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September 15, 1999

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RE: Case No. EA-99-172 - Empire District Electric Company


Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and fourteen (14) conformed copies of the **STAFF'S INITIAL BRIEF**.

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,


David J. Stueven
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DJS/wf
Enclosure
cc: Counsel of Record

FILED³
SEP 15 1999
Missouri Public
Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED³

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 and Area in Greene)
County, Missouri.)

Case No. EA-99-172

STAFF'S INITIAL BRIEF

Submitted by:

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

In the Matter of the Application of The)
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County, Missouri.)

Case No. EA-99-172

STAFF'S INITIAL BRIEF

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), and for its Initial Brief, states to the Missouri Public Service Commission ("Commission") as follows:

I. Procedural History

On October 20, 1998, Empire District Electric Company ("Empire") filed an application for a certificate of public convenience and necessity for authorization to construct, install, own, operate, control, manage and maintain an electric transmission and distribution system to provide electric service in four areas of Greene County, Missouri ("Application"). The Application was for territory in and around Republic, Willard, Strafford, and an area in southeastern Greene County. On December 3, 1998, Southwest Electric Cooperative, Ozark Electric Cooperative, Webster Electric Cooperative (collectively known as "Cooperatives") and the City of Springfield, by and through the Board of Public Utilities ("CU"), were granted leave to intervene.

On March 1, 1999, Empire filed direct testimony with the Commission. On May 3, 1999, the Staff, CU, and the Cooperatives filed rebuttal testimony with the Commission.

On June 8, 1999, representatives from the Staff, CU, Empire and the Cooperatives participated in a prehearing conference. After much discussion and negotiation prior to, during and after the prehearing conference, the Cooperatives, Staff and Empire entered into a non-unanimous stipulation and agreement ("Stipulation"), which was filed on June 25, 1999. OPC and CU did not sign the Stipulation. OPC, due to workload considerations (Tr. 27), had not attended the prehearing conference and chose not to take a position on the Stipulation at that time. CU opposed the Stipulation, and requested a hearing on June 29, 1999.

Empire, Staff and CU filed surebuttal and cross surrebuttal testimony on July 8, 1999 and an evidentiary hearing was held on August 2, 1999. At the evidentiary hearing, OPC stated that it supported the Stipulation and was satisfied that the Stipulation was fair and in the public interest (Tr. 27 and 28). OPC then asked to be excused from the hearing and waived cross-examination. The Regulatory Law Judge approved OPC's request and excused OPC.

II. Non-Contested Issues

A. The Area In And Around Republic

The service area, as specified in the Stipulation, that Empire is requesting in and around the city of Republic is not contested in this case. CU agrees that allowing Empire to add this area to its service territory would be appropriate (Burks' Cross Surrebuttal, p. 2, line 15). As such, CU apparently also agrees, at least for the area in and around Republic, that Empire has the managerial, financial and technical expertise necessary to provide regulated service to new customers. Granting a certificate for the area in and around Republic allows Empire to

accommodate the current and future expansion of Republic's city limits and allows Empire to make reasonable extensions from its current facilities.

B. The Areas Within the Current City Limits of Strafford and Willard

The areas requested within the city limits of Strafford and Willard are not opposed by any party to this case. CU agrees that Empire should be granted authority to serve the areas that are within the city limits of those cities, as Empire currently has franchises with both of those municipalities (Burks' Cross Surrebuttal, p. 4, line 23 and p. 5, line 1).

Empire is the only electric utility with a franchise for the cities of Strafford and Willard. As such, Empire is the only utility company with authorization to use the public right of way within the City of Willard, and after the census in the year 2000 it will be the only electric utility company with authorization to use the public right of way in Strafford. Southwest Electric Cooperative has electric facilities in Strafford, but cannot set new meters if the population exceeds 1500. New customers in these two cities may not be able to receive service if Empire is not granted a certificate for those areas that are within the city limits of Strafford and Willard. Further, there is no evidence presented that granting the areas within the current city limits of Willard and Strafford would not be in the public interest.

III. Contested Issues

A Proposed List of Issues was filed on July 14, 1999. Other issues, beyond those previously filed, were raised during the evidentiary hearing. This brief will address those issues first and then address the issues as listed in the Proposed List of Issues.

A. Need For Regulated Service

There is a need for regulated service in the areas requested by Empire. The persons outside of the city limits of Springfield who receive service from CU do not have an adequate

voice in the provision of that service. While two of the CU board members are from outside the city limits of Springfield, they are selected and approved by the Springfield City Council. (Tr. 147). Those CU customers outside of Springfield's city limits have no power to elect the city council and are paying a surcharge that the customers of CU who live within the city limits do not pay. (Tr. 149). This surcharge is not dedicated for provision of service outside of Springfield; rather, it just "goes into the general operating fund." (Tr. 150, lines 5 and 6). While persons outside the city limits would have an opportunity to "have their voice heard" (Tr. 155, line 1), they would have no recourse, such as voting in new council members, if the council approved a rate increase or an increase in the surcharge that was not justified. Nor do the persons outside the city limits of Springfield have advocates who are specifically trained in the law of utility regulation, such as the Office of Public Counsel, to represent those persons' interest in rate proceedings.

B. Duplication of Service

1. In General

While Staff has agreed that granting Empire the certificate for the area requested would most likely result in some duplication of facilities, it is Staff's position that the possible duplication of facilities is not sufficiently detrimental to support denying Empire a certificate for these areas. CU witness Burks testified that if Empire's certificate was granted, Empire could come into an area that already had poles on both sides of the road, and put up a third set. (Tr. 156 and 157). However, Mr. Burks conceded that this possibility was purely speculative on his part. (Tr. 157). It should also be pointed out that duplication already exists in this area and that granting or denying the Application will not eliminate duplication. (Tr. 124). Also, Empire's tariff only allows for economically reasonable extensions of Empire's facilities. If

Empire makes unreasonable additions to its facilities and lines, Empire may not be able to recover those costs through rates.

2. Area Around Willard

Empire is requesting authorization to serve a limited area contiguous to the northeast corner of Willard. The only party that has facilities or customers in this area is one of the Cooperatives, and said Cooperative does not oppose the granting of Empire's Application, as amended by the Stipulation. CU appears to base its opposition to granting this area to Empire on the facts that there are already extensive facilities in this area (Burks' Cross Surrebuttal, pp. 3 and 4) and that granting Empire a certificate would result in duplication of CU's facilities. However, CU, in its testimony, does not give any specifics for the area requested around Willard. In fact, when Mr. Burks was asked if CU had any facilities or customers in the area around Willard he stated, "I don't think we have in that small buffer area, I do not think that we have any customers nor do we have any facilities inside that area." (Tr. 172 lines 16-18). Therefore, any duplication of facilities would be with the Cooperative that is also a signatory to the Stipulation.

3. Area Around Strafford

Empire Application, as amended by the Stipulation, requests a certificate for a limited area contiguous to the southwest corner of Strafford. CU and one of the Cooperatives currently serve the area in question. Duplication of facilities is a distinct possibility in this area. (Tr. 84). However, Staff maintains that the disadvantages of duplication would not outweigh the benefits of granting the certificate. Further, Empire can only make reasonable extensions of its existing facilities in accordance with its Commission-approved tariff. This would prohibit Empire from

extending service, and thus duplicating facilities, unless Empire could recover the costs to serve customers off of that extension. (Tr. 116).

C. Safety

During the conduct of the hearing, there was much discussion of duplication and the safety concerns resulting from said duplication. There were also suggestions that this case is not the appropriate forum to address safety concerns. Regardless of whether this is the appropriate forum, there was no evidence presented that Empire has a poor safety record or that Empire does not comply with applicable safety standards. In fact, in response to Commissioner Crumpton's questions regarding safety, Staff's witness, Mr. Ketter, reiterated that safety is not an issue and that Staff would not sign off on an agreement that was unsafe. (Tr. 121). Further, in response to Vice Chair Drainer's questions regarding safety, Empire's witness, Mr. Palmer, stated that Empire had reached 1,000,000 man-hours without an accident and that Empire had not had a safety problem due to crossing over another utility's facilities in recent history. (Tr. 53).

D. Sufficiency of Application

Counsel for CU inquired into the validity of Empire's economic feasibility study. CU's counsel suggested that, due to the fact that the study was not changed after the filing of the Stipulation, said study was no longer valid. Empire's witness, Mr. Palmer stated that the feasibility study was still valid, even considering the reduced area under the Stipulation. Even if that were not so, the Commission has considered the overall financial stability of a company when faced with an uncertain feasibility study. *In Re Utilicorp*, 3 Mo. P.S.C. 3d 127 (1994). As the estimated construction costs are "less than 4/10 of 1 percent" (Tr. 75, line 21) of Empire's construction budget, it would appear that granting the certificate would not represent a financial

burden to Empire. Further, if Empire makes unreasonable facility investments to serve this area, Empire runs the risk of the Commission not including such investments in determining rates.

E. Public Interest

It is Staff's position that granting Empire's Application, as modified by the Stipulation "is necessary or convenient for the public service."¹

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

There is a need for electric service in the area adjoining Willard. The Stipulation allows Empire to make reasonable extensions of its facilities to provide service in that area. Service to this area is especially critical if Willard annexes any of the area as specified in the Stipulation. As stated above, the only electric provider in this area is the Cooperative. Cooperatives cannot set new meters within the city limits of incorporated cities with a population in excess of 1500.² If that area is annexed, there would be a period of time in which no electrical provider would be able to provide service, as no other electrical provider, besides Empire and the Cooperative, currently has facilities in that area.

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

There is a need for electrical service by Empire in the area adjoining Strafford. This area is experiencing growth, and the City of Strafford is annexing areas, through voluntary annexation, along OO Highway. (Tr. 115 and 135). CU's witness, Mr. Burks, states that CU has purchased 40 acres of land to build a substation in the vicinity of Strafford. (Burks, Surrebuttal, p. 4). That would indicate that CU anticipates an increased need for electrical service in that area. Staff's witness, Mr. Ketter, concurs that growth, primarily commercial

¹ §393.170.3 RSMo 1994.

² §§394.020(3) and 394.080(4).

growth, is expected in this area. (Tr. 115). As CU did not indicate when that substation would be on-line, it would appear that allowing Empire an opportunity to obtain customers in the area around Strafford would ensure that there would be sufficient capacity to provide electrical service to new customers in that area.

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

Granting Empire's application for the area adjoining Willard (which area is specified in the Stipulation) will promote the public interest. It gives new customers an opportunity to select service from a regulated company. It also will ensure that, in the event of expansion of Willard's city limits, new customers will be able to obtain service in a timely manner. While there may be some duplication of service, this duplication would be more than outweighed by the benefit of having that area within the service territory of a company that has a franchise with the city of Willard.

In response to questions from Vice Chair Drainer, Commissioner Crumpton, and Commissioner Murray, Staff's witness, Mr. Ketter, specifically states that granting the Application, as amended by the Stipulation, is in the public interest. (Tr. 119, 121, and 124).

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

Granting Empire's Application for the area adjoining Strafford (which areas is as specified in the Stipulation) will promote the public interest. It is anticipated that Strafford will exceed the rural population threshold of 1500 as of the 2000 census (Tr. 59) and that the cooperative will therefore no longer be able to set new meters within the city limits of Strafford. Because Empire is the only franchised provider in Strafford, any expansion of the city limits

would leave new customers without a utility that could lawfully provide electric service. As stated by Mr. Ketter, "I see that ... the law would get in front of customers being able to get service in a reasonable time if some ... restrictions kept either the coop or Empire from providing service." (Tr. 114, lines 10-14). In response to questions from Vice Chair Drainer, Commissioner Crumpton, and Commissioner Murray, Staff's witness, Mr. Ketter, specifically states granting the Application, as amended by the Stipulation, is in the public interest. (Tr. 119, 121, and 124). Also, approving the Stipulation would give new customers in this area the opportunity to obtain service from a regulated company.

F. Non-unanimous Stipulation and Agreement

The Cooperatives, the Staff, and Empire all entered into the Stipulation where Empire agreed to reduce the amount of territory it sought from approximately 50 square miles to 15 square miles. For this, the Cooperatives and the Staff agreed to support Empire's Application as amended by the Stipulation.

The Commission is required to hold a full hearing on any issues in dispute, not just on whether the non-unanimous stipulation and agreement should be accepted. *State ex rel. Fischer v. PSC*, 645 S.W.2d 39 at 42-44 (Mo. App. 1982). The Commission is also required to make complete findings of fact as required by §386.420 RSMo (1994). *State ex rel. Monsanto Company et al v. PSC*, 716 S.w.2d 791 (Mo. banc 1986).

In the present case, all parties filed surrebuttal testimony subsequent to the filing of the Stipulation. Further, CU, the non-signatory party, was given full opportunity to cross-examine the witnesses in this case. Between the testimony and the cross examination conducted at the evidentiary hearing, the issues that need to be addressed in a certificate case were more than adequately examined. The Commission has sufficient information before it to render a decision

that complies with *Fischer* and *Monsanto* and the Commission has proceeded in a manner consistent with what is required according to these two decisions.

IV. Conclusion

The Staff, the Cooperatives, and Empire have presented sufficient evidence for the Commission to make appropriate and complete findings of fact to resolve the issues presented in this case. There is no dispute regarding the area in and around Republic, as specified in the Stipulation, and there is no dispute over the areas within the current city limits of Strafford and Willard. Based on the evidence found in the testimony and from the evidentiary hearing, there is a demonstrated need for regulated service in the areas requested by Empire, as specified in the Stipulation. Further, while there may be some duplication of service, any detriments that may result from such duplication are far outweighed by the benefits to the public if the Stipulation is approved. The evidence also showed that Empire's safety record is such that approving the Stipulation will not create any safety hazards.

The areas outside the existing city limits allow additional area that may be subject to annexations in the future. To the extent that this area is subsequently annexed, Empire will not have to seek expansion of its service territory and could respond to customer request for electric service without having to file an application for a certificate of convenience and necessity and await Commission approval.

Empire has shown that granting the certificate is for the public necessity or convenience, in that they have demonstrated a need for electric service in the areas around Strafford and Willard. It has also been shown that granting those areas will promote the public interest.

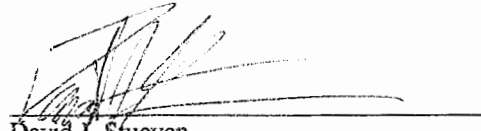
The Stipulation is supported by substantial evidence and the Commission has before it a full and complete record upon which to base a decision. Empire's Application, as amended by

the Stipulation, meets all the requirements of the Commission and is not deficient in any way. The Application, as amended by the Stipulation, should be granted.

WHEREFORE, the Staff respectfully requests that the Commission issue an order granting Empire's Application, consistent with the terms of the Non-Unanimous Stipulation and Agreement filed by the Cooperatives, the Staff, and Empire.

Respectfully submitted,

DANA K. JOYCE
General Counsel

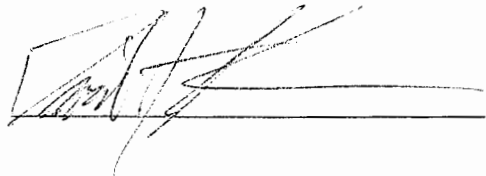


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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list on this 15th day of September 1999.



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Revised: September 15, 1999

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