LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION
312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-3847
E-MAIL: DEANBBE@SOCKET.NET

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

DEAN L. COOPER
MARK G. ANDERSON
TIMOTHY T. STEWART
GREGORY C. MITCHELL
RACHEL M. CRAIG
BRIAN T. McCARTNEY
DALE T. SMITH

September 15, 1999

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Missouri Public Service Commission

Mr. Dale Hardy Roberts
Executive Secretary
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Case No. EA-99-172

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding please find an original and fourteen copies of the Initial Brief of The Empire District Electric Company.

If you have any questions, please give me a call.

Sincerely yours,

Gary W. Duffy

Enclosures
cc w/encl:
John B. Coffman, Office of Public Counsel
Jeff Keevil
Rodric A. Widger
David J. Stueven, Office of PSC General Counsel

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

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 EMPIRE DISTRICT ELECTRIC COMPANY

Gary W. Duffy MBE #24905
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, Missouri 65102-0456
(573) 635-7166
(573) 635-3847 (facsimile)
Attorneys for
The Empire District Electric Company

September 15, 1999

TABLE OF CONTENTS

I. INTRODUCTION

This is a certificate case under §393.170 RSMo involving three areas in southwest Missouri in and near the cities of Strafford, Willard and Republic. Under that statute, The Empire District Electric Company ("Empire") is required to seek the Commission's approval before it can lawfully serve customers in areas beyond the boundaries previously established by the Commission.

As the Commission knows, Empire has been an electric utility since the early years of this century, and has been in existence even longer than the Commission. Empire filed this case in response to municipal annexations in those three cities, where Empire holds franchises, and to address expected growth in other areas of Greene County. (Ex. 1, pp. 3-4; Ex. 2, p. 2) Empire's boundaries for its electric operations in Missouri are set by this Commission in cases like this one. Those boundaries are fixed. The Commission has not allowed Empire's boundaries to automatically expand if a municipality in which Empire is providing service expands its boundaries. In this situation, the Commission-established boundaries have been overtaken by those cities. In other words, while the voters of those cities have endorsed Empire as the franchised electric supplier within each city's boundaries, the cities' boundaries have expanded beyond the boundaries for Empire previously set by this Commission. This case is Empire's attempt to "catch up" to the municipal expansion by securing permission from the Commission to change its boundaries to serve in the newly annexed areas and some additional areas surrounding them to accommodate some future growth.

The record reflects that while Empire originally sought permission for a much greater

area, it has reached an agreement with all[1] of the other parties to the case except City Utilities of Springfield ("CU") on a much smaller area. A Non-Unanimous Stipulation and Agreement was filed on June 25, 1999. Appendix A to that document shows the three tracts where Empire seeks a certificate in this case.

The controversy in the case appears to have been even further narrowed to just the areas outside of Strafford and Willard. Based upon statements made at the hearing by CU, Empire believes there is no opposition to Empire receiving a certificate for the area it seeks in and around Republic, Missouri. (Tr. 26, lines 1-7) CU, however, opposes Empire being certificated in the *rural portions* of the other two areas around Strafford and Willard. (Tr. 26, lines 4-11) CU does not object to Empire being certificated in the newly annexed areas of Strafford and Willard. (Id.; Tr. 65, lines 19-23) The total area Empire is seeking in and around Willard is about 600 acres, or less than one square mile. (Ex. 2, p. 2) The total area Empire is seeking in and around Strafford is about 1,508 acres, which is a little less than two and half square miles. (Id.)

Empire believes the evidence supports the Commission granting it a certificate of public convenience and necessity for the areas depicted in the Non-Unanimous Stipulation and Agreement filed on June 25, 1999.

II. THE COMMISSION'S ARTICULATED STANDARDS

Section 393.170 RSMo 1994 allows the Commission to grant permission to Empire to expand its electric system if the Commission determines that "such construction or such exercise

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[1] While the Non-Unanimous Stipulation was signed by only Empire, the Staff of the Commission, and the three rural electric cooperative intervenors, the Office of the Public Counsel has since stated that it supports the Non-Unanimous Stipulation. (Tr. 21)

of the right, privilege or franchise is necessary or convenient for the public service." The General Assembly has given the Commission wide discretion with such a standard. In recent cases, the Commission has articulated the standards it currently uses to determine whether something is "necessary or convenient for the public service."

The Commission has the authority to grant certificates of convenience and necessity when it determines after due hearing that construction is "necessary or convenient for the public service." The term "necessity" does not mean "essential" or "absolutely indispensable" but that an additional service would be an improvement justifying its cost. ***State ex rel. Beaufort Transfer Co. v. Clark***, 504 S.W. 2d 216, 219 (Mo.App. 1973).

The criteria used by the Commission lately in certificate cases can be found in ***In Re Intercon Gas, Inc.***, 30 Mo.P.S.C. (N.S.) 554 (1991) and ***In Re Ozark Natural Gas Company***, 5 Mo.P.S.C. 3rd 143 (1996). The ***Intercon*** case combined the standards used in several earlier 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.*** at 561. ***Ozark Natural Gas*** at 145. How each of those standards applies to Empire in this situation will be discussed in turn.

III. THE COMMISSION'S STANDARDS HAVE BEEN MET

A. Need for the service

As noted earlier, the term "necessity" does not mean "essential" or "absolutely indispensable" but rather that an additional service would be an improvement justifying its cost. ***State ex rel. Beaufort Transfer Co. v. Clark, supra.*** Mr. Palmer testified that Empire is the

franchised electric supplier in each of the three cities and that these areas are experiencing growth to varying degrees. He said that Willard has much potential for continued growth as a "bedroom community" outside of Springfield. (Ex. 1, p. 4) Empire has already expanded to the edge of its certificate boundary in this area. (Id.) Similarly, Strafford is a prime spot for growth in both commercial and residential facilities. (Ex. 1, p. 5) In serving in this area now, Empire is hampered much as it is in Willard because it has power lines built up to the existing boundary but can go no further, to keep up with the growth, without the Commission's permission. (Id.) Mr. Ketter appeared to concur that these were growth areas. (Tr. 115)

CU is the only opponent to Empire's modified request. While a rural electric cooperative has facilities in the rural area outside of Willard, it is not opposing Empire's modified request. CU has no facilities there. (Tr. 111)

Mr. Ketter testified that he saw a specific need for Empire to be granted a certificate within the city limits. (Tr. 114) He also said he thought it would also be appropriate for the adjacent rural area so that there would not be delays brought about by territorial limits and laws when new customers in those areas seek electric service. He testified that the Commission normally allows so-called "buffer zones" around cities in certificates – sometimes as much as two miles. (Tr. 126)

Empire is the only Commission-regulated supplier in this area of the state. Mr. Ketter testified that there is a possibility that future customers in these areas will want service from a utility that is regulated by the Commission. (Tr. 123) There is also the prospect that Empire would be the only lawful supplier of electricity in a particular area,[2] and that if the Commission

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[2] A rural electric cooperative can only serve in non-rural areas, so this can occur when an area ceases to be rural, i.e., it comes inside a city of greater than 1,500 population by annexation. See, §§ 394.010 and 394.080.

does not allow the boundary change, there would be no lawful supplier for new customers. To that extent, it is in the public interest to allow Empire to serve these new areas even though it might result in some duplication of service, because there is already duplication of service in the area. (Tr. 124) As Mr. Ketter observed, the granting or denial of this certificate application is not going to change existing duplication of facilities. (Id.)

B. The applicant must be qualified

The Commission should only grant a certificate when it reasonably believes that the utility company is qualified to perpetually operate the system. In the case of Empire, it is unquestioned in this record that Empire has the ability to manage and operate an electric system. It presently serves an area of approximately 10,000 square miles in southwest Missouri, southeast Kansas, northeast Oklahoma and northwest Arkansas. (Ex. 1, p. 2) At December 1998, Empire had 120,496 residential customers, 21,917 commercial customers, 358 industrial customers, and 7 wholesale customers on it electric system. (Id.) Empire's witness testified that Empire has the managerial ability to provide the service. (Ex. 1, p. 8) Empire is not aware of any evidence in this record that challenges its qualifications to construct, own, and operate an electric distribution system for the public. Nothing in Empire's decision to change its request for a smaller area affects that managerial ability. (Tr. 50-51)

C. Applicant must have the financial ability to provide the service

Empire is not aware of any evidence in this record that even questions its financial ability to construct, own, and operate an electric distribution system for the public in the areas sought in this application. Empire's witness testified that Empire has the financial ability to provide the service. (Ex. 1, p. 9) Nothing in Empire's decision to change its request for a smaller area affects that financial ability. (Tr. 51) Mr. Ketter said he felt certain that Empire had the

necessary financial resources. (Tr. 115)

D. The applicant's proposal must be economically feasible

There was no serious challenge mounted to Empire's estimate of future customers, revenues and expenses during the first three years of operation in the areas sought in this case. The only criticism voiced by CU was that Empire's construction cost estimates were low and the respective revenue stream was greatly overstated. (Ex. 5, pp. 6-7) CU offered no estimates which it contended were more accurate.

The Commission's rules require an application to include "a feasibility study containing plans and specifications for the utility system and estimated cost of the construction of the utility system during the first three (3) 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 (3) years of operations." 4 CSR 240-2.060(2)(F)5. Mr. Palmer testified that when the feasibility study was prepared for the larger area sought in the original application, he utilized past experience in customer growth in Empire's existing areas. (Tr. 74) It was a "good faith" estimate. (Ex. 2, p. 10) He said that Empire's knowledge of the areas in question, the historical growth rate in those areas, contacts with community and business leaders, and Empire's known costs to provide service were all relied upon in making the estimates. (Ex. 2, p. 10) Mr. Ketter agreed that the Commission's rules necessarily make a utility guess at what the anticipated needs might be, but that he thought Empire could provide the service. (Tr. 118) He also pointed out that the rules are more tailored to a new company coming in and asking for a certificate. (Tr. 115-116)

Any substantial construction that Empire would undertake in the areas is already addressed by the Commission-approved extension rule in Empire's tariff. It provides for how much of an investment should be made by Empire and the prospective customer. (Ex. 2, p. 11)

And to put things in perspective, the cost of estimated construction for these three areas is roughly four-tenths of one percent (.04 percent) of Empire's construction budget for the same time period. (Ex. 2, p. 11; Tr. 75)

E. Service must promote the public interest

The representative of the public in this case, the Office of the Public Counsel, supports a grant of a certificate to Empire of the areas specified in the Non-Unanimous Stipulation. (Tr. 28)

Mr. Ketter of the Staff testified that permitting Empire to serve in the adjacent rural areas outside of Willard and Stafford would serve the public interest. (Tr. 118-119) He said that it would be convenient to all concerned that Empire be allowed to serve in those areas and not have to come back to the Commission each time a subdivision was annexed into a city. (Tr. 80-81) He said that even with the possibility of some duplication of facilities, it would still be prudent for these boundaries to change. (Tr. 84, lines 15-20)

Mr. Ketter testified that the only current supplier in the rural Willard area under consideration here is a rural electric cooperative, and that the ability of the cooperative to serve new customers if that area is annexed is "at risk." (Tr. 89)

Mr. Ketter testified that the only current supplier in the rural Strafford area under consideration here is CU, but he "found very few customers in close proximity of Strafford. (Tr. 90, lines 15-18) CU also has other facilities in that area. (Tr. 91)

1. No safety hazards

While all the parties are legitimately concerned about electric safety matters, and the Commission should always be concerned about safety, the prospect of the creation of safety hazards as a result of this proceeding is little or none. The concerns alleged by CU are overstated and unfounded. The reason for that is the Commission already requires Empire and rural electric

cooperatives to abide by the safety provisions of the National Electrical Safety Code ("NESC") in the construction of electric transmission and distribution facilities. *See*, 4 CSR 240-18.010. Mr. Palmer testified that the NESC already addresses power line construction relative to line crossings and other clearances to maintain a safe working environment, and that Empire makes every effort to comply with those requirements. (Ex. 2, p. 3) The NESC does not prohibit such situations, but rather specifies the safe manner in which they are to be erected. (Id.) Mr. Palmer testified that "We know of many areas where CU has extended lines over or placed lines near existing lines of rural electric cooperatives to serve new customers." (Ex. 2, p. 4)

Also, the General Assembly has not given the Commission the authority to base territorial allocation decisions on alleged safety concerns. §386.310 RSMo 1994 gives the Commission its safety jurisdiction. Subsection 2 of §386.310 RSMo says: "The Commission shall not make any rule, regulation, decree or order with respect to allocation of territory or territorial rights among electric suppliers pursuant to sections 386.310 RSMo and 394.160 RSMo." Therefore, Empire believes the General Assembly has stated clearly that safety allegations such as those made by CU are not to be considered by the Commission in certificate cases such as this. As Mr. Palmer testified, "the NESC rules already provide a sufficient basis for addressing any safety concerns." (Ex. 2, p. 4)

Mr. Ketter testified that the safety rules of the Commission covered line crossings and that he thought the proposal under consideration here was safe and in the public interest. (Tr. 121)

In summary, there is no evidentiary basis for the Commission to deny a certificate to Empire based upon alleged safety concerns. Further, it would be a violation of §386.310.2 RSMo 1994 if it were to do that.

2. No need to speculate about future changes

CU's witness also suggested that the Commission should refrain from granting Empire a certificate because of perceived changes in electric regulation that are coming. Mr. Palmer noted that there is no certainty at this time regarding whether any changes will be made in the laws regarding electric regulation, and if they are made, what they will be. (Ex. 2, pp. 8-10) Empire's position is that the prospect of future legislative changes does not negate the desire or need for Empire to expand its certificate of convenience and necessity in these three areas in Greene County.

IV. CONCLUSION

There is sufficient evidence demonstrating that Empire has met all of the tests the Commission has articulated for the granting of a certificate of public convenience and necessity in the three areas shown in the Non-Unanimous Stipulation and Agreement. CU, in opposing only a portion of the territory covered by that agreement, has been afforded full due process rights to challenge the positions of the other parties to this case. CU has not produced sufficient evidence to support its position.

Respectfully submitted,

Gary W. Duffy MBE #24905
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, Missouri 65102-0456
(573) 635-7166
(573) 635-3847 (facsimile)

Attorneys for
The Empire District Electric Company

Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing was served by either hand delivery or by placement with the U.S. Postal Service addressed to the following counsel this 15th day of September, 1999.

Jeff Keevil
Stewart & Keevil, LLC
1001 Cherry Street, Suite 302
Columbia, MO 65201

Rodric A. Widger
Andereck, Evans, Milne, Peace & Baumhoer
1111 S. Glenstone, P.O. Box 4929
Springfield, MO 65808-4929

John B. Coffman
Deputy Public Counsel
Office of the Public Counsel
Truman State Office Building
Jefferson City, Missouri

David J. Stueven
Assistant General Counsel
Office of the General Counsel
Missouri Public Service Commission
Truman State Office Building
Jefferson City, Missouri

Gary W. Duffy

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