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TO: Invenergy Transmission LLC
FROM: Polsinelli PC
SUBJECT: Letter Re: Legal Deficiencies in Proposed Missouri Legislation to Strip
Condemnation Authority From the Grain Belt Express Transmission Project
DATE: January 27, 2020

Grain Belt Express Clean Line LLC (“**Grain Belt**”) is developing a 780 mile, ±600 kilovolt high voltage direct current (“**HVDC**”) transmission line running from southwest Kansas, through Missouri and Illinois, and ultimately terminating in Indiana, known as the Grain Belt Express Project (hereinafter, the “**Project**”). The Project includes a 500 MW converter station in Missouri that will deliver affordable, clean energy to 39 Missouri cities and other Missouri customers.

I. THE MISSOURI PSC UNANIMOUSLY APPROVED THE PROJECT AND DETERMINED IT TO BE IN THE BEST INTEREST OF THE PUBLIC

On March 20, 2019, the Missouri Public Service Commission (the “**PSC**”), by unanimous decision, issued a certificate of convenience and necessity (“**CCN**”) for the Project, effective April 19, 2019. As with all public utility projects, a CCN from the PSC bestows upon the project sponsor the authority to use eminent domain, if necessary, for the purpose of constructing, operating and maintaining the Project—as it is not feasible to build long-distance transmission projects without eminent domain authority.

The PSC’s unanimous finding that the Project is in the public interest was based on an extensive record and resulted from careful consideration of the statewide benefits of the Project balanced against the impact on landowners. In ruling, the PSC noted that:

The evidence showed that when the Project is constructed and begins operation, it will transmit energy from wind farms in Kansas to wholesale customers in Missouri. In the case of MJMEUC, those customers are Missouri cities and towns that serve as electric providers to approximately 347,000 Missouri citizens. . . . [A]n entity that constructs and operates a transmission line bringing electrical energy from electrical power generators to public utilities that serve consumers is a necessary and important link in the distribution of electricity and qualifies as a

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public utility. The Commission concludes that Grain Belt’s Project will serve the public use, and Grain Belt qualifies as a public utility.¹

Specifically, the PSC found that customers of the Missouri Joint Municipal Electric Utility Commission (“MJMEUC”) would save \$12.8 million annually as a result of MJMEUC’s contract for capacity on the Project. The PSC also found that the Project will result in these additional benefits:

- Over 1,500 jobs during the three-year construction phase²
- \$7.2 million in annual property taxes to the affected counties³
- Substantially improved reliability of the electric grid⁴
- Reduced energy production costs⁵
- Lower emissions from energy production⁶
- Access to renewable energy needed to satisfy municipal and corporate renewable energy standards⁷

The PSC was mindful of the Project’s impact on landowners and addressed those impacts in its Order. As explained in the unanimous PSC decision:

The evidence in the case demonstrated that the Grain Belt Project will create both short-term and long-term benefits to ratepayers and all the citizens of the state. In the Commission’s view, the broad economic, environmental, and other benefits of the Project to the entire state of Missouri outweigh the interests of the individual landowners. Many of the landowners’ concerns will be addressed through carefully considered conditions placed on the CCN.⁸

The conditions placed on the CCN require Grain Belt and its representatives to provide fair compensation, negotiate in good faith, maintain open lines of communication, minimize and mitigate agricultural impacts, restore land, and more. The PSC decision has since been upheld by the Missouri Court of Appeals Eastern District.⁹

¹ MPSC Docket No. EA-2016-0358, Order on Remand, p. 38.

² *Id.* at, p. 46.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at pp. 31, 46.

⁷ MPSC Docket No. EA-2016-0358, Order on Remand at pp. 17-18.

⁸ *Id.* at p. 47.

⁹ Case No. ED107886 (Dec. 17, 2019).

II. THE PROPOSED LEGISLATION WILL OVERTURN THE WELL FOUNDED DECISION OF THE PSC AND VIOLATE GRAIN BELT’S CONSTITUTIONAL RIGHTS.

In the current session of the Missouri General Assembly, three bills—House Bill 2033, Senate Bill 597, and Senate Bill 604 (collectively, the “**Bills**”)—have been introduced which, by design, will retroactively strip Grain Belt’s eminent domain authority for the Project. If the Bills are signed into law and retroactively applied against Grain Belt this would amount to:

1. Creating a new inferior class of public utility, lacking a key characteristic of a public utility (condemnation authority), not only without PSC input but in direct contravention of the clear public benefit determination made by the PSC; and
2. A clear and direct violation of Grain Belt’s rights under the Missouri Constitution, which would not be allowed to stand in a court of law.

A. The Bills Arbitrarily Create An Inferior Class of Utility.

If enacted, the Bills would create a new inferior class of public utility that does not have eminent domain authority, despite the PSC declaring such public utility to be in the public interest. Meanwhile, all other public utilities, including investor-owned utilities and independent transmission owners, would retain their rights of eminent domain.

There are three characteristics that distinguish the new class of public utility from all other public utilities: (1) a transmission line that uses HVDC technology; (2) a transmission line that does not provide for the erection of substations at intervals of less than fifty miles; and (3) the public utility does not collect its costs to provide service under a regional transmission organization (“**RTO**”) tariff.¹⁰ These characteristics were determined by the PSC to *enhance* the public benefit of the Grain Belt Project.¹¹

First, the use of HVDC technology results in a smaller footprint than an alternating current (“**AC**”) transmission line, “is the most cost-effective and efficient way to move large amounts of electric power over long distances,” and “will provide a congestion-free delivery source of power, unlike using an interconnected AC system to move power.”¹²

Second, the lack of substations at intervals of less than fifty miles is a necessary component of HVDC technology which enables the efficient movement of large quantities of electricity over long distances. Moreover, fewer substations reduce the burden on landowners by decreasing the footprint of the Project and taking less land out of production.

¹⁰ The Bills also target entities that do not provide retail service, but that characteristic is not determinative because independent transmission owners that do not provide retail service will retain eminent domain authority, as long as they do not have the three determinative characteristics listed above.

¹¹ MPSC Docket No. EA-2016-0358, Order on Remand, pp. 10-11, 24.

¹² *Id.* at p. 10.

Third, the PSC found that Grain Belt’s participant-funded model, rather than an RTO-funded model, is a *benefit* to Missouri ratepayers. Transmission line costs collected through an RTO tariff are socialized among all retail electric customers, regardless of whether such customers receive a direct benefit from the transmission line. As stated by the MPSC, “[s]ince the Project will employ a participant-funded or ‘shipper pays’ model under which the costs of the Project are imposed on shippers who use the Project, none of those costs will be recovered through the cost allocation process of MISO, PJM, or SPP. Accordingly, none of these costs will be passed through to Missouri ratepayers and will not result in an increase in the transmission component of their retail rates.”¹³

Revoking eminent domain authority from an entity with the characteristics listed above is directly contrary to the careful, fact-based, and balanced determination of the PSC. In addition, and perhaps most importantly, as explored below, the effect of the Bills would be to deprive Grain Belt of vital rights protected under the Missouri Constitution.

B. The Bills Amount to a Clear and Direct Violation of Grain Belt’s Protected Constitutional Rights.

The Missouri Constitution bars the General Assembly from enacting retroactive laws, such as what the Bills seek to create.¹⁴ The Missouri Courts have interpreted this provision a number of times and have clearly stated that retroactive laws cannot affect a party’s substantive or vested rights.¹⁵

The right of a public utility, such as Grain Belt, to exercise eminent domain is a substantive right, as directly determined on two different occasions by the Missouri Appellate Court.¹⁶ Accordingly, any attempt to retroactively legislate this right away would certainly be invalidated by the courts.

In addition to its clear substantive right, Grain Belt likely also has a vested right to its grant of condemnation authority by the PSC. This would certainly further influence a court that the operation of the Bills is unconstitutional. Moreover, since the Bills inappropriately target a single public utility, they could be found to be unconstitutional “special laws.”¹⁷ Finally, the Bills could also amount to an unconstitutional taking in violation of the U.S. and Missouri Constitutions, requiring the State to pay Grain Belt “just compensation” from taxpayer funds.¹⁸ Considering the tens of millions of dollars that Grain Belt has expended on Project development

¹³ *Id.* at p. 24.

¹⁴ Mo. Const. art. I, sec. 13.

¹⁵ *Klotz v. St. Anthony’s Med. Ctr.*, 311 S.W.3d 752, 760 (Mo. banc 2010); *Hess v. Chase Manhattan Bank, USA, N.A.* 220 S.W.3d 758, 769 (Mo. banc 2007); *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341 (Mo. banc 1993).

¹⁶ *Southwestern Bell Tel. Co. v. Newingham*, 386 S.W.2d 663, 667 (Mo. App. 1965); *Phillips Pipe Line Co. v. Brandstetter*, 263 S.W.2d 880, 884 (Mo. App. 1954).

¹⁷ Mo. Const. art. III, sec. 40.

¹⁸ Daryl J. Levison, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, 391-92 (Spring 2000) (taxes needed to pay compensation for regulatory takings impose “arbitrary [and] regressive” costs on the public, “disadvantage[s]” corporations, and increases the state’s administrative costs).



efforts in reliance on the CCN's appropriate grant of eminent domain authority, it would vigorously defend its rights in court and seek all available damages.