
**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

**Grain Belt Express Clean Line LLC)
)
Application For an Order Granting Grain Belt)
Express Clean Line LLC a Certificate of Public)
Convenience and Necessity Pursuant to Section)
8-406.1 of the Public Utilities Act to Construct,)
Operate and Maintain A High Voltage Electric)
Service Transmission Line And to Conduct a)
Transmission Public Utility Business in)
Connection Therewith and Authorizing Grain)
Belt Express Clean Line Pursuant to)
Sections 8-503 and 8-406.1(i) of the Public)
Utilities Act to Construct the High Voltage)
Electric Transmission Line)**

Docket No. 15-0277

INITIAL BRIEF OF MARY ELLEN ZOTOS

Now comes MARY ELLEN ZOTOS (“MEZ”), by her attorney, PAUL G. NEILAN, and hereby files her Initial Brief in this proceeding pursuant to Section 200.800 of the Rules of Practice of the Illinois Commerce Commission (the “Commission” or “ICC”).

I. Introduction

A. Overview and Summary of Party’s Position

(a) Overview of Project

Grain Belt Express Clean Line LLC (“GBX”) has filed an application (the “Application”) under Section 406.1 of the PUA (as defined below), pursuant to which it proposes to build a \$2,750,000,000, 780-mile, +/- 600 kilovolt (“kV”) high-voltage direct current (“HVDC”) transmission line beginning in west Kansas and terminating a few miles beyond the Illinois border in Indiana (the “Project,” or the “Line”). GBX alleges that the Line will be used to

connect prospective wind farms in west Kansas to load in the PJM Interconnection (“PJM”) and the Midwest Independent System Operator (“MISO”) territories. PJM and MISO are regional transmission organizations (“RTO” or “RTOs”).

According to GBX, the Line will deliver about 3500 megawatts (“MW”) of power into PJM and about 500MW into MISO. Power would be converted to alternating current (“AC”) at those terminals. GBX has proposed a route that extends some 202 miles across Illinois, a substantial part of which traverses agricultural land designated as “prime” farmland by the U.S. Department of Agriculture (“USDA”). MEZ’s property in Montgomery County, Illinois, lies in the Line’s proposed path.

GBX is not a “public utility” within the meaning of Section 3-105 of the Illinois Public Utilities Act, 220 ILCS 5/3-105. (The Illinois Public Utilities Act, 220 ILCS 5/1-101 et seq. is referred to as the “PUA,” and unless otherwise stated the term “Section” refers to the indicated section of the PUA.) GBX has neither facilities to offer transmission service nor transmission service customers. GBX does not claim, nor has it shown, that the Line is needed to ensure grid reliability, operating efficiency or competitive market efficiency in either PJM or MISO. GBX has not submitted the Project to either the PJM or MISO regional transmission planning processes for a determination of whether there is any public need for it. GBX claims that it need not do so because it is a “merchant” transmission owner.

GBX has received expressions of interest by wind farm developers in using the Line if it is built, though none of these developers has made a commitment to build a wind farm in GBX’s target resource area in west Kansas.

GBX is asking the Commission chiefly for two things. It is requesting first that the Commission issue to it a Certificate of Public Convenience and Necessity (a “CPCN”) as a

transmission public utility to construct and operate the Line in Illinois, together with a related DC to AC converter station in Clark County, Illinois, and, second, an order authorizing and directing GBX to construct the Line pursuant to Section 8-503. Though in this Docket GBX does not ask for authority to exercise the power of eminent domain under Section 8-509, the implicit threat to use that power will overshadow all easement rights negotiations between GBX and Illinois landowners.

(b) Summary of MEZ's Position

GBX has failed to show that any public need for the Line exists, and therefore the Line will not promote the public convenience and necessity as required by Section 8-406.1. The closest GBX comes to anything approaching a public need is its claimed benefit of facilitating compliance with the Illinois RPS. However, the record in this case shows incontrovertibly that there is absolutely no need for the Line in order to ensure continued compliance with the Illinois RPS.

Nor has GBX shown that the Line will remedy any reliability, service adequacy or service reliability issues in either PJM or MISO. Neither of those RTOs has asked that the Line be built.

While it may be argued that the Line will “promote” the competitiveness of the Illinois electricity market, the criterion under Section 8-406.1 requires the Commission to weigh any such “promotion” against its effects on all Illinois consumers, including landowners whose properties may be affected by the Project. Because the Line will yield at best a marginal improvement to that market, its costs far outweigh its benefits, and therefore it does not “promote” a more competitive market within the meaning of Section 8-406.1.

With a price tag of \$2,750,000,000 the line does not meet the least cost requirement of Section 8-406.1 because its real objectives can be met without incurrance of so Brobdingnagian an expense.

Contrary to GBX's claims, by reserving its right to allocate Project costs to ratepayers and thus failing to assume all market risks of the Project, GBX resigns all pretense of being a "merchant" transmission owner as that term is defined by FERC. GBX's supposed promise to come back to the Commission before seeking such a cost allocation is completely illusory because this Commission cannot even accept such an undertaking without impermissibly invading FERC's exclusive and plenary jurisdiction over interstate transmission. Absent status as a "merchant" transmission owner, GBX invalidates its own authority to sell transmission capacity at negotiated rates, and the business model on which its entire Application rests collapses.

D. Legal Standards

Wabash, C. & W. Ry. Co. v. Commerce Commission, 309 Ill. 412 (1923) is most instructive on the legal standards applicable in this case, and its facts bear comparison to GBX's Application. Like GBX, private profit was the principal objective of the proposed new railroad in *Wabash*. 309 Ill. at 416. And just as GBX's proposed Line depends on the development of wind farms in western Kansas, the *Wabash* petitioner's short line railroad would not be constructed but for the existence of a coal field (owned by one of the promoters), the mining of which would be made possible by the new railway. 309 Ill. at 414. Other railroads protested issuance of a CPCN for construction of the new railroad, but the Commission ultimately issued one. On appeal, the *Wabash* Court reasoned that the word 'necessity' as used in the term "certificate of public convenience and necessity" is not used in a strict lexicographical sense of 'indispensably requisite' because that would be too restrictive. 309 Ill. at 418. "Necessity" is a relative, rather

than an absolute term, and the *Wabash* Court stated that no definition could be given that would fit all cases. 309 Ill. at 418-19. However, the *Wabash* Court emphasized that the facilities in question must be highly important to the public convenience and desirable for the public welfare, and must be of sufficient importance to warrant their expense. *Id.* There must be an “urgent need” for the utility service proposed, and its importance and desirability to the public must warrant it. 309 Ill. 418-19.

While at first glance *Wabash* appears to weigh in favor of GBX’s Application, a more thorough consideration of the case leads to the opposite conclusion. Though in *Wabash* the Illinois Supreme Court upheld the grant of the CPCN to the petitioning railroad builder, it based its decision chiefly on an express finding that “no constitutional right of the [objecting party] or others was invaded”; with that fact settled, the Court reasoned that the Commission had sufficient evidence before it to reach its decision. 309 Ill. at 419. *Wabash* must be read in the context of the effects of a requested CPCN on constitutional rights.

Unlike the railroad in *Wabash*, GBX’s Line does invade constitutional rights, namely those of MEZ, the other landowner-intervenors in this Docket, and still others whose properties may yet be affected by the Line. GBX wants to cross more than 200 miles of other peoples’ real property in central Illinois, and issuance of the requested CPCN will empower it to achieve that end through either the actual or threatened use eminent domain.

The Commission may issue a CPCN to GBX only if it finds that the proposed service is necessary for the public’s convenience and necessity, and not just for the convenience of the promoters. *New Landing Utility, Inc. v. Illinois Commerce Commission*, 58 Ill.App.3d 868, 374 N.E.2d 6, *opin. supplemented, rehearing den.*, 58 Ill.App.3d 868, 375 N.E.2d 578 (2nd Dist.

1977); *Wabash*, supra, 309 Ill. at 416. Illinois law requires this Commission to specifically find that public convenience and necessity require the proposed service, *Eagle Bus Lines v. Illinois Commerce Commission*, 119 N.E.2d 915, 922, 3 Ill.2d 66, 77 (1954).

GBX needs if not the full and immediate power of eminent domain then at minimum an unobstructed path to it. Without that, any discussions with landowners regarding easement rights are pointless. But the concept of “public” in the term “public need” serves to protect and restrict the exercise of the power of eminent domain by ensuring freedom from unnecessary intrusions on, and condemnation of, private property. *Lakehead Pipeline Co. v. Illinois Commerce Comm.*, 696 N.E.2d 345, 352, 360, 296 Ill.App.3d 942, 952 (3rd Dist.,1998).

The Commission must also advert to the limits of its jurisdiction. As discussed below, it has no jurisdiction over interstate transmission, but the positions GBX advocates would have the Commission embroil itself in matters reserved exclusively to the Federal Energy Regulatory Commission’s (“FERC”) jurisdiction.

IV. Section 8-406.1(f) Criteria for a Certificate

A. Section 8-406.1 (f) – Grain Belt Express’ Promotion of the Public Convenience and Necessity

(1) GBX Has Failed To Show That Any Need For The Line Exists

GBX has failed to show that there exists any public need for their proposed transmission line in Illinois. GBX did not submit its proposed Project to any regional transmission planning process to determine whether any need for it exists (Tr. 219:15-19; 532:21 –534:9; 280:5-14), even though GBX started planning the Line as early as 2010. (Tr. 771:16 –772:6). GBX’s witnesses attempt to divert attention from this by claiming that there is no supra- or inter-regional transmission organization that can address a project like the Line, which extends through more than one RTO, and because as a “merchant” transmission owner they are not

required to do so. (Tr. 219:15-22; Tr. 280:5-15; GBX Exh. 11.0, ll. 1456-1460). These attempts are at best disingenuous, and at worst strikingly misleading. GBX proposes to deliver 3500MW into PJM and 500MW in MISO (GBX Petition, par. 6). On completion of the Line GBX will turn operation of the Line over to an RTO, most likely PJM. (GBX Exh. 11.0, ll. 955-958). GBX could have submitted the Project for review to each of PJM and MISO, separately – unless, of course, GBX did not want to run the risk having either or both RTO determine that the Line was not needed. Furthermore, as discussed below, GBX is not a “merchant” transmission owner, and thus has no exemption from the requirement of FERC Order 1000 to submit the Project to a regional transmission planning process.

GBX thus presents no evidence in this docket that the Line is needed to provide adequate, reliable or efficient service.

To remedy this deficit GBX structures the rest of its testimony as a well-written bluffer’s guide to portraying public need where none exists. For example, GBX witness Mr. Skelly goes on at great length about how the Line will supposedly help Illinois meet its RPS goals, comply with the U.S. EPA’s Clean Power Plan, and enhance grid reliability and wholesale market competition, among a host of other ostensible benefits. (GBX Exhibit 1.0, ll. 117-213). He also emphasizes the Line’s capacity to spark the development of windfarms in West Kansas that would otherwise remain on the drawing board (GBX Exh. 1.0, ll. 146-153).

But GBX’s long list of putative benefits falls well short of a showing of public need for the Line. That a project – any project – holds potential for future benefits does not prove that that project is needed by the public. Taking a few steps back from this Docket reveals that the Application and the bulk of GBX’s testimony amount to nothing more than question-begging on a grand scale. GBX effectively argues that a needed project like the Line will have many, many

benefits, and therefore the Line is needed. This hides the key question of whether the Line is needed behind a cornucopia of anticipated renewable, environmental and economic benefits that will flow from it (e.g., GBX Exhs. 1.0, 4.0 and 5.0). Of course we can all agree that benefits are good; they are, after all, *benefits*. But GBX never shows that the Line *itself* is *needed*. GBX simply assumes as evidence the conclusion it wants to reach. The Commission may issue a CPCN only if it finds that the service is for the public convenience and necessity. *New Landing Utility, Inc. v. ICC*, 58 Ill. App. 3d 868 (2d Dist. 1977). Nothing of the kind has been shown in this case.

(2) The GBX Line Is Not Needed For Compliance With The Illinois RPS
MEZ witness Severson testified that the GBX Line is not needed to comply with the Illinois RPS. (MEZ Exh. 1.0, ll. 437-443). GBX witness Berry does not rebut this, but instead states simply that a REC has to be generated somewhere. (GBX Exh. 11.13, ll. 347-350). At the hearing GBX witness Berry agreed that the Illinois RPS can be satisfied by means of renewable energy credits or alternative compliance payments, and that there is no need to physically deliver the related renewable energy into either PJM or Illinois. (Tr. 374:17 –375:13). MEZ witness Severson’s unrebutted testimony is that even if demand in the Illinois REC market were to increase consistently year after year, the Illinois RPS requirement could still be met with RECs purchased either in Illinois and states adjacent to Illinois, or in other states if those states’ renewable generation resources prove insufficient. (MEZ Exh. 1.0, ll. 367-373). The term “other states” means the other 49 states, including Kansas. Thus, the Illinois RPS may be satisfied by buying RECs generated in GBX’s targeted west Kansas resource area. Illinois can buy RECs from Kansas without a \$2,750,000,000 transmission line running from here to there.

The unrebutted testimony in this docket is that the GBX Line is neither necessary nor relevant to meeting the Illinois RPS requirements. (MEZ Exh. 1.0, ll. 372-373).

B. Section 8-406.1 (f) (1)

1. Necessary to Provide Adequate, Reliable, Efficient Service

(a) There Is No Evidence That The GBX Line Is Needed To Provide Adequate, Reliable Or Efficient Service

If PJM or MISO, or both, had determined that the Line were necessary to relieve congestion on the grid or ensure reliability or adequacy of service, then the marginal improvements to the wholesale electricity market on which GBX's case largely rests might be relevant, though not determinative, of whether the Commission should issue it a CPCN. But GBX never submitted its project to PJM or MISO to determine whether it was needed. GBX has made no showing that the Line is needed for reliability of the PJM grid. There has been no showing that the Line will relieve congestion anywhere in PJM or MISO, nor has there been any showing that without the Line the adequacy of service in PJM either is, or will be placed, at risk.

The needs of west Kansas wind developers and the needs of GBX's promoters do not equate to a public need of Illinois ratepayers. There is no public need for the Line, and under the legal standards discussed in Section I.D above, this Commission may not issue a CPCN to GBX, and consequently authorize it to use the power of eminent domain against multiple landowners in Illinois, on the strength of GBX's argument that the Line may marginally improve competitiveness in the PJM market.

2. Promote the Development of an Effectively Competitive Electricity Market

The un rebutted testimony of MEZ witness Severson shows that the PJM electricity market is already effectively competitive and efficient. (MEZ Exh. 3.0, ll. 143-186). ICC witness Zuraski also agreed that an effectively competitive electricity market already exists in Illinois. (Tr. 1107:19 –1108:15). PJM's own Independent Market Monitoring Unit has certified that the PJM electricity supply market is already effectively competitive. (MEZ Exh. 3.0, ll. 143-179, and footnotes 3, 6, 7 and 8). Even GBX witness McDermott agrees with that assessment. (GBX

Exh. 4.0, l. 52). Neither MEZ witness Severson nor ICC Staff witness Zuraski claimed that the market was perfect. (E.g., MEZ Exh. 3.0, ll. 172-179; ICC Staff Exh. 3.0, ll. 167-182).

In determining whether the Line “promotes the development of an effectively competitive electricity market,” the test of Section 8-406.1(f)(1) is not satisfied simply because the Line may marginally improve the PJM or MISO electricity market. The “promotion” of the development of an effectively competitive market does not take place in a vacuum, despite testimony of GBX’s witnesses to the contrary. (E.g., GBX Exh. 4.0, ll. 325-335). In order to issue a CPCN to GBX and enable it to condemn the property of Illinois landowners under power of eminent domain, there must be a public need. As MEZ witness Severson stated, the proposed GBX project is “[l]ike that old 1970s song about Oz and the Tin Man, [GBX] will give nothing to PJM that it doesn’t already have.” (MEZ Exh. 3.0, ll. 185-186).

Putting aside for the moment the fact that the wholesale electricity market is already effectively competitive, GBX’s witnesses naturally place great emphasis on whether the Line will “promote” such a market. The problem with this approach is that it proves too much. One could imagine a wide variety of measures that would improve the electricity market. As long as they have some positive impact, even a *de minimis* impact, they can all be said to “promote” the development of an effectively competitive electricity market. With that in mind, and recognizing that the term “promote the development of an effectively competitive electricity market that operates efficiently” is not defined in the PUA, the Commission must determine what that term means and how it is to be implemented in the real world.

In addition to its use in Section 8-406.1, the term “promote the development of an effectively competitive electricity market that operates efficiently” appears four additional times in the PUA: Section 20-102(d); Section 16-101A; Section 8-406; and Section 8-503. Other than

in Section 8-503, in every instance in which this term is used in the PUA it is accompanied by another term that modifies “electricity market.” These additional terms are:

“and benefits all Illinois consumers,” Section 20-102(d));

“and is equitable to all consumers,” (Sections 16-101A(d);

“is equitable to all customers,” 8-406.1(f)(1) and 8-406(b).

It is axiomatic that when interpreting statutes courts must ascertain and give effect to the intent of the legislature. *In re Marriage of Takata*, 304 Ill.App.3d 85, 94, 709 N.E.2d 715 (1999). The best indicator of legislative intent is typically the plain and ordinary meaning of the language of the statute. *Takata*, 304 Ill.App.3d at 94, 709 N.E.2d 715. To that end, every part of the statute must be considered together and every word or phrase should be given some reasonable meaning within the context of the statute. *Macaluso v. Macaluso*, 779 N.E.2d 250, 252, 334 Ill.App.3d 1043, 1047 (Ill. App. 3rd Dist. 2002)

The references to effects on all Illinois consumers in the statutory sections listed above show that the “promotion” of an effectively competitive electricity market must be evaluated in light of its effects on those consumers. GBX’s economists are free to label every *de minimis* improvement to a market as a thing that, by definition, “promotes” the development of an effectively competitive market. (GBX Exh. 4.0, ll. 49-51, 56-60, 325-335). This Commission, however, must interpret the term according to Illinois law, in the context of the entire statutory scheme of Article XVI of the PUA, and in a way that gives a reasonable meaning to every term in the statute. Therefore, an action that is proposed to “promote” development of an effectively competitive market must be considered in light of its effects on all Illinois consumers. The

Commission has to weigh one against the other in determining whether the proposed “promotion” of the electricity market benefits and is equitable to all Illinois consumers.

In this case, GBX has presented the Commission with a \$2,750,000,000 transmission project:

- for which neither PJM nor MISO has determined there is a public need as part of their regional transmission planning processes;
- that is not needed to remedy any existing reliability or service adequacy problems in either PJM or MISO;
- that is proposed by GBX, an entity that is not, and does not claim to be, a public utility;
- that is proposed by GBX, an entity that claims to be, but is not, a “merchant” transmission owner;
- whose ameliorative effects on wholesale electricity markets that GBX admits are already effectively competitive will be de minimis at worst and marginal at best;
- which involves a taking of private property under the exercise or threatened exercise of the power of eminent domain to benefit GBX, a private company engaged entirely in the pursuit of private profits (GBX Exh. 4.2, ll. 138-143; Tr. 463:3 –464:9); and
- whose costs may be imposed on Illinois ratepayers if GBX chooses to pursue cost allocation.

The conclusion is inescapable. Even if the Line does “promote the development of an effectively competitive electricity market,” as GBX’s economists allege, it is not equitable and beneficial to all Illinois consumers, and therefore fails to satisfy the requirements of Section 8-406.1(f)(1).

3. Least Cost

(a) The GBX Line Does Not Meet The Least Cost Requirement Generally

The GBX Line will cost \$2,750,000,000. (Tr. 944:17 –946:16; GBX Exh. 11.0, ll. 1870-1872). As a matter of straight common sense, the issue of least cost must be examined in the context of the Line’s purpose because determining whether something is the least cost means to an end requires at least a rudimentary knowledge of what that end is. GBX and, unfortunately, ICC Staff oversimplify this question by assuming that the Line is an end in itself; that is, its purpose is nothing more than that of bringing windpower from Kansas to PJM and MISO.

(Application of GBX, pars. 5, 6 and 7). ICC Staff witness Rashid also testified that if the purpose of the Line is to transmit wind-generated electricity 780 miles, then the Line is the least cost means of transmitting that electricity for 780 miles. (ICC Staff Exh. 1.0, ll. 225-232). Like GBX, ICC Staff witness Rashid defined the purpose of the Line as the Line itself, without any further inquiry as to why it was being built in the first place. ICC Staff Exh. 1.0, ll. 228-231).

As with the question of public need, it is once again important to avoid falling into GBX's subtle but circular logic trap, in which all questions of purpose (and need, for that matter) are answered by reference back to putative benefits. (E.g., GBX Exh. 1.0, ll. 117-213). By this little verbal stratagem, GBX obscures the tough question of *why* it wants to bring windpower from west Kansas to points east, and instead diverts the Commission's attention to the far safer and much easier question of whether direct current provides a less expensive means of transmitting electricity across four states than alternating current. (E.g., GBX Exh. 2.0, ll. 250-288).

But GBX's conclusion that HVDC moves power more cheaply than AC over a distance of 780 miles (GBX Exh. 2.0, ll. 285-288; Tr. 464:19 – 465:5), even though quite correct as a matter of electrical engineering, and even perhaps as one of pure physics, is not a sufficient ground for this Commission to grant the very public power of eminent domain to a very private company pursuing intensely private profits. (GBX Exh. 4.2, ll. 138-143; Tr. 463:3 –464:9).

When the Commission steps outside the circularity of GBX's least cost claim and asks *why* GBX wants to bring Kansas windpower to PJM and MISO, *why* the Commission should allow GBX to involuntarily deprive Illinois residents of their property rights, GBX can adduce no reason that even remotely approaches a legitimate public need. GBX never submitted the proposed Line to either PJM or MISO, and the line is not needed to alleviate congestion, solve a

reliability problem, or remedy any inadequacy of existing service in either PJM or MISO. (Tr. 369:18 – 370:10).

(b) The GBX Line Does Not Meet The Least Cost Requirement For Meeting The Illinois RPS

Subject to a cost-effectiveness requirement, 20 ILCS 3855/1-75(c)(2)(E), the Illinois RPS can be satisfied through the purchase of RECs from Illinois or adjacent states, or from other states if renewable generation resources in the first two categories prove inadequate. 220 ILCS 5/16-115D(a)(4). GBX witness Berry agreed that there is no requirement for physical delivery of electricity to Illinois in the state's RPS. (Tr. 1016:18-23). Even if the volume of RECs required to be purchased increased markedly (MEZ Exh. 1.0, ll. 367-373), spending \$2,750,000,000 to build a 780-mile HVDC transmission line is self-evidently not the least cost means of satisfying the Illinois RPS requirements. ICC Staff's testimony that the Line meets the least cost requirement is irrelevant to this point because its witness completely disavowed making any determination as to least cost based on any need to meet the requirements of the Illinois RPS. (Tr., 372;20 to 380:3).

(c) GBX Is Not A “Merchant” Transmission Company, And Therefore The Line Does Not Meet The Least Cost Requirement Of Section 8-406.1

GBX’s principal argument that it meets the least cost standard is a masterpiece of misdirection. It effects this subterfuge by using two different meanings of the term “merchant transmission owner,” one of which is derived from FERC’s requirements for granting negotiated rate authority to certain transmission utilities, while the other is entirely of GBX’s own manufacture. For purposes of meeting the least cost requirement of Section 8-406, GBX characterizes itself as a FERC-type of “merchant” transmission owner, that is, one that cannot impose any costs on ratepayers. But FERC’s definition of “merchant” transmission owner would become quite inconvenient should the Line lose money, so GBX morphs into a “merchant” transmission owner that reserves the right to allocate the Line’s costs to ratepayers. Like a three-card monte impresario, GBX makes sure that the Commission never quite knows which “merchant” card is in play.

(c)(1) The Business Model GBX Presents to the Commission Does Not Meet FERC’s Definition of a “Merchant” Transmission Owner

FERC’s definition of “merchant” transmission project is set forth clearly and unambiguously in its *Final Policy Statement on Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects*, FERC Dockets A.D. 12-9-000 and A.D. 11-11-000, 142 FERC 61,038 (January 17, 2013) (the “FERC Merchant Transmission Policy Statement”) (also cited in testimony by GBX at GBX Exh. 1.0 ll. 331-333, n. 3). Here, FERC states:

[FERC] first granted negotiated rate authority to a merchant transmission project developer over a decade ago, finding that merchant transmission can play a useful role in expanding competitive generation alternatives for customers. [Citation omitted.] Unlike traditional utilities recovering their costs-of-service from captive and wholesale customers, **investors in merchant transmission projects assume the full market risk of development.**

FERC Merchant Transmission Policy Statement, pg. 2, par. 2 (emphasis added).

GBX repeatedly labels itself a “merchant” transmission company by claiming that it is assuming all of the market risk of the Project, and that Illinois ratepayers will pay nothing for it. (E.g., GBX Exh. 11.0, ll. 55-57; ll. 247-249; 1158-1165 (“Grain Belt Express is a merchant project because it is assuming the market risk of the Project and does not have a process to recover its costs from ratepayers....”); ll. 1476-1484). This claim, which GBX uses to clothe the Project with FERC’s definition of “merchant” transmission owner, is the chief support for its assertion that the Project meets the least cost requirement. GBX witness McDermott testified that because GBX is a “merchant” transmission company, it is a private entity pursuing private profits, and therefore the Project will unquestionably meet the least cost requirement because GBX will seek to maximize its own private profit from the Line. (GBX Exh. 4.2, ll. 138-143; Tr. 463:3 –464:9). In effect, GBX witness McDermott’s position is that a “merchant” transmission company is by definition least cost.¹

What GBX witness McDermott overlooks is that the company’s reservation of the right to allocate costs to ratepayers eviscerates its claim to be a “merchant” transmission owner. Despite claiming over and over that Illinois ratepayers will never pay a dime for the Line because theirs is a “merchant” transmission project, GBX saws that floor out from under itself by holding on to the ability to allocate costs to ratepayers, notwithstanding its so-called promise not to do so without first obtaining the Commission’s approval. (GBX Exh. 11.0, ll. 1487-1510; ll. 1944-1954; GBX Exh. 11.13, ll. 241-248). (Tr. 204:12 –218:24; 1014:20 –1015:12). GBX then

¹ Of course, this argument equates motive with result, and therefore proves too much because then every profit-seeking firm becomes by definition least cost. Were two private, for-profit companies before the Commission competing for a CPCN for the Line, GBX witness McDermott’s logic would undoubtedly impale the Commission on the horns of a least-cost dilemma. Putting these objections aside, however, we’ll assume for our purposes that GBX witness McDermott’s position is correct.

switches gears to its own definition of a “merchant” transmission project, that is, the company is a “merchant” transmission owner only by virtue of earning its revenues through discrete transmission services contracts with shippers, and not because it has assumed the full market risk of the Project. (Tr. 929:21 – 930:6; 1014:20 – 1015:12; 205:14 -23). GBX witness Skelly testified that under GBX’s business model, the company as developer of the line would bear only some, not all, of the risk (Tr. 206:7-12), and that one of the circumstances under which GBX would seek cost allocation to ratepayers is if the Line were losing money (Tr. 216:21 – 217:2). GBX thus disavows assumption of all of the market risks of the Project and reserves its right to allocate the Line’s costs to ratepayers, all of which is the antithesis of the “merchant” transmission business model contemplated by the FERC Merchant Transmission Policy Statement.

Far from assuming all market risk of the Project, GBX retains the upside benefit if the Project makes money, but reserves the right to allocate costs to ratepayers if it loses money. Perhaps a more apt title for the Project would be “Too Big To Fail Express.”

(c)(2) GBX’s Reservation Of Rights To Allocate Costs To Ratepayers Calls Into Question Its Negotiated Ratemaking Authority

Because GBX’s reservation of rights to allocate costs of the Line to ratepayers means that it is not assuming all market risks of the Project, its position calls into question the continued validity of the negotiated ratemaking authority granted to it by FERC. *In re Grain Belt Express Clean Line LLC, Order Conditionally Authorizing Proposal and Granting Waivers*, 147 FERC Par. 61,098 (May 8, 2014) (the “FERC GBX Order”). As FERC stated in that order:

To approve negotiated rates for a transmission project, [FERC] must find that the rates are just and reasonable. To do so, [FERC] must determine that the merchant transmission owner has assumed the full market risk for the cost of constructing its proposed transmission project.

(FERC GBX Order, par. 12). GBX represented to FERC that it met the four-factor test outlined by FERC in *Chinook*, 126 FERC 61,134 (2009). (FERC GBX Order, par. 6). See also, *Grain Belt Express Clean Line LLC, Application for Authorization to Sell Transmission Service Rights at Negotiated Rates, Request for Approval of Capacity Allocation Process, and Request for Waivers*, November 15, 2013, FERC Docket No. ER14-409 (the “Grain Belt FERC Application”).² One of those four factors includes just and reasonable rates, and in determining whether a merchant transmission owner’s negotiated rates are just and reasonable, FERC looks first to whether that owner has assumed the full market risk of the project. *Chinook*, 126 FERC 61,134, at par. 38. In applying for negotiated rate authority, GBX represented to FERC that it “**is assuming all market risk** associated with the development and construction of the Project...” (Grain Belt FERC Application, pg. 12, Sec. A.1; emphasis added). The GBX FERC Order shows that FERC clearly relied on GBX’s representation that it was assuming *all* market risk of the Project in determining whether to grant it negotiated ratemaking authority. The entire record in this docket shows that GBX’s 2013 representation to FERC is flatly untrue now, thus calling into question the continued validity of GBX’s negotiated ratemaking authority under the GBX FERC Order. Without authority to negotiate transmission rates with its shippers, not only is GBX no longer a least cost project under its own witnesses’ theories, but the entire business model on which its Application to this Commission for a CPCN is premised collapses.

² Available at http://elibrary.ferc.gov/idmws/file_list.asp?document_id=14162237 ..

(c)(3) The Commission Lacks Jurisdiction To Accept GBX's Undertaking To Return To It For Approval Before Seeking Allocation Of Costs Of The Line To Ratepayers

GBX tries to salvage its merchant transmission status by promising that it will return to the Commission for approval before seeking to allocate any costs of the Line against Illinois ratepayers:

All of the costs associated with the development, construction and operation of the Grain Belt Express Project will be recovered through charges to Grain Belt Express' transmission capacity customers, i.e., from the shippers of electricity on the Project and the wholesale purchasers of electricity taking delivery from the Project. Grain Belt Express does not intend to seek to recover costs of the Project by regional cost allocation to retail customer load using the cost allocation processes of PJM or MISO. Grain Belt Express proposes that the Commission adopt the same requirement concerning cost allocation that the Commission adopted in its Order granting a certificate of public convenience and necessity to Grain Belt Express' sister company, Rock Island Clean Line LLC ...:

Prior to recovering any Project costs from Illinois retail ratepayers through PJM or MISO regional cost allocation, Grain Belt Express will obtain the permission of the Illinois Commerce Commission in a new proceeding initiated by Grain Belt Express.

GBX Petition, par. 20.

This proposed condition is illusory and meaningless because this Commission lacks jurisdiction to even accept such a promise, much less enforce it should GBX renege. Starting in Kansas and terminating in Indiana, the Line is indisputably a medium of interstate commerce, and it would be an integral part of the wholesale power markets it serves. (E.g., GBX Exh. 1.0, ll. 180-183; ll. 324-326; and ll. 573-575).

The question of whether costs of the Line should be allocated to Illinois ratepayers goes directly to the issue of the rates, terms, conditions and costs of interstate transmission service that would be offered by the Line. Interstate transmission is exclusively a matter of federal jurisdiction, 16 U.S.C.A. Section 824(a) and (b) (2015). FERC's jurisdiction over interstate transmission is exclusive and plenary, *Federal Power Commission v. Southern Cal. Edison Co.*,

376 U.S. 205, 215-216 (1964). The federal government's preemption of the field of regulating both wholesale electricity markets and interstate transmission is not simply a matter of administrative law, but is rather based on the Supremacy Clause of the U.S. Constitution. *Naragansett Electric Co. v. Burke*, 119 R.I. 559, 564 (1977). The federal government has displaced any state jurisdiction and preempted the entire field of interstate transmission and wholesale electricity markets. *Nanantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

Were the Commission to even accept GBX's undertaking on this question, much less open an investigation of such cost allocation at some point in the future, even at GBX's request, it would necessarily entangle itself in an investigation of the rates, terms and conditions of service for interstate transmission of electricity, all matters that lie within FERC's exclusive and plenary jurisdiction. Accordingly, this Commission has no jurisdiction to even accept GBX's undertaking, much less investigate and approve or disapprove any GBX proposal to allocate costs of an interstate transmission line to ratepayers at some point in the future. GBX's representation to the contrary, implicit in its offer of this so-called promise to the Commission, could not be more empty or more false.

**(c)(4) Because, For The Reasons Discussed Above, GBX Is Not A
"Merchant" Transmission Project, FERC Order 1000 Requires It To
Participate In The Regional Transmission Planning Process.**

FERC Order 1000, requires each transmission provider (other than merchant transmission owners) to participate in the relevant regional transmission planning process that complies with FERC Order 890. Order No. 1000, FERC 31,323 at pars. 146, 151 and n. 151. By its own admission on the record in this Docket, GBX has not done this. Therefore, this Commission

should not consider GBX's Application until that regional transmission planning process for the Line has been completed.

V.F Landowner Concerns about Impacts of Construction on their Properties

Much of the land that would be traversed by the proposed Line is prime farmland. As MEZ witness Zotos testified, only a very limited amount of land in the world is recognized by the USDA as prime farmland, meaning that the land not only has the best combination of physical and chemical characteristics for producing food and other crops, but is also available for these uses. (MEZ Exh. 2.0, ll. 22-28). The Commission should note that USDA encourages responsible levels of government to facilitate the wise use of this scarce resource, a consideration that should be included in the Commission's evaluation of GBX's Application.

Although the Agricultural Impact Mitigation Agreement ("AIMA") defines "prime farmland," the AIMA by its terms treats such land no differently than it would a brownfield site. (AIMA, Definitions). In order to install the Line, GBX would take a 175-foot wide swath of prime farmland out of production. (MEZ Exh. 2.0, ll. 35-37). The construction process will cause compaction to the land, which means that the soil will be compressed so that the composition of dirt, nutrients and gases in the soil are adversely affected, and the soil itself will become less able to allow water to pass through it. (MEZ Exh. 2.0, ll. 38-44). This decreased permeability to water can lead to waterlogging of the soil. Any damage to drain tiles caused by construction vehicles across the land only exacerbates that problem. (MEZ, Exh. 2.0, ll. 45-48).

Even though GBX claims that once the Line is built farming operations could be conducted under the line and around the structures, GBX's proposal completely disregards the additional time, work and expense that would be necessary to farm the affected land. Pylons (and any related guy-wires) would have to be avoided. Farm-related machinery is very large and does

not simply maneuver around obstructions such as pylons and guy-wires. Some areas may have to be cultivated manually, which involves a large amount of labor time and expense and is not consistent with how modern farming operations are conducted. GBX's proposed compensation scheme to landowners does not take this into account. (MEZ Exh. 2.0, ll. 49-70).

For these reasons, even if the Commission finds that the Line will "promote the development of an effectively competitive electricity market" (see Section IV.B.2 of this Initial Brief, above), it does not do so on a basis that is equitable and beneficial to all Illinois consumers, including affected landowners in particular.

IX Conclusion

WHEREFORE, MARY ELLEN ZOTOS respectfully requests that the Commission enter an order:

- 1) Denying the Application of GBX for a CPCN under Section 8-406.1 of the PUA;
- 2) Denying the request of GBX for an order to construct the Line pursuant to Section 8-503 of the PUA; and
- 3) For such other relief as the Commission deems just and proper.

Respectfully submitted,

MARY ELLEN ZOTOS

By /s/ **Paul G. Neilan** _____

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