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MISSOURI'S CHANCE AT LOW-COST RENEWABLE ENERGY 'GONE WITH THE WIND'?

ABSTRACT

The Grain Belt Express, a proposed wind energy transmission line that will span across much of the Midwest,¹ has been stalled for the past five years due to the legal battles it has faced in Missouri² over whether the company can be properly granted the authority to exercise eminent domain power over landowners in the state who oppose the project.³ This Note provides a comprehensive analysis of the issues surrounding the Grain Belt Express in Missouri in order to argue that the project is in the state's public interest—as correctly decided by Missouri's Public Service Commission in granting Grain Belt eminent domain authority⁴—and to advocate against legislation specifically aimed at blocking the project in Missouri.⁵ This Note proceeds by first providing an overview of the project and the issue, next presenting the arguments on both sides of the issue, then providing the legal and regulatory background, followed by a summary of Grain Belt's legal journey in Missouri to date, and finally concluding with arguments against the Missouri legislation targeted at the Grain Belt Express.

1. *Route Overview*, GRAIN BELT EXPRESS, <https://grainbeltexpress.com/overview.html> (last visited Sept. 19, 2021).

2. See Paul Henry, *Missouri's Grain Belt Express HVDC Transmission Line Project (Easements and Eminent Domain)*, OWNERS' COUNSEL AM. (Sept. 17, 2020), <https://www.ownerscounsel.com/missouris-grain-belt-express-hvdc-transmission-line-project-easements-and-eminent-domain/>.

3. Adrienne Spiller, *The Show-Me State's Fight Against Grain Belt Express Clean Line: Will Administrative Proceedings, Legislation, or the Takings Clause Provide Protection for Private Land?*, J. ENV'T & SUSTAINABILITY L. 311, 312–13 (2016).

4. See *In re Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity*, File No. EA-2016-0358, 2019 WL 1354055, at *29, *31, *47 (Mo. P.S.C. Mar. 20, 2019) (Report and Order).

5. See *Protect Wind Energy, Protect Missouri Jobs, Oppose House Bill 527*, SIERRA CLUB, <https://www.sierraclub.org/sites/www.sierraclub.org/files/sce-authors/u2061/HB%20527%20-%20Support%20Grainbelt%20Express.pdf> (last visited Feb. 7, 2021); H.B. 527, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021); H.B. 1027, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015); H.B. 1062, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019); H.B. 2033, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020); Kurt Erickson, *After misfire last year, Missouri lawmakers again trying to stop Grain Belt Express*, ST. LOUIS POST-DISPATCH (Jan. 13, 2020), https://www.stltoday.com/news/local/govt-and-politics/after-misfire-last-year-missouri-lawmakers-again-trying-to-stop-grain-belt-express/article_06ecb601-6ca7-5cc6-ba11-28516fb5abb4.html.

INTRODUCTION

The Grain Belt Express is a large-scale energy transmission project that will span approximately 800 miles across the midwestern United States, delivering abundant, low-cost wind energy to areas throughout.⁶ The transmission line will begin in southwestern Kansas, run through 206 miles of the northern region of Missouri, across another 200 miles of the central region of Illinois, and end shortly beyond the border of Illinois and Indiana.⁷ Since its initial proposal in 2014,⁸ however, the project has effectively stagnated due to regulatory barriers standing in the way of its construction and significant pushback from landowners in the affected states who oppose the company's use of the private land.⁹ These challenges have been predominantly faced in what has shown to be the most difficult battleground for Grain Belt, the state of Missouri.¹⁰ There, the company has undergone over five years of contentious regulatory proceedings,¹¹ legal battles with landowners,¹² and multiple legislative attempts to nullify the project's approval from Missouri's Public Service Commission,¹³ which would effectively prohibit it from moving forward in the state.¹⁴

The central issue the Grain Belt Express faces in Missouri is whether the private company can be properly granted the authority to exercise eminent

6. *Route Overview*, *supra* note 1; Beth Conley, *Grain Belt Express to Increase Local Access to Low-Cost, Homegrown Clean Energy, Adding Up to \$7B in Energy Savings for Kansas and Missouri Consumers*, INVENERGY (Aug. 25, 2020), <https://invenergy.com/news/grain-belt-express-to-increase-local-access-to-low-cost-homegrown-clean-energy-adding-up-to-7b-in-energy-savings-for-kansas-and-missouri-consumers>.

7. *Route Overview*, *supra* note 1; Corina Rivera-Linares, *Grain Belt Express files application in Missouri for proposed 206-mile line*, TRANSMISSIONHUB (Sept. 1, 2016), <https://www.transmissionhub.com/articles/2016/09/grain-belt-express-files-application-in-missouri-for-proposed-206-mile-line.html>.

8. Leslie Holloway, *Grain Belt Express*, MO. FARM BUREAU, <https://mofb.org/grain-belt-express/> (last visited Sept. 19, 2021).

9. See Henry, *supra* note 2; Spiller, *supra* note 3, at 312.

10. See Meredith Hurley, *Traditional Public Utility Law and the Demise of a Merchant Transmission Developer*, 14 NW J. L. & SOC. POL'Y 318, 336 (2019); Spiller, *supra* note 3, at 326.

11. See Henry, *supra* note 2.

12. *Mo. Landowners All. v. Pub. Serv. Comm'n*, 593 S.W.3d 632, 636 (Mo. Ct. App. E.D. 2019); *In re Invenergy Transmission LLC*, 604 S.W.3d 634, 636 (Mo. Ct. App. W.D. 2020); Keryn Newman, *MO PSC Complaint Alleges Grain Belt Express Can No Longer Claim Eminent Domain Authority*, STOPPATH WV (Sept. 3, 2020), http://stoppathwv.com/stoppath-wv-blog/mo-psc-complaint-alleges-grain-belt-express-can-no-longer-claim-eminent-domain-authority?fbclid=IwAR0zxhYA7gClc4eb0UrVnYJqOVvbNi6olQKn_TYdW4pgtLRalvesdbQtTjE.

13. See H.B. 1027, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015); H.B. 1062, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019); H.B. 2033, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020); Erickson, *supra* note 5.

14. Karen Uhlenhuth, *Missouri eminent domain bill takes aim again at Grain Belt Express project*, ENERGY NEWS NETWORK (Apr. 30, 2020), <https://energynews.us/2020/04/30/midwest/missouri-eminent-domain-bill-takes-aim-again-at-grain-belt-express-project/>.

domain power over the landowners in its path who are unwilling to sell the use of their land to Grain Belt through easements.¹⁵ With eminent domain authority, the company would be able to obtain these easements without the consent of the landowners, so long as they receive just compensation.¹⁶ To be granted such authority, Grain Belt must receive a Certificate of Convenience and Necessity (“CCN”) from Missouri’s Public Service Commission (“PSC”) by showing that construction of the project is “necessary or convenient for the public service.”¹⁷ Though it was initially denied from receiving a CCN following a hearing before the PSC,¹⁸ Grain Belt was eventually able to appeal the decision all the way to the Missouri Supreme Court,¹⁹ where the formerly governing precedent that guided the PSC’s denial was reversed,²⁰ and the case was remanded back to the PSC under new guidance.²¹ Following its rehearing on the issue, the Grain Belt Express was ultimately deemed to be in the public interest of Missouri and was granted a CCN,²² permitting the private company to exercise eminent domain authority to acquire use of the land.²³ Grain Belt has since been subject to numerous attempts by Missouri landowners to overturn this decision, all of which have thus far been unsuccessful,²⁴ most notably with Grain Belt’s recent victories in both the Eastern and Western Courts of Appeals.²⁵

Although Grain Belt’s legal journey in Missouri to date has certainly marked a major victory for both the project and the state’s future, the battle still reigns on. In late February 2021, a bill aimed specifically at the project passed in the

15. Spiller, *supra* note 3, at 312, 318.

16. *See id.*

17. MO. REV. STAT. § 393.170(3) (2018).

18. *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, File No. EA-2014-0207, 2015 WL 4124748 (Mo. P.S.C. July 1, 2015) (Report and Order).

19. Grain Belt Express Clean Line, LLC v. Pub. Serv. Comm’n, 555 S.W.3d 469, 471 (Mo. 2018).

20. *In re* Ameren Transmission Co. of Ill. (ATXI), 523 S.W.3d 21, 25 (Mo. Ct. App. W.D. 2017) (holding that the approval of all counties affected by the proposed construction of a public utility project is a prerequisite to obtaining a CCN).

21. *Grain Belt Express Clean Line, LLC*, 555 S.W.3d at 474.

22. *In re Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity*, 2019 WL 1354055, at *47, *50.

23. Spiller, *supra* note 3, at 312.

24. *See* Jeff Postelwait, *Grain Belt Express Transmission Line Moves Forward with Missouri Court Decision*, T&DWORLD (Mar. 19, 2020), <https://www.tdworld.com/overhead-transmission/article/21126570/grain-belt-express-transmission-line-moves-forward-with-court-decision>; *see* *Labor-endorsed Grain Belt Express can move forward after failed legislative attempt to block the project*, LABOR TRIBUNE (May 28, 2020), <https://labortribune.com/labor-endorsed-grain-belt-express-can-move-forward-after-failed-legislative-attempt-to-block-the-project/>.

25. *Mo. Landowners All. v. Pub. Serv. Comm’n*, 593 S.W.3d 632 (Mo. Ct. App. E.D. 2019); *In re* Invenergy Transmission LLC, 604 S.W.3d 634 (Mo. Ct. App. W.D. 2020).

Missouri House of Representatives by a substantial margin.²⁶ The bill, originally introduced as House Bill 527, prohibited an entity from exercising eminent domain power “for the purpose of constructing above-ground merchant lines,”²⁷ which would have the effect of blocking the Grain Belt Express from proceeding in Missouri.²⁸ Though the bill was unable to gain enough traction to make it through the Missouri Senate in its most recent legislative cycle,²⁹ the approaching timeline of the project’s construction has led opposition groups to place this issue as a top legislative priority for the upcoming cycle.³⁰ This, along with the repeated history of similar legislation brought against the project in recent years, suggests that yet another piece of legislation targeting Grain Belt in the near future is all but inevitable.³¹ Now, however, the potential bill will be under an even more pressing timeline and even greater pressure to pass, as virtually all other routes to stop the project have been effectively closed off,³² posing an unprecedented threat for the Grain Belt Express and the future of energy in Missouri.

Because the landowners in Grain Belt’s path would only be minimally affected by Grain Belt’s use of the land, would be fairly and generously compensated for such use, and because the project would bring substantial benefits to Missourians throughout the state, Missouri’s Public Service Commission correctly decided that the Grain Belt Express is in the public interest of Missouri and is a proper use of eminent domain authority.³³ Legislation targeted at blocking the project in Missouri is thus contrary to the interest of Missouri citizens—both economically and in the state’s long-term progress toward a future of clean energy—and should therefore be rejected.

26. Will Robinson, *Missouri House Passes Bill Against Eminent Domain Use*, BROWNFIELD AG NEWS (Feb. 26, 2021), <https://brownfieldagnews.com/news/missouri-house-passes-bill-against-eminent-domain-use/>; see Jonathon Jain, *Missouri Farm Bureau lays out legislative priorities for next session*, MO. FARM BUREAU (Aug. 9, 2021), available at <https://www.news-tribune.com/news/local/story/2021/aug/10/farm-bureau-lays-out-legislative-priorities-for-next-session/882950/>.

27. H.B. 527, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021).

28. *Protect Wind Energy*, *supra* note 5.

29. Cameron Gerber, *PSC dismisses complaint against Grain Belt Express*, MO. TIMES (Aug. 4, 2021), <https://themissouritimes.com/psc-dismisses-grain-belt-express-complaint/>.

30. See Jain, *supra* note 26.

31. See *id.*; Harold Selby, Opinion, *Grain Belt Express keeps Missouri moving forward*, MO. TIMES (Jan. 27, 2021), <https://themissouritimes.com/opinion-keep-missouri-moving-forward/>.

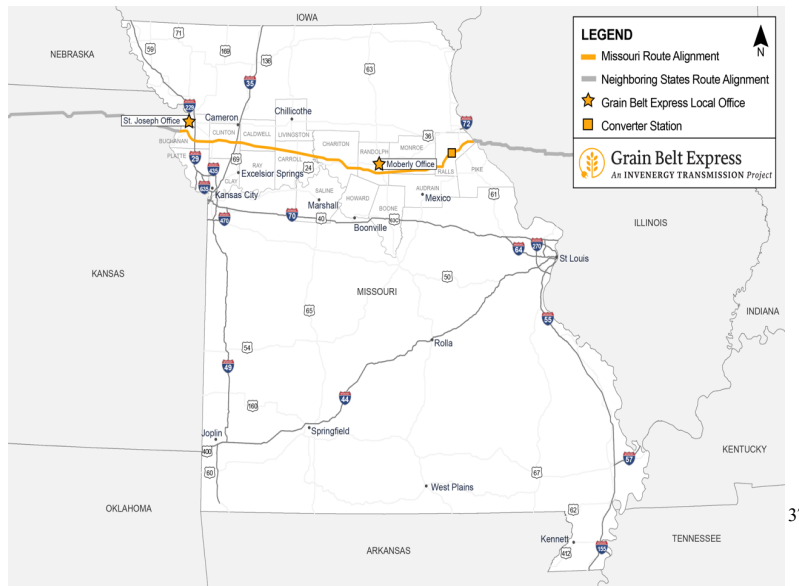
32. See *supra* note 12 (all); Gerber, *supra* note 29.

33. See *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, File No. EA-2016-0358, 2019 WL 1354055, at *46–50 (Mo. P.S.C. Mar. 20, 2019) (Report and Order).

I. PROJECT & ISSUE OVERVIEW

A. Project Overview

Grain Belt Express Clean Line LLC (“Grain Belt”) seeks to develop a 780-mile, high-voltage, direct current (“HVDC”) transmission line that will traverse Missouri from Kansas into Illinois and Indiana with over 4,000 megawatts (“MW”) of wind power generated in western Kansas.³⁴ Approximately 2,500 MW of this power will be delivered to energy markets in Missouri,³⁵ where 206 miles of the project will span across eight counties in the state’s northern region, beginning at the Missouri River, south of St. Joseph, and ending south of Hannibal in Ralls County, where it will cross the Mississippi River into Illinois.³⁶



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34. *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, Case No. EA-2016-0358 (Mo. P.S.C. Jan. 18, 2019) (Grain Belt Express Proposed Findings of Fact and Conclusions of Law).

35. Until late August of 2020, Grain Belt’s plan had consistently dedicated just 500 MW of power to Missouri. *See id.* With the sale of the project to the energy company, Inverenergy (a contentious acquisition that was challenged by Missouri landowners, as discussed briefly below), and growing demand for renewable energy in Missouri, Grain Belt announced that it will now increase the amount power that it will deliver to Missouri by an additional 1,500 MW from its total 4,000 MW capacity. *Grain Belt Express Aims to Carry More Wind Power to Missouri*, MO. ENERGY INITIATIVE, <http://hosted-p0.vresp.com/1927911/e1a127abcc/ARCHIVE> (last visited Sept. 19, 2021).

36. *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, Case No. EA-2016-0358 (Mo. P.S.C. Jan. 18, 2019) (Grain Belt Express Proposed Findings of Fact and Conclusions of Law).

37. *Route Overview*, *supra* note 1.

Included in the construction of the project along the Missouri route will be a series of about four to six steel transmission structures per mile, which will be approximately 110–150 feet tall and six to forty-six feet wide at the base, and a converter station located in Ralls County that will occupy approximately forty to sixty-five acres.³⁸ Grain Belt estimates an economic investment of approximately \$9 billion in the project, \$1 billion of which is attributable to the portion of the project located in Missouri.³⁹

In order to proceed with construction in Missouri, Grain Belt will first need to obtain easements from each of the landowners along the Missouri route.⁴⁰ Of the 739 total easements it will need, only about half have thus far been secured through voluntary negotiations.⁴¹

B. Issue Overview

Because Grain Belt will likely not be able to successfully secure voluntary easements from each of the landowners along its Missouri route,⁴² it will need to resort to the use of eminent domain authority in order to acquire use of the land from those unwilling to sell.⁴³ These landowners, however, strongly disapprove of Grain Belt's ability to use such authority, arguing that it will result in a fundamentally unjust taking of their property for the private benefit of a for-profit company at the expense of the landowners who will be undercompensated

38. Spiller, *supra* note 3, at 319; *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, Case No. EA-2016-0358 (Mo. P.S.C. Aug. 30, 2016) (Initial Application).

39. Conley, *supra* note 6. The \$9 billion estimate encompasses the total projected investment in Kansas and Missouri alone and does not reflect the cost of the Illinois or Indiana portions of the project, likely due to the uncertainty of the project's future in Illinois. Needless to say, if the project does in fact move forward in Illinois and Indiana, its total cost would be significantly greater than \$9 billion. To get a sense of just how much the project's investment may increase if approved in Illinois (and likely will increase to some extent regardless of such approval), in 2016, the project estimated its *total* cost to be just \$2.35 billion (\$525 million in Missouri), despite planning to generate the same 4,000 MW energy capacity. *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, Case No. EA-2016-0358 (Mo. P.S.C. Aug. 30, 2016) (Initial Application).

40. See Spiller, *supra* note 3, at 319–20.

41. H.B. 527, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021) (summary of public testimony from the committee hearing available at <https://www.house.mo.gov/billtracking/bills211/sumpdf/HB0527C.pdf>); Jonathan Ahl, *Grain Belt Express Moving Forward with Land Purchases*, ST. LOUIS PUB. RADIO, <https://news.stlpublicradio.org/government-politics-issues/2021-06-28/grain-belt-express-moving-forward-with-land-purchases> (last visited Sept. 19, 2021); Keryn Newman, *Citizens Tell Governor "Grain Belt Express Not A Public Utility"*, CALDWELL COUNTY NEWS (Jan. 22, 2019), <http://www.mycaldwellcounty.com/news/citizens-tell-governor-grain-belt-express-not-public-utility>.

42. See Ahl, *supra* note 41.

43. See Spiller, *supra* note 3, at 324.

and suffer severe harm to the value and use of their land.⁴⁴ On the other hand, Grain Belt Express proponents assert that the project is a proper and justified exercise of eminent domain authority, arguing that it is in the public interest of Missouri due to the substantial benefits that delivering such a significant amount of low-cost, clean energy to the state's energy grid would bring to residents throughout the state.⁴⁵ Further, they maintain that the project will be only minimally intrusive to the landowners in its path, who will be generously compensated for the use of the land and protected from any potential impacts resulting from such use.⁴⁶ Thus, the benefits that Missourians will enjoy from the project overwhelmingly outweigh the minimal costs that the affected landowners may incur, if any, rendering it in the state's public interest to allow Grain Belt to exercise eminent domain authority in order to proceed with construction of the project.

II. ARGUMENTS FOR & AGAINST THE GRAIN BELT EXPRESS IN MISSOURI

A. *Missouri Landowners' Position*

Though the exact proportion of affected landowners that oppose the project remains relatively unclear, the minimal amount of total voluntary easements procured thus far and the organized efforts against the project suggest substantial opposition. As noted, to date, Grain Belt has secured only about half of the 739 total easements required in Missouri through voluntary negotiations with the landowners, which has caused many to fear that Grain Belt will resort to using eminent domain authority to take the remaining fifty percent of the land.⁴⁷ It is primarily this concern that has driven Missouri landowners to organize efforts to lobby against the project through groups such as "Block Grain Belt Express – Missouri."⁴⁸ These groups and the collective opposition assert that Grain Belt—a private, for-profit company—should not be able to use eminent domain authority to take land from those unwilling to sell to it.⁴⁹ This, they maintain, will not only be a fundamentally unjust confiscation of their land for which they

44. See H.B. 527, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021) (summary of public testimony from the committee hearing available at <https://www.house.mo.gov/billtracking/bills/211/sumpdf/HB0527C.pdf>); Newman, *supra* note 41.

45. See *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, File No. EA-2016-0358, 2019 WL 1354055, at *29 (Mo. P.S.C. Mar. 20, 2019) (Report and Order).

46. See *id.*

47. See H.B. 527, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021) (summary of public testimony from the committee hearing available at <https://www.house.mo.gov/billtracking/bills/211/sumpdf/HB0527C.pdf>); Ahl, *supra* note 41; Newman, *supra* note 41.

48. *Block Grain Belt Express – Missouri*, FACEBOOK (May 15, 2015), <https://www.facebook.com/blockgrainbeltexpressmo/posts/great-newstwo-counties-clarify-opposition-to-grain-belt-chariton-and-ralls-legal/898858936823085/>.

49. See Spiller, *supra* note 3, at 324.

will be undercompensated, but it will also create detrimental precedent for property rights and lead to significant, undue economic harm to them through the adverse effects the structures will have on agricultural production and property values.⁵⁰

1. “No Eminent Domain for Private Gain”

The primary concern that opponents of the Grain Belt Express have with the project is their position that it would be fundamentally unjust to allow a private, for-profit company to exercise government authority to take their land for the company’s private benefit, often touting their popular slogan, “No Eminent Domain for Private Gain.”⁵¹ In addition to simply preferring not to give up their land, these landowners fear that allowing a private corporation to exercise eminent domain power would inevitably result in undercompensation for the value of their land.⁵² This land is often uniquely cherished by the landowners, given the long-term physical labor and particular care that is typically required to maintain it and the reality that such land has often been passed down for generations, creating much sentimental value.⁵³ As such, it cannot be justly compensated for at a value acceptable to the landowner, let alone at any value the PSC deems to be the “fair market value” per the guidance of a private corporation.⁵⁴ In the eyes of these landowners, the already distasteful practice of eminent domain becomes even more so when they see their land taken at the behest of profit-seeking corporation.⁵⁵

2. Diminishing Property Rights

These landowners also fear that granting Grain Belt this authority would create a detrimental precedent for their property rights by essentially permitting any private company to “buy” the right to condemn and seize property from unwilling sellers, just as Grain Belt was able to do by investing enough money in the right product to be able to claim public benefits.⁵⁶ This, the landowners

50. See H.B. 527, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021) (summary of public testimony from the committee hearing available at <https://www.house.mo.gov/billtracking/bills/211/sumpdf/HB0527C.pdf>); Newman, *supra* note 41.

51. Richard Warneck, *Letter: Farms would unfairly suffer under wind turbines*, ST. LOUIS POST-DISPATCH (Feb. 24, 2020), https://www.stltoday.com/opinion/mailbag/letter-farms-would-unfairly-suffer-under-wind-turbines/article_854924fd-446d-58c0-bb75-b8ae684ae2c3.html.

52. See Spiller, *supra* note 3, at 324.

53. See *id.*

54. See H.B. 527, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021) (summary of public testimony from the committee hearing available at <https://www.house.mo.gov/billtracking/bills/211/sumpdf/HB0527C.pdf>).

55. See Spiller, *supra* note 3, at 324.

56. See Blake Hurst, *Proposed wind-power transmission line threatens our property rights*, ST. LOUIS POST-DISPATCH (Feb. 18, 2020), <https://www.stltoday.com/opinion/columnists/blake->

argue, creates a market price for eminent domain in Missouri, which is an abuse of eminent domain authority and certainly contrary to the Framers' intent in drafting the Fifth Amendment's Takings Clause.⁵⁷ By granting Grain Belt this authority, Missouri is opening the door to eminent domain becoming merely an avenue for large corporations to have virtually unlimited access to discounted property.⁵⁸

3. Decreased Property Values & Agricultural Production

Another major concern many of these landowners share is the effect that the construction of large, steel structures and electrical transmission lines will have on the value of their property and their agricultural output.⁵⁹ Some estimates suggest that the value of the affected properties and those adjacent will "decrease by up to 50 percent."⁶⁰ Though the exact basis for these estimates is unclear, it certainly follows that an addition of steel structures that are upwards of 150 feet tall and forty-six feet wide will result in a diminution in the value of the property at least to some extent,⁶¹ especially given that much of the property value is derived from the very use of the land. In addition to this decreased property value from the lost agricultural capacity in the area the structures physically occupy, the landowners also fear that the structures will negatively impact hunting tourism and the aesthetic value of their land, as the scenic landscape views are often the very reason many people purchase land in the country to begin with.⁶² Moreover, the structures will also likely have a denigrating effect on the land's soil.⁶³ As noted by Marilyn O'Bannon, the County Commissioner of Monroe County and the owner of five miles of farmland that the Grain Belt Express will run directly through, "The easements run in the middle of the fields. Excavation equipment and concrete trucks will have to run across acres to get to the easements, destroying the soil."⁶⁴ While the damage will likely not be irreparable, the concern is nevertheless valid, as this will certainly cause at least some soil damage and, at the very least, will burden the landowners.

As these landowners contend, all things considered, the Grain Belt Express will be directly economically harmful to those in its path, and, because Grain Belt is a private company, it should not be able to force this raw deal on

[hurst-proposed-wind-power-transmission-line-threatens-our-property/article_f9440158-8dc1-53de-9dea-9fc9ea21292b.html](https://www.stlulaw.com/hurst-proposed-wind-power-transmission-line-threatens-our-property/article_f9440158-8dc1-53de-9dea-9fc9ea21292b.html).

57. *See id.*

58. *See id.*

59. *See* Spiller, *supra* note 3, at 325.

60. *Id.*

61. *Id.* at 319.

62. *Id.* at 325.

63. *Id.*

64. E-mail from Marilyn O'Bannon, Monroe Cty. Comm'r, to Jeff Becker, St. Louis Univ. L.J. (Feb. 9, 2021, 06:23 CST) (on file with author).

landowners using government authority to push its own profit-seeking agenda. Doing so would create detrimental precedent for property rights, increasing the susceptibility of landowners to similar corporations taking their land at will with little legitimate purpose beyond profit.

B. Grain Belt's Position

Supporters of the Grain Belt Express contend that the effects its structures will have on landowners in its path are only minimal, are well-compensated for through its generous easement payment structure, and, most importantly, are justified by the substantial benefits the project will bring to the Missouri public. Balancing the competing interests, the public benefits to be reaped from the project overwhelmingly outweigh the minimal costs of its construction to the landowners in its path, thus rendering it in the interest of the Missouri public to grant Grain Belt eminent domain authority to gain the easements it needs to begin construction of the project.

1. Compensation to Landowners

Grain Belt maintains that the project will be an overall good deal for landowners, one that they will benefit from economically while being entirely protected from any potential risks that may arise from the project's implementation.⁶⁵ This is largely due to the generous compensation structure Grain Belt will provide to these landowners in exchange for the required easements to use their property.⁶⁶ The company strongly prefers to obtain such easements through voluntary negotiations made in good faith with the landowners, only using eminent domain as a last resort if necessary after all reasonable efforts to negotiate have been exhausted.⁶⁷

The deal Grain Belt offers to the landowners along its route encompasses a threefold compensation structure, including (1) an easement payment; (2) structure payments; and (3) agricultural impact payments.⁶⁸ Each easement payment will be ten percent greater than the fair market value of the land, calculated as 110% of the average fee sales in the applicable county.⁶⁹ For the

65. See *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, File No. EA-2016-0358, 2019 WL 1354055, at *21–22 (Mo. P.S.C. Mar. 20, 2019) (Report and Order).

66. See *id.*

67. Direct Testimony of Mark O. Lawlor on Behalf of Grain Belt Express Clean Line LLC, Case No. EA-2014-0207 (Mo. P.S.C. Mar. 26, 2014).

68. *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, File No. EA-2016-0358, 2019 WL 1354055, at *21 (Mo. P.S.C. Mar. 20, 2019) (Report and Order).

69. *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, Case No. EA-2016-0358 (Mo. P.S.C. Jan. 18, 2019) (Grain Belt Express Proposed Findings of Fact and Conclusions of Law).

structure payments, landowners can choose between either a one-time payment of \$18,000 for each transmission line structure located on a landowner's property or an annual payment starting at \$1,500 per structure in the first year after construction, which will increase by two percent each year thereafter for the life of the project.⁷⁰ Finally, landowners will receive compensation for certain agricultural impacts that are directly attributable to the construction or maintenance of the project, including damage to crops, field repair, and temporary or permanent impacts to any center pivot irrigators.⁷¹ Grain Belt will also provide such landowners with indemnification protections and certain liability releases.⁷² The company estimates a total of approximately \$35 million to be paid in compensation to Missouri landowners.⁷³ As noted by Missouri's PSC, this compensation package is "superior to that of most utility companies."⁷⁴ Most importantly, the landowners will retain the ability to raise crops, graze livestock, hunt, or otherwise use almost the entirety of the easement area, as the physical structures typically only "occupy less than 1% of the total easement area."⁷⁵ This means that of the total amount of land factoring into the compensation calculus, landowners will retain use of over ninety-nine percent of it.⁷⁶ In fact, of the 206 miles the project will traverse in Missouri, only a mere nine acres of land will be taken out of agricultural production.⁷⁷ Given this relatively minimal impact the project will have on the land it occupies, taken together with the "superior" deal Grain Belt offers for its use, the landowners would likely be in an even better net economic position than they would be without the project. While they are entitled to their own value perspective, it certainly seems clear that, at the very least, the landowners are provided "just

70. GRAIN BELT EXPRESS, FREQUENTLY ASKED QUESTIONS FOR LANDOWNERS (Invenergy Transmission LLC), <https://grainbeltexpress.com/documents/LandownerFAQs.pdf> [hereinafter FAQ FOR LANDOWNERS]; *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, Case No. EA-2016-0358 (Mo. P.S.C. Jan. 18, 2019) (Grain Belt Express Proposed Findings of Fact and Conclusions of Law).

71. *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, Case No. EA-2016-0358 (Mo. P.S.C. Jan. 18, 2019) (Grain Belt Express Proposed Findings of Fact and Conclusions of Law).

72. *Id.*

73. *Route Overview*, *supra* note 1.

74. *In re Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity*, 2019 WL 1354055, at *21.

75. *Missouri Landowner Protocol for Right-of Way Acquisition for the Grain Belt Express Clean Line*, CLEAN LINE ENERGY PARTNERS (June 2016), <https://efis.psc.mo.gov/mpsc/common/components/viewdocument.asp?DocId=936028182> (emphasis added); FAQ FOR LANDOWNERS, *supra* note 70.

76. *See id.*

77. *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, File No. EA-2016-0358, 2019 WL 1354055, at *21 (Mo. P.S.C. Mar. 20, 2019) (Report and Order).

compensation” for their land sufficient to meet the constitutional criteria of the Takings Clause.⁷⁸

2. Economic Benefits

In addition to the staggering \$1 billion the company estimates it will bring in investment to the state’s economy,⁷⁹ including \$35 million in direct easement payments to affected landowners, Grain Belt also claims it will bring Missouri over \$7 million in annual tax revenue, create a significant number of jobs, provide lasting support for workers throughout the state, bring Missourians substantial energy savings, and even expand broadband infrastructure to advance Missouri’s rural economies.⁸⁰

a. Benefits to Missouri Workers

The Grain Belt Express will both add jobs and provide long-term support for Missouri workers throughout the state, serving as a much-needed employment boost during a particularly difficult time for Missouri.⁸¹ Over 1,500 Missourians will be employed by Grain Belt during the three-year construction period alone,⁸² as well as about seventy-eight that will be permanently employed by the company to maintain the transmission line along the Missouri route.⁸³ Additionally, the project will provide lasting support for workers throughout the state indirectly, as some of Missouri’s largest employers have recognized in their public support of the project.⁸⁴ Most notably, General Motors, Target, Unilever, Procter & Gamble, Kellogg’s, and Nestle have all long been on record backing the project throughout its quest for Missouri’s approval.⁸⁵ Together, these

78. U.S. CONST. amend. V.

79. Conley, *supra* note 6.

80. Jeffrey Tomich, *Battle reignites over \$2.5B Midwest transmission line*, E&E NEWS (Dec. 19, 2019), <https://www.eenews.net/stories/1061847775>; *Route Overview*, *supra* note 1.

81. According to the Missouri Economic Research and Information Center, seasonally adjusted unemployment reached an astounding 10.2% in 2020—almost seven percentage points higher than in 2019. Karan Pujji, *Claims Missouri is Weathering the Financial Storm*, WEBSTER-KIRKWOOD TIMES (Dec. 25, 2020), https://www.timesnewspapers.com/webster-kirkwoodtimes/claims-missouri-is-weathering-the-financial-storm/article_5ab7ad30-453d-11eb-9c9a-8f0d1acf0b58.html.

82. *Route Overview*, *supra* note 1.

83. Marie French, *Construction of wind-energy transmission line to create Missouri jobs*, ST. LOUIS POST-DISPATCH (Jan. 30, 2014), https://www.stltoday.com/business/local/construction-of-wind-energy-transmission-line-to-create-missouri-jobs/article_be6e5f7f-5755-50a1-8ed4-efe299e87ad6.html.

84. Tom Kiernan, *Kiernan: Grain Belt Express offers Missouri jobs and grid resiliency*, ST. LOUIS POST-DISPATCH (Feb. 11, 2020), https://www.stltoday.com/opinion/columnists/kiernan-grain-belt-express-offers-missouri-jobs-and-grid-resiliency/article_e6f92aec-e45d-5c4d-b957-fb31f7c58a06.html.

85. *Id.*

companies employ over 10,000 Missouri workers.⁸⁶ In a 2016 joint letter to Missouri's Public Service Commission, the companies explained how the project's approval and the benefits of the low-cost, renewable energy they would derive therefrom was "increasingly important . . . [in their] decisions about where to expand and . . . [construct] new facilities."⁸⁷ Simply put, the Grain Belt Express would provide long-term support for thousands of existing workers throughout the state employed by companies such as those that have publicly advocated for it, and the appeal of clean and affordable energy the project will yield would incentivize these employers to expand new facilities in Missouri, creating even more jobs for Missourians. With this, in addition to the jobs that would be directly created through construction and maintenance of the line, Grain Belt posits a strong case for the project to benefit Missouri workers.

b. Energy Savings

Perhaps the most economically appealing aspect of the project is the substantial amount of energy savings Missourians would enjoy as a result of the staggering 2,500 MW of low-cost wind energy the Grain Belt Express would bring to the state's energy grid.⁸⁸ In fact, wind energy is one of the cheapest electricity generation technologies currently available.⁸⁹ On average, unsubsidized wind power is priced at about \$41 per megawatt hour ("MWh"),⁹⁰ which is significantly lower than the average costs of Missouri's currently leading energy sources. For instance, coal power accounts for about seventy percent of the total electricity generation in Missouri⁹¹ and costs approximately \$109/MWh on average.⁹² Nuclear power is Missouri's next leading source of energy, accounting for about eleven percent of the state's electricity generation⁹³ at an average price of about \$155/MWh,⁹⁴ followed by natural gas, which runs

86. *Id.*

87. *Id.*; Letter from General Mills et al. to Daniel Hall, Chairman, Mo. Pub. Serv. Comm'n et al. (June 30, 2016) (available at https://www.dgardiner.com/wp-content/uploads/2016/07/Company-letter-on-RE-access-in-Missouri_logos.pdf).

88. See PA Consulting Group, *Analysis Summary: Impact of Grain Belt Express on Kansas and Missouri Ratepayers*, GRAIN BELT EXPRESS (2020), https://www.grainbeltexpress.com/documents/PAConsulting_%20Analysis%20Summary.pdf.

89. Robert Fares, *Wind Energy is One of the Cheapest Sources of Electricity, and It's Getting Cheaper*, SCI. AM. (Aug. 28, 2017), <https://blogs.scientificamerican.com/plugged-in/wind-energy-is-one-of-the-cheapest-sources-of-electricity-and-its-getting-cheaper/>.

90. LAZARD'S LEVELIZED COST OF ENERGY ANALYSIS—VERSION 13.0 (Nov. 2019), <https://www.lazard.com/media/451086/lazards-levelized-cost-of-energy-version-130-vf.pdf> [hereinafter LAZARD'S].

91. U.S. ENERGY INFO. ADMIN., MISSOURI: STATE PROFILE AND ENERGY ESTIMATES (May 21, 2020), <https://www.eia.gov/state/analysis.php?sid=MO>.

92. LAZARD'S, *supra* note 90.

93. MISSOURI: STATE PROFILE AND ENERGY ESTIMATES, *supra* note 91.

94. LAZARD'S, *supra* note 90.

at about \$56/MWh⁹⁵ and powers about eleven percent of Missouri's electricity.⁹⁶ This substantial price differential between wind power and Missouri's current energy sources is even greater when factoring in government subsidies on renewable energy, as subsidized wind power is about *half* the price.⁹⁷ Grain Belt expects the average price of its wind energy to range from about \$16.81/MWh to \$22.21/MWh, far lower than the price Missourians currently pay for their energy.⁹⁸ The cost reduction will lead to annual savings of about \$12.8 million for Missouri consumers after the Grain Belt Express is constructed,⁹⁹ which translates to an average savings of about fifty dollars per year for each residential customer.¹⁰⁰ These savings will likely only further increase, as wind energy prices have been steadily declining each year due to scale, continuous improvements in wind turbine technology, and other efficiency-related technological improvements in wind energy transmission, all largely driven by wind power becoming increasingly competitive with fossil fuel energy sources.¹⁰¹ All things considered, Missouri consumers can certainly expect more money in their pockets as a result of the Grain Belt Express.

c. Rural Broadband Expansion

One of the less-discussed benefits of the Grain Belt project is the expansion of broadband infrastructure to Missouri's rural communities. Currently, high-speed internet is unavailable in fifty of Missouri's 114 counties.¹⁰² As recently as last year, 780,000 Missourians—over ten percent of the state—lacked access to adequate internet speeds.¹⁰³ These are predominantly residents of rural and underrepresented communities whose lawmakers cite “lack of funding” as the primary hurdle to guaranteeing broadband connectivity for their citizens.¹⁰⁴ These communities miss out on improved communications, education, business,

95. *Id.*

96. MISSOURI: STATE PROFILE AND ENERGY ESTIMATES, *supra* note 91.

97. See Silvo Marcacci, *Renewable Energy Prices Hit Record Lows: How Can Utilities Benefit From Unstoppable Solar and Wind?*, FORBES (Jan. 21, 2020), <https://www.forbes.com/sites/energyinnovation/2020/01/21/renewable-energy-prices-hit-record-lows-how-can-utilities-benefit-from-unstoppable-solar-and-wind/?sh=4b56af952c84>.

98. PA Consulting Group, *supra* note 88.

99. *Route Overview*, *supra* note 1.

100. PA Consulting Group, *supra* note 88.

101. See Fares, *supra* note 89.

102. Harold Selby, Commentary, *Grain Belt Express provides more than clean energy in Missouri*, ST. LOUIS BUS. J. (Aug. 21, 2020), <https://www.bizjournals.com/stlouis/news/2020/08/21/commentary-grain-belt-express-provides-more-than.html>.

103. Lee Barker, Commentary, *Grain Belt Express moves Missouri in the right direction*, COLUMBIA TRIB. (Feb. 7, 2021), <https://www.columbiatribune.com/story/opinion/columns/guest/2021/02/07/grain-belt-express-moves-missouri-right-direction-lee-barker-higginsville/4394032001/>.

104. *Id.*

and health care, putting them at a stark economic disadvantage.¹⁰⁵ Particularly affected by this are the students in these communities, who have recently suffered as classes have moved online.¹⁰⁶ A shocking thirty-six percent of Missouri's students lack adequate internet access for virtual learning.¹⁰⁷ The burden on these students and all of the other disadvantages associated with inadequate internet access in rural communities will be greatly diminished after construction of the Grain Belt Express, as the entire length of the transmission line will contain optical fiber that will expand broadband connectivity to areas throughout.¹⁰⁸ In total, this additional infrastructure will expand broadband service to approximately *one million* rural Missourians, providing them with much-needed high-speed internet.¹⁰⁹ As a result, these rural communities can expect a boost in their economies, as well as their overall quality of life.

3. Environmental Benefits

Though Grain Belt has maintained its focus on the economic benefits of the project in its appeal to Missourians, the environmental benefits of a large-scale, homegrown wind energy project should not be understated. It is now well-known that the current predominant sources of energy in the United States, fossil fuels, are limited, unsustainable, and detrimental to Earth's atmosphere.¹¹⁰ Continued widespread use of such fossil fuels will inevitably saturate the atmosphere with an amount of carbon dioxide beyond the threshold that can support human life, leading to catastrophic consequences.¹¹¹ Though the exact timeline for this is uncertain, some of the most reliable scientific estimates suggest that it could occur anywhere between the year 2030 and 2052 based on current trends in energy consumption, among other factors.¹¹² Because of this, a large-scale transition away from fossil fuels and towards clean, renewable energy sources is imperative, as is the speed at which it happens.¹¹³ Even the most rigid skeptics should agree that this is not something worth gambling over,

105. Selby, *supra* note 102.

106. Barker, *supra* note 103.

107. Elle Moxley, *Report: 36% of Missouri students lack internet to learn at home*, ST. LOUIS AM. (July 30, 2020), http://www.stlamerican.com/news/local_news/report-36-of-missouri-students-lack-internet-to-learn-at-home/article_230aa3e8-d1fb-11ea-bc26-0721908ca926.html.

108. Kaitlyn Schallhorn, *Grain Belt line will include 'first of its kind' broadband infrastructure, impacting 1M rural Missourians*, MO. TIMES (Feb. 6, 2020), <https://themissouritimes.com/grain-belt-line-will-include-first-of-its-kind-broadband-infrastructure-impacting-1m-rural-missourians>.

109. *Id.*

110. See John Cook et al., *Consensus on consensus: a synthesis of consensus on human-caused global warming*, ENV'T RES. LETT. (Apr. 13, 2016), <https://iopscience.iop.org/article/10.1088/1748-9326/11/4/048002/pdf>.

111. See Myles Allen et al., *Summary for Policymakers*, IPCC (2018), <https://www.ipcc.ch/sr15/chapter/spm>.

112. *See id.*

113. *See id.*

especially considering the overwhelming scientific consensus on this reality.¹¹⁴ The sheer necessity of the transition toward renewable energy and its crucial urgency gives this such significant weight over almost any other competing interest, even setting aside the substantial economic benefits of a large-scale energy transmission project. Such was recognized by Missouri's Public Service Commission in finding that the Grain Belt Express was in Missouri's public interest, stating that the "benefit [of delivering wind energy to Missourians] alone would be sufficient to find that, far from being a detriment, the Grain Belt Express Project promotes the public interest and Missouri state energy policy."¹¹⁵ By proceeding with the project, Missouri will be taking a substantial and crucial step in the right direction, one that will only lead to further expansion of renewable energy in the state. Failing to do so will not only inhibit Missouri's progress in this regard, but it will also inhibit that of other states along Grain Belt's path.¹¹⁶ Most notably, without Missouri's approval, Illinois will be deprived of all of the benefits of the project, given that Missouri is the most practical geographic link between Kansas, where the wind farms are located, and Illinois, where Grain Belt plans to construct another 200 miles of its transmission line.¹¹⁷ When viewed in this context, the progress of the country as a whole in its transition towards renewable energy is greatly affected by Missouri's decision on whether to proceed with construction of the Grain Belt Express. These far-reaching environmental consequences of the project are far more important than any other interest involved when viewed from this prospective.

Taken together, it is beyond clear that all of the broad economic and environmental benefits of the Grain Belt Express overwhelmingly outweigh the interests of the landowners in its path, especially given that they will be only minutely affected, generously compensated, and wholly protected from any impact resulting from Grain Belt's use of their land. Thus, Missourians should strongly encourage the construction of the Grain Belt Express.

III. LEGAL BACKGROUND

A. *Federal and State Constitutional Requirements*

The history of eminent domain in the United States is rooted in the Takings Clause held within the Fifth Amendment to the U.S. Constitution, which states, "... nor shall private property be taken for public use, without just

114. See Cook et al., *supra* note 110.

115. *In re* Joint Application of Invenergy Transmission LLC, Invenergy Investment Company LLC, Grain Belt Express Clean Line LLC and Grain Belt Express Holding LLC, File No. EM-2019-0150, 2019 WL 4467444, at *15 (Mo. P.S.C. Sept. 11, 2019) (Amended Report and Order).

116. See Schallhorn, *supra* note 108.

117. *Id.*

compensation.”¹¹⁸ In *Kelo v. City of New London*,¹¹⁹ the Supreme Court set forth three categories that satisfy the “public use” requirement for the taking of property.¹²⁰ These include (1) where the state takes private property for public ownership, “such as for a road, a hospital, or a military base;” (2) where the state takes private property and gives it to a private entity or common carrier for public use, “such as with a railroad, a public utility, or a stadium;” and (3) where private property is taken and given to private parties to serve a public purpose, even if it is privately used.¹²¹ The Fifth Amendment’s Takings Clause is incorporated into the Due Process guarantees of the Fourteenth Amendment and thus applies to state governments as well.¹²²

Missouri’s Constitution addresses eminent domain in Article 1, Sections 26, 27, 28.¹²³ Section 28 prohibits the taking of private property “for private use with or without just compensation,”¹²⁴ while Section 27 restricts the use of eminent domain for public use to the area of property “actually to be occupied by the public improvement or used in connection therewith[.]”¹²⁵ Section 26 requires the taking of private property for public use to provide just compensation, which is a matter to be determined “by a jury or board of commissioners”¹²⁶ (*i.e.*, Missouri’s Public Service Commission).

B. State Regulatory Requirements

In order for an electrical corporation to begin construction as a public utility in Missouri, RSMO. § 393.170 requires that it must first receive a Certificate of Convenience and Necessity from Missouri’s Public Service Commission.¹²⁷ At its discretion, the PSC may grant a corporation a CCN upon a determination that its proposed construction is “necessary or convenient for the public service.”¹²⁸ If such a determination is made, the corporation may then exercise eminent domain authority to acquire use or ownership of land without the consent of the landowner.¹²⁹

The PSC evaluates five factors, commonly known as the *Tartan* factors, to determine whether an applicant’s proposed construction is “necessary or convenient for the public service,” which include the following: (1) there must

118. U.S. CONST. amend. V.

119. 545 U.S. 469, 497 (2005); Spiller, *supra* note 3, at 316.

120. Spiller, *supra* note 3, at 314.

121. *Id.*

122. *Id.*; U.S. CONST. amend. XIV.

123. Spiller, *supra* note 3, at 314; MO. CONST. art. I, §§ 26–28.

124. MO. CONST. art. I, § 28.

125. MO. CONST. art. I, § 27.

126. MO. CONST. art. I, § 26.

127. MO. REV. STAT. § 393.170(1) (2018).

128. *Id.* § 393.170(3).

129. *See id.*; Spiller, *supra* note 3, at 318.

be a need for the public service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) *the service must promote the public interest*.¹³⁰

Because the concerns that Missouri landowners have with the Grain Belt Express project primarily involve the considerations evaluated under factor (5),¹³¹ factors (1)–(4) are not addressed here. Further, as discussed below, the PSC has unanimously held that the Grain Belt Express satisfies each of these criteria,¹³² a decision that has been repeatedly upheld by Missouri appellate courts and is thus unlikely to be overturned.¹³³ Because of this, opponents of the project now must resort to legislation as likely the only means left to halt construction of the project.¹³⁴ The policy considerations pertinent to such legislation are likewise those evaluated under factor (5).¹³⁵ For these reasons, factor (5)—whether the Grain Belt Express promotes the public interest of Missouri—maintains the focus of this Note.

Whether an applicant's proposed construction promotes the public interest of Missouri is a matter of policy to be determined at the discretion of the PSC.¹³⁶ In making its determination, the commission conducts a balancing process, assessing the total interests of the public to be affected by the proposed construction.¹³⁷

130. *In re Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity*, No. EA-2016-0358, 2019 WL 1354055, at *26 (Mo. P.S.C. Mar. 20, 2019) (emphasis added).

131. *See id.* at *28; *see* H.B. 527, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021) (summary of public testimony from the committee hearing available at <https://www.house.mo.gov/billtracking/bills211/sumpdf/HB0527C.pdf>).

132. *See In re Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity*, 2019 WL 1354055, at *31; Kevin Kelly, *Commission Grants Grain Belt Express Request to Build Transmission Line*, MO. PUB. SERV. COMM'N (Mar. 20, 2019), https://psc.mo.gov/Electric/Commission_Grants_Grain_Belt_Express_Request_to_Build_Transmission_Line.

133. *See* *Mo. Landowners All. v. Pub. Serv. Comm'n*, 593 S.W.3d 632, 647 (Mo. Ct. App. E.D. 2019); *In re Invenergy Transmission LLC*, 604 S.W.3d 634, 643 (Mo. Ct. App. W.D. 2020).

134. *See* H.B. 527, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021).

135. *See id.* (summary of public testimony from the committee hearing available at <https://www.house.mo.gov/billtracking/bills211/sumpdf/HB0527C.pdf>).

136. *In re Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity*, 2019 WL 1354055, at *28.

137. *Id.*

IV. GRAIN BELT'S LEGAL JOURNEY TO DATE

A. *The Battle for Regulatory Approval*

Grain Belt initially applied for a CCN back in 2015 and was denied by Missouri's PSC due to then-existing insufficiencies with the project and its funding.¹³⁸ After several adjustments were made in order to conform with the requirements of the *Tartan* factors, Grain Belt was again denied in 2017, though this time reluctantly due to the PSC's belief that it was bound by precedent¹³⁹ that required prior consent from each county affected by the proposed construction as a prerequisite to obtaining a CCN.¹⁴⁰ Although the Commission expressed its disagreement with the precedent in its decision and suggested that it would have otherwise approved Grain Belt's application, it nevertheless saw that it was bound and could not lawfully grant Grain Belt a CCN because it had not received the requisite assent from all of the affected counties.¹⁴¹

The PSC's decision was eventually appealed all the way to the Missouri Supreme Court in *Grain Belt Express Clean Line, LLC v. Public Service Commission*.¹⁴² There, the precedent binding the PSC was reversed, and the Missouri Supreme Court unanimously found that the type of CCN Grain Belt applied for, a *line* CCN,¹⁴³ did not require the prior consent of the affected counties.¹⁴⁴ Consequently, the Commission's denial of Grain Belt's application was reversed, and the case was remanded back to the PSC to determine solely whether the project is necessary or convenient for the public service.¹⁴⁵

On remand, the PSC conducted a thorough analysis of all of the relevant considerations surrounding the Grain Belt Express, and—in a 5–0 unanimous decision¹⁴⁶—it approved Grain Belt's application for a CCN and found that the project was in the public interest of Missouri, stating, “[T]he broad economic,

138. *See* Grain Belt Express Clean Line, LLC v. Pub. Serv. Comm'n, 555 S.W.3d 469 (Mo. 2018).

139. *In re* ATXI, 523 S.W.3d 21, 26–27 (Mo. Ct. App. W.D. 2017)

140. *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, File No. EA-2016-0358, 2017 WL 3620018, at *14 (Mo. P.S.C. Aug. 16, 2017) (Report and Order).

141. *Id.* at *12–14.

142. 555 S.W.3d 469 (Mo. banc 2018).

143. As opposed to an *area* CCN where county consent is required for utility companies seeking to provide retail services, Grain Belt is a utility seeking to provide wholesale services to sell its wind energy to other energy distributors, and, as such, it applied for a *line* CCN. *Id.* at 470.

144. *Id.*

145. *Id.* at 474.

146. Kelly, *supra* note 132.

environmental, and other benefits of the Project to the entire state of Missouri outweigh the interests of the individual landowners.”¹⁴⁷

The Commission subsequently affirmed its decision after Grain Belt was acquired by Invenegy, an energy investment company, which required a rehearing on the issue.¹⁴⁸ Shortly after the rehearing, a Missouri landowners group appealed the decision to the Eastern District Court of Appeals, where the Commission’s approval was reviewed and affirmed.¹⁴⁹ A similar appeal was later brought in the Western District in 2020, where the claim of a family whose farm is within Grain Belt’s path was also denied, and the PSC’s decision was again affirmed,¹⁵⁰ effectively solidifying the project’s approval from the PSC and its ability to exercise eminent domain authority in Missouri.

B. *The Battle in the Legislature*

Since Grain Belt’s most recent victories in the Eastern and Western Districts, Missouri landowners and state legislators acting on their behalf have made multiple attempts to enact legislation that would have the effect of overturning the Missouri PSC’s decision and thereby blocking the Grain Belt Express from proceeding, all of which have thus far been unsuccessful.¹⁵¹ Leading up to 2021, the most recent attempt transpired in the Missouri legislature just before it took leave for Covid-19 in 2020.¹⁵² The bill debated, House Bill 2033, prohibited a private entity from using eminent domain to construct the type of above-ground electrical transmission line proposed by Grain Belt, “regardless of whether it has received a certificate of convenience and necessity from the public service commission.”¹⁵³ The bill passed in the House by a 118–42 margin.¹⁵⁴ It was then brought to the Senate and included as a late addition to Senate Bill 782, where, in an unusual course of events, the bill passed, but then was ultimately recalled and quashed by a unanimous vote, as

147. *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, File No. EA-2016-0358, 2019 WL 1354055, at *29, *31 (Mo. P.S.C. Mar. 20, 2019) (Report and Order).

148. *In re* Joint Application of Invenegy Transmission LLC, Invenegy Investment Company LLC, Grain Belt Express Clean Line LLC and Grain Belt Express Holding LLC, File No. EM-2019-0150, 2019 WL 4467444, at *14–17 (Mo. P.S.C. Sept. 11, 2019) (Amended Report and Order).

149. *Mo. Landowners All. v. Pub. Serv. Comm’n*, 593 S.W.3d 632, 647 (Mo. Ct. App. E.D. 2019).

150. *In re* Invenegy Transmission LLC, 604 S.W.3d 634, 643 (Mo. Ct. App. W.D. 2020).

151. See Postelwait, *supra* note 24; *Labor-endorsed Grain Belt Express can move forward after failed legislative attempt to block the project*, *supra* note 24.

152. Uhlenhuth, *supra* note 14.

153. H.B. 2033, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020).

154. Forrest Gossett, *Grain Belt Express fight moves to Missouri Senate*, HANNIBAL-COURIER POST (Feb. 5, 2020), <https://www.wind-watch.org/news/2020/02/07/grain-belt-express-fight-moves-to-missouri-senate/>.

many Senators were unaware of the “hidden” eminent domain inclusion relating to Grain Belt until after the bill’s passage.¹⁵⁵

Since this close call in the Senate, the Missouri legislature, largely consumed by Covid-19 and other serious issues that arose in 2020,¹⁵⁶ again shifted its attention back to the Grain Belt Express project with the introduction of House Bill 527 on January 6, 2021.¹⁵⁷ The bill contained substantially similar language to that of House Bill 2033 and likewise was intended to have the effect of blocking Grain Belt from proceeding with construction in Missouri.¹⁵⁸ After passing in the House by a margin of 123–33,¹⁵⁹ the bill was brought to the state Senate as Senate Bill 508,¹⁶⁰ where it was ultimately unable to gain enough traction to reach a vote on the Senate floor.¹⁶¹

Despite these repeated legislative failures, the lack of available alternatives¹⁶² has prompted landowners’ groups and state representatives acting on their behalf to again push this issue to the top of their agendas for the 2022 legislative cycle,¹⁶³ this time under much more pressing circumstances with the project’s construction set to begin in Missouri in early 2023.¹⁶⁴ This swarming opposition and the repeated history of this legislation¹⁶⁵ suggests that yet another bill targeting the project is almost certainly forthcoming in the Missouri legislature’s 2022 session. With the enclosing construction timeline,¹⁶⁶ this session will likely be the last chance for those in opposition to block the project before it finally commences, creating a unique need for these landowners to

155. AJ Capuano, *Blow-up at Missouri State Capitol after Sharpe puts ‘grenade’ in transportation bill*, KTOV (May 15, 2020), <https://ktvo.com/news/local/sparks-fly-at-missouri-state-capitol-after-sharpe-puts-grenade-in-transportation-bill>; Kaitlyn Schallhorn, *Amid claims of dishonesty, Senate unanimously reconsiders omnibus bill after finding ‘hidden’ language from House*, MO. TIMES (May 15, 2020), <https://themissouritimes.com/amid-claims-of-dishonesty-senate-unanimously-reconsiders-transportation-bill-after-finding-hidden-grain-belt-language-from-house/>.

156. See Jason Rosenbaum & Jaclyn Driscoll, *How the Coronavirus Upended Missouri’s 2020 Legislative Session*, ST. LOUIS PUB. RADIO (May 18, 2020), <https://news.stlpublicradio.org/politics-issues/2020-05-18/how-the-coronavirus-upended-missouris-2020-legislative-session>.

157. H.B. 527, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021) (status and history of the bill available at <https://legiscan.com/MO/bill/HB527/2021>);

158. See *id.*; H.B. 2033, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020).

159. Jain, *supra* note 26.

160. S.B. 508, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021).

161. See Jain, *supra* note 26.

162. See Selby, *supra* note 31.

163. See Jain, *supra* note 26.

164. See Ahl, *supra* 41.

165. See Jain, *supra* 26; *supra* note 13.

166. See Ahl, *supra* 41.

succeed in the legislature by the year's end. As a result, Missourians and their legislators are now on the brink of a pivotal decision for the state's future.¹⁶⁷

V. ARGUMENTS AGAINST MISSOURI LEGISLATION TARGETING THE GRAIN BELT EXPRESS

A. *Contrary to the Public Interest*

As set forth above, and as noted in the unanimous decision of Missouri's PSC, the substantial benefits that the Grain Belt Express will bring to residents throughout the state outweigh any potential impact the project may have on the landowners in its path, rendering the project in the public interest of Missouri.¹⁶⁸ Depriving the public of these benefits—namely, the jobs it would create and support, the boost in annual tax revenue, the substantial energy savings it will bring to Missourians, the rural broadband expansion, and its broad environmental benefits¹⁶⁹—would be a disservice to the state and contrary to its public interest. This is especially true when considering that it would be done for the sake of protecting the interests of rural landowners who will be receiving a “superior” deal that is likely even in their net economic benefit, given that they will be compensated for greater than the fair market value of their land, are protected from any potential harm that may result, and will suffer only an extremely minute loss of agricultural production, as less than a mere one percent of the easement area on their land will be occupied.¹⁷⁰ Balancing all of these interests, the scale is tilted overwhelmingly in favor of the Grain Belt Express. Enacting legislation to block construction of the project would thus be an unjust and ill-considered result for the state of Missouri.

B. *Unconstitutional*

What is more, this type of legislation is likely unconstitutional, given that it targets one, specific company to the exclusion of all others, thus constituting “special” legislation, which is prohibited by both Missouri's Constitution¹⁷¹ and the Equal Protection Clause of the Fourteenth Amendment.¹⁷² Using the most recent piece of legislation as an example, House Bill 527 was plainly targeted

167. See Mo. Cattlemens Ass'n, *Stand Tall for Private Property Rights: Yes on HB 527 & SB 508* (advertisement), https://www.mocattle.org/Media/MOCattle/Docs/eminent-domain_02-12-2021-83.pdf; *Protect Wind Energy*, *supra* note 5.

168. *In re Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity*, File No. EA-2016-0358, 2019 WL 1354055, at *47 (Mo. P.S.C. Mar. 20, 2019) (Report and Order).

169. See *id.* at *31–46.

170. See *id.* at *46; FAQ FOR LANDOWNERS, *supra* note 70.

171. MO. CONST. art. III, § 40; see, e.g., *City of Springfield v. Smith*, 19 S.W.2d 1, 3 (Mo. banc 1929).

172. U.S. CONST. amend. XIV; see, e.g., *Rinaldi v. Yaeger*, 86 S.Ct. 1497, 1499–1500 (1966).

specifically at the Grain Belt Express, made clear by both its language and the arguments posed by the legislators in support of it that routinely referenced the project by name.¹⁷³ The bill's language specifically prohibited a "utility company that does not provide service to end-use customers or provide retail service" from exercising eminent domain power "for the purpose of constructing . . . a high-voltage direct current electric transmission line."¹⁷⁴ This is precisely the type of transmission line that Grain Belt seeks to construct and precisely the type of service it would provide as a wholesale utility company.¹⁷⁵ Moreover, the bill also provided that it did not apply to almost any other electrical corporation,¹⁷⁶ essentially limiting its application to the sole case of Grain Belt. With this, it appears clear that the legislators that drafted the bill had the specific intent of enacting a law targeted directly at Grain Belt and certainly not one that would be generally applicable, as is constitutionally required.¹⁷⁷ Thus, even if similar legislation is enacted, Grain Belt could quite possibly have a claim to invalidate the law as unconstitutional, though that is certainly a much less favorable route.

C. *Inhibits Energy Progress*

Notwithstanding all other considerations surrounding the Grain Belt Express, Missourians should oppose the legislation brought against it simply because it would inhibit the state's progress, as well as that of the country as a whole. As public opinion continues to strongly favor the increased use of renewable energy sources and the decreased use of fossil fuels,¹⁷⁸ Missouri lags behind. Currently, Missouri's reliance on coal as an energy source is second only to Texas in terms of net electricity generation.¹⁷⁹ Yet, Missourians align with the

173. See H.B. 527, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021) (summary of public testimony from the committee hearing available at <https://www.house.mo.gov/billtracking/bills/211/sumpdf/HB0527C.pdf>).

174. *Id.*

175. *In re* Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, File No. EA-2016-0358, 2019 WL 1354055, at *46–50 (Mo. P.S.C. Mar. 20, 2019) (Report and Order).

176. Specifically, it states: "This subsection shall not apply to any rural electric cooperative organized or operating under the provisions of chapter 394, or to any corporation organized on a nonprofit or a cooperative basis as described in subsection 1 of section 394.200, or to any electrical corporation operating under a cooperative business plan as described in subsection 2 of section 393.110." H.B. 527, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021).

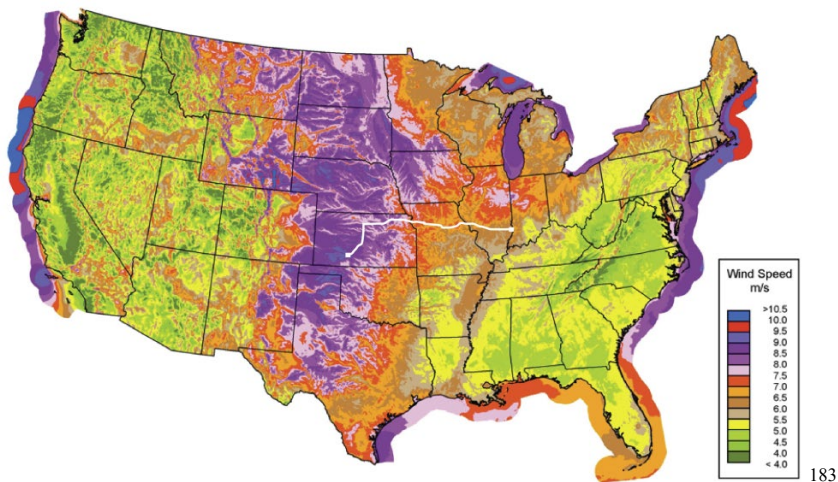
177. MO. CONST. art. III, § 40.

178. *Public opinion on renewables and other energy sources*, PEW RSCH. CTR. (Oct. 4, 2016), <https://www.pewresearch.org/science/2016/10/04/public-opinion-on-renewables-and-other-energy-sources/>.

179. Duggan Flanakin, *Environmentalists Pushing Multiple Renewable Energy Initiatives for Missouri Ballot*, HEARTLAND INST. (Apr. 8, 2020), <https://www.heartland.org/news-opinion/news/environmentalists-pushing-multiple-renewable-energy-initiatives-for-missouri-ballot>.

rest of the American public in their support for renewables, voting 2-to-1 in favor of expanding renewable energy even back in 2008.¹⁸⁰ The Grain Belt Express is an opportunity to manifest the views of Missourians and propel the state in the right direction—towards a future of sustainable energy.

The same is true in the larger context of the United States as a whole, given that the effects of the Grain Belt Express extend well beyond Missouri. As noted, Missouri is the most practical geographic link between the wind farms in Kansas and other states further east.¹⁸¹ In fact, Missouri may even be seen as the key to unlocking wind power for all eastern states, as it sits directly between them and the home of the country's fastest wind speeds, the Great Plains, where the most sensible and efficient location for wind farms in the United States is located.¹⁸² To provide a full understanding of just how important Missouri's role is in this regard, the following map visually depicts relative wind speeds in the United States, with the white line in the middle representing the route of the Grain Belt Express:



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As just the first opportunity to transmit wind power from the Great Plains to the eastern United States, Grain Belt's role here cannot be understated, as many similar projects would likely follow suit if the stringent regulatory barriers in Missouri are broken down, given the strong economic incentives of doing so. In this sense, Missouri can now be seen as "the Gateway to the East." Enacting legislation to block the transmission line from traversing Missouri would create

180. NRDC FACT SHEET, FS:13-02-E, THE RENEWABLE ENERGY STANDARD: BOOSTING MISSOURI'S ECONOMY (Feb. 2013), <https://www.nrdc.org/sites/default/files/RPS-MO.pdf>.

181. See *Route Overview*, *supra* note 1.

182. See PA Consulting Group, *supra* note 88.

183. *Id.*

a significant hurdle for these eastern states, as well as for other midwestern states, to access wind energy from the Great Plains and all of the benefits surrounding it. Thus, the progress of the United States as a whole in transitioning to renewable energy hinges to an extent on whether Missouri chooses to proceed with the project. The State of Missouri—and the rest of the country—simply cannot afford to pass up the opportunity presented by the Grain Belt Express and take a step backwards by adopting such legislation.

CONCLUSION

The Grain Belt Express, a proposed large-scale energy transmission project, will provide abundant, low-cost wind energy to areas throughout the Midwest. It will particularly benefit the State of Missouri, both economically and environmentally. However, this state has proven to be the most difficult battleground for the project, as significant pushback from its landowners has stalled Grain Belt for the past five years. These landowners primarily challenge the company's ability to exercise eminent domain authority, which would allow it to acquire use of the land in its path without the landowners' consent. Though they raise valid concerns, the substantial benefits to be realized from the project to the Missouri public overwhelmingly outweigh the minimal burden it would place on these landowners, especially considering the mitigation Grain Belt has provided them through its generous compensation structure. Thus, the project is clearly in the public interest of the State of Missouri. However, this has been strongly contested through years of legal battles with these landowners, which have ultimately resulted in Grain Belt receiving approval from Missouri's Public Service Commission in 2019 to proceed with construction of the project. The decision has since been repeatedly affirmed in Missouri courts, leaving opposing landowners with no option other than to try to block the project through legislation. In both 2020 and 2021, legislation targeting the project passed in the Missouri House by substantial margins, but both efforts ultimately failed in the state Senate. With the project's approaching construction timeline, its opposition is again swarming to capitalize on likely its last chance to block the project by passing legislation to that effect in the 2022 legislative cycle. However, like that which has preceded it, this forthcoming legislation would deprive Missouri, as well as other states further east, of the project's substantial economic benefits and, more importantly, of the significant and crucial step it would mark towards a future of renewable energy. Because such legislation is contrary to the public interest of Missouri and would inhibit clean energy progress, Missourians should emphatically oppose it.

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