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The Show-Me State's Fight Against Grain Belt Express Clean Line: Will Administrative Proceedings, Legislation, or the Takings Clause Provide Protection for Private Land?

Adrienne Spiller*

Abstract

Grain Belt Express Clean Line is a proposed direct current transmission line that will run from Kansas, through Missouri and Illinois, and end in Indiana.¹ Its stated purpose is to move wind energy from Kansas to Indiana so it may be dispersed to other markets in need of lower cost, renewable energy.² To operate as a public utility, Grain Belt Express must apply for, and be granted, a Certificate of Convenience and Necessity from each state's Public Service Commission, or equivalent thereof.³ Grain Belt Express has already received the necessary regulatory approvals to operate as a public utility in Kansas and Indiana, and is currently in a contested battle for approval in Missouri.⁴ Grain Belt Express started the process of obtaining the necessary approval in Illinois on April 10, 2015.⁵ In true show-me-state fashion, Missouri landowners and the Public Service Commission are asking Grain Belt Express the tough questions and requiring factual proof of assertions before conceding the private land of citizens. If Grain Belt Express is recognized as a public utility, it receives the ability to use eminent domain to seize land from private citizens that are unwilling to sell.⁶

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¹ *Grain Belt Express Clean Line: Overview*, CLEAN LINE ENERGY PARTNERS, http://www.grainbeltexpresscleanline.com/site/page/project_description (last visited Apr. 25, 2015).

² *Id.*

³ *Grain Belt Express Clean Line: Regulatory Approvals*, CLEAN LINE ENERGY PARTNERS, http://www.grainbeltexpresscleanline.com/site/page/regulatory_approvals (last visited Feb. 10, 2016).

⁴ *Id.*

⁵ *Id.*

⁶ MO. REV. STAT. § 523.262 (2000).

I. INTRODUCTION

Grain Belt Express is a limited liability company connected to National Grid, “one of the largest investor-owned utility companies in the world.”⁷ Grain Belt Express must receive a Certificate of Convenience and Necessity from Missouri’s Public Service Commission before it can begin its clean energy line project across Missouri.⁸ The Certificate of Convenience and Necessity would allow Grain Belt Express to become a regulated public utility in Missouri, giving Grain Belt Express eminent domain authority to gain easements across privately owned land.⁹ As of April 24, 2015, Missouri’s Public Service Commission had not issued a final ruling on whether the Certificate of Convenience and Necessity would be granted to Grain Belt Express.¹⁰

Missouri citizens and landowners developed a “Block Grain Belt Express – Missouri: ‘No Eminent Domain for Private Gain’” initiative that has generated significant support in opposition of Grain Belt Express Clean Line.¹¹ Hundreds of landowners showed up for the town hall meetings in communities across the state.¹² Representative Jim Hansen introduced House Bill 1027 to Missouri’s General Assembly in late February 2015, calling to

⁷ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104 (Grain Belt Express Application Mar. 26, 2014), https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/. (“The connection between Grain Belt Express and National Grid plc goes as follows: “Grain Belt Express is a wholly owned subsidiary of Grain Belt Express Holding LLC, a Delaware limited liability company, which is a wholly owned subsidiary of Clean Line Energy Partners LLC (“Clean Line”), a Delaware limited liability company. The primary owners of Clean Line are GridAmerica Holdings, Inc. (“GridAmerica”) and Clean Line Investor Corp., a subsidiary of ZAM Ventures, LP (“ZAM Ventures”). GridAmerica is a subsidiary of National Grid USA, which is a subsidiary of National Grid plc. National Grid plc and its affiliates are one of the largest investor-owned utility companies in the world”). *Id.*

⁸ *Id.*

⁹ *Grain Belt Express Clean Line: Regulatory Approvals, supra* note 3.

¹⁰ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104, https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

¹¹ “*No Eminent Domain for Private Gain*,” BLOCK GRAIN BELT EXPRESS – MISSOURI, <http://blockgbemo.com/index.php> (last visited Apr. 25, 2015).

¹² Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104, https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

prevent companies, such as Grain Belt Express, from having the power to use eminent domain.¹³ Websites, signs, blogs, and other printed and online articles opposing Grain Belt Express are sprinkled throughout the state.¹⁴ Among many reasons, opposition to the Grain Belt Express is primarily centered around private landowners not wanting their land taken through eminent domain by a for-profit company.¹⁵ However, not all Missouri landowners and citizens are opposed to Grain Belt Express. Supporters cite increased county revenues, more jobs, and cleaner, renewable energy as the primary reasons to allow this project in Missouri.¹⁶

As any Missourian knows, landowners will not allow their land to be taken without a fight. The landowners still have at least two prayers for relief if Missouri's Public Service Commission grants Grain Belt Express the Certificate of Convenience and Necessity: H.B. 1027, and a lawsuit claiming this would not be a proper use of eminent domain. This article (1) provides the legal background on eminent domain and the takings clause of state and federal constitutions, and (2) the administrative and regulatory procedures involved in this dispute. The next section provides a thorough background of Grain Belt Express's proposal as a whole and specifically what is proposed for Missouri, including the proffered advantages, disadvantages and possible alternatives. Finally, this article outlines the eminent domain argument for and against Grain Belt Express in Missouri if the Public Service Commission does grant its application allowing it to be recognized as a public utility.*

¹³ H.B. 1027, 98th Gen. Assembly, 1st Reg. Sess. (Mo. 2015).

¹⁴ See generally, "No Eminent Domain for Private Gain," BLOCK GRAIN BELT EXPRESS – MISSOURI, <http://blockgbemo.com/index.php> (last visited Apr. 25, 2015); Keryn Newman, *Trust Grain Belt Express?*, STOPPATH WV, <http://stoppathwv.com/1/post/2015/04/trust-grain-belt-express.html> (Apr. 24, 2015); *Clean Line Supplies Information to PSC at Final Hour*, THE CALDWELL COUNTY NEWS, http://www.mycaldwellcounty.com/opinion/article_5a876f60-e857-11e4-805b-b3ccc7a25bb8.html (Apr. 21, 2015).

¹⁵ "No Eminent Domain for Private Gain," BLOCK GRAIN BELT EXPRESS – MISSOURI, <http://blockgbemo.com/about.php> (last visited Apr. 25, 2015).

¹⁶ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104, https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

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II. LEGAL BACKGROUND

A. *Constitutional and Statutory Law*

The Fifth Amendment to the United States Constitution hosts the Takings Clause which states: “. . . nor shall private property be taken for public use, without just compensation.”¹⁷ In *Kelo v. City of New London*, the Supreme Court of the United States identified three categories that satisfy the element of “public use.”¹⁸ The first is when a state takes private property for public ownership, “such as for a road, a hospital, or a military base.”¹⁹ The second is when a state takes private property and gives it to private parties or common carriers for public use, “such as with a railroad, a public utility, or a stadium.”²⁰ The third, and rarely allowed, way is when private property is taken and given to private parties to serve a public purpose even if it is privately used.²¹ The Fourteenth Amendment incorporates the Takings Clause of the Fifth Amendment to the States.²²

Missouri’s Constitution addresses the taking of private property for public use in Article 1, Sections 26, 27, and 28.²³ Section 26 addresses just compensation when private property is taken by requiring a “jury or board of commissioners” to determine the compensation amount and by preventing any seizure of property until such amount is paid to the owner.²⁴

Chapter 523 of the Revised Statutes of Missouri addresses condemnation proceedings.²⁵

¹⁷ U.S. CONST. amend. V.

¹⁸ *Kelo v. City of New London, Conn.*, 545 U.S. 469, 497 (2005) (5-4 decision).

¹⁹ *Id.*

²⁰ *Id.* at 498.

²¹ *Id.*

²² U.S. CONST. amend. V; U.S. CONST. amend. XIV.

²³ MO. CONST. art. I, §§ 26-8.

²⁴ MO. CONST. art. I, § 26.

²⁵ Specifically, RSMo. § 523.262 vests the power of eminent domain in the following manner:

1. Except as set forth in subsection 2 of this section, the power of eminent domain shall only be vested in governmental bodies or agencies whose governing body is elected or whose governing body is appointed by elected officials or in an urban redevelopment corporation operating pursuant to a redevelopment agreement with the municipality for a particular redevelopment area, which agreement was executed prior to or on December 31, 2006.

If passed, proposed Missouri House Bill 1027 would add the following language to RSMo. § 523.262(4):

Notwithstanding any other provision of law to the contrary, the power of eminent domain shall not be exercised for any electric transmission line project if any of the following apply:

- (1) Such project is proposed and built outside a regulated regional transmission planning process;
- (2) Such project is not eligible for regional cost allocation under a transmission tariff of a regional transmission operator or independent system operator; and
- (3) Such project is constructed entirely with private funds and users of the line pay for the transmission line.

2. A private utility company, public utility, rural electric cooperative, municipally owned utility, pipeline, railroad or common carrier shall have the power of eminent domain as may be granted pursuant to the provisions of other sections of the revised statutes of Missouri. For the purposes of this section, the term “common carrier” shall not include motor carriers, contract carriers, or express companies. Where a condemnation by such an entity results in a displaced person, as defined in section 523.200, the provisions of subsections 3 and 6 to 10 of section 523.205 shall apply unless the condemning entity is subject to the relocation assistance provisions of the federal Uniform Relocation Assistance Act.

3. Any entity with the power of eminent domain and pursuing the acquisition of property for the purpose of constructing a power generation facility after December 31, 2006, after providing notice in a newspaper of general circulation in the county where the facility is to be constructed, shall conduct a public meeting disclosing the purpose of the proposed facility prior to making any offer to purchase property in pursuit thereof or, alternatively, shall provide the property owner with notification of the identity of the condemning authority and the proposed purpose for which the condemned property shall be used at the time of making the initial offer.

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This subsection shall not apply to any rural electric cooperative or municipally owned utility.²⁶

This bill would end Grain Belt Express's project before it begins, because it would not allow private out-of-state companies to exercise eminent domain.²⁷ Grain Belt Express relayed its confidence that the bill would not pass because the legislature is unlikely to single out one company.²⁸ Further, Missouri's statute 523.271 specifically states eminent domain is not proper if acquired for "economic development" purposes.²⁹

B. Case Law

Kelo v. City of New London is the leading authority on when a private company can take private land for public use.³⁰ In *Kelo*, the City of New London created a development project that would "revitalize an economically distressed city" by creating jobs and increasing tax revenues.³¹ The development agent acquired most of the necessary property by negotiating with willing sellers, but a few property owners refused to sell.³² The City of New London decided it could acquire the remainder of the land through eminent domain, and the holdouts challenged the constitutionality of this decision by stating the "takings were not for public use."³³ The Supreme

²⁶ H.B. 1027, 98th Gen. Assembly, 1st Reg. Sess. (Mo. 2015); MO. REV. STAT. § 523.262 (2000).

²⁷ Trevor McDonald, *House Bill 1027 Sets Sights on Eminent Domain and Out-of-State Utilities*, HANNIBAL COURIER-POST (Apr. 15, 2015), <http://www.hannibal.net/article/20150415/NEWS/150419244/-1/lifestyle>.

²⁸ *Id.*

²⁹ MO. REV. STAT. § 523.271 (2000). "1. No condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes. 2. For the purposes of this section, "economic development" shall mean a use of a specific piece of property or properties which would provide an increase in the tax base, tax revenues, employment, and general economic health, and does not include the elimination of blighted, substandard, or unsanitary conditions, or conditions rendering the property or its surrounding area a conservation area as defined in section 99.805." *Id.* (emphasis added).

³⁰ 545 U.S. 469 (2005) (5-4 decision).

³¹ *Id.* at 472.

³² *Id.*

³³ *Id.* at 475.

Court of the United States granted certiorari to answer the question of whether a taking for “economic development satisfies the ‘public use’ requirement of the Fifth Amendment.”³⁴

In a 5-4 decision written by Justice Stevens, the Court held that a taking for economic development qualifies as a public use, and the town was allowed to proceed under eminent domain.³⁵ The Court explicitly noted that states may impose stricter requirements as to what constitutes a public use, beyond the Fifth Amendment requirements.³⁶ The dissent, written by Justice O’Connor, cautioned that the majority opinion effectively removed the words “for public use” from the Fifth Amendment, and that “all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded – i.e., given to an owner who will use in it a way that the legislature deems more beneficial to the public – in the process.”³⁷

In response to *Kelo*, Missouri’s legislators passed House Bill 1944 with the intention of strengthening landowners’ rights against eminent domain proceedings.³⁸ Thus, *Kelo* is superseded by statute in Missouri due to the 2006 legislative amendments to chapter 523.³⁹ After the bill passed, Governor Matt Blunt stated, “This week I signed legislation to protect homeowners and property rights in our state. House Bill 1944 rejects the findings of the U. S. Supreme Court in *Kelo v. New London* by prohibiting the use of eminent domain solely to increase tax revenue for government.”⁴⁰

³⁴ *Id.* at 477.

³⁵ *Id.* at 484.

³⁶ *Id.* at 489-90.

³⁷ *Id.*

³⁸ *Planned Indus. Expansion Auth. of Kan. City v. Ivanhoe Neighborhood Council*, 316 S.W.3d 418, 426 (Mo. Ct. App. W.D. 2010); H.B. 1944, 93rd Gen. Assembly, 2nd Reg. Sess. (Mo. 2006); Dale A. Whitman, *Eminent Domain Reform In Missouri: A Legislative Memoir*, 71 MO. L. REV. 721, 723 (2006).

³⁹ *Planned Indus. Expansion Auth. of Kan. City v. Ivanhoe Neighborhood Council*, 316 S.W.3d 418, 426 (Mo. Ct. App. W.D. 2010)

⁴⁰ Matthew Blunt, MO. GOV. MESS. (July 14, 2006).

C. Administrative and Regulatory Procedures

An electric company cannot begin construction in the State of Missouri until the Public Service Commission determines the construction is “necessary or convenient for the public service.”⁴¹ Discretion to grant or deny a Certificate of Convenience and Necessity is given to the Public Service Commission by RSMo. § 393.170.⁴²

The application for a Certificate of Convenience and Necessity must include a vast amount of information, including a description of the company, proof of authorization to do business in Missouri, sworn affidavits, and detailed descriptions of the proposed construction.⁴³ Hearings are also required before the Public Service Commission issues an approval.⁴⁴ Missouri’s Public Service Commission has five criteria that it uses to determine whether to grant a Certificate of Convenience and Necessity to a corporation: “(1) There must be a need for the service; (2) The applicant must be qualified to provide the proposed service; (3) The applicant must have the financial ability to provide the service; (4) The applicant's proposal must be economically feasible; and (5) The service must promote the public interest.”⁴⁵ These factors are applied by the Public Service Commission in every case regarding an application for a Certificate of Convenience and Necessity.⁴⁶ If Grain Belt Express is granted a Certificate of Convenience and Necessity, it would be recognized as a public utility in Missouri, and could use eminent domain to take land from private citizens who are unwilling to sell.

⁴¹ MO. REV. STAT. § 393.170 (2000).

⁴² MO. REV. STAT. § 393.170(3) (2000). “3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary.” *Id.*

⁴³ MO. CODE REGS. ANN. tit. 4 § 240-3.105 (2015); MO. CODE REGS. ANN. tit. 4 § 240-2.060 (2015).

⁴⁴ MO. REV. STAT. § 393.170 (2000). The hearings are set by the Commission and are recorded so that a complete transcript can be added to the record. MO. CODE REGS. ANN. tit. 4 § 240-2.110 (2015).

⁴⁵ Entergy Ark., Inc., EA-2012-0321, 2012 WL 2992478 (Mo.P.S.C. July 11, 2012).

⁴⁶ Missouri-American Water Co., SA-2015-0150, 2015 WL 1799979 (Mo.P.S.C. Apr. 14, 2015).

III. GRAIN BELT EXPRESS PROPOSAL

A. *Grain Belt Express's Perspective*

Grain Belt Express wants to construct “approximately 206 miles of high voltage, direct current (“HVDC”) transmission line that will traverse [Missouri] from Kansas into Illinois and Indiana” and a converter station in Ralls County, Missouri.⁴⁷ The entire project from Kansas to Indiana is estimated to be approximately 750 miles in length, with 370 miles of line in Kansas, 206 miles in Missouri, 200 miles in Illinois, and 5 miles in Indiana.⁴⁸ The purpose of the HVDC transmission line is to bring cheaper, wind-generated, renewable energy from the plains in Kansas to other regions.⁴⁹ Grain Belt Express will likely use steel direct current transmission structures, which are approximately 110 to 150 feet tall, six to 46 feet wide at the base (the narrowest part), contain about 35,000 to 40,000 pounds of steel, and have four to six structures per mile.⁵⁰ The final HVDC right-of-way easement is estimated at approximately 150 to 200 feet.⁵¹ The total estimated cost of the transmission line is “approximately \$2.2 billion, with \$500 million of this estimate attributable to the portion of the Project to be located in Missouri.”⁵²

To procure the easements from landowners, Grain Belt Express offers a three-part solution.⁵³ First, Grain Belt Express will “offer an easement payment equal to 100 percent of the fair market fee value of the land within

⁴⁷ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104 (Grain Belt Express Application Mar. 26, 2014), https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Grain Belt Express Clean Line: Project Description*, CLEAN LINE ENERGY PARTNERS, http://www.grainbeltexpresscleanline.com/site/page/project_description (last visited Apr. 25, 2015).

⁵¹ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104 (Grain Belt Express Application Mar. 26, 2014), https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

⁵² *Id.*

⁵³ *Id.*

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the easement area.”⁵⁴ Then, it will “offer either an annual or one-time payment for each transmission line structure located on a landowner’s property.”⁵⁵ Finally, Grain Belt Express will “offer compensation for certain damages that are directly attributable to the construction or maintenance of the Project.”⁵⁶

Grain Belt Express’s proposed route for the transmission line crosses 525 individual landowners’ properties across the State of Missouri.⁵⁷ The right-of-ways will still be available for use to the landowners for agricultural purposes as long as certain rules are followed.⁵⁸ No structures are allowed in any capacity on the right-of-ways.⁵⁹ Agriculture or crops must stay under 10 feet in height and trees or brush may be removed as necessary.⁶⁰

Grain Belt Express proposes many benefits from allowing this project.⁶¹ One is that the project will provide enough renewable energy for 1.6 million homes per year.⁶² Another is that it “will create thousands of construction jobs and hundreds of permanent jobs.”⁶³ In regards to Missouri specifically, Grain Belt Express estimates the project will create approximately 1,000 construction jobs, and up to 70 permanent jobs once construction is complete.⁶⁴ Another benefit is that counties with transmission lines will receive increased tax revenue that can be used to benefit schools or

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104 (Grain Belt Express Response Apr. 13, 2015), https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

⁵⁸ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104 (Grain Belt Express Application Mar. 26, 2014), https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Grain Belt Express Clean Line: Project Description*, CLEAN LINE ENERGY PARTNERS, http://www.grainbeltexpresscleanline.com/site/page/project_description (last visited Apr. 25, 2015).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104 (Grain Belt Express Application Mar. 26, 2014), https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

other local needs.⁶⁵ Finally, the project purportedly will reduce air pollution and water withdrawal from lakes.⁶⁶

Grain Belt Express states in its application for a Certificate of Convenience and Necessity that it satisfies the Public Service Commission's five required criteria in addition to the other statutory and regulatory requirements.⁶⁷ The first criterion is a need for the service.⁶⁸ Grain Belt Express states this requirement is met because the transmission line will allow Missouri and other states to fulfill their respective renewable portfolio standard requirements by generating low-cost renewable wind energy.⁶⁹ The second criterion is public interest.⁷⁰ Grain Belt express states this element is met because the transmission line will generate jobs and tax revenue for Missourians, and will ultimately reduce electricity prices in the state.⁷¹ The third criterion is economic feasibility.⁷² Grain Belt Express argues there is a high demand for renewable energy and this transmission line is the "most cost-effective and efficient way to move large amounts of renewable energy over a long distance."⁷³ The fourth criterion is financial capability to provide

⁶⁵ *Grain Belt Express Clean Line: Project Description*, CLEAN LINE ENERGY PARTNERS, http://www.grainbeltexpresscleanline.com/site/page/project_description (last visited Apr. 25, 2015).

⁶⁶ *Id.*

⁶⁷ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104 (Grain Belt Express Application Mar. 26, 2014), https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/; Missouri-American Water Co., SA-2015-0150, 2015 WL 1799979 (Mo.P.S.C. Apr. 14, 2015); MO. CODE REGS. ANN. tit. 4 § 240-2.110 (2015); MO. ANN. STAT. § 393.170 (2000); MO. CODE REGS. ANN. tit. 4 § 240-3.105 (2015); MO. CODE REGS. ANN. tit. 4 § 240-2.060 (2015); MO. ANN. STAT. § 393.170(3) (2000).

⁶⁸ Missouri-American Water Co., SA-2015-0150, 2015 WL 1799979 (Mo.P.S.C. Apr. 14, 2015).

⁶⁹ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104 (Grain Belt Express Application Mar. 26, 2014), https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

⁷⁰ Missouri-American Water Co., SA-2015-0150, 2015 WL 1799979 (Mo.P.S.C. Apr. 14, 2015).

⁷¹ Grain Belt Express Clean Line, *supra* note 67.

⁷² Missouri-American Water Co. *supra* note 68.

⁷³ Grain Belt Express Clean Line, *supra* note 67.

the service.⁷⁴ Grain Belt Express states that investors are funding the current development portion of the project, and later the transmission line will operate on revenue from purchasers of the renewable energy.⁷⁵ The fifth, and final, criterion is qualification to provide the service.⁷⁶ Grain Belt Express assures the Commission that its employees have longstanding experience in this area and that it is fully backed by the most experienced and educated affiliates in the world.⁷⁷

Grain Belt Express is not the only wind-generated, transmission line project that Clean Line Energy is trying to develop.⁷⁸ Centennial West Clean Line is in the very beginning stages of gaining approvals and is proposed to go from New Mexico to California in approximately five to seven years, if approved.⁷⁹ Plains & Eastern Clean Line is proposed to run from Oklahoma to Tennessee.⁸⁰ It is still awaiting all of the necessary approvals, but construction is projected to begin between 2016 and 2018.⁸¹ The Rock Island Clean Line is proposed to go through Illinois and/or Iowa and hopes to begin construction in roughly five to seven years.⁸² The Western Spirit Clean Line does not have a proposed route yet, but plans to at least go across New Mexico.⁸³

B. Missouri Public Service Commission Staff's Perspective

One branch of the Missouri Public Service Commission is the Public Service Commission Staff ("PSC Staff").⁸⁴ The PSC Staff "participate as a

⁷⁴ Missouri-American Water Co. *supra* note 68.

⁷⁵ Grain Belt Express Clean Line, *supra* note 67.

⁷⁶ Missouri-American Water Co. *supra* note 74.

⁷⁷ Grain Belt Express Clean Line, *supra* note 73.

⁷⁸ Projects Overview, CLEAN LINE ENERGY PARTNERS, <http://www.cleanlineenergy.com/projects> (last visited Apr. 24, 2015).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Plains & Eastern Clean Line, CLEAN LINE ENERGY PARTNERS, <http://www.plainsandeasterncleanline.com/site/page/schedule> (last visited Feb. 14, 2016).

⁸² Rock Island Clean Line, CLEAN LINE ENERGY PARTNERS, <http://www.rockislandcleanline.com/site/page/project-description> (last visited Feb. 14, 2016).

⁸³ Western Spirit Clean Line, CLEAN LINE ENERGY PARTNERS, <http://www.westernspiritleanline.com/site/page/project-description> (last visited Feb. 14, 2016).

⁸⁴ *Information Guide*, MO. PUB. SERV. COMM'N (Sept. 2013),

party in all cases before the Commission” and conduct thorough investigations and research before making recommendations to the Commission.⁸⁵ The Commission reviews the recommendations and filings of the PSC Staff before reaching any decision.⁸⁶ The following information comes from the PSC Staff’s recommendation to the Commission of their Proposed Findings of Fact and Conclusions of Law in regards to Grain Belt Express’s application for Certificate of Convenience and Necessity in Missouri.⁸⁷

The PSC Staff’s recommendation states generally that Missouri citizens could potentially purchase some of the wind-generated electricity from retail providers for their own use.⁸⁸ The proposed conclusion evaluates whether or not Grain Belt Express’s project satisfies the five criteria necessary to be granted the Certificate of Convenience and Necessity.⁸⁹ For criterion one, PSC Staff found “that Grain Belt Express’ transmission line project is *not needed* in Missouri.”⁹⁰ PSC Staff found the second criterion, qualification, satisfied based on the experience and education of Grain Belt Express’ employees, consultants, and affiliates.⁹¹ The third criterion, financial ability, was also satisfied because of Grain Belt investors’ capital value.⁹² However, Grain Belt Express did not satisfy the fourth criterion, economic feasibility, because it had not shown its generated electricity would be cheaper than other alternatives.⁹³ For the fifth criterion, PSC Staff found that Grain Belt Express had not shown that its project satisfies public interest because there was not a factual basis for the company’s assertions that the

<http://psc.mo.gov/CMSInternetData/ConsumerInformation/PSC%20Information%20Guide.pdf>

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104 (PSC Staff’s Proposed Findings of Fact & Conclusions of Law Dec. 23, 2014), https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

⁸⁸ *Id.* at 4.

⁸⁹ *Id.* at 1.

⁹⁰ *Id.* at 4, (emphasis added).

⁹¹ *Id.*

⁹² *Id.* at 6.

⁹³ *Id.*

project would decrease electricity prices, be the most cost-effective, or reduce a need for fossil-fueled power plants.⁹⁴

The report concluded that “[b]ecause Grain Belt Express has not shown it is needed, economically feasible or promotes the public interest in Missouri,” the Commission should deny Grain Belt Express a Certificate of Convenience and Necessity.⁹⁵

C. Missouri Landowners’ Perspective

Many Missouri landowners are opposed to Grain Belt Express’s transmission line for a number of reasons.⁹⁶ Primarily, landowners do not want the Public Service Commission to recognize Grain Belt Express as a public utility in Missouri because then the company could use eminent domain to take private land from those unwilling to sell.⁹⁷ The landowners feel that their land is worth more than fair market value, and that removing them from land that has been passed down for generations cannot be justly compensated for.⁹⁸ These landowners have already experienced their hardearned land slowly, piece-by-piece, seized in other eminent domain actions for use by pipelines and other transmission lines.⁹⁹ The biggest difference between these other eminent domain actions and the current Grain Belt Express proposal is that Grain Belt Express is a for-profit company.¹⁰⁰ Landowners are not willing to see their land taken to earn money for and benefit a for-profit business.¹⁰¹ Finally, the landowners also have not been given adequate information or assurances that the transmission line will even supply this renewable energy to anyone in Missouri.¹⁰²

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ “No Eminent Domain for Private Gain,” BLOCK GRAIN BELT EXPRESS – MISSOURI, <http://blockgbemo.com/index.php> (last visited Apr. 25, 2015).

⁹⁷ *Id.*

⁹⁸ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104 (Transcript – Volume 5, Local Public Hearing Aug. 20, 2014), https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 16.

¹⁰¹ *Id.* at 120.

¹⁰² *Id.* at 114-15.

The Block Grain Belt Express – Missouri website parallels many of the other arguments against the transmission line given by Missouri landowners in public hearings.¹⁰³ For example, the value of properties with the transmission line, and surrounding properties, is expected to decrease by up to 50 percent.¹⁰⁴ The transmission lines will also make it difficult for farmers to work and could reduce productivity.¹⁰⁵ The transmission line will remove wooded areas in its path, have negative impacts on hunting tourism, and create denigrating scenic landscape views that directly oppose the reason many people purchase land in the country to begin with.¹⁰⁶ Another major opposition to the transmission line is its predicted negative health impacts on those within a certain proximity to the lines.¹⁰⁷ Some landowners even testified at the public hearings that their oncologists advise them to move if the transmission line is constructed because it will be highly detrimental to their health.¹⁰⁸

However, there are some Missouri landowners who support Grain Belt Express's construction of the transmission line.¹⁰⁹ Among the most frequently cited reasons for support are a significant increase in tax revenue that can benefit community schools, more jobs, and the option to participate in renewable energy instead of relying so heavily on fossil fuels.¹¹⁰

D. What Phase Is Grain Belt Express In Now?

At the time of publication of this note, Grain Belt Express still has not received the necessary regulatory approvals from two of the four states.¹¹¹

¹⁰³ “No Eminent Domain for Private Gain,” BLOCK GRAIN BELT EXPRESS – MISSOURI (last visited Apr. 25, 2015), <http://blockgbemo.com/index.php>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104 (Transcript – Volume 5, Local Public Hearing Aug. 20, 2014), https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

¹⁰⁹ *Id.* at 118.

¹¹⁰ *Id.* at 118.

¹¹¹ *Grain Belt Express Clean Line: Regulatory Approvals*, CLEAN LINE ENERGY PARTNERS, http://www.grainbeltexpresscleanline.com/site/page/regulatory_approvals (last visited Apr.

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Grain Belt Express applied for a Certificate of Public Convenience and Necessity in Kansas on March 7, 2011, and received approval on December 7, 2011.¹¹² After applying for a Certificate of Public Convenience and Necessity in Indiana on November 2, 2012, the company received approval on May 23, 2013.¹¹³ As such, Grain Belt Express is currently authorized to operate as a public utility in Kansas and Indiana.¹¹⁴ Grain Belt Express applied for a Certificate of Public Convenience and Necessity in Illinois on April 10, 2015, but hopes to receive approval within two years.¹¹⁵

Missouri's approval has proven to be the most difficult for Grain Belt Express to obtain for a couple of reasons.¹¹⁶ Grain Belt Express applied for a Certificate of Convenience and Necessity in Missouri on March 26, 2014.¹¹⁷ Now, over a year later, Grain Belt Express still has not received approval.¹¹⁸ Kansas approved Grain Belt Express's application in nine months, and Indiana approved it in just over six months.¹¹⁹ Missouri's Public Service Commission has held numerous public hearings in the counties the transmission line is expected to cross, heard direct testimony from multiple organizations, groups, and individuals in opposition of the project, and filtered through piles of exhibits, briefs, and other documents from both sides.¹²⁰ As of April 24, 2015, a total of 521 items were filed with Missouri's Public Service Commission in regards to this case.¹²¹

After hearing, reading, and analyzing all of the evidence put before it, Missouri's Public Service Commission issued an order on February 11, 2015 directing the filing of additional information by Grain Belt Express.¹²² Grain

25, 2015).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104, https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

¹²¹ *Id.*

¹²² Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104 (Order Directing Filing of Information Feb. 11, 2015), https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

Belt Express had until April 14, 2015, to respond to the order.¹²³ On April 13, 2015, Grain Belt Express filed its response by supplying the additional information requested by the Public Service Commission.¹²⁴ Now, the Public Service Commission will determine a supplemental procedural schedule, and all parties will have a chance to respond to the new information filed by Grain Belt Express.¹²⁵ Then, Missouri's Public Service Commission is expected to give a final ruling on whether it will accept or deny Grain Belt Express's application for a Certificate of Convenience and Necessity.¹²⁶

Missouri House Bill 1027, if passed, could stop Grain Belt Express in its tracks.¹²⁷ Missouri's General Assembly is expected to vote on this bill before the session ends in May 2015. Further, the Missouri Public Service Commission frequently agrees with the PSC Staff's proposed findings and conclusions, and prior to the filing of additional information, the PSC Staff would deny Grain Belt Express's application.¹²⁸ Now that Grain Belt Express has filed the requested additional information, it will be interesting to see whether PSC Staff's position has changed.

IV. EMINENT DOMAIN ANALYSIS

If Missouri's Public Service Commission allows Grain Belt Express to be recognized as a public utility in Missouri, the next likely step will be a dispute in circuit court debating whether this is a legal action of eminent domain. RSMo. § 523.010 gives public utilities authority to bring a condemnation proceeding in circuit court if they cannot secure an agreement for transfer of the property with the original landowner out of court.¹²⁹ It is

¹²³ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104, https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ H.B. 1027, 98th Gen. Assembly, 1st Reg. Sess. (Mo. 2015).

¹²⁸ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104, (PSC Staff's Proposed Findings of Facts & Conclusions of Law Dec. 23, 2014), https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

¹²⁹ MO. REV. STAT. § 523.010(1) (2000). ("In case land, or other property, is sought to be appropriated by [a public utility] . . . and such corporation and the owners cannot agree upon the proper compensation to be paid . . . such corporation may apply to the circuit court of the

doubtful that every one of the 525 landowners whose land the transmission line is proposed to cross will agree outside of court to sell their land rights to Grain Belt Express.¹³⁰ Therefore, Grain Belt Express will likely bring a condemnation action in Missouri circuit court to exercise the power of eminent domain vested to it by RSMo. § 523.262.¹³¹

Specifically, Grain Belt Express will likely argue that eminent domain is proper in this situation because it is a recognized public utility and the transmission line is for public use. Before Missouri's 2006 legislative changes occurred, Grain Belt Express would have won this case based on the United States Supreme Court's decision in *Kelo* that expanded the power of eminent domain by significantly broadening what constitutes "public use."¹³² However, in 2006, Missouri's legislature took action to supersede *Kelo* with House Bill 1944.¹³³ As a result, Grain Belt Express's claim that the transmission line will benefit the public or be for public use will now be more heavily scrutinized in a Missouri circuit court.

The landowners opposing the condemnation proceeding may rely on RSMo. § 523.271, which specifically denies the use of "eminent domain for solely economic development purposes."¹³⁴ The statute defines economic development as the "use of a specific piece of property or properties which would provide an increase in the tax base, tax revenues, employment, and general economic health . . ."¹³⁵ Most, if not all, of Grain Belt Express's proposed advantages for this project qualify as "economic development" under Missouri's statute. Grain Belt Express will need to come up with other reasons for why this project is for public use if it wants a chance at winning a condemnation proceeding in Missouri.

county of this state where such land or any part thereof lies . . ."). *Id.*

¹³⁰ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104, (Grain Belt Express Response Apr. 13, 2015), https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/.

¹³¹ MO. REV. STAT. § 523.262 (2000).

¹³² *Kelo v. City of New London, Conn.*, 545 U.S. 469, 480-83 (2005) (5-4 decision).

¹³³ *Planned Indus. Expansion Auth. of Kan. City v. Ivanhoe Neighborhood Council*, 316 S.W.3d 418, 426 (Mo. Ct. App. W.D. 2010); H.B. 1944, 93rd Gen. Assembly, 2nd Reg. Sess. (Mo. 2006); Dale A. Whitman, *Eminent Domain Reform In Missouri: A Legislative Memoir*, 71 MO. L. REV. 721, 723 (2006).

¹³⁴ MO. REV. STAT. § 523.271 (2000) (emphasis in original).

¹³⁵ *Id.*

V. CONCLUSION

In true Show-Me-State fashion, many landowners in Missouri are putting up a tough fight against Grain Belt Express's transmission line proposal that would span the State of Missouri. Grain Belt Express is currently awaiting a decision from Missouri's Public Service Commission on whether it will be granted a Certificate of Convenience and Necessity that recognizes it as a public utility. If Missouri's Public Service Commission denies Grain Belt Express the certificate, then it will not be allowed to move forward on its transmission line project through the state. If Grain Belt Express's application is granted, and it is recognized as a public utility, the company will negotiate with the 525 landowners in hopes of securing agreements, giving each landowner just compensation for the use of their land.

However, many Missouri landowners will likely refuse to sign an agreement with Grain Belt Express, forcing Grain Belt Express to bring condemnation proceedings in circuit court. Missouri landowners could then fight Grain Belt Express again, arguing that this project is not a proper use of eminent domain under Missouri's statutes. The other hope for Missouri landowners is House Bill 1027, which would end Grain Belt Express's project in Missouri if passed by the General Assembly in May 2015. In conclusion, it is no surprise that a for-profit, out-of-state company has met such resistance from landowners refusing to relinquish land they have worked a lifetime for.

** Editor's Note:* A few outcome determinative actions have occurred since the writing of this article in April 2015. Most significantly, Missouri became the first state to deny Clean Line Energy's request for a Certificate of Convenience and Necessity.¹³⁶ The Grain Belt Express transmission line

¹³⁶ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104 (Report & Order, July 1, 2015) https://www.efis.psc.mo.gov/mpsc/commoncomponents/view_itemno_details.asp?caseno=E A-2014-0207&attach_id=2016000069; see also Editorial Board, Editorial: *Missouri, My Friend, is Blowing Against the Wind*, ST. LOUIS POST-DISPATCH (Nov. 16, 2015),

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hoped to cross Kansas, Missouri, Illinois, and Indiana.¹³⁷ Kansas and Indiana approved Clean Line's applications prior to the writing of this article, and Illinois gave its approval in November of 2015.¹³⁸

In a close 3-2 decision, Missouri's Public Service Commission determined the Grain Belt Express request did not meet three of the five required criteria.¹³⁹ The majority held that Clean Line is qualified to provide the proposed transmission line, and has the financial ability to do so, but that the line is not needed in Missouri, is not in the public interest, and is not economically feasible.¹⁴⁰ The Commission denied Clean Line's application for rehearing, and closed the file in October 2015.¹⁴¹ In response to the denial, Clean Line's website states, "we remain committed to moving the project forward and believe the project is too important to Missouri's energy future to not pursue. Clean Line is currently reviewing options to advance the Grain Belt Express in Missouri."¹⁴² Clean Line may file a new application with Missouri's Public Service Commission.

http://www.stltoday.com/news/opinion/editorial-missouri-my-friend-is-blowing-against-the-wind/article_4b7dfdca-6d19-557c-8938-b4147e9e58d7.html.

¹³⁷ *Grain Belt Express Clean Line: Regulatory Approvals*, CLEAN LINE ENERGY PARTNERS, http://www.grainbeltexpresscleanline.com/site/page/regulatory_approvals (last visited Mar. 14, 2016).

¹³⁸ *Id.*

¹³⁹ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104 (Report & Order, July 1, 2015) https://www.efis.psc.mo.gov/mpsc/commoncomponents/view_itemno_details.asp?caseno=EA-2014-0207&attach_id=2016000069. (In the order, the Commission said, "[i]t is important to note that these factors have been developed and implemented by the Commission itself, not by the legislature or the courts, so the Commission is not bound to strictly follow past decisions where it is reasonable to deviate from those standards."). *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Grain Belt Express Clean Line, Case No. EA-2014-0207, Tracking No. BCOM-2011-0104 (Application for Rehearing of Grain Belt Express Clean Line, LLC, July 29, 2015) (Notice Closing File, Oct. 21, 2015), https://www.efis.psc.mo.gov/mpsc/filing_submission/DocketSheet/docket_sheet.asp?caseno=EA-2014-0207&pagename=.electronicsubmission.asp&order_by=&asc_desc=&hdexhibit=&hdtestimony=&hdtranscript=&hdnotices=&page=1.

¹⁴² *Grain Belt Express Clean Line: Regulatory Approvals*, CLEAN LINE ENERGY PARTNERS, http://www.grainbeltexpresscleanline.com/site/page/regulatory_approvals (last visited Mar. 14, 2016).

The legislation proposed by Missouri House Representative Hansen to block initiatives like the Grain Belt Express failed.¹⁴³ The last action on H.B. 1027 was April 28, 2015, and it is currently not on the House calendar or scheduled for hearing.¹⁴⁴

¹⁴³ *HB 1027*, MO. H.R., <http://www.house.mo.gov/billsummary.aspx?bill=HB1027&year=2015&code=R> (last visited Mar. 14, 2016).

¹⁴⁴ *Id.*