

**BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI**

In the Matter of the Application of Ozark Energy)	
Partners, LLC for a Certificate of Public Convenience)	
And Necessity to Construct and Operate an Intrastate)	Case No. GA-2006-0561
Natural Gas Pipeline and Gas Utility to Serve Portions)	
Of the Missouri Counties of Christian, Stone and)	
Taney, and for Establishment of Utility Rates)	

**BRIEF
OF
SOUTHERN MISSOURI GAS COMPANY, L.P.
D/B/A SOUTHERN MISSOURI NATURAL GAS**

James M. Fischer, MBN 27543
Larry W. Dority, MBN 25617
Fischer & Dority, P.C.
101 Madison Street, Suite 400
Jefferson City, MO 65101
Telephone: (573) 636-6758
Facsimile: (573) 636-0383

Attorneys for Southern Missouri Gas
Company, L.P. d/b/ Southern Missouri
Natural Gas

January 8, 2008

**BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI**

In the Matter of the Application of Ozark Energy)	
Partners, LLC for a Certificate of Public Convenience)	
And Necessity to Construct and Operate an Intrastate)	Case No. GA-2006-0561
Natural Gas Pipeline and Gas Utility to Serve Portions)	
Of the Missouri Counties of Christian, Stone and)	
Taney, and for Establishment of Utility Rates)	

**INITIAL BRIEF OF THE
SOUTHERN MISSOURI NATURAL GAS**

I. INTRODUCTION

On June 30, 2006, Ozark Energy Partners, LLC ("OEP") filed an application for a certificate of convenience and necessity in this proceeding to construct and operate an intrastate natural gas pipeline and gas utility to service portions of Christian, Stone and Taney counties in Missouri, including the municipalities of Branson and Hollister, Missouri. OEP is not presently a certificated local distribution company, and OEP has never provided natural gas or transportation services to any customers. (Tr. 163)¹. In addition, OEP does not have a municipal franchise to serve Branson, Missouri. (Tr. 111)

As discussed below, OEP is proposing to ** _____ ** for delivering natural gas to these communities, and OEP has not met its burden of proof to demonstrate: (1) that there is a need for the proposed service in Branson and Hollister, Missouri; (2) that OEP is qualified

¹ Upon the commencement of this proceeding, Judge Jones took official notice of the proceedings in *Re Southern Missouri Natural Gas*, Case No. GA-2007-0168. Exhibits were marked in order following the last exhibit number used in Case No. GA-2007-0168. (Tr. 15). In this Brief, all transcript references which are designated as (Tr. xx) will refer to the transcripts in Case No. GA-2006-0561, unless specifically noted otherwise. Transcript references from the hearings in Case No. GA-2007-0168 will be designated as follows: (Case No. GA-2007-0168—Tr. xx).

NP

to provide the proposed service; (3) that OEP has the financial ability to provide the service; (4) that OEP's proposal is economically feasible; and (5) that OEP's proposed service will promote the public interest. *See Re Tartan Energy*, 3 Mo.P.S.C.3d 173, 177 (Sept. 16, 1994).

In contrast, Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas, a Missouri limited partnership, ("SMNG"), owns and operates a natural gas transmission and distribution system located in southern Missouri which serves approximately 7,500 residential, commercial and industrial customers. SMGC is a "gas corporation" and "public utility" under the jurisdiction of the Missouri Public Service Commission, pursuant to Chapters 386 and 393, RSMo. 2000. SMNG has been providing natural gas and transportation services in southern Missouri since 1994.

In August, 2007, the Commission granted SMNG an additional certificate of public convenience and necessity to serve Lebanon, Houston, and Licking, Missouri, conditioned upon the Company securing adequate financing. *See Report & Order, Re Application of Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas 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 Lebanon, Missouri*, Case No. GA-2007-0212 (consolidated)(August 16, 2007).

SMNG has municipal franchises to serve both Branson and Hollister, Missouri. SMNG is seeking a certificate of public convenience and necessity from the Commission to serve Branson, Hollister, Branson West, and surrounding unincorporated areas in Case No. GA-2007-0168.

The Staff has recommended in this proceeding, and in Case No. GA-2007-0168, that the Commission grant both SMNG and OEP conditional certificates of public convenience and necessity

NP

to serve their proposed service areas, including Branson and Hollister, Missouri, under certain specified conditions. (Tr. 25) One of the conditions being suggested by Staff is that "whichever company can achieve reasonable funding, in other words operating cash from a certificated lender, should be the one that is permitted to proceed in the Branson area." (Tr. 25)

As explained herein, OEP does not have any agreements with lenders to finance its start-up company's construction of a local distribution system in its proposed service area. (Tr. 170) According to the OEP Feasibility Study, OEP will need ** _____

_____ ** (Tr. 173) However, Mr. Epps, the Managing Director of OEP, has testified that OEP has no contracts for equity or debt financing. (Tr. 170) Even more importantly, OEP has not demonstrated that it has the financial capability to finance OEP's plan to bring natural gas to the Ozarks. (Tr. 179-80)

SMNG, on the other hand, has filed an application with the Commission in Case No. GF-2007-0215 to recapitalize SMNG by bringing in a new infusion of equity capital in the range of \$10-13 million, and approximately \$40-50 million in debt capital. The primary terms and conditions of the proposed financing have been negotiated, the identity of the investor and lender have been filed with the Second Amended Application in Case No. GF-2007-0215, and the Company expects to be in a position to close the financing in the first quarter of 2008, subject to the necessary regulatory approvals from the Commission. (Case No. GA-2007-0168--Tr. 81) SMNG's financing proposal would provide the necessary funds to complete the Branson, Hollister, and Branson West expansion project, as well as the Company's expansion into Lebanon, Houston, and Licking. (Case No. GA-2007-0168--Tr. 81-82) *See Second Amended Financing Application*, Case No. GF-2007-0215 (filed on December 17, 2007).

NP

Although SMNG believes it will have the necessary financing to provide service in Branson and Hollister in the very near future, subject to Commission approval, SMNG nevertheless believes that Staff's approach to create a "race" between SMNG and OEP for financing is ill-advised, and should not be followed by the Commission.

In *Re Intercon Gas, Inc.*, 30 Mo.P.S.C.(N.S.) 554, 561 (June 28, 1991); *State ex rel. Intercon Gas v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo.App. W.D. 1993), the Commission was faced with two competing applications for certificates of public convenience and necessity. Like the Commission Staff in this proceeding, Public Counsel suggested in *Intercon* that the Commission grant both competing companies certificates of convenience and necessity. *Re Intercon*, 30 Mo.P.S.C. (N.S.) 554, 569. The Commission carefully considered the policy implications of Public Counsel's recommendation, and rejected it, stating:

Public Counsel's recommendation is somewhat tempting. It enjoys the distinction of being simple, dispositive, and patriotic, appealing as it does to our collective belief in the virtues of competition. Nevertheless, the Commission finds that it is in the public interest to certify only one pipeline. As show infra, the evidence in this case does not reveal a present market, or a need, for an amount of gas sufficient to support two pipelines, both of which now propose to make ends meet not by selling gas, but only by transporting it. . . The Commission is of the opinion that one pipeline will have a far better chance of succeeding than two. . . Although the Commission appreciates Public Counsel's suggestion, the uncertainties of a new and untested market are best explored by one provider, not two. *Id.*

In the *Intercon* case, the Commission compared the qualifications and proposals of the competing pipelines, and determined the most appropriate company to grant a certificate of public convenience and necessity. SMNG submits that this traditional approach is appropriate in Case Nos. GA-2007-0168 and GA-2006-0561. For the reasons recognized by the Commission in the *Intercon*

case, it simply does not make economic sense to grant both SMNG and OEP conditional certificates to serve Branson and Hollister, as suggested by Staff.

SMNG submits that the competent and substantial evidence in these cases clearly indicates that SMNG has the necessary municipal franchises to serve Branson and Hollister, and is otherwise the best qualified company, both technically and financially, to serve these areas. Unlike OEP, SMNG has a track record of providing natural gas and transportation services in Missouri, using a proven and traditional method of delivery of natural gas through an interstate pipeline and local distribution system.

SMNG does not believe that the Commission should certificate OEP to provide service in Branson and Hollister, knowing that OEP intends to use a method of delivery that ** _____

** (Tr. 142)

SMNG respectfully submits that the Commission should follow its traditional approach for certificating local distribution companies, as discussed herein. If this approach is followed, the Commission will not grant a certificate of public convenience and necessity to OEP to serve Branson and Hollister, Missouri. Instead, the Commission should approve the application of SMNG to serve Branson, Hollister, Branson West, and the surrounding unincorporated areas, as requested by SMNG in Case No. GA-2007-0168.

SMNG also regrets that so much of the material in this Brief must be filed under seal. However, this is inevitable since OEP has chosen to designate an unusual amount of its case as "Highly Confidential." Such critical HC information includes OEP's fundamental supply plan, the identity of its investors and management personnel, and remarkably, even the identity of one of its

NP

witnesses has been classified as HC by OEP. Hopefully, the Commission will understand SMNG's need to redact so much of this Brief to address OEP's case in order to comply with OEP's designation of this material as Highly Confidential.

II. Comparison of the Applicants in Case Nos. GA-2007-0168 and GA-2006-0561

As is quite apparent from the discussion herein, and from the SMNG Brief filed in Case No. GA-2006-0168, there is really no comparison between the qualifications, experience, technical and financial capability, and the nature of the proposals of SMNG and OEP in Case Nos. GA-2007-0168 and GA-2006-0561:

QUALIFICATIONS

(1) SMNG is an existing local distribution company in Missouri serving 7,500 customers, and has recently been certificated by the Commission to expand into Lebanon, Houston, and Licking, Missouri. (Case No. GA-2007-0168—Tr. 72) OEP is not certificated anywhere and has no experience serving customers. (Tr. 163-64)

(2) SMNG has an experienced management in place with over 300 years of collective experience. (Case No. GA-2007-0168—Tr. 72) OEP's existing management has never been employed by a local distribution company, and does not express any expertise in this area. (Tr. 167-69)

(3) SMNG has identified its management team, including the professional engineer who will be in charge of constructing SMNG's system, and who has built over 20,000 kilometers of pipelines across the United States and in ten (10) other countries. (Case No. GA-2007-0168--Tr. 222-223) OEP has not identified its specific management team. (Tr. 160-61; 172-73) OEP has waffled on who specifically will be in charge of managing its local distribution system (*Id.*), and the

NP

record indicates that even Mr. Cattron, the most experienced manager connected with OEP, will only be involved to "bring the right people to the table." (Case No. GA-2007-0168--Tr. 319)

(4) SMNG will be hiring approximately 20 additional personnel to serve the Branson area. (Case No. GA-2007-0168--Tr. 75) OEP, on the other hand, will be hiring only ** _____

_____ ** (Tr. 172-73)

ECONOMIC FEASIBILITY

(5) SMNG has filed with the Commission a Feasibility Study that specifically includes the capital expenditures, expenses, and revenues associated with its proposal to serve Branson, Hollister, and the surrounding, unincorporated areas. (Case No. GA-2007-0168--Ex No. 2, Appendix C--HC). SMNG's Feasibility Study shows that the SMNG proposal is clearly economically feasible. (Case No. GA-2006-0168--Application, Appendix C--HC; Tr. 72, 413) OEP's Feasibility Study, on the other hand, does not include the specific costs associated with serving specific communities (Tr. 111), and on its face, appears to produce ** _____

_____ ** Based upon such ** _____ **, it would not be reasonable to find that OEP's proposal is economically viable.

NP

FINANCING CAPABILITY

(6) SMNG has filed an application with the Commission in Case No. GF-2007-0215 to recapitalize SMNG by bringing in a new infusion of equity capital in the range of \$10-13 million, and approximately \$40-50 million in debt capital. *See Second Amended Financing Application*, Case No. GF-2007-0215 (filed on December 17, 2007). SMNG's financing proposal would provide the necessary funds to complete the Branson, Hollister, and Branson West expansion project, as well as the Company's expansion into Lebanon, Houston, and Licking. (Tr. 81-82) OEP, on the other hand, has not filed any financing applications with the Commission, and has failed to disclose the identity of its Class A investors (Tr. 165, 175), or any realistic plan on how it would raise the financing to complete its proposed project.

MUNICIPAL FRANCHISE TO SERVE BRANSON

(7) SMNG has a municipal franchise to serve Branson and Hollister, Missouri. (Case No. GA-2006-0168--Tr. 138) OPE, on the other hand, does not have a municipal franchise to serve Branson, Missouri. (Tr. 43, 111)

METHOD OF DELIVERY OF NATURAL GAS

(8) SMNG is proposing to utilize a traditional method of delivering natural gas through an interstate pipeline, and a local distribution system that has provided safe and adequate service throughout Missouri. OEP is proposing to use an ** _____

** (Tr. 22; Exhibit No. 27 HC, p. 7, 11)

** _____

NP

** (Tr. 142)

ENGINEERING AND PROJECT DESIGN

SMNG's preliminary engineering and project design for its proposed local distribution system is complete, pending approval of its application for a certificate of public convenience and necessity. (Case No. GA-2007-0168--Tr. 74). OEP, on the other hand, has indicated that

**

** (Ex. No. 27, HC, p. 9)

Based upon the comparison of the qualifications, experience, technical and financial capability, and the nature of the proposals of SMNG and OEP, it is clear that SMNG should be granted the opportunity to serve Branson, Hollister, Branson West, and the surrounding unincorporated areas, as requested by SMNG in Case No. GA-2007-0168.

III. The Legal Standard To Be Met By OEP

In *Re Tartan Energy*, 3 Mo.P.S.C.3d 173, 177 (Sept. 16, 1994), the Commission clearly articulated the legal standard to be met by applicants for a certificate of convenience and necessity: (1) there must be a need for the service; (2) the applicant must be qualified to provide the 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. *See also Re Intercon Gas, Inc.*, 30 Mo.P.S.C.(N.S.) 554, 561 (June 28, 1991); *State ex rel. Intercon Gas v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo.App. W.D. 1993). This standard has also been historically applied to natural gas certificate cases. *See Report & Order, Re Application of Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas for a certificate of public convenience, and*

NP

necessity authorizing it to construct, install, own, operate, control, manage and maintain a natural gas distribution system to provide gas service in Lebanon, Missouri, Case No. GA-2007-0212 (consolidated)(August 16, 2007).

As discussed below, since OEP has failed to meet its burden of proof to meet the legal standard articulated by the Commission and the courts for the grant of a certificate of convenience and necessity, the Commission must deny its request in this proceeding. In this process, the Commission should also compare SMNG and OEP to determine which applicant is in the best position to provide natural gas and transportation service in Branson and Hollister, Missouri. *See also Re Intercon Gas, Inc.*, 30 Mo.P.S.C.(N.S.) 554, 561 (June 28, 1991); *State ex rel. Intercon Gas v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo.App. W.D. 1993).

IV. OEP Has Not Met Its Burden of Proof To Be Certificated In Branson or Hollister, Missouri

For the reasons stated below, SMNG submits that OEP has not met its burden to proof to be granted a certificate of public convenience and necessity to provide natural gas and transportation services in Branson, Hollister, and the surrounding unincorporated areas.

A. OEP Has Failed To Demonstrate That There Is A Need For Its Proposed Service In Branson and Hollister, Missouri.

In this proceeding, OEP has requested a certificate to serve Branson, Missouri, even though SMNG has the municipal franchise to serve this community, and OEP does not have a municipal franchise to serve Branson. In fact, during the hearings, OEP representatives testified that OEP did not intend to serve Branson at all, unless OEP received a municipal franchise to serve Branson. (Tr. 111)

NP

SMNG is actively seeking a certificate of public convenience and necessity to serve Branson in Case No. GA-2007-0168. Since SMNG is qualified to provide natural gas service in Branson and Hollister, and has in fact been providing such services in southern Missouri since 1994 in its currently certificated areas, OEP has a heavy burden to show that there is a real need for its proposed natural gas service in Branson and Hollister that would justify two local distribution companies attempting to serve these communities.

As stated in *State ex rel. Public Water v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo.App. 1980), the phrase “necessary and convenient for the public service” also extends to preventing undesirable competition and the duplication of services. The Commission historically has sought to prevent undesirable competition among traditional public utilities, and has specifically discouraged the duplication of natural gas services in the same areas. *See Re Intercon Gas, Inc.*, 30 Mo.P.S.C.(N.S.) 554, 561 (June 28, 1991); *State ex rel. Intercon Gas v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo.App. W.D. 1993). A grant of OEP’s request to serve in the Branson and Hollister areas in this proceeding would not promote this long standing public policy.

B. OEP Has Failed To Meet Its Burden To Show It Is Qualified To Provide Natural Gas and Transportation Services.

As the Applicant, OEP has the burden of proof to demonstrate that it is qualified to provide natural gas and transportation services in Branson and Hollister, Missouri. *See Intercon*; Section 393.170. As explained below, OEP has failed to meet its burden to show it has the background, experience, and qualifications to provide the proposed services. Therefore, the Commission should deny OEP’s application to serve Branson and Hollister, Missouri.

NP

OEP is not an existing local distribution company. (Tr. 163) It has been in existence for less than two years, having been organized in April, 2006, when Mr. Epps filed incorporation papers with the Secretary of State. (Tr. 158-59) If it is certificated to provide natural gas and transportation service in this proceeding, OEP will be embarking upon its first venture into the natural gas distribution business. (Tr. 164) Since OEP has no track record in the natural gas business, it has a heavy burden to demonstrate that the personnel who will be running the public utility have the necessary background, qualifications and experience to provide safe and adequate natural gas services in Branson and Hollister, Missouri. Unfortunately, OEP has not produced competent and substantial evidence to demonstrate who the managers will be and that they are qualified to manage and operate a local distribution company.

Mr. Dan Epps is the full-time managing director of OEP and one of the founders of the OEP. (Tr. 158-59). Mr. Epps has no other employment, and is effectively running the day-to-day operations of OEP. (Tr. 159). Previously, Mr. Epps worked as a supervisor and crew foreman for Haug Construction Company installing fiber optic cable for the telephone industry, and as an owner of a real estate company. (Exhibit 27HC, p. 53)(Exhibit F to Application, OEP Feasibility Study, p. 53)(Tr.161-62)

Mr. Epps has no background in working for or otherwise managing a natural gas local distribution company. (Tr. 167-68) He has never worked for a traditional local distribution company, or a company that provided natural gas service to customers using compressed natural gas. (Tr. 168). He has never worked for a company which constructed natural gas pipelines or local distribution systems. (Tr. 167). He has never worked for a company that purchased fixed priced

NP

contracts for natural gas. (Tr. 168) It does not appear that Mr. Epps personally has relevant experience or other qualifications to operate or manage a local distribution company.

Mr. Epps candidly testified that he does not consider himself an expert in any of the following areas: the operation or regulation of natural gas distribution companies, the operation or regulation of natural gas pipeline companies, or in the area of natural gas safety regulation. (Tr. 169). Counsel for OEP objected when Mr. Epps was asked if he was an expert in determining the level of natural gas needed to serve customers in a specific community, suggesting that SMNG's counsel was "bordering on harassment of the witness." (Tr. 169)

Perhaps such sensitivity is understandable when it became painfully apparent that Mr. Epps has very little knowledge about even the basic, fundamentals of natural gas. Although Mr. Epps' company is planning to charge customers based upon the number of Ccfs used by the customers (Exhibit No. 27HC, p. 64-67)(Exhibit F HC to Application, OEP Feasibility Study, p. 64-67), Mr. Epps was not familiar with the number of therms in one Ccf of natural gas.²:

[Fischer]: **Q. Do you know how many therms are in a CCF of natural gas?**

[Epps]: A. No. We've never had natural gas in the Ozarks, so how could I have worked for somebody with it?

(Tr. 168)

² According to the Wikipedia Online Dictionary: "A **therm factor** is used by gas companies to convert the volume of gas used to its heat equivalent, and thus calculate the actual energy use. It is usually in the units therms/Ccf. Since a therm is close to the heat output of 1 Ccf of gas under normal conditions, the factor is usually close to 1." Source: Wikipedia Online Dictionary: <http://en.wikipedia.org/wiki/Therm>.

The record is unclear regarding Mr. Epp's future with OEP if the Commission approves OEP's application in this case. On pages 160-61 of the transcripts, Mr. Epps testified that he will be a member of the Board of Directors and the General Manager of Company:

[Fischer]: Q. **Will you effectively be a member of the board of directors and the general manager of the company?**

[Epps]: A. That's my anticipation.

* * *

[Fischer]: Q. **That's what I'm asking, are – you're not going to be the general manager after it's certificated?**

[Epps]: A. I will. I just said that. I will to a certain time.

However, after Mr. Epps's qualifications and lack of experience in the natural gas industry were explored during cross-examination (Tr. 158-170), Mr. Epps seemed to change his testimony regarding his expected future role in OEP, assuming the Commission granted a CCN to OEP (Tr. 172-73):

**

NP

**

_____. ** (Tr. 116) In fact, when SMNG challenged the appropriateness of Mr. Cattron's participation as an "outside expert" in Case No. GA-2007-0168, Mr. Cattron testified that "I think we would probably be more involved in assisting in bringing the

15

right people to the table. . . So in all aspects, whether it's operations, whether its gas procurement, it going to be much of our role to assist them in identifying the people to make it happen." (Case No. GA-2007-0168--Tr. 319) Mr. Cattron denied that he would be providing the primary technical expertise for running the natural gas company (Tr. 328) or making the decisions regarding OEP's critical decisions. (Tr. 320)

The only other persons identified as "owners" of OEP in its Feasibility Study are Randy S. Hole, a certified financial specialist from Kansas City, Missouri, and Ralph B. Handlin, a 74-year old consulting engineer. (Tr. 164-64; Exhibit No. 27, pp. 54-55)(Exhibit F to Application, OEP Feasibility Study, p. 54-55) These gentlemen did not testify in the hearings, and it is not apparent from the record, what role these gentlemen would have in the day-to-day management of OEP, except that they would be on the Board of Directors. (Tr. 164-65) According to Staff witness Michael Straub, Staff has not investigated the backgrounds of the owners of OEP (Tr. 36). Mr. Straub testified that he did not know the identity of Mr. Hole or Mr. Handlin, prior to the hearing. (Tr. 36-37)

In summary, OEP has failed to meet its burden of proof to demonstrate that the Company has the necessary qualifications, experience, or background to own, operate, control, manage or maintain a natural gas distribution system. The Commission should therefore deny OEP's application in this proceeding.

C. OEP Has Failed To Meet Its Burden To Demonstrate That OEP is Financially Capable Of Providing The Proposed Service.

OEP also has the burden of proof to demonstrate that OEP has the financial capability to provide the proposed service. However, as explained herein, OEP has failed to meet its burden of

NP

proof on this issue, and the Commission should therefore deny its Application to serve Branson and Hollister, Missouri, and the surrounding unincorporated areas.

According to OEP Feasibility Study, OEP will need ** _____

_____ ** (Tr. 173) However, Mr. Epps has testified that OEP has no contracts for equity or debt financing. (Tr. 170) OEP has not demonstrated that it has the financial capability to finance Mr. Epp's plan to bring natural gas to the Ozarks. (Tr. 179-80) The record does not demonstrate that OEP has a realistic possibility of raising the necessary capital to fund its proposed local distribution company. As a result, OEP has failed to meet its burden of proof to receive a certificate of public convenience and necessity in this proceeding.

The record does reflect that OEP' counsel objected to disclosing whether Mr. Epps would be providing additional funding to support his dream of building a local distribution company (Tr. 174-75). Perhaps this is understandable since information in the record raises concerns about Mr. Epps' personal financial situation. Mr. Epps testified that when he pled guilty to a federal offense, he met the income guidelines to be represented by a Public Defender.³ (Tr. 167). The record does not indicate that his financial situation has changed since he pled guilty, but it is certainly OEP's burden of proof to demonstrate how the Company will have the financial capability to provide the proposed service.

³ A person is eligible for representation by a federal public defender when the court is satisfied after "appropriate inquiry" that the defendant is "financially unable to obtain counsel." 18 U.S.C. § 3006A(b). *See also United States v. Barecelon*, 833 F.2d 894, 896 (10th Cir. 1987).

Surprisingly during cross-examination, it became apparent for the first time that OEP has some additional "secret" owners whose identity is considered "beyond highly confidential" by OEP's counsel (Tr 165):

[Fischer]: **Q. Are there any other members of – or equity owners of Ozark Energy Partners?**

[Epps]: A. Yes.

[Fischer]: **Q. Besides Mr. Handlin, yourself and Mr. Hole?**

[Epps]: A. Yes.

[Fischer]: **Q. Who would that be?**

[Steinmeier]: Objection, your Honor. This would be beyond the – beyond highly confidential. . . Ozark Energy Partners should be under no obligation to disclose the inner workings of its financial arrangements at this time. . .

Interestingly, ** _____ **

(Tr. 175) As a result, Staff has not investigated these owners, other financial backers of OEP, or OEP's likelihood of receiving financing. (Tr. 61-62) While OEP may waive its right to put on evidence to support its case, this does not relieve the Commission of determining whether OEP has met its burden of proof to demonstrate that it has the financial capability of providing the proposed service. SMNG does not believe that OEP has made even a minimal showing with competent and substantial evidence in the record that OEP has the financial capability of providing the proposed service in Branson and Hollister, Missouri. As a result, the Commission should deny OEP's application.

NP

D. OEP Has Failed To Meet Its Burden Of Proof To Demonstrate That Its Proposal Is Economically Feasible.

As explained below, OPE has failed to meet its burden of proof to demonstrate that OEP's proposal is economically feasible. As a result, the Commission should deny OEP's application in this proceeding. Instead, the Commission should grant SMNG a certificate of public convenience and necessity, as requested in Case No. GA-2007-0168.

1. OEP's Feasibility Study Does Not Specifically Include Branson Or Hollister Costs In The Analysis.

OEP has failed to provide a Feasibility Study that specifically includes the cost of serving the Branson and Hollister areas. As a result, it has failed to comply with 4 CSR 240-3.205(1)(A)(5).

During the hearings, counsel for OEP objected to cross-examination of Staff witness Mike Straub regarding the size of storage facilities needed to serve the Branson area as follows:

** _____

_____ ** (Tr.
43)(emphasis added)

Mr. Cattron also confirmed during cross-examination that there are no distribution costs included in the OEP Feasibility Study that were projected to be located within the City of Branson or any other city. (Tr. 111) In addition, Mr. Cattron testified: "What I've testified to is we don't have a franchise in that [Branson] community, and so until we have one, we would not have the authority to lay distribution assets in that city." (Tr. 111)

Counsel's statement that ** _____
_____ :

NP

**

Finally, in answer to questions from Commissioner Murray, Staff witness Mike Straub also confirmed that the OEP Feasibility Study does not include Branson:

[Commissioner Murray]: **Q. Do you have any concerns that the [OEP] feasibility study did not include Branson?**

[Straub]: **A.** Yes, we did. They are – the reason it didn't include Branson, that I've been told, is because they do not have a certificate for Branson. Branson is a large portion of the service area. Staff's thought on OEP and Branson is that if Southern Missouri or the – was unable to get the necessary financing and be a provider, but OEP would be, then Branson franchise would probably come later. (Tr. 71)

Based upon the information included in the record, it appears that OEP has not included specific costs associated with serving Branson in its Feasibility Study. As a result, OEP has failed to meet the requirements of 4 CSR 240-3.205(1)(A)(5) to provide "a feasibility study containing the plans and specifications for the utility system and estimated costs of construction of the utility system during the first three (3) years of construction. . . and an estimate of the number of customers, revenues and expenses during the first three (3) years of operation" as it relates to Branson, Missouri. The record is not clear whether specific numbers of customers, revenues and expenses

NP

during the first three (3) years of operation were included specifically for Hollister either. It appears, based upon the testimony of Mr. Cattron, that all of OEP's cost estimates were generic, and not community-specific. Mr. Cattron testified: "There are no specific distribution costs in any city." (Tr. 111)(*emphasis added*)

More importantly, OEP has failed to meet its burden of proof to demonstrate that its proposal to serve Branson, Hollister, and surrounding unincorporated areas is economically feasible since it has made no attempt to include the required investments, an estimate of the number of customers, revenues and expenses during the first three (3) years of operation in Branson, Hollister, or any specific city in its Feasibility Study. As a result, the Commission should deny OEP's application for conditional certificate of public convenience and necessity in this proceeding.

**2. The Assumptions In OEP's Feasibility Study Related To Its _____
_____ ** Are Suspect And Do Not Appear Credible.**

OEP has proposed an alternative supply strategy which it has referred to as a the

** _____ ** OEP's Feasibility Study describes this
alternative as follows:

**

** (Exhibit No. 27 HC, p. 7)

* * *

Supply Strategy: ** _____ **

**

NP

_____ ** (Exhibit No. 27 HC, p. 11).

* * *

** _____

_____ ** (Exhibit 27 HC, p. 12)

Exhibit 9a and 9b of the OEP Feasibility Study (Exhibit 27 HC, pp. 68 and 69) shows that OEP is assuming that there would be a capital expenditure of ** _____

_____ **(*Id.*) These assumptions suggest that OEP intends to install ** _____

_____ **

According to the testimony of OEP's "Highly Confidential" witness, ** _____

_____ ** (Tr. 138) However, OEP's projected number of customers in Year 1 is between ** _____ **

Based upon this evidence, it appears that OEP will not be able to serve its projected number of customers in Year 1 with the capital expenditures for these facilities that are contained in the OEP Feasibility Study. At best, it appears that OEP would be able to serve

** _____ **

OEP's Feasibility Study also indicates that OEP will spend an additional ** _____

_____ ** (Exhibit 27 HC, pp. 68 and 69) With ** _____

NP

_____. ** However, by Year 2, OEP is also projecting
that it will have ** _____

_____. (Exhibit No. 27 HC, p. 27) According to the testimony of ** _____

_____ ** (Tr. 135)

OEP does intend to eventually utilize a more ** _____ ** supply strategy: **

_____ ** (Exhibit No. 27 HC, p. 8) However, it does not appear that this
** _____

_____ ** Without using more realistic
assumptions, OEP has failed to meet its burden of proof to show how OEP will meet its projected
customers needs during those first three years of the proposed project.

NP

Based upon such ** _____ ** shown in its own Feasibility Study, it is difficult to understand how OEP has met its burden of proof to show that its proposal is economically feasible, even under OEP's own assumptions. ** _____

4. OEP Has Failed To Meet Its Burden To Demonstrate That Its Proposal Will Provide Safe And Adequate Service To the Public.

The safety and adequacy of facilities are proper criteria in evaluating necessity and convenience as are the relative experience and reliability of competing suppliers. *See State ex rel. Ozark Elec. Coop. v. Public Service Commission*, 527 S.W.2d 390, 394 (Mo.App. 1975); *State ex rel. Intercon Gas v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo.App. W.D. 1993).

OEP also has the burden of proof to show that its unique supply strategy will result in safe and adequate service to the public. SMNG respectfully submits that OEP has failed to meet this burden of proof. The Commission has never certificated a local distribution company that provides service through a ** _____ ** supply alternative. In fact, OEP's "Highly Confidential" witness, ** _____

NP

** (Tr. 142)

[illegible]

____ ** (Tr. 44-45) SMNG respectfully submits that OEP bears a heavy burden to demonstrate that its proposal will not adversely affect the health, welfare and safety of Missouri citizens.

Interestingly, OEP's owner, Mr. Epps, did not ** _____

____ ** (Tr. 183)

SMNG respectfully submits that OEP has not met its burden of proof to show that its proposed plan will be provide safe and adequate service, and otherwise promote the health, welfare and safety of the public.

**E. OEP Has Failed To Meet Its Burden To Demonstrate That
OEP's Proposal Will Promote The Public Interest.**

As discussed above, OEP has not demonstrated that there is a public need for its service, that it is qualified to provide service, that its proposal is economically and financially viable, or that it is capable of providing safe and adequate service. As a result, it is not in the public interest to grant OEP's application in this proceeding.

In contrast, the SMNG is currently providing the public with safe and adequate service in the twelve communities and desires to serve the Branson, Hollister, and Branson West which is the subject of Case No. GA-2007-0168. The Commission should not permit OEP to jeopardize the SMNG's ability to exercise its franchises to serve Branson and Hollister, Missouri by granting a conditional certificate to OEP to serve the same areas.

NP

CONCLUSION

In conclusion, Southern Missouri Natural Gas respectfully requests the Commission to follow its previously articulated standard for determining if a Certificate of Public Convenience and Necessity should be granted to an applicant. Based upon the competent and substantial evidence in the record, it is clear that Ozark Energy Partners, LLP has not met its burden of proof in this proceeding. It has failed in its efforts to meet the following legal standard: (1) there must be a need for the service; (2) the applicant must be qualified to provide the 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. As a result, the Commission should deny OEP's Application in this proceeding.

Respectfully submitted,

/s/ James M. Fischer
James M. Fischer, MBN 27543
email: jfischerpc@aol.com
Larry W. Dority, MBN 25617
email: lwdority@sprintmail.com

Fischer & Dority, P.C.
101 Madison Street, Suite 400
Jefferson City, MO 65101
(314) 636-6758

ATTORNEY FOR SOUTHERN
MISSOURI GAS COMPANY, L.P.
d/b/a SOUTHERN MISSOURI NATURAL
GAS

NP

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Brief was served to all counsel on the official service list in the above-referenced case via electronic filing and electronic mail (e-mail) on this 8th day of January, 2008.

/s/ James M. Fischer

James M. Fischer

NP