
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

BRIEF ON EXCEPTIONS
OF
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Now comes MARY ELLEN ZOTOS, by its attorney LAW OFFICES OF PAUL G. NEILAN, P.C., and hereby files its Brief on Exceptions in this proceeding pursuant to Section 200.830 of the Rules of Practice of the Illinois Commerce Commission (the “Commission” or “ICC”).

INTRODUCTION

Mary Ellen Zotos (“MEZ”) is the owner of certain property of approximately 160 acres (the “Property”) located at 6172 Brown Trail, near the town of Harvel, in Montgomery County, Illinois. The Property consists of prime farmland, as defined by the

United States Department of Agriculture. The property has been in MEZ's family since the 1930's, and her family has been farming in this area for generations, even before the Civil War (1861-1865).

Grain Belt Express Clean Line LLC ("GBX") has petitioned the Illinois Commerce Commission (the "ICC") under Section 8-406.1 of the Illinois Public Utilities Act (the "Act"), 220 ILCS 5/8-406.1, for a certificate of public convenience and necessity ("CPCN") for an electric transmission line (the "Line") that would run from west Kansas to Indiana. The Line will go through Illinois, and as currently planned the line would traverse the Property.

On October 15, 2015, the Administrative Law Judges issued a proposed order ("the Proposed Order") in this case. The Proposed Order is the subject of this Brief on Exceptions, which includes certain specific language changes MEZ is requesting in the Commission's Final Order in this case.

MEZ supports the Proposed Order's finding that GBX has not demonstrated that the Project is needed to provide adequate, reliable, and efficient service to customers within the meaning of Section 8-406.1 of the Act. (Proposed Order, pg. 123). However, MEZ takes strong exception to the Proposed Order's granting of a CPCN notwithstanding this express finding. MEZ also takes exception to the Proposed Order's findings that:

- (1) The Line will promote the public convenience and necessity (Proposed Order, pg. 122);
- (2) The Project will promote the development of an effectively competitive electricity market that operates efficiently, is equitable to all customers, and is the least cost means of satisfying those objectives (Proposed Order, pg. 124);
- (3) GBX bears all of the risk of the Line (Proposed Order, pg. 125), and the related Condition for Cost Allocation stated in Appendix B (Appendix B, pg. 1); and the commission's acceptance of GBX's cost allocation provision (Proposed Order, pg. 154); and

(4) Eminent domain is not at issue in this case (Proposed Order, pg. 208).

EXCEPTION 1: The Proposed Order is in Error in Granting a CPCN to GBX Notwithstanding an Express Finding that the Project is Not Needed to Provide Adequate, Reliable, and Efficient Service to Customers.

In order to obtain a CPCN under Section 8-406.1, GBX must meet the requirements of that section. Section 8-406.1(f)(1) provides as follows:

(f) The Commission shall, after notice and hearing, grant a certificate of public convenience and necessity filed in accordance with the requirements of this Section **if**, based upon the application filed with the Commission and the evidentiary record, **it finds the Project will promote the public convenience and necessity and that all of the following criteria are satisfied:**

(1) **That the Project is necessary to provide adequate, reliable, and efficient service to the public utility's customers** and is the least-cost means of satisfying the service needs of the public utility's customers or that the Project will promote the development of an effectively competitive electricity market that operates efficiently, is equitable to all customers, and is the least cost means of satisfying those objectives.

220 ILCS 5/8-406.1(f)(1) (emphasis added). The Proposed Order states as follows:

The Commission finds that GBX has **not** demonstrated that the Project is needed to provide adequate, reliable, and efficient service to customers within the meaning of Section 8-406.1

Proposed Order, pg. 123 (emphasis added).

One would be hard-pressed to find a more self-evident violation of the Act than the Commission's granting of a CPCN to GBX under Section 8-406.1 in the face of its express finding that GBX has not satisfied all of that section's requirements. MEZ's suggested changes to the language of the second full paragraph on page 124 of the Proposed Order is as follows:

The Commission finds that GBX has not demonstrated that the Project is needed to provide adequate, reliable, and efficient service to customers within the meaning of Section 8-406.1. Accordingly, GBX has failed to meet all of the requirements of Section 8-406.1(f)(1), and therefore under the clear and express terms of that section, the Commission may not grant a CPCN to GBX.

Exception 2: The Proposed Order Errs in Finding That the Line Will Promote The Public Convenience And Necessity.

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 or necessity 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, C. & W. Ry. Co. v. Commerce Commission*, 309 Ill. 412, 416 (1923).

The Line would promote the convenience and perhaps the necessity of GBX and its prospective transmission contract counter-parties who might develop windfarms in west Kansas, all of whom comprise precisely the class of promoters whose interests the Commission must look beyond in deciding whether a project promotes the *public's* convenience and necessity.

In place of any showing of public necessity and convenience, GBX provides a fourteen-car pile-up of ostensible benefits. (GBX Exhibit 1.0, ll. 117-213). In particular, GBX 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.

The un rebutted testimony of MEZ witness Severson shows that the 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 testified 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 all of the other states, including Kansas. Thus, the Illinois RPS may be satisfied by buying RECs generated in GBX’s targeted west Kansas resource area. Those west Kansas-generated RECs can be purchased without need of a \$2,750,000,000 transmission line running across four states.

Accordingly, MEZ suggests the following changes to the first and second full paragraphs on page 122 of the Proposed Order:

Although, the parties are in basic agreement as to the requirements, there is substantial disagreement as to the how they apply to the facts before us in this matter. The proponents of the Project emphasize Commission discretion and its authority to consider a broad range of factors. They assert that the Project would provide broad benefits to Illinois and to MISO and PJM. The proponents stress the environmental, competitive, economic benefits, and downward pressure on the price of electricity and RECs in the region. The parties opposed to the Project argue in favor of a narrower definition of necessity, focusing on the Illinois costs and the benefits that would accrue to the Illinois electricity market. They assert that the Illinois electricity market is already

competitive and the Project will impose considerable costs. They also assert that the Commission must consider the equitability of the Project to all Illinois ratepayers under the express language of Section 8-406.1(f). They focus on the uncertainty of the Project, possible negative impacts on Illinois wind and nuclear power producers, and the burdens it will impose on landowners.

The Commission finds that in determining whether there has been a demonstration of “necessity” in this context, as Staff suggests, consideration should be given as to whether the benefits of the Project are ‘needful and useful to the public;’ whether the benefits outweigh the costs; and whether the Project would prevent the attainment of a greater net benefit through an alternative project or some combination of alternative projects. The evidentiary record reflects that while the Project will~~would~~ allow the transmission of large amounts of wind generated energy from western Kansas to ~~access the Illinois electricity markets and to compete to serve customer load,~~ the parties primarily benefited would be GBX and the prospective windfarm developers in west Kansas. The record is clear that the chief benefit of the project would be to facilitate compliance with the Illinois RPS. However, the requirements of the Illinois RPS may be met through purchases of RECs, alternative compliance payments, or a combination of those methods without the need for a major new transmission line running from Kansas to Indiana. ~~The wind farms are not yet developed but the Commission notes that the testimony supports a finding that the Project will facilitate development of the wind farms in where the resources are such that~~ The record, including particularly the testimony of LACI witness Proctor, is clear that electricity can be generated in Illinois at a significantly a comparable or even lower cost than wind power can be generated in Illinoiswest Kansas. While t~~There is substantial testimony that the wind farms will not be developed in the absence of sufficient transmission capacity, there currently is no public necessity or convenience that would be served through construction of the project. There is convincing evidence that the Project will enable low-cost wind energy to access the Illinois electricity markets, reduce wholesale and retail electricity prices. The evidence indicates the low-cost wind energy will also increase the supply of RECs in the regional markets, putting downward pressure on the prices of RECs, and helping Illinois and other PJM and MISO states to meet the RPS. The Commission notes that no alternative or combination of alternatives have been suggested, that would produce these benefits.~~ The Commission finds that GBX has not shown that the Project will promote the convenience and necessity.

Exception 3: The Proposed Order Errs in Finding That the Line Will Promote the Development of an Effectively Competitive Electricity Market That Operates Efficiently, Is Equitable to All Customers, and Is the Least Cost Means of Satisfying Those Objectives (Proposed Order, pg. 124).

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). Put another way, as MEZ witness Severson testified, the GBX project is “[l]ike that old 1970s song about Oz and the Tin Man, [because GBX] will give nothing to PJM that it doesn’t already have.” (MEZ Exh. 3.0, ll. 185-186).

Despite this, the Proposed Order “...rejects arguments that because the Illinois and regional electricity markets are already competitive, it is not possible for the Project to promote the development of an effectively competitive electricity market.” (Proposed Order, pg. 124). No one has argued that it is *not possible* for the Line to promote an effectively competitive market.

Section 8-406.1(f)(1) requires the Commission to determine whether a project promotes an effectively competitive market that is equitable to all customers. This determination is not made in the perfect market of an economist’s imagination in which anonymous, atomistic, individual market participants bargain against one another with full knowledge of all relevant facts. (*E.g.*, GBX Exh. 4.0, ll. 325-335). The Commission

could hear testimony on the promotion of effectively competitive markets from a full regiment of economists, but it must still make its determination in and for the real world.

In determining that the Line does promote an effectively competitive market, the Proposed Order sidesteps the crude but still fundamental question of equitability under Section 8-406.1(f)(1): how much competitive market promotion must be shown in order for the Commission to clothe a private company engaged entirely in the pursuit of its own private profits (GBX Exh. 4.2, ll. 138-143; Tr. 463:3 – 464:9) with the power, whether implicit or otherwise, of eminent domain?

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 flaw in this reasoning is that it proves too much. A wide variety of measures could improve an electricity market, even by a *de minimis* degree, and under the logic of the Proposed Order they would all be said to “promote” the development of an effectively competitive electricity market.

To answer the question as the Proposed Order does is to set a precedent under which even the slightest improvement in the Illinois electricity market is sufficient grounds to enable a private company to condemn the property of Illinois landowners. The Proposed Order amounts to an abdication of the Commission’s responsibility to determine the equitability of the project under Section 8-406.1(f)(1).

MEZ therefore proposes the following changes to the language of the first full paragraph on page 12 of the Proposed Order:

Based on its review of the evidentiary record and considering the arguments, the Commission finds that while the

~~Project will may promote the development of an effectively competitive electricity market that operates efficiently, the Commission must determine whether the steps taken for that promotion are equitable to all customers, and is the least cost means of satisfying those objectives. Many steps can be taken to improve a competitive market, but those steps can't be viewed in isolation. The Commission believes this project has a high probability of overcoming the uncertainties identified by the parties and represents the potential for substantial benefits for Illinois ratepayers. It appears to the Commission that the project has the potential to unlock wind resources that will be competitive and place downward pressure on the price of RECs and wholesale energy prices. Implicit within the grant of a CPCN to an applicant under Section 8-406.1 is the prospective use of the power of eminent domain if easement negotiations with landowners are not successful. Eminent domain is in substance the power to involuntarily deprive a property owner of all or some portion of his rights, title and interest in land, and therefore the Commission recognizes that it should be granted with abundant caution and due regard for the rights of landowners. The Commission finds that while the project would promote the competitive electricity market, the record is clear that the Illinois electricity market is already effectively competitive, and the degree of market improvement that the project might achieve is not sufficient to warrant the prospective divestment of property rights from Illinois landowners. rejects arguments that because the Illinois and regional electricity markets are already competitive, it is not possible for the Project to promote the development of an effectively competitive electricity market.~~

Exception 4: The Proposed Order Errs in Finding that GBX Bears All of the Risk of The Line (Proposed Order, pg. 125), and Errs in Accepting GBX's Condition for Cost Allocation (Proposed Order, pg. 154; Appendix B, pg. 1).

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). GBX claims that the Line will unquestionably meet the least cost requirement because GBX is a “merchant” transmission company, meaning that because it is a private entity pursuing private profits, GBX will seek to maximize its own private profit from the Line. (GBX

Exh. 4.2, ll. 138-143; Tr. 463:3 –464:9). This is GBX’s chief support for its claim that the Line meets the least cost requirement of Section 8-406.1(f)(1). But the Proposed Order overlooks GBX’s reservation of the right to seek an allocation of 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).

The Proposed Order gives no thought to whether an applicant for a CPCN can, without self-contradiction, claim to assume all market risk and then a few breaths later disclaim that same of assumption of market risk. Understanding what is meant by the term assumption of all market risk does not require an advanced degree in economics: an assumption of all market risk means exactly that, all market risk come Hell or high water. *Cf., e.g.,* 810 ILCS 5/2A-407. GBX’s claim of “merchant” transmission status comprises the entire foundation of its application to the Commission for a CPCN, and its simultaneous non-assumption of all market risk indicates that its management does not worry about making sense.

GBX misleads the Commission by assigning to the term “merchant,” as applied to a transmission owner, two different meanings, without disclosing that in its Application.¹ FERC’s definition of a “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)

¹ “‘When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean — neither more nor less.’” Carrol, L., *Through the Looking Glass and What Alice Found There*, in *The Annotated Alice*, at pg. 213 (W.W. Norton, 2000).

(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).

In its order approving negotiated rate authority for GBX as a FERC-defined “merchant” transmission owner, FERC stated:

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.

Clean Line LLC, Order Conditionally Authorizing Proposal and Granting Waivers, 147 FERC Par. 61,098 (May 8, 2014) (the “*FERC GBX Order*”) (*FERC GBX Order*, par. 12) (emphasis added).

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 *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

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

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.

In contrast, GBX now tells the Commission that it is a "merchant" transmission owner not because it has assumed the full market risk of the Line, but simply because it will earn its revenues through discrete transmission services contracts with shippers. This is GBX's own definition of a "merchant" transmission owner, and it differs fundamentally from FERC's. (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; 216:21 – 217:2). This is the antithesis of the "merchant" transmission business model contemplated by the *FERC Merchant Transmission Policy Statement*.

The entire record in this docket shows that GBX's earlier 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.

The equitable common law doctrine of judicial estoppel prevents a party from asserting inconsistent positions in separate proceedings in order to receive favorable judgments in each proceeding. *U.S. v. McCaskey*, 9 F.3d 368 (5th Cir. 1993); *Giannini v. First National Bank of Des Plaines*, 136 Ill. App. 3d 971 (1985). At its heart, this doctrine prevents chameleonic litigants from "shifting positions to suit the exigencies of the moment," *Cashmore v. Builders Square, Inc.*, 211 Ill. App. 3d 13, 18 (1991), engaging in "cynical gamesmanship," *Teledyne Industries, Inc. v. N.L.R.B.*, 911 F.2d 1214, 1218 (6th Cir. 1990), or "hoodwinking" a court, *Kale v. Obuchowski*, 985 F.2d 360, 361 (7th Cir. 1993). This is precisely what GBX has done in telling FERC that it has accepted the full market risk of the Line in order to obtain federal "merchant" transmission owner status, but telling the Commission that it does not accept the full market risk of the Line, but it's still a "merchant" transmission owner. The Commission should prevent GBX from engaging in this behavior by denying its application for a CPCN.

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 M ISO. 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.

Subtlety and nuance are often admired attributes in legal analysis. Fortunately, neither is required to understand why the Commission lacks jurisdiction to even accept such a promise, much less enforce it should GBX renege:

- 1) GBX promises to come back to the Commission for its approval before seeking any allocation of costs of the Line to Illinois ratepayers.
- 2) The Line starts in Kansas at a MISO interconnection and terminates in Indiana with a PJM interconnection. Therefore, the Line is part of an interstate electricity transmission system.³
- 3) Allocating costs of the Line to Illinois ratepayers means determining whether and/or how much Illinois ratepayers should pay for the Line.
- 4) The amount or cost per unit of service that a utility ratepayer pays for utility service is a utility “rate.”
- 5) Therefore, by undertaking to approve or disapprove GBX’s charging of Illinois ratepayers for the Line, this Commission will be determining a rate for part of the interstate electricity transmission system.

GBX even admits as much in its Reply Brief in this case: “[u]nder the cost allocation condition, [GBX] would be seeking this Commission’s permission to recover

³ The fact that the Line crosses the footprint of more than one regional transmission is irrelevant to this point.

some or all of its costs through an RTO cost allocation process....” GBX Reply Brief, at pg. 49.

This Commission has no jurisdiction to determine whether or how much of an interstate transmission operator’s costs may be recovered from anyone. 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).

By so much as accepting GBX’s undertaking on this question, the Commission acquires an option or obligation (it doesn’t matter which) to give the go-ahead (or not) for some rate to be charged for interstate transmission service. It matters not one iota whether the Commission opens a full-tilt investigation of a GBX-proposed charge and determines a precise rate itself, or whether the Commission simply gives a thumbs-up/thumbs-down summary vote on whether GBX should get started on some cost allocation process with PJM or MISO. That GBX freely volunteers this condition to the Commission is completely irrelevant. The problem is the same, namely, that by accepting GBX’s cost-allocation condition this Commission ignores the limits of its own jurisdiction, ignores Article VI, Clause 2 of the United States Constitution (the “Supremacy Clause”) and

ample United States Supreme Court precedent (see above), and usurps the exclusive and plenary jurisdiction of the United States Government acting through FERC.

GBX's arguments against MEZ on this issue are tantamount to an admission that GBX is not a "merchant" transmission owner. If GBX were really a "merchant" transmission owner as defined by FERC, then there would be no questions concerning cost allocation, and this entire discussion would be unnecessary. What makes it necessary is that GBX wants to be a cat that can change its spots from market risk to no market risk, as future circumstances warrant.

MEZ has no issue whatsoever with the Commission's authority over transmission siting, permitting and construction, which are all state law matters clearly within the Commission's jurisdiction. But siting, permitting and construction of a transmission line are a far cry from allocating the costs of that line. GBX would have the Commission embroil itself in matters of exclusively federal jurisdiction.

As mentioned above, GBX's principal argument that it meets the least cost standard of Section 8-406.1(f)(1) is premised on its status as a FERC-defined "merchant" transmission owner, that is, one that cannot impose any costs on ratepayers. This, GBX argues, means that it has an incentive to reduce its costs to the minimum in order to be profitable, which is by its definition "least cost." In other words, either GBX is least cost, or it will be ground into powder between the free market's relentless upper and lower millstones of supply and demand. But GBX's reservation of a right to seek cost allocation to ratepayers means those free market millstones don't exist for GBX, and neither do the incentives on which it bases its claim to be least cost.

EXCEPTION 5: The Proposed Order Errs in Finding That Eminent Domain is Not At Issue in This Case (Proposed Order, pg. 208).

The Proposed Order finds that “GBX has not requested eminent domain. Thus, eminent domain and the specific concerns raised by the intervenors and landowners are not at issue here.” (Proposed Order, pg. 208).

Based on the record in this case, this finding is not just wrong; it is ostrich-like. The Proposed Order would have the Intervenors accept, and the public believe, that simply because GBX **did not expressly ask in this docket** for eminent domain authority that the Commission can draw the curtains around Section 8-509 of the Act and move the intervenors and their concerns along with a dismissive “nothing-to-see-here.”

Of all the findings of the Proposed Order to which MEZ takes exception, this is the one that truly boggles the mind. *Cf. Arizona v. United States*, 132 S. Ct. 2492, 2521 (U.S. 2012) (Scalia, J.).

Here we have a proceeding, and an expedited one under Section 8-406.1 no less, in which the applicant for the CPCN is by its own admission not now a public utility, but *presumably will be later*; in which the applicant for the CPCN clearly has no capability to manage the construction of, and absolutely no experience in managing, a major transmission line, but *will presumably have those attributes later*, after it signs contracts with entities such as Quanta, its general contractor; in which the applicant for the CPCN has no capability of financing the construction of the Line, but *presumably will have that capability later* once its project financing is in place; in which the Commission would establish a “Financing Condition” under which the applicant would *come back to the Commission later* to show that it had met that condition; in which the Commission would impose a “Cost Allocation” condition that, while void as beyond the scope of the

Commission’s jurisdiction, contemplates that the applicant for the CPCN would *come back to the Commission at some later point* to seek approval for such cost allocation; and, finally, in which the Commission would impose an “Interconnection Condition” that the applicant for the CPCN *can only satisfy at some later point*.

The Commission has bent over backwards to accommodate the current status of GBX as a would-be utility that currently exists only on paper. In consequence, the Proposed Order has more future conditions than an H.G. Wells novel. The plethora of future conditions in the Proposed Order in effect converts Section 8-406.1 into a blank slate on which any applicant – even one with no plant, no equipment, no inventory, no existing transmission lines, no experience running a transmission line, no ability to construct a transmission line, hardly any staff, and financial resources ranging between slim and none – can doodle as it pleases.

Yet in the teeth of all these future conditions that the Commission allows to GBX, the Proposed Order pooh-poohs any concern by Illinois landowners that GBX might possibly – might just possibly – *come back to the Commission at some later time* to seek eminent domain authority. By so discounting the possibility that GBX might return for a grant of eminent domain power, the Proposed Order misses in a near-heroic way both the point of Section 8-406.1 and the fundamental nature of transmission line easement acquisition.

Accordingly, MEZ proposes the following changes to the first full paragraph on page 208 of the Proposed Order:

The Commission does not take these concerns lightly. Although GBX has not requested eminent domain, ~~Thus,~~ eminent domain and the specific concerns raised by the intervenors and landowners are ~~not~~ very much at issue here. ~~However,~~ I the Commission notes

the many commitments GBX has made in regards to property acquisition and construction of the Project. GBX has adopted a code of conduct as to its negotiations with landowners; it commits to truthful and respectful interactions and communications with landowners. GBX has repeatedly insisted that although it cannot make commitments as to certain actions at this time, it is committed to working with landowners to negotiate additional reasonable measures for prevention and mitigation of potential impacts to the landowner's property. The record in this proceeding indicates that GBX has considered landowner concerns and made minor revisions to its route or use of structures to address concerns. GBX indicates that it is not limited by the AIMA, its easement form, or its other commitments. The Commission anticipates that GBX will continue to take reasonable measures to address landowner concerns in connection with negotiating easements. [However, the Commission recognizes that implicit](#) If the Commission is asked to grant GBX eminent domain authority, the Commission will consider GBX's negotiations, as to monetary compensation, but it will also scrutinize the efforts GBX has made to address other, less tangible, costs and burdens to landowners and communities.

EXCEPTION 6: The Proposed Order's Findings And Ordering Paragraphs Must Be Revised To Be Consistent With The Exceptions Taken By MEZ

To be consistent with MEZ's exceptions stated above, MEZ respectfully requests that the following language be added to Section XIII. - Findings and Ordering Paragraphs on pages 302-303 of the Proposed Order:

FINDINGS AND ORDERING PARAGRAPHS

XV. CONCLUSION

Having given due consideration to the entire record, the Commission is of the opinion and finds that:

- (1) the Commission has jurisdiction over Grain Belt Express Clean Line LLC and the subject matter of this proceeding;
- (2) the recitals of fact and legal argument identified as the parties' respective positions accurately reflect the record in this matter;

(3) the recitals of fact and conclusions of law reached by the Commission are hereby adopted as findings of fact and conclusions of law for purposes of this Order;

~~(3)4~~ pursuant to Section 8-406.1(f)(1) of the Act, subject to the determinations made in this Order, the Commission finds that while the Project will~~may~~ promote the development of an effectively competitive electricity market that operates efficiently, GBX has not made a showing that it does so in a way that is equitable to all customers, nor has it shown that the project and is the least cost means of satisfying those objectives;

~~(5)~~ pursuant to Section 8-406.1(f)(1) of the Act, subject to the determinations made in this Order, the Commission finds that GBX has not shown that the Project is needed to provide adequate, reliable, and efficient service to the public utility's customers;

~~(6)~~ pursuant to Section 8-406.1(f)(1) of the Act, subject to the determinations made in this Order, the Commission finds that GBX has not shown that it is a "merchant" transmission owner, and therefore has not shown that the Project is the least cost means of meeting the objectives GBX proposes;

~~(7)4~~ pursuant to Section 8-406.1(f)(2) of the Act, subject to the determinations made in this Order, the Commission finds that Grain Belt Express Clean Line LLC is capable of efficiently managing and supervising the construction process and has taken sufficient action to ensure adequate and efficient construction and supervision of the construction;

~~(8)5~~ pursuant to Section 8-406.1(f)(3) of the Act, subject to the conditions in this Order, the Commission finds that Grain Belt Express Clean Line LLC is capable of financing the proposed construction without significant adverse financial consequences for Grain Belt Express Clean Line LLC or its customers;

~~(9)6~~ the route for the roughly 202-mile long transmission line, which will traverse Illinois from near Canton to a converter station in Clark County, should be approved along the routes identified in the prefatory portion of this Order and as legally described in the Appendix A attached hereto;

~~(10)7~~ the easement widths for the ± 600 kV line as proposed by Grain Belt Express Clean Line LLC, including permanent easements and temporary construction easements, as set forth in the prefatory portion of this Order are reasonable and appropriate and should be approved;

(118) pursuant to Section 8-406.1(h), the Commission finds that Grain Belt Express Clean Line LLC shall pay a one-time construction fee to each county in which the project is constructed within 30 days after the completion of construction; the construction fee shall be \$20,000 per mile of high voltage electric service line constructed in that county, or a proportionate fraction of that fee; the fee shall be in lieu of any permitting fees that otherwise would be imposed by a county;

(128) pursuant to Section 8-406.1(i) of the Act, Grain Belt Express Clean Line LLC is authorized, pursuant to Section 8-503 of the Act, to construct the high voltage electric service line, the new and expanded substations and related facilities as approved by the Commission in the prefatory portion of this Order; and

(139) all motions, petitions, objections, and other matters in this proceeding which remain unresolved should be disposed of consistent with the conclusions herein.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that a Certificate of Public Convenience and Necessity ~~is hereby will not be~~ issued to Grain Belt Express Clean Line LLC pursuant to Section 8-406.1 of the Public Utilities Act, ~~and that said certificate shall read as follows:~~

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

~~IT IS HEREBY CERTIFIED that the public convenience and necessity require (1) construction, operation, and maintenance by Grain Belt Express Clean Line LLC of segments of a +600-kilovolt electric transmission line and related facilities over the routes found appropriate at locations approved in Docket No. 15-0277, at locations as shown on the Appendix A attached hereto; and (2) the transaction of an electric public utility business in connection therewith, all as herein before set forth.~~

~~IT IS FURTHER ORDERED that the Certificate of Public Convenience and Necessity is conditioned upon Grain Belt Express Clean Line LLC complying with the conditions discussed above and set forth in Appendix B to this Order.~~

~~IT IS FURTHER ORDERED that pursuant to Section 8-503 of the Act, Grain Belt Express Clean Line LLC is authorized to construct the high voltage electric service line, and related facilities as approved by the Commission in the prefatory portion of this Order.~~

~~IT IS FURTHER ORDERED that Grain Belt Express Clean Line LLC's request to maintain its books and records at its principal office and that of its ultimate parent company, Clean Line Energy Partners LLC, in Dallas, Texas, is approved, subject to the condition that that Grain Belt Express Clean Line LLC shall promptly reimburse any Staff travel costs and expenses incurred in order to review these books and records.~~

~~IT IS FURTHER ORDERED that Grain Belt Express Clean Line LLC's request that the applicability of 83 Ill. Adm. Code 415 be waived so long as Grain Belt Express Clean Line LLC maintains its books and records in accordance with the FERC Uniform System of Accounts, and that Grain Belt Express Clean Line LLC be allowed to submit annual financial information required by ICG Form 21, 83 Ill. Adm. Code 210, and Section 5-109 of the Act, by using the FERC Uniform System of Accounts to complete ICG Form 21, is granted.~~

IT IS FURTHER ORDERED that all information designated and filed as proprietary and confidential in this proceeding shall continue to be treated as proprietary and confidential for a period of two years from the date of this Order.

IT IS FURTHER ORDERED that all motions, petitions, objections, and other matters in this proceeding which remain unresolved are disposed of consistent with the conclusions herein.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED:

Respectfully submitted,

MARY ELLEN ZOTOS

By: /s/ Paul G. Neilan
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