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 INTERVENORS SIERRA CLUB AND RENEW MISSOURI

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

PSC Decisions

Statutes

Supreme Court Rules

PSC Regulations

Other Authorities

Statement of Facts

The MLA agrees that the Statement of Facts in the Joint Brief of Intervenors Sierra Club and Renew Missouri ("Joint Intervenors") is accurate, with one exception.

The Joint Intervenors state that Missouri ratepayers would not be charged for construction of the Grain Belt project. (Brief, p. 5) Actually, as the PSC pointed out in the order on appeal, Grain Belt would recover the construction costs from the customers who use the line. (Part 40 LF, Vol. 16, p. 2664, par. 9). Therefore, as discussed in the MLA's response to Grain Belt's Brief (see A17), if the line is used by Missouri ratepayers, as Grain Belt and MJMEUC claim it will be, then those Missouri ratepayers will in fact pay for the costs of the Grain Belt line. (Testimony of Grain Belt's CEO Mr. Michael Skelly, Part 14, Exh. Vol. 21, p. 1229:7-11; and Part 34, Tr. Vol. 12 p. 515:20-516:11)

ARGUMENT

I. THE PUBLIC SERVICE COMMISSION ("PSC") DID NOT ERR IN RELYING ON THE ATXI DECISION FROM THE WESTERN DISTRICT BECAUSE THE ATXI DECISION CORRECTLY INTERPRETED § 393.170. (Responds to Joint Intervenors' Point I)

With one major exception, discussed below, the arguments under Joint Intervenors Point I are basically the same as the arguments raised by Grain Belt in Point I of its own substitute brief. Rather than repeat the response to those arguments here, the MLA respectfully refers the Court to pages 18-34 of the MLA's response to Grain Belt's substitute brief.

The only substantive argument under this Point raised solely by the Joint Intervenors is based on the fact that § 393.170.2 in effect says that the utility must obtain permission from the proper "municipal authorities" before it may be granted a CCN by the PSC.[1] (Substitute Brief, p. 13-14; see statute at Grain Belt's substitute appendix, A37). Based on what they view as the statutory definition of "municipality", the Joint Intervenors argue that counties and county commissions are not "municipal authorities". Therefore, they contend, § 393.170.2 does not require the prior consent of county commissions before the PSC may issue a CCN.

The MLA submits that this argument should be rejected on two grounds: that it was not preserved for review by this Court, and that it is flawed on its merits.

Argument not preserved for review by this Court.

The argument in question was not preserved for review here for two

[1] All statutory references are to RSMo (2016) unless otherwise noted.

separate reasons. First, although this argument was raised by MJMEUC in its Reply Brief in the Eastern District (Part 43 LF, pp. 5-6 of Reply Brief), it was not even mentioned in that proceeding by the Joint Intervenors. (See their initial brief at Part 42 of LF, and reply brief at Part 43 of LF). Therefore, the Joint Intervenors' attempt to raise the argument in its substitute brief with this Court runs afoul of Rule 83.08(b), which says that a party "shall not alter the basis of any claim that was raised in the court of appeals brief…." (See Rule at Appendix A1)

Second, the Joint Intervenors did not even remotely suggest in their Application for Rehearing at the PSC that counties and/or County Commissions do not qualify as "proper municipal authorities" under § 393.170.2. The same is true for the other appellants seeking reversal of the PSC's decision.[2] In fact, the Joint Intervenors' Application for Rehearing does not even mention the phrase "proper municipal authorities," or any words encompassing that notion or touching on the issue raised at pages 13-14 of their substitute brief.

Their failure to raise this issue in their Application for Rehearing means they have waived the argument. As § 386.500.2 states: "Such

[2] See Applications for Rehearing at the PSC from the Joint Intervenors, MJMEUC and Grain Belt at Part 41, LF Vol. 17, pp. 2757-62, 2739-53, and 2724-38 respectively.

application [for rehearing] shall set forth specifically the ground or grounds on which the applicant considers said order or decision to be unlawful, unjust or unreasonable. *The applicant shall not in any court urge or rely on any ground not so set forth in its application for rehearing."* (Emphasis added; see statute at Appendix A3).

Since at least 1919, this Court has held that reviewing courts acquire no jurisdiction to decide a point on its merits which was not included in the Application for Rehearing with the PSC. *Lusk v. Pub. Serv. Comm'n,* 210 S.W. 72, 75 (Mo. banc 1919) (holding that points not raised in the appellant's Motion for Rehearing at the PSC "cannot be ruled on its merits, but must be disallowed to appellants by virtue of said statutory command"). The statute in question there contained language identical to that quoted above from § 386.500.2. (*Id.*)

Citing *Lusk, supra*, in *State ex rel. Kansas City, Independence and Fairmount Stage Lines Co. v. Pub. Serv. Comm'n,* 63 S.W.2d 88, 90-91 (Mo 1933) the Court reiterated that the reviewing court "acquires jurisdiction to review the commission's orders only when the person or corporation seeking such review has complied with the requirements prescribed by the statute."

That same rule has been consistently reaffirmed throughout the years. In *State ex rel. Dyer v. Public Serv. Comm'n,* 341 S.W.2d 795, 801 (Mo

1960), this Court stated that "We are precluded by statute from considering any ground not specifically set forth in the [Motion for Rehearing at the PSC]." In *State ex rel. American Telephone & Telegraph Co. v. Public Serv. Comm'n,* 701 S.W.2d 745, 751 (Mo. App. 1985), the above-quoted statement from *State ex rel. Dyer* was again said to mean that appellate courts are without jurisdiction to rule on any alleged error which was not raised in the Application for Rehearing.

Similarly, *State ex rel. City of West Plains v. Pub. Serv. Comm'n,* 310 S.W.2d 925, 934 (Mo banc 1958) stated that the court is "precluded from considering" points not raised in the Application for Rehearing.

Apparently the most recent pronouncement on this issue from this Court came in *State ex rel. Office of the Public Counsel v. Pub. Serv. Comm'n,* 236 S.W. 3d 632, 636 (Mo banc 2007), which stated as follows: "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."

Furthermore, one purpose of an Application for Rehearing is to allow the PSC an opportunity to determine if there was any point it had overlooked or misinterpreted in its final decision. *State ex rel. AG Processing v. Pub.*

Serv. Comm'n, 276 S.W.3d 303, 312 (Mo. App. 2008). The Joint Intervenors gave the PSC no opportunity to do so with respect to the point it belatedly raises at pages 13-14 of its substitute brief.

For the above reasons, the MLA respectfully submits that the Court has no jurisdiction to even address the merits of the Joint Intervenors' argument regarding the meaning of "municipal authorities."

The merits of Joint Intervenors argument concerning the meaning of "municipal authorities."

The basis for the Joint Intervenors' argument is that § 386.020(34) supposedly defines the word "municipality" as a "city, village or town". (Joint Intervenors' Brief, pp. 13-14; see statute at Appendix A10).

Actually, only some of the 60 subsections of § 386.020 specifically "define" the word or phrase which they address. One example where the word is specifically defined is subsection (8), which states as follows: "'Commissioner', one of the members of the commission"

On the other hand, as opposed to actually defining the word or phrase in question, approximately 23 of the subsections of § 386.020 state that the word or phrase in question "includes" certain items. For example, subsection (11) states as follows: "'Corporation' includes a corporation, company, association and joint stock association or company.'" The General Assembly must have meant for there to be a distinction between

words or phrases directly defined in § 386.020, such as subsection (8), and those which are said to "include" certain words or phrases, such as subsection (11).

So when subsection (34) says that "'Municipality' includes a city, village or town", case law supports the proposition that the word "municipality" is not limited to the three words which it precedes. As stated in *In re S.J.S. v. T.J.S.*, 134 S.W.3d 673, 677 (Mo. App. 2004): "Generally, the word 'include' is not a word of limitation, but rather of enlargement. When used in conjunction with a number of specified objects, it implies that there may be others that are not mentioned." (citation omitted). *Accord: St. Louis County v. State Highway Commission,* 409 S.W.2d 149, 153 (Mo. 1966); *Short v. Southern Union Company,* 372 S.W.3d 520, 532 (Mo. App. 2012).

Similarly, Black's Law Dictionary, 9th Ed., 2009, defines the word "include" as follows: "To contain as a part of something. ● The participle including typically indicates a partial list < the plaintiff asserted five tort claims, including slander and libel>. But some drafters use phrases such as *including without limitation* and *including but not limited to* – which mean the same thing."

The MLA's point here is perhaps more clearly illustrated by subsection (29) of § 386.020, which states that "'line' includes route." If the word "line" includes "route" and only "route", then every reference to the word "line" in the laws related to the PSC, such as transmission line, telephone line and cable TV line, would mean those facilities are not really "lines". They would all be "routes" and only "routes". Clearly, that cannot be what the General Assembly intended.

Accordingly, the MLA contends that the word "municipality" in subsection (34) is not limited to a city, village or town, but may include a county and perhaps other political subdivisions as well.

The PSC has required proof of county consents, where applicable, since at least 1919. In *Re Lanagan Telephone Company,* 8 Mo. P.S.C. 597, 602-03 (1919) the PSC required that the utility file the consent from the County Court before it would issue the requested CCN.

In *S.W. Water Co.,* 25 Mo. P.S.C. 637, 638 (1941), when faced with essentially the same argument being raised here by the Joint Intervenors, the PSC ruled that consent of the county was required for the grant of a CCN in unincorporated areas of the county.

And in *Union Electric Co. of Missouri,* 3 Mo. P.S.C. (N.S.) 157, 160 (1951), the PSC held that in unincorporated areas of a county, "the county

court franchises constitute 'the proper municipal authorities' as the term is used in Section 393.170, ibid, and the proper support for granting the certificates of convenience and necessity."

This position is also supported by a long-standing rule of the PSC. Current Rule 4 CSR 240-3.105(1)D addresses the documents which must be filed with the PSC when the utility is seeking a CCN. It states that "When consent or franchise by a city or county is required [as it is under § 229.100] approval shall be shown by a certified copy of the document granting the consent or franchise…." (Emphasis added. This rule is included in Grain Belt's Appendix to its substitute brief, A41).

And the Commission's Rules of Practice and Procedure enacted in 1932 stated, in Rule XIV.2.(b), that when a utility applied for permission to build new facilities it was required to provide the following: "When the consent, franchise or permit of a county, city, municipal or other public authority is necessary, a certified copy of the application therefor and of the ordinance or other document granting such consent, franchise or permit." (Exhibit 202 at Part 24, Exh. Vol. 38, pp. 2940, 2954-55).

A comparable requirement was also included in the reenactment of the Commission's Rules in both 1954 and 1971. (Exhibit 203 at Part 24, Exh. Vol. 38, pp. 2977 & 2993; and Exhibit 204, *Id.* at pp. 3024-05 & 3039).

This Court addressed this subject in *State ex rel. Public Water Supply District No. 2 of Jackson County v. Burton*, 379 S.W.2d 593 (Mo 1964), which at pages 599-600 included a discussion of past PSC practices in this regard. *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 p. A16)

Although they have now tried to back away from their initial position, even the Joint Intervenors have conceded that *State ex rel. Public Water Supply District, supra*, does stand for the proposition that "county assents come within the requirements for municipal consents of § 393.170.2". (Joint Supplemental Brief filed with the PSC, p. 6, Part 40, LF Vol. 15, p. 2589)

Given the PSC's own long-standing rules in this regard, and its actual decisions requiring county consent before the utility may build its facilities on county roads, the term "municipality" has long been understood to include counties and/or county commissions.

For all of the above reasons, the Joint Intervenors' argument that counties are not included within the term "municipal authorities" was not preserved for review, and in any event is without merit.

And for the foregoing reasons, the MLA submits there is nothing in the Joint Intervenors' Point I which would warrant reversal of the PSC's decision.

II. THE PSC DID NOT ERR BY GIVING COUNTY COMMISSIONS "VETO POWER" OVER CONSTRUCTION OF THE GRAIN BELT LINE UNDER § 229.100, BECAUSE WHATEVER POWER IS GIVEN TO THE COUNTIES UNDER THAT PROVISION, AND WHATEVER IMPACT IT MAY HAVE ON THE PSC'S REGULATORY AUTHORITY, ARE PRODUCTS OF THE STATUTORY SCHEME ENACTED BY THE GENERAL ASSEMBLY. (Responds to Joint Intervenors' Point II).

The primary argument here is that the ATXI decision allows the counties to withhold consent for a utility to use its public rights of way for utility purposes, which interferes with the PSC's "general supervision" over public utilities. (Brief, pp. 18-20) This general argument was addressed by the MLA at pages 46-48 of its substitute brief in response to Grain Belt. The MLA respectfully refers the Court to that discussion with regard to this issue.

In support of this argument, the Joint Intervenors rely on two cases

involving the City of Crestwood and Union Electric Company, both from the 1970's. (brief, p. 21). However, these cases had nothing to do with the issues before the Court in this case.

In 1958, Crestwood had granted Union Electric a franchise, allowing the utility to construct its facilities on the streets and other public places within the City. *Union Electric Co. v. City of Crestwood*, 499 S.W.2d 480, 481 (Mo 1973). In both *Crestwood* cases, the basic question was whether nearly twenty years later the city could require that the utility place all future transmission lines underground. (*Id.* 482).

So these cases simply involved questions of the right of a city to regulate the placement of utility facilities after a franchise had already been granted. They did not involve any question relating to the construction of § 393.170. The primary lesson from the *Crestwood* cases is that once a city grants a franchise for a utility to serve within its corporate limits, then absent any provision in that franchise to the contrary the PSC in at least in some instances has overriding authority to determine matters involving the general public.

Notably, in their combined 85 pages of substitute briefs, neither Grain Belt nor MJMEUC even mention the *Crestwood* cases.

For the above reasons, the MLA submits that the Joint Intervenors'

Point II does not merit reversal of the PSC decision in the case below.

CONCLUSION

For the foregoing reasons, the Joint Intervenors have provided no reasonable 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,

/s/ Paul A. A Agathen
Paul A. Agathen MO
Bar No. 24756
485 Oak Field Ct.
Washington, MO 63090
636-980-66404
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 3261words, as determined by the word count feature of Microsoft Word.

/s/ 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 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