not contrary to the Commission's enabling statutes and related case law.

In this section, MJMEUC points to case law and a number of statutes for the general proposition that the PSC is vested with a wide range of authority in regulating public utilities. (Brief, pp. 21-22). No one could argue with that point. However, as discussed in the MLA's reply to Grain Belt, none of the general statutes or decisions regarding the PSC's authority states that a utility may build its transmission line across a county's roads without first having obtained the consent of the applicable County Commissions. The statutes relied on by MJMEUC touch on that subject, if at all, only by generalizations regarding other unrelated powers of the PSC.

In contrast, § 229.100 specifically addresses the need for a utility to obtain the consent of the County Commissions before it may cross the county roads with its electrical facilities. Therefore, as discussed by the MLA in its reply to Grain Belt, to the extent that the statutes cited by MJMEUC do conflict in any way with

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

the specific requirements of § 229.000, the general statutes must give way to the specific provisions of § 229.100. (See discussion and authorities cited by the MLA in its response to Grain Belt's Point II, page 48).

Accordingly, MJMEUC is simply wrong when it claims that "our Legislature clearly intended the Commission, as opposed to any other entity including county commissions, to be the decision-maker regarding the construction and location of a line to transmit electricity across the state." (Brief, p. 22) In fact, the Legislature definitely provided a key role for County Commissions in this process by enacting what is now § 229.100, and allowing that law to remain in effect for over 100 years.

Actually, MJMEUC seems to concede as much when it says that the authority to grant an effective CCN remains "primarily vested" in the PSC. (Brief, p. 22).

Finally, MJMEUC's reliance for this point on the opinion from the Eastern District is misplaced. That opinion did not state, as implied by MJMEUC, that the authority of the county commissions under § 229.100 is somehow incompatible with the PSC's authority under § 393.170. (Brief, p. 22). The Eastern District was only observing there that, in its view, the county consents need not be obtained before the PSC is allowed to issue the CCN.

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Argument D: Contrary to MJMEUC's claim, the PSC decision in this case does not violate the State's administrative process to ensure uniform and non-parochial regulation of utilities.

Under Argument D, MJMEUC seems to be making essentially the same points it made under Argument C and elsewhere in its Point I. Although everyone recognizes the broad, general purposes of utility regulation referred to by MJMEUC, those generalizations must still give way to the specific mandates of § 229.100 and § 393.170.

Argument E: Contrary to MJMEUC's claim, the PSC decision in this case does not violate any Constitutionally-grounded deference to the PSC as an agency of the executive branch.

The thrust of MJMEUC's argument under this point seems to be that ATXI's interpretation of § 393.170 somehow violates the constitutionally-mandated separation of powers.

Again, the MLA has no quarrel with the broad generalizations recited in this regard by MJMEUC. (Brief, p. 24-25). It is not clear, however, exactly why MJMEUC believes that the ATXI decision in any way violates the concept of separation of powers.

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At one point it claims that the Western District intended to elevate County Commission authority under § 229.100 to "primary authority over public property, private property and public utility projects as well." (Brief, p. 25)

It also argues that the ATXI decision is unconstitutional because it describes a judicial action against an executive agency in violation of the doctrine of Separation of Powers. (Brief, p. 25).

Apparently, the basic argument here is that the Western District's decision is unconstitutional merely because it allegedly misinterpreted state law with respect to the PSC's ability to grant a CCN to a utility. In reality, of course, the Western District was simply interpreting a statute which affected the authority of an administrative agency, just as courts have done on countless occasions in the past, and will no doubt continue to do in the future.

If anything, MJMEUC has things backwards. Speaking with respect to the doctrine of the Separation of powers, *Chambers v. Figgie International, Inc.*, 838 S.W.2d 168, 171 (Mo. App. 1992) stated that "The system of judicial review provides a check upon the powers exercised by the administrative agency…."

In support of its position MJMEUC cites only two cases, neither of which remotely implies that a court's interpretation of a state statute somehow violates the doctrine of Separation of Powers. (Brief, pp. 24-25). MJMEUC is seemingly

asking this Court to overturn *Marbury v. Madison*, and the very principle of judicial review.

The Courts do not share MJMEUC's rigid view of the doctrine of Separation of Powers. As this Court noted in *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 12 (Mo banc 1992):

> While the autonomy of the legislative, executive, and judicial branches lies at the heart of our system of government, a careful study of the whole Constitution will … demonstrate that it was not the purpose [of the framers] to make a total separation of these three powers. Each branch constitutes only a part of a single government and must interact harmoniously with the other two. The independence of the branches must be consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of union and amity. (Internal quotation marks and citation omitted; brackets in original)

Based on the foregoing, MJMEUC's Argument E provides no basis for overturning the PSC's decision in the case on appeal.

II. MJMEUC'S ARGUMENT THAT THE PSC WRONGFULLY RECEIVED TWO DOCUMENTS INTO EVIDENCE, AND RELIED UPON THOSE DOCUMENTS IN REACHING ITS DECISION, SHOULD BE REJECTED BECAUSE (1) MJMEUC COULD NOT HAVE EFFECTIVELY OFFERED ANY REBUTTAL TO THOSE DOCUMENTS EVEN IF IT HAD BEEN A PARTY TO THE CASE FROM WHICH THOSE DOCUMENTS ORIGINATED; AND (2) ANY

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ERROR BY THE COMMISSION IN ADMITTING THOSE DOCUMENTS AMOUNTED TO HARMLESS ERROR. (Responds to MJMEUC's Point II)

In its Point II**,** MJMEUC is contesting only two documents, which it says are referenced in the PSC's Findings of Fact, paragraphs 15 and 16. (Brief, p. 34). The first document complained of, as identified in footnote 22 of the PSC's Order, under paragraph 15, is Exhibit 375. This document is simply a copy of the PSC's decision in the ATXI case. (See Report and Order in Grain Belt's Appendix, p. A10).

The second document complained of, identified in footnote 23, in paragraph 16 of the PSC's Report and Order in this case, consists of excerpts from ATXI's initial Brief to the PSC in the underlying ATXI case. (*Id.*)

MJMEUC's objection to these two exhibits is that they were created in the PSC's ATXI case, to which MJMEUC was not a party. Therefore, MJMEUC claims it "had no opportunity to meet and rebut that evidence and was thus denied …Due Process…." (Brief, p. 26)

In making this argument, MJMEUC relies on § 536.070(2) and a corresponding PSC Rule which state that a party has the right to rebut the evidence against him or her. (Brief, p. 25; Appendix pp. A-36 to A-39). But it is difficult to

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imagine how MJMEUC could possibly have "rebutted" the two documents in question, even had it been a party to the ATXI case.

The first document complained of is the PSC's final order in the ATXI case. It was relied upon by the PSC in the case below for the simple proposition that in the underlying ATXI case, the PSC ruled that ATXI could not be issued a final CCN until it had received the necessary county consents. (PSC Order, p. 9, par. 15 at Grain Belt's Appendix A10). This same issue has been addressed extensively by MJMEUC and others in this case, and so it is difficult to see how MJMEUC could possibly be prejudiced here by not having had the additional opportunity to address that same issue in the ATXI case.

Also, the issue which MJMEUC claims it had no opportunity to address will no doubt be decided by this Court on this appeal. If so, then regardless of what the PSC may have said about that issue in the ATXI case, it will be moot once the issue is decided here.

Moreover, it is common practice for parties to an appeal of a PSC decision to rely on prior PSC cases. For example, Grain Belt cites approximately 11 such decisions in its own brief in this case. (Brief, p. iv). If the PSC decision in the ATXI case cannot be referenced by the PSC in the case below, then the same principle should apply to all of the earlier PSC decisions relied on by Grain Belt.

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The MLA had no opportunity to participate in those cases, and so by MJMEUC's logic the Court should strike the findings and conclusions of all of those decisions.

Also, MJMEUC relies extensively here upon the Concurring Opinion of the four Commissioners. (See, e.g. Brief pp. 11-12, 29). However, this Concurring Opinion also relies on a case in which none of the parties here participated. (See references to the Commission's 1994 *Tartan* case at page 2 and f.n. 4 of the Concurring Opinion; Grain Belt's Appendix, p. A21) If the PSC's reliance on a past case in its official opinion was supposedly error, then MJMEUC is being inconsistent in relying here on the Concurring Opinion.

The second document complained of is Exhibit 376, cited by the PSC in paragraph 16 and footnote 23 of its Order. (See Grain Belt's Appendix, p. 10). This document consists of portions of ATXI's brief to the PSC in the underlying ATXI case at the PSC. (*Id.*) It was relied on by the PSC in the case below simply to demonstrate what ATXI had said in its brief, and not to demonstrate the truth of what ATXI said there. (*Id.)*

So even if MJMEUC had been a party to the ATXI case, it could not have rebutted the fact that those statements were made by ATXI to the PSC. Accordingly, there could be no possible prejudice to MJMEUC from the reference to Exhibit 376 for the purpose for which it was cited. *See Cross v. M.S.M.C., Inc.*, 464 S.W.3d 237, 242 (Mo. App. 2015) (holding that the alleged error by the trial

court was in any event harmless because it did not prejudice the complaining party).

At first blush, MJMEUC's strongest argument in its Point II is its claim that the PSC relied on the two exhibits in question to find "as a matter of fact in this case" that ATXI had applied to the Commission for a line certificate under Section 393.170.1 and not an area certificate. (Brief, p. 27, citing the PSC's ATXI order at its Appendix A10, and quoting from paragraph 16 thereof). The problem is, MJMEUC is misreading the statement it is citing.

The complete sentence in the PSC's order, quoted only in part by MJMEUC, was as follows:

> ATXI had argued to the Commission, in part, that it need not obtain county assents because ATXI applied to the Commission for a line certificate under Section 393.170.1 and not an area certificate under Section 393.170.2, RSMo. (*Id*.)

It is quite apparent that in this sentence the PSC was only reiterating what ATXI had *argued* to the PSC, and that the PSC did not make any finding of fact there with respect to those allegations. So despite what MJMEUC claims, the ATXI brief to the PSC was relied on in the case below only to show what ATXI had said, not for the truth of its allegations.

And even if MJMEUC had been a party to that case, it could not have rebutted the fact that ATXI said what it said. To the extent that the PSC erred in relying on either of the documents in question, it was harmless error.

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The MLA has found very few decisions which address the right to rebut evidence under §536.070(2). One which did touch on the subject was *Mueller v. Ruddy,* 617 S.W.2d 466 (Mo. App. 1981). While the court there acknowledged the right to rebut evidence in a regulatory proceeding, it further stated as follows: "Since decisions rendered by an administrative body are presumed to be valid, appellants carry the burden of overcoming this presumption by establishing unfairness in the procedure." *(Id.* at 475).

MJMEUC has clearly failed to do so here.

Finally, although MJMEUC did object to the introduction of the two exhibits in question, it did not ask the PSC for the opportunity to rebut or otherwise address the contents of those documents. (Part 40, LF Vol. 15, 2646-2652) Had it done so, it may well have been allowed to present the rebuttal which it now says it had no opportunity to offer.

The PSC cannot logically be faulted for not giving MJMEUC what it never asked for. *See State v. Easley*, 909 S.S.2d 376, 377 (Mo. App. 1995), finding that there generally is no error in refusing a mistrial if none is asked for. "As the trial judge is not present to assist counsel in trying cases, the judge should act without a request only in exceptional circumstances." (*Id.*)

Based on the above, there is no reason for the Court to reverse the PSC's decision on the basis of MJMEUC's Point II.

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III. THE COURT SHOLD REJECT MJMEUC'S ARGUMENT REGARDING THE UNCONSTITUTIONAL DEPRIVATION OF A PROPERTY RIGHT (THE LOWER COSTS IT SUPPOSEDLY WOULD PAY BY USING THE GRAIN BELT LINE) BECAUSE (1) MJMEUC DID NOT PRESERVE THAT ARGUMENT FOR REVIEW; AND (2) MJMEUC DID NOT HAVE ANY PROPERTY RIGHT WHICH WAS OR COULD BE TAKEN FROM IT BY THE PSC. (Responds to MJMEUC's Point III).

MJMEUC's argument here essentially is as follows: MJMEUC and its members will save significant sums of money if the Grain Belt project is built; the Concurring Opinion recognized these benefits, and would have approved the project but for the ATXI case; and therefore: (1) the PSC's Order violates the constitutional rights of its customers under Article I § 10 of the Missouri Constitution by depriving them of their "property rights"; and (2) it is also "unreasonable and unjust" because the Concurring Opinion acknowledged the benefits to MJMEUC and yet deprived them of those same benefits in the official Report and Order. (Brief, pp. 28-29).

This point should be rejected for several reasons.

First, point V of MJMEUC's Application for Rehearing to the PSC is the closest that MJMEUC comes to raising the argument which it makes in point III of its Brief on this appeal. (Part 41, LF Vol. 17, pp. 2749-50). However, nowhere in

that Point V does MJMEUC mention Article I § 10 of the Missouri Constitution, or any other alleged constitutional infirmity with the PSC's final Order.

A party is not allowed to raise an issue on appeal which was not included in its Application for Rehearing. (Section 386.500.2: "The applicant shall not in any court urge or rely on any ground not so set forth in its application for rehearing.") (See copy of the statute at Appendix to brief of MLA in response to appellant Grain Belt, p. A3)

See also State ex rel. Capital City Water Company v. Mo Pub. Serv. Comm'n, 850 S.W.2d 903, 909 (Mo. App. 1993) (stating that "The Office of Public Counsel is correct in its argument that the Company did not set forth its claim of laches in its application for rehearing. As a result, laches has not been preserved for appeal and this court will not address it."); and *State ex rel. Office of the Public Counsel v. Pub. Serv. Comm'n,* 236 S.W. 3d 632, 636 (Mo banc 2007) (holding that "Under section 386.500.2, the applicant is prohibited from seeking rehearing on any grounds not included in its application, which means that rehearing applications must be thorough or the applicant will waive any grounds omitted from the rehearing petition.").

Accordingly, MJMEUC's constitutional claim under its Point III has not been preserved for judicial review.

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That claim was also waived for a second related reason. "Constitutional challenges must be raised at the first available opportunity." *State ex rel. MoGas Pipeline v. Pub. Serv. Comm'n,* 395 S.W.3d 562, 568 (Mo. App. 2013). Here, the challenge could have been raised in the Application for Rehearing, but was not.

Moving to the merits of Point III, the two legal arguments made by MJMEUC in its brief on this Point (that the PSC order is both unconstitutional and "unreasonable and unjust") are supported by a single case citation, to *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n,* 706 S.W.2d 870, 881 (Mo. App. 1985). (Brief, p. 30) But actually, the most significant point made at the cited page of that case is that "The Commission's order will not be set aside unless confiscation is clearly established." (*Id.)*

And confiscation has not been established here for several related reasons.

First, there can be no unconstitutional taking of a property right where that right did not exist in the first place. *See Overbey v. Chad Franklin National Auto Sales,* 361 S.W.3d 364, 381 (Mo banc 2012) (holding there was no unconstitutional taking of a punitive damage award in excess of the amount allowed by statute because the plaintiffs "never had a right to recover more than the amount set out in the statute, so they had no property right that was limited or denied"); and *McIntosh v. LaBundy,* 161 S.W.3d 413, 416-17 (Mo. App. 2005) (no unconstitutional taking for refusing to place plaintiff on an approved list of

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providers of sex offender therapy when he had no legally protected right or privilege to be on that list.)

Here, MJMEUC has failed to show how or why it had a property right in the savings which might accrue if the Grain Belt line were to be built. At best MJMEUC has a void Concurring Opinion which addressed the savings for MJMEUC if the line is ever completed. But a mere Advisory Opinion can hardly create any rights at all, much less a constitutionally-protected property right in savings which may or may not ever materialize.

And for even that Opinion to have any meaning, MJMEUC would need to demonstrate that Grain Belt will eventually build the proposed line – a proposition which is certainly questionable at this point.

In other words, at best MJMEUC would have only a conditional property right, dependant on the ability of Grain Belt to eventually build a line it has been working on for years, and for it still does not have all the needed county consents. So at this time, MJMEUC has no property rights which could be confiscated either by the PSC's official order or by the unofficial Concurring Opinion.

MJMEUC also claims in its Point III that the PSC's decision was unreasonable under § 386.510. (Brief, p. 28). However, nowhere in its argument under Point III does MJMEUC even mention that statute. It is reasonable to assume that this claim is wholly dependent on the argument that the PSC's order

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constituted an unconstitutional taking of MJMEUC's property rights. Having addressed that issue above, the MLA believes it has also disposed of MJMEUC's argument in Point III regarding § 386.510.

Finally, MJMEUC says the PSC's Order was unlawful, and so it was forced to appeal it to the courts, "and the months or years that will be consumed in that process are likely to cause failure of the Grain Belt Project …." (Brief, p. 30). The MLA is not sure what the complaint is here, although the statement appears to concede that the Grain Belt line may never be built.

For the above reasons, there is nothing in MJMEUC's Point III which would merit reversal of the PSC Report and Order.

CONCLUSION

For the foregoing reasons, MJMEUC has provided no legitimate grounds for the Court to reverse the PSC's Report and Order which is the subject of this appeal. The PSC decision should therefore be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

I certify pursuant to Rule 84.06(c) that this brief includes the information required by Rule 55.03 (except that counsel does not have a facsimile number), and complies with the limitations contained in Rule 84.04(b) and local Rule 360. I further certify that this brief contains 4938 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 29day of March, 2018, the foregoing was filed electronically with the Clerk of the Missouri Court of Appeals, Eastern District, 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