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October 5, 1999

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

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

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding please find an original and fourteen copies of the Reply 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:
Office of Public Counsel
Jeff Keevil
David Stueven
Rod Widger
Bill Gipson
Mike Palmer

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

REPLY BRIEF OF

THE EMPIRE DISTRICT ELECTRIC COMPANY

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October 5, 1999

45

I. INTRODUCTION

This reply brief responds to the "Initial Brief of the City of Springfield, Missouri, through the Board of Public Utilities" (hereinafter "CU's brief"). The Empire District Electric Company ("Empire") has no reply to the Initial Brief submitted by the Staff of the Public Service Commission.

Initially, Empire notes that CU's brief confirms Empire's belief that the only opposition CU has in this case is to the areas *outside of* Strafford and Willard. (CU brief, p. 1) CU is not opposed to any of the new territory in and around Republic, or the new territory inside Strafford and Willard.

There are several topics contained in the Introduction section of CU's brief which warrant a response.

The 1974 Resolution is Irrelevant

CU's brief on page 2 quotes from a House Resolution dated April 29, 1974, purportedly to represent the sentiment of the Missouri General Assembly regarding duplication of electric lines. While this is may be an interesting historical footnote, it *does not* represent the sentiment of the Missouri General Assembly at the present time, and certainly since at least 1982. In 1982, the General Assembly passed the first version of the "anti-flip-flop" statutes; §§ 393.106 and 394.315 RSMo. Those statutes, which exist today in modified form, codify the intent of the General Assembly that competition is allowed for new electric customers. Allowing competition necessarily means allowing some duplication of facilities. Under those statutes, once a customer at a new structure selects a supplier, the customer is prohibited from switching suppliers later unless there is a valid public interest reason, other than a rate differential, for that to occur and

the Commission gives its permission for such a change. *See,* §393.106.2 RSMo 1994; §394.315.2 RSMo 1994; §91.025.2 RSMo 1994. The anti-flip flop statutes have been amended several times since 1982, but that same underlying concept of allowing competition for new customers has always been there. Read in that context, the 1974 resolution quoted by CU has no more relevance today than long lines at gasoline stations and the false perception there was a global energy crisis, which was also a widely-held belief in 1974.

CU's Interpretation of Section 386.310 RSMo Is Wrong

CU's brief on pages 2 and 3 challenges Empire's recitation of the provision in § 386.310 RSMo that "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." CU argues that Empire's position is "baseless" since this proceeding is not "pursuant to sections 386.310 RSMo and 394.160 RSMo." CU either simply misunderstands the statutory language or chooses to ignore it.

Section 394.160 RSMo gives the Commission subject matter jurisdiction over rural electric cooperatives in a very limited sense. It *only* allows the Commission to direct cooperatives in the subject matter area of the safety aspects of constructing, operating, and maintaining electric distribution and transmission lines. It does not allow the Commission to further encroach on the operation of rural electric cooperatives. *See,* § 394.160.1 RSMo 1994. Similarly, § 386.310 RSMo gives the Commission subject matter jurisdiction to enact safety rules pertaining to public utilities and municipal gas systems.

Together, §§ 394.160 and 386.310 RSMo therefore give the Commission subject matter jurisdiction over the listed entities with regard to the safe construction, operation and maintenance of electric transmission and distribution lines. Subsection 2 of § 386.310 RSMo,

however, says that "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." Read in context, subsection 2 means that the General Assembly has *not* given the Commission subject matter jurisdiction to "allocate territory" among electric suppliers through the *safety* jurisdiction given to it *pursuant to Sections 386.310 and 394.160 RSMo.* This case concerns the allocation of territory *among electric suppliers*. That is because if the Commission does not grant Empire's modified request herein, it will by default allocate that territory to rural electric cooperatives and to CU.

This plain meaning of the statute is bolstered by another provision in Subsection 1 of § 386.310 RSMo, which narrowly and explicitly specifies the conditions which must exist before the Commission can attempt to "minimize retail distribution electric line duplication" in the context of exercising "safety" jurisdiction. The statutory provision says the Commission has "the power to minimize retail distribution electric line duplication *for the sole purpose* of providing for the safety of employees and the general public in those cases when, upon complaint, the commission finds that a proposed retail distribution electric line cannot be constructed in compliance with commission safety rules." (Emphasis supplied) It is very important to note the criteria contained in that phrase. First, there must be a "complaint." A complaint is an action brought pursuant to § 386.390 RSMo 1994. Second, the Commission must find that a *proposed* electric distribution line *cannot* be constructed in compliance with Commission safety rules. Neither of those things are present here.

The Empire witness testified that the Commission already has safety rules in place which specify safe clearances for electric line crossings. Mr. Palmer testified that the NESC, as adopted by the Commission in 4 CSR 240-18.010, 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) Staff's witness Mr. Ketter noted safety is not an issue in this case. (Tr. 121)

It should also be noted that the statutory requirement for a "complaint" filing ***before*** the Commission can exercise safety jurisdiction over a proposed retail distribution line came into existence in 1979. L. 1979, H.B. No. 186, p. 560, § 1. That was five years *after* the 1974 House Resolution quoted by CU. Such later action by the General Assembly, and approved by the governor, certainly supersedes any sentiments expressed in a previous House Resolution.

Finally on this topic, CU's brief quotes on page 3 a sentence from ***State ex rel. Intercon Gas, Inc. v. Public Service Commission of Missouri***, 848 S.W.2d 593, 597 (Mo.App. 1993) to support its argument that "safety and adequacy of facilities are proper criteria in evaluating necessity and convenience." There was no issue concerning "safety" in the ***Intercon Gas*** case. The court in ***Intercon Gas*** was merely quoting general provisions of law pertaining to the Commission's processing of certificate cases. The *full* quotation is: "The safety and adequacy of facilities are proper criteria in evaluating necessity and convenience as are the relative experience and reliability of competing suppliers." The ***Intercon Gas*** court cited ***State ex rel. Ozark Elec. Coop. v. Public Service Comm'n***, 527 S.W.2d 390, 394 (Mo.App. 1975) as the basis for its quotation.

In ***Ozark Elec. Coop***, supra, the Kansas City District of the Court of Appeals affirmed a decision of the Commission granting a certificate of public convenience to Empire near Willard, Missouri. A rural electric cooperative had challenged the grant. The Court of Appeals noted that Empire has been continuously serving the electric energy needs of the City of Willard since 1927. ***Id.*** at 393. It noted the evidence regarding the relative experience of both suppliers in the

provision of underground electric service. Empire had the requisite experience while Ozark did not *Id.* at 393-394. The court also rejected the cooperative's claim that a certificate being granted to Empire would "result in a duplication of electric facilities contrary to law and public interest... ." *Id.* at 394. Therefore, there was no "safety" issue apparent in ***Ozark Elec. Coop*** either. As such, the phrase relied upon by CU is just *obiter dicta.*

The result of this discussion is that CU, to foster its position, has resorted to (i) quoting an out-of-date, irrelevant, and superseded House Resolution; (ii) ignoring the plain meaning of §386.310.2 RSMo. 1994; and (iii) quoting a phrase from an appellate opinion which has no bearing on the issue. Therefore, CU has not disproved Empire's position that 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 where the allocation of territory is involved and there are no proposed distribution lines which cannot be constructed without violating the Commission's safety rules.

Franchise Requirement For CU

On pages 3 and 4, CU attempts to discredit Empire and its witness on the position Empire took regarding the requirement of a franchise for CU to serve inside another municipality. CU claims Empire made an "erroneous statement of the law" and quotes from a Commission proceeding to bolster CU's position. (Id. at p. 3) CU should attempt to find stronger support for its arguments since it has long been recognized that the Commission is not a court and therefore it does not have the authority to declare or enforce principles of law. ***State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*** 596 S.W.2d 466, 468 (Mo.App.E.D., 1980).

The Commission's belief regarding franchises, as stated in ***Re Osage Water Company***, Case No. WA-98-236 and WC-98-211, is neither conclusive (since the Commission is not a

court) nor final, since an application for rehearing is still pending regarding the municipal consent/franchise issue in that case. More importantly, CU has cited no authority for the proposition that it is entitled to act like an 800-pound gorilla and force itself upon an unwilling municipality. Section 71.520 RSMo allows all cities in this state to authorize other persons to set poles and other facilities necessary for the operation of a utility under, along and across public roads and places *under such conditions as may be prescribed in the ordinance.* A municipality thus may grant or refuse permission to electrical companies to place appliances in streets. ***State ex inf. Shartel, ex rel. City of Sikeston v. Missouri Utilities Co.***, 53 S.W.2d 394 (Mo 1932). Section 88.613 RSMo, for example, provides further that Missouri cities of the third class may grant the right to other persons to erect electric facilities "upon such terms as may be prescribed by ordinance and that such right to any such person, persons or corporation shall not extend for a longer period than twenty years ... ." CU has cited no statutory authority which creates an exception for CU from that process.

While the General Assembly has created one type of exception for CU because it allows CU to serve beyond the municipal boundaries of Springfield, there is no part of § 386.800 RSMo which purports to authorize CU to serve *inside another municipality* without that municipality's consent. The only reason CU is afforded the privilege to serve outside its boundaries is that it was doing so under the auspices of its purchase of the former Springfield Gas & Electric Company ("SG&E"). As such, CU presumably could not exercise any greater authority than SG&E did. SG&E, as a Commission-regulated public utility, certainly could not have served inside a municipality without its consent. See § 71.520 RSMo. The Commission cannot override the requirement of municipal consent. In ***City of Sikeston v. Public Service Commission***, 82 S.W.2d 105 at 109 (Mo. 1935) , the Supreme Court said

> ... a certificate [of convenience and necessity] from the [public service] commission is only, where required, an additional condition imposed by the state to the exercise of a privilege which a municipality may give or refuse, ***and the commission is not to give its certificate to a company until after the city has consented that it may operate within its boundaries***. Section 5193, R.S.1929 (Mo. St. Ann. § 5193, p. 6617), specifically makes this requirement.

(Emphasis supplied). Section 5193, as it existed in 1929, is virtually identical to the present text of § 393.170 RSMo 1994. Thus, the law has not changed since the Supreme Court said in 1935 that the Commission has no power to grant a certificate if the municipality refuses to consent to the operation of the utility within its boundaries.

That argument applies equally to CU. Section 386.800 RSMo only *permits* CU to serve in the old SG&E territory. It does not mandate such service, or purport to make such service by CU *exclusive* as to other providers in that area, e.g., rural electric cooperatives, Commission-regulated utilities, or other municipally-owned utilities. In the absence of any language in § 386.800 which makes CU's territory exclusive as to all other suppliers, the only logical result is that the General Assembly intended to permit competition there also.

CU does not fully explain on page 5 its reliance on the excerpt from ***Re Osage Water Company*** to the effect that a franchise "is necessary only to use public rights of way." The implication appears to be that if CU is serving a particular structure, and then the structure is annexed into the City of Strafford or Willard, that CU is somehow authorized to continue serving that structure. If that is what CU is trying to say, the Commission needs more facts before it can subscribe to such a proposition. Is the CU distribution line serving the structure located entirely on a private easement? Is the CU line crossing any public streets or rights of way? It is certainly possible to envision an isolated situation where CU may be serving a structure entirely on private right of way, but it is also possible to envision CU's lines crossing public streets. The clear

language of ***City of Sikeston,*** 82 S.W.2d at 109, and the statutes pertaining to municipalities that municipal consent is required to cross public streets, is difficult to ignore. There is, at least, substantial doubt whether CU can freely serve anyone it wants inside the boundaries of another municipality when CU does not have a franchise. Again, though, this is not a question that the Commission can lawfully decide because it is not a court, and it is not a question critical to the outcome of this proceeding.

II. HAVE THE SIGNATORY PARTIES PROVIDED ADEQUATE EVIDENCE TO SUPPORT THE NON-UNANIMOUS STIPULATION?

Despite CU's arguments, the answer is "yes." On page 6 of its brief, CU cites ***Re Missouri Public Service***, 2 MoPSC 3d 221, 223 (MoPSC 1993) for the proposition that "the stipulating parties must file evidence and testimony supporting settlement of the disputed issues." CU contends the stipulating parties have not done that. (CU's brief, p 6) Empire disputes the relevance of this assertion, and its correctness.

First, Empire does not believe ***Re Missouri Public Service*** is applicable here. The most obvious reason is that ***Re Missouri Public Service*** was a *rate* case involving the settlement of specific issues with *specific dollar amounts* which another party was contesting. The Commission had difficulty dealing with a compromise total dollar amount being applied to numerous discrete issues and whether there was evidence to support the compromise of the discrete issues in the face of opposition from another party. That is not the factual or legal situation presented here. The underlying issues[1] in this case did not change with the stipulation;

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[1] The issues created by the filing of this case by Empire are (a) whether it is qualified to provide its service in the new areas and (b) whether there was a need for service in the new

only the amount of territory involved. And only portions of two of the areas are even being contested by CU.

Second, contrary to the assertion of CU, the stipulating parties have produced "evidence and testimony" supporting settlement of the disputed issues. *All of the evidence* in this proceeding was adduced at the evidentiary hearing, which was held after the filing of the stipulation and agreement. Before the hearing, there was *no evidence in this case* because there had been no hearing at which evidence was received into a record. Thus, there was considerable "evidence and testimony" adduced at the evidentiary hearing in support of the stipulation. Two witnesses testified in support of the stipulation. Six parties supported the stipulation.

Third, the quoted language from ***Re Missouri Public Service*** comes from an "Order Granting Rehearing and Clarification." That order was, by its very nature, an interlocutory order of the Commission ordering a rehearing and directing the submission of additional evidence on disputed issues. It did not purport to rule on the merits of any specific issue or announce a principle of general applicability to all future cases – of any nature– before the Commission.

Fourth, if the Commission meant there to be a standing requirement that additional prepared testimony is required to be filed in support of *any* non-unanimous stipulation that is filed, it should amend 4 CSR 240-2.115 to set out this new requirement and provide for the automatic suspension of procedural schedules in cases where stipulations are filed so that such testimony can be filed under sanction of the Commission.

CU attempts on page 6 of its brief to twist around the statements of Mr. Ketter. It is obvious that Mr. Ketter had testimony originally opposing part of Empire's request. It is equally

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areas. CU does not appear to contest the first part. As to the second part, CU only contests the need for service in certain areas, but not others.

obvious that Mr. Ketter changed his mind and supported Empire's modified request after additional facts came into his possession after he filed his rebuttal testimony. There is no law that says a witness cannot change his mind, especially after a closer examination of the issues. But even if Mr. Ketter were to be viewed as discrediting himself by changing his position in pre-filed testimony, that does not negate the fact that Empire's evidence on the need for service did not change. There was consistent evidence from Mr. Palmer on the need for service, and that is sufficient to support the Commission's decision since, as a trier of fact, it may believe or disbelieve witnesses.

CU stresses on page 6 that neither Mr. Ketter nor Mr. Palmer were privy to immediate annexation plans of Strafford or Willard. That is not of particular significance here, since people on the outskirts of the city can petition for *voluntary* annexation at any time. Voluntary annexations are just as legally effective as involuntary annexations instituted by a municipality. Voluntary annexations will lead to the same type of potential problem discussed at length at the hearing as to whether there will be a supplier who is legally authorized to provide service in the newly-annexed area.

On page 7, CU says the Commission need not worry about the areas outside of Willard and Strafford because CU will be there to serve, even inside the city limits, "even without a franchise." As the earlier discussion under the "Introduction" heading points out, it would not be prudent for the Commission to rely on legal advice on this topic from CU, given that it has no statutory or case law authority to support its position.

Also on page 7 of its brief, CU stresses that there is no evidence of "need" for Empire's service in the areas in question. As pointed out in Empire's initial brief, "need" in this context does not necessarily mean an immediate, desperate plea for assistance. 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).

On page 8, CU attempts to mix its notion of additional evidence to support a stipulation and the requirements of the Commission's rules for filing a certificate case. Through this concoction of its own making, CU implies at the top of page 8 that Empire should have made a *new filing* of the names of ten people residing in the areas covered by the Non-Unanimous Stipulation and Agreement. Nowhere in the Commission's rules is there such a requirement. Empire complied with the Commission's filing requirements.

CU carries this same erroneous notion forward to the feasibility study, suggesting that Empire was somehow required to produce a new feasibility study as a result of the Non-Unanimous Stipulation and Agreement, and that "the Commission is precluded by its own rule from granting Empire the disputed new territory." Id. at 8. Again, nowhere is there any requirement in the Commission's rules saying that a feasibility study must be modified to conform to a stipulation, and that a case must be dismissed if that doesn't happen.

The feasibility study filed by Empire was, of necessity, a prediction of future customer growth. Mr. Palmer testified that the numbers reflected in the feasibility study were representative of the type and magnitude of growth that Empire has experienced in the past in this same area. (Tr. 74) As such, they would be valid as year by year projections whether the area sought by Empire was the original one, or the modified one. CU nevertheless attacks these projections as "speculative" and contends that the Commission should not rely on them. Of course they are speculative! They are projections of future events over which the predictor does not have control. Let us not lose sight of the reason the Commission makes an applicant create

these predictions in the first place. The reason is to aid the Commission in determining whether the additions are economically feasible. In the case of a brand-new utility going into a brand new area, those predictions help the Commission discern the economic feasibility of the project. But that is not the situation in this case. Further, the economic feasibility of extensions by Empire has already been examined by the Commission. Empire's Commission-approved extension rule would automatically apply to any extensions. Given that CU does not oppose a certificate for Empire within the new city limits of Willard and Strafford, that leaves only the following question for the Commission: Should Empire be allowed to make extensions, under its Commission-approved extension rule, just outside of the city limits around Willard and Strafford? The answer is "yes."

III. IS THERE A NEED FOR ELECTRIC SERVICE BY EMPIRE IN THE AREAS ADJOINING WILLARD AND STRAFFORD?

The answer to this is yes. CU says no, because CU already has "significant amounts of facilities" in the Staffford area, but none in the Willard area. (CU brief, pp. 9-10)

On page 10 of its brief, CU cites a 1918 decision of the Missouri Supreme Court, ***State ex rel. Electric Company of America v. Atkinson***, 275 Mo. 325, 204 S.W. 897, 898-899 (Mo. 1918) to the effect that "if another utility is adequately rendering the service proposed, or is able and willing ... then the necessity would not exist and the certificate should be refused." There are several reasons why no particular weight should be afforded to that proposition in this case.

First, CU apparently failed to consider *what actually happened* in the reported case before it referenced the quotation. In ***Electric Company of America***, the Commission granted a certificate to an electric company franchised by the City of Maplewood even though there was

another electric company without such a municipal franchise operating in the same area. The Supreme Court *affirmed* the Commission's order granting the certificate, saying "we cannot say that the Public Service Commission was wrong in issuing its certificate. That certificate may be issued if the commission finds the improvement necessary or convenient." ***Id.*** at 900. Therefore, ***Electric Company of America*** does not stand for the proposition cited by CU, but instead stands for the proposition advocated by Empire; that the Commission may grant a certificate even in the face of pre-existing facilities of other suppliers. The Commission did that in ***Electric Company of America*** in 1918. It did the same thing in 1975 in ***State ex rel. Ozark Elec. Coop. v. Public Service Comm'n***, supra. The Commission did it in 1980 in ***State ex rel. Public Water Supply District No. 8 of Jefferson County v. Public Service Comm'n***, 600 S.W.2d 147 (Mo. App. 1980). There are numerous other cases that could be cited for the same result. Indeed, in ***Public Water Supply District No. 8,*** supra, the Court of Appeals said "any harm [to the competitor] is only of secondary importance." ***Id.*** at 156.

Second, all of the cited cases, including ***Electric Company of America,*** recognize that it is the Commission's decision -- and not a court's -- as whether a certificate should be granted. It is the Commission that makes the public interest determination. ***State ex rel. Harline v. Public Service Commission***, 343 S.W.2d 177 (Mo. 1961). Thus, any implication sought to be made by CU by quoting from a court decision to give the impression there is some rule of law compelling the Commission to refuse to grant a certificate to Empire here is blatantly false.

Third, CU's position here is diametrically opposed to the position it takes in the public media. In this forum, CU tenaciously fights to keep Empire out as a competitor. In the forum of public opinion, though, it talks out of the other side of its mouth. Ken McClure, Executive Senior Manager of CU, told the ***Springfield Business Journal*** in regard to the application filed

by Empire that "We'll put our service up against anybody. We've been competing in that area 'outside the city limits' for years and done very well. We're not scared of that competition." (Tr. 144) If CU is "not scared" of the competition from Empire, it would seem that it should not be opposing Empire's request in this case.

On page 11, CU argues that since there was no evidence that any prospective customer outside of its boundaries has asked Empire for service, there must be no need for Empire's service in the new area. This argument begs the question, since Empire cannot lawfully serve outside its boundaries. CU is arguing for a standard to be applied here that doesn't exist. There is no requirement that there be requests for service in order to establish need. In a situation where a utility is proposing to be certificated for an undeveloped area, there would be no customers who could even make such a request. Again, the term "necessity" does not mean "essential" or "absolutely indispensable" but that an additional service would be an improvement justifying its cost. ***Beaufort Transfer Co.***, supra.

On page 12, and at length thereafter, CU repeats evidence submitted at the hearing and argues that there are "negative outcomes" with duplication. CU neglects to mention that it is most likely a major contributor to the duplication it seeks to prevent. Thus, it is apparently permissible for CU to duplicate the facilities of a rural electric cooperative, but unacceptable if someone else wants to come into the area and compete. Further, the type of situations listed by CU are related to overhead electric lines. There would be no requirement for Empire to necessarily crowd onto a public right of way with another set of poles. It could serve customers from the rear of the customer's facilities, or it could serve them with underground service. In both situations, it would be pursuant to Empire's Commission-approved extension rule.

On page 15, CU repeats the position of Mr. Burks that granting a certificate to Empire

"would conflict with the possible future deregulation of the electric industry." CU fails to point out when this deregulation will occur in Missouri, and what it will look like. Therefore, it is impossible for CU to claim that Empire's authorization to serve in some relatively small new areas is going to "conflict" with something that doesn't exist in the first place.

On page 16, CU points to the fact that CU has lower rates than Empire. The appropriate response is "so what?" There is no guarantee that three or five years from now the same situation will exist. Rates change to reflect the particular circumstances of the time. CU may take actions, or fail to take actions, in the future which will have an adverse effects on rates. But CU's rates will still be established by a City Council rather than an independent body such as the Commission. Further, service by CU includes none of the statutory protections available by the Commission, such as the ability of a complainant to have a case heard by an independent, non-interested body rather than the group that hired the managers of the utility in the first place.

IV. CONCLUSION

Regulated utilities such as Empire serve the vast majority of the geographic area in this state now. Empire has been providing safe and reliable service since before there was even such a thing as the Public Service Commission. The Commission has granted Empire additional territory over the years even in the face of pre-existing competition. There has been no showing that those prior decisions of the Commission -- to allow the same thing that is requested here -- have been a mistake. There has been no challenge to Empire's ability to provide service. Empire has presented testimony as to recently experienced growth and development in these areas, and there is no reason to suspect that growth and development in those areas will suddenly cease.

CU, who has proclaimed publicly that it is "not afraid" of competition from Empire,

certainly appears to be terrified of the prospect from the discussion in its brief and the position it is taking. Knowing that it has already duplicated pre-existing facilities of other suppliers, CU decries any future possible duplication by Empire. Boasting that it has lower rates, CU opposes Empire even offering service to prospective customers in the two affected areas. It is the policy of the General Assembly to allow competition for new electric customers. If the Commission denies this application, it will be thwarting the policy of the General Assembly.

There is no compelling reason why Empire should be denied the ability to offer service to those who want it in the relatively small areas involved in this application. There is no reason why future customers who want service from an independently-regulated public utility should be denied that opportunity. The granting of this certificate will not guarantee that Empire will ever add any customers in those areas which are opposed by CU. But it will ensure there is some competition and choice available to those future customers. The Commission should grant the certificate for the areas contained in the Non-Unanimous Stipulation.

Respectfully submitted,

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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 5th day of October, 1999.

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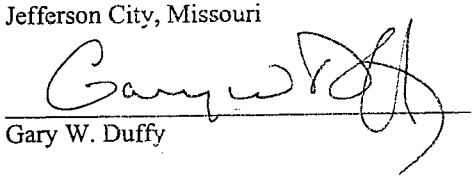

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