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	)))))))	Case No. GA-2007-0289

MGE'S POST-HEARING BRIEF

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ATTORNEYS FOR MISSOURI GAS ENERGY

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Introduction

This unique case deserves a unique remedy.

In January 2004 the developer of a proposed 200-300 home subdivision named Seven Bridges was looking to meet the gas service needs of that development. The proposed Seven Bridges subdivision was to be located partially within, but mostly beyond, the service territory of Aquila. The developer approached Aquila, Empire District Gas Company's (EDG or Empire) predecessor in interest in Platte County, and requested that Aquila provide gas service to the Seven Bridges subdivision. In response, Aquila did not provide service to the proposed Seven Bridges subdivision, choosing not to file to expand its service territory so that it could serve Seven Bridges because it did not want to expand its gas service business. The developer then requested service from Missouri Gas Energy (MGE), which pursuant to its tariff possessed authority to serve that portion of the proposed Seven Bridges subdivision located in sections 11 and 12 (T52N, R35W) in Platte County, and MGE personnel worked with the developer so that the development could proceed. MGE began constructing facilities to serve Seven Bridges in January 2006.

After MGE, acting pursuant to authority set forth in its tariff, entered into a contract with the developer, built the facilities needed to provide service and began providing gas service to the Seven Bridges subdivision, Empire (successor in interest to Aquila), now – beginning with its application to intervene filed herein on February 21, 2007 – asks that the Commission not permit MGE to serve Seven Bridges because some of the Seven Bridges development is located in Empire's service territory.

Staff and Empire will argue that because MGE does not have a certificate of convenience and necessity ("CCN" or "Certificate") to serve Seven Bridges, the Commission must recognize the validity of Empire's CCN and force MGE to discontinue service to Seven Bridges. But the Commission is empowered to look beyond Staff and Empire's technical arguments and determine which utility will best serve the public interest. MGE should be permitted to continue serving Seven Bridges as it provides less expensive, more efficient service than Empire and was the only utility which responded to the needs of the Seven Bridges developers.

MGE should be granted a Certificate to provide gas distribution service in sections 13 and 14 (T52N, R35W) of Platte County, Missouri. The evidence shows that Missouri Gas Energy is qualified to provide such service and meets the statutory requirements. Empire has not proven that it is in the public interest for it to operate in the sections contained in its application. In addition, MGE should be permitted to continue service to Seven Bridges in sections 11 and 12.

As required by the Commission's November 13 Order, MGE will address the list of issues submitted to the Commission. Before addressing those issues, MGE will provide the background and procedural history of the case as well as legal issues presented in the case.

Background and Procedural History

MGE's predecessor, Gas Service Company ("Gas Service"), received a certificate to provide natural gas distribution service in and around the Kansas City International Airport area in Case No. 12,632 on May 24, 1955. As part of the certificate, the Commission authorized Gas Service to operate a twelve inch gas main to serve the airport and surrounding area. This gas main is known as the Leavenworth Supply Line (LSL). Part of the LSL is located in sections 10, 11, 12 of township 52 N, range 35W in Platte County, Missouri. (See map at Staff Exh. 2.) The Commission authorization for the LSL did not include the authority for Gas Service to serve customers located in sections 10, 11 and 12.

Empire's predecessor (Missouri Public Service a/k/a Aquila) was granted a certificate to provide gas distribution service in sections around Platte City and Tracy, Missouri in Case No. 13,172 (Jan. 12, 1956). As part of this certificate, Missouri Public Service was authorized to provide gas distribution service in sections 10, 11, 12 (the same area where the LSL ran).

Both companies provided gas service in their respective territories for some time. However, Empire's predecessor Missouri Public Service did not provide service in the southern portion of its Platte County territory for many years. To this day, Empire has no customers in sections 10 and 11 and Aquila only began serving three customers in section 12 in 1995. (Tr.179). Instead, Missouri Gas Energy's predecessor Gas Service served a customer in section 12 from the LSL in 1960. (Noack Rebuttal, Exh. MGE-2, p. 5). Gas Service continued to serve this customer and added two more customers in section 10 in 1992 and 1993 (Id.). This provision of service to customers in Missouri Public Service's territory was never challenged by Missouri Public Service or its successors.

Southern Union Company acquired the Gas Service properties and Certificate. This transaction was approved by the Commission in Case No. GM-94-40. Southern Union operates the property as MGE.

In two cases, (GA-96-130 and GR-96-285), the Commission ordered MGE and the Commission Staff (Staff) to cooperate in preparing and filing a tariff setting out the metes and bounds legal description of the current and complete MGE service area. Staff had requested that the Commission order MGE to file such tariffs because MGE's service territory was difficult to identify. (Tr. 116). Aquila was a party to Case No. GR-96-285.

MGE and Staff worked together in a lengthy and complicated process to produce tariff sheets that would define the MGE service territory. (Tr. 118). MGE filed series tariff sheets on February 21, 1997 which were reviewed and approved by Staff. That tariff included tariff sheet 6.15 which indicated, among other things, that sections 10, 11, 12 in T52N, R35W were part of MGE's certificated territory. A copy of the tariff filing was placed in the GA-96-130 and GR-96-285 case files.

The Staff presented its recommendation to approve MGE's tariff filing to the Commission on May 14, 1997 and the Commission approved the Staff's recommendation on the same day. (Straub Rebuttal, Exh. Staff-20, Schedule 2.1). The tariff sheets became effective on May 21, 1997 (Straub Rebuttal, Exh. Staff-20, p. 3) and are still in effect today.

MGE provided service to another customer in section 10 in 2002. (Noack Rebuttal, Exh. MGE-2, p. 5).

In January 2004, upon being made aware of the proposed Seven Bridges subdivision, Aquila decided that it did not want to expand its service territory to include section 13 of T52N,

R35W for the purpose of providing gas service to the proposed Seven Bridges subdivision. (Teter Direct, Exh. EDG-2, p. 3; Tr. 194-196).

Having been rebuffed by Aquila, the developers of Seven Bridges then contacted MGE about providing natural gas service to the subdivision in 2004. (Tr. 114). MGE, pursuant authority set forth in its tariff, undertook to serve the subdivision. On January 6, 2006, MGE entered into a contract with the Seven Bridges developers for the construction of facilities to be used for provision of gas service to the development. The development is located in sections 11, 12, 13 and 14. (Noack Direct, Exh. MGE-1, p. 4) MGE began construction of gas facilities in the first phase of the Seven Bridges subdivision (section 12) shortly after the contract was signed and began serving Seven Bridges in early 2006. (Noack Direct, Exh. MGE-1, p. 4). MGE is providing service to Seven Bridges from the LSL which abuts the northern edge of the development and is closer than Empire's supply line. (Noack Rebuttal, MGE-2, p. 5).

While MGE was building plant to serve Seven Bridges, the Commission approved the sale of Aquila's gas properties to Empire on April 18, 2006 in Case No. GA-2006-0205.

Aquila became aware of the planned Seven Bridges development in 2004 (Tr. 193). MGE began construction to serve the development in January 2006 in Section 12. Although construction began in this subdivision (which is next to highway Route N) in January 2006. Empire claims that it did not become aware of MGE's provision of service to Seven Bridges until July or August of 2006 (Teter Direct, Exh. EDG-2, p. 4) Even with this knowledge, Empire did not contact MGE about this provision of service until the fall of 2006 and never contacted Staff or filed a complaint against MGE. In fact, the first time Empire (or Aquila for that matter) ever raised this issue with the Commission was in the application to intervene filed herein by Empire on February 21, 2007.

MGE filed its application for a certificate of public convenience and necessity for sections 13 and 14 on January 31, 2007. Empire filed an application to intervene on February 21, 2007.

Empire's application to intervene did not contain an application for a CCN to serve sections 13 and 14. Empire's application for a CCN was filed on May 30, 2007.

Legal Issues

MGE proposes that it continue to serve Seven Bridges which is located in Sections 11, 12, 13 and 14. Sections 13 and 14 are currently not certificated to any utility. Empire has a CCN for sections 11 and 12 but the Commission has the authority to issue a CCN to a public utility even though such certificate will overlap with another public utility's area of service. Osage Water v. Miller County Water Auth., 950 S.W.2d 569, 575 (Mo. App. S.D. 1997). In such cases the public interest and convenience is the Commission's chief concern when determining whether to grant more than one certificate within one certificated area. Id.

The Missouri Court of Appeals, in De Paul Hospital School of Nursing, Inc. v. Southwestern Bell Tel. Co., 539 S.W.2d 542 (Mo. App. 1976), discussed 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," stating:

> (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.**" State ex rel. Laundry, Inc. v. Public Service Commission, 327 Mo. 93, 34 S.W.2d 37, 42-3(2, 3) (Mo. 1931). "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. State ex rel. Electric Company of Missouri v. Atkinson, et al., 275

> Mo. 325, 204 S.W. 897; State ex rel. Pitcairn v. Public Service Commission, 232 Mo. App. 535, 111 S.W.2d 222." State ex rel. Crown Coach Company v. Public Service Commission, 238 Mo. App. 287, 179 S.W.2d 123, 126 (5, 6) (1944).

(Emphasis added). Id. at 548.

Section 393.170.1 RSMo provides that gas corporations serving the public are not to begin construction of their facilities before obtaining the permission and approval of the Commission. But this statute does not limit the Commission from exercising its sound judgment and, where it is in the public interest and necessary or convenient for the public service, authorize the construction of facilities after they were built. The Commission has the authority to determine that MGE should continue to serve Seven Bridges.

Staff may cite State ex rel. Imperial Utility Corporation v. Borgmann, 664 S.W.2d 215 (Mo. App. W.D. 1983) for the proposition that a tariff with no statutory authority is invalid. The court in Imperial found that there was no statutory authority authorizing a public utility to collect charges for service rendered to a previous customer. Id. at 219. Because statutory authority did not exist, the utility's tariff provision which sanctioned such collection activities were declared invalid by the court in response to a complaint filed against the utility by one of its customers.

In this case, no party is suggesting that there is no statutory authority for a utility to specify its service territory in its tariff nor has any Commission complaint ever been filed by Empire or Aquila against MGE for serving customers pursuant to its tariff. Even if there was a mistake in the extent of MGE's certificated area in MGE's tariff, such a mistake does not automatically invalidate the tariff. The Commission has recognized that pursuant to Section 386.270 RSMo. once a tariff is effective, it is valid until found otherwise in a complaint case. See, Order Rejecting Tariff, In re Empire District Electric Company, Case No. ET-2002-210

(November 19, 2001). Therefore, MGE justifiably relied on its tariff when providing service to customers in sections 10 and 12.

Moreover, even if there were no statutory authority for MGE's tariff, the Commission has the authority to determine that MGE should provide service to Seven Bridges. Because of the Commission's broad authority to protect the public, Imperial provides little guidance for the Commission in this case.

It appears that Empire and Staff will no doubt cite Doniphan Telephone Company v. PSC, 377 S.W.2d 469 (Mo. App. 1964) in support of their contention that MGE cannot expand its service territory without a CCN. While the case does stand for the proposition that a utility cannot annex additional territory to its service area by filing a map with the Commission, there are several differences which distinguish it from the circumstances in the instant case.

First, unlike MGE in this case, Doniphan Telephone (Doniphan) did not have a tariff indicating that the territory in question was part of its service territory. Instead, Doniphan merely filed a map with the Commission several years after its certificate was issued, which outlined a three-mile strip of land for which Doniphan asserted it had authority to provide telephone service. In this case, MGE relied on its effective tariff for its decision to provide service to requesting customers in sections 10 and 12. Tariffs have the force of law and MGE was not only entitled, but was also obligated to act in accordance with its tariff and provide service to the Seven Bridges subdivision in sections 11 and 12 as requested by the developers.

Second, Doniphan never rendered telephone service in the three-mile strip. The origin of the case was a petition by the landowners in the three-mile strip requesting telephone service by Southwestern Bell Company (Bell). The Commission ordered Bell to provide service to the three-mile strip and Doniphan appealed asserting that the Commission's decision impaired its

"property rights" in the three-mile strip. The court found that because Doniphan had no CCN, it had no property right in the three-mile strip.

Here, MGE or its predecessors have been providing service in sections 10 and 12 for over forty years. There are no complaints by landowners in these sections that MGE has not provided adequate service. On the contrary, the evidence shows that Empire's predecessor, Aquila, made a decision not to expand its service territory so that it could serve Seven Bridges.

The Doniphan case is important to the outcome of this case, but not for the reasons cited by Staff and EDG. The case illustrates that the Commission has comprehensive authority to regulate the service areas of utilities under its supervision. In Doniphan, the Commission required Bell, whose existing telephone lines were nearest to the unserved three-mile strip to extend service into the area. Bell did not request this extension nor apply for a CCN to serve the three-mile strip. The court held that the Commission's order that Bell serve the three-mile strip was reasonable and not in excess of the Commission's statutory power.

If the Commission in Doniphan had the authority to award a CCN to a company that did not want to serve an area even though its facilities were located near the area, this Commission has the authority to determine that the entire Seven Bridges development should be served by MGE whose facilities are already in place and serving the development. The Doniphan decision shows that the Commission has broad authority to determine which utility is best suited to serve a particular area and can disregard the existing service territory boundaries in making this determination.

Comments of Affected Customers

In response to Commissioner Murray's question concerning what the individuals affected by this case think about switching service to Empire (Tr. 66-67), MGE attaches the statement of

David Barth, the developer of Seven Bridges, as Exhibit 1. This statement shows support for continuation of MGE service.

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

Even though Empire has a certificate for these sections, MGE's predecessor Gas Service began serving customers in sections 10 and 12 as early as 1960. MGE's tariff indicates that these sections are part of its service territory. MGE reasonably relied on this tariff when it began providing gas service to customers in sections 10 and 12.

A. Tariff Process

In two separate dockets (GA-96-130 and GA-96-285) the Commission ordered Staff and MGE to cooperate in preparing and filing a tariff defining the service territory of MGE. Because MGE was the product of many acquisitions and mergers over the years, it was difficult to determine the exact boundaries of its service territory. (Tr. 117-118). The process took three months and MGE personnel spent at least 200 hours pulling the data, looking at facilities, generating facilities maps and comparing Commission orders to the maps. (Tr. 137-138). Staff acknowledged the difficulty of the task as it involved a detailed review of 2900 square miles of MGE service territory. (Tr. 270). Staff and MGE reviewed Commission orders from 1935 to 1995 in 79 certificates of convenience and necessity cases and determined that MGE had facilities in 31 counties, 101 townships, 245 ranges and 2091 sections. (Straub Rebuttal, Ex. 20, p. 3). As a result of this extensive review, MGE filed tariffs reflecting its service territory on February 21, 1997. Tariff sheet 6.15 was part of this filing and that sheet indicates that sections 10, 11 and 12 of T52N, R35W in Platte County, Missouri are part of MGE's certificated territory. Staff prepared a recommendation that the Commission approve MGE's tariff filing and

the Commission agreed with Staff's recommendation on May 14, 1997. (Straub Rebuttal, Exh. Staff-20, Schedule 2.1). MGE's tariff became effective on May 21, 1997.

There is no evidence of bad faith on MGE's part for the inclusion of sections 10, 11 and 12 in its tariff. (Tr. 274). Staff witness Straub explained at the hearing that given the size and complexity of the undertaking ordered by the Commission, he understood how a mistake could have been made regarding the inclusion of these sections in MGE's certificated territory. (Tr. 271).

B. MGE Reasonably Relied on Its Tariff

After the tariff was approved, MGE relied on its tariffs as defining its service territory. (Tr. 98, 125). Now that it had a tariff which defined its service territory, MGE no longer had to refer back to the 79 orders from the Commission when it needed to know where it was authorized to serve. This reliance on the tariff as the way to answer questions as to the extent of its service territory is not unique to MGE. When it receives questions from the public regarding the extent of a utilities service territory, the Staff looks to the utility's tariff to answer these questions. (Tr. 266). EDG employees also look to its tariff when determining if it has the authority to serve. (Tr. 193). Indeed, the very purpose of the Commission's order that MGE define its service territory was to make MGE's service territory easier to identify. (Straub Rebuttal, Exh. Staff-20, p. 4).

Even if tariff sheet 6.15 mistakenly listed certain sections for which MGE did not have a CCN, the tariff was still effective and remains in effect. Staff witness Straub, who has over twenty years experience in the administration of utility tariffs, agreed that a tariff that contains an error is still an effective tariff. (Tr. 263). Indeed, Staff has taken the position in a previous case that even if a clerical error in a tariff is discovered and brought to the Commission's attention by

the utility, the original tariff should remain in effect. The Commission agreed with Staff and found that all rates in the tariff were lawful and reasonable under Section 386.270 RSMo. until found otherwise in a complaint case. See, Order Rejecting Tariff, In re Empire District Electric Company, Case No. ET-2002-210 (November 19, 2001). To this day no complaint has been brought against MGE's tariff sheet No. 6.15 and consistent with the Commission's conclusion in that 2001 Empire case, MGE's tariff sheet 6.15 is prima facie lawful and reasonable under section 386.270.

Finally, MGE's reliance is justified under Missouri case law. A tariff that has been approved becomes Missouri law, with the same force and effect as a statute directly prescribed by the Legislature. State ex rel. Laclede Gas Co. v. PSC, 156 S.W.3d 513, 521 (Mo. App. W.D. 2005). Thus, after tariff sheet 6.15 became effective it didn't matter whether a mistake had been made regarding the extent of MGE's certificate in the sections (10, 11, 12) surrounding the LSL. Nor did it matter, as Staff and EDG seem likely to argue, that MGE had no intent to expand its service territory when it made the tariff filing. According to the law, sections 10, 11 and 12 are part of MGE's certificated territory as long as the tariff remains effective.

Thus, MGE, pursuant to its tariff, properly served a customer in section 10 in 2002. No party challenged MGE's right to do so. In 2004, the developer of Seven Bridges contacted MGE about providing service to its proposed subdivision that encompassed sections 11, 12, 13 and 14. MGE justifiably relied on its tariff when it indicated that it could serve the initial phase of the Seven Bridges in section 12.

C. Aquila's 1999 Dispute With MGE Shows That Aquila Knew About MGE's Tariff Authority and Chose to Ignore It.

Empire and Staff are likely to discuss a 1999 exchange between Aquila and MGE over MGE's interest in serving a development (Oak Creek) in section 6 T52N R34W and section 1

T52N, R35W. Aquila had a CCN to serve these sections. It seems likely that Empire and Staff will point out that Aquila asked MGE in a 1999 letter to provide a CCN for sections 1 and 6 and that this letter put MGE on notice that it had no CCN for section 12 when it began providing service to Seven Bridges in 2006.

However, MGE did not pursue the 1999 Oak Creek development not because it didn't believe it had authority to serve (such a belief would have been contrary to its filed and approved tariff), but rather because it was not able to reach an agreement with the developer. (Tr. 91). Because MGE did not reach an agreement, the issue faded away. (Tr. 91). MGE's belief that it had the authority to serve is evidenced by the fact that it did not file to amend its tariff. As shown above, MGE reasonably relied on its tariff. MGE did not check its CCN at this time because it believed it could rely on its tariff to define its service territory. (Tr. 97).

This 1999 exchange shows that Aquila was aware at least by 1999 that MGE's tariff apparently authorized it to serve in certain sections where Aquila also had a 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. (Tr. 206-207). Even with this knowledge, Aquila did not contact Staff or file a complaint against MGE in order to protect its CCN. Aquila's inaction is consistent with its desire not to expand its service territory as shown by its refusal to serve the proposed Seven Bridges subdivision. Empire witness Teter admitted that it was not Aquila's custom to seek an expansion of its certificated territory and Aquila did want to grow the business and serve new customers. (Tr. 200).

Aquila's failure in 1999 to inform the Commission Staff of MGE's tariff or file a complaint concerning MGE's tariff, worked to the disadvantage of MGE in that MGE continued to rely on its tariff as setting forth its certificated service area. Based on its tariff, MGE built

facilities and provided service to Seven Bridges. The Commission should not rule against MGE for relying on its tariffs, when Empire's predecessor knew that the MGE tariffs contained sections that Aquila had a CCN for and Aquila did nothing to protect its service territory.

Furthermore, even though 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. (Tr. 209). Empire completed its due diligence in September of 2005. (Tr. 220). 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. (Tr. 220). It is certainly likely Empire would have followed up with Aquila and MGE before closing the sale had it known that MGE had tariffs which stated that a portion of Aquila's service territory was also MGE's service territory. Perhaps the issue of overlapping certificates would have been resolved before MGE finalized its contract with the Seven Bridges developer and began construction in January 2006. Once again, Aquila's inaction is the key factor, not MGE's justifiable reliance on its tariffs.

D. The Commission Has Issued Certificates of Convenience and Necessity and Authorized Utility Facilities After They Were Built.

Empire and Staff seem likely to assert that section 393.170 requires a utility to receive Commission authorization before it builds gas plant. However, the Commission has on 10 separate occasions from 1921 to the present issued certificates of convenience and necessity and authorized utility facilities after they were built[1]. Last year the Commission in Case No. EA-

[1] 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

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. These orders show the Commission's long-standing practice of granting certificates of convenience and necessity after the utility improvements had already been made where the facilities are necessary to the public convenience.

The Staff has proposed that MGE continue to serve certain customers (the customers served in sections 10, 12 and 13 that are not part of Seven Bridges). The Staff obviously recognizes that the Commission can award MGE a certificate to serve these customers after the fact. Empire agrees with Staff's proposal and apparently it has no interest in serving these individual customers even though they are located in Empire's certificated territory.

Staff may assert that the Commission cannot award MGE a CCN for sections 10, 11 and 12 because MGE has not asked for such a certificate. (Tr. 64) This position is contradicted by Staff which wants MGE to continue to serve customers in sections 10, 12 and 13 that are served off the LSL. Staff counsel explained that the Commission could attach a new condition to the LSL line certificate indicating that MGE can serve these individual customers. (Tr. 65). MGE believes that the same "condition" approach can be used for the Seven Bridges customers which are also served by the LSL.

The Commission is empowered to grant certificates of convenience and necessity when it has determined after due hearing that construction is necessary or convenient for the public service. The safety and adequacy of facilities are proper criteria in evaluating the necessity and

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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).

convenience as of the relative experience and reliability of competing suppliers. State ex rel. Ozark Electric Coop v. Public Service Commission, 527 S.W.2d 390, 394 (Mo. App. 1975). Furthermore, it is within the discretion of the Commission to determine when the evidence indicates the public interest would be served in the award of the certificate. Id. at 392.

This hearing has established that there is a need for service at Seven Bridges and that MGE is already providing safe and adequate service to the development. The Commission has in the past granted a CCN to a utility without the utility even applying for the certificate. In Meyers v. Southwestern Bell Telephone Co. and Doniphan Telephone Co., 9 Mo. P.S.C. (N.S.) 612 (1961) the Commission issued a CCN to Southwestern Bell after the Commission determined that the service was feasible. The case, which was the predecessor to the Doniphan decision discussed earlier, was initiated by rural citizens who wanted phone service and not by Southwestern Bell.

E. The LSL Is the Superior Gas Supply Source for Seven Bridges.

Staff and Empire have taken the position that the Commission has never authorized MGE to serve customers in section 10, 11, and 12 from the LSL. While it is true that the orders in Case No. 12,632 do not specifically provide this authority, the reason for the restriction was due to supply concerns voiced by the city of St. Joseph over 50 years ago. St. Joseph intervened because it was served by the same interstate gas pipeline that fed the LSL. (Noack Rebuttal, Exh. MGE-2, p.2). Today, MGE serves St. Joseph and MGE's gas supply is adequate to serve St. Joseph, Seven Bridges and other areas of Platte County (Id.).

Moreover, Staff's authorization concerns are belied by its recommendation that MGE continue to serve those customers in sections 10, 12 and 13 that are served from the LSL and are not part of Seven Bridges. (Warren Rebuttal, Exh. Staff-18, p. 7). Staff does not explain why

the lack of such authorization to serve Seven Bridges customers from the LSL makes MGE's application to serve customers in sections 13 and 14 deficient (Id.) but the service to individual customers in sections 10, 12 and 13 from the LSL is not a problem. As indicated earlier, the Commission has the power to authorize MGE to serve customers from the LSL after the fact.

What Staff and Empire want the Commission to ignore is that the LSL is closer to Seven Bridges than Empire's gas supply. Commissioners Murray and Clayton both expressed an interest in examining which company has the more conveniently located facilities (Tr. 54) and how each company will serve the area. (Tr. 62). MGE serves Seven Bridges from the 12 inch LSL which abuts the northern edge of Seven Bridges. (Noack Rebuttal, Exh. MGE-2, p. 5; Warren Rebuttal, Exh. Staff-18, Schedule 7). Empire, on the other hand, will have to extend a 4-inch main one-half mile from the entrance of the Copper Ridge subdivision, over the LSL, and to the entrance of Seven Bridges in order to get gas to the development. (Tr. 158-159). In order to build a secondary feed for Seven Bridges, MGE will again be able to take advantage of the abutting LSL. Empire will have to build at least a one-half mile 4-inch main to its gas supply for its secondary supply. Exh. MGE-4 is a map of Empire's facilities and shows that the majority of Empire's existing facilities are over a mile away from Seven Bridges.

II. Should MGE be Granted a CCN to Serve T52N, R35W Sections 13 and 14 in Platte County, Missouri?

MGE meets all the requirements for a CCN in these sections. *In Re Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.5) 554, 561 (1991) lists the following criteria to be used by the Commission in evaluating CCN applications: (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; (5) the service must promote the public interest. MGE is currently providing service in Missouri and therefore

has the expertise, experience and financial qualifications to provide gas service in sections 13 and 14. The extension of facilities to sections 13 and 14 is economically feasible because it produces margin to the Company. (Noack Direct, Exh. MGE-1, p. 6). There is no question that there is a need for the service as the Seven Bridges development encompasses sections 13 and 14.

In most cases the public interest test is met if there are positive findings with respect to the other four standards. However, in this case of competing applications to serve sections 13 and 14, the Commission must consider which application better meets the needs and interests of the public. The allocation of territory to utilities by the Commission must be done on the basis of the public interest and not on basis of interest to the utilities involved. State ex rel. Consumers Public Service Co. v. PSC, 180 S.W.2d 40, 45 (Mo. 1944). MGE's superiority over Empire is addressed in section V of the brief.

III. Should Empire District Gas (Empire) be Granted a CCN to Serve T52N, R35W Sections 13, 14, 15, 22, 23 and 24, in Platte County, Missouri?

One of the factors that the Commission considers in whether a CCN should be granted is whether there is a request for service. Empire has not demonstrated any request for service in sections 15, 22, 23 and 24 of T52N, R35W. (Noack Surrebuttal, Ex. MGE-3, p.3). Empire witness Klein admitted that Empire has received no requests for service in these sections. (Tr. 178). The Commission should not award a certificate for sections which have no need for service as such a grant would violate long accepted standards used by the Commission to determine whether a CCN should be granted. By granting a certificate in sections 15, 22, 23 and 24 to Empire - when Empire has been absolutely unable to show any present need for gas service to exist – the Commission would in essence be permitting Empire to "bank" significant portions of land for service territory in the future, a notion that flies in the face of good public policy. The

public interest would be better served by letting MGE compete to service these sections as they develop instead of awarding them to Empire. (Noack Rebuttal, Exh. MGE-2, p. 8).

Conversely, in sections 13 and 14, the developers of the Seven Bridges subdivision requested service to its proposed development which encompassed sections 11, 12, 13 and 14. Empire's predecessor decided not to provide service because Aquila was not interested in expanding its service territory. (Tr. 195-196). Empire witness Teter indicated that Aquila's policy was not to expand its service territory and that he made the decision not to pursue providing service to Seven Bridges. (Tr. 195-196). The developer of Seven Bridges, when faced with a utility that would not provide service, contacted MGE in 2004. MGE, unlike Aquila, worked with the developer so that the subdivision could move forward.

Empire will likely assert that the refusal to provide service to Seven Bridges is not relevant as Aquila believed the development was located outside its service territory and neither it nor Aquila ever turned down a customer for service in its territory. Regardless of its truth (which has not been proven), such an assertion means little to the developer of Seven Bridges who was rebuffed by Aquila when he asked Aquila to provide gas service to the proposed Seven Bridges subdivision in sections 13 and 14. 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. (Tr. 200). Indeed, the most Aquila was willing to do was to have one of its employees "keep an eye" on Seven Bridges and see how it progresses. (Tr. 195). Seven Bridges, which is partly located in Aquila's existing territory (sections 11 and 12) and mostly in sections outside of Aquila's territory (sections 13 and 14), was out of luck with Aquila. For developments such as Seven Bridges, which abutted Aquila's service territory, Aquila's service was inadequate and incomplete and it is not

surprising that Seven Bridges contacted MGE. MGE should not be penalized in this case for acting as a public utility and seeking to meet the customer needs expressed by the developer of the proposed Seven Bridges subdivision when Aquila did not.

Moreover, Empire's claims regarding Aquila's belief as to the location of Seven Bridges don't make sense. If Aquila believed that Seven Bridges was restricted to Section 13 then why would it assign a marketing representative to monitor the development to see if Seven Bridges ever expanded into Section 12? (Tr. 195). Aquila would not want to share part of Seven Bridges with another utility, nor would the Commission allow such a practice due to safety concerns.

The Commission should not reward Empire with a certificate for 13 and 14 when its predecessor affirmatively decided not to file for a certificate to serve Seven Bridges. Moreover, MGE should not be penalized for undertaking the obligations of a public utility in accordance with its Commission-approved tariff and providing service to Seven Bridges.

IV. 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 Township 52 North, Range 35 West; Sections 1, 2, 3, 4, 5 and 6 of Township 52 North, Range 34 West; Sections 1 and 12 of Township 52 North, Range 36 West; and Sections 4, 5 and 6 of Township 52 North, Range 33 West, all in Platte County, Missouri? 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?

As shown above, the Commission's approval of MGE's tariff gave the Company every reason to believe it had both the authority and the obligation to serve these sections. MGE justifiably relied on its tariff when determining whether to provide service to customers in section 12 and in response to Seven Bridges' request for service in 2004. However, for the majority of the above sections, MGE has not had a request for service nor has it built facilities.

As this case has moved forward and MGE become aware of the extent of the conflict between the service area description in its tariff and the Platte County service area of EDG, MGE has expressed its willingness to revise its tariffs to remove those sections where it has not undertaken the obligations of a public utility. MGE is willing to revise its tariff to reflect the removal of sections 1, 2, 3, 4, 5, 6, 7, 8, 9 of T52N, R35W; the removal of sections 1, 2, 3, 4, 5, 6 of T52N, R34W; the removal of sections 1, 12 of T52N, R36W; the removal of sections 4, 5, 6 of T52N, R33W all in Platte County, Missouri. (Noack Surrebuttal, Ex. MGE-3, p. 4-5).

However, MGE's provision of service to the Seven Bridges subdivision in sections 11 and 12 was undertaken under clear authority set forth in its tariff and is in the public interest for the following reasons:

a) MGE served these customers under a valid tariff.

b) Aquila knew of this tariff yet filed no complaint against MGE.

c) Aquila had no interest in serving Seven Bridges because the company had a policy of not expanding its service territory.

d) MGE should not be punished for acting as a public utility pursuant to its tariffs and at a customer's request.

e) EDG ratepayers will be forced to pay for facilities that duplicate those of MGE.

f) MGE's rates are lower than Empire's.

g) There are no safety concerns with MGE providing service to Seven Bridges.

These reasons are addressed in section V of the brief.

V. 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 Township 52 North, Range 35 West, in Platte County, Missouri? If so, What Remedy(ies) or Relief Should the Commission Order?

MGE has shown that it justifiably relied on its tariff when providing service to customers in sections 10, 11 and 12 and that the tariff has the force and effect of law. The record also shows that Aquila knew of MGE's tariffs since at least 1999 and did not challenge them at the Commission or bring them to the attention of the Commission's Staff. Empire became aware of MGE's service to Seven Bridges no later than the summer of 2006, yet did nothing to bring this matter to the attention of the Commission or it Staff until February 21, 2007. The record shows that Aquila was not interested in serving the Seven Bridges subdivision because it did not want to expand its service territory to sections 13 and 14. MGE has also shown that should the Commission decide that the tariff does not provide MGE with sufficient authority to provide service in these sections, the Commission has the authority to grant MGE a CCN after the facilities have been constructed. MGE is currently providing safe and adequate service to Seven Bridges as evidenced by the fact that Empire and Staff want the Commission to order MGE to sell its existing facilities to Empire.

A. The Commission Cannot Order Equitable Relief.

Empire and Staff are likely to maintain that by allowing Empire to use MGE's existing facilities used to serve Seven Bridges, the transition from MGE service to Empire service can be accomplished safely, quickly and economically. This argument is based on Empire's request that the Commission order MGE to sell its facilities to Empire. The Commission does not have the authority to grant this request.

MGE, having acted as a public utility at the customer's request and pursuant to its tariffs, is not interested in selling its facilities to Empire. The Commission is an administrative body only, and not a court, and thus the Commission has no power to exercise or perform a judicial function such as enforcing contracts. May Dept. Stores Co. v. Union Electric Light & Power Co., 107 S.W.2d 41, 57 (Mo. 1937). The Commission does not have the authority to order a sale of MGE's facilities to Empire since as an administrative agency, the Commission does not have the authority to grant equitable relief. Am. Petroleum Exch. v. PSC, 172 S.W.2d 952, 955 (1943). Thus, should the Commission determine that MGE should not serve Seven Bridges, Empire will have to construct its own facilities to serve the development.

B. Empire Ratepayers Will Pay for Duplication of MGE Facilities.

The cost that Empire will incur to replace MGE facilities was outlined by Empire witness Klein. Mr. Klein testified that Empire would have to install a 4 inch main from near the center of section 12 at a cost of 10 to 15 dollars per linear foot for 2,640 feet. (Tr. 160). This main would have to cross the LSL (Tr. 159) which is located in the southern portion of section 12. In addition to the cost of the 4 inch main, Empire will have to install the mains and services to serve the customers of Seven Bridges. Empire estimates that for the first 100 new homes the cost would be $78,000 (Tr. 162) plus the cost of service lines to the existing households at $550 per customer. (Tr. 162).

In addition to these costs, Empire will incur costs for a second feed into Seven Bridges as it typically builds a second feed due to safety issues. (Tr. 163-164). The costs for the second feed will be $10 to $15 a foot and the second feed from the northern portions of section 11 and possibly section 12 (Tr. 164).

Empire ratepayers will have to pay for and pay a return on the following rate base items should the Commission grant Empire's request to serve Seven Bridges:

1) 2640 feet of 4 inch main to supply Seven Bridges ($10 to $15 per foot ($26,400 to $39,600))

2) For each 100 new homes, approximately 9,500 feet of main will be needed to serve them. ($78,000)

3) Service installation for existing homes (60[2] customers x $550 = $33,000)

4) At least 2640 feet of 4 inch main for a second feed for Seven Bridges ($10 to $15 per foot for 2640 feet ($26,400 to $39,600)).

TOTAL $163,800 to $190,200

These costs, except for the secondary feed, are to replace facilities that MGE has already installed and that Empire could have installed had its predecessor been willing to meet the needs of this customer and expand its service territory to serve the proposed Seven Bridges subdivision. Moreover, because the LSL abuts the northern edge of Seven Bridges, MGE ratepayers do not have to pay for the 4" main costs for the initial supply line and the secondary supply line. Thus, MGE's service is more economical and more efficient than Empire's.

Empire ratepayers will have to foot the bill for additional rate base items that are replacements for facilities that already exist. Thus, the public interest is not served by allowing Empire to serve Seven Bridges because MGE already serves Seven Bridges more efficiently than Empire could. The existence of existing facilities is a factor that the Commission looks at when issuing a certificate. Commissioner Clayton outlined these factors and comparisons in his dissent in Case No. GA-2007-0212, et al., In re Southern Missouri Gas Company.

[2] Staff indicates that there are 60 customers in Seven Bridges. (Warren Surrebuttal, Exh. Staff-19, p. 7).

> . . . The Commission may consider "the safety and adequacy of facilities[,] the relative experience and reliability of competing suppliers,"[3] and the public interest.[4] In addition, the court has further suggested other factors such as a comparison of the proposed expansion with existing services, the actual costs of current supply, the projected costs of the new company, the comparative reliability of the supply and the financial soundness and effective management of the company. Other factors include whether there are existing facilities in place that may provide adequate service and the costs associated with providing such structure.[5] . . .

Since MGE is already providing service pursuant to its tariff to the portion of Seven Bridges located in section 12, the Commission must consider the fact that MGE's existing facilities already provide adequate service and Empire will have to expend unnecessary costs at ratepayers expense to serve the development.

C. Seven Bridges Residents Will Pay Higher Rates With Service From Empire.

Should Seven Bridges residents become Empire customers, not only will they have to pay for facilities that already exist, they will pay higher gas rates as well. Staff calculated that it would be more expensive for customers to receive service from Empire than for MGE based on usage assumptions that are typical for a Kansas City area residential customers. (Tr. 242-243).

D. There are no Legitimate Safety Concerns With MGE Continuing to Serve Seven Bridges.

Staff and Empire may argue that MGE cannot serve the Seven Bridges subdivision due to the safety concerns of two LDCs serving the same service territory. First, there is almost no overlap since Empire has no customers in sections 10, 11, 13 and 14 and only 3 customers in section 12. (Tr. 158, 179). Empire does have an agreement to serve customers in the Copper

[3] Ozark Elec. Coop. v. Public Service Commission, 527 S.W.2d 390, 394 (Mo. App. 1975).
[4] Id. at 392.
[5] Public Water Supply Dist. 8 v. Public Service Commission, 600 S.W.2d 147, 156-157 (Mo. App. 1980).

Ridge subdivision but currently serves no customers. (Tr. 179). Importantly, Copper Ridge is located at least one-half mile from Seven Bridges. (Tr. 158)

Staff witness Warren asserts that Commission Gas Safety Department has a preference that there only be one LDC in a community to avoid confusion among emergency responders. (Warren Rebuttal, Exh. Staff-18, p. 5). Mr. Warren is not a member of the Commission's Gas Safety department (Tr. 236) nor did any member of the Gas Safety department provide any testimony in this case. Mr. Warren admitted that this so-called preference is not found in any Commission statute or regulation. (Tr. 236). Moreover, Mr. Warren does not have any formal gas safety training. (Tr. 236). Clearly, witness Warren is not qualified to testify about the Commission's gas safety standards and that any "preference" is something that he alone concocted.

Moreover, Mr. Warren's "preference" that only one LDC serve a community is contradicted by his recommendation in this case. Mr. Warren recommends that MGE continue to serve those customers served by the LSL that are not located in the Seven Bridges development. Mr. Warren defines "community" as an incorporated area and its surroundings. (Tr. 236). Mr. Warren believes that Copper Ridge and Seven Bridges are part of the same community (Tr. 239) and notes that Seven Bridges is less than one mile south of Copper Ridge. (Warren Rebuttal, Exh. Staff-18, p. 5). The customers that are served by the LSL are located between these subdivisions and thus Mr. Warren's recommendation would have MGE customers located in between the Copper Ridge/Seven Bridges "community" served by EDG.

Mr. Warren attempts to justify this contradiction by introducing the concept of placing natural barriers between MGE and Empire customers. There are no natural barriers separating the individual customers served off the LSL in sections 10 and 12 and the Copper Ridge or

Seven Bridges developments. (Tr. 239). As shown on Schedule 8 to Warren's Rebuttal testimony, there are no natural barriers between existing MGE customers in section 7 of T52N, R34W and Empire customers directly to the north in section 6. (Tr. 238). Mr. Warren could not even give an example of one natural boundary between service territories of existing Missouri LDCs. (Tr. 237). Like his so called "one LDC preference", Mr. Warren's natural boundaries requirement is nowhere to be found in Commission statutes or rules and should not be considered by the Commission.

There is no evidence that MGE is not currently providing safe and adequate service nor is there any evidence that safety will be compromised by allowing MGE to continue to serve Seven Bridges.

E. The Question of a Platte City Franchise is not Relevant to This Case.

The Seven Bridges subdivision is not part of Platte City. (Tr. 239). Staff witness Warren admitted that it is uncertain if Platte City will annex the subdivision due to changes in annexation laws. (Warren Rebuttal, Exh. Staff-18, p. 6). Should annexation occur, MGE will obtain a Platte City franchise. (Noack Surrebuttal, Exh. MGE-3, p. 3). However, this contingency provides no valid reason for the Commission to order MGE to stop serving Seven Bridges.

VI. 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?

MGE believes that this request by EDG is not necessary and is not an issue that the Commission needs to decide. MGE has provided service pursuant to the service area defined by its tariff. In its Order in this case, the Commission will determine the extent of MGE's service area defined by its tariff and will advise MGE to make revision to its tariff to reflect its Order. MGE will, as it has in the past, only provide service in its service territory defined in its tariff.

Conclusion

In the final analysis, the Commission must determine if it is in the public interest for MGE or Empire to serve Seven Bridges. As an administrative agency in charge of deciding service disputes between utilities, it has broad discretion to determine which is the best utility to serve the development. MGE justifiably relied on its tariff when it undertook the responsibilities of a public utility and provided service to Seven Bridges. MGE is providing safe and adequate service to Seven Bridges from a gas supply source that is closer than that of Empire. Empire will have to build facilities that duplicate MGE's and these building costs will be passed on to Empire ratepayers.

What Empire is seeking in this case is the best of both worlds. When the Seven Bridges development conflicted with the desire of Empire's predecessor not to expand its service territory, it was content to let the developer fend for itself in finding a gas utility. Empire's predecessor did not want to be bothered with working with the developer building facilities to reach Seven Bridges or filing to expand its service territory. After Seven Bridges became a reality, however, Empire belatedly asserts its right to serve the subdivision due to its CCN for sections 11 and 12. The Commission should reject Empire's claims to the development and recognize that MGE should provide service as it is the only utility that responded to the customers' needs.

WHEREFORE, for the above reasons, MGE requests the Commission grant its application for a certificate of convenience and necessity in sections 13 and 14, T52N, R35W and for an order indicating that MGE has the authority to serve its existing customers in sections 10, 11 and 12, T52N, R35W as well as all current and future customers located in the Seven

Bridges development located in sections 11, 12, 13 and 14 in T52N, R35W, Platte City, Missouri.

Respectfully submitted,

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ATTORNEYS FOR MISSOURI GAS ENERGY

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was emailed to the following counsel this 21st day of December, 2007:

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/s/ Roger W. Steiner

AFFIDAVIT OF DAVID BARTH

STATE OF MISSOURI)
) ss
COUNTY OF PLATTE)

I, David Barth, do hereby state:

1. I am the Owner/Developer of the Seven Bridges development located in Sections 11, 12, 13 and 14 Township 52N, Range 45W in Platte County, Missouri. I have an agreement with Missouri Gas Energy (MGE) concerning the extension of facilities for the provision of gas service to Seven Bridges.

2. I am aware of the proceeding before the Missouri Public Service Commission where MGE has applied for a Certificate of Public Convenience and Necessity (CCN) for Sections 13 and 14, Township 52N, Range 45W in Platte County, Missouri (Case No. GA-2007-0289). I am also aware that in the same docket Empire District Gas Company (EDG) seeks a certificate for Sections 13 and 14 and has asked the Commission to either order MGE to sell its gas distribution facilities used to serve Seven Bridges to EDG or order MGE to abandon those facilities so that EDG can install facilities to serve Seven Bridges.

3. I appreciate the working relationship that I have with MGE and am satisfied with MGE's service. I also prefer MGE's rate structure to that of EDG. I believe a switch from MGE to EDG would cause a financial hardship to me and Seven Bridges.

4. For these reasons, I support MGE's application for a CCN in Sections 13 and 14. I request that EDG's application for a CCN for Sections 13 and 14 be denied and request that MGE continue to serve the Seven Bridges development that is located in Sections 11 and 12.

David Barth MEMBER, CENTRAL PLATTE HOLDINGS L.L.C.

Subscribed and sworn to before me in the ____ day of December, 2007.

_____