STEWART & KEEVIL, L.L.C.
ATTORNEYS AT LAW

CHARLES BRENT STEWART
JEFFREY A. KEEVIL

WILLIAM M. SHANSEY
OF COUNSEL

1001 CHERRY STREET
SUITE 302
COLUMBIA, MISSOURI 65201-7931

AREA CODE 573
TELEPHONE 499-0635
FACSIMILE 499-0638

October 5, 1999

FILED[2]
OCT 5 1999
Missouri Public Service Commission

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

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

Dear Mr. Roberts:

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

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

Sincerely,

Jeffrey A. Keevil

JAK/er
Enclosures
cc: counsel for parties of record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

Jeffrey A. Keevil
MO Bar No. 33825
Stewart & Keevil, L.L.C.
Cherry Street Centre
1001 Cherry Street, Suite 302
Columbia, Missouri 65201

Attorney for the City of Springfield, Missouri, through the Board of Public Utilities

October 1999

44

TABLE OF CONTENTS

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

COMES NOW the City of Springfield, Missouri, through the Board of Public Utilities (hereafter "City Utilities" or "CU"), and respectfully submits its Reply Brief as directed by the Presiding Regulatory Law Judge at the conclusion of the hearing herein on August 2, 1999, in reply to the initial briefs of The Empire District Electric Company ("Empire") and the Staff of the Missouri Public Service Commission ("Staff").

INTRODUCTION

The Initial Brief of City Utilities, filed on September 15, 1999, discusses in detail numerous reasons why the Commission should deny the application of Empire for a certificate of convenience and necessity for the areas outside the city limits, but adjoining, Strafford and/or Willard as set forth in the Non-Unanimous Stipulation; nothing contained in the initial briefs of Empire or Staff alters the arguments set forth in City Utilities' Initial Brief that the application of Empire, as set forth in the Non-Unanimous Stipulation, should be denied. City Utilities will not repeat in this brief all of the reasons why the Commission should deny Empire's certificate request(s), but would

refer the Commission to its Initial Brief for a detailed discussion of those reasons. In this Reply Brief, City Utilities will merely address certain matters contained in the initial briefs of Empire and Staff; failure of this Reply Brief to address any specific statement or argument contained in the initial briefs of Empire or Staff should not be construed as agreement with such statement or argument.

ARGUMENT

In its initial brief Staff, and to a lesser extent Empire, appears to take the position that "regulated" service (presumably meaning service from an investor-owned company regulated by this Commission) should be given preference over municipally-owned service providers, and presumably also over rural electric cooperatives, which are not regulated by this Commission. This assertion conveniently ignores the fact that each of these three types of providers are important parts of the overall electric system in Missouri, and are certainly statutorily sanctioned; each has a role to play and none are by definition the preferred form of service. This can be clearly seen from the so-called "flip-flop" statutes enacted by the Missouri General Assembly, which have lately received much attention as restructuring of the electric industry has been debated. There is a "flip-flop" statute applicable to each type of provider – municipal, cooperative, and investor-owned utility. *See,* Sections 91.025.2, 393.106.2, and 394.315.2 RSMo. Each type of provider is given the same types of protection from erosion of its customer base as each of the other types. If the Missouri General Assembly had intended for the law of the state to show a preference for one type of service provider over another, presumably it would not have enacted three virtually identical "flip-flop" statutes applicable to each type of service provider. The Missouri General Assembly's intent to not show a preference for

one type of service provider over another can also be seen in the territorial agreement law, Section 394.312 RSMo, which provides for territorial agreements between each type of service provider - cooperatives, municipals and investor-owned utilities – upon similar conditions. In fact, by providing that electric suppliers could come to the Commission when the parties could not agree on boundaries, the territorial agreement law shows that the Missouri General Assembly intended for the Commission to be impartial and show no preference for one type of service provider over another simply because one was regulated by this Commission and the others were not. *See,* Section 394.312.2 RSMo. Staff's argument in its brief also directly contradicts the rebuttal testimony of its own witness, Mr. Ketter, who testified that "[i]t is my opinion that Empire has not established the need for **regulated** electric service and that it is not in the public interest to encourage duplication of electric facilities in these areas already served by cooperative and municipal facilities." (Ex. 3, p. 9)(emphasis added).

It should also be remembered that, in contrast to the closed-door board meetings of a for-profit corporation such as Empire, the monthly board meetings of City Utilities are open to the public and are televised several times each month; customers may attend and speak at these meetings. (Tr. 186-87). As Mr. Burks testified:

> City Utilities is regulated by a Board of Public Utilities that is made up of 11 members [2 of which **must** be from outside the city limits of Springfield – Tr. 182] that live within the confines of the community that we serve . . . The governance of the utility is regulated at the local level by those who receive service from us on an ongoing basis.

(Tr. 181). This is an example of the inherent accountability to which municipally-owned utilities are subject, rather than being subject to regulation by this Commission. Decisions are made locally, rather than in Jefferson City, at open meetings at which those

affected may **attend and participate**; the public participation in the process, as well as the public scrutiny, is just as great if not greater than in Commission proceedings.

Furthermore, as discussed in City Utilities' Initial Brief, City Utilities' bills are actually lower than Empire's current bills (and Empire's are soon expected to increase – Tr. 93), even with the inclusion of the surcharge outside the city limits of Springfield. (Ex. 8). Empire and Staff understandably chose not to address this fact in their initial briefs. This is true in spite of the fact that Empire's rates are regulated by the Commission, while City Utilities' are not. This is an example of the inherent accountability to which City Utilities is subject ensuring the reasonableness of rates, as well as the adequacy of service. Also, if Empire is allowed to extend its service as it is requesting in this case, without sufficient new customers, the remaining customer base will have to absorb the cost of Empire's over-building of facilities. (*See*, Ex. 5, p. 5).

Staff states on page 4 of its initial brief that "it is Staff's position that the possible duplication of facilities is not sufficiently detrimental to support denying" Empire's application. This is quite curious, because, as discussed in detail in City Utilities' Initial Brief, Staff's witness Mr. Ketter testified extensively in his rebuttal testimony about the negative consequences of duplication (which he admitted would result from granting Empire's application)(Ex. 3, pp. 5-6), and specifically testified that "[i]t is my opinion that Empire has not established the need for regulated electric service and that it is not in the public interest to encourage duplication of electric facilities in these areas already served by cooperative and municipal facilities." (Ex. 3, p. 9).

Staff's current "position", as set forth in its Initial Brief, did not materialize until after Staff signed on to the Non-Unanimous Stipulation (which, as discussed in City

Utilities' Initial Brief, is not supported by the evidence). Staff would now apparently have the Commission dismiss the issue of duplication because "duplication already exists." (Staff Brief, p. 4). However, Mr. Ketter expressly recognized this in his rebuttal testimony when he recommended denial of Empire's application; in fact, it was his opinion (as well as that of Mr. Burks) that furthering duplication of facilities, *i.e.*, adding a third set of poles and wires in the area, would simply exacerbate the problems associated with duplication, including but not limited to additional safety hazards for utility workers and the public. (Ex. 3, pp. 5, 8; Ex. 5, p. 4; Ex. 6, p. 2). Staff's attempt in its brief to dismiss the negative consequences of duplication because "duplication already exists" should not be sanctioned by the Commission; there are already two lines out there, and adding a third will have possibly severe safety consequences. *See, id.* This concern lies at the heart of City Utilities' opposition to Empire's application in this case.

As Mr. Burks testified, duplication creates

> . . . the possibility for a lineworker to make a simple mistake and come in contact with the wrong set of lines. This is especially a possibility during storm restoration or when a lineworker believes a line is de-energized and then goes to work (makes contact) with another electric company's energized line. This could result in a worker being killed or seriously injured. There is also the chance of a lineworker checking the wrong line and believing the line he/she is patrolling is in good working condition, then re-energizing the wrong line. This could result in the line the lineworkers were supposed to be patrolling laying on the ground or on someone's house or vehicle and being re-energized. This could result in someone from the general public being killed or seriously injured.

(Ex. 5, p. 4). In his rebuttal testimony, which he affirmed as true at the hearing (Tr. 76-77), Mr. Ketter of the Staff testified similarly.[1] (Ex. 3, p. 8). Staff's apparent about-face at the present time, despite Mr. Ketter's concerns regarding safety, can simply be

[1] It should also be remembered that Mr. Ketter and Mr. Burks testified as to additional negative consequences of duplication – such as degradation of aesthetics and cost recovery – which were discussed at length in City Utilities' Initial Brief.

explained as Staff's attempt to justify its signing on to the Non-Unanimous Stipulation in an effort to short-circuit this case. The Commission should remember that at the hearing Mr. Ketter, the Staff's only witness, would not state that it was his idea for Staff to enter into the Non-Unanimous Stipulation. (Tr. 81-82).

Furthermore, although Empire continues to incorrectly assert that safety concerns are not to be considered in certificate application cases (Empire Brief, p. 9), as discussed in City Utilities' Initial Brief, Empire's position is directly refuted by the Missouri Court of Appeals. In *State ex rel. Intercon Gas, Inc. v. Public Service Commission of Missouri*, 848 S.W.2d 593 (Mo. App. 1993), a gas certificate case also brought pursuant to section 393.170 RSMo like the present case, the Missouri Court of Appeals, Western District, specifically stated that "**The safety and adequacy of facilities are proper criteria in evaluating necessity and convenience**." (emphasis added) *Id.* at 597. Interestingly, this case was an appeal of the *Intercon Gas* case cited by Empire in its initial brief. Further, Empire's reliance on the National Electrical Safety Code (NESC) as a guarantee of safety is misplaced because, as Mr. Ketter testified, the NESC provides only minimum standards and in certain situations it is desirable to provide for more than simply the "minimum". (Tr. 132).

In their initial briefs, both Empire and Staff claim that the Non-Unanimous Stipulation is supported by record evidence in this proceeding. Staff states at page 9 of its brief that "all parties filed surrebuttal testimony subsequent to the filing of the Stipulation." While it may be true that Empire and Staff filed surrebuttal, the surrebuttal testimony which they filed subsequent to the filing of the Non-Unanimous Stipulation failed to adequately support the stipulation, as discussed in detail in City Utilities' Initial

Brief. Because the failure of the signatory parties to the Non-Unanimous Stipulation to provide adequate evidence to support the stipulation was discussed at length in City Utilities' Initial Brief, that entire argument will not be repeated here, but City Utilities would merely refer the Commission to its Initial Brief's discussion on that point.

However, City Utilities would remind the Commission that even a cursory review of the "evidence" alleged by the signatory parties to support the stipulation shows that such "evidence" failed to meet even the minimum requirements set forth in the Commission's own rule governing certificate applications. *See,* 4 CSR 240-2.060(2)(F). As stated by the Commission in *In re Ozark Natural Gas Co., Inc.,* 5 Mo. P.S.C. 3d 143 (1996), which was cited by Empire in its initial brief, "[t]he criteria used in evaluating certificate applications can be generally found in Commission Rule 4 CSR 240-2.060(2) . . ." *Id.* at 145; *see also, In the matter of the application of Intercon Gas, Inc.,* 30 Mo. P.S.C. (N.S.) 554, 561 ("the Commission finds in its published Rules a number of requirements which Applicants for certificates . . . are expected to meet" [citing 4 CSR 240-2.060]). For example, 4 CSR 240-2.060(2)(F) requires that an application for a certificate of convenience and necessity by an electric company include a list of the names and addresses of ten persons residing in the proposed service area; although Empire's original application included a list of ten persons residing in the proposed service area, Empire neglected to file a list of ten persons residing in the proposed service area covered by the Non-Unanimous Stipulation despite the fact that not all ten persons on Empire's original list reside in the proposed service area covered by the Non-Unanimous Stipulation, which can be clearly seen from reviewing the original list. The failure of Empire and Staff to provide even the most minimum evidence required by

Commission rule in support of the new territory to be granted to Empire under the Non-Unanimous Stipulation not only precludes the Commission from granting Empire a certificate for the areas outside, but adjoining, Strafford and Willard, but also calls into question the lawfulness of even granting Empire a certificate for the new area around Republic as well.[2]

In its initial brief, on page 5, Empire claims that Mr. Ketter testified "that the Commission normally allows so-called "buffer zones" around cities in certificates", citing page 126 of the transcript. First, this is **not** exactly what Mr. Ketter testified, as a review of page 126 of the transcript reveals. Second, Empire failed to mention in its brief that Mr. Ketter did testify that when this so-called "buffer zone" approach has been adopted in prior cases by the Commission, it has been for predominantly rural areas of the state rather than an area such as Greene County, and has predominantly been used in cases where a utility was seeking authority to convert existing line certificates to area certificates (Tr. 130), which is not the situation in the present case.

In the conclusion of its brief, Empire seems to attempt to shift the burden of proof in this case to City Utilities. However, as the applicant for a certificate of convenience and necessity, the burden of proof in this case is on Empire to prove that the requested certificate(s) should be granted, not on City Utilities to prove that it should not be. *See, e.g., In the matter of the application of Missouri Pipeline Company,* 5 Mo. P.S.C. 3d 38 (1996). Further, as discussed in the Initial Brief of City Utilities, the Commission has previously declared that when a Non-Unanimous Stipulation is filed, the signatory

[2] "[T]he Commission puts future applicants on notice that applications which change drastically or are filed without the required documents will not be looked upon favorably." *In re Ozark Natural Gas Co., Inc.*, 5 Mo. P.S.C. 3d 143 at 155 (1996), citing *In the Matter of the Application of Tartan Energy Company*, 3 Mo. P.S.C. 3d 173 at 190 (1994).

parties' "new position [as reflected in the Non-Unanimous Stipulation] must still be supported and the stipulating parties, particularly the company, bear the risk [*i.e.*, the burden of proof is on the company] concerning any disputed issues." *In the matter of Missouri Public Service,* 2 MPSC 3d 221 at 223 (1993).

In its Initial Brief, City Utilities discussed in detail why the potential for future annexations by either Strafford and/or Willard do not constitute need for electric service by Empire in the areas outside either town at the present time[3]. It also discussed why the Commission need not worry that if the Commission does not grant Empire a certificate for the areas outside the current city limits of Strafford and Willard, and if at some undetermined future point in time either area was annexed by the respective city, new customers in the newly annexed area would not have a provider available to provide service, because City Utilities could lawfully provide such service without a franchise[4]. Therefore, this brief will not further address the matters of annexation and franchises mentioned in the initial briefs of Empire and Staff, but would simply refer the Commission to City Utilities' Initial Brief. Likewise, in its Initial Brief, City Utilities discussed in detail why there is no need for electric service by Empire in either the area adjoining Strafford and/or Willard, and why granting Empire's application for either the area adjoining Strafford and/or Willard would not promote the public interest; therefore,

[3] On page 10 of its initial brief, Empire disagrees with City Utilities that, as phrased by Empire, "the Commission should refrain from granting Empire a certificate because of perceived changes in electric regulation that are coming"; as clearly set forth in City Utilities' testimony and Initial Brief, this is not the only reason Empire's certificate request should be denied, but is certainly an issue the Commission must consider in this case. However, City Utilities would submit that, to paraphrase Empire, "the Commission should refrain from granting Empire a certificate because of perceived" annexations that may or may not be coming.

[4] As the Commission recently found, in an application case under Section 393.170 RSMo, "a franchise is necessary only to use public rights of way;" otherwise, a municipal "franchise or consent is unnecessary." *In the Matter of Osage Water Company,* Case No. WA-98-236 and WC-98-211, Report and Order issued August 10, 1999.

this brief will not further address the matters of need and public interest mentioned in the initial briefs of Empire and Staff since in their briefs neither Empire nor Staff raised any arguments which were not anticipated and fully addressed in City Utilities' Initial Brief, but City Utilities would refer the Commission to its Initial Brief for a full discussion of these issues.

CONCLUSION

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

Respectfully submitted,

Jeffrey A. Keevil
Missouri Bar No. 33825
Stewart & Keevil, L.L.C.
1001 Cherry Street, Suite 302
Columbia, Missouri 65201
(573) 499-0635
(573) 499-0638 (fax)

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by placing same in first-class mail, with proper postage affixed, or by hand delivery, to counsel for parties of record on this 5th day of October, 1999.