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**

STAFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and, in accord with the Commission's *Order Establishing Post-Hearing Procedural Schedule*, and its November 28, 2007, *Order Granting Motion For Extension of Time*, which reset the filing of proposed findings of fact and conclusions of law to December 21st, states:

The following proposed findings of fact and conclusions of law are being submitted pursuant to the procedural orders in this case. The proposed findings of fact and conclusions of law are grouped by issue in the same manner as the Staff's Brief, filed this same date, which addresses the contested issues of this case as those issues were set forth in the Commission's procedural orders.

The Missouri Public Service Commission, having considered all of the competent evidence upon the whole record, makes the following findings of fact and conclusions of law:

I. ISSUES 1 and 4: Which LDC holds Certificates of Convenience and Necessity to provide gas service in Platte County?

Findings of Fact

A. Issue 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 Commission's January 12, 1956 Order in Case Number 13,172 issued on January 12, 1956, authorized Missouri Public Service Company, a predecessor of Empire, to construct, operate and maintain a natural gas transmission and distribution system to serve T52N, R35W sections 1, 2, 3, 10, 11, and 12, and T52N, R34W sections 4, 5, and 6, among other sections, townships and ranges, in Platte County. (Empire Ex 3, Gatz Dir. lns 11-18; Staff Ex 18, Warren Reb, lns 4-17 including Sch. 3,4,5, and 6; Tr. 221, lns 11-25) Staff witness Warren prepared a Section Map[1] that shows sections certificated to both Empire and MGE for the provision of natural gas service. The parties did not challenge Mr. Warren's Section Map, or the information contained in it; therefore, the Commission may rely on it as incontrovertible evidence of the approximate placement of MGE's Leavenworth Supply Line (LSL) and the area CCNs, by section, of MGE and Empire in Platte County.

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

The number of sections of territory listed at issue above in the original issues list were reduced from 23 to 22 sections when Empire witness Ron Gatz deleted a reference to Section 6, T52N, R33W on page 4, line 13 of his rebuttal testimony (Empire Ex 4; Tr. p. 213, lns 3-13).

[1] The Section Map is titled "Sections in Platte County Certificated to MGE and EDG for Natural Gas Distribution, Sections not Certificated to MGE but in tariff, and Sections Requested in this Case by MGE and EDG". This map shows the Leavenworth Supply Line (LSL) and the boundary between MGE's and Empire's adjoining certificated areas that are just south of Platte City in Platte County and are at the heart of this dispute. The Section Map is Schedule 3 to Warren Rebuttal, Staff Ex 18, and is also separately marked for hearing as Staff Ex 2 and marked as Staff Deposition Ex 9 of Hack Deposition, Staff Ex 16).

MGE and Empire do not claim Section 6, T52N, R33W to be a part of their certificated areas and this is correctly reflected on their tariff sheets and on the Section Map. (Staff Ex.18, Warren Reb. Sch. 1, 3, and 6; Staff Ex 2).

The Commission granted The Gas Service Company, a predecessor of MGE, its CCN for sections of territory in Platte County in Commission Case No. 12,632. In this case[2], the Commission issued its first of three orders, a May 24, 1955 Report and Order, which granted both line and area CCN's to MGE. (Staff Ex 18, Warren Reb p. 3 lns 1-6, Sch. 2, 3, 4, and 5; Staff Ex 7, Case No. 12,632 Report & Order-May 24, 1955, p. 9, Ordered para. 2 and 3).

1. Case No. 12,632 Granted MGE's "Line" Certificate (CCN) for the Airport Supply Line

Ordered paragraph 2 of the May 24, 1955 Report and Order provides:

> "That The Gas Service Company be and is hereby authorized to construct, operate and maintain a ten-inch pipe line for the purpose of supplying natural gas to the Mid-Continent Airport site as set forth on Exhibit "B" attached to its supplemental application which is hereby referred to and made a part hereof."

Staff witness Henry Warren, using both "Exhibit B" of the May 24, 1955 order (Staff Ex 7) and "Exhibit A" of the December 18, 1956 Report and Order in Case No. 12,632 (Staff Ex 9), made a reasonable approximation of the airport supply line, which is referred to as MGE's Leavenworth Supply Line (LSL), and placed the LSL on map Schedules 2, 3, 7, and 8 of his rebuttal testimony[3] . (Warren Reb. Staff Ex 18). MGE's LSL starts near East Leavenworth, Missouri, and runs east about 10 miles to the Mid-Continental Airport, which is also known as the MCI, or Kansas City International Airport. (This airport is sometimes referred to as KCI,

[2] In its November 13, 2007 *Notice And Order Amending Post-Hearing Procedural Schedule*, the Commission took official notice of Case Number 12,632, *Application of the Gas Service Company for a Certificate of Convenience and Necessity to Serve as a Natural Gas Public Utility a Described Area in Platte County, Missouri*, in its entirety.
[3] Map Schedules 2, 3, 7, and 8 of Warren's Rebuttal testimony are the same as Staff Exhibits 1 (Warren Sch. 2), 2 (Warren Sch. 3), 4 (Warren Sch 7), and 5 (Warren Sch 8).

although KCI technically designates the downtown airport).

Referring to the Section Map, the MGE LSL can be followed from origin to destination. The LSL start point is located in Section 12, T52N, R36W and runs east through Sections 7 through 12, T52N, R35W, before the line reaches MGE's certificated service area entering MGE's Section 7, T52N, R34W. The LSL continues east through MGE's certificated area Sections 8, 9, 10, and 15 (just south of 10) of T52N, R34W. When asked "Would you agree that's a reasonable approximation of the Leavenworth supply line?" MGE witness Rob Hack replied "I have no reason to dispute that." (Tr p 74 ln 7 to p 75 ln 10).

The Commission's second order, issued on June 2, 1955, in Case No. 12,632 was styled "Order Modifying Commission Report and Order Dated May 24, 1955" (Staff Ex 8). The purpose of this order was to permit MGE's predecessor, The Gas Service Co., to increase the size of the LSL from a 10-inch pipeline to a 12-inch pipeline. (Staff Ex 18, Warren Reb Sch. 5; Staff Ex 8, p. 2).

The Commission's third and last order in Case No. 12,632 was issued December 18, 1956. (Staff Ex 18, Warren Reb. Sch. 5; Staff Ex 9). This order acknowledges the restrictions placed on the LSL in the first order and expands the sections that MGE's predecessor may serve from the LSL to include sections in southern Platte County around the community of Platte Woods and the southern Clay County community of Gladstone which MGE already had a CCN to serve. (Staff Ex 18, p. 3, lns 12-19). Ordered paragraph 1 provides:

> "Ordered: 1. That The Gas Service Company be and is hereby authorized to construct, maintain and operate connecting lines that will enable it to make full use of and is hereby authorized to so use the 12 inch line heretofore authorized in orders issued herein on May 24 and June 24, 1955, supplying gas to its distribution system in Platte Woods and Gladstone, Missouri, and in other areas for which the applicant has heretofore been certificated, the route of said lines being more fully described by a map attached to the application and made a part thereof and marked as Exhibit A which is hereby referred to and made a part hereof."

At deposition, MGE witness Hack testified he knows the difference between a line certificate and an area certificate and he agreed the result of the orders in Case No. 12,632 was to grant MGE a line certificate for constructing, operating, and maintaining a 12 inch supply line from the Southern Star interstate pipeline to the Kansas City airport. (Staff Ex 16, Hack Dep. p 14 ln 21 to p 15 ln 24)

2. Case No. 12,632 Granted MGE's "Area" Certificate (CCN) to Provide Gas Service in Platte County

Ordered paragraph 3 of the May 24, 1955 Report and Order, the first order in this case, provides a clear and unambiguous description of MGE's Platte County service territory by section, township, and range numbers:

> "ORDERED: 3. That the Gas Service Company be and is hereby granted a certificate of convenience and necessity to provide natural gas service within the following area:
> Beginning at the northeast corner of Section 9, Township 52, Range 33, thence west a distance of nine miles to the northwest corner of Section 7, Township 52, Range 34, thence south a distance of nine miles to the southwest corner of Section 19, Township 51, Range 34, thence east distance of approximately four and one-half miles to the center of the south line of Section 23, Township 51, Range 34, thence north a distance of one mile to the center of the north line of Section 23, Township 51, Range 34, thence east a distance of on-half mile to the northeast corner of said section, thence north a distance of three miles to the northeast corner of Section 2, Township 51, Range 34, thence east a distance of four miles to the southeast corner of Section 33, Township 52, Range 33, thence north a distance of five miles to the point of beginning, all in Platte County, Missouri."

Staff witness Warren applied this information to the Section Map[4], discussed and referenced above, by marking the sections in Platte County that are certificated to MGE in Case No. 12,6632 and to Empire in Case No. 12,172. The Section Map shows the LSL and the boundary between MGE's and Empire's adjoining certificated areas that are just south of Platte City in Platte County, which are at the heart of this dispute. (See also Staff Ex 18, Warren Sch. 4 and 5).

[4] See Footnotes 1 and 2.

Conclusions of Law

Based on Commission Case No. 12,632 and the Section Map which illustrates MGE's certificated sections in that case, the Commission has not granted MGE a CCN to provide natural gas service to Platte County 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 Section 4 and 5 of T52N, R33W. From the clear language of the orders in Case No. 12,632, the Commission granted MGE a line certificate, not an area certificate, for its Leavenworth Supply Line to transport natural gas through T52N, R35W sections 7,8,9,10, 11, and12; and T52N, R36W section 12.

II. SUB-ISSUE 4: 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?

Findings of Fact

The evidence in this case established that MGE's tariff incorrectly lists sections of territory in Platte County which MGE does not have statutorily-required authorization to serve. MGE did not seek and the Commission did not grant MGE a CCN to serve the above-listed 22 sections of territory.

Conclusions of Law

Missouri statute[5] and prevailing case law require gas corporations to seek and obtain the Commission's permission and approval to serve a new territory before beginning construction.

1. Section 393.170 RSMo Requires the Commission to Grant a CCN to a Public Utility.

Under Section 393.170 RSMo, the Missouri Legislature has required the Commission to

[5] Section 393.170

pass on the question of approving the service territory of public utilities. In pertinent part, Section 393.170 requires:

1. "No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant … *without first having obtained the permission and approval of the commission*."

2. "*No such corporation shall exercise any right or privilege* under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, *without first having obtained the permission and approval of the commission*…"

3. "The commission shall have the power to grant the permission and approval herein specified whenever it shall *after due hearing* determine that such construction or such exercise of the right, privilege or franchise *is necessary or convenient for the public service.* The commission may by its order impose such condition or conditions as it may deem reasonable and necessary…" (*emphasis added*)

2. Missouri Case Law Requires the Commission to Address the Issue of Service Territory

Missouri courts have long held the Commission is not only empowered to pass on the question of public necessity and convenience, but that Section 393.170 requires the Commission to do so:

> "A primary function of the Commission in its regulation of electric utilities is to allocate territory in which they may render service. The Commission is empowered by statute to pass upon the question of public necessity and convenience (1) for any new company or additional company to begin business anywhere in the state, or (2) for an established company to enter new territory (citation omitted)…Those powers were created in 1913 by the enactment of present Section 393.170, V.A.M.S., which has since remained in effect, without change." *State ex rel.Harline v.Pub. Serv.Comm.of Missouri*, 343 S.W. 2d 177 at 182 (Mo.App.1960).

> "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 [emphasis added]* (citations omitted)" *State ex rel. Doniphan Telephone Company v. Public Service Commission*, 377 S.W. 2d 469 at 474 (Mo.App. 1964).

The Doniphan Court applied Section 392.260, at that time the telephone company counterpart of Section 393.170, which applies to gas, electric, water, and sewer utilities, and likened Section 392.260 to Section 393.170:

> "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 392.260. These two statues are similar in provision 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." *Id.* at 475.

Under these cases, MGE has no claim to an area certificate to serve Platte County 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 Section 4 and 5 of T52N, R33W. The Commission's orders in Case No. 12,632 clearly grant MGE a line certificate for its Leavenworth Supply Line to transport natural gas through T52N, R35W sections 7,8,9,10, 11, and 12; and T52N, R36W section 12. (Section Map, Staff Ex 2; Staff Ex 1). As the Court explained in *State ex rel. Union Electric Company v. PSC*, 770 S.W.2d 283 (Mo.App. W.D. 1989) a line certificate is different from an area certificate:

> "…line certificate authority…carries no obligation to serve the public generally along the path of the line. The elements of proving the public necessity of a line are different from the test applied to proving the public necessity of area certificate authority." (*Id*. at 285).

Here, the Court held Union Electric could not serve a traffic signal from its line, even though it held a line certificate, because another utility had an area certificate to provide service at the traffic signal's location. Likewise, MGE may not rely on its line certificate to provide service in the sections granted to Empire for area service.

More importantly, the language in the Case No. 12,632 orders cannot be construed beyond the clear meaning of the language contained in the orders. The Commission granted

MGE's predecessor a line CCN, not an area certificate, for its Leavenworth Supply Line to transport natural gas through T52N, R35W sections 7, 8, 9, 10, 11, and 12; and T52N, R36W section 12. In its December 18, 1956 order, discussed above, the Commission provided a clear and unambiguous description of the sections of territory for which MGE holds an area CCN to provide gas distribution service.

3. MGE has Not Applied for a CCN to Serve Any of the 22 Sections Listed in its Tariff and May Not Rely on Section 386.270 to Follow its Tariff.

MGE defends its misstep of constructing services in an area without a CCN by wrongly relying on Section 386.270 for the statutory authority to follow its tariff – a tariff based on incorrect information it supplied to the Commission in its 1997 tariff filing (File No. 9700571). (Tr. p 16 ln 22 to p17 ln 9; p 135 ln25 – p 136 ln 1; Staff Ex 16, Hack Deposition p. 43 ln 17 – 23). Section 386.270 provides:

> "All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be *prima facie* lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be *prima facie* lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter." (*emphasis added*)

Based on the evidence of record in this case, MGE's tariff is not lawful because it lacks the required statutory authority. The Commission did not grant MGE an area CCN for the 22 sections of territory that MGE incorrectly lists in its tariff[6], as required under Section 393.170, and MGE cannot produce an area CCN showing service authority for any of these 22 sections.

4. MGE's Tariff Lacks Statutory Authority and is Invalid

To refute MGE's arguments, the Commission notes two cases which contradict MGE.

[6] As discussed above in para. I. B Issue 4, the Commission has <u>not</u> granted MGE a CCN to provide natural gas service to the 22 Platte County 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 Section 4 and 5 of T52N, R33W. See MGE tariff 6.15, shown in Staff Ex 18, Warren Reb. Sch. 1.

Both hold a tariff not based on statutory authority is invalid and without effect. *State ex rel. Doniphan Telephone Company v. Public Service Commission*, 377 S.W.2d 469 (Mo.App. 1964) and *Imperial Utility Corp. v. Borgmann*, 664 S.W. 2d 215 (Mo.App. W.D. 1983).

In Doniphan, cited and discussed above, the telephone company sought to add a 3 mile by 17 and ½ mile strip of land to its certificated exchange area. To do so "…Doniphan filed with the Commission a 'map' of the three mile strip with a schedule of rates applicable thereto. This was done without notice to the residents of the area, without a hearing, and without any accompanying or ensuing order issued by the Commission thereon." (*Doniphan* at 471). Doniphan's claim of authority to serve the 3 mile strip was based on two factors: (1) its certificate for the Greenville exchange area (that did not include the 3 mile strip) and (2) the act of filing a map of the three mile strip (and applicable rate schedule) with the Commission. (*Id.* at 473).

Doniphan argued "The service area maps previously described were filed with the Commission and by operation of law became effective. As such they are binding upon the Commission, the applicants and the utilities unless the Commission finds them to be unreasonable and arbitrary." The Court rejected Doniphan's argument holding "Nothing contained in the foregoing can be held to derogate the clear requirements of the Public Service Commission Law." The Court further ruled "…that Doniphan possesses no property right whatsoever in the three mile strip… A nonexistent property right cannot be violated or subjected to eminent domain." (*Id.* at 475).

The import of Doniphan is clear: A public utility cannot add to its certificated service area by filing a tariff. A tariff filed by a utility, putatively the map and rate schedule filed by Doniphan, cannot grant rights to a utility not granted to it by the Commission. The statutory

requirements under the Public Service Commission law must be followed by the utility and enforced by the Commission.

Imperial Utility Corp., a sewer utility, had in its tariff a provision authorizing it to record the legal description of property on which sewer charges are more than 30 days delinquent, the names and addresses of the title owners and the amount due. According to the tariff, the amount becomes a first lien on the property and, presumably an obligation ultimately enforceable by foreclosure. The Court invalidated Imperial's tariff holding the tariff purported to authorize a procedure whereby Imperial could have acquired rights against a new customer as a result of the charges owed by a previous customer. (*Imperial* at 217).

In rejecting Imperial's tariff, the Court ruled:

"…we conclude that Imperial 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." (*Id.* at 218)

Again, the Court invalidated a tariff that creates rights for a utility for which there is no statutory authority. Likewise, MGE may not claim rights to serve 22 sections of additional service territory in its tariff because the Commission never granted MGE the statutorily required authority to serve that territory.

MGE's tariffs must accurately reflect its service territory. Because MGE's tariff wrongly lists 22 sections for which the Commission has <u>not</u> granted MGE a CCN to serve, the Commission has a duty to order MGE to correct its tariffs. Therefore, the Commission orders MGE to remove Platte County 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 Section 4

and 5 of T52N, R33W from its list of certificated service territory. To do otherwise would mean the Commission was condoning MGE's violation of Sections 393.170 and 386.270.

III. 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 Township 52 North, Range 35 West, in Platte County, Missouri? If so, what remedy(ies) or relief should the Commission order?

Findings of Fact

MGE witness Hack admitted at hearing and deposition that MGE had built facilities in Sections 13 and 14, T52N, R35W, for the purpose of serving the Seven Bridges subdivision. (Tr. p.123, ln 6 to ln 17; Staff Ex 16 Hack Dep. p. 36 ln 2-8). Mr. Hack also stated that MGE had built facilities in Sections 11 and 12, T52N, R35W to serve Seven Bridges. (Staff Ex 16 p. 49 lns 1 – 11; p. 51 ln 24 – p. 52 ln 12) MGE is also providing gas service to customers in Sections 10 and 12, T52N, R35W. (Tr. p. 100 lns 3-6). Without authorization, MGE has built facilities and provided service in Empire's certificated area, Sections 10, 11, and 12 of T52N, R35W, and built facilities in the sections it has applied for, Sections 13 and 14, so MGE can serve Seven Bridges development.

Seven Bridges is an upscale subdivision and is located and growing in Sections 11, 12, 13 and 14 T52N, R35W. (See Staff Ex. 18, Warren Reb. Sch. 7, 8, and 9. See Photos, Staff Ex 15). Based on marketing intelligence gathered by Aquila (Empire) in 2004, Seven Bridges was expected to become a 200 to 300 lot subdivision. (Tr. p. 193, lns 21-25; p. 196 lns 3-6). According to Empire witness Ron Gatz, the current plans for Seven Bridges call for about 1500 homes to be built in multiple phases. (Empire Ex 3, p. 6 lns 21-23).

Despite the fact that it does not have authority to serve this area, MGE signed a contract with the Seven Bridges developer in January 2006. MGE began construction activities thereafter

and started serving "about 39" Seven Bridges customers in May 2006. MGE began working with the Seven Bridges developer up to a year and a half before signing the contract in January 2006. (Tr. p. 130 ln 10 – p 131 ln 13) This means MGE would have begun working with the developer as early as the summer of 2004, which is about the same time frame that Aquila's marketing representative made contact with Seven Bridges. (Tr. p. 193, ln 21 to p. 194 ln 6).

1. MGE Tariff Filing No. 9700571

The history of this tariff begins on February 20, 1997, when Mr. Rob Hack, in his capacity as Senior Attorney for MGE, initiated Tariff Filing No. 9700571 by letter to the Commission. (Staff Ex 20 Straub Reb, Sch. 2-6). Mr. Hack explains in his letter: "MGE files these tariff sheets to clarify the geographic boundaries of its service area as the Commission has directed by its order in Case Nos. GA-96-130 and GR-96-285."

Mr. Hack's letter further tells the Commission that the enclosed tariff sheets are not a compliance filing, but should be treated as a 'normal' tariff filing. One of the enclosed tariff sheets, SHEET No. 6.15 "Index of Certificated Areas", listed the 22 sections of Platte County for which MGE did not have an area CCN and are now at issue. (Straub Reb. Sch. 2-23).

In his April 11, 1997 letter to Mack McDuffey of the Commission Staff, Mr. Hack attached "…a list of orders that MGE used in preparing the above-referenced tariff filing [9700571]." In this attachment, Mr. Hack listed the May 24, 1955 Order in Case No. 12,632 and claimed that MGE used this order, among others, in preparing its tariff filing. (Straub Reb. Sch. 2-25; 2-26; and 2-27). In his deposition Mr. Hack stated MGE reviewed each order listed on the attachment. (Hack Dep. p 10 lns 1-3). At deposition, when asked if MGE was trying to add to its certificated area when it filed its tariff, Mr. Hack replied "No, we were trying to define our service territory, our existing service territory." (Hack Dep. p 23 ln 22 to p 24 ln 1).

Mr. Mike Straub, then the Assistant Manager-Rates, Energy Department of the Commission Staff, testified the purpose of the Tariff[7] was to place in MGE's tariff a description of its Commission authorized service area as required by Commission Rule 4 CSR 240-2.060, which was in effect at the time of the filing. This effort was undertaken to address the situation of utility services expanding with growing city boundaries and the difficulty of identifying whether a utility had a CCN to serve new areas. At that time, often in the context of a rate case, the Staff would work with a utility to seek clarification of its service areas. (Straub Reb p 3 lns3-8 and p 4 lns 1-12).

At a May 14, 1997 agenda session, the Commission took up MGE's Tariff filing presented on the Utility Operations Division Routing Slip. (Staff Ex 20 Straub Reb. Sch. 2-1 and 2-1 and marked separately at Staff Ex 13). The Routing Slip explains that the CCN cases reviewed by the Staff and Company granted either transmission or area certificates and that the Company's proposed service area was developed by listing the service area by township, range and section, and not by the more difficult metes and bounds format. (Routing Slip para. 3, Staff Ex 13) The Tariff filing, MGE SHEET 6.15 "Index of Certificated Areas", incorrectly listed the 22 sections for which MGE has no area CCN. That error went undetected through the approval process. (Straub Sch. 2-23).

However, at agenda, prior to approving the Tariff, after Mr. Straub discussed the purpose of the filing, the Commissioners directed Mr. Straub to add a hand-written statement on the Routing Slip which reflected the Commission's understanding of the tariff: "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. [initialed by Mike Straub and dated May 14, 1997]" (Straub Reb. Sch. 2-1 and 2-2 ; p. 4 lns 13-20; Tr. p. 273 lns 10-13). The Routing Slip was faxed to Mr. Hack on

[7] The "Tariff" refers to MGE Tariff Filing No. 9700571 which includes Tariff SHEET No's. 6.15 and 8.

May 19, 1997 (Straub Reb. Sch. 2-1 and 2-2). Mr. Hack acknowledged its receipt and placed it in the company files. (Tr. p. 79, lns 1- 7).

Questioned at hearing about whether he believed MGE acted in bad faith working with Staff on the tariff filing, Mr. Straub said: "…had I believed that the filing would have granted additional service area or that there were questionable sections, I would have addressed those. I thought all the sections were reviewed…I choose to believe the error was in good faith, but I have no proof one way or the other." (Tr. p. 273 ln 18 to p. 274 ln 9)

In any event, the substantial evidence of record in this case makes it clear the Commission did not intend to grant MGE rights to serve new territory as the result of its approval of MGE's Tariff Filing No. 9700571.

2. Aquila Informed Rob Hack of an Error in MGE's Tariff in its August 12th, 1999, Letter From Dean Cooper

In June of 1999, Aquila (or MPS) the predecessor company to Empire, became aware of MGE's plans to install facilities in the southeast quarter section of Section 6, T52N, R34W, which is part of Aquila's natural gas service territory. As a result of Aquila's discussions with local MGE officials, MGE halted the construction of facilities in this area. (Empire Ex 2, Teter Dir. p 2 lns 6-17). Because of this event, Aquila had its attorney send a letter to MGE referencing Commission Case No. 13,172 which clearly listed the sections of territory in Platte County that Aquila (Empire) was certificated to serve. That letter also requested MGE supply copies of any documentation concerning MGE's certified service territory in Platte County. MGE did not respond to the letter. (Id. at p. 3, lns 5-9; Staff Ex 14, August 12, 1999 Letter from Dean Cooper to Rob Hack)

Mr. Dean Cooper, attorney for Missouri Public Service (MPS or Aquila, now Empire), sent a letter to Mr. Hack, dated August 12, 1999, in which he responded to Mr. Hack's proposal

to make an agreement with Aquila concerning two Platte County sections: Section 6, Township 52, Range 34 and Section 1, Township 52, Range 35. Mr. Cooper writes to Mr. Hack:

> "In looking into this issue I first tried to confirm that MPS [Empire] and MGE in fact had 'overlapping' certificates. MPS's certificate for these sections results from Missouri Public Service Commission Case No. 13,172, which was issued on January 12, 1956. To search for MGE's certificate, I reviewed the Platte County cases listed in your e-mail to me of August 3, 1999. Of those cases, *only Commission Case No. 12,632, issued May 24, 1955, describes territory near the area in question. It includes sections to the immediate east and south of that granted to MPS in Case No. 13, 172* and was taken into account by the Commission in Case No. 13,172." (*emphasis added*)
> (Staff Ex 14).
>
> "…It is difficult for MPS to entertain MGE's proposal for splitting the sections in question, unless it can confirm that there are indeed overlapping certificates." (Id.)

Under questioning at hearing, Mr. Hack testified:

> Q. Is it your understanding Mr. Cooper told you that Sections 1 and 6 belonged to Empire? And by Empire, I mean its predecessor.
> A. Yes. (Tr. p. 90, lns 19-22)
>
> Q. And, Mr. Hack, you – you knew all of this back in 1999, the contents of this letter?
> A. I knew all of this. I'm not sure I understand what you mean, Mr. Berlin.
>
> Q. All that Mr. Cooper has conveyed to you in his letter of August 12th, 1999.
> A. I certainly read the letter. Yes.
>
> Q. And you – you must have understood it, correct?
> A. Yes, I did. (Tr. p. 91, lns 17-25)

Even though Mr. Hack admits he understood Mr. Cooper's letter, Mr. Hack took no further action after receiving the letter to correct or resolve the matter of MGE's issue or claim of overlapping service territories with Missouri Public Service (Empire).

(Staff Ex.16, Hack Dep. p 48, lns 2-9).

Based on Mr. Hack's testimony at hearing and deposition, Mr. Hack knew or should have known of a problem with the accuracy, or lack of accuracy, of the territory sections in Platte County that MGE listed in its Tariff, SHEET 6.15 "Index of Certificated Areas".

Q. When did you first become aware of the discrepancy between the areas listed in your tariff and the areas listed in the CCN orders?
A. The only time I recall ever looking at it, it was limited to the – the two sections described in the August '99 letter. (Tr. p. 99 lns 9 -14)

Further, MGE did not review the May 24, 1955 Order in Case No. 12,632 that describes MGE's Platte County service territory – an order to which Mr. Cooper referred Mr. Hack. Mr. Cooper also referred Mr. Hack to the January 12, 1956 order in Case No. 12,172 which granted MPS (Empire) its Platte County service territory. MGE did not check that order. MGE did nothing.

Just as startling is Mr. Hack's vacillation when asked whether MGE checks CCN orders or whether it relies on a tariff – a tariff with problems pointed out to him in Mr. Cooper's August 12th 1999 letter - when making decisions to build facilities. In one breath, Mr. Hack admits MGE checks its CCN orders before it builds facilities in an area, and in another breath says he misspoke - MGE checks the tariff. (Staff Ex 16, Hack Dep. p. 37 lns 10-12 and p. 38 lns 10-13). Mr. Hack, a knowledgeable regulatory attorney and senior executive, is trying to have it both ways, knowing full well of the certificate discrepancies in MGE's Tariff and, in his words "…The expansion of service territory occurs through the CCN process." (Id. at p. 39 lns 14-15).

Mr. Hack had also testified MGE is responsible for the accuracy of the information that it puts on its filed tariff sheets. (Tr. p. 87, lns 3-5 and 20-23; Staff Ex. 16, Hack Deposition p. 41, lns 17-22). That MGE took no further action to review or correct its tariff when it was made aware of the problems in its tariff, is a serious breech by MGE of its duty to ensure the accuracy of its filed tariff. MGE, relying on known inaccuracies in its tariff, constructed new facilities to serve new territory already certificated to Empire (Sections 10, 11, 12, 1, 2, and 3 T52N, R35W, and Sections 4, 5, and 6 T52N, R34W).

Conclusions of Law

1. MGE may not rely on its Tariff's "Force and Effect of Law" and is an Inapplicable Defense to Serving New Area Without a CCN

As discussed above at length, the courts will invalidate a tariff for which there is no statutory authority. Those arguments will not be addressed again. However, assuming *arguendo* a court would hold MGE's Commission approved tariff to have proper statutory authority, which it does not, the "force and effect of law" argument[8] is an inapplicable defense to MGE's serving new territory without a CCN.

The argument that an approved tariff has the "force and effect of law" comes from the "Filed Rate Doctrine", also called the "Filed Tariff Doctrine". This legal doctrine was enunciated in *Bauer v. Southwestern Bell Telephone Co.*, 958 S.W.2d 568 (Mo.App.E.D., 1997). The Bauer Court held: "A tariff that has been approved by the Public Service Commission becomes Missouri law and has the same force and effect as a statute enacted by the legislature (*citation omitted*)" (*Id.* at 570). While arguably a powerful holding, the Bauer Court's analysis does not end here. To flesh out the meaning and application of this holding, the Bauer Court further holds:

> "The filed tariff, or filed rate, doctrine governs a utility's relationship with its customer and provides that <u>*any rate*</u> filed with the appropriate regulatory agency is sanctioned by the government and cannot be the subject of legal action. [citing to *Metro-Link Telecom*, 919 S.W.2d at 692]. <u>*The filed tariff doctrine conclusively presumes that both a utility*</u> and its customers <u>*know the contents and effect of the published tariffs*</u>. [citing Id. at 693]" (*Bauer* at 570). (<u>*emphasis added*</u>)

This doctrine applies to a filed rate. Even if the court were to liberally construe the "…any rate filed…" language of this holding to apply to MGE's Tariff SHEET 6.15 "Index of

[8] MGE witness Mike Noack defends MGE's building facilities in Sections 11 and 12, T52N, R35W under the authority of a lawfully approved tariff. (MGE Ex 2, Noack Reb p 5 lns 19-22). At hearing, Commissioner Clayton questioned MGE Counsel on the issue of how to resolve two approved and conflicting tariffs that could be assumed to have the full force and effect of law. (Tr. p. 25, lns 8-15).

Certificated Areas" list, the intent of the doctrine is to govern "…a utility's relationship with its customer…", and not to grant new rights to a utility that may only be granted pursuant to Section 393.170.

And finally, the Filed Tariff Doctrine conclusively presumes that MGE knows the contents and effect of its Tariff SHEET 6.15 "Index of Certificated Areas". In 1997, MGE represented to the Commission that it had reviewed the May 24, 1955 order in Case No. 12,632 when it filed Tariff Filing No. 9700571. In that filing, MGE misrepresented to the Commission that it was authorized to serve 22 Platte County sections for which MGE had no area CCNs. Again, in 1999, Aquila (Empire) counsel alerted MGE by letter to Rob Hack, MGE's Senior Counsel, informing him that (1) Empire, not MGE, held the CCN to Section 6, T52N, R34W and Section 1, T52N, R35W, (2) that Empire was granted its Platte County service territory in Case No. 12,172, and (3) that MGE's Platte County service area was set forth in the May 24, 1955 order in Case No. 12,632.

MGE has a duty to provide accurate information to the Commission. Accordingly, and in light of the facts presented, MGE may not hide behind the Filed Tariff Doctrine as an affirmative defense to MGE's reliance on wrong information it supplied to the Commission in its tariff filing. To do so perverts the Filed Tariff Doctrine's required conclusive presumption MGE knows 'the contents and effect' of its tariff.

Even allowing MGE the favorable light of inadvertent error in its Tariff Filing (9700571), MGE knew, or should have known from the August 12th 1999 letter, that its "lawfully approved tariff" contained significant inaccuracies about its certificated area. Inexplicably, MGE chose to ignore the warnings of the 1999 letter. MGE may not rely on its knowing omission of the errors contained in its Tariff to hold out mistruths to the public about its certificated area, let alone rely

on them for the required authority to serve areas never granted by the Commission. MGE's clothing its actions and omissions in the "full force and effect of law" argument to justify its reliance on its Tariff fails the required presumption MGE knows the content and effect of its Tariff. This doctrine is inapplicable to this set of facts.

Because only a Commission order granting a CCN creates a utility's right to serve an area, MGE's knowing omission, and subsequent reliance on that omission to create rights it does not have, is inexcusable, without statutory authority, and unenforceable.

2. Remedies or Relief

Section 386.360 permits the Commission to seek injunctions from the courts for any violation. This includes an injunction against any LDC that "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." The statute does not require the Commission to show harm where a statute creates the injunctive right. *Danforth v. Independence Dodge*, 494 S.W.2d 362.

Two cases that demonstrate the Commission's ability to enjoin include, *State ex rel. Public Service Com. V. Missouri Southern R. Co.*, 214 S.W. 381 (Mo. 1919), and *Public Service Com. V. Kansas City Power & Light Co.*, 31 S.W.2d 67 (Mo. 1930). In the Missouri Southern Railroad case, the court found that a writ of mandamus was the appropriate remedy to force the railroad to perform a positive legal duty. Later in the Kansas City Power & Light Co. case, the court affirmed an injunction to stop the power company from distributing electricity along lines without a certificate of convenience and necessity. From these cases, it seems clear that the Commission could seek an injunction prohibiting MGE from providing service in sections of Platte County for which it has no CCN or seek a writ demanding that MGE abandon or sell its

facilities located in sections where the company has no CCN. Again, looking at the Doniphan Court holding, a utility has no constitutionally protected property rights to a territory where it has no CCN.

Therefore, based on all the above, the Commission:

1. Orders MGE to correct its Tariff SHEETS 6.15 and 8 and to bring its Tariff into compliance with the May 24, 1955 Order of the Commission in Case No. 12,632 by removing from its Tariff the 22 Sections of Platte County listed in SHEET 6.15 "Index of Certificated Areas" for which it has no area CCN from the Commission[9].

2. Orders MGE to either abandon or to sell to Empire the facilities that MGE has built in:

   (a) Sections 10, 11, and 12, T52N, R35W which are certificated to Empire pursuant to the January 12, 1956 Commission Order in Case No. 12,172; and in,

   (b) Sections 13 and 14, T52N, R35W for supervening reasons of public interest more fully explained below.

With regard to MGE's incursions into the far southeastern edge of Section 12 T52N, R35W, and the northeastern edge of Section 13 T52N, R35W, the Commission modifies appropriate certificates because the incursions are at the ends of two streets, Oakmont Drive and NW 126th Street, which belong to subdivisions that MGE already serves in its certificated area. (Staff Ex 18, Warren Reb Sch. 8 and 9). Because MGE's serving the ends of both streets are separated by the natural boundaries of Prairie Creek and Fox Creek, and because these streets are

[9] Refer to FN 3 above: As discussed in para. I. B Issue 4, the Commission has not granted MGE a CCN to provide natural gas service to the 22 Platte County 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 Section 4 and 5 of T52N, R33W. See Staff Ex 18 Warren Reb p. 6 ln 16 – p.7 ln 3; MGE tariff 6.15, shown Warren Rebuttal Sched 1 and the Section Map, Staff Ex 2.

outgrowths of larger subdivisions located in MGE's certificated area, both creeks provide a reasonable boundary between service providers. (Staff Ex 21, Warren Surr. p. 7 lns 3-10).

Staff witness Warren testified at hearing it is not a common situation for LDCs to have service territories next to each other. (Tr. p. 246 lns 6-8) That Prairie Creek and Fox Creek sit in a flood plain and that there is no known development that would extend into the creek or flood plain provides an economical, feasible natural barrier which would eliminate customer confusion among service providers. (Tr. p. 246 lns 12-21; p 247 lns 10-25; p 248 lns 1-16). MGE's service at the ends of these streets represent small areas that Empire does not oppose and are areas that should be defined in a CCN order. (Empire Ex. 5, Gatz Surr. p 3, lns 1-16). Section 393.170.3 provides "The Commission may by its order impose such condition or conditions as it may deem reasonable and necessary."

MGE witness Hack testified MGE serves a "handful" of customers, primarily in Sections 10 and 12 (T52N, R35W) directly off the LSL. (Tr. p. 126 lns 19-21). According to MGE witness Mike Noack, not including the Seven Bridges customers, MGE provided service to a customer in Section 12 in 1960. In 1992 and 1993, MGE began providing service to two customers in Section 10, to another in Section 10 in 2002, and another in Section 12 in 2006. (MGE Ex 2, Noack Reb p. 5 lns 1 – 6). For reasons discussed above, the Commission adopts Staff's recommendation these "handful" of customers, those customers served directly off the LSL, be permitted to remain MGE customers should Empire not wish to extend its service lines to serve them. (Staff Ex 18, Warren Reb p. 7, lns 5 – 10).

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

Findings of Fact

MGE is not be granted a CCN to serve Sections 13 and 14, T52N, R35W, for the following reasons:

(1) MGE's Application for a CCN to serve two sections, 13 and 14, is founded on wrong information it supplied to the Commission stating "MGE already has a certificate from the Commission to serve adjacent sections 11 and 12 in that same Township and Range…" (MGE Application p. 2, para. 6). As already discussed at length in Brief Section I, paragraph B above, Empire has the CCN to serve sections 10, 11, 12, 1, 2, and 3, T52N, R35W, which are located just north of Sections 13 and 14. The import of MGE's erroneous assumption is that MGE has based its ability to serve Sections 13 and 14 from facilities it has built in Sections 10, 11, and 12 that are certificated to Empire and for which MGE holds no area CCN from the Commission. "It would not be logical or practical for the Commission to grant MGE a CCN to serve Sections 13 and 14 under these circumstances." (Staff Ex 19, Warren Surr. p. 5 lns 15-16).

(2) The Commission may not consider MGE's request for a modified area CCN because MGE's Application is deficient and does not meet the standards set forth under 4 CSR 240-3.205(1)(A)(3 and 4) and (5)(E).

At this late stage of the proceeding, MGE now asks the Commission to grant it entirely different relief than what it first applied for in its Application. MGE's filed Application had sought a CCN for Sections, 13 and 14. But now, as the result of an informal technical conference held August 23, 2007, and the parties' pre-filed testimony, MGE has discovered it has no CCN to serve Sections 10, 11, and 12 of T52N, R35W, and that Sections 10, 11, and 12, among many others, have been certificated to Empire since 1956. MGE now asks the Commission to grant it a CCN including both its original Application for Sections 13 and 14 and

a portion of Empire's certificated area, Sections 10, 11, and 12 "…to protect the interests of Seven Bridges developers and those customers already served by MGE." (MGE Ex. 3, Noack Surr. p. 5 lns 1-12).

(3) Empire currently has three distribution customers in Section 12. The first customer was served in 1995 and the others followed shortly thereafter. Empire has installed the main to serve Copper Ridge, a subdivision planned in two phases of about 70 homes and located entirely in Section 12. (Tr. p. 179 ln 9 to p. 180 ln 12). There is no evidence in the record to suggest that Empire has refused to serve customers or has lost its right to provide service in its certificated area. (Tr. p. 171, lns 9–12). Indeed, Empire testified it had no gas supply or funding problems regarding its serving Seven Bridges subdivision. (Tr. p. 198, ln 8-19).

(4) That "MGE may not rely on the mistake it made in its tariff sheet No. 6.15 to serve in an area in which it does not have a CCN" and that the Commission uphold Empire's CCN area and not uphold the CCN errors in MGE's tariff is "…in the overall public interest of the people of the State of Missouri." (Tr. p. 243 lns 8 – 20; Staff Ex 19, Warren Surr. p. 5 lns 7-17). Staff witness Warren's position is further buttressed by the glaring fact that MGE was made aware of the error in its tariff from the August 1999 letter sent to Mr. Hack by MPS (Empire's predecessor) counsel Dean Cooper, but chose to do nothing about it. Even Mr. Hack agrees a utility is responsible for the information it puts in its tariff. (Tr. p. 87, lns 3-5 and 20-23; Staff Ex. 16, Hack Dep. p. 41, lns 17-22).

Conclusions of Law

The Commission may not entertain MGE's additional request for service territory already certificated to Empire because MGE's Application is deficient and does not comply with Commission Rule 4 CSR 240-3.205(1)(A)(3 and 4) and (5)(E) and because Section 393.170

contemplates that any extension of area serviced by a utility be obtained only by securing a CCN from the Commission after proper notice and hearing. *State ex rel. Doniphan Telephone Co. v. Public Service Commission*, 377 S.W.2d 469 (Mo. App. 1964). MGE's Application does not address its wish to carve out portions of Empire's certificated area to allow it to serve Sections 13 and 14.

Section 393.170 authorizes the Commission to grant an LDC authority to serve new territory "…whenever it shall *after due hearing* determine that such construction or such exercise of the right, privilege or franchise *is necessary or convenient for the public service.*" (*emphasis added*). Because MGE seeks additional service territory through testimony in this proceeding not described in its filed Application, the Commission is limited to considering MGE's request for only Sections 13 and 14.

Further, the Commission's allocation of service territory must be done on the basis of public interest and not on the basis of interest of companies. *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 180 S.W.2d 40, 352 Mo. 905 (1944).

Even if the Commission should overlook MGE's deficient Application and its violating Commission orders in Case No. 12,632, MGE's building of facilities in territory certificated to another public utility creates a situation ripe for destructive competition and is to be avoided. "The obvious public benefit derived is avoidance of duplicated services and conservation of resources." *State of Missouri ex rel. Union Electric Company v. Public Service Commission of the State of Missouri*, 770 S.W.2d 283 at 287 (Mo.App. W.D. 1989).

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

Findings of Fact

Empire's seeking Commission authorization to provide gas service to Sections 15, 22, 23, and 24, in addition to Sections 13 and 14, all in T52N, R35W, represents a realization of Empire's true and current certificated area with those sections under active development and those expected to develop over the next few years. Section 13 development will extend into Section 14 in the near future. A plat of the Seven Bridges development is on file at the Platte County Courthouse. Current plans are to build about 1500 homes in multiple phases. With a growing need for gas service in the area, it is in the public interest to have service available. (Empire Ex 3, Gatz Dir. p. 6 ln 14 to p. 7 ln 3). Moreover, to eliminate potential for confusion in the path of development, the Commission is well served to address the granting of service territory now to avoid any future conflicts between LDC's and developers. (See Section Map, Staff Ex 2 and Staff Ex 18, Warren Reb. Sch. "Platte City Annexaton Plan Map" and Sch. 8 "Satellite View of Platte City and Area to the South").

With regard to the customers MGE is currently serving in Empire's certificated sections 11 and 12, T52N, R35W, customers would not be harmed by a Commission order directing MGE to facilitate a seamless transition of these customers to Empire. (Staff Ex 18, Warren Reb p. 7 lns 11-15) Empire witness Dan Klein, the company's Director of Engineering, testified:

> "…Empire...currently serves a subdivision just east of Route N, which basically splits Section 12 from north to south. And our facilities are currently on the east side of route N serving that Copper Ridge subdivision that's been mentioned earlier…Missouri Gas Energy's facilities that serve the Seven Bridges subdivision extend north along Route N to a point basically across the road, across Route N from the Copper Ridge subdivision. So, practically speaking all we'd have to do is cross route N with an extension of our existing polyethylene main and tie it into MGE's existing polyethylene main, and then we could initiate service through…those facilities." (Tr. p. 153 lns 2-4; p. 156 lns 2-22).

Mr. Klein testified that once a Seven Bridges customer of MGE's is notified of the transition, Empire would need only turn off the customer's gas, remove MGE's meter, install Empire's meter, and relight the service. This would take less than 30 minutes. (Tr. p. 156 ln 23 to p. 157 ln 7). MGE serves about 39 customers in Seven Bridges in Section 12 for a total of about 50 in Sections 10, 11, and 12. (Tr. p. 114 lns5-11; p. 131, lns 8-13). MGE's facilities in Section 12 (T52N, R35W, certificated to Empire) currently extend north from Seven Bridges to near Copper Ridge. (Tr. p. 184, lns 12-24; Staff Ex 2, Section Map). Empire tying into MGE's facilities is the optimal solution.

If Empire did not use MGE's facilities to serve Seven Bridges, Empire would install mains and services to serve them. This would include about a half mile of mains at an installation cost of $10 to $15 per lineal foot. The cost of serving the first 100 homes would be about $78,000 and $44,000 for each 100 customers thereafter. (Tr. p. 160 lns 11-14; p. 161 lns 4-14; p. 161 lns 11-20). Empire would use county utility easements to reach Seven Bridges from its facilities in Section 12. (Tr. p. 160 lns 1-3). No streets would be dug up. Empire would employ trenchless technologies to bore and install facilities under the road without disturbing the surface. (Tr. p. 184, lns 3-11).

Empire witness Ron Gatz testified that the Seven Bridges developer would not lose money in making the transition from MGE to Empire. (Tr. p. 218 ln 22 to p. 219 ln 8). Moreover, Empire will use internally generated funds to meet the increase in demand for natural gas and will not need additional external financing to expand its gas distribution service in Platte County. (Empire Ex. 3, Gatz Dir. p. 7 lns 5-21).

Both Empire and MGE charge "just and reasonable" rates set and approved by the Commission. Staff witness Warren calculated an estimated bill for a customer using 860 CCF

during the period of June 2006 through June 2007. At that level of usage at that point in time, the MGE bill would be $1,023.64 and the Empire bill $1,161.33, a 13% difference. (Staff Ex 19, Warren Surr. p. 8 lns 1-5). This difference will fluctuate based on the PGA rate and the volume of gas purchased. Recently, Empire filed to reduce its PGA (Purchased Gas Adjustment) factor by 20% which will affect the 2007-2008 heating season. Also, because Empire has a lower monthly customer charge, there would be a point at which, as usage decreases, the Empire bill would become lower than MGE's bill. (Tr. p. 244 ln 13 – p. 245 ln 22). Even so, inevitable PGA changes and individual usage variations cause fluctuations in both Empire and MGE rates. Such rate change fluidity among LDCs adds nothing to a public interest determination.

Both Staff witness Warren and Empire witness Gatz testified to the inherent safety benefit and reduced customer confusion that would be achieved by having only one LDC providing gas service in the area. (Staff Ex 18, Warren Reb p. 5 lns 7-18; Empire Ex 4, Gatz Reb p. 6 lns 10-15). Safety may be considered by the Commission in its evaluation of convenience and necessity. *State ex rel. Intercon Gas, Inc. v. Public Service Com'n of Missouri,* 848 S.W.2d 593 (1993).

Conclusions of Law

Missouri courts have long held the Commission is not only empowered to pass on the question of public necessity and convenience, but that Section 393.170 requires the Commission to do so.

On the basis of its existing CCN to serve customers in Sections 10, 11, and 12 of T52N, R35W, the franchise agreement between Empire and Platte City, and the Annexation Agreement between Platte City and Kansas City, the Commission grants a CCN to Empire to serve T52N, R35W sections 13, 14, 15, 22, 23 and 24, in Platte County, Missouri, because it is in the public

interest to do so, with the noted exceptions of MGE's incursions into Section 12 at the end of Oakmont Drive and into Section 13 at the end of NW 126th Street. As discussed above, it is reasonable to allow Prairie Creek and Fox Creek to serve as the natural boundaries between MGE and Empire to address these exceptions. (Staff Ex 18, Warren Reb p. 7 lns 15 to p. 8 ln 4; Sch.. 7, 8, and 9; Staff Ex 19, Warren Surr. p. 6 ln 21 to p. 7 ln 10).

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

Findings of Fact

Because the southeastern sections of Empire's certificated service area abut the northwestern sections of MGE's certificated area, and because the development of new subdivisions in the area south of Platte City adds to the demand for gas service, the Commission orders MGE *and* Empire to provide formal notice to the other company of any future contact made by it with developers in areas that are adjacent to the MGE / Empire service area boundaries. Two LDCs operating in the same area is not a common situation in Missouri. As the result of this dispute, the Commission finds increased communication between neighboring LDCs will help reduce customer confusion and potential disputes.

Conclusions of Law

Pursuant to the Commission's jurisdiction over both LDC's under Section 386.250, and its authority under Section 393.170, the Commission orders MGE and Empire to provide formal notice to the other company of any future contact made by it with developers in areas that are adjacent to the MGE / Empire service area boundaries.

WHEREFORE, the Staff submits its Proposed Findings of Fact and Conclusions of Law as directed by the Commission.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or e-mailed to all counsel of record 21st day of December 2007.

/s/ Robert S. Berlin