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September 15, 1999

FILED[2]
SEP 15 1999
Missouri Public Service Commission

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

RE: Case No. EA-99-172
In the Matter of the Application of The Empire District Electric Company

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case are an original and fourteen (14) copies of the INITIAL BRIEF OF THE CITY OF SPRINGFIELD, MISSOURI, THROUGH THE BOARD OF PUBLIC UTILITIES.

Copies of this filing have on this date been mailed or hand-delivered to counsel for parties of record. Thank you for your attention to this matter.

Sincerely,

Jeffrey A. Keevil

JAK/er
Enclosures
cc: counsel for parties of record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED[2]
SEP 15 1999
Missouri Public Service Commission

In the Matter of the Application of The Empire District Electric Company for a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage, and Maintain an Electric Transmission and Distribution System to Provide Electric Service in an Area in Greene County, Missouri.	)	Case No. EA-99-172

INITIAL BRIEF OF THE CITY OF SPRINGFIELD, MISSOURI, THROUGH THE BOARD OF PUBLIC UTILITIES

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September 1999

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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INITIAL BRIEF OF THE CITY OF SPRINGFIELD, MISSOURI,
THROUGH THE BOARD OF PUBLIC UTILITIES

COMES NOW the City of Springfield, Missouri, through the Board of Public Utilities (hereafter "City Utilities" or "CU"), and respectfully submits its Initial Brief as directed by the Presiding Regulatory Law Judge at the conclusion of the hearing herein on August 2, 1999.

INTRODUCTION

In this case, the Commission must decide whether to grant The Empire District Electric Company ("Empire") a certificate of convenience and necessity for the areas outside the city limits, but adjoining, Strafford and/or Willard as set forth in the Non-Unanimous Stipulation filed by Empire, Staff and the intervenor cooperatives.[1] City Utilities believes that such certificate(s) should not be granted because there is no need for electric service by Empire in either of the proposed areas, nor would the granting of

[1]It must be remembered that the original application in this case has been modified by the Non-Unanimous Stipulation filed on June 25, 1999, and that Empire is now requesting a certificate of public convenience and necessity for only those three areas set forth in the Non-Unanimous Stipulation; of the three areas set forth in the Non-Unanimous Stipulation, City Utilities is only opposing portions of two of those areas.

such certificate(s) promote the public interest, but would simply result in wasteful and unnecessary duplication of facilities and service with all of the problems attendant to duplication, including but not limited to safety concerns, unnecessary costs, and aesthetics degradation (which will be discussed further herein). In this regard,

> [T]he findings of the Subcommittee on Electrical Distribution Line Duplication confirm and substantiate the existence of duplication of service lines . . . resulting in wasteful and unwise uses of valuable energy resources and creating indefensible ecological blights—some in or near residential areas . . . and . . . there appears to be unnecessary competition among the power producers to extend their distribution lines . . . and . . . such competition has resulted in costly unneeded extensions of lines and paralleling of existing service lines in order to serve new customers and thus constitutes an unreasonable and unwarranted expense which the consuming public must bear. . . .

Missouri House Resolution 150, 77th General Assembly, April 29, 1974. The House Resolution also referred to "the serious problems, both present and future, engendered by the maze of duplicate electrical distribution lines marring and scarring the countryside." *Id.*

Before addressing the issues set forth in the list of issues filed herein by Staff, it is necessary to correct some potential legal misperceptions which may exist due to Empire's witness testifying outside his area of knowledge, *i.e.*, testifying as to matters of law. The Commission may recall that Empire's witness, Mr. Palmer, testified that the Commission was precluded from considering safety issues in certificate cases such as this due to Section 386.310 RSMo. (Ex. 2, p. 4). First of all, as even Mr. Palmer quoted in his testimony, Section 386.310 RSMo. merely provides that "The Commission shall not make any rule, regulation, decree or order with respect to allocation of territory or territorial rights . . . pursuant to sections 386.310 and 394.160, RSMo." What Mr. Palmer did not mention is that this case is not pursuant to sections 386.310 or 394.160 RSMo.,

but rather, is pursuant to section 393.170 RSMo. as are all electric certificate cases. (*See,* Empire's Application). Section 393.170.3 RSMo. provides that "[t]he commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such . . . is necessary or convenient for the public service." Therefore, Mr. Palmer's position is baseless. Second, and even clearer, the Missouri Court of Appeals has directly contradicted Mr. Palmer's position on this matter. In a recent gas certificate case also brought pursuant to section 393.170 RSMo. like the present case, *State ex rel. Intercon Gas, Inc. v. Public Service Commission of Missouri,* 848 S.W.2d 593 (Mo. App. 1993), the Missouri Court of Appeals, Western District, specifically stated that "**The safety and adequacy of facilities are proper criteria in evaluating necessity and convenience.**" (emphasis added) *Id.* at 597. Mr. Palmer's position that the Commission is precluded from considering safety issues in certificate cases such as this, being in direct contradiction to the Missouri Court of Appeals, is simply wrong.

The Commission may also recall that Mr. Palmer (as well as Staff's witness Mr. Ketter) testified that, if the Commission does not grant Empire a certificate for the areas outside the current city limits of Strafford and Willard, and if at some undetermined future point in time either area was annexed by the respective city, new customers in the newly annexed area would not have a provider available to provide service because, in their opinion, a franchise would be required from the respective city in order to provide service. (Tr. 58, 67-68, 123-124). This is simply another erroneous statement of the law. A franchise, as the Commission correctly found in another recent certificate case under Section 393.170 RSMo., "is necessary only to use public rights of way." *In the Matter of*

Osage Water Company, Case No. WA-98-236 and WC-98-211, Report and Order issued August 10, 1999. In fact, in that case, the Commission granted a certificate to a Commission-jurisdictional water company in the absence of a franchise. The presence of a franchise does not bestow, nor does the absence of a franchise preclude, the ability to provide service; it merely grants use of public rights of way. In fact, counsel for Empire, in his opening statement in this case, correctly stated that what being the "franchised electric supplier" means "is that the city councils or boards of aldermen . . . passed an ordinance saying that Empire has a right to use public streets, rights of way and allies [*sic*] as a supplier of electric service." (Tr. 15-16). That's all a franchise is.

In this regard, it is important to remember that City Utilities is unlike most other municipal electric utilities in Missouri; while others may be limited to serving within their city limits, City Utilities is not so limited by virtue of both statutory and case law. Section 386.800 RSMo. provides that

> No municipally owned electric utility may provide electric energy at retail to any structure located outside the municipality's corporate boundaries after July 11, 1991, unless: . . .(4) The structure is located in an area which was previously served by an electrical corporation regulated under chapter 386, and chapter 393, RSMo, and the electrical corporation's authorized service territory was contiguous to or inclusive of the municipality's previous corporate boundaries, and the electrical corporation's ownership or operating rights within the area were acquired in total by the municipally owned electrical system prior to July 11, 1991.

What the foregoing means, simply stated, is that City Utilities can lawfully serve the entire territory of the former Springfield Gas and Electric Company (shown on Schedule 1 to Ex. 5) which was acquired by City Utilities in the early 1940's, and which includes the areas outside the city limits, but adjoining, Strafford and/or Willard as set forth in the Non-Unanimous Stipulation. City Utilities is governed by an 11 member board, two of

which must be customers of City Utilities who live outside the city limits of Springfield (and may live in the disputed areas around Strafford and Willard). (Ex. 5, p. 2; Tr. 175). Mr. Palmer even testified that cooperatives could serve inside the city limits of Willard and/or Strafford without a franchise because they "have what is similar to a blanket franchise to serve in the state of Missouri, and that the state law would supersede local authority," although he was unwilling to admit the same for City Utilities. (Tr. 69).

Recognizing that a franchise "is necessary only to use public rights of way" (*In the Matter of Osage Water Company,* Case No. WA-98-236 and WC-98-211, Report and Order issued August 10, 1999), based on the statute cited above, as well as case law, City Utilities can lawfully serve these areas, even without a franchise from Strafford and/or Willard, even if at some undetermined future point in time either area was annexed by the respective city. Therefore, the Commission need not worry that if the Commission does not grant Empire a certificate for the areas outside the current city limits of Strafford and Willard, and if at some undetermined future point in time either area was annexed by the respective city, new customers in the newly annexed area would not have a provider available to provide service.

Each of the issues in the list of issues filed in this case by Staff on July 15, 1999, will now be addressed, though possibly not in the order listed by Staff.

ISSUES CONTAINED IN LIST OF ISSUES FILED BY STAFF

Have the signatory parties to the Non-Unanimous Stipulation provided adequate evidence to support the Non-Unanimous Stipulation?

When a Non-Unanimous Stipulation is filed, the signatory parties' "new position [as reflected in the Non-Unanimous Stipulation] must still be supported and the

stipulating parties, particularly the company, bear the risk [*i.e.*, the burden of proof is on the company] concerning any disputed issues"; "**[t]he stipulating parties must** likewise **file evidence and testimony supporting settlement of the disputed issues.**" (emphasis added). *In the matter of Missouri Public Service*, 2 MPSC 3d 221 at 223 (1993). The signatory parties to the Non-Unanimous Stipulation have not done so in the present case.

In his rebuttal testimony, filed before Staff entered into the Non-Unanimous Stipulation, Staff witness Ketter specifically stated "that Empire has not established the need for regulated electric service and that it is not in the public interest to encourage duplication of electric facilities in these areas." (Ex. 3, p. 9). In fact, at his deposition, given after the filing of the Non-Unanimous Stipulation, Mr. Ketter stated under oath that he still believed the foregoing statement to be true. (Tr. 94). The only reason set forth in Mr. Ketter's surrebuttal testimony, filed after Staff entered into the Non-Unanimous Stipulation, for granting Empire a certificate for the territory outside of Strafford and Willard is to allow Empire to serve those areas in the event that Strafford or Willard annex them at some point in the future (Ex. 4, p. 3); Mr. Ketter confirmed at the hearing that possible future annexation was his sole reason for recommending Empire be granted a certificate for the territory outside of Strafford and Willard. (Tr. 79-81).

However, Mr. Ketter admitted that he had no knowledge of any plans by Strafford or Willard to annex the subject areas and that neither city had indicated any such plans during Mr. Ketter's recent visit to the respective cities (Tr. 99). Further, Mr. Ketter even admitted that there is no immediate need and that such a need, based on annexation, is probably more than two years in the future, if at all. (Tr. 114). As discussed in detail in the Introduction section of this brief, the Commission need not worry that if the

Commission does not grant Empire a certificate for the areas outside the current city limits of Strafford and Willard, and if at some undetermined future point in time either area was annexed by the respective city, new customers in the newly annexed area would not have a provider available to provide service, because City Utilities could lawfully provide such service even without a franchise.

Like Mr. Ketter, in his surrebuttal testimony Mr. Palmer of Empire gave as his only justification for the position as reflected in the Non-Unanimous Stipulation the possibility of future expansions of city boundaries and Empire's desire not to "repeatedly come to the Commission to change boundaries." (Ex. 2, p. 3). Like Mr. Ketter, Mr. Palmer had no evidence of any impending expansions of city boundaries and thought the areas to be granted to Empire in the Non-Unanimous Stipulation "should be sufficient at least for several years." *Id.*

Rather than support settlement of the disputed issues as set forth in the Non-Unanimous Stipulation, the testimony of both Mr. Ketter and Mr. Palmer which was filed after the Non-Unanimous Stipulation was filed does just the opposite -- they both admit that there is currently no need for regulated electric service in the territory outside of Strafford and Willard for which Empire would be granted a certificate under the Non-Unanimous Stipulation and that such a need will probably take years to arise, if it arises at all. Mr. Ketter's original position, "that Empire has not established the need for regulated electric service and that it is not in the public interest to encourage duplication of electric facilities in these areas" (Ex. 3, p. 9), is the only position supported by the evidence, rather than the signatory parties' new position as reflected in the Non-Unanimous Stipulation.

Furthermore, Empire failed to provide even the most basic evidence, as required by Commission rule, to support the Non-Unanimous Stipulation. 4 CSR 240-2.060(2)(F) requires that an application for a certificate of convenience and necessity by an electric company include a list of the names and addresses of ten persons residing in the proposed service area, and a feasibility study containing plans and specifications for the utility system and estimated cost of construction during the first three years of construction; plans for financing; proposed rates and charges and an estimate of the number of customers, revenues and expenses during the first three years. While Empire's original application included a list of ten persons residing in the proposed service area, Empire did not file a revised list of ten persons residing in the proposed service area covered by the Non-Unanimous Stipulation despite the fact that not all ten persons on Empire's original list reside in the proposed service area covered by the Non-Unanimous Stipulation. Furthermore, while Empire's original application included an estimate of revenues and expenses to expand into the territory sought in the original application, no revised revenue and cost figures were provided for the reduced service area covered by the Non-Unanimous Stipulation. Therefore, the Commission is precluded by its own rule from granting Empire the disputed new territory.

At the hearing, Mr. Palmer testified, over objection, that the estimates of costs and revenues provided with the original application (applicable to the original expanded service territory) were based on "pure speculation" since Empire "did not have any actual customers that had requested service" in the new territory, and since the numbers were "pure speculation" they "could apply to any areas." (Tr. 46-48). This merely begs the question. If the numbers originally provided by Empire were so speculative that they

could apply to any area, regardless of size, how can the Commission rely on such numbers with any assurance of accuracy? In his surrebuttal testimony, Mr. Palmer went to great lengths to mention how much less territory Empire is currently seeking as compared to how much territory Empire was seeking in its original request (Ex. 2, p. 2), and at the hearing he stated that Empire was originally seeking approximately 55 square miles of additional territory while it is now only seeking approximately 15 square miles of additional territory (Tr. 52). However, he would have the Commission believe that the cost and revenue numbers given for the 55 square mile territory are the same as for the 15 square mile territory. Something just doesn't add up. Either the numbers originally provided by Empire were so speculative as to be essentially worthless, or Empire realized after filing its surrebuttal testimony that it had failed to include revised cost and revenue numbers as required to support the Non-Unanimous Stipulation and was forced to rely on the only numbers set forth in Empire's testimony (Ex. 1), which was filed before the Non-Unanimous Stipulation.

Is there a need for electric service by Empire in the area adjoining Strafford (which area is as specified in the Non-Unanimous Stipulation)?

Before the Commission may grant Empire a certificate of convenience and necessity for any new service territory, the Commission must find that the grant of such certificate is necessary or convenient for the public service. Section 393.170 RSMo. Before the Commission can find that the grant of such certificate is necessary or convenient for the public service, the Commission must find that there is a need for the proposed service. *See, e.g., In the matter of Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.S.) 554, 561 (1991). There is no need for electric service by Empire in the area adjoining Stafford,

as City Utilities already has, and has had for some time, significant amounts of facilities in such area. (Ex. 6, p. 4 and Schedule 2). This was acknowledged by Mr. Ketter. (Tr. 91, 110). Furthermore, City Utilities owns approximately forty acres in this area which was purchased for construction of a substation facility. (Ex. 6, p. 4).

The courts of Missouri have stated that "what is necessary and convenient [for the public service] encompasses . . . prevention of undesirable competition, and prevention of duplication of service." *State ex rel. Intercon Gas, Inc. v. Public Service Commission of Missouri,* 848 S.W.2d 593, 597 (Mo. App. 1993) [citing *State ex rel. Public Water Supply District No. 8 v. Public Service Commission,* 600 S.W.2d 147, 154 (Mo. App. 1980).] Early in this century, the Missouri Supreme Court stated that:

> This is an era in which we, in a large measure if not fully, realize a necessity for the conservation of energy and of natural resources . . . **the requirement of a finding of necessity, as well as of public convenience,** further **implies that if another utility is adequately rendering the service proposed, or is able and willing . . . then the necessity would not exist and the certificate should be refused.** (emphasis added)

State ex rel. Electric Company of Missouri v. Atkinson, 275 Mo. 325, 204 S.W. 897, 898-99 (1918). Since City Utilities is able and willing to provide service in the area, Empire's requested certificate should be refused.

The Office of the Public Counsel stated at the hearing in this case that as far as they were concerned there is no issue that City Utilities "would be competent to serve the customers" in the area(s) at issue in this case. (Tr. 28). Staff's witness, Mr. Ketter, agreed at the hearing with Mr. Burks of City Utilities that City Utilities has facilities that are through most of the area in question around Strafford, and that granting Empire's certificate request would result in duplication with City Utilities' facilities. (Tr. 90-91, 122). Even Mr. Palmer of Empire admitted that City Utilities currently has facilities in

the area around Strafford. (Tr. 64). Mr. Ketter further stated, in response to questions from the bench, that based upon his field inspection City Utilities is prepared or equipped to provide service in the areas outside of the city limits of Strafford and Willard, and that City Utilities has facilities in place appearing to be ready to serve anyone who might ask for service. (Tr. 109-110). Mr. Ketter also stated unequivocally in his rebuttal testimony that "Empire has not established the need for regulated electric service and that it is not in the public interest to encourage duplication of electric facilities". (Ex. 3, p. 9) Based on the foregoing, and the court cases cited in the preceding paragraph, Empire's request for a certificate should be denied; Empire has failed to establish that there is a need for its service as required by law.

As discussed under the first "issue" herein, the only justification given by any of the parties who support the Non-Unanimous Stipulation for granting Empire a certificate for this area is that Empire is the franchised electric supplier within the city limits, and at some hypothetical, undetermined time in the future the city might annex a portion of this area outside the city limits. (Ex. 4, p. 3; Ex. 2, p. 3). However, none of these parties were aware of any evidence that any such annexation plans exist. (Tr. 99). In response to questioning from Commissioner Murray, **Mr. Ketter even admitted that there is no current need for Empire to serve the "buffer zones" around Strafford or Willard,** since there is no customer asking Empire for service in those areas, and that granting Empire a certificate would result in duplication of services, which would be a negative outcome. (Tr. 122).

Given that there has been much discussion herein regarding the further duplication of facilities and services which would result from granting Empire's

certificate request, it may be helpful at this point to review exactly what some of the "negative outcomes" associated with duplication are.[2] Regarding this matter, Mr. Ketter testified as follows:

> Much of the area around Springfield is [already] served by two electric utilities . . . Authorizing a regulated utility to serve here will add to the duplication of facilities.
>
> Extension of electric service requires an investment in facilities for the utility. Utilities then split or compete for the new customers and cannot realize the fullest use of the existing distribution facilities. Crossing developed lots limits the utility's ability to recover these costs. . .
>
> While duplication of facilities allows new customers a choice of electric supplier, there is a cost. Existing customers in the neighborhood often complain about the tree trimming necessary to extend electric service along the road right-of-way to serve new customers. Utilities have use of the road right-of-way to install facilities and if one side is already occupied, then the other side is cleared to allow construction of electric lines.
>
> . . . Duplication of facilities may require non-standard construction techniques, as with the longer poles, and added intrusion on the property owners along the route. It is common that the first utility in an area will utilize the most convenient and least expensive route to extend service and later entrants into an area use what is available.[3]

(Ex. 3, pp. 5-6). Although the foregoing was first stated by Mr. Ketter in his rebuttal testimony, he affirmed at the hearing that he still believed the foregoing statements to be true. (Tr. 83-88).

Mr. Ketter further testified that "Duplication of electric facilities poses an extra hazard for workmen and requires additional measures to provide safe working conditions. These duplicated lines cross over and under one another and clutter the skyline with facilities. When outages occur due to storms or other causes, identifying the utility to call

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[2] These negative outcomes are equally applicable to show that granting Empire's request would not promote the public interest, but will be discussed here, under the "need" issue, since duplication is also a factor which shows that there is no need for the service.

[3] In his surrebuttal testimony, for some reason Mr. Palmer seemed to proudly proclaim that "Empire, on many occasions, uses private right-of-way to serve customers" (Ex. 2, p. 5), apparently without any concern as to cost.

may be difficult, both for the public and for policemen or firemen. Duplication adds more facilities that can be hit by vehicles or with which the public or utility workers can come in contact." (Ex. 3, p. 8). Mr. Ketter also affirmed at the hearing that he still believed these statements regarding safety to be true statements (Tr. 91), and stated plainly that "when there are duplicative facilities, there are more hazards." (Tr. 120). As discussed in the Introduction section of this brief, according to the Missouri Court of Appeals, the safety of facilities is a proper criteria for consideration in a certificate case such as this, Mr. Palmer's faulty legal analysis to the contrary notwithstanding. *State ex rel. Intercon Gas, Inc. v. Public Service Commission of Missouri,* 848 S.W.2d 593 (Mo. App. 1993).

Mr. Burks' testimony regarding the negative consequences of duplication was almost identical to that of Mr. Ketter. (*See*, Ex. 6, p. 2). He, like Mr. Ketter, testified as to the safety problems associated with duplication (Ex. 5, pp. 3-4), aesthetic degradation caused by duplication (Ex. 5, p. 3), and the cost recovery issues associated with duplication (Ex. 5, pp. 3, 4-5). As stated by Mr. Ketter, "I don't like duplication. I don't like the way it looks. I don't feel it's productive for the utilities that have to invest money when they may not see it returned." (Tr. 133). In short, duplication carries with it a host of negative consequences – degradation of safety, aesthetics and cost recovery – with no countervailing affirmative consequences.

Given the cases referenced at the beginning of this section, the undisputed fact that granting Empire's requested certificate would result in duplication with the facilities of City Utilities, and the host of negative consequences associated with duplication of facilities, Empire has failed to demonstrate that there is a need for electric service by

Empire in the area outside the city limits of, but adjoining, Strafford as specified in the Non-Unanimous Stipulation, and the Commission should deny Empire's request for a certificate for this area.

Would granting Empire's Application for the area adjoining Strafford (which area is as specified in the Non-Unanimous Stipulation) promote the public interest?

Before the Commission may grant Empire a certificate of convenience and necessity for any new service territory, the Commission must find that the grant of such certificate is necessary or convenient for the public service. Section 393.170 RSMo. Before the Commission can find that the grant of such certificate is necessary or convenient for the public service, the Commission must find that the service would promote the public interest. *See, e.g., In the matter of Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.S.) 554, 561 (1991). Granting Empire a certificate for the area outside the city limits of, but adjoining, Strafford would not promote the public interest as it would result in wasteful and unnecessary duplication of facilities with all of the problems attendant to duplication of facilities, including but not limited to safety concerns, unnecessary costs, and aesthetics degradation. It would also conflict with the possible future deregulation of the electric industry. (Ex. 5, pp. 3, 5-6). Since City Utilities is able to adequately serve the area, at a cost to the customer which is less than Empire in most instances, granting Empire a certificate for the area would simply not promote the public interest. Each of these matters will be discussed below.

That granting Empire a certificate for this area would result in duplication with City Utilities' facilities is undeniable (*See, e.g.*, Tr. 90-91, 122) and was discussed at length in the preceding section of this brief. The myriad negative consequences of

duplication – such as safety concerns, unnecessary costs, and aesthetics degradation (*See, e.g.*, Ex. 3, pp. 5-6, 8; Ex. 5, pp. 3-5; Tr. 120, 133) – were also discussed at length in the preceding section of this brief on the issue of "need". Therefore, that discussion will not be repeated at this point. However, as noted in footnote 2, each of these negative outcomes of duplication are equally applicable to show that granting Empire's request would not promote the public interest; in fact, they prove just the opposite – that granting Empire's request would be detrimental to the public interest.

Granting Empire's request would also not promote the public interest because it would conflict with the possible future deregulation of the electric industry. As Mr. Burks testified, in the majority of states which have already passed legislation concerning deregulation, the deregulation "has been done in a manner that provides the customer with choice of their energy provider through the existing set of poles and wires" (Ex. 5, p. 6); this allows a customer to choose from whom they buy their energy while having it delivered over the same poles and wires. Under such a scenario it would illogical and bad policy to encourage the construction of further poles and lines, resulting in further duplication, at this time prior to deregulation when customers may in the future be allowed choice of several energy providers in an area without additional construction of poles and wires.

Given the host of negative consequences attendant to duplication of facilities which would result from granting Empire's request, as well as the conflict with the possible future deregulation of the electric industry, City Utilities submits that granting Empire a certificate for this area would clearly not promote the public interest. Perhaps, if there was some question about City Utilities' ability or competency to serve the area

one could argue that, even with duplication of facilities as a result, granting Empire a certificate for this area would promote the public interest; however, that is not the case in this proceeding. As discussed earlier, the Office of the Public Counsel has agreed that there is no issue regarding City Utilities' competency to serve the area (Tr. 28), and Staff has agreed that City Utilities is equipped and ready to provide service in the area. (Tr. 109-110).

Perhaps also, if City Utilities charged customers in the area a significantly greater amount than Empire's rates one could argue that, even with duplication of facilities as a result, granting Empire a certificate for this area would promote the public interest; however, that is not the case in this proceeding either. As clearly shown by the bill comparisons (Exhibit 8), which were late-filed at the request of Commissioner Crumpton, **City Utilities' residential bills are lower** than the bills of both Empire and the cooperatives[4]; **City Utilities' medium non-residential, three-phase service bills are significantly lower** than the bills of both Empire and the cooperatives; and City Utilities' small non-residential, single-phase service bills are merely $81 (on an annual basis) greater than the bills of Empire and less than the cooperatives. (Ex. 8). This is true even with the inclusion of the "surcharge" charged by City Utilities to customers outside of Springfield, such as in the area(s) at issue in this case (as reflected on Ex. 8, the surcharge is only 5%, rather than 10% as stated at the hearing). Furthermore, it must be remembered that the Exhibit 8 bill comparisons were calculated based on Empire's current rates; **Mr. Ketter of Staff testified that he expects Empire to file for a rate**

[4] Although the cooperatives may provide a capital credit allocation, which may (after the fact) reduce the annual costs once the allocation is actually disbursed to the customers, there is no guarantee when or if these disbursements will actually take place; furthermore, in most instances shown, City Utilities' bills are still lower than the cooperatives' bills even after consideration is given to the capital credit allocation.

increase sometime soon. (Tr. 93). As shown by Exhibit 8, City Utilities is actually the overall low-cost provider in the area (even with the surcharge), so granting Empire a certificate for this area would not promote the public interest for any reason related to rates, nor any other reason.

Is there a need for electric service by Empire in the area adjoining Willard (which area is as specified in the Non-Unanimous Stipulation)?

Before the Commission may grant Empire a certificate of convenience and necessity for any new service territory, the Commission must find that the grant of such certificate is necessary or convenient for the public service. Section 393.170 RSMo. Before the Commission can find that the grant of such certificate is necessary or convenient for the public service, the Commission must find that there is a need for the proposed service. *See, e.g., In the matter of Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.S.) 554, 561 (1991).

The only real differences between the area adjoining Willard and the area adjoining Strafford (which has been previously discussed in detail herein) are: (i) although City Utilities has facilities adjacent to the area outside the city limits of, but adjoining, Willard for which Empire would be granted a certificate under the Non-Unanimous Stipulation, CU has no facilities actually located in such area (Tr. 172) as they do in the area adjoining Strafford; however, Ozark Electric already has facilities in this area (Tr. 64) and the Office of the Public Counsel stated at the hearing that there is no issue that Ozark Electric "would be competent to serve" in the area (Tr. 28); and (ii) Mr. Ketter stated that the area in question around Willard was not even an area of expansion (Tr. 115), thereby further reducing the "need" for service by Empire in this

area. There is no need for electric service by Empire in the area adjoining Willard for the same reasons that there is no need for electric service by Empire in the area adjoining Strafford, as discussed in detail previously herein. Since those reasons have been discussed in detail previously herein they will not be repeated here; however, City Utilities would refer the Commission to the previous discussion herein of why there is no need for electric service by Empire in the area adjoining Strafford, which is equally applicable to the area adjoining Willard.

Would granting Empire's Application for the area adjoining Willard (which area is as specified in the Non-Unanimous Stipulation) promote the public interest?

Before the Commission may grant Empire a certificate of convenience and necessity for any new service territory, the Commission must find that the grant of such certificate is necessary or convenient for the public service. Section 393.170 RSMo. Before the Commission can find that the grant of such certificate is necessary or convenient for the public service, the Commission must find that the service would promote the public interest. *See, e.g., In the matter of Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.S.) 554, 561 (1991). Granting Empire a certificate for the area outside the city limits of, but adjoining, Willard would not promote the public interest for the same reasons that granting Empire a certificate for the area outside the city limits of, but adjoining, Strafford would not promote the public interest, as discussed in detail previously herein. Since those reasons have been discussed in detail previously herein they will not be repeated here; however, City Utilities would refer the Commission to the previous discussion herein of why granting Empire a certificate for the area outside the city limits

of, but adjoining, Strafford would not promote the public interest, which is equally applicable to the area adjoining Willard.

CONCLUSION

As the applicant herein, Empire bears the burden of proof as to why it should receive a certificate of convenience and necessity for the areas as described in the Non-Unanimous Stipulation, with regard to any of the contested areas. For the reasons set forth herein, City Utilities submits that the signatory parties to the Non-Unanimous Stipulation have not provided adequate evidence to support the Non-Unanimous Stipulation and have not even provided sufficient evidence to comply with the Commission's own rule; that there is no need for electric service by Empire in the area adjoining Strafford (which area is as described in the Non-Unanimous Stipulation); that granting Empire's Application for the area adjoining Strafford (which area is as described in the Non-Unanimous Stipulation) would not promote the public interest, but would in fact be detrimental to the public interest; that there is no need for electric service by Empire in the area adjoining Willard (which area is as described in the Non-Unanimous Stipulation); and that granting Empire's Application for the area adjoining Willard (which area is as described in the Non-Unanimous Stipulation) would not promote the public interest, but would in fact be detrimental to the public interest. Therefore, City Utilities respectfully requests that the Commission issue an order denying Empire's Application (as modified or amended by the Non-Unanimous Stipulation) for the areas outside the current city limits of, but adjoining, Strafford and Willard.

Respectfully submitted,

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ATTORNEY FOR THE CITY OF SPRINGFIELD, MISSOURI, THROUGH THE BOARD OF PUBLIC UTILITIES

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by placing same in first-class mail, or by hand delivery, to counsel for parties of record on this 15th day of September, 1999.