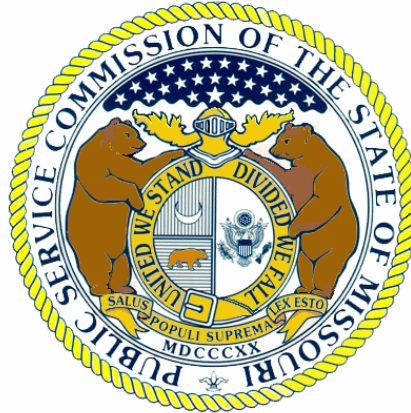


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



In the Matter of the Application of Missouri Gas)
Energy, a Division of Southern Union Company, for)
a Certificate of Public Convenience and Necessity)
Authorizing it to Construct, Install, Own, Operate,) **Case No. GA-2007-0289, et al.**
Control, Manage and Maintain a Natural Gas)
Distribution System to Provide Gas Service in Platte)
County, Missouri, as an Expansion of its Existing)
Certified Area)

REPORT AND ORDER

Issue Date: February 14, 2008

Effective Date: February 24, 2008

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Missouri Gas Energy, a Division of Southern Union Company, for a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Natural Gas Distribution System to Provide Gas Service in Platte County, Missouri, as an Expansion of its Existing Certified Area)
)
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) **Case No. GA-2007-0289, et al.**
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APPEARANCES

Roger W. Steiner, Attorney at Law, Sonnenschein, Nath & Rosenthal, L.L.P, 4520 Main Street, Suite 1100, Kansas City, Missouri 64111, for Missouri Gas Energy.

Jeffrey A. Keevil, Attorney at Law, Stewart & Keevil, L.L.C., 4603 John Garry Drive, Suite 11, Columbia, Missouri 65203, for The Empire District Gas Company.

Robert Berlin, Senior Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Marc D. Poston, Senior Counsel, Office of the Public Counsel, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

REGULATORY LAW JUDGE: Harold Stearley

REPORT AND ORDER

Procedural History

On January 31, 2007, Missouri Gas Energy (“MGE”), a Division of Southern Union Company, filed an application with the Missouri Public Service Commission, pursuant to Section 393.170, RSMo 2000,¹ requesting that the Commission grant it authority to “construct, install, own, operate, control, manage and maintain a system for the provision of natural gas service to the public pursuant to its approved rates, rules and regulations, in Sections 13 and 14, Township 52 North, Range 35 West in Platte County, Missouri.” In its application, MGE included a map showing the sections in Platte County for which it sought certification and identifying surrounding sections that it claimed it were already included in its authorized service area. According to MGE, Sections 1, 2, 3, 10, 11 and 12 in Township 52 North, Range 35 West and Sections 4, 5 and 6 in Township 52 North, Range 34 West in Platte County are included in its authorized service area.

On March 13, 2007, The Empire District Gas Company (“Empire”) was granted intervention. In its request for intervention, Empire claimed that it, not MGE, was authorized to provide natural gas service in Sections 1, 2, 3, 10, 11 and 12 in Township 52 North, Range 35 West and Sections 4, 5 and 6 in Township 52 North, Range 34 West in Platte County. Empire further asserted that it already had facilities in Section 12, which is adjacent to Sections 13 and 14 for which MGE is seeking a certificate. Therefore, Empire concluded that: (1) MGE was encroaching into its certificated

¹ All statutory references throughout this order are to RSMo 2000 unless otherwise noted.

territory; (2) Empire was fully capable of providing natural gas service to these two sections; and, (3) the facts did not support granting a certificate to MGE.

Ultimately, Empire filed its own application seeking a certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain a system for the provision of natural gas service in the same two sections of land as MGE's application (Sections 13 and 14, T52N, R35W² in Platte County, Missouri). Empire's application also sought a certificate for Sections 15, 22, 23 and 24 in the same township and range. Empire also asked the Commission to clarify which company has a certificate for Sections 1, 2, 3, 10, 11 and 12 in T52N, R35W and Sections 4, 5 and 6 in T52N, R34W in Platte County, sections in which both MGE and Empire claim to have Commission authority to provide natural gas service.

Pursuant to Commission Rule 4 CSR 240-2.110(3), the two cases were consolidated on May 31, 2007. A procedural schedule was adopted and an evidentiary hearing was scheduled to be held on October 25-26, 2007.

Issues Requiring Commission Decision

The issues before the Commission, as formulated by MGE, Empire, the Office of Public Council ("OPC") and the Staff of the Missouri Public Service Commission ("Staff"), and as adopted by the Commission, are:³

² The remainder of the Report and Order will adopt this format for abbreviating township and range. Section 140.180, RSMo 2000.

³ When filing this list of issues, the parties asserted that that they did not agree that any particular issue listed was, in fact, a valid or relevant issue. The parties further asserted that the issues list they proposed was a "non-binding" list and not to be construed as impairing any party's ability to argue about any of the issues listed, or any other related matters. The Commission adopted the issues list proposed by the parties with the caveat that the parties' framing of the issues may not accurately reflect the material issues to this matter under applicable statutes and rules. See *List of Issues, Order of Witnesses, Order of Cross-Examination, and Order of Opening Statements*, filed October 5, 2007 and *Order Adopting List of Issues, Order of Opening Statements, List and order of Witnesses and Order of Cross Examination*,

1. Who has a certificate of convenience and necessity (“CCN”) to serve Sections 1, 2, 3, 10, 11, and 12 of T52N, R35W and Sections 4, 5 and 6 of T52N, R34W all in Platte County, Missouri?

2. Should MGE be granted a CCN to serve Sections 13 and 14 of T52N, R35W in Platte County, Missouri?

3. Should Empire be granted a CCN to serve Sections 13, 14, 15, 22, 23 and 24 of T52N, R35W in Platte County, Missouri?

4. Has the Commission granted MGE a CCN authorizing MGE to provide natural gas service for Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of T52N, R35W; Sections 1, 2, 3, 4, 5 and 6 of T52N, R34W; Sections 1 and 12 of T52N, R36W; and Sections 4, 5 and 6 of T52N, R33W, all in Platte County, Missouri?⁴ If the Commission has not granted MGE a CCN authorizing MGE to provide natural gas service in these sections of land, should the Commission order MGE to correct the service territory descriptions in its existing tariffs by excluding references to these sections?

5. Has MGE constructed, installed, owned, operated, controlled, managed and/or maintained natural gas distribution facilities (gas plant) and/or provided natural gas service without first obtaining the required authorization from the Commission in Sections 10, 11, 12, 13 and 14 of T52N, R35W, in Platte County, Missouri? If so, what remedy(ies) or relief should the Commission order?

6. Should the Commission order MGE to formally provide notice to Empire of any future contact MGE has with developers in areas adjacent to the Empire service area boundaries in Platte County so that Empire can determine where and when future development is occurring along its boundaries?

The Commission also adopted the issue as to whether MGE or Empire were providing safe and adequate service. Consequently, if at the hearing the Commission found evidence of unsafe or inadequate service being provided by either company, it put the parties on notice that it might authorize its Staff to pursue a complaint action

Effective October 10, 2007.

⁴ Section 6 of T52N, R33W was inadvertently included in MGE’s application and the issues list. This section is not listed in MGE’s tariff of its certificated service areas.

and/or seek penalties for any established violations of State statutes, Commission rules or the company's tariffs.

Evidentiary Hearing and Case Submission

Pursuant to the procedural schedule adopted by the Commission, the evidentiary hearing was convened and concluded on October 25, 2007, at the Commission's offices in Jefferson City, Missouri. In total, the Commission admitted the testimony of 7 witnesses and received 31 exhibits into evidence.

Post-hearing briefs and proposed findings of fact and conclusions of law were filed according to the post-hearing procedural schedule. After two amendments to the post-hearing procedural schedule were ordered the final deadline for these filings was set for December 21, 2007, and the case was deemed submitted for the Commission's decision on that date.⁵

Empire's Post-Hearing Motion to Strike Portions of MGE's Brief

On December 28, 2007, Empire filed a motion to strike certain portions of MGE's post-hearing brief and an attachment thereto. Empire claims that MGE included in its brief a section titled "Comments of Affected Customers," and a document captioned Exhibit 1, purporting to be the statement of the developer of the Seven Bridges Subdivision ("Seven Bridges"). Empire claims that this late-filed "statement" violates Commission Rule 4 CSR 240-2.130 establishing the procedure for pre-filed testimony.

The practice of allowing pre-filed testimony is designed to give parties notice of the parties' claims, contentions and evidence, promote judicial economy, and eliminate

⁵ "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

unfair surprise at hearing. Empire asserts that to allow MGE to unfairly supplement the evidence with what amounts to additional testimony not only creates the issue of unfair surprise, but that for the Commission to accept this evidence would violate due process because Empire did not have an opportunity to cross-examine this purported new witness.

MGE responded to the motion to strike on January 3, 2008. In its response, MGE maintains that it included the statement of Mr. David Barth, the owner and developer of Seven Bridges in response to Commissioner Murray's questions at hearing concerning how the customers of Seven Bridges felt about the prospect of having to switch providers of natural gas service. MGE asserts that the statement is relevant to the Commission's decision and believes the statement may be considered.

The Transcript reflects that Commissioner Murray did indeed ask questions as to whether the parties or their attorneys have had contact with the customers affected by the determination in this case.⁶ Commissioner Murray specifically asked if any party knew what the customers that would be affected by the Commission's decision thought about the situation.⁷

While Commissioner Murray did ask questions at the hearing regarding the positions of the affected customers, the record reveals that Commissioner Murray did not request late-filed exhibits be filed in this regard. The record in this case was deemed submitted on December 21, 2008, when post-hearing briefs and proposed

⁶ Transcript pp. 66-67.

⁷ No local public hearings were requested in this matter by any person, group or entity, including the Office of the Public Counsel, and none were held by the Commission. On page 67 of the Transcript, attorney Marc Poston, representing OPC further stated that no responses or comments were received from any customer or member of the public in regard to this matter.

findings of fact and conclusions of law were filed with the Commission. MGE has not filed a proper motion requesting the Commission to re-open the matter for receipt of additional evidence. Consequently, MGE's offering of Mr. Barth's statement would indeed be a violation of the Commission's rules on testimony. While the Commission could have cured any due process issue by allowing additional response time for Empire, the Commission finds that MGE's attempt to supplement the record in this fashion is inappropriate and Empire's motion to strike shall be granted.⁸

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. In making its findings of fact, the Commission is mindful that it is required, pursuant to Section 386.420.2, after a hearing, to "make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises." Because Section 386.420 does not explain what constitutes adequate findings of fact to support the agency's decision, Missouri courts have turned to Section 536.090, which applies to "every decision and order in a contested case," to fill in the gaps of Section 386.420.⁹ Section 536.090 provides, in pertinent part:

⁸ The Commission further notes that because Mr. Barth's statement was not notarized, it was a hearsay statement. While hearsay testimony may be considered if no objection is made, like all probative evidence received without objection in a contested case must be considered in administrative hearings, hearsay evidence does not qualify as competent and substantial evidence upon the whole record essential to the validity of a final decision, finding, rule of order of an administrative officer or body under Section 22, Art. V of the Missouri Constitution. *Lacey v. State Bd. of Registration for the Healing Arts*, 131 S.W.3d 831, 842 (Mo. App. 2004); *State ex rel. De Weese v. Morris*, 359 Mo. 194, 200-201, 221 S.W.2d 206,209 (Mo. 1949); Section 536.070(8).

⁹ *St. ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 103 S.W.3d 813, 816 (Mo. App. 2003); *St. ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n*, 24 S.W.3d 243, 245 (Mo. App. 2000).

“Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.”

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.¹⁰ Nonetheless, the following formulation is often cited:

The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.¹¹

Findings of fact are inadequate when they "leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected."¹² Findings of fact are also inadequate that "provide no insight into how controlling issues were resolved" or that are "completely conclusory."¹³

When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon that witness's qualifications, expertise and credibility with regard to the attested to subject matter. Not only does the qualification of a witness as an expert rest within the factfinder's discretion,¹⁴ but witness credibility is solely a matter for the factfinder, "which

¹⁰ *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo. App. 1976).

¹¹ *Id.* (quoting 2 Am.Jur.2d *Administrative Law* § 455, at 268).

¹² *State ex rel. Int'l. Telecharge, Inc. v. Mo. Pub. Serv. Comm'n*, 806 S.W.2d 680, 684 (Mo. App. 1991) (quoting *St. ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 701 S.W.2d 745, 754 (Mo. App. 1985)).

¹³ *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *St. ex rel. Rice v. Pub. Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61 (1949)).

¹⁴ *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376, 382 (Mo. App. 2005); *Emerson Elec. Co. v. Crawford & Co.*, 963 S.W.2d 268, 271 (Mo. App. 1997). In determining whether a witness is an expert under section 490.065.1, RSMo 2000, the factfinder looks to whether he or she possesses a "peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice, or experience." *Id.* In *State Board of Registration for Healing Arts v.*

is free to believe none, part, or all of the testimony.”¹⁵ An administrative agency, as factfinder, also receives deference when choosing between conflicting evidence.¹⁶

Appellate courts also must defer to the expertise of an administrative agency when reaching decisions based on technical and scientific data.¹⁷ And an agency has reasonable latitude concerning what methods and procedures to adopt in carrying out its statutory obligations.¹⁸ Consequently, it is the agency that decides what methods of expert analysis are acceptable, proper and credible while satisfying its fact-finding mission to ensure the evidentiary record, as a whole, is replete with competent and substantial evidence to support its decisions.¹⁹

Additionally, the Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.²⁰ When interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather

McDonagh, 123 S.W.3d 146, 154-55 (Mo. banc 2003), the Missouri Supreme Court ruled that the standards set out in section 490.065 apply to the admission of expert testimony in contested case administrative proceedings.

¹⁵ *In re C.W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl*, 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell*, 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark*, 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc.*, 782 S.W.2d 170, 173 (Mo. App. 1990).

¹⁶ *Klokkenga v. Carolan*, 200 S.W.3d 144, 152 (Mo. App. 2006); *Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc.*, 208 S.W.3d 922, 924 (Mo. App. 2006); *In the Interest of A.H.*, 9 S.W.3d 56, 59 (Mo. App. 2000); *State ex rel. Associated Natural Gas Co. v. Public Service Com'n of the State of Mo.*, 37 S.W.3d 287 (Mo. App. 2000); *State ex rel. Midwest Gas Users' Ass'n. v. Public Service Com'n of the State of Mo.*, 976 S.W.2d 485 (Mo. App. 1998); *State ex rel. Conner v. Public Service Com'n*, 703 S.W.2d 577 (Mo. App. 1986).

¹⁷ *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 128 (Mo. App. 1982), citing to *Smithkline Corp. v. FDA*, 587 F.2d 1107, 1118 (D.C.Cir.1978); *Cayman Turtle Farm, Ltd. v. Andrus*, 478 F.Supp. 125, 131 (D.C.Cir.1979).

¹⁸ *Id.* citing to *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 539 F.2d 824, 838 (2d Cir.1976), *vacated for mootness*, 434 U.S. 1030, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978).

¹⁹ *Id.*

²⁰ *State ex rel. Beaufort Transfer Co. v. Public Service Commission of Missouri*, 610 S.W.2d 96, 100 (Mo. App. 1980). *State ex rel. Missouri Pacific Freight Transport Co. v. Public Service Commission*, 312 S.W.2d 363, 368 (Mo. App. 1958); *State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission*, 110 S.W.2d 364, 366 (1937).

as a fact-finding agency.²¹ Consequently, factual determinations made with regard to the Commission's prior orders receive the same deference shown in relation to all of the Commission's findings of fact. Indeed, even where there are mixed questions of law and fact, a reviewing court views the evidence in the light most favorable to the Commission's decision.²²

Findings of Fact Regarding the Parties

1. Missouri Gas Energy ("MGE") is a division of Southern Union Company with its principal office located at 3420 Broadway, Kansas City, Missouri 64111.²³

2. Southern Union Company is incorporated under the laws of the State of Delaware and is authorized to do business in Missouri as a foreign corporation under its registered fictitious name of MGE.²⁴

3. MGE provides natural gas service in the Missouri counties of Andrew, Barry, Barton, Bates, Buchanan, Carroll, Cass, Cedar, Christian, Clay, Clinton, Cooper, Dade, Dekalb, Greene, Henry, Howard, Jackson, Jasper, Johnson, Lafayette, Lawrence, McDonald, Moniteau, Pettis, Platte, Ray, Saline, Stone, and Vernon.²⁵

4. MGE has more than 8000 miles of main and more than 500,000 service lines in its Missouri service areas.²⁶

5. MGE is a "gas corporation" and a "public utility" as those terms are defined in Section 386.020.²⁷

²¹ *Id.*

²² *State ex rel. Coffman v. Pub. Serv. Comm'n*, 121 S.W.3d 534, 541-542 (Mo. App. 2003). See also *State ex rel. Inter-City Beverage Co., v. Mo. Pub. Serv. Comm'n*, 972 S.W.2d 397, 401 (Mo. App. 1998).

²³ MGE's Application for a Certificate of Public Convenience and Necessity (MGE's Application), p. 1, paragraphs 1-2, filed January 31, 2007. See also Case No. GA-2001-509.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Transcript p. 84, lines 19-23.

6. The Empire District Gas Company (“Empire”) is a corporation organized and existing under the laws of the State of Kansas, with its principal office located at 602 Joplin Street, Joplin, Missouri 64802.²⁸

7. Empire is authorized to do business in Missouri as a foreign corporation and is appropriately registered with the Missouri Secretary of State.²⁹

8. Empire provides natural gas service in the Missouri counties of Cooper, Henry, Johnson, Lafayette, Morgan, Pettis, Platte, Ray, Saline, Vernon, Chariton, Grundy, Howard, Linn, Atchison, Holt, Nodaway, Andrew and Livingston.³⁰

9. Empire is a “gas corporation” and a “public utility” as those terms are defined in Section 386.020.³¹

10. The Office of the Public Counsel (“OPC”) “may represent and protect the interests of the public in any proceeding before or appeal from the public service commission.”³² Public Counsel “shall have discretion to represent or refrain from representing the public in any proceeding.”³³

11. The General Counsel of the Missouri Public Service Commission

²⁷ MGE’s Application for a Certificate of Public Convenience and Necessity (MGE’s Application), p. 2, paragraphs 3, filed January 31, 2007. See also Case No. GA-2001-509.

²⁸ Empire’s Application for a Certificate of Public Convenience and Necessity (Empire’s Application), p. 1, paragraphs 1, filed May 30, 2007.

²⁹ *Id.* at p. 2, paragraph 2. See also Case No. GO-2006-0205.

³⁰ *Id.* at p. 1, paragraph 1.

³¹ *Id.*

³² Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 4 CSR 240-2.040(2).

³³ Section 386.710(3), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 4 CSR 240-2.040(2). Public Counsel “shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of his office. If the public counsel determines that there are conflicting public interests involved in a particular matter, he may choose to represent one such interest based upon the considerations of this section, to represent no interest in that matter, or to represent one interest and certify to the director of the department of economic development that there is a significant public interest which he cannot represent without creating a conflict of interest and which will not be protected by any party to the proceeding.” *Id.*

“represent[s] and appear[s] for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission . . .”³⁴

Findings of Fact Concerning the Types of CCNs as They Relate to the Disputed Service Territory

12. The Commission has the authority to grant certificates of service authority for the provision of natural gas service pursuant to Section 393.170.

13. The Commission has traditionally exercised its certificating authority to grant three different types of certificates for the provision of certain natural gas services, i.e. a line certificate, an area certificate and a transport certificate.³⁵

14. A “line certificate” is granted when a company properly requests to construct, install, own, operate, control, manage, and maintain a distribution system to provide service along, and a reasonable distance from, a specific distribution line.³⁶

15. An “area certificate” is granted when a company properly requests to construct, install, own, operate, control, manage, and maintain a distribution system to provide service in a specific service area, with the requested service area being defined by a metes and bounds, or township-range-section format.³⁷

³⁴ Section 386.071, RSMo 2000; Commission Rules 4 CSR 240-2.010(8) and 4 CSR 240-2.040(1). Additionally, the General Counsel “if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute in the name of the state all actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him.” *Id.*

³⁵ Staff Exh. 20, Straub Rebuttal, p. 5, lines 10-23, p. 6, lines 1-22, p. 7, lines 1-10.

³⁶ *Id.*

³⁷ *Id.*

16. A “transport certificate” or “transmission certificate” is a type of certificate that is granted when a company properly requests to construct, install, own, operate, control, manage, and maintain facilities for the purpose of transporting energy (gas or electric) from its origin or one portion of the Local Distribution Company (“LDC”) service area to another portion of its service area. This certificate is required when a LDC must transport or supply facilities outside of its authorized service area and does not automatically allow the LDC to provide service from the transport facilities to customers that may be located in or near the area.³⁸

17. In addition to both MGE and Empire seeking an area certificate for Sections 13 and 14 of T52N, R35W, and Empire seeking an area certificate for Sections 15, 22, 23, and 24 of T52N, R35W, the parties dispute the current status of CCNs each currently has in other specific sections in Platte County.

18. While the Commission, in this order, will ultimately decide the legal issues in this matter, the dispute concerning the status of MGE’s and Empire’s CCNs in Platte County, as they relate to certificate type, is appropriately framed as follows:

a.) The Staff of the Missouri Public Service Commission (“Staff”) has identified 22 Sections of land in Platte County it, and Empire, believe are erroneously listed in MGE’s tariff as having Commission-approved CCNs to provide customers with natural gas service, i.e. having an area certificate.³⁹

b.) The 22 disputed Sections are: Sections 4, and 5 of T52N, R33W; Sections 1, 2, 3, 4, 5 and 6 of T52N, R34W; Sections 1, 2, 3, 4, 5, 6, 7, 8,

³⁸ *Id.*; Staff Exhs. 7-9. Throughout Mr. Straub’s pre-filed rebuttal testimony he uses the word “transport” to describe these certificates; however, during the live testimony at hearing the parties used the term “transmission certificate.” The term “transmission certificate” as referenced by witness Straub, is defined in the same manner as Mr. Straub defined a “transport certificate” in his prefiled testimony. Transcript p. 82, line 22, p. 83, lines 4, 8, p. 118, line 19, p. 271, line 5, Staff Exh. 20, Straub Rebuttal, p. 6, lines 5-15.

³⁹ Staff Exhs. 1-3 and 17-21.

9, 10, 11 and 12 of T52N, R35W; and Sections 1 and 12 of T52N, R36W.⁴⁰

c.) Staff and Empire maintain that MGE has no Commission-approved certificate of any type for Sections 4, and 5 of T52N, R33W, Sections 1, 2, 3, 4, 5 and 6 of T52N, R34W, Sections 1, 2, 3, 4, 5, and 6, of T52N, R35W, and Section 1 of T52N, R36W.⁴¹

d.) Staff and Empire also maintain that MGE only has a line certificate for Sections 7, 8, 9, 10, 11 and 12 of T52N, R35W and Section 12 of T52N, R36W.⁴²

e.) Included in these 22 Sections are 9 Sections where MGE and Empire each claim they are authorized provide customers with natural gas service, i.e. each claim to have an area certificate.⁴³

f.) These 9 sections of alleged over-lap are: Sections 4, 5 and 6 in T52N, R34W and Sections 1, 2, 3, 10, 11 and 12 in T52N, R35W.⁴⁴

Findings of Fact Regarding MGE's CCNs

19. On May 24, 1955, in Case Number 12,632, the Commission authorized Gas Service Company ("GSC"), MGE's predecessor in interest, to construct, operate and maintain the infrastructure necessary to supply gas to the Mid-Continent Airport ("MCI Airport" - also known as Kansas City International Airport).⁴⁵

20. The exact language used by the Commission for this grant appeared in

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), pages 108-116, decided May 24, 1955; Order Modifying Commission Report and Order Dated May, 24, 1955, Case Number 12,632, effective June 24, 1955; Staff Exhs. 1, 4, 7-9; Staff Exh. 17, Warren Direct, p. 3, lines 14-20; Staff Exh. 18, Warren Rebuttal, p. 1, lines 24-27 and Schedule 5; Staff Exh. 19, Warren Surrebuttal, p. 3, lines 21-23; MGE Exh.1, Noack Direct, p. 4, lines 19-24, p. 5, lines 1-3; Transcript p. 73, lines 24-25, p. 74, lines 1-4. It should be noted that the Commission's May 24, 1955 Report and Order in Case Number 12,632 does not use the terms "transport," "line" or "area" to distinguish or describe the CCNs it was issuing.

ordered paragraph number 2 of the May 24, 1955 order and reads as follows:

That the Gas Service Company be and hereby authorized to construct, operate and maintain a ten-inch pipe line for the purpose of supplying natural gas to the Mid-Continent Airport site as set forth in Exhibit "B" attached to its supplemental application which is hereby referred to and made a part hereof.⁴⁶

21. Exhibit "B" to the May 24, 1955 Report and Order in Case Number 12,632 demonstrates that the sections of land for the location of the MCI Airport included all of, or portions of, Sections 9, 10, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 33 and 34 of T52N, R34W.⁴⁷

22. The Sections, or portions thereof, described in Finding of Fact Number 21 cover approximately eight to nine square miles of land.⁴⁸

23. The May 24, 1955 Report and Order in Case Number 12,632 authorizing the construction of a ten-inch supply line to serve MCI Airport was amended by a subsequent order, effective on June 24, 1955, authorizing the construction of a twelve-inch supply line.⁴⁹

⁴⁶ *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), ordered paragraph 2, decided May 24, 1955; Staff Exh. 7. Transcript p. 73, lines 17-25, p. 75, lines 14-15.

⁴⁷ Exhibit "B" to the Report and Order in the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.); Exhibit A to the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case Number 12,632, p. 3, Report and Order, effective December 31, 1956; Staff Exhs. 7 and 9. See also Exhibit 3 to the *Application of the Missouri Public Service Company for a Certificate of Convenience and Necessity for Ownership, Operation, and Maintenance of a Natural Gas Distribution System and All Connecting Lines Required therewith within Platte County, Missouri*, Case Number 12,674, consolidated with Case Number 12,632.

⁴⁸ See Footnote 45, supra.

⁴⁹ *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), ordered paragraph 2, decided May 24, 1955; *Order Modifying Commission Report and Order Dated May, 24, 1955*, Case Number 12,632, effective June 24, 1955; Staff Exh. 7; Transcript p. 73, lines 17-25, p. 75, lines 14-15.

24. After receiving this grant of authority, GSC constructed a twelve-inch supply line to provide gas service to the MCI Airport site.⁵⁰

25. The twelve-inch supply line, known as the “Leavenworth Supply Line,” is currently owned and operated by MGE, GSC’s successor in interest, and starts in the vicinity of East Leavenworth, Missouri and runs east to the MCI Airport.⁵¹

26. The Leavenworth Supply Line traverses Section 12 of T52N, R36W; Sections 7-12 of T52N, R35W; and Sections 7, 8, and 9 of T52N, R34W, in order to reach the area MGE is certificated to serve immediately around the MCI Airport.⁵²

27. The Leavenworth Supply Line runs through the sections of land immediately to the north of Sections 13 and 14 T52N, R35W, the sections for which both companies currently seek an area certificate.⁵³

28. In the Conclusions of Law section of the Commission’s May 24, 1955 Report and Order in Case Number 12,632, the Commission notes that either GSC or Missouri Public Service Company (“MPSC” -- GSC’s competitor) had the capability to provide gas to the airport site, and further states: “However, the use of this 500 Mcf. of firm gas is restricted to the airport site only and neither company would be permitted to

⁵⁰ Staff Exhs. 7, 8 and 9; Transcript p. 75, lines 11-25; *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), effective May 24, 1955; *Order Modifying Commission Report and Order Dated May, 24, 1955*, Case Number 12,632, effective June 24, 1955.

⁵¹ Staff Exh.18, Warren Rebuttal, p. 3, lines 1-7. See also Schedule 2 of this Exhibit and Staff Exh. 1 and 2.

⁵² Exhibit “B” to the Report and Order in the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.). See also Exhibit A to the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, Case Number 12,632, p. 3, Report and Order, effective December 31, 1956; Staff Exhs. 7 and 9; Transcript p. 74, lines 7-25, p. 75, lines 1-10; Staff Exh.18, Warren Rebuttal, p. 3, lines 1-7. See also Schedule 2 of Staff Exh. 18 and Staff Exh. 1 and 2.

⁵³ MGE Exh.1, Noack Direct, p. 4, lines 19-24, p. 5, lines 1-3. Staff Exh. 1 and 2.

interconnect its airport supply line with distribution lines to serve areas outside of the airport.”⁵⁴

29. The restriction of use noted by the Commission in its Conclusions of Law section is not repeated in the ordered paragraphs in of the May 24, 1955 Report and Order in Case Number 12,632.⁵⁵

30. As evidenced by Exhibit “B” to the May 24, 1955 Report and Order in Case Number 12,632, the Commission granted GSC, and thus its successor in interest MGE, a combination “line” certificate and “area” certificate to serve the sections of land comprising the location of the MCI Airport, i.e., all of, or portions of, Sections 9, 10, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 33 and 34 of T52N, R34W.⁵⁶

31. The Commission’s May 24, 1955 Report and Order in Case Number 12,632 granting GSC a line certificate to construct and utilize the Leavenworth Supply Line, by definition, authorized GSC to construct, install, own, operate, control, manage, and maintain a distribution system to provide service along, and a reasonable distance

⁵⁴ *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), page 114, effective May 24, 1955; Staff Exh. 7.

⁵⁵ Transcript p. 75, lines 11-25, p. 76, lines 1-20, p. 94, lines 18-24, p. 119, lines 14-21, p. 270, lines 23-25, p. 271, lines 1-11. See also Finding of Fact Number 28 and associated Footnote Number 54.

⁵⁶ Exhibit “B” to the Report and Order in the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.). See also Exhibit A to the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, p. 3, Report and Order, effective December 31, 1956; Staff Exhs. 7 and 9. See also Exhibit 3 to the *Application of the Missouri Public Service Company for a Certificate of Convenience and Necessity for Ownership, Operation, and Maintenance of a Natural Gas Distribution System and All Connecting Lines Required therewith within Platte County, Missouri*, Case Number 12,674, consolidated with Case Number 12,632.

from, the Leavenworth Supply Line running through Section 12 of T52N, R36W, Sections 7-12 of T52N, R35W and Sections 7, 8, and 9 of T52N, R34W.⁵⁷

32. The Commission's May 24, 1955 Report and Order in Case Number 12,632 not only granted GSC a line certificate as described in Finding of Fact Number 31, but also granted GSC an area certificate to construct, install, own, operate, control, manage, and maintain a distribution system to provide service in a specific service area, i.e. the sections of land comprising the location of the MCI Airport; i.e., all of, or portions of, Sections 9, 10, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 33 and 34 of T52N, R34W.⁵⁸

33. No party to this action contests the classifications of the certificates that were granted in the Commission's May 24, 1955 Report and Order in Case Number 12,632, or the authorized uses for the certificates described in Findings of Fact Numbers 14, 15, 30, 31, or 32.⁵⁹

34. The reason for the restriction that was placed on the use of the Leavenworth Supply Line for those sections of land not encompassed within the MCI Airport location was concern over jeopardizing the available supply of natural gas to the City of St. Joseph and the area surrounding the city because the gas for the Leavenworth Supply Line was to be drawn from 12-inch line terminating in St. Joseph and serving multiple communities in route thereto.⁶⁰

⁵⁷ Empire Exh. 4, Gatz Rebuttal, p. 5, lines 21-23, p. 6, lines 1-3; Empire Exh. 5, Gatz Surrebuttal, p. 7, lines 4-23, p. 8, lines 1-8; Staff Exh. 18, Warren Rebuttal, p. 3, lines 9-19. *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), effective May 24, 1955. See also Finding of Fact Number 14, *supra*.

⁵⁸ *Id.* See also Finding of Fact Number 15, *supra*; Findings of Fact Numbers 36, and 37 and Footnotes 62 and 63, *infra*.

⁵⁹ Footnotes 56-58, *supra*; Transcript p. 75, lines 11-25, p. 94, lines 18-22.

⁶⁰ *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a*

35. No company besides GSC had any type of CCN for Sections 10, 11, and 12 of T52N, R35W at the time the restriction was imposed on the Leavenworth Supply Line, and only one reason existed for the Commission's decision to restrict the grant to only a line certificate – the concern over jeopardizing the available supply of natural gas to the City of St. Joseph.⁶¹

36. In addition to the combination line/area certificate granted to GSC to serve the MCI Airport location, the Commission's May 24, 1955 Report and Order in Case Number 12,632 also granted GSC an additional CCN to provide natural gas service (an area certificate) when it stated in ordered paragraph number 3:

That the Gas Service Company be and is hereby granted a certificate of convenience and necessity to provide natural gas service within the following area:

Beginning at the northeast corner of Section 9, Township 52, Range 33, thence west a distance of nine miles to the northwest corner of Section 7, Township 52, Range 34, thence south a distance of nine miles to the southwest corner of Section 19, Township 51, Range 34, thence east a distance of approximately four and a half miles to the center of the south line of Section 23, Township 51, Range 34, thence north a distance of one

Natural Gas Public Utility a Described Area is Platte County, Missouri, Case Number 12,632, Report and Order, pp. 110-116, effective December 31, 1956; Staff Exhibit 9; Transcript p. 235, lines 3-25, p. 236, line 1.

⁶¹ *Id.* (See all three Reports and Orders in Case Number 12,632); *In the Matter of the Application of Missouri Public Service Company for a Certificate of Convenience and Necessity for Ownership, Operation and Maintenance of a Natural Gas System in an Area Adjacent to Platte City and Tracy, Platte County, Missouri, as Shown on the Attached Map Marked Exhibit A*, Case No. 13,172.

Staff's witness Henry Warren testified that he believed another reason for the Commission's 1955 restriction was that the Leavenworth Supply Line passed through Empire's predecessor's certificated territory, although there is nothing in the May 24, 1955 Report and Order in Case Number 12,632 that would support such speculation. Transcript p. 235, lines 3-25, p. 236, line 1.

In fact, neither MGE's predecessor in interest Gas Service Company, nor Empire's predecessor in interest, Missouri Public Service Company, were granted an area CCN for Sections 10, 11, and 12 of T52N, R35W (sections the supply line crossed and which allegedly were where both companies currently have area CCNs) until the following year. *In the Matter of the Application of Missouri Public Service Company for a Certificate of Convenience and Necessity for Ownership, Operation and Maintenance of a Natural Gas System in an Area Adjacent to Platte City and Tracy, Platte County, Missouri, as Shown on the Attached Map Marked Exhibit A*, Case No. 13,172, Report and Order, effective January 27, 1956. Empire Exh. 3, Gatz Direct, RFG Attachment 1.

mile to the center of the north line of Section 23, Township 51, Range 34, thence east a distance one-half mile to the northeast corner of said section, thence north a distance of three miles to the northeast corner of Section 2, Township 51, Range 34, thence a distance of four miles to the southeast corner of Section 33, Township 53, Range 33, thence north a distance of five miles to the point of beginning, all in Platte County, Missouri.⁶²

37. The geographical area described in Finding of Fact Number 36, granting GSC an area certificate to provide natural gas service to all of the enclosed sections within those boundaries, totally surrounds and includes the same sections comprising the location of the MCI Airport, i.e., Sections 9, 10, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 33 and 34 of T52N, R34W.⁶³

38. The area certificate granted to GSC in the Commission's May 24, 1955 Report and Order in Case Number 12,632, authorized GSC to provide natural gas service, not only to residential and commercial customers near and outside the boundaries of the MCI Airport site, but also to all of the sections of land within the MCI Airport site, i.e. Sections 9, 10, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 33 and 34 of T52N, R34W. GSC was authorized to use its Leavenworth Supply Line to serve the portions of the sections constituting the airport site.⁶⁴

⁶² *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), effective May 24, 1955. See also Staff Exhs. 7, 8, and 9.

⁶³ Exhibit "B" to the Report and Order in the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.). See also Exhibit A to the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, p. 3, Report and Order, effective December 31, 1956; Staff Exhs. 7 and 9. Even without this specific grant of an area certificate, the Commission's order had granted an area certificate for these 14 sections of land when it authorized GSC to serve these sections in order to supply gas to the airport site.

⁶⁴ MGE Exh. 3, Noack Surrebuttal, p. 2 lines 9-23; Empire Exh. 5, Gatz Surrebuttal, p. 7, lines 4-23, p. 8, lines 1-8; Staff Exh. 18, Warren Rebuttal, p. 3, lines 9-19. Exhibit "B" to the Report and Order in the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo.

39. The Commission's May 24, 1955 Report and Order in Case Number 12,632, notes that the provision of natural gas service to customers located in the geographical area described in Finding of Fact Number 36, to serve the area outside of the boundaries for the MCI Airport site would come from another part of GSC's distribution system, namely its contiguous certificated area surrounding Kansas City, Missouri as opposed to the Leavenworth Supply Line.⁶⁵

40. The supply of gas to GSC, at the time the Commission issued its May 24, 1955 Report and Order in Case Number 12,632, was from the facilities of an interstate pipeline owned and operated by the Cities Service Gas Company.⁶⁶

41. The CCN granted to GSC in 1955 for the geographical area described in Finding of Fact Number 36 included Sections 7 and 18 of T52N, R34W that are adjacent to Sections 12 and 13 of T52N, R35W, which are two of the primary sections at issue in this matter.⁶⁷

42. In 1956, GSC applied for modification of the certificates granted in the May 24, 1955 Report and Order in Case Number 12,632.⁶⁸

P.S.C. (N.S.). See also Exhibit A to the *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, p. 3, Report and Order, effective December 31, 1956; Staff Exhs. 7 and 9.

⁶⁵ *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), decided May 24, 1955. See also Staff Exhs. 7, 8, and 9.

⁶⁶ *Id.*; *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), effective December 31, 1956. See also Staff Exhs. 7, 8, and 9.

⁶⁷ *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, 6 Mo. P.S.C. (N.S.), at page 116, decided May 24, 1955. See Staff Exh. 2 for a Plat Map depicting the majority of MGE's certificated service area.

⁶⁸ *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area is Platte County, Missouri*, Case Number 12,632, Report and Order issued December 18, 1956, effective December 31, 1956; Staff Exhibit 9.

43. In its application, GSC sought the full an unrestricted use of the Leavenworth Supply Line for supplying natural gas service to customers for which it had been certificated in Case Number 12,632 “in and about Platte Woods, Gladstone, Missouri **and other areas near or beyond** the Mid-Continent International Airport.” (Emphasis added.)⁶⁹

44. The Commission duly noted in the 1956 Report and Order that GSC was specifically “request[ing] authority now to use the full capacity of the 12-inch line authorized heretofore in this case to provide improved service to customers in and about Platte Woods, Gladstone, Missouri **and other areas near or beyond the Mid-Continent International Airport.**” (Emphasis added.)⁷⁰

45. GSC had also specifically sought authority to construct and operate connecting lines to the Leavenworth Supply Line in order to supply its distribution system in Platte Woods and Gladstone, Missouri, cities that were already within their certificated service area (area certificate).⁷¹

46. In 1956, the Commission modified its 1955 Report and Order in Case Number 12,632 to allow GSC to construct and operate connecting lines to the Leavenworth Supply Line and to make full use of the supply line for all areas depicted in a map made part of the order and marked Exhibit A. This modification is encompassed in ordered paragraph number 1 of the order, which states:

Ordered: 1. **That the Gas Service Company be and is hereby authorized to construct, maintain and operate connecting lines that will enable it to make full use of and is hereby authorized to so use the 12 inch line heretofore authorized in orders issued herein on May**

⁶⁹ *Id.* See also the case file for Case Number 12,632, particularly GSC’s Application.

⁷⁰ *Id.*

⁷¹ *Id.*; Transcript p. 76, lines 4-20.

24 and June 24, 1955, supplying gas to its distribution system in Platte Woods and Gladstone, Missouri, and in other areas for which the applicant has heretofore been certificated, the route of said lines being more fully described by a map attached to the application and made part thereof and marked Exhibit A which is hereby referred to and made a part hereof. (Emphasis added.)⁷²

47. The Commission concluded, in the 1956 Report and Order, that Cities Service Gas Company, the supplier of gas for GSC's Leavenworth Supply Line, had completed the construction of an additional 16-inch pipeline to serve St. Joseph, Missouri, and the original concern for restricting the use of the Leavenworth Supply Line to supplying the MCI Airport and surrounding area was now alleviated.⁷³

48. The map attached to GSC's application and to the Commission's order depicted not only the proposed connecting lines for Platte Woods and Gladstone, but the entire Leavenworth Supply Line.⁷⁴

49. With regard to GSC's proposed expansion and use of the Leavenworth Supply Line, the Commission stated:

The facts show that the construction will be in the public interest and that none of the customers now served or to be served in any of the applicant's certificated areas will be adversely affected by the construction as proposed or the change in the use of the present 12 inch line heretofore authorized in this case. (Emphasis added.)⁷⁵

50. The Commission's 1956 Modification Order granting GSC's request stated that GSC was authorized to make full use of the 12-inch Leavenworth Supply Line in its orders issued herein on May 24 and June 24, 1955, to supply gas to its distribution system in Platte Woods and Gladstone, Missouri, and in other areas for which the

⁷² *Id.* See Exhibit A delineating the entire Leavenworth Supply Line as the subject of the order.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

applicant has heretofore been certificated. The order **did not state** that it **only** authorized full use of the supply line for sections in which it had previously granted GSC an area certificate, but rather states that it authorizes full use of the line “**in other areas for which the applicant has heretofore been certificated.**” (Emphasis added.)⁷⁶

51. The language used in the Commission’s 1956 Modification Order granting GSC’s request to lift the restrictions on use of the Leavenworth Supply Line demonstrates that in ordered paragraph number 1 that the adjective “certificated” modifies the noun “areas,” i.e. “certificated areas.”

52. The language used in the Commission’s 1956 Modification Order granting GSC’s request to lift the restrictions on use of the Leavenworth Supply Line demonstrates that in ordered paragraph number 1 the word “areas” is used as a noun and not used as an adjective to modify the word “certificated,” i.e. the order does not make any reference to “area certificates” or to any other specific type of certificates when it uses the word “certificated.”

53. The Commission’s 1956 Modification Order granting GSC’s request did not state that it authorized the full use of the Leavenworth Supply Line for only those sections in which it had previously granted GSC an area certificate. It states that it authorizes full use in areas heretofore certificated. The order changes the use of the supply line, an expansion of its use, near or beyond the Mid-Continent International Airport, in any of the applicant’s service areas in which a certificate was granted in Case No. 12,632, without distinction as to the type of certificate.

⁷⁶ See Findings of Fact Numbers 42-49, and their associated footnotes.

54. The Commission's 1956 Modification Order granting GSC's request had the effect of lifting all restrictions on the Leavenworth Supply Line's use in all sections where GSC had been granted a service area CCN, near and beyond the MCI Airport, i.e. all of the sections identified in Finding of Fact Number 36.

55. The Commission's 1956 Modification Order granting GSC's request had the effect of converting the line certificate for the Leavenworth Supply Line, where it traversed Sections 7, 8 and portions of 9, in T52N, R34W, into an area certificate. GSC had, in fact, already been granted an area certificate for these sections. However, prior to the 1956 Order, the gas supply for serving customers in these three sections, with the exception of the part of Section 9 included in the MCI Airport area, was restricted to a source other than the Leavenworth Supply Line. Once the restriction was lifted, GSC was free to serve customers in these sections directly from any connection made to the Leavenworth Supply Line.

56. The Commission's 1956 Modification Order granting GSC's request had the effect of converting GSC's line certificate for Section 12 of T52N, R36W and Sections 7-12 of T52N, R35W, into an area certificate because it authorized the **full and unrestricted use** of the Leavenworth Supply Line in all areas where GSC had "**heretofore been certificated,**" (i.e. "any certificate," "all certificates" or "every certificate"), near and beyond the MCI Airport, **regardless of the type of certificate previously issued by the Commission.** (Emphasis added.)⁷⁷

⁷⁷ When interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency. Consequently, factual determinations made with regard to the Commission's prior orders receive the same deference shown in relation to all of the Commission's findings of fact. *Beaufort Transfer Co.*, 610 S.W.2d at 100; *Missouri Pacific Freight*, 312 S.W.2d at 368; *Orscheln Bros. Truck Lines*, 110 S.W.2d 366.

Findings of Fact Regarding MGE's 1997 Commission-Approved Tariff

57. As an ancillary matter in Case Number GA-96-130, after MGE acquired the service area of GSC in Commission Case Number GM-94-40, the Commission determined that the extent and boundaries of MGE's service area were "ill-defined" and ordered MGE and the Commission's Staff "to cooperate in preparing and filing a tariff setting out the plat and legal description of the current and complete MGE service area, and canceling all prior certificates."⁷⁸

58. In Case No. GR-96-285, the Commission noted: "MGE has committed to file tariff sheets with metes and bounds descriptions and maps showing certificated service areas in the State of Missouri by February 28, 1997. This commitment by MGE adequately addresses Staff's concern on this issue. The Commission finds that this issue is resolved by virtue of MGE's commitment to file the requested tariff sheets by February 28, 1996."⁷⁹

59. In response to the Commission's directive, MGE worked with the Commission's Staff for approximately three months to revise and update its tariff to accurately reflect its certificated service areas in Missouri.⁸⁰

⁷⁸ MGE Exh.1, Noack Direct, p. 3 lines 1-18. See also, Report and Order, *In the Matter of the Application of Missouri Pipeline Company for Permission, Approval, and a Certificate of Public Convenience and Necessity Authorizing It to Modify and to Construct, Own, Operate, Control, Manage and Maintain a Natural Gas Transmission Pipeline, a Delivery Spur, Delivery Stations and Related Interconnections and Other Facilities and to Transport natural Gas in Portions of Cass and Jackson Counties, Missouri*, Case No. GA-96-130; *In the Matter of the Joint Application of Western Resources, Inc., d/b/a Gas Service, a Western Resources Company, a Kansas Corporation and Southern Union Company, d/b/a Missouri Gas Energy, a Delaware Corporation, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets Relating to the Provision of Gas Service in Missouri from Western Resources, Inc. to Southern Union Company, and in Connection Therewith, Certain Other Related Transactions*, Case No. GM-94-40.

⁷⁹ Report and Order, *In the Matter of Missouri Gas Energy's Tariff Sheets Designed to Increase Rates for Gas Service in the Company's Service Area*, Case No. GR-95-285. MGE Exh. 1, Noack Direct, p. 3 lines 1-18; Staff Exh. 20, Straub Rebuttal, p. 2, lines 17-25, p. 3, lines 1-2.

⁸⁰ Transcript p. 137, lines 15-25, p. 138, lines 1-25, p. 139, lines 1-21.

60. In order to comply with the Commission's order to update its tariff listing of MGE's certificated service areas MGE personnel spent "at least 200 hours pulling data, looking at facilities, generating facilities maps, comparing the order of the facilities maps, deriving the tariff sheets, working with Mr. McDuffey (Staff) to explain all the materials, at least once at our offices, perhaps twice."⁸¹

61. MGE witness Robert Hack, currently serving as MGE's Chief Operating Officer, testified that in order to prepare the tariff sheets, MGE and Staff examined the Commission's certificate, merger and acquisition orders. MGE and Staff then prepared maps based upon these orders and a review of MGE's facility to identify all of the township, range and section number encompassing MGE's certificated service area.⁸²

62. Mr. Hack testified that he prepared the 1997 tariff sheets that resulted from MGE's and Staff's collaboration to accurately identify its certificated service areas.⁸³

63. Mr. Hack was serving in the capacity of MGE's Senior Attorney in 1997.⁸⁴

64. The tariff filing resulting from MGE and Staff's collaboration, which included MGE's Index of Certificated Areas for Platte County, was filed on February 20, 1997, bore an issue date of February 21, 1997, and bore an effective date of April 21, 1997.⁸⁵

⁸¹ *Id.*

⁸² Transcript p. 116, lines 1-5.

⁸³ Transcript p. 116, lines 6-25, p. 117, lines 1-9.

⁸⁴ Transcript p. 69, lines 1-4, Staff Exh. 12.

⁸⁵ P.S.C. MO. No. 1, Original Sheet No. 6.15, Date of Issue: February 21, 1997; Effective Date: May 21, 1997; tariff tracking number JG-2003-0638; MGE Exh.1, Noack Direct, p. 3 lines 1-18. Staff Exh. 3.

65. On April 10, 1997, MGE filed a letter with the Commission requesting that the effective date for the above referenced tariff sheets be extended until May 21, 1997.⁸⁶

66. MGE's tariff filing, in response to the Commission's directive for it to clarify the geographical boundaries of its service area in Case No. GA-96-130 and GR-96-285, included the following Tariff Sheets:⁸⁷

P.S.C. Mo. No. 1
1st Revised Sheet No. 6, Canceling Original Sheet No. 6
Original Sheet No. 6.1 through Original Sheet No. 6.16

67. MGE's tariff filing included a total of 17 sheets describing MGE's service areas in Andrew, Audrain, Barry, Barton, Buchanan, Carroll, Cass, Cedar, Christian, Clay, Clinton, Cooper, Dade, DeKalb, Greene, Henry, Howard, Jackson, Jasper, Johnson, LaFayette, Lawrence, McDonald, Moniteau, Newton, Pettis, Platte, Ray, Saline, Stone, and Vernon Counties in Missouri.⁸⁸

68. MGE's tariff sheets, as referenced above, all bore the title line of "Index of Certificated Areas," and all bore the caption of "Missouri Gas Energy, a Division of Southern Union Company, For: All Missouri Service Areas."⁸⁹

69. Tariff Sheet No. 6.15, one of the original sheets included in MGE's February 20, 1997 tariff filing, lists MGE's certificated areas for Pettis and Platte Counties, Missouri.⁹⁰

⁸⁶ Staff Exh. 11; Transcript p. 77, lines 17-23.

⁸⁷ Staff Exh. 20, Straub Rebuttal, p. 3, lines 3-22, p. 4, lines 1-22, p. 5, lines 1-17, and Schedule 2 to the Exhibit, pp. 6, 7 and 23; Staff Exh. 10; Staff Exh. 21, Straub Surrebuttal, p. 2, lines 1-12.

⁸⁸ Staff Exhibit 10; P.S.C. MO. No. 1, Tariff Tracking Number JG-2003-0638

⁸⁹ P.S.C. MO. No. 1, Original Sheet No. 6.15, Date of Issue: February 21, 1997; Effective Date: May 21, 1997; Tariff Tracking Number JG-2003-0638; MGE Exh.1, Noack Direct, attached Exhibit A; Staff Exhibit 13.

70. MGE’s Original Sheet 6.15 lists the following sections of Platte County as being part of its certificated area:

Platte County

T50N, R33W	Sections 4, 5, 6, 7, 8, 9
T51N, R33W	Sections 4, 5, 6, 7, 8, 9, 16,17,18,19, 20, 21, 28, 29, 30, 31, 32, 33
T51N, R34W	Sections 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36
T51N, R35W	Sections 11, 12
T52N, R33W	Sections 4, 5, 7, 8, 9, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, 33
T52N, R34W	Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36
T52N, R35W	Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12
T52N, R36W	Sections 1, 12
T54N, R33W	Sections 4, 5, 6, 7, 8, 9, 16,17,18,19, 20, 21, 28
T54N, R34W	Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 28, 29, 30, 31, 32, 33
T54N, R35W	Sections 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17
T55N, R34W	Section 31
T55N, R35W	Sections 32, 33, 34, 35, 36 ⁹¹

(Emphasis placed on the sections in dispute.)

71. MGE’s Original Sheet No. 6.15, listing MGE’s certificated areas for Platte County, Missouri, includes the 22 disputed sections in this matter that were delineated in Finding of Fact Number 18, which include the 9 sections that allegedly overlap with Empire’s certificated area, i.e. Sections 1, 2, 3, 10, 11 and 12 in T52N, R35W and Sections 4, 5 and 6 in T52N, R34W.⁹²

⁹⁰ P.S.C. MO. No. 1, Original Sheet No. 6.15, Date of Issue: February 21, 1997; Effective Date: May 21, 1997; Tariff Tracking Number JG-2003-0638; MGE Exh.1, Noack Direct, attached Exhibit A; Staff Exhibit 13.

⁹¹ *Id.*

⁹² MGE Exh.1, Noack Direct, attached Exhibit A; MGE Exh. 2, Noack Rebuttal, p. 3 lines 12-22, p. 4, lines 1-5; Staff Exhibit 13.

72. There are no distinctions of any type on Original Sheet No. 6.15 identifying the specific types of CCNs that were granted by the Commission to MGE, or its predecessor in interest GSC, for each of the sections listed as part of MGE's certificated areas.⁹³

73. There is no documentation of any type accompanying Original Sheet No. 6.15 that differentiates between sections where MGE, or its predecessor in interest GSC, was granted a "transport," "line" or "area" certificate, or any combination of these types of certificates.⁹⁴

74. Michael W. Straub, employed by the Commission as the Assistant Manager-Rates in the Energy Department of the Operations Division between May 1995 and August 2000, supervised the person assigned to review MGE's tariff filing when it was filed in 1997.⁹⁵

75. Witness Straub testified that he could only remember two things about this particular 1997 tariff filing by MGE, wanting to get the tariffs clarified and writing an annotation on the tariff routing slip.⁹⁶

76. MGE witness Robert Hack testified that the Staff person he remembered most for working with him on developing the new tariff sheets was Mr. Mack McDuffey.⁹⁷

77. Mr. Hack, while serving as MGE's Senior Attorney, filed a letter with the Commission on April 11, 1997, in response to a request from Mr. McDuffey to provide a

⁹³ P.S.C. MO. No. 1, Original Sheet No. 6.15, Date of Issue: February 21, 1997; Effective Date: May 21, 1997; Tariff Tracking Number JG-2003-0638.

⁹⁴ MGE Exh.1, Noack Direct, attached Exhibit A; Staff Exhibit 13.

⁹⁵ Staff Exh. 20, Straub Rebuttal, p. 3, lines 3-22, p. 4, lines 1-22, p. 5, lines 1-17.

⁹⁶ Transcript p. 273, lines 1-17.

⁹⁷ Transcript p. 69, lines 5-8. Mr. McDuffey was not a witness in this matter.

list of Commission orders used by MGE while working on the creation of the new tariff sheets.⁹⁸

78. The list was comprised of approximately 80 cases including the Commission's May 24, 1955 order in consolidated cases numbered 12,632 and 12,674.⁹⁹

79. Witness Straub testified that Staff's investigation of MGE's new tariff sheets included review of Commission orders issued dating from November 22, 1935 through April 18, 1995, a total of approximately 80 MGE CCN and service order cases.¹⁰⁰

80. The time period referenced by Mr. Straub matches the dates on the list of orders submitted by Mr. Hack to Mack McDuffey on April 11, 1997.

81. From the approximately 80 cases reviewed, Staff determined that MGE had facilities in 31 counties, 101 townships, 245 ranges, and 2,901 sections.¹⁰¹

82. Many of the Commission orders that were reviewed were over 50 years old at the time of their review.¹⁰²

83. After Staff's review, the tariff sheets, including Original Sheet No. 6.15, were routed to the Commissioners for a vote of approval or suspension with the Utility Operations Division Routing Slip, File No. 9700571.¹⁰³

⁹⁸ Staff Exh. 12; Transcript p. 77, lines 24-25, p. 78, lines 1-19.

⁹⁹ Staff Exh. 12. "It is worth noting that the Commission December 1956 Modification Order for Case No. 12,632 was not included on this list."

¹⁰⁰ Staff Exh. 20, Straub Rebuttal, p. 3, lines 3-22, p. 4, lines 1-22, p. 5, lines 1-17; Staff Exh. 12.

¹⁰¹ Staff Exh. 20, Straub Rebuttal, p. 3, lines 3-22, p. 4, lines 1-22, p. 5, lines 1-17; Staff Exh. 12; Transcript p. 270, lines 11-18.

¹⁰² Transcript p. 84, lines 24-25, p. 85, line 1; Staff Exh. 12.

¹⁰³ Staff Exh. 13.

84. The Utility Operations Division Routing Slip, File No. 9700571 was circulated to five Staff members to review and initial prior to submission to the Commissioners. Those five members were Mr. McDuffey, Mr. Straub, Mr. Matisziw, Mr. Goldammer, and “Legal.” There are four sets of initials correspond to the name listings with Mr. Straub being listed as “absent.” Mr. McDuffey initialed twice indicating a revision had been made on May 9, 1997.¹⁰⁴

85. Staff’s recommendation on the routing slip was to approve the tariffs, or to allow them to go into effect by operation of law.¹⁰⁵

86. Staff’s recommendation on the routing slip states, in pertinent part:

The Commission Rule 4 CSR 240-2.060 (Rule) requires metes and bounds description of the certificated service area . . .

Staff and Company have reviewed certificates of convenience and necessity (CCN) cases and Company service orders in the development of the proposed tariffs sheets. The CCN cases were granted in either a transmission or service area certificate making development of a service area in a metes and bounds format very difficult. Therefore, the description of the Company’s proposed service area was developed by listing the service areas by township, range and section. The township, range and section format is utilized by other regulated energy utilities under the jurisdiction of the Commission. In Staff’s opinion a township, range and section format satisfies the Rule. Therefore, Staff has no objection to this format.¹⁰⁶

87. The Commission’s Utility Operations Division Routing Slip, File No. 9700571, bearing an Agenda Date of May 14, 1997, establishes that three of the acting

¹⁰⁴ *Id.*

¹⁰⁵ MGE Exh.1, Noack Direct, attached Exhibit A; Staff Exhibit 13.

¹⁰⁶ *Id.*

Commissioners reviewed MGE's February 1997 tariff filings; Chair Zobrist, Vice Chair Drainer, and Commissioner Crumpton.¹⁰⁷

88. These same three Commissioners initialed the routing slip and indicated that the Commission's action was to approve the tariff filing. A separate hand-written notation on the routing slip indicates that the Commission's vote was "3-0".¹⁰⁸

89. Mr. Straub was present at the Commission's Agenda meeting on May 14, 1997, when the Commission made its decision on approving Original Sheet No. 6.15.¹⁰⁹

90. Mr. Straub testified that he added a hand written note to the Division Routing Slip of File No. 9700571, MGE's updated tariff filing. The hand-written addition reads as follows: "The purpose of this filing is to show the Company's current service area, and does not expand to any area that it currently does not serve."¹¹⁰

91. There is no competent or substantial evidence in the record that would establish that Mr. Straub's hand-written addition to the Division Routing Slip of File No. 9700571 constituted official action by the Commission that was voted upon by the Commissioners in attendance at the May 14, 1997 Agenda meeting.¹¹¹

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Staff Exh. 20, Straub Rebuttal, p. 3, lines 3-22, p. 4, lines 1-22, p. 5, lines 1-17.

¹¹⁰ Staff Exh. 20, Straub Rebuttal, p. 3, lines 3-22, p. 4, lines 1-22, p. 5, lines 1-17 and Schedule 2 to the Exhibit, pp. 1-2; Staff Exh. 13. Transcript p. 253, lines 5-25, pp. 254-259, p. 260, lines 1-18.

¹¹¹ The Commission appropriately sustained a hearsay objection to Mr. Straub's testimony concerning whom he claimed had instructed him to add this notation. The statement that he was instructed to add this notation was admitted into evidence solely for the limited purpose of establishing that Mr. Straub believed he had a reason for adding his hand-written statement to the routing slip, not for the purpose of the truth of the matter that he was in fact instructed to do so. There was no 1997 member of the Commission present at the evidentiary hearing that could have corroborated Mr. Straub's statement, or been subject to cross-examination of the parties regarding the statement. There simply is no competent evidence in the record to establish who, if anyone, gave Mr. Straub the directive to add his hand written note to the Division Routing Slip File No. 9700571. See Footnote Number 8 – hearsay evidence not competent or substantial.

92. MGE's Original Sheet No. 6.15 has not been revised since its original submission and approval in 1997.¹¹²

93. Once a tariff becomes effective a company must comply with the tariff.¹¹³

94. Failure to comply with a tariff could result in, among other things, the Staff filing a complaint action against the company.¹¹⁴

95. If there is an error in a tariff that has been approved by the Commission, the tariff remains in effect unless the tariff is modified by the appropriate procedure.¹¹⁵

96. Any alleged discrepancy or error in a Commission-approved tariff can be brought to the attention of the Commission by any interested party.¹¹⁶

97. Any alleged discrepancy or error in a Commission-approved tariff can be corrected voluntarily on the part of the company by filing a corrected tariff.¹¹⁷

98. Any alleged discrepancy or error in a Commission-approved tariff can be corrected by an interested party filing a complaint action with the Commission challenging the lawfulness of the order approving the tariff.¹¹⁸

99. MGE's Tariff Sheet 6.15, as filed and approved, is still in effect in the form in which was approved on May 14, 1997.¹¹⁹

¹¹² P.S.C. MO. No. 1, Original Sheet No. 6.15, Date of Issue: February 21, 1997; Effective Date: May 21, 1997; Tariff Tracking Number JG-2003-0638; MGE Exh.1, Noack Direct, p. 3 lines 1-18 and attached Exhibit A. See also Staff Exhs. 10-13.

¹¹³ Transcript p. 261, lines 16-25. See also Conclusions of Law, Legal Effect of a Commission-Approved Tariff.

¹¹⁴ *Id.*

¹¹⁵ Transcript p. 262, lines 3-25, p. 263, lines 1-25, p. 264, lines 1-2, p. 265, lines 7-13, p. 269, lines 17-23, p. 274, lines 16-23, p. 277, lines 4-13.

¹¹⁶ *Id.*; Sections 386.390, 386.400, 386.420, RSMo 2000; Commission Rule 4 CSR 240-2.070.

¹¹⁷ Transcript p. 262, lines 8-25, p. 263, lines 1-3, p. 269, lines 8-14.

¹¹⁸ See Footnotes 113-117.

¹¹⁹ Transcript p. 263, line 25, p. 264, lines 1-2.

100. There is no competent and substantial evidence in the record to establish that any proper party intervened and requested MGE's Tariff Sheet 6.15 should have been suspended or challenged the filing of the Tariff in any way.

101. Lacking interveners, there was no proper party, or properly contested case before the Commission whereby an intervening entity could appeal the Commission's order approving MGE's Tariff Sheet 6.15 in a court of competent jurisdiction.¹²⁰

102. To date, no interested party has filed a complaint action with the Commission challenging the lawfulness of its May 14, 1997 order approving MGE's Tariff Sheet 6.15.¹²¹

103. To date, MGE has not voluntarily filed a new tariff with the Commission to provide any identified corrections to its Commission-approved Tariff Sheet 6.15.¹²²

104. At the evidentiary hearing, MGE offered to voluntarily correct its Commission-Approved Tariff Sheet 6.15 to remove Sections 1, 2 and 3 of T52N, R35W and Sections 4, 5 and 6 of T52N, R34W from its Index of Certificated Areas.¹²³

105. In its Post-Hearing Brief, MGE represented to the Commission that it would voluntarily correct its Commission-Approved Tariff Sheet 6.15 to remove Sections 4 and 5 in T52N, R33W, Sections 1, 2, 3, 4, 5, and 6 of T52N, R34W, Sections 1, 2, 3, 4, 5, 6, 7, 8, and 9 of T52N, R35W, Sections 1 and 12, of T52N, R36W, if the Commission should find that MGE lacks a Commission-approved CCN for these

¹²⁰ Sections 386.500, 386.510, 386.515, 386.520, 386.530, and 386.540, RSMo 2000.

¹²¹ Transcript p. 269, lines 24-25, p. 270, lines 1-3. The Commission takes notice that there have been no filings by any of the parties to this action, other than the immediate case, addressing whether the Commission's order approving MGE's 1997 Tariff was in error or in any way, unlawful.

¹²² P.S.C. MO. No. 1, Original Sheet No. 6.15, Date of Issue: February 21, 1997; Effective Date: May 21, 1997; Tariff Tracking Number JG-2003-0638.

¹²³ Transcript p. 97, lines 23-25, p. 98, lines 1-5, p. 119, lines 14-25, p. 120, lines 1-2; MGE Exh. 3, Noack Surrebuttal, p. 4, lines 18-22, p. 5, lines 1-10.

sections.¹²⁴

Findings of Fact Concerning MGE's Expansion into the Disputed Sections

106. The developers of "Seven Bridges" contacted MGE about providing natural gas service to their subdivision and executed a contract with MGE for the provision of that service on January 6, 2006.¹²⁵

107. Seven Bridges is a large planned residential subdivision, comprised of approximately 1,500 new homes to be constructed in several phases in Sections 11, 12, 13 and 14 of T52N, R35W.¹²⁶

108. MGE received a construction advance from the developer of Seven Bridges to cover the cost of the extension of its gas facilities to phases one through four of the subdivision.¹²⁷

109. MGE began construction of the extension facilities immediately after the contract was signed and began providing service to customers in the first phase of the "Seven Bridges" subdivision (Section 12) in early 2006.¹²⁸

110. This construction included the placement of main extensions from its twelve inch supply line, the "Leavenworth Line," to serve the portion of the Seven Bridges development in Sections 13 and 14.¹²⁹

¹²⁴ MGE's Post-Hearing Brief, Part IV, Case Number GA-2007-0289, filed December 21, 2007.

¹²⁵ MGE Exh.1, Noack Direct, p. 3 lines 23-24, p. 4, lines 1-5; Transcript p. 92, lines 15-20.

¹²⁶ Transcript p. 122, lines 18-24; MGE Exh. 1, Noack Direct, p. 4, lines 8-17; MGE Exh. 2, Noack Rebuttal, p. 5 lines 11-15. MGE's Application further stated that the expansion of its services would involve two commercial buildings. MGE's Application, p. 2, paragraph 5. See also Empire Exh. 3, Gatz Direct, p. 6, lines 22-23.

¹²⁷ MGE Exh.1, Noack Direct, p. 5, lines 6-9.

¹²⁸ MGE Exh.1, Noack Direct, p. 3 lines 23-24, p. 4, lines 1-5; Transcript, p. 150, lines 21-25.

¹²⁹ MGE Exh. 2, Noack Rebuttal, p. 7 lines 10-12. The Leavenworth Line was constructed to serve the Kansas City International Airport and the adjacent area. MGE Exh.1, Noack Direct, p. 4, lines 19-24, p. 5, lines 1-3; Transcript p. 133, lines 18-25, p. 134, lines 1-25, p. 135, line 1.

111. In order to serve the Seven Bridges development, MGE began construction in Sections 13 and 14 in T52N, R35W, where they border Sections 11 and 12 in T52N, R35W, prior to MGE discovering these sections were not in an area approved by the Commission as MGE's service territory.¹³⁰

112. MGE filed its application for a CCN to provide service in Sections 13 and 14 in T52N, R35W as soon as it became apparent that its construction activities had taken place in an area not approved for service by the Commission.¹³¹

Findings of Fact Regarding MGE's Provision of Service in the Disputed Sections

113. MGE, or its predecessor in interest, has been serving at least one customer in Section 12 in T52N, R35W since 1960.¹³²

114. MGE has been servicing two customers in Section 10 in T52N, R35W since 1992.¹³³

115. MGE has been servicing existing customers and a new customer in Sections 10 and 12 since the Commission approved its tariff in May of 1997.¹³⁴

116. In May and October of 2006, MGE began serving customers in the Seven Bridges development and one other customer in Section 12, pursuant to its tariff.¹³⁵

¹³⁰ MGE Exh. 2, Noack Rebuttal, p. 2 lines 20-23, p. 3, lines 1-2, p. 5 lines 11-24; Transcript p. 123, lines 7-11, p. 134, lines 19-25, p. 135, lines 102.

¹³¹ MGE Exh. 2, Noack Rebuttal, p. 2 lines 22-23, p. 3, lines 1-2; Transcript p. 123, lines 7-11, p. 133, lines 18-25, p. 134, lines 1-25, p. 135, line 1.

¹³² MGE Exh.1, Noack Direct, p. 3 lines 1-18; MGE Exh. 2, Noack Rebuttal, p. 5 lines 1-2; Transcript p. 128, lines 2-9.

¹³³ *Id.*; MGE Exh. 2, Noack Rebuttal, p. 5 lines 2-3; Transcript p. 100, lines 3-11.

¹³⁴ *Id.*; MGE Exh. 2, Noack Rebuttal, p. 5 lines 3-5; Transcript p. 84, lines 9-12.

¹³⁵ MGE Exh. 2, Noack Rebuttal, p. 5 lines 5-7; MGE Exh. 3, Noack Surrebuttal, p. 2 lines 2-4; Transcript p. 93, lines 14-17, p. 114, lines 14-23, p. 128, lines 14-19, p. 130, lines 12-15.

117. MGE currently serves residential customers in subdivisions located directly to the north (Sections 10, 11 and 12) and east (Sections 7 and 18) of Sections 13 and 14. MGE, if granted a certificate, will use the same supply line that serves these customers to provide service to Sections 13 and 14.¹³⁶

118. MGE serves customers on Oakmont Drive, beginning in a subdivision in Section 7, T52N, R34W for which it has a CCN to serve customers. Oakmont Drive now extends into the southeast corner of Section 12 in T52N, R35W just east of Prairie Creek.¹³⁷

119. MGE is serving approximately 40 customers in Section 12, T52N, R35W and 10 to 20 customers in Sections 10 and 11, T52N, R35W.¹³⁸ A handful of these customers are served directly off of the Leavenworth Supply Line.¹³⁹

120. None of the customers that MGE serves in Sections 10, 11, and 12 of T52N, R35W, are located in Platte City or are located in areas that require a franchise agreement with any municipality.¹⁴⁰

Findings of Fact Regarding MGE's Ability to Provide Natural Gas Service in the Disputed Sections

121. MGE has an adequate supply of gas and adequate pipeline transportation capacity to serve customers in Sections 13 and 14, T52N, R35W.¹⁴¹

122. MGE has provided the Commission with a schedule outlining the

¹³⁶ MGE Exh.1, Noack Direct, p. 3 lines 1-18, p. 4, lines 19-24, p. 5, lines 1-3; Transcript p. 95, lines 18-23, p. 100, lines 3-11, p. 114, lines 5-11, p. 126, lines 5-24.

¹³⁷ Staff Exh.18, Warren Rebuttal, p. 5, lines 1-5.

¹³⁸ Transcript p. 95, lines 21-23, p. 100, lines 3-11, p. 114, lines 3-11, p. 126, lines 5-24, p. 131, lines 4-13.

¹³⁹ Transcript p. 126, lines 17-21, p. 128, lines 3-13.

¹⁴⁰ Transcript p. 115, lines 8-19, Staff Exh. 4.

¹⁴¹ MGE Exh.1, Noack Direct, p. 4, lines 19-24, p. 5, lines 1-3.

estimated construction costs, advances by the developers and estimated margin to be received from the future customers using natural gas. Based upon this schedule, MGE will profit from serving the new customers.¹⁴²

123. MGE is currently providing natural gas service in Missouri and has the expertise, experience and financial qualifications to provide natural gas service in Sections 13 and 14.¹⁴³

124. MGE is already serving a portion of the Seven Bridges development and allowing it serve the entire development would prevent the duplication of services.¹⁴⁴

125. MGE is willing to enter a franchise agreement with Platte City to serve any customers that are within its city limits.¹⁴⁵

Findings of Fact Regarding Empire's CCNs and Tariffs

126. On January 12, 1956, in Case Number 13,172, the Commission authorized the Missouri Public Service Company to construct, operate and maintain a natural gas transmission and distribution system in Sections 13, 14, 15, 22, 23, 24, 25, 26, 27, 34, 35 and 36 in T53N, R35W; **Sections 1, 2, 3, 10, 11, and 12 in T52N, R35W;** Sections 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32 and 33 in T53N, R34W; and **Sections 4, 5 and 6 in T52N, R34W** of Platte County, Missouri. **(The sections emphasized in bold are the sections appearing in both MGE's and Empire's current tariffs.)**¹⁴⁶

¹⁴² MGE Exh.1, Noack Direct, p. 5, lines 15-18.

¹⁴³ MGE Exh.1, Noack Direct, p. 5, lines 22-24, p. 6, lines 1-3.

¹⁴⁴ *Id.*

¹⁴⁵ MGE Exh. 3, Noack Surrebuttal, p. 3, lines 14-15.

¹⁴⁶ *In the Matter of the Application of Missouri Public Service Company for a Certificate of Convenience and Necessity for Ownership, Operation and Maintenance of a Natural Gas System in and Area Adjacent*

127. At the time Missouri Public Service Company was granted this certificate, GSC's over-lapping certificate for Sections 10, 11, and 12 in T52N, R35W was a line certificate.¹⁴⁷

128. The CCN conveyed to Missouri Public Service Company ("MPSC") was subsequently transferred to Aquila, Inc. successor in interest to MPSC.¹⁴⁸

129. In Case Number GO-2006-0205, the Commission approved a Unanimous Stipulation and Agreement executed between Aquila, Inc., d/b/a Aquila Networks – MPS and Aquila Networks -- L&P ("Aquila") and Empire transferring all of Aquila's Missouri jurisdictional natural gas utility operations; effective May 2, 2006.¹⁴⁹

130. In the order approving the Unanimous Stipulation and Agreement (Case Number GO-2006-0205), the Commission authorized Empire to adopt Aquila's tariff sheets and authorized Empire to provide natural gas service in the areas that were being served by Aquila in accordance with those tariff sheets.¹⁵⁰

to Platte City and Tracy, Platte county, Missouri, as Shown on the Attached Map Marked Exhibit A, Case Number 13,172 (unreported). See also Empire Exh. 4, Gatz Rebuttal, p. 4, lines 1-6 and Staff Exh. 2. As previously noted, when interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency. Beaufort Transfer Co., 610 S.W.2d at 100; Missouri Pacific Freight Transport Co., 312 S.W.2d at 368; Orscheln Bros. Truck Lines, 110 S.W.2d at 366.

¹⁴⁷ See Findings of Fact Numbers 19-56 and their associated footnotes.

¹⁴⁸ Empire Exh. 3, Gatz Direct, p. 10, lines 4-20; MGE Exh. 2, Noack Rebuttal, p. 3, lines 21-22, p. 4, line 1.

¹⁴⁹ *In the Matter of the Joint Application of Aquila, Inc. d/b/a Aquila Networks – MPS and Aquila Networks -- L&P ("Aquila"), The Empire District Gas Company ("EDG"), and The Empire District Electric Company ("EDG") for an Order Authorizing the Sale, Transfer, and Assignment of Certain Assets and Liabilities from Aquila to EDG and in Connection Therewith, Certain Other Related Transactions, Case Number GO-2006-0205, Order Approving Unanimous Stipulation and Agreement and Granting a Certificate of Public Convenience and Necessity, issued April 18, 2006, effective May 1, 2006.*

¹⁵⁰ *Id.*

131. On June 15, 2006, the Commission approved the tariff sheet filed by Empire, P.S.C. Mo. No. 1, Sec. A, Original Sheet No, 1; Empire's adoption notice of Aquila's tariff, tariff tracking number YG-2006-0896, effective June 20, 2006.¹⁵¹

132. Aquila's tariff, as adopted by Empire, P.S.C. MO. No. 1, Sheet No. 3 identifies the following Sections of Platte County as being part of its authorized gas service territory:

- a.) Sections 4-6 of T52N, R34W;
- b.) Sections 1-3, and 10-12 of T52N, R35W;
- c.) Sections 16-21 and 28-33 of T53N, R34W;
- d.) Sections 6, 7, 13-15, 18, 19, 22-27 and 34-36 of T53N, R35W; and,
- e.) Sections 1-3, 10-15 and 22-24 of T53N, R36W.¹⁵²

Findings of Fact Concerning Empire's Provision of Service in the Disputed Sections

133. Empire holds a franchise from Platte City, in Platte County, Missouri, to provide gas service within Platte City.¹⁵³

134. The community of Platte City has been part of Empire's, or its predecessor's, authorized service area for over 50 years.¹⁵⁴

135. Empire also has an order from the County Court of Platte County to construct, operate, and maintain pipelines for transmission of gas along, across, or under the roads, highways and public ways of Platte County, Missouri.¹⁵⁵

¹⁵¹ *Id.* Order Recognizing Adoption of Tariffs in Compliance with Commission Order, Issue date, June 15, 2006, Effective Date, June 20, 2006.

¹⁵² P.S.C. MO. No. 1, Original Sheet No. 3, Date of Issue: April 27, 2004; Effective Date: May 1, 2004; tariff tracking number YG-2006-0896.

¹⁵³ Empire Exh. 3, Gatz Direct, p. 4, lines 18-19; Empire Exh. 1, Klein Direct, p. 6, line 7; Staff Exh.18, Warren Rebuttal, p. 5, lines 20-23.

¹⁵⁴ Empire Exh. 3, Gatz Direct, p. 4, lines 12-14.

136. Platte City and Kansas City have an annexation agreement which creates the potential for areas inside the Platte City planning area that are certificated to MGE becoming annexed.¹⁵⁶

137. Empire believes that the service territory at issue in this case will eventually be annexed into Platte City, and based upon its current franchise and court authority, that it should be granted a CCN to provide service in Sections 13 and 14, T52N, R35W, and the surrounding Sections 15, 22, 23, and 24.¹⁵⁷

138. Of the nine disputed sections, where Empire and MGE both have Commission-approved tariffs listing them as part of their respective service areas (i.e. Sections 4, 5 and 6 of T52N, R34W and Section 1, 2, 3, 10, 11, and 12 of T52N, R35W) only portions of Section 1 in T52N, R35W and Sections 5 and 6 in T52N, R34W are encompassed within Platte City's boundaries.¹⁵⁸

139. Empire, or its predecessor Aquila, has provided gas service to at least one customer in Section 12 of T52N, R35W since October of 1995.¹⁵⁹

140. Empire is currently serving 3 residential customers and no commercial customers in Section 12 of T52N, R35W.¹⁶⁰

141. Empire has installed main to serve customers in the in the Copper Ridge Subdivision located in Section 12 of T52N, R35W, but there are no active customers in this subdivision at this time.¹⁶¹

¹⁵⁵ Empire Exh. 3, Gatz Direct, p. 4, lines 19-22.

¹⁵⁶ Staff Exh.18, Warren Rebuttal, p. 6, lines 1-13; Staff Exh. 4.

¹⁵⁷ Empire Exh. 3, Gatz Direct, p. 4, lines 14-18, p. 6, lines 1-23, p. 7, lines 1-3; Staff Exh. 4.

¹⁵⁸ Staff Exh. 17, Warren Direct, p. 3, lines 14-20; Staff Exh. 4.

¹⁵⁹ Empire Exh. 2, Teter Direct, p. 5, lines 18-20. Transcript p. 179, lines 21-25.

¹⁶⁰ Staff Exh.18, Warren Rebuttal, p. 4, lines 19-21. Transcript p. 158, lines 4-14, p. 180, lines 6-9.

142. Copper Ridge is a two-phase subdivision expected to have approximately 70 homes when it is completed.¹⁶²

143. Empire serves no customers in Sections 2, 3, 10, and 11 in T52N, R35W, and no customers in Section 4 and 5 of T52N, R34W.¹⁶³

144. Empire serves 163 residential customers in Section 1 in T52N, R35W.¹⁶⁴

145. Empire serves 680 residential customers and 51 commercial customers in Section 6 of T52N, R34W.¹⁶⁵

Findings of Fact Regarding Empire's Ability to Provide Natural Gas Service in Sections 13, 14, 15, 22, 23, and 24 of T52N, R35W

146. Empire's existing natural gas distribution system in the Platte City area is comprised of approximately 47 miles of coated and wrapped steel and polyethylene main serving approximately 2,800 customers in Platte City, Weston and Tracy in Platte County, Missouri.¹⁶⁶

147. The natural gas utilized to serve Empire's customers in the Platte City area is delivered into Empire's distribution system through Southern Star Central Gas Pipeline's transmission network.¹⁶⁷

148. Empire has the necessary interstate pipeline transportation capacity to serve the anticipated growth in the Seven Bridges in Sections 11-14 in T52N, R35W via

¹⁶¹ *Id.*

¹⁶² Transcript p. 179, lines 17-20.

¹⁶³ Transcript p. 179, lines 12-16, p. 180, lines 22-25, p. 181, lines 1-25, p. 182, lines

¹⁶⁴ Transcript p. 180, lines 22-25, p. 181, lines 1-25, p. 182, lines 1-2.

¹⁶⁵ *Id.*

¹⁶⁶ Empire Exh. 1, Klein Direct, p. 2, lines 11-14. See also Staff Exh. 4 Platte City Annexation Plan Map.

¹⁶⁷ Empire Exh. 1, Klein Direct, p. 2, lines 18-20.

an existing transportation agreement it has with the Southern Star Central Pipeline Company.¹⁶⁸

149. Empire has expanded its system in Section 12 and built loop segments to support future growth projected for Sections 13 and 14, T52N, R35W, and the surrounding Sections 15, 22, 23, and 24.¹⁶⁹

150. Empire will use internally generated funds to expand its existing natural gas delivery system to adequately serve the expected increase in demand for natural gas service.¹⁷⁰

151. Empire expects its investment in the new service area to grow to \$331,000 by the end of the third year of service; \$166,000 of this cost being for main installation and \$165,000 being for service installation.¹⁷¹

152. Empire's projected investment in new service area, described in Findings of Fact Numbers 148-151, *supra*, does not include the investment necessary to serve the existing customers in Sections 12, 13 and 14, T52N, R35W, that are currently receiving service from MGE.¹⁷²

153. The exact system modifications necessary for Empire to accommodate all of the future growth in the six additional sections sought in which Empire seeks a CCN (i.e. Sections 13, 14, 15, 22, 23, and 24, T52N, R35W) have not been determined.¹⁷³

¹⁶⁸ Empire Exh. 3, Gatz Direct, p. 7, lines 6-8; Empire Exh. 1, Klein Direct, p. 3, lines 21-23.

¹⁶⁹ Empire Exh. 1, Klein Direct, p. 3, lines 5-8.

¹⁷⁰ Empire Exh. 3, Gatz Direct, p. 7, lines 8-21; Empire Exh. 1, Klein Direct, p. 4, lines 20-22; Transcripts p. 216, lines 16-23.

¹⁷¹ Empire Exh. 1, Klein Direct, p. 5, lines 22-23.

¹⁷² Empire Exh. 1, Klein Direct, p. 6, lines 1-5.

¹⁷³ Empire Exh. 1, Klein Direct, p. 3, lines 11-13.

154. Empire could use the facilities that MGE uses to serve its existing customers in Sections 12, 13 and 14, T52N, R35W, if the Commission were to order MGE to abandon or sell those facilities to Empire.¹⁷⁴ However, even if this was possible, Empire would still have to extend a 4-inch main one-half mile from its current facilities, over the LSL, to the entrance of Seven Bridges in order to supply gas to Seven Bridges at a cost of \$26,400 to \$39,600.¹⁷⁵

155. Empire could use MGE's facilities located in the disputed sections to serve customers if the Commission directed MGE to sell those facilities to Empire.¹⁷⁶

156. Empire would have to exchange meters for those customers currently being served by MGE if the Commission directed MGE to sell those facilities to Empire, a 30-minute process involving shutting off the gas, exchanging meters, and relighting the service.¹⁷⁷

157. Empire expects that for every one-hundred new homes in the proposed developments in Sections 13 and 14, T52N, R35W, approximately nine-thousand five-hundred (9,500) feet of main will be required to serve them.¹⁷⁸

158. Empire's dollar cost for each lineal foot of 4-inch main is \$10 to \$15.¹⁷⁹

159. Empire's dollar cost for 9,500 feet of main to serve 100 new customers would be between \$95,000 and \$142,000.¹⁸⁰

¹⁷⁴ Transcript, p. 155, lines 18-25, p. 156, lines 1-25, p. 157, lines 1-7.

¹⁷⁵ Transcript p. 158, lines 20-25, p. 159, lines 2-8; See Finding of Fact Number 158.

¹⁷⁶ Transcript p. 156, lines 2-22.

¹⁷⁷ Transcript p. 157, lines 1-7, p. 158, lines 1-25, p. 159, lines 1-25, p. 160, lines 1-19.

¹⁷⁸ Empire Exh. 1, Klein Direct, p. 5, lines 12-14, Transcript p. 161, lines 22-25.

¹⁷⁹ Transcript p. 160, lines 11-14.

¹⁸⁰ Transcript p. 160, lines 11-14, p. 161, lines 22-25.

160. Empire's dollar cost for 9,500 feet of main to serve 100 established customers would be the same, between \$95,000 and \$142,000, plus the cost of service.¹⁸¹

161. Empire's cost of main to serve the first 100 existing customers, if Empire is unable to use MGE's current facilities, is approximately \$78,000.¹⁸²

162. For each additional 100 customers the cost of main would be approximately \$44,000, if Empire is unable to use MGE's current facilities.¹⁸³

163. In addition to the main installation, a service line and regulator will have to be installed at each customer's home.¹⁸⁴

164. Empire's service installation generally costs \$550 per customer. To provide service installation to the approximately 40 to 60 customers that MGE is currently serving in Seven Bridges, this cost would total between \$22,000 and \$33,000.¹⁸⁵

165. In addition to installing main to connect to MGE's current facilities, assuming MGE's existing facilities can be used, and in addition to installing main for new customers, Empire would eventually have to install "looping facilities" to provide a secondary flow for consistency of service. The looping facilities cost the same as any other main installation.¹⁸⁶

¹⁸¹ Transcript p. 162, lines 1-3.

¹⁸² Transcript pp. 160-165.

¹⁸³ *Id.*

¹⁸⁴ Empire Exh. 1, Klein Direct, p. 5, lines 14-16.

¹⁸⁵ Transcript p. 162, lines 3-10.

¹⁸⁶ Transcript p. 163, lines 3-25, p. 164, lines 1-18. See Findings of Fact 154, 157-162.

166. The projected extension of Empire's gas distribution facilities into the new service territory sought in this case meets the economic thresholds of Empire's line extension policy, i.e. the extensions will generate sufficient revenue to justify constructing and operating the new facilities.¹⁸⁷

167. Customers receiving natural gas service from Empire are charged higher rates than MGE's customers. Based upon rates between June 2006 and June 2007, a MGE customer using 860 CCF of natural gas would pay \$1023.64 for that gas, while an Empire customer would pay \$1,161.33 for the same amount of natural gas. Empire's charges are 13% higher than MGE's. Empire does have a lower monthly customer charge than MGE, so customers using less natural gas in the heating season would have less of an increase, but it would cost more for customers to receive natural gas service from Empire.¹⁸⁸

Findings of Fact in Relation to Granting Empire's Request for a CCN in Sections 15, 22, 23, and 24 of T35N, R35W

168. Empire is not serving any customers in Sections 15, 22, 23, and 24 of T52N, R35W.¹⁸⁹

169. There is also no evidence in the record to establish that MGE is serving any Customers Sections 15, 22, 23, and 24 of T52N, R35W.

¹⁸⁷ Empire Exh. 1, Klein Direct, p. 4, lines 16-19.

¹⁸⁸ Staff Exh. 19 Warren Surrebuttal, p. 7, lines 13-23, p. 8, lines 1-7; Transcript p. 242, lines 10-25, p. 243, lines 1-7. p. 244, lines 13-25, p. 245, lines 1-22, p. 250, lines 4-21. Without providing an actual cost translation, Witness Warren testified that Empire's recent submission of a reduced PGA factor could possibly lower Empire's rates. However, when asked the same questions about MGE's recent PGA factor filing, Mr. Warren was unable to make a similar comparison or comment on the exact effects these reductions might have comparatively on the two company's rates. The Commission finds the testimony regarding the potential effect of the reduced PGA factors to be incompetent and insubstantial on this issue.

¹⁸⁹ Transcript p. 182, lines 3-14, 25, p. 183, lines 1-2.

170. Empire has received no requests from any customer to provide natural gas service in Sections 15, 22, 23, and 24 of T52N, R35W.¹⁹⁰

171. There are no developments, large or small, being constructed in Sections 15, 22, 23, and 24 of T52N, R35W.¹⁹¹

172. Empire's Witness Mr. Daniel Klein testified that the reason Empire requested a CCN for Sections 15, 22, 23, and 24 of T52N, R35W is that it views these sections as being "the logical progression of the growth of the Platte City area and anticipate significant residential growth there and desire to serve those customers."¹⁹²

Findings of Fact in Relation to Whether MGE or Empire Violated Section 393.170, any other pertinent state statute, Commission Rule or Regulation, or any tariff provisions

173. Empire maintains that MGE intentionally and knowingly invaded their certificated service area, and constructed facilities outside of its own certificated area without proper Commission approval because:

- a.) In June of 1999 Aquila, Empire's predecessor, became aware of MGE's plan to install facilities in the southeast Quarter Section of Section 6, T52N, R34W, to serve the Oak Creek Subdivision. After discussions with MGE representatives, MGE stopped construction of facilities in this area and Aquila installed facilities to serve the Oak Creek Subdivision.¹⁹³
- b.) As a result of the June 1999 encounter between Aquila and MGE, Aquila's attorney sent a letter to MGE referencing the Commission's Case No 13,172 listing the sections of Platte County that Aquila (now Empire) was certified to serve. MGE did not respond.¹⁹⁴

¹⁹⁰ Transcript p. 178, lines 13-22, p. 182, lines 3-14, 25, p. 183, lines 1-2.

¹⁹¹ Transcript p. 178, lines 13-22, p. 182, lines 3-14, 25, p. 183, lines 1-2.

¹⁹² Transcript p. 183, lines 14-17.

¹⁹³ Empire Exh. 2, Teter Direct, p. 2, lines 10-17.

¹⁹⁴ Empire Exh. 2, Teter Direct, p. 3, lines 3-9. Staff Exh. 14.

- c.) On January of 2004, Empire became aware of the Seven Bridges Subdivision that was to be built in Sections 13 and 14 of T52N, R35W of Platte County.¹⁹⁵
- d.) In July or August of 2006, Empire became aware that the Seven Bridges development was under way in Section 12, as opposed to Sections 13 and 14 of T52N, R35W of Platte County.¹⁹⁶
- e.) In August of 2006, Empire's Vice-President and Chief Operating Officer for its gas division, met with MGE's president to discuss the disputed Sections over which both claim to have a certificate to provide service. Empire maintains that nothing resulted from this meeting.¹⁹⁷
- e.) On September 6, 2006, Empire sent an e-mail to MGE's Vice-President of Field Operations requesting an investigation into the Seven Bridges development with regard to which company should be serving this development in Section 12.¹⁹⁸
- f.) On October 16, 2006, MGE's Vice-President of Field Operations and Empire's Director of Gas Operations had a face-to-face meeting to discuss the certification issue – MGE proposed Empire abandon their certificate to Section 10, 11, and 12 and Empire offered to purchase all of MGE's facilities allegedly being operated without a certificate in Section 12 at MGE's current book value.¹⁹⁹
- g.) Empire claims that MGE is continuing to expand its distribution system in Sections 12, 13, and 14 of T52N, R35W and is using what appears to Empire to be the existence of unauthorized gas service to buttress its application to expand its certificated service area in Platte County.²⁰⁰

174. MGE maintains that it did not intentionally and knowingly invade Empire's certificated service area or violate Section 393.170 by constructing facilities outside of its own certificated area without proper Commission approval because:

- a.) MGE appropriately relied upon its 1997 tariff when expanding its facilities in Sections 10, 11, and 12 in T52N, R35W, and when responding to the

¹⁹⁵ Empire Exh. 2, Teter Direct, p. 3, lines 13-20.

¹⁹⁶ Empire Exh. 2, Teter Direct, p. 4, lines 1-9.

¹⁹⁷ Empire Exh. 3, Gatz Direct, p. 9, lines 1-23, p. 10, lines 1-3.

¹⁹⁸ Empire Exh. 2, Teter Direct, p. 4, lines 10-15.

¹⁹⁹ Empire Exh. 2, Teter Direct, p. 5, lines 1-22, p. 6, lines 1-9.

²⁰⁰ Empire Exh. 3, Gatz Direct, p. 18, lines 1-18.

request of the Seven Bridges developer to provide natural gas service to the residents of the subdivision.²⁰¹

- b.) MGE immediately sought a CCN for Sections 13 and 14 upon discovering they were beginning to encroach into those sections for which they lacked a CCN.²⁰²
- c.) Contrary to Empire's assertions, MGE did not pursue the 1999 Oak Creek development in Section 6 T52N R34W and Section 1 in T52N, R35W, because it was not able to reach an agreement with the developer, not because it lacked authority to serve.²⁰³
- d.) MGE had the authority to serve Oak Creek and did not check its CCN at this time because it believed it could rely on its 1997 Commission-approved tariff to define its service territory.²⁰⁴
- e.) The 1999 exchange described by Empire only establishes that Aquila was aware, at least by 1999, that MGE's tariff authorized it to serve in certain sections where Aquila had a dual CCN. Aquila witness Teter testified that he had his staff review MGE's tariffs as a result of the 1999 letter and found that MGE's tariffs contained nine sections where Aquila had a CCN.²⁰⁵
- f.) Both Aquila, Empire's predecessor, (as early as June of 1999) and Empire (no later than the summer of 2006) had knowledge that MGE's tariffs contained sections for which Aquila then and Empire now had a CCN but failed to act in any way to contest the validity of MGE's tariff until this certification case was filed.²⁰⁶

²⁰¹ Transcripts pp. 93- 98, p. 119, lines 14-25, p. 120, lines 1-14

²⁰² MGE Exh. 2, Noack Rebuttal, p. 2 lines 22-23, p. 3, lines 1-2; Transcript p. 123, lines 7-11, p. 134, lines 19-25, p. 135, lines 102.

²⁰³ Transcript p. 90, lines 19-25, p. 91, lines 1-25, p. 92, lines 1-9, p. 95, lines 7-17, 24-25, p. 96, lines 1-8, 11-14, p. 97, lines 7-20, p. 98, lines 10-25, p. 99, line 1.

²⁰⁴ *Id.*

²⁰⁵ Transcript p. 205, lines 16-25, p. 206, lines 1-27, p. 207, lines 1-12. Aquila witness Steve Teter, who was Aquila's Director of Missouri Gas Operations, acknowledged that it was not Aquila's custom to seek expansion of its territory and that it did not want to grow its business.²⁰⁵ Transcript p. 200, lines 13-25, p. 201, lines 1-16.

²⁰⁶ Transcript pp. 190-209. See also Finding of Fact Number 173 and associated footnotes. Although Aquila had knowledge that MGE's tariffs contained sections for which Aquila had a CCN, it did not inform Empire of this fact when Empire conducted due diligence regarding its purchase of Aquila gas properties. Empire completed its due diligence in September of 2005. Had Empire had knowledge of MGE's tariffs during this time, it is likely that it would have asked for further information, as it had a duty to investigate Aquila's CCN. Transcript p. 208, lines 14-25, p. 209, lines 1-25, p. 220, lines 1-6.

- g.) MGE asserts that the Commission should not find any violations against MGE for relying on its tariffs, when Empire and its predecessor knew that MGE's tariffs contained sections with an overlapping CCN and when neither company did anything to protect its service territory.²⁰⁷

175. The Commission's Staff did not take a position on whether either company may have violated Section 393.170, or any other pertinent state statute, Commission Rule or Regulation, or any tariff provisions. On the contrary, Staff Witness Straub testified that:

- a.) Staff confirms that ". . . to this day we have a lot of instances where there's uncertainty on service areas and who is allowed or required to serve in areas."²⁰⁸
- b.) Staff witness Michael Straub testified that Staff had no explanation as to why it recommended approval of MGE's Original sheet 6.15, with the alleged errors listing its certificated areas, other than it was a mistake. Mr. Straub's testimony was as follows:

Q. Okay. Do you have any explanation -- there are -- there are more than just nine overlapping sections in this tariff. I believe there's a total of 22 --

A. Yes.

Q. -- which Staff has stated is in error. Do you have any explanation why or how that slipped past Staff's review?

A. I wish I did. And I -- and I must say it is embarrassing. But -- but at the same time, you've got to keep in mind that there are 2900 sections. And just to give you a reference of what a section is, that's a square mile.

So there are 2900 square miles of MGE service territory all on the western side of the state. So it's an encumbering process to -- to get that together.

²⁰⁷ Transcript p. 269, lines 24-25, p. 270, lines 1-3. The Commission takes notice that there have been no filings by any of the parties to this action, other than the immediate case, addressing whether the Commission's order approving MGE's 1997 Tariff was in error or in any way, unlawful.

²⁰⁸ Transcript p. 267, lines 17-25, p. 268, lines 1-12.

And, yes, that wasn't Staff's brighter moment by missing that. But it's very understandable to see how something like that can happen, especially in the case of where you have the supply line sections.

We've talked a lot about the different types of certificates, whether it's an area certificate or a line certificate. But we need to keep in mind that there is more than one kind of line certificate.

We have a line certificate that allows customers -- utilities to serve based off of a line extension. And then we have the line certificate where it simply allows the transmission of the facilities through an area that's not in service area of the affected companies.

So it could have easily looked at those sections where the Leavenworth supply line is, and -- and I can understand how those would have mistakenly got included as service area because if you had to read 79 orders, by the time you get to No. 79, you're probably a little blurry.

And you -- you just see, okay, I see those sections. And so I can understand how those sections got -- got into the tariff.

The other sections that are not located where the supply line is is a little more difficult to understand. And it's -- it's even more difficult to understand how Staff missed it.

I do know, also, in a lot of other instances, especially historically, more than ten years ago, when the Commission would grant a service area to a utility, whether it be a gas or an electric utility, in most instances, it would grant to a gas utility as an example to the City of Sedalia and surrounding area. So there was always a dispute or a question as to really what surrounding area meant.

Well, we all know that it means -- if it's close to Sedalia and the company can provide service, then that's the surrounding area. So there will be instances where there will be sections listed on MGE's tariff that it will be difficult to find a CCN for.

And it would be in those types of CCN cases where they would simply refer to the area as the rural area is another good example or surrounding area.

And we even have gas utilities that have been granted an entire county. So that's pretty easy when it's an entire county. But I guess

what I'm getting at is -- is I know this on the surface is -- appears serious. And it is.

But on the other hand, it's -- compared to the magnitude of what we're dealing with, it's -- you know, we've got a very small section of the state or of MGE's service area where we're -- where we've discovered this problem, which is why the Staff is reviewing the '97 filing and making sure that if there are other instances like this that we can address those before it results in in type of case.

Q. Okay. And do I understand the process correct that MGE, the company, worked with Staff in determining which areas to include in its tariff?

A. I know they did work with Staff, and they did work with Mr. McDuffey. I wish I could tell you that I remember everything about this filing. But, honestly, the only thing I remember about this -- I remember two things about this filing.

One, the rate case where we wanted to get this into effect, where we wanted to get this taken care of because MGE is one of the -- geographically, one of the largest gas utilities. So I remember that.

And then I remember writing the sentence that we've all discussed simply because that was a very unique instance to add a sentence to the routing slip. So I do remember that.

The interaction that I may have had with Mr. McDuffey during the filing, I'm -- I'm a total blank on. And -- and what I would go on now is simply that --what the tariff filing indicates in the routing slip.²⁰⁹

- c.) As noted in Mr. Straub's testimony, Staff believes there is general confusion with regard to the service areas of gas companies that provide service in a large segment of Missouri.²¹⁰
- d.) Mr. Straub further testified, as noted above, that it would be expected to have difficulty finding orders supporting the granting of a CCN for MGE because of the Commission's use of broad language when describing service territories in its orders.²¹¹

²⁰⁹ Transcript p. 270, lines 4-25, pp. 271-272, p. 273, lines 1-17

²¹⁰ *Id.*

²¹¹ *Id.*

- e.) Mr. Straub also testified that he could only remember two things about this particular 1997 tariff filing by MGE, wanting to get the tariffs clarified and writing his annotation on the tariff routing slip.²¹²
- f.) Staff's witness Michael Straub also testified that there is no reason to believe that MGE acted in bad faith when it filed its revised tariff in 1997.²¹³

176. The Commission's Staff has not recommended that the Commission seek penalties against either MGE or Empire.²¹⁴

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

Conclusions of Law Regarding the Commission's Jurisdiction and Authority

Section 386.020 (18) defines a "gas corporation" as including "every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any gas plant operating for public use under privilege, license or franchise now or hereafter granted by the state or any political subdivision, county or municipality thereof." Section 386.020(42) defines "public utility" as including "every . . ., gas corporation, . . ., as [this term is] defined in this section, and . . . is hereby

²¹² *Id.*

²¹³ Transcript p. 273, lines 18-25, p. 274, lines 1-9.

²¹⁴ No where in the Transcript, or in the prefiled testimony from Staff's witnesses, was there a request that the Commission authorize its Staff to seek penalties against either company in this matter. In Staff's Post-hearing Brief, Staff recommends that MGE be ordered to correct its tariff and to either abandon or sell its infrastructure in the disputed sections to Empire. See *Staff's Brief*, Case Number GA-2007-0289, filed December 21, 2007, page 24 -26.

declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter.”

MGE is a “gas corporation” and a “public utility” as those terms are defined in Sections 386.020(18) and (42), respectively, and; consequently, is subject to the jurisdiction, control and regulation of the Commission. Empire is also a “gas corporation” and a “public utility” as those terms are defined in Sections 386.020(18) and (42), respectively, and; consequently, is subject to the jurisdiction, control and regulation of the Commission.

Conclusions of Law Regarding Relevant Statutory Provisions, Commission Rules and Case Law

It is the long-standing view of Missouri’s courts that the Public Service Commission Law is to be “liberally construed for the public’s, *ergo* the consumer’s protection.”²¹⁵ The Court of Appeals in *De Paul Hospital School of Nursing, Inc. v. Southwestern Bell Tel. Co.* summarized this principal as followed:

[T]he Public Service Commission Law of our own state has been uniformly held and recognized by this court to be a remedial statute, which is bottomed on, and is referable to, the police power of the state, and under well-settled legal principles, as well as by reason of the precise language of the Public Service Commission Act itself, is to be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities. In its broadest aspects, the general purpose of such regulatory legislation is to substitute regulated monopoly for destructive competition. But the dominant thought and purpose of the policy is the protection of the public while the protection given the utility is merely incidental. (Internal citations omitted.)²¹⁶

Keeping this view in mind, the Commission will examine the relevant law and apply that

²¹⁵ *De Paul Hospital School of Nursing, Inc. v. Southwestern Bell Tel. Co.*, 539 S.W.2d 542, 548 (Mo. App. 1976).

²¹⁶ *Id.* See also Section 386.610; *State ex rel. Laundry, Inc. v. Pub. Serv. Comm’n*, 34 S.W.2d 37, 42-43 (Mo. 1931); *State ex rel. Electric Company of Missouri v. Atkinson, et al.*, 204 S.W. 897, 899 (Mo. banc 1918); *State ex rel. Pitcairn v. Pub. Serv. Comm’n*, 111 S.W.2d 222, 229 (Mo. App. 1937). *State ex rel. Crown Coach Company v. Pub. Serv. Comm’n*, 179 S.W.2d 123, 126 (Mo. App. 1944).

law to the specific facts of this case.

Conclusions of Law Regarding Commission’s Legal Authority to Grant a Certificate of Convenience and Necessity

“The legislature has seen fit to vest the Public Service Commission with exclusive authority to allocate the territory in which a particular utility may render service, by providing that the Commission shall pass upon the question of the public necessity and convenience for any new or additional company to begin business anywhere in the state, or for an established company to enter new territory.”²¹⁷ The governing statute for the grant of a certificate of convenience and necessity for the allocation of service territory for the provision of natural gas service is Section 393.170, RSMo 2000. Section 393.170 provides:

1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.
2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.
3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable

²¹⁷ *State ex rel. Doniphan Tel. Co. v. Pub. Serv. Comm’n*, 377 S.W.2d 469, 474 (Mo. App. 1964); *State ex rel. City of Sikeston v. Pub. Serv. Comm’n of Missouri*, 82 S.W.2d 105, 110 (Mo. 1935); *Pub. Serv. Comm’n v. Kansas City Power & Light Co.*, 31 S.W.2d 67, 69-70 (Mo. banc 1930); *State ex rel. Harline v. Pub. Serv. Comm’n*, Mo. App., 343 S.W.2d 177, 182 (Mo. App. 1960).

and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

Section 393.170.3 authorizes the Commission to grant a certificate of convenience and necessity when it determines, after due hearing, that the proposed project is "necessary or convenient for the public service."²¹⁸ The term "necessity" does not mean "essential" or "absolutely indispensable," but rather that the proposed project "would be an improvement justifying its cost,"²¹⁹ and that the inconvenience to the public occasioned by lack of the proposed service is great enough to amount to a necessity.²²⁰ It is within the Commission's discretion to determine when the evidence indicates the public interest would be served by the award of the certificate.²²¹

While Section 386.170 speaks to the Commission's authority to grant a CCN for the construction of facilities to provide natural gas service, it offers little statutory guidance as to specific criteria that must be satisfied prior to the grant of such certificates. In fact, pursuant to Section 393.170.3, the Commission may impose the conditions it deems reasonable and necessary for the grant of a CCN.

²¹⁸ Section 393.170; *St. ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo. App. 1993); *State ex rel. Webb Tri-State Gas Co. v. Public Service Commission*, 452 S.W.2d 586, 588 (Mo. App. 1970); *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas Service in Lebanon, Missouri*, Case Number GA-2007-0212, et al., 2007 WL 2428951 (Mo. P.S.C.)

²¹⁹ *Id.*; *Intercon Gas, Inc.*, 848 S.W.2d at 597; *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973).

²²⁰ *Id. Beaufort Transfer Co.*, 504 S.W.2d at 219; *State ex rel. Transport Delivery Service v. Burton*, 317 S.W.2d 661 (Mo. App. 1958).

²²¹ *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas Service in Lebanon, Missouri*, Case Number GA-2007-0212, et al., 2007 WL 2428951 (Mo. P.S.C.); *Intercon Gas, supra*, quoting *St. ex rel. Ozark Electric Coop. v. Public Service Commission*, 527 S.W.2d 390, 392 (Mo. App. 1975).

The Commission has articulated the filing requirements for gas utility CCNs in Commission Rule 4 CSR 240-3.205, and the specific criteria to be used when evaluating applications of gas utility CCNs are more clearly set out in the case *In Re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991). The *Intercon* case combined the standards used in several similar certificate cases, and set forth the following criteria: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest. *Id.*²²²

Conclusions of Law Regarding Legal Effect of Granting a Certificate of Convenience and Necessity

Once the Commission grants a CCN to a LDC, the LDC has an obligation to serve the public in its allotted service areas. The certificate of convenience and necessity is a mandate to serve the area covered by it, because it is the utility's duty, within reasonable limitations, to serve all persons in an area it has undertaken to serve.²²³ A public utility cannot refuse service, "when exercising its public function; that is, furnishing something, a necessity, that all are entitled to receive upon equal terms, under equal circumstances, and without exclusive conditions."²²⁴

²²² Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994), 1994 WL 762882, *3 (Mo. P.S.C.).

²²³ *State ex rel. Missouri Power and Light Co. v. Pub. Serv. Comm'n.* 669 S.W.2d 941, 946 (Mo. App. 1984); *City of Blue Springs, Mo. v. Central Development Ass'n*, 684 S.W.2d 44, 51 (Mo. App. 1984); *Harline*, 343 S.W.2d at 181-182; *State ex rel. Ozark Power & Water Co. v. Pub. Serv. Comm'n.*, 229 S.W. 782 (Mo. 1921); *State ex rel. Kansas City Power & Light Co. v. Pub. Serv. Comm'n., et al.*, 76 S.W.2d 343 (Mo. 1934); *State ex rel. Federal Reserve Bank of Kansas City v. Pub. Serv. Comm'n.*, 191 S.W.2d 307, 313 (Mo. App. 1945); *May Department Stores Co. v. Union Electric Light & Power Co.*, 107 S.W.2d 41 (Mo. 1937).

²²⁴ *State ex rel. M.O. Danciger & Co. v. Pub. Serv. Comm'n.*, 205 S.W. 36, 42 (Mo. 1918).

The Commission further notes that it has the authority to issue a certificate of convenience and necessity to a public utility even though such certificate will overlap with another public utility's area of service.²²⁵ The public interest and convenience is the Commission's chief concern when determining whether to grant more than one certificate within one certificated area.²²⁶

Conclusions of Law Regarding the Legal Effect of a Commission Approved Tariff

“A tariff is a document which lists a public utility services and the rates for those services.”²²⁷ There can be no dispute that Commission has the power to approve gas company tariffs, and once the Commission approves a tariff, it becomes Missouri law.²²⁸ Thus, both MGE’s and Empire’s tariffs have “the same force and effect as a statute directly prescribed from the legislature.”²²⁹ Tariffs are interpreted in the same manner as state statutes.²³⁰ Consequently, Missouri courts would interpret Commission

²²⁵ *Osage Water Co. v. Miller County Water Authority, Inc.*, 950 S.W.2d 569, 575 (Mo. App. 1997); *State ex rel. Missouri Pacific Freight Transp. Co. v. Public Serv. Comm’n*, 295 S.W.2d 128, 132 (Mo. 1956); *Crown Coach Co.*, 179 S.W.2d at 126-129; *State ex rel. Electric Co. of Missouri v. Atkinson*, 204 S.W. 897, 899-900 (Mo. banc 1918).

²²⁶ *Osage Water Co.*, 950 S.W.2d at 575; *Missouri Pacific Freight*, 295 S.W.2d at 132; *State ex rel. Orscheln Bros. Truck Lines, Inc. v. Pub. Serv. Comm’n*, 433 S.W.2d 596, 605 (Mo. App. 1968); *Crown Coach Co.*, 179 S.W.2d at 126-129.

²²⁷ *State ex rel. Missouri Gas Energy v. Public Service Com’n*, 210 S.W.3d 330, 337 (Mo. App. 2006); *Bauer v. Sw. Bell Tele. Co.*, 958 S.W.2d 568, 570 (Mo. App. 1997).

²²⁸ Sections 393.130, 393.140(11), and 393.150; *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm’n*, 156 S.W.3d 513, 521 (Mo. App. 2005); *A.C. Jacobs and Co., Inc. v. Union Elec. Co.*, 17 S.W.3d 579, 583 (Mo. App. 2000); *Southwestern Bell Yellow Pages, Inc. v. Wilkins*, 920 S.W.2d 544, 548 (Mo. App. 1996); *State ex rel. St. Louis County Gas Co. v. Pub. Serv. Comm’n*, 286 S.W. 84, 86, (Mo. 1926); *Wheelock v. Walsh Fire Clay Products Co.*, 60 F.2d 415 (8th Circuit 1932); *Updike Grain Co. v. Chicago & N.W. Ry. Co.*, 35 F.2d 486 (8th Circuit 1929); *Chicago, R. I. & P. R. Co. v. Furniture Forwarders of St. . . .*, 267 F.Supp. 175 (D.C. Mo. 1967).

²²⁹ *Id.*; *Laclede Gas Co.*, 156 S.W.3d at 521; *Allstates Transworld Vanlines, Inc. v. Southwestern Bell Tel. Co.*, 937 S.W.2d 314, 317 (Mo. App. 1996); *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). *State ex rel. Maryland Heights Fire Prot. Dist. v. Campbell*, 736 S.W.2d 383, 387 (Mo. banc 1987).

²³⁰ *Id.*

approved tariffs by trying to “ascertain the intent of [the company and the Commission] from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.”²³¹ Courts can only look beyond the plain and ordinary language of a company’s tariff “when the meaning is ambiguous or [acceptance of the plain and ordinary language] would lead to an illogical result defeating the purpose of the [tariff].”²³²

Pursuant to Section 386.270 RSMo, all Commission orders are prima facie lawful and reasonable.²³³ Section 386.270 provides:

All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

Consequently, once a tariff is approved and has become effective, it is valid until found otherwise invalid in a lawsuit litigating that issue; either by an appeal of the Commission’s decision in a court of competent jurisdiction pursuant to Section 386.510, or in a complaint action before the Commission pursuant to Section 386.390.²³⁴ In both of these litigation choices, the burden of proof would lie with the petitioner challenging

²³¹ *Id.*

²³² *Id.*

²³³ Section 386.270, RSMo 2000; *Missouri Gas Energy*, 210 S.W.3d at 337; Section 386.270. RSMo 2000.

²³⁴ Sections 386.510 and 386.390, RSMo 2000; *State ex rel. Public Counsel v. Public Service Com’n*, 210 S.W.3d 344, 360 (Mo. App. 2006); *A.C. Jacobs and Co., Inc. v. Union Elec. Co.*, 17 S.W.3d 579, 583 (Mo. App. 2000); *State ex rel. GTE North, Inc. v. Public Service Commission*, 835 S.W.2d 356, 367 (Mo. App. 1992); *State ex rel. Union Elec. Co. v. Public Service Com’n of State of Mo.*, 765 S.W.2d 618, 621 (Mo. App. 1988); Transcript p. 261, lines 16-25, p. 262, lines 1-25, p. 263, lines 1-25, p. 264, lines 1-2 (Testimony of Staff Witness, Michael Straub). See also *In the Matter of the Filing of Proposed Tariffs by The Empire District Electric Company to Comply with the Commission’s Report and Order in Case No. ER-2001-299 and to Correct a Recently Discovered Error in the Calculation of the Revenue Requirement*, Case No. ET-2002-210, Tariff No. 200200321, *Order Rejecting Tariff*, issued November 19, 2001, effective date November 24, 2001.

the lawfulness of the order approving the tariff.²³⁵

If a proper party believes there is an error in a Commission approved tariff, that party would have the two options for litigation described above. However, there is one additional mechanism whereby a Commission approved and effective tariff could be changed if discovered to be in error – voluntary revision.²³⁶

Conclusions of Law Regarding Contested Issues of Law

To understand this case completely the Commission was required to thoroughly review, dissect and interpret the orders it issued in 1955 and 1956 with respect to the predecessor companies for Empire and MGE. “The Commission is entitled to interpret its own orders and to ascribe to them a proper meaning and, in so doing, the Commission does not act judicially but as a fact-finding agency.”²³⁷

Conclusions of Law regarding Sections 4 and 5 of T52N, R33W, 1, 2, 3, 4, 5, 6, of T52N, 34W, 1, 2, 3, 4, 5, and 6 of T52N, R35W, and 1 of T52N, R36W

The Commission’s findings of fact reveal that despite the fact that Sections 4 and 5 of T52N, R33W, Sections 1, 2, 3, 4, 5, 6, of T52N, R34W, Sections 1, 2, 3, 4, 5, and 6 of T52N, R35W, and Section 1 of T52N, R36W are listed in MGE’s 1997 Commission-

²³⁵ “In cases where a complainant [brought pursuant to Section 386.390, RSMo 2000] alleges that a regulated utility is violating a law, its own tariff, or is otherwise engaged in unjust or unreasonable actions, the complainant has the burden of proof.” *David A. Turner and Michele R. Turner, Complainants, v. Warren County Water and Sewer Company, Respondent*, 9 Mo. P.S.C. 3d 548 (Mo. PSC 2001), *citing to, Margolis v. Union Electric Company*, 30 Mo. P.S.C. (N.S.) 517, 523 (1991); *Michaelson v. Wolf*, 261 S.W.2d 918, 924 (Mo. 1953); *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968). In cases where a petitioner challenges the lawfulness of a Commission order pursuant to Section 386.510 the party seeking to set aside an order of the Commission shall have the burden of proof “to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful as the case may be.” Section 386.430, RSMo 2000; *Union Elec. Co.*, 765 S.W.2d at 621.

²³⁶ Transcript p. 262, lines 1-25, p. 263, lines 1-102, p 269, lines 8-23 (Testimony of Staff Witness, Michael Straub).

²³⁷ *Beaufort Transfer Co.*, 610 S.W.2d at 100; *Missouri Pacific Freight*, 312 S.W.2d at 368; *Orscheln Bros. Truck Lines*, 110 S.W.2d 366.

approved tariff for certificated service areas, there is no substantial or credible evidence in the record as a whole to support a conclusion of law that the Commission ever granted MGE a CCN for these fifteen particular sections. Additionally, there is no dispute that Empire has a Commission-approved CCN for Sections 1, 2, and 3 of T52N, R35W and 4, 5, and 6 of T52N, R34W; six of these fifteen sections and six of the nine sections listed in both MGE's and Empire's tariffs that are at issue.

As was previously noted, there are three proper methods for removing errors from a Commission-approved public utility's tariff: (1) a proper appeal of the order approving the tariff that erroneously reflects the grant of a CCN; (2) a properly filed complaint case challenging the legality of the order approving the tariff that erroneously reflects the grant of a CCN, and, (3) voluntary removal of the erroneously tariff sections by submission of a revised tariff.

Empire's predecessor in interest, MPSC, was an active participant in the 1955 and 1956 cases in which MGE's predecessor, GSC, was granted its current area certificates for Platte County. As such, it was in a position to review and monitor MGE's tariff filings in association with those actions and could have raised objections to any allegedly erroneous tariff filing at that time or challenged the lawfulness of any Commission order approving those tariff filings. No actions were filed during that time period contesting the status of GSC's tariffs.

In 1995 and 1996, the Commission issued appropriate notice and provided an opportunity to intervene in two cases where the Commission ultimately directed MGE to file updated tariff sheets to clarify its service territory.²³⁸ One of those cases, GR-96-

²³⁸ *In the Matter of the Application of Missouri Pipeline Company for Permission, Approval, and a*

285, was a general rate increase case, in which Empire's predecessor, Aquila, was a party.²³⁹ Consequently, Aquila was on notice that MGE was revising its tariffs. Additionally, in 1997, when the Commission worked with MGE in preparing its tariffs, Aquila could have intervened and requested that the tariffs be suspended and challenged their approval, they did not.

In 1999, Empire's predecessor, Aquila, was fully aware of MGE's expansion into the disputed sections, but again chose not to challenge this expansion or MGE's tariffs. As early as the summer of 2006, Empire itself was aware of the tariff discrepancies and the fact that there were overlapping service areas listed in the company's tariffs. Empire chose not to contest MGE's tariff, and only after this new certification action was filed did it elect to raise the issue of the accuracy of MGE's Commission-approved tariffs. Unfortunately, this case does not provide the appropriate action procedurally that can be used to challenge MGE's tariffs.

In short, although Empire and its predecessors have had multiple opportunities to address any alleged errors in MGE's tariffs, to date, they have taken no proper legal action to challenge MGE's Commission-approved tariffs or challenge whether MGE had a Commission-approved CCN for the sections in dispute. Consequently, at this stage of the proceedings pending before the Commission the only means available for correcting any errors in MGE's tariff is by voluntary revision.

Fortunately, MGE is serving no customers in Sections 4 and 5 of T52N, R33W,

Certificate of Public Convenience and Necessity Authorizing It to Modify and to Construct, Own, Operate, Control, Manage and Maintain a Natural Gas Transmission Pipeline, a Delivery Spur, Delivery Stations and Related Interconnections and Other Facilities and to Transport natural Gas in Portions of Cass and Jackson Counties, Missouri, Case No. GA-96-130; See also Footnote 238, infra.

²³⁹ *In the Matter of Missouri Gas Energy's Tariff Sheets Designed to Increase Rates for Gas Service in the Company's Missouri Service Area, Case Number GR-96-285.*

Sections 1, 2, 3, 4, 5, 6, of T52N, R34W, Sections 1, 2, 3, 4, 5, and 6 of T52N, R35W, and section 1 of T52N, R36W, and has volunteered to remove these fifteen sections from its tariff. In Part IV of MGE's Post-Hearing Brief and in paragraph 9 of MGE's Proposed Findings of Fact and Conclusions of Law, the company represents that it will remove these sections at the Commission's direction. MGE Witness Noack, also attested to this commitment in his pre-filed surrebuttal testimony.²⁴⁰ According, the Commission will direct MGE to remove these fifteen sections from its tariff. This revision also eliminates any dispute between the parties with regard to which company has a Commission-approved CCN for Sections 1, 2, and 3 of T52N, R35W and Section 4, 5, and 6 of T52N, R34W; six of the nine sections currently listed in both MGE's and Empire's tariffs.

Conclusions of Law regarding Sections 7, 8, 9, 10, 11, and 12 of T52N, 35W, and 12 of T52N, R36W

Staff witness Straub testified that MGE's service territory covered some 2900 square miles on the western side of the state. He testified that it was an encumbering process to identify the exact extent of MGE's service area, that orders from ten years ago and beyond used non-specific language to describe service areas, and that it would be expected to find service areas in MGE's tariff where it would be difficult to pin-point a specific order granting them a CCN for that service area.²⁴¹

Staff and MGE both attested to the long and complex review that was undertaken

²⁴⁰ MGE Exh. 3, Noack Surrebuttal, pp. 4-5.

²⁴¹ Staff's witness Straub had testified as to the difficulty Staff faced when assisting MGE with its tariff revisions. Transcript page 271, lines 7-12. While Mr. Straub had supervised the Staff members working with MGE, the Commission notes that the Staff member primarily responsible for providing assistance with drafting MGE's revised tariff was Mr. Mack McDuffey. Unfortunately, Mr. McDuffey was not a witness in this case, and it is possible that he could have shed additional light on the inclusion of the twenty-two sections in dispute.

when MGE, with Staff's assistance, composed the 1997 tariff filing that was approved by the Commission. And despite any possible confusion with regard to the specifics of MGE's tariff, once the tariff was approved by the Commission MGE was obligated to provide service in Section 12 of T52N, R36W and Sections 7-12 of T52N, R35W pursuant to its tariff.

More importantly, despite the confusion all of the parties have registered with regard to MGE's 1997 tariff filing, and the 80 Commission orders granting CCNs to MGE throughout its service territory, the Commission has determined in its Findings of Fact, that MGE has a valid Commission-approved CCN for Section 12 of T52N, R36W and Sections 7-12 of T52N, R35W.²⁴² The Commission also concludes, as a matter of law, that MGE has a valid Commission-approved CCN for Section 12 of T52N, R36W and Sections 7-12 of T52N, R35W.²⁴³

It is true that Empire also has a CCN to serve customers in Sections 10-12 in T52N, R35W,²⁴⁴ and Empire's tariff accurately reflects this CCN.²⁴⁵ And even though the Commission has approved dual certificates for Sections 10, 11, and 12 of T52N,

²⁴² Even MGE in this matter could not cite to a Commission order granting the CCN, but MGE's failure to locate the order, or properly interpret the 1956 order does not establish that there was no Commission-approved CCN. See Transcript pp. 93-94, 148-149. The parties simply failed to properly analyze the pertinent Commission orders, and interpretation of the Commission's prior orders is clearly part of the Commission's fact-finding mission. The Commission's interpretation of its own order obviously supersedes any party's impression of what those orders delineate.

²⁴³ Specifically, and with emphasis, the Commission concludes that its 1956 Modification Order granting GSC's request for the full use of the Leavenworth Supply Line had the effect of converting GSC's line certificate for Section 12 of T52N, R36W and Sections 7-12 of T52N, R35W, into an area certificate because it authorized the **full and unrestricted use** of the supply line in all areas where GSC had "**heretofore been certificated,**" (i.e. "any certificate," "all certificates" or "every certificate"), **near and beyond the MCI Airport, regardless of the type of certificate previously issued by the Commission.**

²⁴⁴ Staff Exh. 18, Warren Rebuttal, p. 4, lines 5-9.

²⁴⁵ Staff Exh. 18, Warren Rebuttal, p. 4, lines 14-19, and Schedules 5 and 6 to the Exhibit with MPS and L&P Tariff Sheet No. 3. The January 1956 order granting Empire's predecessor in interest a service area certificate for Sections 10, 11, and 12 made perfect sense at the time because MGE's predecessor only had a line certificate for these sections until December 1956 when the Commission lifted the restrictions from Leavenworth Supply Line.

R35W, the Commission has the authority to grant dual certificates and it has found this grant to be in the public interest. Furthermore, the Commission concludes there is no substantial and competent evidence in this record that provides a compelling reason to change the status of these dual CCNs at this time.

The Commission's Staff argued for splitting Section 12 between the companies, Staff argued that there would be less of a safety concern associated with the homes served by MGE at the end of Oakmont Drive in Section 12, because Prairie Creek provides a natural barrier between Oakmont Subdivision and the Cooper Ridge and Seven Bridges Subdivisions in Section 12. Staff could not reference any other similar use of natural boundaries to divide service territories, and curiously, Staff also put forth a contradictory view that MGE should still be allowed to serve its current customers in Sections 10 and 11 without any boundaries between these customers and people or entities that might become Empire's future customers in those same sections.²⁴⁶

MGE and Empire share at least four linear miles of common boundary between their respective service areas and have shared three square-mile sections of dually certificated territory without any physical demarcation other than the traditional Township and Range surveys. They have shared these respective boundaries and service territories without complication, and it is unclear to the Commission how cutting off one corner of Section 12 to isolate some of MGE's customers, while allowing the mixing of customers from both companies in Sections 10 and 11 would result in less of a concern for customer safety.

²⁴⁶ Transcript pp. 238-239.

In terms of safety issues, the Commission concludes that emergency personnel would have little difficulty directing a request to shut off gas to the correct company much easier just by knowing which subdivisions or communities the companies serve as opposed to which side of a creek they may or may not serve. Nor would it be a tremendous burden to have both companies shut off their gas in these three sections should the need arise, knowing that the companies have dual certificates to provide service. To accept Staff's position would require some 40 to 60 customers to switch providers, which is not only inconvenient and confusing, but an unnecessary change that generates additional cost with little to no gain. The Commission concludes that Staff's position regarding using Prairie Creek as a "natural boundary" for splitting Section 12 is not persuasive or compelling and this boundary would be just as arbitrary as any other boundary.²⁴⁷

The Commission also observes that the evidence presented concerning the Platte City Annexation Plan is totally speculative in nature. There is no time frame for any proposed annexation. Annexation is subject to voter approval, so there is also no affirmative indication that annexation will actually extend into any additional sections of Platte County. Moreover, if Platte City should expand its boundaries, there is no evidence in the record to support a conclusion that if the City's expansion intruded into MGE's service area, that MGE could not obtain a franchise agreement, similar to Empire's, in order to provide natural gas service to residents within the City's borders. The Commission concludes that the arguments raised by Empire, Staff, and OPC

²⁴⁷ Transcripts p. 236-239 and 246-248. See also Finding of Fact Number 118. The Commission finds the testimony of Witness Warren in regard to the use of a natural boundary, i.e. Prairie Creek is not competent, is insubstantial, and is non-credible.

concerning the Platte City Annexation Plan and Empire's franchise agreement with Platte City are totally irrelevant.

Empire and MGE, or their predecessors, have been operating under the assumption that each was certificated in Sections 10, 11, and 12 for over fifty years. This has not led to the duplication of services or facilities, it has not resulted in any form of destructive competition, nor has this grant of dual certificates created any safety issues. In fact, the companies have co-existed in these sections without issue until it became time to determine which company should, as a matter of public interest, serve the Seven Bridges Subdivision, in Sections 13 and 14.

Empire is currently serving a very small group of customers in the northeast corner of Section 12, and is serving no customers in Sections 10 or 11. MGE is serving a larger group of customers in the southwest corner of Section 12. The slow expansion rate into these sections coupled with appropriate notice requirements will prevent any possible duplication of facilities and alleviate any safety concerns.²⁴⁸

The Commission concludes that MGE's 1997 Commission-approved tariff listing Sections , 7, 8, 9, 10, 11, and 12 of T52N, 35W, and 12 of T52N, R36W as part of its certificated service area is not in error and does not require correction.²⁴⁹ MGE was justified in relying on its 1997, unchallenged, Commission-approved tariff to provide service to customers in these sections. Moreover, MGE was obligated, upon request, to

²⁴⁸ The Commission will address the public interest issues involved in the dual certificates in more detail in the next section where the Commission makes its determination on which company should be granted a certificate for Sections 13 and 14 of T52N, R35W.

²⁴⁹ The Commission further notes, that even assuming, *arguendo*, that the Commission had concluded the listing of these seven sections in MGE's tariff to be in error, which is the opposite of what the Commission concludes, no proper legal challenge was made in this matter that would have required MGE to correct its tariff with regard to these sections. While MGE has volunteered to remove Section 12 of T52N, R36W and Sections 7, 8, and 9 of T52N, R35W from its tariff, because the Commission concludes the tariff is not in error with respect to these Sections there is no need for such a correction.

provide service in any of these sections. MGE appropriately honored its Commission-approved tariff and Commission-granted CCN to provide service to the Seven Bridges Subdivision.

Because the Commission concludes that MGE has an approved CCN to provide service in these sections, and has held that CCN since December of 1956, Staff's Empire's and OPC's arguments that MGE could not rely on an erroneous tariff to provide service in these sections or to expand its certificated service area are all irrelevant and the Commission finds no need to address those arguments.²⁵⁰ Similarly, the Commission finds no need to address the issue as to whether the Commission can award the grant of a CCN to a company after facilities have been built.²⁵¹

The Commission recognizes that growth in Platte County will undoubtedly continue, even if the rate of growth is totally unpredictable. In order to ensure that no duplication of services occurs, and to prevent any possible issues related to public safety, the Commission will require MGE and Empire to provide notice to each other and to the Commission's Staff with regard to their respective developments and

²⁵⁰ These parties cite to *State ex rel. Doniphan Telephone Company v. Public Service Commission*, 377 S.W.2d 469 (Mo. App. 1964), *Public Service Commission v. Kansas City Power & Light Company*, 31 S.W.2d 67 (Mo. 1930) and *State of Missouri ex rel. Imperial Utility Corporation v. Borgmann*, 664 S.W.2d 215 (Mo. App. 1983) for the proposition that erroneous tariffs cannot be used to expand service territory beyond the service area encompassed within an existing CCN.

²⁵¹ MGE notes that last year the Commission in Case No. EA-2006-0309 authorized, permitted and issued certificates of convenience and necessity to Aquila to construct, install, own and operate an electric power generation plant which was built before Aquila filed its application for a certificate. MGE also directs the Commission to the following cases providing similar post-construction CCNs: *In Re Louisiana Light, Power and Traction Company*, 11 Mo.P.S.C. 247, Case No. 2931(1921); *In Re Cairo Light & Power Company*, 14 Mo.P.S.C. 76, Case No. 3452 (1923); *In Re Missouri Electric Power Company*, 19 Mo.P.S.C. 102, Case Nos. 7732 & 7739 (1931); *In Re Santa Fe Hills, Inc.*, 4 Mo. P.S.C. (N.S.) 59, Case No. 11,241 (1952); *In Re Rockaway Beach Water Company*, 7 Mo.P.S.C. (N.S.) 54, Case Nos. 13,494 & 13,485 (1956); *In Re National Development of Clay County et al.*, 12 Mo. P.S.C. (N.S.), 199, Case No. 15,031 (1965); *In Re Union Electric Company*, 30 Mo.P.S.C. (N.S.) 468, Case Nos. EC-90-355, EA-90-250 and EA-91-54 (1991); *In Re Union Electric Company*, 1 Mo.P.S.C.3d 332, Case No. EA-92-218 (1992); *In Re Osage Water Company*, 8 Mo. P.S.C.3d 280 (1999).

expansions into the dually-held certificated area of Sections 10, 11, and 12 of T52N, R35W. Should any concerns develop, any proper party may file a complaint action with the Commission, and the Commission shall regulate the expansion as required to serve the best interests of the public.

Conclusions of Law regarding Sections 13, 14, 15, 22, 23, and 24 of T52N, 35W

As was previously noted, the Court of Appeals appropriately held, when reviewing the Commission's decision in *Intercon Gas, Inc.*, that it is within the Commission's discretion to determine when the evidence indicates the public interest would be served when awarding a CCN.²⁵² Empire and MGE have both requested a new CCN for Sections 13 and 14 of T52N, R35W, and Empire has further requested a new CCN for Sections 15, 22, 23, and 24 of T52N, R35W. While the *Intercon* case did not provide an exhaustive list of factors the Commission may consider with regard to which company should be granted a certificate, the five-factor analysis articulated by the Commission in *Intercon* provides the Commission with solid basis for analyzing how the public interest can best be served when determining which, if any, company should receive a CCN for these six sections of land in Platte County.

Looking at the first *Intercon* factor for the grant of a CCN, there must be a need for the service.²⁵³ In terms of need for service, there is a clear need for service in Sections 13 and 14 based upon the Seven Bridges developer's request for service from MGE. Seven Bridges is a large planned residential subdivision, comprised of

²⁵² *State ex rel. Intercon Gas, Inc. v. Public Service Com'n of Missouri*, 848 S.W.2d, 593 597-598 (Mo. App. 1993).

²⁵³ *In Re Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.S.) 554, 561 (1991). Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994), 1994 WL 762882, *3 (Mo. P.S.C.).

approximately 1,500 new homes to be constructed in Sections 11, 12, 13 and 14 of T52N, R35W, and clearly there is a need to provide natural gas service to the new home-owners as evidenced by the request directed to MGE to provide service.

On the other hand, there is absolutely no evidence in the record that supports granting Empire or MGE a CCN for Sections 15, 22, 23 and 24, in T52N, R35W. There are no customers being served in these sections by either company, there have been no requests for service and there is absolutely no development, large or small, occurring in these sections. As noted already in this order, Platte County's Annexation Plan is purely speculative and even if it outlines a future plan that would encompass these sections, this speculative plan in isolation also fails to substantiate a need for natural gas service in these four sections. The Commission concludes that Empire, the requesting company, shall not be granted a CCN for these four sections.

Intercon factor two requires the applicant for a CCN to be qualified to provide the proposed service. The Commission concludes, based upon its Findings of Fact, that both companies are qualified managerially, financially and technically to provide service to Sections 13 and 14 of T52N, R35W.

Intercon factors three and four require the applicant to have the financial ability to provide the service and the applicant's proposal must be economically feasible. Again, in this instance, both companies have the financial ability to provide the service and both could make a return on the companies' investment. However, the economies of the two companies differ in that the evidence in this record establishes that if Empire provides the service, it will be provided at a higher cost to the consumer. The cost to consumer analysis, however, only comprises a single portion of the analysis for the fifth

Intercon factor, the public interest analysis.

Intercon factor five correlates to Section 393.170's requirement that the service must promote the public interest. Additionally, the Court of Appeals has noted that when the Commission conducts its public interest analysis that it is to consider the interest of the public as a whole, not singular interests of the companies involved.²⁵⁴ The Court further stated that the public interest involves the determination on how the utility service in question can be best provided at the lowest rate to the user.²⁵⁵ Part of this consideration of cost includes an analysis of whether a company has existing infrastructure in place and the cost required to construct new infrastructure.²⁵⁶

The Commission has already concluded that MGE and Empire both have Commission-approved CCNs to serve Sections 10, 11, and 12 of T52N, R35W; sections that are contiguous with Sections 13 and 14. However, MGE also has a CCN to serve, and is currently serving customers in Sections 7, and 18 of T52N, R34W, as well as in Sections 10, 11, 12 of T52N, R35W – these sections all being contiguous with Sections 13 and 14. Having more common border with the new sections to be served is a factor that weighs in MGE's favor. MGE can provide service to Seven Bridges more efficiently based upon the location of its currently existing facilities.

MGE is already serving customers in Sections 10 and 11, whereas Empire is not providing service in these Sections and apparently has no infrastructure in these Sections. MGE is serving customers in Section 12 in close proximity to the new

²⁵⁴ *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 156 (Mo. App. 1980); *State ex rel. Consumers Public Service Co. v. PSC*, 180 S.W.2d 40, 44-45 (Mo. banc 1944).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

customers to be served in Sections 13 and 14, whereas Empire is not. MGE was requested by the developer to provide service to Seven Bridges and received a construction advance from the developer of Seven Bridges to cover the cost of the extension of its gas facilities to phases one through four of the subdivision, whereas Empire did not.²⁵⁷

MGE began construction of the extension facilities to Seven Bridges immediately after signing a contract with the developer and began providing service to customers in the first phase of the subdivision in Section 12 in early 2006.²⁵⁸ This construction included the placement of main extensions from its twelve-inch Leavenworth Supply Line to serve the portion of the Seven Bridges that would be constructed in Sections 13 and 14.²⁵⁹ MGE began construction in Sections 13 and 14, prior to its discovery that it needed to make its current request for a CCN to serve in those sections.

Empire, on the other hand, even if it was able to utilize MGE's current infrastructure, would have to construct new main and secondary loops that would cross MGE's Leavenworth Supply Line to supply Seven Bridges. Not only would this result in a duplication of facilities and increased cost that could be passed on to the rate-payers,

²⁵⁷ MGE Exh.1, Noack Direct, p. 5, lines 6-9. Empire's Witness Ronald Gatz testified that it was his opinion that a portion of the construction advance to MGE could be refundable to the developer and/or transferred to Empire along with MGE's infrastructure. See Transcripts pp. 216-219. Mr. Gatz was allowed to answer questions in this regard over MGE's objection that such answers would be speculative. Mr. Gatz was instructed that he could answer the questions if he had personal knowledge regarding the construction advance at issue. Mr. Gatz, however, answered the questions based upon his personal opinion not on personal knowledge of the specific construction advance at issue. Mr. Gatz's response was totally speculative in nature, and the Commission finds his response to this questioning to be incompetent and insubstantial.

²⁵⁸ MGE Exh.1, Noack Direct, p. 3 lines 23-24, p. 4, lines 1-5; Transcript, p. 150, lines 21-25.

²⁵⁹ MGE Exh. 2, Noack Rebuttal, p. 7 lines 10-12. The Leavenworth Supply Line was constructed to serve what is now the Kansas City International Airport and the adjacent area. MGE Exh.1, Noack Direct, p. 4, lines 19-24, p. 5, lines 1-3.

but this crossing of main and supply lines could result in a potential safety hazard.²⁶⁰ MGE has already placed infrastructure in the ground and is already providing service to a portion of Seven Bridges. Granting MGE a CCN would promote continuity in the continued development and provision of service to these sections because they are adjacent to the Leavenworth Supply Line and MGE already has infrastructure in place.

MGE has existing infrastructure in place to serve the Seven Bridges Subdivision in Sections 10, 11 and 12 where it already has a Commission-approved CCN. Even if Empire was allowed to use these facilities, which would require a decision beyond the authority of this Commission,²⁶¹ Empire would incur additional costs to construct additional infrastructure to serve Seven Bridges, and bills for Empire's customers are already thirteen percent greater than bills for MGE's customers.²⁶² Moreover, the developer of Seven Bridges has expressed its preference for MGE to serve its customers by contracting with MGE.

In summation, given the location of MGE's current infrastructure, its readily available supply of gas from its Leavenworth Supply Line, the cost comparison demonstrating that MGE can provide service to its customers at a lower charge, the customer's preference for MGE to provide service to Seven Bridges and the continuity of service that MGE can provide to this region, the Commission finds it to be in the

²⁶⁰ Transcript pp 158-159.

²⁶¹ While the Commission might have authority to seek injunctive relief to suspend the provision of services by a regulated utility if that regulated utility lacked proper authority from the Commission to provide that service, it is very clear that the does not have authority to grant equitable relief, i.e. order the sale of a companies infrastructure to another regulated entity. See *Public Serv. Comm'n v. Kansas City Power & Light Co.*, 325 Mo. 1217, 31 S.W.2d 67 (Mo. banc 1930); *Intercon Gas, Inc.*, 848 S.W.2d at 596-597; *May Dep't Stores Co.*, 107 S.W.2d at 49; *Am. Petroleum Exch. v. Pub. Serv. Comm'n*, 172 S.W.2d 952, 955 (Mo.1943); *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Com'n of State of Mo.*, 116 S.W.3d 680, 696 (Mo. App. 2003).

²⁶² See Findings of Fact Numbers 151-167.

public interest to grant MGE a CCN to serve Section 13 and 14 of T52N, R35W.

Conclusions of Law Regarding if the Commission Should Authorize its Staff to Seek Penalties

Section 386.570 provides:

1. Any corporation, person or public utility which violates or fails to comply with any provision of the constitution of this state or of this or any other law, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission in a case in which a penalty has not herein been provided for such corporation, person or public utility, is subject to a penalty of not less than one hundred dollars nor more than two thousand dollars for each offense.

2. Every violation of the provisions of this or any other law or of any order, decision, decree, rule, direction, demand or requirement of the commission, or any part or portion thereof, by any corporation or person or public utility is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.

3. In construing and enforcing the provisions of this chapter relating to penalties, the act, omission or failure of any officer, agent or employee of any corporation, person or public utility, acting within the scope of his official duties of employment, shall in every case be and be deemed to be the act, omission or failure of such corporation, person or public utility.

Section 386.600 authorizes the Commission to seek such penalties in the circuit court. It provides, in pertinent part:

An action to recover a penalty or a forfeiture under this chapter or to enforce the powers of the commission under this or any other law may be brought in any circuit court in this state in the name of the state of Missouri and shall be commenced and prosecuted to final judgment by the general counsel to the commission.

These statutes together authorize the Commission to seek penalties for violation of Section 393.170, a Commission order, the Commission's Rules or a company's tariff

provisions.²⁶³ However, the Commission may only initiate such a lawsuit seeking penalties after holding a contested hearing.²⁶⁴

The Commission concludes that there is simply no substantial or credible evidence in the record to support a conclusion that either company has violated any statute, Commission Rule or tariff provision. Similarly, there is no substantial or credible evidence that either company has acted in bad faith.

MGE reasonably relied on its tariff when supplying requested service in Sections 10, 11 and 12 of T52N, R35W, and was required to provide service when asked. In fact, as the Commission has determined, MGE was also appropriately certificated to provide service in Sections 10, 11 and 12, and again, the certificate is mandate to provide service when it is requested. MGE did not violate Section 393.170 by constructing facilities in Sections 10, 11 and 12, because it had already obtained the permission and approval of the Commission to provide natural gas service in these sections. MGE did not intrude upon Empire's certificated service area, nor did it seek to inappropriately expand its service territory beyond what it had Commission approval to serve when it filed its 1997 tariff.

MGE also immediately sought a Commission CCN for Sections 13 and 14 once it discovered it had begun to encroach in areas beyond its certificated service territory. Sections 13 and 14 were not certificated at the time MGE began its expansion, and it halted construction and sought Commission approval as soon as it was practically

²⁶³ See *State v. Davis*, 830 S.W.2d 27 (Mo. App. 1992), where the court held that the Commission's petition seeking penalties for violations of the law or refusals to follow orders of the Commission stated a claim upon which relief could be granted.

²⁶⁴ *State ex rel. Sure-Way Transp., Inc. v. Division of Transp., Dept. of Economic Development, State of Mo.*, 836 S.W.2d 23, 27 (Mo. App. 1992) (relying on *State v. Carroll*, 620 S.W.2d 22 (Mo. App. 1981)); see also *State ex rel. Cirese v. Ridge*, 138 S.W.2d 1012 (Mo. banc 1940).

possible.²⁶⁵ The Commission concludes that there was no violation of Section 393.170 in this instance either, not where the company has made a good faith effort to comply with the statute in the most expedient manner possible under the circumstances.

Conversely, the Commission concludes that Empire did not lay in wait before filing its application for a CCN in the contested territory in an attempt to take over MGE's already constructed facilities or in attempt to dislodge MGE at a loss of its investment in infrastructure in any way. Empire did not intentionally delay raising the issue of what sections in Platte County constituted MGE's certificated service area in Platte County with the Commission. There is no competent or substantial evidence to substantiate such a conclusion. Empire and its predecessor may have slept on a possible expansion of its territory, and may have failed to file an appropriate procedural challenge to MGE's 1997 Commission-approved tariff, but those decisions constitute business judgments that are outside the jurisdiction of this Commission.²⁶⁶

The Commission concludes that, under the facts of this case, there has been no violation of Section 393.170, or any other statute, Commission rule, or tariff provision by either MGE or Empire. The Commission shall not authorize its Staff to seek penalties against either company.

²⁶⁵ MGE Exh. 2, Noack Rebuttal, p. 2 lines 20-23, p. 3, lines 1-2; p. 5 lines 11-24; Transcript p. 123, lines 7-11, p. 134, lines 19-25, p. 135, lines 102.

²⁶⁶ *Harline*, 343 S.W.2d at 181-182. "The utility's ownership of its business and property includes the right of control and management, subject, necessarily, to state regulation through the Public Service Commission. 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. The utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation and does no harm to public welfare." *Id.*

Final Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decision.

For the reasons cited herein, the Commission shall:

- a.) acknowledge that MGE has a Commission-approved CCN for Section 12 in T52N, R36W, Sections 7, 8, 9, 10, 11, and 12 in T52N, R35W (7 sections total), pursuant to the Commission's 1955 and 1956 orders in Case No. 12,632;
- b.) grant MGE a CCN for Sections 13 and 14 in T52N, R35W;
- c.) acknowledge there has been no change in the status of Empire's CCN for Sections 1, 2, 3, 10, 11, and 12 of T52N, R35W and Sections 4, 5, and 6, of T52N, R34W;
- d.) have MGE revise its tariff, in accordance with MGE's representation to voluntarily correct its Tariff Sheet 6.15 to reflect it has no CNN for Section 1 of T52N, R36W, Sections 1, 2, 3, 4, 5 and 6 of T52N, R35W, and Sections 1, 2, 3, 4, 5, and 6 of T52N, R34W, and Sections 4, and 5 of T52N, R33W;
- e.) deny Empire's request for a CCN in Sections 15, 22, 23, and 24 of T52N, R35W;
- f.) direct Empire and MGE to provide notice to each other and to the Staff of the Commission regarding any future development and expansion in Sections 10, 11, and 12 of T52N, R35W, where they hold dual certificates; and,
- g.) direct Empire and MGE to file revised tariff sheets identifying which types of certificates they have (i.e. transport, line, or service area certificates) in their tariffs.

IT IS ORDERED THAT:

1. The “Motion of The Empire District Gas Company to Strike a Portion of and Attachment to MGE’s Post-hearing Brief,” filed on December 28, 2007, is granted. The section in MGE’s post-hearing brief entitled “Comments of Affected Customers” and Exhibit 1, attached to MGE’s brief are hereby stricken from the record.

2. The Commission acknowledges that Missouri Gas Energy’s Tariff Sheet 6.15 correctly reflects, that pursuant to the Missouri Public Service Commission’s 1955 and 1956 orders in Case No. 12,632, Missouri Gas Energy has a Commission-approved Certificate of Convenience and Necessity for Section 12 in T52N, R36W, and Sections 7, 8, 9, 10, 11, and 12 in T52N, R35W in Platte County, Missouri.

3. Missouri Gas Energy is granted a Certificate of Convenience and Necessity to provide natural gas service in Sections 13 and 14 in T52N, R35W, in Platte County, Missouri.

4. Missouri Gas Energy shall revise its current Tariff Sheet 6.15, in accordance with its representation to voluntarily correct its Tariff, to reflect it has no Certificate of Convenience and Necessity for Section 1 of T52N, R36W, Sections 1, 2, 3, 4, 5 and 6 of T52N, R35W, and Sections 1, 2, 3, 4, 5, and 6 of T52N, R34W, and Sections 4, and 5 of T52N, R33W; all in Platte County, Missouri.

5. The Commission acknowledges there has been no change in the status of Empire’s Certificate of Convenience and Necessity for Sections 1, 2, 3, 10, 11, and 12 of T52N, R35W and Sections 4, 5, and 6, of T52N, R34W in Platte County, Missouri.

6. The Empire District Gas Company’s request for a Certificate of Convenience and Necessity in Sections 13, 14, 15, 22, 23, and 24 of T52N, R35W, in

Platte County, Missouri is denied.

7. The Empire District Gas Company and Missouri Gas Energy shall provide notice to each other, and to the Staff of the Missouri Public Service Commission, regarding any future development and expansion in Sections 10, 11, and 12 of T52N, R35W in Platte County, Missouri, where they hold dual certificates.

8. The Empire District Gas Company and Missouri Gas Energy shall file revised tariff sheets with the Commission identifying which types of certificates they have (i.e. transport, line, or service area certificates) in all of the areas in which they hold any type of certificate to provide any type of natural gas service.

9. All objections not ruled on are overruled and all pending motions not otherwise disposed of herein are hereby denied.

10. This order shall become effective on February 24, 2008.

11. This case shall be closed on February 25, 2008.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Clayton, Appling,
and Jarrett, CC., concur;
and certify compliance with the
provisions of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 14th day of February, 2008.