BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Landowners Alliance, a non-profit Missouri Corporation	)	
	)	
Complainant,	)	
	)	
V.	)	Case No. EC-2014-0251
	)	
Grain Belt Express Clean Line LLC, and	)	
Grain Belt Express Holding LLC, and	)	
Clean Line Energy Partners LLC	)	
	)	
Respondents	)	

ANSWER OF MISSOURI LANDOWNERS ALLIANCE
TO MOTION TO DISMISS

Pursuant to the Commission's order in this case of April 15, The Missouri Landowners Alliance (the Alliance) hereby files its Answer to the Motion to Dismiss filed by the above named respondents (hereafter Grain Belt) on April 14, 2014.

1. Grain Belt's Claims That it Has Not Violated the Commission's Ex Parte Rules.

At the very outset of its argument, Grain Belt totally misconstrues the Commission's Ex Parte Rules. Their basic premise is that the Ex Parte Rules only apply to ex parte communications, as the latter term is defined in the Rules. (See Grain Belt's Motion, p. 3, stating that the Ex Parte Rules "only apply" to ex parte communications). That is absolutely incorrect.

The Rules do prohibit certain ex parte communications, as well as certain "extra-record communications". However, that is not all that the Rules prohibit. Moreover, the Alliance has already acknowledged that it is not aware of any prohibited ex parte communications. (Complaint, p. 2) Thus when Grain Belt argues that they have not

engaged in any such communications, they add nothing of any value to the discussion here.

The Alliance is alleging, instead, that Grain Belt has violated subsections (12) and (14) of the Ex Parte Rules, which are set out at page 3 of the Complaint. As is apparent, these two subsections are totally independent of the provisions of the Rule which restrict the ex parte and extra-record communications. In fact, neither subsection (12) nor subsection (14) makes any mention at all of those two terms. Thus contrary to Grain Belt's basic premise, the Ex Parte Rules do indeed apply to the facts of this case.

Grain Belt also says the Alliance is only alleging that Grain Belt violated the Ex Parte Rules "indirectly". (Motion, p. 2) That claim is also inaccurate. Instead, the Alliance contends that Grain Belt directly violated subsections (12) and (14) of the Rules, and did so on numerous occasions. Those two subsections should not somehow be given a subordinate role in determining what activities are and are not permitted under the Commission's Rules.

When properly framed, the issues in this Complaint are fairly straight-forward. With Grain Belt having filed its testimony with its application for the certificate of convenience and necessity (CCN), it is now clear that Grain Belt is indeed supporting its proposal on the basis of all five of the issues identified by the Alliance in its Complaint.[1] It is also clear from the material in the Complaint that Grain Belt has repeatedly argued and advanced its own position on those same five issues in publically disseminated material. (Complaint, p. 9-16)

[1] The five issues which the Alliance said would likely be litigated here are identified at page 7 of the Complaint. Those five issues are in fact being raised by Grain Belt in the CCN case. (See Application in Case No. EA-2014-0207, filed March 26, 2014, pp. 8-11).

To simplify matters here, and for purposes of illustration only, the Alliance will address just one of the five issues being litigated by Grain Belt in its CCN case: their claim that the proposed line should be approved by the Commission in part because it supposedly will create jobs in Missouri.[2]

The facts regarding this issue are not in dispute. Grain Belt initiated the CCN docket on January 13 of this year, when it filed its Notice of Intent to File for the CCN. Prior to and after that date, Grain Belt has consistently touted the number of jobs which it supposedly would bring to Missouri if the Commission approves its proposed line. Those claims were made through a number of different means, including the Grain Belt website, the Clean Line website, newspaper interviews, press releases, and press conferences. (Complaint, p. 9-13)

Even after Grain Belt filed its testimony with the Commission in the CCN case on March 26, it continued to publically promote the economic benefits which the project would supposedly bring to Missouri, using its website, press releases, newspaper interviews and trade journals. (See Supplement to Formal Complaint, filed April 2, 2014). So the only real question here is this: do these public, extra-record disseminations of Grain Belt's position on a key issue in the CCN case violate either of the two provisions of the ex parte rules relied on by the Alliance.

Looking first to the language of Subsection (12), that rule has been violated if, by publically disseminating its arguments on the issue of jobs, Grain Belt is attempting to win public support for the proposed line, which in turn Grain Belt intends would, directly

[2] For purposes of this Answer, the Alliance will not address the validity of the Grain Belt claims about the supposed jobs which its Project will create.

or indirectly, outside the hearing process, bring pressure or influence to bear upon the commission.

Grain Belt will of course never admit that it hopes to turn public support for its project into any kind of influence with the Commission. However, if that is not their underlying intent, then why ask people to sign letters of support for their line, which they then filed with the Commission in the CCN case? (See Schedule MOL-10). And if that is not Grain Belt's underlying strategy, then why bother to put all the money and effort into winning public support for their project? The only logical conclusion is that Grain Belt intends for the public support to somehow translate into pressure or influence on the Commission. Whether or not that strategy is successful is beside the point.

In the absence of any other logical explanation for Grain Belt's PR campaign, their public attempts at winning support for the line, outside the hearing process, and on the basis of contested issues, constitute a violation of subsection (12) of the Commission's ex parte rules. While a violation of this subsection may be difficult to define, the Commission will no doubt know it when it sees it.

Moving to subsection (14), and incorporating the language of that provision, the issue can be framed as follows: At any time after January 13, 2014 (when the CCN case was first docketed) did Grain Belt make any statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication, that was made outside the official course of the proceedings, and that relates to any of the following: evidence regarding the transaction involved [i.e., the supposed economic benefits of their proposed project]; or the credibility of any of their prospective witnesses [i.e., their glowing descriptions of the

qualifications of the authors of their economic study][3]; or the results of any examinations or tests [i.e., their 40 page study on job creation]; or, as incorporated by subsection (14)(G), Grain Belt's many opinions on the merits of any of their claims, defenses, or positions in the CCN case.

The answer clearly is "yes", that Grain Belt has consistently violated section (14) of the ex parte Rules, and continues to do so even as it is litigating its certificate case at the Commission.

Grain Belt's Suggested Exemptions From the Ex Parte Rules. Grain Belt attempts to justify it publications on the ground that they fall within a number of exceptions to or exemptions from the ex parte rules.

First, they cite Section 386.210 of the Revised Statutes of Missouri, saying that this law encourages "the free exchange of ideas, views, and information between any person and the commission or any commissioner". (Motion, p. 3) Unfortunately, Grain Belt omitted the language immediately following that which it quoted: "….provided that such communications relate to matters of general regulatory policy and do not address the merits of the specific facts, evidence, claims, or positions presented or taken in a pending case unless such communications comply with the provisions of subsection 3 of this section" [discussed hereafter].

As is clear from the language omitted by Grain Belt, this statute does not sanction extra-record publications which promote a party's position on the contested issues in a pending case.

[3] See Complaint, p. 11

Grain Belt also argues that its various publications were permissible under section 3(2) of that statute, which authorizes communications on substantive issues if "made at a forum where representatives of the public utility affected thereby, the office of public counsel, and any other party to the case are present." (Motion, p. 4) This provision clearly envisions some form of public gathering, where all the parties are personally present and are able to hear and respond to what is being said. Yet Grain Belt claims that its own private websites are somehow transformed into a forum where the commissioners and all the parties are gathered together.

Grain Belt's explanation is as follows: "If MLA considers the Commission to be sufficiently present in public forums where websites are viewed and news publications are read [which the Alliance has absolutely never claimed] then certainly other parties to the case are similarly present such that the communication is not prohibited by the Rules or Missouri Law."

While the thought process there is difficult to follow, the most glaring problem with this argument is that the Alliance, Public Counsel and even the Commission had absolutely no ability to question what Grain Belt published on their websites. This one-directional "forum" is clearly not what the statute envisioned, and thus it provides Grain Belt no sanctuary from the Commission's ex parte rules.

Moreover, Grain Belt does not even attempt to explain how its newspaper interviews, press releases, press conferences, and newspaper advertisements could possibly qualify as "public forums". Clearly, the "public forum" excuse has not merit.

Grain Belt also raises this "public forum" argument when claiming that its publications do not violate subsection (14) of the ex parte rules. (Motion, p. 4-5). In fact, the "public forum" argument amounts to the totality of their defense on this critical issue.

Their argument regarding subsection (14) is as follows: "All of the statements that MLA alleges are improper occurred in a public forum. They are by definition, therefore, not ex parte communications under Section (3) or a communication covered by Section (11) relating to future cases." (Motion, p. 5). Saying it is so does not make it so, and the argument here has the same flaws as the "public forum" argument just discussed.

Grain Belt also relies on Commission Rule 240-4(10)(A)(5), which they say provides an exemption for the "issuance of public communications regarding utility operations, such as the status of utility programs, billing issues, security issuances, or publically available information about a utility's finances." (Motion, p. 6). Again, however, Grain Belt omitted key language which immediately follows that which it quoted to the Commission: "These communications may also include a copy of the public communication, *but should not contain any other communications regarding substantive issues."* (emphasis added)

Grain Belt's arguments about the supposed economic benefits from its line clearly are <u>not</u> the type of communications contemplated by the exemption they rely on -- particularly when considering the language in the Rule which Grain Belt chose to omit.

Their next proposed exemption is equally without merit. Citing subsection (6) of the rule previously discussed, Grain Belt claims that the publications promoting the economic benefits of the proposed line somehow qualify as matters which are brought before state or federal agencies, such as the FERC. (Motion, p. 6) The fact that Grain

Belt needs to stretch the ex parte rules this far is a clear red flag regarding the merits of their defense to the Complaint.

Additional Arguments by Grain Belt. Grain Belt makes two other claims in this section which merit brief mention. First, they note that no Commissioner or staff member has filed any notice of an ex parte or extra-record communication, so they must believe that none of Grain Belt's publications are in violation of the Rules. The problem is, the Rules relied on by Grain Belt only require notice of ex parte and extra-record communications. (4 CSR 240-4.020(3)-(4)) There is absolutely no duty on the part of anyone to file a notice of a violation of the two subsections of the Rules which Grain Belt is alleged to have violated.

Second, Grain Belt mentions that the Alliance also operates a website. (Motion, p. 4). The significance of this fact is not clear. No one, at least not the Alliance, is alleging there is something inherently wrong with operating a website. The website is only a problem when it is misused, as when advancing one's position on contested issues in a pending commission case. Given that Grain Belt makes absolutely no claim that the Alliance has in any way misused its own website, it is fair to assume that it has not.

2. The Ex Parte Rules Do Not Impermissibly Infringe on Grain Belt's Freedom of Speech or Freedom of Expression.

Grain Belt contends that the Commission can place virtually no restrictions on Grain Belt in its endeavor to address the merits of the contested issues outside the Commission proceedings. According to Grain Belt, "the Supreme Court has continually invalidated prior restraints, no matter the context". (Motion, p. 8).

If that is the law, then the Commission is powerless to prevent the Grain Belt witnesses from standing up at the next Commission agenda session, and arguing that its Project should be approved on the basis of the supposed economic benefits it will create.

Fortunately, that is not the law, and just as clearly the Commission has the authority to prevent a party from doing indirectly what it may prevent that party from doing directly. As the Alliance noted in its Complaint, the general rule in this regard is that a court "may take such steps by rule and regulation what will protect their processes from prejudicial outside influence." (Complaint, p. 28)

Thus not surprisingly, none of the cases cited by Grain Belt hold that a party to a judicial or quasi-judicial proceeding has a constitutional right to influence the outcome of that proceeding by arguments made outside the proceeding itself.

In its Complaint, the Alliance pointed out that the Grain Belt's publications constitute what is termed "commercial speech". (Complaint, p. 28). As such, Grain Belt's statements are clearly not entitled to the same protection as was afforded in cases they cite in their Motion. Nevertheless, Grain Belt did not even attempt to explain why this distinction does not diminish any claims it might otherwise have to promote its position on the litigated issues outside of the Commission proceedings.

Finally, Grain Belt argues that its Freedom of Speech is guaranteed by Section 8 of Article I of the Missouri Constitution. Grain Belt quotes that provision for the following proposition:

> 'That no law shall be passed impairing the freedom of speech, no matter by what means communicated' and 'that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject …'

That language sounds quite persuasive -- except that Grain Belt has once again left out a critical provision immediately following the language which it quoted. The passage relied on by Grain Belt actually says that a person is free to say or write whatever he will, "being responsible for all abuses of that liberty." Thus the omitted language acknowledges that freedom of speech has its limitations, and that those who abuse the freedom should expect to be held responsible.

There is something ironic about demanding one's Freedom of Speech on the basis of a truncated version of the very provision supposedly granting that freedom.

For the foregoing reasons, Grain Belt has not refuted the allegations of the Complaint. Accordingly, the Alliance respectfully asks the Commission to dismiss Grain Belt's Motion to Dismiss the Complaint, and for such other relief as the Commission deems just and reasonable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served upon the parties to this case by email or U.S. Mail, postage prepaid, this 16th day of April, 2014.

/s/ Paul A. Agathen
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