

**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,)	Case No. GA-2007-0289, et al.
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.)	

BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

The Office of the Public Counsel supports the certificate of public convenience and necessity (CCN) application of Empire District Gas (“Empire” or “EDG”), and recommends that the Missouri Public Service Commission deny Missouri Gas Energy’s (MGE) CCN application. In this atypical CCN application case, the Commission will be required to determine whether a utility’s lawful service territory can be expanded through a tariff filing that erroneously includes an area greater than the service area certificated by the Commission. The only lawful conclusion is that a service area may only be expanded as provided by the Missouri Legislature, as set forth in §393.170 RSMo 2000.¹ The Missouri Legislature enacted §393.170 to require a prior Commission determination that a utility’s provision of service in a particular area “is necessary or convenient for the public service.” Without this essential finding, a utility’s provision of service in an area where it did not receive a certificate of service is unlawful.

¹ All Missouri statutory references are to RSMo 2000 unless otherwise noted.

Issue 1: Who has a certificate of convenience and necessity 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?

Empire received a CCN from the Commission to serve T52N, R35W sections 1, 2, 3, 10, 11, and 12; and T52N, R34W sections 4, 5, and 6, and accurately lists these areas in its tariff. (Ex. 18, Schedule 6). MGE was not granted a CCN by the Commission to serve these areas, and MGE can point to no Commission order granting such authority. Certificates of convenience and necessity are a required prerequisite to a utility offering natural gas distribution services. §393.170. “The commission is purely a creature of statute, and its powers are limited to those conferred by statute, either expressly or by clear implication as necessary to carry out the powers specifically granted.” State ex rel. Util. Consumers Council, et al. v. P.S.C., 585 S.W.2d 41 (Mo.banc 1979). The powers “conferred by statute” regarding service area authority expressly require the granting of a CCN by the Commission as a prerequisite to a gas utility serving an area.

MGE claims to have the authority to serve areas where it did not receive a CCN from the Commission based solely on an erroneous area listing by MGE in its tariff. Prior case law, under very similar circumstances, contradicts MGE’s interpretation of the requirements for receiving service authority. In Doniphan Telephone Company v. Public Service Commission, 377 S.W.2d 469 (Mo.App. 1964), the Court of Appeals considered Doniphan Telephone Company’s (DTC) claim of authority to serve an area based on DTC’s filing of a map with the Commission. Just like MGE’s claim in the present case, the Commission had not issued a CCN to DTC for the area in question. The Court of Appeals stated that “[i]t 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 Court further held:

The legislature has seen fit to best 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.

In the present case, the Commission never contemplated the question of the public convenience and necessity for MGE to serve these areas. Citing to Public Service Commission v. Kansas City Power & Light, 31 S.W.2d 67 (Mo. 1930), the Court in *Doniphan* stated:

"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 or 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*. These two statutes are similar in provisions and purposes. Both clearly contemplate that any right of the nature here claimed can be obtained only 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. Hence, we further rule that Doniphan possesses no property right whatsoever in the three mile strip.

Without ambiguity, the Court in *Doniphan* concluded that *any right* to serve an area can be obtained only by securing a certificate of convenience and necessity from the Commission, after proper notice and a hearing. DTC was not allowed to rely on the utility's filing of an incorrect service area map as a basis for expanding that utility's service area, just as MGE also lacks the proper authority to serve these areas. Proper notice and a hearing never occurred regarding MGE serving the areas in question. Without a Commission approved CCN, after notice and a hearing, MGE does not have a CCN nor the authority 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.

Issue 2: Should MGE be granted a CCN to serve T52N, R35W sections 13 and 14 in Platte County, Missouri.

The Commission should reject MGE's application for a CCN to serve T52N, R35W sections 13 and 14 in Platte County, Missouri. The Seven Bridges Subdivision will cover T52N, R35W sections 11, 12, 13 and 14. (Staff Ex. 4). Empire District Gas Company is currently certificated by the Commission to serve T52N, R35W sections 11 and 12. (Ex. 18, p. 4). Empire already possesses the lawful authority to serve a portion of the Seven Bridges Subdivision, and denying MGE's CCN application and approving Empire's CCN application will avoid duplicated services and will conserve resources. A single natural gas provider serving a single subdivision rather than multiple providers also avoids confusion over which utility to contact should an emergency arise that requires a quick service response from the utility. (Ex. 18, p.5).

Issue 3: Should Empire be granted a CCN to serve T52N, R35W sections 13, 14, 15, 22, 23 and 24, in Platte County, Missouri?

There is a public demand for natural gas service in the Seven Bridges Subdivision. With Empire having the lawful authority to serve the two other sections which will encompass the Seven Bridges Subdivision (T52N, R35W sections 11 and 12), granting Empire its CCN application to serve the adjacent sections 13, 14, 15, 22, 23 and 24 will ensure a single provider serves the entire subdivision and expected future development in the area.

Issue 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 T52N, R35W; Sections 1, 2, 3, 4, 5 and 6 of T52N, R34W; Sections 1 and 12 of T52N, R36W; and Sections 4, 5 and 6 of T52N, R33W, 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 has not granted MGE a CCN authorizing it to provide natural gas service in these sections. Accordingly, MGE should be ordered to correct its tariffs by removing all references to areas where MGE does not hold a Commission-approved CCN. Under §393.140, the Commission has the authority to direct MGE to correct its tariff to properly reflect its lawful service territory.

Case law also supports the Commission's authority to amend MGE's tariff. In State ex rel. Hotel Continental v. Burton, 334 S.W.2d 75 (Mo. 1960), the Missouri Supreme Court held that "the Public Service Commission has only the power and authority specifically conferred upon it by the statutes and such power as may be reasonably necessary to enable the Commission to effectively exercise the power

specifically granted.” To enable the Commission to effectively exercise its power to designate the service areas of utility companies, and to effectively exercise its power over utility tariffs, the Commission must have the power to direct MGE to amend its tariffs in accordance with the authority granted to the Commission under §393.170.

Issue 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 T52N, R35W, in Platte County, Missouri? If so, what remedy(ies) or relief should the Commission order?

The record evidence indicates that MGE has 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 T52N, R35W, in Platte County, Missouri. Accordingly, MGE has acted unlawfully by constructing facilities and providing service in an area where it has no CCN.

Public Counsel is concerned with the consumer impact of an order directing MGE to withdraw from these areas. However, we are also concerned with the impact of reducing the significance and weight carried by a CCN order, and the elimination of the scrutiny required by a CCN filing under §393.170. The appropriate remedy is a seamless transition of the existing customers from MGE to Empire. MGE should be required to continue serving the existing customers until such time that Empire is able to provide service. If the Commission concludes that Empire and not MGE will be granted a certificate to serve the Seven Bridges Subdivision, Public Counsel is hopeful that MGE

will concur with the need for a seamless transition, and will cooperate with Empire to transfer customers.

Mr. Robert Hack, Chief Operating Officer of MGE, acknowledged that a local distribution company is responsible for ensuring its tariff filings accurately reflect only the areas where it received a lawful CCN approved by the Commission pursuant to §393.170. (Tr.87). This responsibility includes following up with inquiries and corrections when the accuracy of the areas listed in MGE's tariff are legitimately questioned. Well before MGE agreed to provide natural gas service to Seven Bridges in January 2006, MGE was put on notice of a discrepancy between the service areas listed in MGE's tariff and the service areas for which MGE received a CCN from the Commission. (Tr.99). After MGE suggested to Empire's predecessor UtiliCorp United Inc. d/b/a Missouri Public Service (MPS) that MGE and MPS split overlapping service areas in Platte County, MPS advised MGE in a letter dated August 12, 1999 that MGE's CCN authority for the Platte County does not include areas where MGE claimed to have overlapping authority with MPS. (Staff Exhibit 14). At that point MGE was put on notice of the discrepancy in its tariff, and should have resolved the problem before expanding into an area where MGE has no CCN. MGE continues to expand into these areas despite the uncertain outcome of this case and appears uninterested in mitigating any losses associated with a Commission order directing MGE to withdraw service. Any such losses should be upon MGE's shareholders only, and ratepayers should be held harmless from MGE's error.

Issue 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?

This issue seeks to impose a requirement on MGE that to Public Counsel's knowledge is not imposed upon any other local distribution company, including Empire. Public Counsel is not aware of any public benefit that would occur from this requirement, other than to head-off territory disputes before MGE begins constructing facilities to serve a new development. However, the Commission's resolution of the issues in this case will hopefully clarify the lawful boundaries of both companies and avoid any future disagreements over service areas. Public Counsel takes no position on this issue except to suggest that if the Commission orders that MGE provide such notice, the same requirement should also apply to Empire.

Conclusion

Two local distribution companies are before the Commission, and each followed a different path before arriving where they are today; seeking the authority to expand their service territories into the same areas of Platte County. MGE made errors in defining its service territory, and those errors resulted in MGE's unlawful construction of gas facilities and the unlawful provision of gas service. Without that unlawful encroachment, MGE would have little if any nexus with the new areas it seeks to expand into. Empire, on the other hand, requested and received the lawful authority under a Commission-approved CCN to serve a portion of these areas. Empire continues to follow the lawful process of requesting and receiving a CCN before serving an area. MGE should not be

rewarded for its erroneous tariff filing, its decision not to correct the errors when discovered, and its unlawful provision of service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 21st day of December:

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