

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 7th day of
December, 2011.

In the Matter of the Application of The Empire District)	
Gas Company, for a Certificate of Public Convenience)	
and Necessity Authorizing it to Construct, Install, Own,)	
Operate, Control, Manage and Maintain a Natural Gas)	File No. GA-2012-0111
Distribution System to Provide Gas Service in Nodaway)	
County, Missouri, as an Expansion of its Existing)	
Certified Area)	

**ORDER GRANTING CERTIFICATE OF CONVENIENCE AND
NECESSITY**

Issue Date: December 7, 2011

Effective Date: December 15, 2011

Background

On October 11, 2011, The Empire District Gas Company ("Empire") filed an application requesting that the Commission grant it a Certificate of Convenience and Necessity ("CCN") to expand its service territory into 20 Sections in Township 63 North in Nodaway County, Missouri.¹ Empire asserts that new commercial customers in this area have expressed an interest in converting from their existing fuel sources to natural gas.

The Commission issued notice and set a deadline for intervention requests. No person or entity intervened, and no party requested a hearing.

On November 21, 2011, the Commission's Staff filed its recommendation to grant the CCN subject to certain conditions. No party opposed Staff's recommendation and Empire agreed to the conditions.

¹ Empire filed its application pursuant to Section 393.170, RSMo 2000, and Commission Rules 4 CSR 240-2.060 and 3.205.

Legal Standard to Grant a CCN

“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.”² 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 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.

² *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).

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."³ The term "necessity" does not mean "essential" or "absolutely indispensable," but rather that the proposed project "would be an improvement justifying its cost,"⁴ and that the inconvenience to the public occasioned by lack of the proposed service is great enough to amount to a necessity.⁵ 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.⁶

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.

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*,

³ 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.)

⁴ *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).

⁵ *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).

⁶ *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*,

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.⁷

Analysis

While Section 393.170 contemplates a Commission decision following “due hearing,” the term “hearing” “presupposes a proceeding before a competent tribunal for the *trial of issues* between *adversary parties*, the presentation and the consideration of proofs and arguments, and determinative action by the tribunal with respect to the issues ... ‘Hearing’ involves an *opposite party*; ... it contemplates a listening to facts and evidence for the sake of *adjudication* ... The term has been held synonymous with ‘opportunity to be heard’.”⁸ The requirement for a hearing was met in this matter when the opportunity for a hearing was provided and no party requested the opportunity to present evidence.⁹ Ultimately, Empire’s application did not result in a contested case proceeding.

The Commission’s Staff recommended approval of Empire’s application because: (1) no interveners objected; (2) Empire anticipates using customary rights-of-way; (3) no new franchises are necessary; (4) Empire’s proposal is economically feasible; and (5) Empire’s

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).

⁷ 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.).

⁸ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Comm'n of State of Mo.*, 776 S.W.2d 494, 495-496 (Mo. App. 1989).

current contracted capacity is sufficient to serve the additional customers. Additionally, Empire's verified application demonstrates a need for gas service in the service area identified and that there is no other natural gas service available in the described area. The cost of the project will be paid for by Empire or customer-supplied funds pursuant to Empire's extension policy. No external financing for this construction will be necessary. Construction methods will follow Empire's customary standards and the rules of the Commission. Empire's existing rates and regulations for natural gas service contained in its tariff for the Northwest system will apply to service in the proposed area.

Decision

Based on the Commission's independent and impartial review of the verified filings, the Commission determines that Empire has satisfied all necessary criteria for the grant of a CCN. Empire's provision of natural gas service to the service area described is in the public interest and the Commission will grant the request for the certificate. Because Empire has agreed to accept Staff's recommended conditions, and because the Commission finds these conditions to be in the public interest, the Commission will incorporate those conditions into the ordered paragraphs below. Finally, since the application did not result in a contested case, the Commission need not grant Empire a waiver of the 60-day notice of filing requirement in Commission Rule 4 CSR 240-4.020(2), as that rule only applies to cases that are likely to become contested cases.

THE COMMISSION ORDERS THAT:

1. The Empire District Gas Company is granted certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain a system for the

⁹ *Id.*

provision of natural gas service to the public pursuant to its approved rates, rules and regulations in Sections 10, 11, 12, 13, 14, 15, 22, 23, 24, 25, 26 and 27, Township 63 North, Range 34 West and Sections 7, 8, 17, 18, 19, 20, 29 and 30 Township 63 North, Range 33 West, all in Nodaway County, Missouri.

2. The Empire District Gas Company shall maintain separate records for the new service area described in paragraph 1.

3. The Empire District Gas Company shall perform a separate class cost of service study and revenue requirement for the new service area when it files its next rate case.

4. The Empire District Gas Company shall file revised tariff sheets including the newly certificated service area granted by this order within thirty (30) days of the issue date.

5. This order shall become effective on December 15, 2011.

BY THE COMMISSION

(S E A L)



Steven C. Reed
Secretary

Gunn, Chm., Davis, Jarrett
and Kenney, CC., concur.

Stearley, Deputy Chief Regulatory Law Judge