

**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

In the Matter of the Investigation into the)
Principles and Priorities to be Established for)
Evaluating the Reasonableness of the Location) Docket No. 24-GIME-102-GIE
of a Proposed Transmission Line in Future)
Line Siting Proceedings)

GRAIN BELT EXPRESS LLC’S POST-WORKSHOP REPLY COMMENTS

COMES NOW, Grain Belt Express LLC (“Grain Belt Express”) and files these Post-Workshop Reply Comments to the post-workshop initial comments of The Kansas Farm Bureau (“KFB”), Eastern Kansas Oil & Gas Association (“EKOGA”) and Kansas Independent Oil and Gas Association (“KIOGA”), in accordance with the *Order Accepting Staff’s Proposal as Part of the Record and Modifying Procedural Schedule* issued by the State Corporation Commission of the State of Kansas (“Commission” or “KCC”) on November 14, 2024. In support of its Post-Workshop Reply Comments, Grain Belt Express states as follows:

I. Relevant Background

1. In addition to Grain Belt Express, on November 5, 2024, the following parties filed post-workshop initial comments to the Commission Staff’s (“Staff”) November 4, 2024 proposal related to line siting principles and priorities (“Proposal”) in this matter: Evergy Kansas Central, Inc., Evergy Kansas South, Inc. and Evergy Metro, Inc. (collectively, “Evergy”); EKOGA and KIOGA; KAMO Electric Cooperative, Inc. d/b/a KAMO Power; KFB; KLA; NextEra Energy Transmission Southwest, LLC (“NEET Southwest”); ITC Great Plains, LLC (“ITC Great Plains”); Sunflower; and The Citizens’ Utility Ratepayer Board (“CURB”).

2. Grain Belt Express files these Post-Workshop Reply Comments to provide a general response to the post-workshop initial comments of KFB, EKOGA and KIOGA.

II. Response to KIOGA and EKOGA

3. Grain Belt Express appreciates the oil and gas interests' perspective offered in the joint comments filed by KIOGA and EKOGA (hereafter "oil and gas intervenors") and recognizes that this issue is of interest to members of the Commission. However, Grain Belt Express believes that the Oil and Gas Protocols it recently filed in Docket No. 24-GBEE-790-STG properly address the concerns articulated by the oil and gas intervenors. KIOGA and EKOGA have not provided any evidentiary or factual basis in this proceeding to support their recommendations. Moreover, their intervention and recommendations come over a year after this proceeding was initiated and therefore are made far too late in this proceeding to receive the scrutiny they deserve, so their recommendations should be rejected in their entirety.

A. EKOGA and KIOGA Have Failed to Establish a Factual Basis for Implementation of Their Recommendations

4. The oil and gas intervenors offer many conclusory statements and hypotheticals regarding how siting electric transmission facilities would or could impact oil and gas interests but fail to provide factual support.

5. Absent from the oil and gas intervenors' comments, however, are clear examples of how oil and gas interests have been impacted by transmission lines in Kansas to date, how often these instances have occurred, the resolution requested by the oil and gas interest holders, the historical resolution of such issues, and other significant details that would add color to the oil and gas intervenors' perspective. Vague and speculative "impacts" to oil and gas interests without specific examples are unhelpful and are contrary to Grain Belt Express' own experience as a developer.

6. Additionally, oil and gas intervenors do not explain why or how they cannot access reservoirs from alternate points adjacent to transmission lines, simply asserting that it cannot be done.¹

7. In its experience in Kansas, Missouri, and Illinois, Grain Belt Express has not encountered any issues with oil and gas operators or owners in the course of siting, development, or land acquisition. Specifically, Grain Belt Express is more than 97% through its land acquisition for Phase 1 of the HVDC portion of the Grain Belt Express Project and has faced no issues with oil and gas production. Sunflower Electric Power Corporation (“Sunflower”) expressed a similar sentiment in its Post-Workshop Comments, noting that its members’ territories have a large oil and gas presence in Kansas, yet Sunflower has not experienced major difficulties in siting its electric lines.²

8. Grain Belt Express emphasizes that its practice is to strictly avoid siting transmission lines through active oil and gas facilities. A review of the evidentiary record in the recent transmission line siting proceeding filed by NextEra Energy Transmission Southwest (“NEET Southwest”) for its 83-mile (within the state of Kansas) Wolf-Creek to Blackberry transmission line also supports the fact that no oil and gas issues were encountered in the siting of that line through the State of Kansas.

9. When beginning the routing and siting process for a new transmission line, developers study many sources of publicly available data and collect and organize this data within a geographic information system (“GIS”) database. This data will generally include recent aerial photography, U.S. Geological Survey topographic maps, sensitive species habitat, wetlands and

¹ KIOGA/EKOGA Post-Workshop Comments at pp. 1-2.

² Sunflower Comments at ¶¶ 5-6.

flood plains, parcel data, existing energy infrastructure, roads, and municipal boundaries. The purpose of collecting this data is to identify constraints and opportunities within the study area to develop the initial alternative route network. Of the many constraints identified during the routing process of a transmission line are active oil and gas facilities.

10. Active oil and gas facilities flagged as constraints are avoided to the extent practicable. Furthermore, to the extent that oil and gas intervenor concerns are not identified in the routing study process, they can be resolved during the micrositing process and codified with formal agreements as needed.

B. The Oil and Gas Intervenors' Protocols Are Not Necessary and Are Contrary to Kansas Law

11. The oil and gas intervenors' comments and suggested protocols are based upon the faulty premise that a transmission developer requires an easement for the mineral estate, which they do not. Kansas law is clear that the conveyance of mineral rights severs the property interest in the surface rights from the property interest in the subsurface minerals.³ Kansas courts recognize that when the mineral estate has been severed from the surface estate, two separate, distinct, and independent estates are created that may be conveyed separately from the other.⁴ While it is well-known that owners of a severed mineral estate have implied rights for ingress and egress in, through, and around the surface estate and the ability to make reasonable use of the land in order to explore and develop the mineral estate⁵ this does not in turn create a duty on the part of the surface estate owner to obtain a mineral rights holder's permission for a surface easement.

³ *Oxy USA v. Red Wind Oil, LLC*, 51 Kan.App.2d 1028, 360 P.3d 457, 460 (2015), aff'd, 309 Kan. 1022, 442 P.3d 504 (2019).

⁴ *Oxy USA, Inc. v. Red Wing Oil, LLC*, 51 Kan. App. 2d 1028, 360 P.3d 457, 461 (2015), aff'd, 309 Kan. 1022, 442 P.3d 504 (2019).

⁵ *Mai v. Youtsey*, 231 Kan. 419, 424, 646 P.2d 475 (1982).

Therefore, an owner of the surface estate need not obtain permission or approval from the mineral estate owner when the surface owner conveys an interest in the surface estate.⁶

C. The Oil and Gas Intervenors Are Not Landowners of Record for Whom Notice is Required

12. The oil and gas intervenors selectively quote Kansas statutes to recommend that Oil and Gas Interest Holders be included in the parties who receive notice of siting applications pursuant to K.S.A. 66-1,179 and K.S.A. 66-1,178(a)(2).⁷ This is not the law in Kansas and requires a reader to cease reading the relevant statute partway through a sentence.

13. Notice of a siting application is required to be given to “landowners of record”, not the holders of a mineral estate. Kansas law provides that notice is required for “landowners of record whose land or interest therein is proposed to be acquired in connection with the construction of or is located within 660 feet of the center line of the easement where the line is proposed to be located.”⁸

14. “Proposed to be acquired” is the operative language. Transmission developers *do not seek to acquire* an interest from the holder of the mineral estate.

15. In a transmission line siting proceeding, the developer negotiates an easement with the owner of the surface estate, thus, the surface estate owner is the only landowner whose land or interest *is proposed to be acquired*. Thus, the Commission should reject the oil and gas intervenors interpretation of the notice statute.

D. Oil and Gas Intervenors Seek an Unwarranted Level of Protection

⁶ *Dick Properties, LLC v. Paul H. Bowman Tr.*, 43 Kan. App. 2d 139, 143, 221 P.3d 618, 621 (2010).

⁷ KIOGA/EKOGA Comments at pp. 4-5..

⁸ K.S.A. 66-1,178(a)(2)

16. The oil and gas intervenors' request for protocols related to easement negotiation and anticipated compensation for an easement should be rejected. Oil and gas intervenors suggest that oil and gas protocols include compensation which includes:

- a. commit [sic] to pay the total oil and gas reserve value as determined by licensed petroleum engineers for any portion of oil and gas reserves which are rendered actually or economically unrecoverable during the construction, maintenance, or operation of the Project; and
- b. commit [sic] to pay for any oil and gas lease/field impacts resulting from the construction, maintenance or operation of the Project, regardless of when they occur without any cap. These impacts include but are not limited to, lost production revenue for any period of time, increase to cost of operation or development, value of time and material associated with making changes to existing and planned lease infrastructure and development patterns, and plugging and remediation expenses if applicable.

21. The negotiation of easements and the provision of compensation to an impacted oil and gas operator occurs long after the siting of a transmission line is finalized and approved. It is Grain Belt Express' position that the negotiation of easements and fair compensation is a function of site control and land acquisition and is not a component of the siting process. These land acquisition efforts are generally business-to-business negotiations, are not subject to the jurisdiction of the Commission, and should not be subsumed within the already severely time-constrained siting and routing process.

E. The Oil and Gas Intervenors Recommendations Should Be Rejected Because They Have Failed to Provide an Evidentiary Basis

22. The oil and gas intervenors have intervened too late in this proceeding for their requested proposals to be fully evaluated and approved. As a reminder, the oil and gas intervenors intervened in this proceeding almost a year and three months after this proceeding was opened. The first time the parties to this proceeding were able to hear their arguments was at the November 1, 2024 Technical Conference. Moreover, the oil and gas intervenors have only made one

substantive filing in this proceeding and which involves issues that have not previously been discussed or addressed in this proceeding. In their only substantive filing, they fail to identify a single instance in which the problems they have alleged have been an issue. So, while Grain Belt Express does not (and did not) oppose their intervention, it would be inappropriate to incorporate their proposals at this late stage of the proceeding. The oil and gas interveners' assertions and legal claims require scrutiny that this proceeding has not and will not fully evaluate under the current schedule.

23. That scrutiny could have been undertaken at any time in the last year and three months or in the two recent line siting investigations, but it was not. Certainly, if the oil and gas interveners' concerns regarding transmission line siting interference had an evidentiary basis, these concerns would have been raised in a timely fashion either through earlier intervention in this matter or intervention in one or both of the two recent siting proceedings before the Commission.

24. As a result, if any action is taken in this proceeding with respect to Protocols, Staff's Proposal—requiring only the submittal of Oil & Gas Protocols—is more appropriate because it is based upon the information that has been received in this proceeding and been adequately scrutinized by the parties to this proceeding. Thus, the oil and gas interveners' protocol recommendations should be rejected.

III. The Commission Does Not Have the Jurisdiction to Regulate Private Contracts

17. The KCC should decline to regulate compensation as KFB suggests. Compensation is freely negotiated between persons or entities. To the extent that it is not, then appraisal value is

exclusively within the jurisdiction of district courts to determine fair market value, and is not within the Commission's jurisdiction to determine, as it has previously acknowledged.⁹

IV. It May Be Reasonable to Require Transmission Developers to File Protocols But The Commission Should Refrain From Specifying or Permitting Litigation of the Content of Protocols

18. The Commission should reject the oil and gas intervenors and KFB's attempt to draft transmission developers' protocols. While it may be reasonable for the Commission to require transmission developers to file protocols, Grain Belt Express does not believe it would be reasonable for the Commission to dictate the specific content of protocols or to permit intervenors to litigate specific terms of a transmission developer's protocols.

19. There are practical, policy, and legal issues (jurisdictional among them) that exist if the Commission were to require certain content in protocols. Transmission developers are highly incentivized to memorialize their business practices within protocols and to adhere to them. When transmission developers construct and operate a transmission line, they become a part of the fabric of a community for decades to come. It is crucial to the transmission developer's business interests to encourage and maintain cordial relationships with landowners within the areas they operate. Thus, transmission developers are incentivized to treat landowners fairly and honestly, adhere to promises made, and operate their facilities safely.

20. Moreover, there is a significant difference between the Commission requiring transmission developers to submit protocols and for the Commission to dictate the content of protocols. It seems the Commission recognizes that difference given the fact that it has not previously dictated the content of protocols. Instead, it has only required their submission.

⁹ See, Order on Application for Convenience and Necessity, Docket No. 22-NETE-419-COC, August 29, 2022, at paras. 59-60.

21. It is reasonable for the Commission not to dictate the contents of protocols because regulating the content of protocols would be an improper intrusion on transmission developers' and public utilities' management decisions. With respect to prior attempts to intrude upon a public utilities' management decisions, the Kansas Supreme Court stated: "It must never be forgotten that while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of Public Utility Companies and is not clothed with the generate power of management incident to ownership."¹⁰ The Commission has acknowledged this caselaw in prior decisions.¹¹

22. That is also the accepted view in other jurisdictions, for example, like Missouri where its courts have stated: "The powers of regulation delegated to the Commission are comprehensive and extend to every conceivable source of corporate malfeasance. Those powers do not, however, clothe the Commission with the general power of **management** incident to ownership."¹² Additionally, "It is obvious that [the commission] has no authority to take over the general **management** of any **utility**."¹³

IV. Conclusion

23. While Grain Belt Express appreciates the perspective of both the oil and gas intervenors and KFB, they make recommendations that were simply submitted too late to be

¹⁰ *State v. Sw. Bell Tel. Co.*, 115 Kan. 236, 223 P. 771, 781 (1924).

¹¹ *In the Matter of the Application of Mid-Kansas Electric Company, LLC for Approval to Make Certain Changes in its Charges for Electric Services in the Geographic Service Territory Served by Southern Pioneer Electric Company*, Docket No. 12-MKEE-380-RTS (Aug. 8, 2012) (quoting *Wichita Gas Co. v. Public Serv. Comm'n*, 126 Kan. 220, 225 (1928) ("The commission is not the company's business manager. The company has a business manager of its own who must be allowed good-faith exercise of judgment, discretion and initiative.")).

¹² *State v. Public Service Commission of Missouri*, 343 S.W.2d 177, 182[7] (Mo. App. 1960).

¹³ *State ex rel. Laclede Gas Co. v. P.S.C.*, 600 S.W.2d 222, 228[3] (Mo.App.1980) (emphasis added).

adequately scrutinized and lack the factual support to be incorporated into Staff's Proposal. As a result, Grain Belt Express recommends the Commission reject those recommendations.

WHEREFORE, Grain Belt Express respectfully requests the Commission accept these Post-Workshop Reply Comments.

Respectfully submitted,

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/s/ Anne E. Callenbach
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VERIFICATION

I, Anne E. Callenbach, do solemnly, sincerely and truly declare and affirm that I am counsel to Grain Belt Express, LLC, that I have read the foregoing pleading and know the contents thereof, and that the facts set forth therein are true and correct to the best of my knowledge and belief, and this I do under the pains and penalties of perjury.

By: /s/ Anne E. Callenbach
Anne E. Callenbach

November 22, 2024