

## **Questions of General Interest and Importance**

This case raises a single question of general interest and importance:

Is the Missouri Public Service Commission (“PSC”) divested of its statutory authority to regulate electrical utilities and exclusively determine whether utility projects are in the best interest of the state of Missouri and therefore grant a conditional Line Certificate for Convenience and Necessity (“CCN”) under § 393.170.1<sup>1</sup> until after each affected county provides assent?

Because the resolution to this question has an immediate financial impact on the state of Missouri and its electrical consumers by preventing the commencement of the project at issue in this case—thereby jeopardizing the significant economic benefits the PSC found Missouri and its residents will enjoy through lower energy costs and tax credits that will soon be moot—the Court should accept transfer of this case prior to disposition.

### **Reexamination of Existing Law**

Transfer is also necessary to clarify the long-standing distinction between Sections 393.170.1, 393.170.2, and 229.100, and to reexamine the Western District’s decision in Matter of Ameren Transmission Co. of Illinois, 523 S.W.3d 21 (Mo. App. W.D. 2017) (“Neighbors United”) – which contradicts decades of precedent, frustrates the statutory scheme and legislative intent of Section 393.170 et seq., and stands the function of the PSC as a state-wide regulatory body on its head by giving individual counties preemptive veto authority over the PSC to make decisions about the public interest of the state.

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<sup>1</sup> All statutory references are to the REVISED STATUTES OF MISSOURI 2016.

## Factual Summary

Grain Belt Express applied to the PSC for a Line CCN, pursuant to § 393.170.1 to construct and maintain an inter-state electrical transmission line and associated facilities to move clean, low-cost wind-generated energy from western Kansas to Missouri and other states farther east (the “Project”). LF 27. Grain Belt Express has entered a transmission service agreement (“Services Agreement” or “TSA”) with the Missouri Joint Municipal Electric Utility Commission (“Joint Municipalities” or “MJMEUC”) to purchase up to 250 MW of capacity from the Project, which would save hundreds of thousands of electrical consumers millions of dollars annually. LF 29.

The Project has received regulatory approval from the relevant utility commissions in Kansas, Illinois and Indiana. LF 1810. Each state independently determined the Project is in the public interest and issued certificates for construction of the Project across those states. LF 1810-11. Missouri is the final state in which regulatory approval is needed for the Project to proceed. LF at 1810.

While the PSC found Grain Belt Express met the legal criteria to issue a Line CCN, the PSC nonetheless determined a recent erroneous decision from the Western District Missouri Court of Appeals in Matter of Ameren Transmission Co. of Illinois, 523 S.W.3d 21 (Mo. App. W.D. 2017) (“Neighbors United”) prevented it from exercising its jurisdiction. Neighbors United held that an applicant for a CCN is required to “receive the consent of local government authorities *before* the PSC issues a CCN.” Id. at 27 (emphasis

added).<sup>2</sup> The PSC concluded: “while the Commission disagreed with the legal analysis in that opinion” based on Neighbors United, “the Commission cannot lawfully issue a CCN to [Grain Belt Express] until the company submits evidence that it has obtained the necessary county assents under Section 229.100.” LF 2669-70.

Nevertheless, a majority of Commissioners held: “[H]ad it not been for [Neighbors United], we would have granted the GBE application, as the evidence showed that the GBE project is ‘necessary or convenient for the public service.’” LF 2676. The Commissioners identified numerous benefits the Project would have had in the public interest: “lowered energy production costs in Missouri by \$40 million or more”; “a substantial and favorable effect on the reliability of electric service in Missouri”; “positive environmental impacts”; “supported 1,527 total jobs over three years, created \$246 million in personal income [including easement payments], \$476 million in GDP, and \$9.6 million in state general revenue for the state of Missouri, and \$249 million in Missouri-specific manufacturing and personal service contract spending”; and resulted in “a total of approximately \$7.2 million” in yearly property tax benefits to affected counties. LF 2679-80.

### **Legal Basis for Transfer**

Pre-disposition transfer of a case to this Court is permitted pursuant to Rule 83.01.

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<sup>2</sup> The PSC sought Rule 83.04 transfer of Neighbors United, arguing “county commissions [are not] authorized to preclude or delay the Commission’s exclusive authority to decide whether the construction of a transmission line is necessary or convenient for the public service under § 393.170.1.” Neighbors United, PSC App. for Trans., 1.

The Court has found this form of transfer to be appropriate where questions of statewide concern are involved or where the legislature has instructed a certain type of case be given priority over other actions. See e.g., Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824, 826 (Mo. 1990). Both circumstances are present here.

First, this Court has acknowledged that transfer prior to disposition is appropriate where the traditional route through an intermediate appellate court would frustrate the legislature's intent to expedite specific types of cases. In re K.A.W., 133 S.W.3d at 5 n.3. In this case, § 386.530 mandates appeals involving PSC orders, "shall be preferred over all other civil causes." Id. (emphasis added); see also Kansas City Power & Light Co. v. PSC, 651 F.2d 595, 596 (8th Cir. 1981). Section 386.540 further provides that "[w]here an appeal is taken to the supreme court, the cause . . . shall have precedence over all civil causes of a different nature pending in the court." Id. Here, the need for expeditious resolution is even more pronounced because, as explained below, any delay places in jeopardy the significant economic benefits the PSC has found the Project will bring Missouri and its residents.<sup>3</sup>

Second, there are questions of statewide, even national, concern in this case because the Court's ruling clarifying the PSC's authority will immediately impact Missouri's ability to realize economic benefits from the Project. The most immediate impact results from the contract between Grain Belt Express and the Joint Municipalities to lower Missourians' energy costs in dozens of cities by more than 10 million. Trans. Vol. 2, Hr'g

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<sup>3</sup> The Eastern District Court of Appeals has recognized the urgency of this matter by granting Grain Belt Express's Motion to Expedite on Oct. 12, 2017.

Vol. XVI, 999-1000. There will also be lasting statewide and national impact on shaping Missouri's identity as a location for out-of-state energy investment. An adverse ruling will stifle national energy projects that would otherwise utilize and benefit Missouri.

The Court should accept transfer of this case prior to disposition because these important issues of statewide and national concern require immediate action. Every day this case winds through the appellate process without finality is another day Missourians are unable to realize the economic benefits the Project will bring and increases the risk of the Project losing all economic viability such that those benefits are never realized.

**I. Transfer to this Court is necessary to correct the erroneous decision in Neighbors United and reaffirm the distinction between a Line and an Area CCN, as well as to clarify the respective functions of the PSC and the limited role of local authorities in regulating utilities in Missouri.**

The PSC has "general supervision" of all "electrical corporations" that have authority to build and maintain power lines and related facilities to transmit electricity. See § 393.140(1). Grain Belt Express has merely asked the PSC to exercise that authority and issue a conditional Line CCN under § 393.170.1. The PSC agrees a Line CCN for Grain Belt Express is in Missouri's best interests. However, the PSC refuses to exercise its broad supervisory power because of Neighbors United, which found that the lack of county assent under § 229.100 – a non-PSC statute – precluded the PSC from issuing a Line CCN.

Neighbors United was wrongly decided. The consequences of that recent decision have only just started to adversely impact Missourians by preventing Grain Belt Express (and future utility providers) from constructing its line that would supply low-cost, clean

energy to this state. Because of the PSC’s belief that it is hand-cuffed by Neighbors United, this harm will continue until this Court overrules Neighbors United. Missouri cannot afford to delay the benefits the Project will bring or, worse yet, to potentially forfeit these benefits altogether if the Project becomes economically infeasible.

**A. Neighbors United failed to distinguish between a Line CCN under § 393.170.1 and an Area CCN under § 393.170.2.**

A utility is not required to provide proof of municipal or county assent prior to the PSC exercising its statutory authority to issue a Line CCN under § 393.170.1. Missouri law recognizes two types of certificate authority; each derived from a different source. Missouri courts have recognized the distinction between these two different certificate authorities. State ex rel. Elec. Co. v. PSC, 770 S.W.2d 283, 285 (Mo. App. W.D. 1989).

The authority to construct electrical plants, referred to as a “line certificate,” is granted pursuant to § 393.170.1, whereas the “authority for an established company to serve a territory by means of an existing plant,” referred to as an “area certificate,” is granted pursuant to § 393.170.2. Id; State ex rel. Harline v. PSC, 343 S.W.2d 177, 185 (Mo. App. K.C. 1960). In addition to judicial and legislative precedent, PSC regulations also affirm the difference between a Line and an Area CCN. State ex rel. Cass Cnty v. PSC, 259 S.W.3d 544, 549 (Mo. App. W.D. 2008) (“PSC may grant CCNs for the construction of power plants, as described in subsection 1, **or** for the exercise of rights and privileges under a franchise, as described in subsection 2.”); 4 CSR 240-3.105(1)(A). (1)(B).

These certificates are distinct. And each has different prerequisites. To construct transmission lines, a utility must secure a Line CCN and need only obtain “the permission

and approval of the commission” after the PSC determines a Line CCN is “necessary or convenient for the public service.” §§ 393.170.1, 393.170.3. Whether a line is necessary or convenient for the public service does not depend on county assents. See State ex rel. Intercon Gas Co. v. PSC, 848 S.W.2d 593, 597 (Mo. App. W.D. 1993). An Area CCN, in contrast, is required when a utility will provide retail utility service to electrical consumers. Cass County v. PSC, 259 S.W.3d at 549. Unlike a Line CCN under § 393.170.1, for a utility to receive an Area CCN under § 393.170.2, the utility must “show[] that it has received the required consent of the proper municipal authorities.” § 393.170.2.

Despite this clear difference in purpose and function between a Line and Area CCN, the Western District in Neighbors United repeatedly relied on the requirement for municipal assents required by § 393.170.2 for an Area CCN, even though the applicant applied for a Line CCN under § 393.170.1. See 523 S.W.3d at 25-26. The court justified its decision by stating that to construe § 393.170 as not requiring prior *county* assents before issuing a Line CCN under § 393.170.1 “would render the language of section 393.170.2 meaningless by allowing the PSC to grant a CCN without having received the required documentation.” Id. But it is Neighbors United’s conflated analysis of § 393.170 that has rendered the clear statutory, and historical distinction between Line and Area CCNs meaningless. Neighbors United misreads § 393.170.2 by equating without justification a “municipal authority” (which is the statutory language) to a “county commission” or any general “[local government] authorities.” 523 S.W.3d at 26. County commissions are not the same as “municipalities”, see § 386.020(34), and county assents are not required as a prerequisite for a CCN under § 393.170.1 or § 393.170.2. More importantly, there are no

assent requirements as a statutory prerequisite to the PSC granting a Line CCN under § 393.170.1. To hold otherwise would render the language of § 393.170 meaningless.

Here, § 393.170.2 is not at issue. Grain Belt Express did not apply for an Area CCN. Grain Belt Express applied for a Line CCN under § 393.170.1. After extensive review, public hearings, an evidentiary hearing, and witness testimony, the PSC found that the Project is necessary or convenient for the people of Missouri. This is a decision the PSC is empowered to make, but it refuses to act in this matter only because of Neighbors United.

**B. Section 229.100 - a non-PSC law - does not require county assent before the PSC can exercise its statutory authority under § 393.170.1. to grant a Line CCN.**

The PSC has jurisdiction to grant a Line CCN under § 393.170.1 prior to county assents. Neighbors United reached the opposite conclusion by relying on § 229.100 in conjunction with an internal PSC rule, 4 CSR 240–3.105. The court was wrong.

The source of the PSC’s state-wide regulatory authority and jurisdiction is found in § 393.170. The plain language of § 393.170.1 details the requirements necessary for the PSC to grant a Line CCN. The only requirement mandated by the legislature is for a utility to obtain “the permission and approval of the [public service] commission”—not approval from local county commissioners. Consistent with that mandate, the PSC has long exercised its certificate authority prior to local government approval. See e.g., In re Application of Transource Missouri, Order Granting CCN, EA-2016-0188.

In contrast, § 229.100 is a non-PSC law that relates to county roads. It requires those who wish to erect poles and power wires, or lay pipes across public roads of any county to obtain the assent of county commissioners under rules established by the county



engineer. Id. There is nothing in § 229.100 that purports to supersede § 393.170 or set an order of priority. Likewise, there is nothing in § 393.170 that purports to incorporate or even references § 229.100. These are two independent statutes from different chapters that serve completely separate purposes and functions.

The PSC's own, internal rules do not change the analysis. By its own terms, PSC Rule 4 CSR 240-3.105, relied on by the court in Neighbors United, is an administrative rule related to "filing requirements." It has nothing to do with the regulatory authority the Missouri legislature granted to the PSC. It does not (and cannot) limit the PSC's statutorily conferred jurisdiction. Even if it could be read as jurisdictional, the PSC has the authority to grant a variance or waive its requirements altogether. See 4 CSR 240-2.060(4)(1)(B).

While Grain Belt Express must ultimately satisfy the local engineer requirements of § 229.100 in due course, those local decisions may be made later. They do not take priority over the threshold state-wide policy determinations resulting from application of § 393.170. Nothing in these laws or prior judicial decisions suggest otherwise.

**II. Transfer prior to disposition is appropriate to avoid delay and to allow Missourians to realize the significant statewide economic benefits of the Project.**

The Court should accept transfer to secure for all Missourians the full extent of the benefits identified by the PSC, including substantial and proper leasehold payments to landowners, and to allow Missourians to begin enjoying these benefits immediately. Cities across Missouri have already committed to purchasing lower cost, clean, renewable energy from the Project. If the Project does not commence soon, those cities will be forced to turn to higher-cost energy and, in turn, end-use consumers will continue to pay higher energy

costs. Equally significant, federal support through targeted production tax credits for development of wind energy fully expires in 2019. Consolidated Appropriations Act, 2016 (H.R. 2029, Sec. 301). Indeed, a phase-out has already started this year. *Id.* The availability of these tax credits help ensure that the Project can provide the lowest cost to Missouri ratepayers. Each of these issues highlight the state and national import of this matter and the urgency for this Court to accept transfer.

**A. Transfer is necessary to ensure that Grain Belt Express can perform its contract to provide low-cost wind-generated power to Missouri cities, and other purchasers, saving electrical consumers millions of dollars in energy costs.**

The Services Agreement between Grain Belt Express and the Joint Municipalities allows the Joint Municipalities to purchase up to 250 MW of from the Project. LF 36. Relying on this, the Joint Municipalities has entered into contracts with dozens of municipalities throughout Missouri to supply dramatically lower cost power to cities such as Columbia and Kirkwood and a group of 35 smaller cities spanning the state. LF 1826; Exs. 3760-3805; LF 2462-2507. These contracts provide a clear and urgent need for the low-cost, cleaner energy supplied by the Project.

Every day that the Project is delayed, Missouri families do not realize the millions of dollars of economic benefits that the PSC identified. Moreover, the Joint Municipalities Service Agreement accounts for a fraction of the total capacity of the Project, and it alone is expected to generate \$10 million in annual energy cost savings to ratepayers. LF 1827-28; HC Exhibits 1319:11-14. The savings expected under the Services Agreement are indicative of what other energy purchasers throughout the state would realize and will

ultimately be passed on Missouri energy consumers.

These savings will be in jeopardy if the PSC does not authorize the Project soon. Much of the power the Joint Municipalities has contracted to purchase from the Project is intended to replace higher-cost power the Joint Municipalities currently receive from another supplier through a contract that expires soon. LF 1931; LF Exhibits 3719:15. The longer it takes this case to wind its way through the appellate courts, the more likely it is that Missouri will lose out on the economic benefits of the Project because the Joint Municipalities and others will be forced to find power—at a higher cost—elsewhere.

**B. Immediate transfer is necessary for Missourians to benefit from the Production Tax Credit which facilitates substantial private investment in Missouri, leads to the creation of thousands of jobs and saves Missourians money.**

A driving factor behind the current growth of wind-power development across the country is the Renewable Electricity Production Tax Credit (“PTC”). The PTC was established to encourage the development of certain types of renewable energy, including wind. Energy Policy Act of 1992, Pub. L. No. 102-486 (1992). Since its inception, the PTC has been helpful in drastically reducing the price to develop and transmit wind power by more than 50 percent and has been credited with contributing to the creation of tens of thousands of wind energy jobs and the construction of hundreds of wind energy facilities across the United States. P. Cuttino, Congress Should Extend Clean Energy Tax Credits, The Pew Charitable Trust (Dec. 10, 2015). The PTC will phase out to zero in 2019. U.S. Dep’t of Energy, Renewable Electricity Production Tax Credit (2017). Wind facilities that commence construction this year will receive a PTC amount that is already reduced by 20

percent of its full value, then in 2018 by 40 percent, and in 2019 by 60 percent. Wind facilities that commence construction after 2019 will not receive any PTC. Id.

The forthcoming reductions and eventual expiration of the PTC make the swift and final resolution of this matter even more important. Indeed, some investments into facilities that will supply power to the Project were undertaken with the expectation that they would receive the full PTC. LF 1198:7-13. The availability of these PTCs substantially lowers overall development costs of wind-generation projects, which allows Grain Belt Express to pass on the cost savings to its customers. Grain Belt Express, like many other industry members, is relying on the availability of PTCs to complete the Project as cost-effectively as possible to deliver maximum cost-savings to energy consumers. Without the benefit of the PTCs, the completion of Project is in jeopardy and the savings to Missourians at risk.

In addition to ensuring the successful completion of the Project, a timely resolution of this matter could encourage other industry participants to develop wind facilities within Missouri, which would increase new investment across the state, create jobs, and help lower the cost of energy for all Missourians. Furthermore, the PTC will aid Missouri in its effort to achieve its Renewable Energy Standard, which requires Missouri utilities to phase in use of renewable power to 15 percent by 2021. § 393.1030. The Project will lower energy costs for Missouri families, create tens of thousands of jobs and support the state in achieving its goal of increased renewable generation.

WHEREFORE, for the foregoing reasons, Grain Belt Express respectfully requests an order, pursuant to Mo. S. Ct. R. 83.02, transferring this case to the Missouri Supreme Court prior to disposition and for such other further relief as this Court deems appropriate.

Dated: October 30, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 30, 2017, the Form 15 Cover Page, Application for Transfer, and Notice of Transfer were served by emailing a copy to the following interested persons:

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