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, et al.

POST-HEARING BRIEF OF THE EMPIRE DISTRICT GAS COMPANY

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COMES NOW The Empire District Gas Company ("Empire" or "EDG"), by and through the undersigned counsel, and submits this Post-Hearing Brief on the issues set forth below pursuant to the Commission's *Order Granting Motion for Extension of Time* issued herein on November 28, 2007. The following brief will use the description and numbering of the issues as set forth in the List of Issues previously filed herein by Staff.

Introduction

In this case, Case No. GA-2007-0289, Missouri Gas Energy ("MGE") has requested the Commission grant it a certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain a system for the provision of natural gas service to the public in Sections 13 and 14, Township 52 North, Range 35 West in Platte County, Missouri. After MGE filed Case No. GA-2007-0289, EDG filed an Application in Case No. GA-2007-0457 in which EDG requested an order from the Commission granting it a certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain a system for the provision of natural gas

service to the public pursuant to its approved rates, rules and regulations (as the same may change from time to time as provided by law) in Sections 13, 14, 15, 22, 23 and 24, Township 52 North, Range 35 West in Platte County, Missouri, as well as other additional relief which included, among other things, clarifying which company has a certificate of convenience and necessity to provide service in certain surrounding sections of land.[1] By Order dated May 31, 2007, the Commission consolidated Case No. GA-2007-0289 and Case No. GA-2007-0457, and denominated Case No. GA-2007-0289 as the lead case.

Issues

1. 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?

The simple answer to the question posed by this issue is that EDG has a CCN to serve these sections of land and MGE does not. As testified by Mr. Gatz:

> EDG was authorized by the Commission to provide natural gas service in all of the natural gas service territories of Aquila Networks-MPS [i.e., Missouri Public Service]/L&P by Commission Order issued April 18, 2006, in Case No. GO-2006-0205. . . .In Case No. 13,172 [January 12, 1956], the Commission authorized the Missouri Public Service Company [predecessor of EDG] to construct, operate and maintain a natural gas transmission and distribution system in . . . Sections 1, 2, 3, 10, 11 and 12 in Township 52 North, Range 35 West, and . . . Sections 4, 5 and 6 in Township 52 North, Range 34 West of Platte County, Missouri.

[1] In its *Order Denying Motion to Strike Portions of Application* issued on July 3, 2007, the Commission stated that "While it is true that MGE's application only pertained to the grant of a certificate in sections 13 and 14, **Empire appropriately raised the issue of clarifying which utility has a *certificate* to provide service in the surrounding sections of land**. This issue will need to be addressed by the Commission to provide clarity and to promote the orderly future development of gas service to the public, preventing duplication of facilities and services. This issue was appropriately raised in this case and is properly before the Commission in the context of the certification dispute." (emphasis added)

(Gatz Direct, Empire Exhibit 3, p. 5). A copy of the Order in Case No. 13,172 is also attached to Mr. Gatz' direct testimony (Empire Exhibit 3) as RFG Attachment 1. Furthermore, as reflected in the rebuttal testimony of Mr. Warren, the Aquila tariffs which were adopted by EDG pursuant to Case No. GO-2006-0205 accurately reflected these sections of land as part of its authorized service territory. (Warren Rebuttal, Staff Exhibit 18, p. 4 and Schedule 6).

Unlike EDG, there are no Commission orders granting MGE or its predecessors any CCN to serve customers in any of these sections of land. (Warren Rebuttal, Staff Exhibit 18, p. 2). MGE's predecessor, The Gas Service Company, did obtain a restricted *line* certificate in Case No. 12,632 (Staff Exhibit 7) for a supply line to pass through some of these sections, but that order did **not** allow The Gas Service Company [or MGE] to serve customers in any of these sections; in fact, the order in that case initially restricted the authorization for the line to merely supplying natural gas to the Mid-Continent Airport site and was later expanded *slightly* to allow the line to be used for supplying gas to certain areas *for which The Gas Service Company [or MGE] had already been certificated* at the time (i.e., December 18, 1956). (See Warren Rebuttal, Staff Exhibit 18, pp. 2-3 and Staff Exhibits 7 and 9). Therefore, not only do the orders in Case No. 12,632 **not** grant MGE a CCN to serve customers in these sections of land, the use of the supply line which was authorized therein is restricted to serving areas for which MGE's predecessor had been certificated prior to December 18, 1956. Thus, MGE could not use, and has not made application to use, this line to supply the new area it is requesting in its application in this case – although MGE has indicated it plans to so use this line.

Although initially (i.e., in its application which initiated Case No. GA-2007-0289) MGE claimed that it "already has a certificate from the Commission to serve adjacent sections 11 and 12 in that same Township and Range [adjacent to Sections 13 and 14, Township 52 North, Range 35 West in Platte County, Missouri]" and according to the map attached to its application MGE claimed to have a certificate from the Commission to serve sections 1, 2, 3 and 10 in Township 52 North, Range 35 West and sections 4, 5 and 6 in Township 52 North, Range 34 West in Platte County, Missouri, MGE has since apparently given up its claim that it has a CCN to serve any of these sections of land. MGE admits they have no service area CCN for sections 11 and 12 on pages 93-94 and 148-149 of the Transcript, and admits there is "no Commission order in existence that provides MGE an area certificate for Sections 7 through 12 of Township 52 North, Range 35 West" on pages 107-108 of the Transcript; also, Mr. Noack appears to admit they have no CCN to serve sections 1, 2 and 3 of T52N, R35W or sections 4, 5 and 6 of T52N, R34W in his Surrebuttal Testimony, MGE Exhibit 3, p. 5. (See also Warren Rebuttal, Staff Exhibit 18, p. 2 and Schedule 1). Instead, MGE relies on only a tariff approved in 1997 as its authority to serve sections 10, 11 and 12 of T52N, R35W. (See Tr. pp. 93-94 and Noack Surrebuttal Testimony, MGE Exhibit 3, pp. 2 and 5). EDG submits – and case law confirms – that a tariff itself does not grant a certificate in the absence of an order granting a certificate; the tariff is merely to reflect the area for which a certificate has been granted, and in this instance is simply incorrect.

In *State ex rel. Doniphan Telephone Company v. Public Service Commission*, 377 S.W.2d 469 (Mo. App. 1964), the Court of Appeals addressed a situation extremely similar to the situation presented in this case. The Doniphan Telephone Company

("Doniphan") had been granted a certificate of convenience and necessity to render service in a certain area; some years later, it filed with the Commission a map of an additional adjacent area, referred to as a "three mile strip", as part of its service territory. Some years even later, the court case arose out of another Commission proceeding. The Court of Appeals stated as follows:

> All the foregoing directs inquiry to this fundamental question: What legal authority, if any, has been granted Doniphan to render its service in the three mile strip? Doniphan's claim to the area is expressed in these words, quoted from its brief: "By order dated July 9, 1951, Doniphan Telephone Company was granted a Certificate of Public Convenience and Necessity to own, maintain and operate the Greenville exchange – . By the filing with the Public Service Commission of Map effective November 21, 1957, the Three Mile Strip was placed in the Greenville exchange of said company." It is not disputed that on July 9, 1951, the Commission granted Doniphan a certificate of convenience and necessity for the Greenville exchange area, and that such certificate did not include the three mile strip. It is also a matter of record that on November 21, 1957, Doniphan filed a map of the three mile strip in the office of the Commission . . . . Summarizing, it may be said that Doniphan's claim of authority to serve the three mile strip rests solely upon two factors, to-wit: (1) the fact that in 1951 it was granted a certificate for its Greenville area (which did not include the three mile strip), and (2) the act of filing a map of the three mile strip in 1957.
>
> It is not the law that a telephone utility is privileged to annex additional territory to its certificated service area by the simple act of filing a map. The legislature provided otherwise by its enactment of the Public Service Commission law. That body of statutes provides a complete system of law for the regulation of public utilities by the commission it has created. *Public Service Commission v. Kansas City Power & Light Co., Mo. Sup., 31 S.W.2d 67*. The legislature has seen fit to vest the Public Service Commission with exclusive authority to allocate the territory in which a particular utility may render service, by providing that the Commission shall pass upon the question of the public necessity and convenience for any new or additional company to begin business anywhere in the state, or for an established company to enter new territory. [citations omitted]

State ex rel. Doniphan Telephone Company v. Public Service Commission, 377 S.W.2d 469, 473-474 (Mo. App. 1964). The court noted that statutory section 392.260 (the

statutory section relating to CCN applications for telephone companies) had "its counterpart" in statutory section 393.170 (the statutory section relating to CCN applications for natural gas and electric companies, and under which this case was filed) and went on to state as follows:

> In *Public Service Commission v. Kansas City Power & Light Co., Mo. Sup., 31 S.W.2d 67*, the Supreme Court construed present *Section 393.170*, in connection with other pertinent provisions of the Public Service Commission Law, and reached the following conclusions:
>
> "A reasonable construction of the Public Service Commission Act forces the conclusion that it was the intention of the Legislature to clothe the commission with exclusive authority to determine whether or not the furnishing of electricity to a given town or community is a public necessity or necessary for public convenience, and, if so, to prescribe safe, efficient, and adequate property, equipment, and appliances in order to furnish adequate service at reasonable rates and at the same time safeguard the lives and property of the general public, those using electricity, and those engaged in the manufacture and distribution thereof.
>
> "If, as appellant contends, an electrical corporation which has a certificate of convenience and necessity to operate its plant in a given town or community might extend its lines to and furnish other communities with electricity without a certificate o[f] authority from the commission, the purpose of the statute would be defeated. Under such a construction of the statute the commission would have no opportunity to determine whether or not public convenience and necessity demanded the use of electricity in the community to which the line was extended, and no opportunity to prescribe the safe and efficient construction of said extension or determine whether or not appellant was financially able to construct, equip, and operate such extension and furnish adequate service at reasonable rates in the new community, without crippling the service in the community where the commission had theretofore authorized it to operate."
>
> The same reasoning and logic applied by the Supreme Court in its decision from which we have above quoted, relative to an electrical company under the purview of *Section 393.170*, applies with equal force to telephone companies under *Section 393.260* [sic]. These two statutes are similar in provisions and purposes.[2] **Both clearly contemplate that**

[2] The Commission should recognize that this case was decided before the statutory provisions regarding competitive telecommunications companies, of which there are no statutory counterparts in the statutes

> **any right of the nature here claimed can only be obtained by securing a certificate of convenience and necessity from the Commission, after proper notice and a hearing.** Since there is no showing by Doniphan that it has complied with these requirements, it is necessarily our conclusion that it has no authority to extend its telephone lines into the three mile strip and render telephone service in that area. (emphasis added)

State ex rel. Doniphan Telephone Company v. Public Service Commission, 377 S.W.2d 469, 474-475 (Mo. App. 1964); See also *Public Service Commission v. Kansas City Power & Light Company*, 325 Mo. 1217, 31 S.W.2d 67 (Mo. 1930).

Like the service territory map tariff filing, which was not supported by a certificate of convenience and necessity, was not sufficient to grant authority to the utility to serve additional territory in *Doniphan*, the service territory description tariff filing of MGE is also not sufficient to grant MGE authority to serve in the disputed land sections in the absence of a certificate of convenience and necessity. That authority "can only be obtained by securing a certificate of convenience and necessity from the Commission, after proper notice and a hearing." *State ex rel. Doniphan Telephone Company v. Public Service Commission*, 377 S.W.2d 469, 475 (Mo. App. 1964). As shown above, a tariff filing alone is insufficient to annex additional territory.

In addition, the Commission should be aware that the tariff upon which MGE relies for its authority to serve Sections 10, 11 and 12 of T52N, R35W, was simply approved pursuant to the Commission's routing slip procedure and allowed to become effective pursuant to Section 393.140(11) RSMo. (Straub Rebuttal, Staff Exhibit 20, Schedule 2-1 and Schedule 2-4). Even Mr. Hack of MGE admitted at the hearing that the tariff "probably took effect by operation of law." (Tr. pp. 136-137). On the other hand,

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relating to gas and electric companies even now. Therefore, the court's analysis as to gas and electric CCN's under Section 393.170 is still good today.

as noted above, CCN authority is granted pursuant to Section 393.170 RSMo., after notice and hearing.

Furthermore, the purpose of the tariff filing was to clarify MGE's then-existing (1997) service territory (Tr. p. 82) – not grant MGE additional service territory. This is even reflected on the tariff routing slip/Staff recommendation itself, both in the body of the recommendation and in the handwritten note at the end – "The purpose of this filing is to show the company's current service area, and does not expand to any area that it currently does not serve." (Straub Rebuttal, Staff Exhibit 20, Schedule 2-1 and Schedule 2-2). In fact, Mr. Hack admitted that a local gas distribution company cannot simply submit a new tariff listing a new service area in order to obtain a CCN[3], and that the expansion of service territory occurs through the CCN process. (Tr. pp. 109-110). MGE's reliance on this tariff – without a service area CCN to back it up – is completely unfounded.

Finally, the Commission should be aware of the case of *State of Missouri ex rel. Imperial Utility Corporation v. Borgmann*, 664 S.W.2d 215 (Mo. App. 1983). In that case, the utility had an approved tariff which authorized a lien upon the real estate to secure payment of delinquent charges; this lien followed title to the real estate, allowing the company to collect from subsequent owners. The court concluded that the company "was not entitled to a lien or to the remedy of disconnection . . . pursuant to the tariff because there is no statutory authority in Missouri enabling a utility to charge subsequent customers for the unpaid bills of previous customers" and went on to state that "There is no statute in Missouri authorizing a public utility to collect charges for service rendered

[3] Mr. Hack also admitted that "I cannot just file a tariff sheet and – and get new service territory." (Tr. p. 109).

to a previous customer by threat of disconnecting service to the current customer or by imposing a lien on the real estate. **Provisions in Imperial's tariff, . . . which purport to sanction such collection remedies are therefore invalid**." *Id.* at pp. 218-219. (emphasis added) Therefore, since there is no statutory authority for MGE to expand its service territory by simply filing a tariff, the tariff which purports to do so is invalid.

Based on the foregoing, the Commission should find that EDG 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, and that MGE does not, and accordingly, that MGE has no lawful authority to serve such sections.

2. Should Missouri Gas Energy (MGE) be granted a CCN to serve T52N, R35W sections 13 and 14 in Platte County, Missouri?

The simple answer to the question posed by this issue is "No," with one small caveat which will be discussed below. As shown above, MGE does not have a CCN to serve, and therefore is not lawfully authorized to serve, sections 10, 11 and 12 of T52N, R35W in Platte County. As MGE itself has indicated, the Seven Bridges subdivision development encompasses portions of sections 11, 12, 13 and 14. (Noack Rebuttal, MGE Exhibit 2, p. 5). MGE has only requested a CCN for sections 13 and 14. MGE states that the Seven Bridges subdivision phase 1 begins in section 12. (Noack Direct, MGE Exhibit 1, p. 4). Therefore, MGE would be unable to lawfully serve the entire Seven Bridges development.

Furthermore, even though MGE has unlawfully and without authorization begun providing service in sections 11 and 12 (which will be addressed in more detail under one

of the following issues), MGE should not be rewarded for such unlawful and unauthorized activity by being granted a CCN for sections 13 and 14[4]. MGE has admitted that it is currently providing service to Seven Bridges (in sections 11 and/or 12) from its Leavenworth supply line (*Id.*). This is the supply line which the Commission will recall from the discussion above under issue 1 which is only to be used for supplying gas to certain areas *for which The Gas Service Company had already been certificated* at the time of the third order in Case No. 12,632 (i.e., December 18, 1956). (See Warren Rebuttal, Staff Exhibit 18, pp. 2-3 and Staff Exhibits 7 and 9). Therefore, not only is MGE serving unlawfully and without authorization (without a service area CCN) in sections 11 and 12, but is using the Leavenworth supply line in violation of the Commission order which authorized that line. MGE could not lawfully supply sections 13 and 14 off of that line even if granted a CCN for those sections.

As Mr. Gatz testified, since EDG has a certificate for sections 11 and 12 (as established under issue 1 above), EDG – not MGE – should be granted the certificate to serve the requested sections of land (this will be discussed further under the issue below) in order to serve the entire Seven Bridges development, including the portion in sections 13 and 14, and avoid duplication of facilities and the increased safety concerns inherent with having multiple gas service providers in the same development. (Gatz Rebuttal, Empire Exhibit 4, p. 6). Also, the existing facilities of MGE that serve the Seven Bridges development – which were constructed without authorization from the Commission, within EDG's certificated territory – should be transferred to EDG or abandoned to avoid

[4] Mr. Warren of the Staff testified that "It would not be logical for the Commission to grant MGE a CCN to serve in Sections 13 and 14 under these circumstances. The Commission should not permit MGE to benefit from its error and its violation of the Commission's rules." (Warren Surrebuttal, Staff Exhibit 19, p. 5).

duplication of facilities (this will be addressed further under one of the issues below). (*Id.*).

Finally, the Commission should be aware that MGE has provided no record evidence in this case of the economics of its proposal to serve in sections 13 and 14. MGE did attach to its application a construction cost estimate with estimated margins; however, MGE did not introduce this document – or any document like it – into the evidentiary record of the case during the hearing. The Commission cannot simply rely on an attachment to MGE's application as "record evidence," particularly when MGE's application was shown to contain significant errors and inaccuracies. (Klein Direct, Empire Exhibit 1, p. 7). Therefore, MGE has failed to prove – by record evidence – that its proposal meets the basic criteria[5] set for obtaining a CCN.

As noted in the Surrebuttal Testimony of Mr. Gatz (Empire Exhibit 5, p. 3) and the Rebuttal Testimony of Mr. Warren (Staff Exhibit 18, pp. 7-8), MGE has already encroached into a small portion of the northeast corner of section 13 at the end of NW 126th Street, from development which originated in MGE's service territory. As testified by Mr. Warren, a creek which separates this area from the remainder of section 13 serves as a natural barrier between this area and the remainder of section 13, which alleviates the safety concerns of having two different service providers in the land section. (Warren Rebuttal, Staff Exhibit 18, p. 5). Therefore, MGE should be granted a CCN for a very small portion of section 13 – namely, only the area of section 13 east of Prairie Creek and north of Fox Creek. (Gatz Surrebuttal, Empire Exhibit 5, p. 3). This will be further discussed under one of the issues below. However, based on the matters set forth above,

[5] See *In the Matter of the Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company*, 3 Mo. P.S.C. 3d 173, 177 (1994)(citing *Re Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.S.) 554, 561 (1991)).

the Commission should deny the remainder of MGE's request for a CCN to serve T52N, R35W sections 13 and 14 in Platte County, Missouri.

3. Should Empire District Gas[6] (EDG) be granted a CCN to serve T52N, R35W sections 13, 14, 15, 22, 23 and 24, in Platte County, Missouri?

The short answer to the question posed by this issue is Yes," with the exception of that small portion of section 13 east of Prairie Creek and north of Fox Creek mentioned above. Staff agrees that EDG should be granted such a CCN. (Warren Rebuttal, Staff Exhibit 18, p. 7).

The Commission has the authority to grant certificates of convenience and necessity "after due hearing" when "necessary or convenient for the public service," according to Section 393.170 RSMo; however, "[t]he term 'necessity' does not mean 'essential' or 'absolutely indispensable', but that an additional service would be an improvement justifying its cost." *State ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo. App. 1993). The Commission has set forth the following criteria to be used in evaluating certificate 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; and (5) the service must promote the public interest.

In the Matter of the Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, 3 Mo. P.S.C. 3d 173, 177 (1994)(citing *Re Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.S.) 554, 561 (1991)). "The requirement that an applicant's proposal promote the public interest is in essence a conclusory finding as there is no specific

[6] The proper name of the company is The Empire District Gas Company.

definition of what constitutes the public interest. Generally speaking, positive findings with respect to the other four standards will in most instances support a finding that an application for a certificate of convenience and necessity will promote the public interest." *In the Matter of the Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company*, 3 Mo. P.S.C. 3d 173, 189 (1994). Applying the foregoing definitions and criteria, EDG's certificate application should be granted.

EDG's current natural gas transmission and distribution systems in Missouri involve over $120,000,000 in utility assets, providing service to approximately 47,000 natural gas customers in 44 communities. (Gatz Direct, Empire Exhibit 3, p. 4). EDG operates over 1,192 miles of natural gas transmission and distribution mains in Missouri. (*Id.*) The community of Platte City, Missouri – from which EDG holds a franchise – has been part of EDG's or its predecessor's authorized service area (which is adjacent to the additional service territory being requested by EDG) for over 50 years. (*Id.* at 4-5). EDG's existing system in the Platte City, Missouri, area is comprised of approximately 47 miles of main which serves approximately 2,800 customers in Platte City, Weston and Tracy, Missouri in Platte County. (Klein Direct, Empire Exhibit 1, p. 2). The natural gas utilized to serve these customers is delivered into EDG's distribution system through Southern Star Central Gas Pipeline's transmission network. (*Id.*). EDG's distribution system is capable of serving the expected growth in the sections being requested by EDG and has been designed to accommodate the expected growth south of Platte City (i.e., in the area being requested by EDG). (*Id.* at pp. 2-3). Furthermore, EDG has secured enough additional capacity on Southern Star Central Gas Pipeline to supply the

anticipated growth. (*Id.* at pp. 3-4). In short, EDG is qualified to provide the proposed service.

EDG has the necessary financial wherewithal to expand its existing natural gas delivery system in Platte County to serve the expected increase in demand for natural gas service, pursuant to its existing tariff rates, rules and regulations (as they may change from time to time). (Gatz Direct, Empire Exhibit 3, p. 7). EDG will use internally generated funds and will not need additional external financing to expand its existing delivery system in Platte County to accommodate this proposal. (*Id.*). The projected extension of EDG's facilities into the new service territory sought in this case meets the economic thresholds of EDG's line extension policy; no additional capital contribution from the customer is anticipated at this time to fund the expansions. (Klein Direct, Empire Exhibit 1, p. 4). At the investment levels shown on DRK Attachment A (DRK Attachment A to the Direct Testimony of Mr. Klein, Empire Exhibit 1, provides a three-year construction and revenue estimate for the requested territory), the projected extension of EDG's facilities is economically justified at EDG's current tariff rates. (*Id.* at pp. 4-5 and DRK Attachment A). Therefore, EDG has the financial ability to provide the service and its proposal is economically feasible.

As MGE itself has indicated, the Seven Bridges subdivision development encompasses portions of sections 11, 12, 13 and 14. (Noack Rebuttal, MGE Exhibit 2, p. 5). As established under issue 1 above, only EDG has a CCN to serve sections 11 and 12. There is clearly a need for EDG's proposed service in sections 13 and 14 based on Seven Bridges alone. As Mr. Gatz testified, since EDG has a certificate for sections 11 and 12 where the Seven Bridges subdivision started, EDG – not MGE – should be

granted the certificate to serve the requested sections of land in order to serve the entire development, and avoid duplication of facilities[7] and increased safety concerns inherent with multiple service providers in the same development. (Gatz Rebuttal, Empire Exhibit 4, p. 6). Additionally, development is approaching the remainder of the requested new area from the north and south. (Gatz Direct, Empire Exhibit 3, p. 7). Generally, Platte City is growing in a southerly direction toward the new service territory EDG is requesting in this case. (Klein Direct, Empire Exhibit 1, p. 5). Sections 15, 22, 23 and 24 are the logical progression of the growth of the Platte City area, and EDG anticipates significant residential growth there and desires to serve those customers. (Tr. p. 183). There is clearly a need for natural gas service in sections 13, 14, 15, 22, 23 and 24, in Platte County and it is in the public interest to have natural gas service available as the area develops. (Gatz Direct, Empire Exhibit 3, p. 7).

As stated above, "The requirement that an applicant's proposal promote the public interest is in essence a conclusory finding as there is no specific definition of what constitutes the public interest. Generally speaking, positive findings with respect to the other four standards will in most instances support a finding that an application for a certificate of convenience and necessity will promote the public interest." *In the Matter of the Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company*, 3 Mo. P.S.C. 3d 173, 189 (1994). The "other four standards" in this case clearly support granting EDG's service area application, and, based on the foregoing

[7] As will be discussed further under an issue below, the existing unlawful and unauthorized facilities of MGE that serve Seven Bridges should be transferred to EDG or abandoned to avoid duplication of facilities, since MGE – unlike EDG – has no authority to serve Seven Bridges. (See, e.g., Gatz Rebuttal, Empire Exhibit 4, p. 6).

quotation, the public interest standard is also satisfied. However, there are even additional reasons why EDG's proposal promotes the public interest.

As has been mentioned above, in regard to sections 13 and 14, since EDG has a certificate for sections 11 and 12, EDG – not MGE – should be granted the certificate to serve the requested sections of land in order to serve the entire Seven Bridges development, and avoid duplication of facilities and increased safety concerns inherent with multiple service providers in the same development. (Gatz Rebuttal, Empire Exhibit 4, p. 6). Staff has recognized this concern, and appears to agree with EDG. (Warren Rebuttal, Staff Exhibit 18, p. 5). In regard to sections 15, 22, 23 and 24, these sections are expected to develop, the Platte County development plan includes them, and they are adjacent to the existing EDG service area. (Gatz Surrebuttal, Empire Exhibit 5, pp. 9-10). By granting EDG a certificate to serve all of the land sections it has requested, the Commission would provide for continuity in the authorized gas service provider and avoid the conflict that has arisen in this case. (*Id.* at p. 10). EDG's proposal serves the public interest.

Based on all the foregoing, the Commission should grant a CCN to The Empire District Gas Company (EDG) to serve T52N, R35W sections 13, 14, 15, 22, 23 and 24, in Platte County, Missouri, as requested in EDG's application, with the exception of that small portion of section 13 east of Prairie Creek and north of Fox Creek where MGE has already encroached into a small portion of the northeast corner of section 13 at the end of NW 126th Street. (Gatz Surrebuttal, Empire Exhibit 5, p. 3).

4. 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[8] 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?

The Commission will recall that under issue number 1 above it was established that EDG 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, that MGE does not have a CCN to serve these land sections, and accordingly, that MGE has no lawful authority to serve such sections. These sections of land, for which EDG has a CCN, are included in the statement of this issue, issue number 4. However, in addition to these sections of land for which EDG has a CCN, MGE's tariff incorrectly includes several other, additional sections of land in Platte County, for which neither MGE nor EDG possess a CCN. The statement of this issue, therefore, includes all of the known land sections in Platte County which are incorrectly listed in MGE's tariff (except that section discussed in footnote 8), whether EDG has a CCN for the section or not.

[8] Section 6, T52N, R33W is not included in the service territory descriptions in MGE's existing tariffs; it was inadvertently incorrectly included in the statement of this issue.

The Commission has not granted MGE a CCN to provide service in the sections of land set forth in the statement of this issue. (Gatz Rebuttal, Empire Exhibit 4, p. 4; Warren Rebuttal, Staff Exhibit 18, p. 2). However, with the exception of the one section discussed in footnote 8, they are listed in MGE's tariff as part of its service area. (*Id.*) As Mr. Warren testified, "I have identified twenty-two sections listed on this [tariff] sheet for which MGE does not have a CCN to serve customers." (Warren Rebuttal, Staff Exhibit 18, p. 2 and Schedule 1). MGE has failed to provide any Commission order granting it a CCN to serve in any of these sections[9]. Accordingly, the Commission should – in fact, must – order MGE to correct its tariffs. Even Mr. Warren of Staff testified that "Because of MGE tariff sheets containing locations where they do not have a CCN to serve customers, the Commission should order MGE to revise their tariff sheets to conform to the areas they have received a CCN to serve customers." (Warren Rebuttal, Staff Exhibit 18, p. 6)(See also, Gatz Rebuttal, Empire Exhibit 4, p. 4 – "All of these incorrect references to MGE service territory in the Platte City area should be eliminated").

5. 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?

[9] As discussed under issue number 1 above, according to case law MGE may not add to its certificated area by the mere filing of a tariff sheet and any attempt to do so is invalid.

Together, Sections 386.020(18) and (19) and Section 393.170 RSMo require that MGE have obtained a CCN from the Commission *before* MGE constructed, installed, owned, operated, controlled, managed and/or maintained natural gas distribution facilities (gas plant) and/or provided natural gas service in sections 10, 11, 12, 13 and 14 of T52N, R35W, in Platte County. By its application in this case, MGE seeks a CCN for sections 13 and 14, T52N, R35W; therefore, by definition, it does not currently have a CCN for sections 13 or 14 (or else it would not need to ask). However, MGE has admitted that it has extended its facilities into these sections. (Noack Rebuttal, MGE Exhibit 2, p. 2; Tr. p.123). Under issue number 1 above it was established that MGE has no CCN to serve customers in sections 10, 11 or 12, T52N, R35W. However, MGE has repeatedly admitted to not only having facilities in these sections but to also serving customers in sections 10, 11 and 12. (See, e.g., Noack Surrebuttal, MGE Exhibit 3, p. 4; Tr. pp. 100, 126). As established under issue number 1 above, MGE's tariff filing in 1997 was insufficient to grant MGE authority to serve these sections. Therefore, MGE has clearly constructed, installed, owned, operated, controlled, managed and/or maintained natural gas distribution facilities (gas plant) and/or provided natural gas service in Sections 10, 11, 12, 13 and 14 of Township 52 North, Range 35 West, in Platte County, Missouri, without first obtaining the required authorization from the Commission.

In that regard, the Commission should also recall that MGE bases its authority to serve sections 10, 11 and 12 on a simple tariff filing which was approved in 1997. However, MGE knew – or at the very least should have known – that the tariff upon which it claims authority to serve sections 10, 11 and 12 was incorrect no later than August 1999 when it received a letter written by counsel for Aquila which asked for

MGE to "point to MGE's certificate" for certain sections of land MGE claimed it had authority to serve. (Staff Exhibit 14 – letter from Dean Cooper to Rob Hack dated August 12, 1999). Despite being put on notice in 1999 that there was a problem with the tariff, MGE did nothing to correct the problem (Tr. pp. 106-107), and in early 2006 began construction activities in Seven Bridges (Tr. p. 130) in section 12, which constitutes the bulk of the currently-constructed, unauthorized MGE facilities which are at issue.

Since MGE has clearly constructed, installed, owned, operated, controlled, managed and/or maintained natural gas distribution facilities (gas plant) and/or provided natural gas service in Sections 10, 11, 12, 13 and 14 of Township 52 North, Range 35 West, in Platte County, Missouri, without first obtaining the required authorization from the Commission (i.e., a CCN to serve those sections), and in fact has not even requested a CCN to serve sections 10, 11 and 12, the question arises as to what the Commission should order.

The Commission clearly has authority to seek injunctive relief against MGE for its unauthorized actions. This was done in *Public Service Commission v. Kansas City Power & Light Company*, 325 Mo. 1217, 31 S.W.2d 67 (Mo. 1930). See also, *State ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593, 596 (Mo. App. 1993). Furthermore, Section 386.360 RSMo provides:

> 1. Whenever the commission shall be of the opinion that a public utility, municipal gas system, person or corporation is failing or omitting or about to fail or omit to do anything required of it by law or by order or decision of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order or decision of the commission, it shall direct the general counsel to the commission to commence an action or proceeding in any circuit court of the state of Missouri in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunctions. The

> commission's general counsel shall thereupon begin such action or proceeding by a petition to such court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. Such relief shall not be limited to permanent forms of mandamus and injunction, but shall include all available forms of injunction and mandamus, including temporary restraining orders, preliminary injunctions, permanent injunctions, preliminary orders of mandamus, and permanent orders of mandamus.
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> 4. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction, or both, issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief.

In addition, the Commission's general jurisdiction statute, Section 386.250, states the "jurisdiction, supervision, powers and duties of the public service commission" shall extend:

> (1) To the manufacture, sale or distribution of gas, natural and artificial, and electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to gas and electric plants, and to persons or corporations owning, leasing, operating or controlling the same;
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> * * *
>
> (7) To such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly.

The Supreme Court of Missouri has also stated, in discussing the state's Public Utilities Act and the legislative intent behind it, shortly after its enactment, that the legislature "gave the commission plenary power to coerce a public utility corporation into a safe and adequate service and the performance of the public duty unto which its franchise bound it." *State ex rel. Missouri Southern Railroad Company v. Public Service Commission*, 259 Mo. 704, 724; 168 S.W. 1156, 1163 (Mo. 1914). Although this case is old, at least as recently as 2004 the Commission itself cited this *Missouri Southern Railroad Company* case in its Report and Order on Remand, issued on December 2,

2004, in *GS Technology Operating Company, Inc., d/b/a GST Steel Company v. Kansas City Power & Light Company*, Case No. EC-99-553. And as the Commission stated in its *Order Adopting List of Issues, Order of Opening Statements, List and Order of Witnesses and Order of Cross-Examination* issued herein on October 10, 2007, "an ancillary issue to any case before the Commission" is the provision of safe and adequate service.

Accordingly, EDG requests that the Commission issue an order directing MGE to cease operating as a natural gas distribution company in these sections (listed in the statement of this issue) of Platte County, Missouri[10] and to transfer the existing MGE natural gas distribution facilities in these sections[11] to EDG at net book value and assist with the orderly transfer of natural gas service from MGE to EDG so that customer disruption is minimized. (Gatz Direct, Empire Exhibit 3, pp. 3, 11 and 12). Mr. Warren of the Staff appears to agree, stating that "The Commission should order MGE to facilitate a seamless transition from MGE service to EDG service for these customers." (Warren Surrebuttal, Staff Exhibit 19, p. 7). At the present time, this would primarily involve the customers in the Seven Bridges development; the Commission should recall that MGE began its construction activities in Seven Bridges in 2006 – well after being put on notice by the 1999 letter from Dean Cooper that MGE's service territory tariff was incorrect. (Tr. p. 130 and Staff Exhibit 14). As Mr. Hack testified at the hearing in response to questions from Commissioner Clayton, MGE is serving only 39 customers in Seven Bridges, the first of which came online in May 2006. (Tr. pp. 126-130). As Mr. Klein testified, the transition of these Seven Bridges customers from MGE to EDG could be accomplished very easily and with minimal inconvenience to the customers. (Tr. pp.

[10] With the limited exceptions discussed later.
[11] Except those necessary for serving the limited exceptions mentioned in footnote 10.

156-157). The Commission can in its order also provide for the developer to be kept whole in the manner as testified by Mr. Gatz at the hearing. (Tr. pp. 216-219). In the alternative the Commission should order MGE to abandon its facilities in these unauthorized areas at the time EDG facilities are available to serve the affected customers. (Gatz Direct, Empire Exhibit 3, pp. 3, 11 and 12). In either event, MGE should be ordered to assist with an orderly, seamless transition of affected customers from MGE to EDG. (*Id.*).

With regard to the limited exceptions mentioned in footnotes 10 and 11; first, with regard to the limited number of customers being served by MGE directly off/along MGE's Leavenworth supply line, MGE should be allowed to continue to serve them until EDG has facilities in the area available to serve them. (See, Warren Surrebuttal, Staff Exhibit 19, p. 7). Second, with regard to the limited number of customers being served by MGE in section 12 and section 13 east of Prairie Creek and north of Fox Creek, MGE should be allowed to continue to serve these customers, since the creeks provide a natural barrier between the areas of MGE and EDG. (See Warren Rebuttal, Staff Exhibit 18, p. 5). However, the Commission should make it clear in its order that the areas in sections 12 and 13 east of Prairie Creek and north of Fox Creek that MGE would be allowed to serve are as follows: specifically, in section 12, MGE should be limited to serving in the area it is currently serving on Oakmont Drive east of Prairie Creek; and in section 13, MGE should be limited to serving only the area east of Prairie Creek and north of Fox Creek. (Gatz Surrebuttal, Empire Exhibit 5, p. 3).

In addition, the Commission should direct its General Counsel's Office to seek injunctive and/or other necessary and appropriate relief against MGE in court, as an incentive for MGE to comply with the Commission's order.

6. Should the Commission order MGE to formally provide notice to EDG of any future contact MGE has with developers in areas adjacent to the EDG service area boundaries in Platte County so that EDG can determine where and when future development is occurring along its boundaries?

The simple answer to the question posed by this issue is "Yes." MGE should be ordered to provide notice to EDG of any future contact MGE has with developers in areas adjacent to the EDG service area boundaries in Platte County so that EDG can determine where and when future development is occurring along its boundaries, if such development is expected to encroach into EDG's service area, and most importantly to avoid future encroachments by MGE into EDG's service area in Platte County. (Gatz Surrebuttal, Empire Exhibit 5, p. 3).

Conclusion

For all of the foregoing reasons, The Empire District Gas Company respectfully requests that the Commission adopt its position as set forth above on each of the issues set forth herein.

Respectfully submitted,

/s/ Jeffrey A. Keevil

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was sent to counsel for parties of record by depositing same in the U.S. Mail, first class postage prepaid, by hand-delivery, or by electronic mail transmission, this 21st day of December, 2007.

/s/ Jeffrey A. Keevil