BEFORE THE PUBLIC SERVICE COMMISSION
OF THE 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 Natural Gas Pipeline and Gas Utility to Serve Portions of the Missouri Counties of Christian, Stone and Taney, and for Establishment of Utility Rates.	))))))))	Case No. GA-2006-0561

BRIEF OF OZARK ENERGY PARTNERS, LLC

Ozark Energy Partners, LLC, ("Ozark" or "OEP"), the Applicant in this case, filed its Application on June 30, 2006. Supplements to Application were filed on November 6, 2006, February 28, 2007, April 6, 2007 and September 4, 2007. The entire Application, as supplemented, was admitted in evidence as Exhibit 26 at hearing.

The following parties were granted leave to intervene in this case: Southern Star Central Pipeline ("SCCP"), Missouri Gas Energy, a division of Southern Union ("MGE") and Alliance Gas Energy Corporation. On November 6, 2007, Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas (SMNG) was granted leave to be substituted for Alliance Gas Energy Corporation. The Staff of the Public Service Commission ("Staff") and the Office of the Public Counsel ("Public Counsel") also participated in this matter.

On November 16, 2006, a Prehearing Conference was held in this case. On February 28, 2007, OEP's application was completed with the filing of its Feasibility Study, legal descriptions and plat, and other documents. On March 2, 2007, "Ozark Energy Partners' Request for Schedule of Proceedings" was filed,

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but subsequently was not pursued, pending further discussions with Staff. Several follow-up meetings with Staff were held in the following months, to which the Office of Public Counsel was invited.

On November 8, 2007, a *Stipulation and Agreement* was filed in this matter on behalf of Ozark and Staff. On November 13, 2007, SMNG filed its *Objection to Non-Unanimous Stipulation and Agreement and Request for Hearing* in this case.

On November 21, 2007, a *Stipulation and Agreement of OEP, MGE and Staff* was also filed in the case. No objections were filed to the *Stipulation and Agreement of OEP, MGE and Staff.* On December 4, 2007, a *Motion for Admission of Late-Filed Exhibit or Administrative Notice* was filed seeking to ensure that the *Stipulation and Agreement of OEP, MGE and Staff* was considered part of the evidentiary record in this case, although inadvertently a copy had not been offered as an exhibit at hearing. No timely objection to that Motion was filed.

On November 29, 2007, a hearing was held in this case. The record of this case also includes, by official notice, the testimony and exhibits presented at hearing in Case No. GA-2007-0168, *Re: Southern Missouri Natural Gas*, on November 27-28, 2007. (T-15, ll. 7-19; GA-2007-0168, T-379, ll.14-19.)

<u>LEGAL STANDARD: ELMENTS OF CERTIFICATE APPLICATION CASE</u>

The Public Service Commission of Missouri may grant a certificate of convenience and necessity if it determines, after hearing, that the proposed service is “necessary or convenient for the public service.” *State ex rel. Beaufort Transport Co. v. Clark,* 504 S.W.2d 216, 219 (Mo.App. 1973). The Commission has previously established and applied certain criteria to its evaluation of the public convenience and necessity. Those criteria are:

1. There must be a need for the service;
2. The applicant must be qualified to provide the proposed service;
3. The applicant must have the financial ability to provide the service;
4. The applicant’s proposal must be economically feasible; and
5. The service must promote the public interest.

Intercon Gas, Inc. v. Public Service Comm’n, 848 S.W.2d 593, 597 (Mo.App. 1993); aff’d, *State ex rel. Intercon Gas, Inc. v. Public Service Comm’n,* 848 S.W.2d 593 (Mo.App. 1993).

These criteria are set out in OEP’s Feasibility Study in this case and establish the framework for that Study. (Exh. 27 HC, 28 NP, pp. 3-4.) Based upon the whole record of this case, it is clear that Ozark Energy Partners, LLC has met the Commission’s criteria for a certificate of convenience and necessity to provide natural gas service in its requested service territory. Each element of the Commission’s standard is addressed below.

1. *PUBLIC NEED FOR THE PROPOSED SERVICE*

It is undisputed that a public need exists for natural gas service in Ozark’s proposed service territory. No party has suggested otherwise. Staff and MGE have stipulated to public need for the service by stipulating that OEP should be granted a conditional certificate of convenience and necessity in this case.

SMNG offered its own evidence of public need in Case No. GA-2007-0168, the record of which has been incorporated by reference into the instant case. (T-136, l. 10 – T-137, l.25.)

OEP has been granted municipal franchises by the cities of Highlandville, Kimberling City and Reeds Spring, and the City of Hollister granted a municipal franchise to either OEP or Alliance (now SMNG). These franchises were approved by voters in each of these communities by substantial margins. For example, in Highlandville, 66% voted in favor, and in Kimberling City, 63% voted in favor. The strong public electoral support for these municipal franchises is clear evidence of the public need for the service proposed in this case. Mr. Epps testified as to the significant growth in the region, including in and around Hollister. (T-158, ll. 2-8; T-176, l. 23 – T-178, l. 25.) He also testified that he had been to twenty (20) city council meetings during the year before hearing and that the people in the Ozarks region are depending on OEP "to bring this down here." (T-180, l. 24 – T-181, l. 1.) One of those cities is Branson West, which has granted no franchise at the present time. However, Branson West has shown a strong interest in OEP's application and is likely to grant a municipal franchise if OEP is granted a conditional certificate by the Commission.

Figure 1 of OEP's Feasibility Study in this case (Exh. 27 HC, 28 NP, at p. 12) illustrates the dramatic population growth in the proposed service area. The letters from businesses and government officials contained in Exhibit 4 of the OEP Feasibility Study, "Letters of Support," also support a finding and conclusion that a public need exists for the service proposed by OEP in this case. (Exh. 27 HC, 28 NP, pp. 34-49.)

Based upon the competent and substantial evidence in the record of this case, the Commission should find that there is a public need for natural gas service in the proposed service area of Ozark Energy Partners, LLC.

2. *QUALIFICATIONS TO PROVIDE THE PROPOSED SERVICE*

Ozark Energy Partners is clearly qualified to provide the proposed service in the Ozarks region. The Partners themselves have highly relevant experience and qualifications. Their resumes appear in the OEP Feasibility Study (Exhibit 27 HC, Exhibit 28 NP, at pages 53-55). Randy Hole is a certified financial specialist, deeply knowledgeable of natural gas pipeline construction and finance. (T-164, ll. 14-19; Exhibit 27 HC and 28 NP, at page 54.) Ralph Handlin is a 49-year veteran of natural gas engineering and safety and a licensed professional engineer in four states (including Missouri). (Exh. 27 HC, Exh. 28 NP, at page 55; T-164, ll. 22-23.) Mr. Handlin has experience in both gas utility operations and management, and with the United States Department of Transportation Office of Pipeline Safety. (Exh. 27 HC, Exh. 28 NP, at p. 55; T-164, l. 22 – T-165, l. 6.)

Dan Epps, the Managing Director of OEP, is a lifelong resident of the Ozarks region, born and raised in Branson. His family has been there since 1859, and his grandfather was once the Mayor of Branson. (T-155, ll. 22-24.) His resume appears in the OEP Feasibility Study. (Exhibit 27 HC and 28 NP, at page 53.)

Mr. Epps has personally laid 35,000 miles of underground telecommunications facilities in the region (T-180, ll. 16-17) and has his hand on the pulse of the economic growth and development in the area. (T-176, l. 23 – T-181, l. 11.) He has been a successful businessman in real estate and automated credit systems. (Exh. 27 HC, 28 NP, at 53; T-162, ll. 22-24; T-179, ll. 3-12; T-177, ll. 9-11; T-178, ll. 5-14.)

Mr. Epps also has an obvious passion for bringing natural gas "home" to the Ozarks. (T-155, ll. 11-18; T-177, ll. 19-25; T-179, l. 19 – T-180, l. 6, and ll. 23-25; T-181, ll. 1-11.) As Managing Director of OEP, Mr. Epps has been directing the day-to-day activities of the start-up natural gas utility. (T-159, ll. 16-20.) However, once OEP obtains a certificate from the Commission, Mr. Epps will no longer be making the day-to-day decisions of the company. Rather, professional managers will be hired to perform the management of the company. (T-160, ll. 11-15; T-161, ll. 11-15.) Mr. Epps believes OEP has "the best qualified group of people that we've hired to help us get to this point and to carry it on through." (T-180, ll. 7-15.)

Ozark plans to hire an experienced interim management team to manage the process of construction and the provision of gas service to customers, once OEP has received a certificate of convenience from the Commission. That team is represented in OEP's Feasibility Study by Cattron Enterprises, Inc. (Exh. 27 HC, pp. 21-22.) Cattron Enterprises employs Steven W. Cattron and Greg Pollard, the authors of OEP's Feasibility Study in this case.

Mr. Cattron[1] has almost thirty years in the field of public utilities, including having served as President and Chief Operating Officer of Missouri Gas Energy, the second-largest natural gas utility in Missouri, from 1998 to 2002. (Exh. 29; T-105, ll. 7-14.) He also has experience as a regulatory auditor with the Missouri Public Service Commission, a utility consultant and auditor (CPA), and as Vice President of Sales, Marketing and Communications at Kansas City Power & Light (KCP&L). (Exh. 29; GA-2007-0168, T-314, ll. 3-20.) His consulting practice today includes advising clients on the strategic acquisition, development and disposition of utility assets, and consulting with small to medium-size corporations on how to improve profitability through improving cost management practices. (GA-2007-0168, T-314, l. 21 – T-315, l. 14.) Mr. Cattron also serves as Chairman of the Board of Gateway Energy Corporation, a midstream-focused natural gas company with approximately 800 miles of natural gas gathering, transportation and distribution systems and related facilities in Texas, Oklahoma, offshore Texas and in federal waters of the Gulf of Mexico. (Exh. 29.)

Mr. Pollard[2] has more than twenty years in the utility business, most of it in natural gas. For Southern Union Gas Company in Texas, he was responsible for managing operations, including construction, service, maintenance, code compliance and engineering. As a Vice President of Missouri Gas Energy, Mr. Pollard has extensive experience in field construction and operations as well as

[1] Mr. Cattron's resume appears on page 57 of the OEP Feasibility Study (Exhibit 27 HC and 28 NP, at page 57) and separately as Exhibit 29. His educational and professional background were presented at hearing in GA-2007-0168. (GA-2007-0168, T-313, l. 8 – T-315, l. 17.)

[2] Mr. Pollard's resume appears on page 58 of the OEP Feasibility Study (Exhibit 27 HC, Exhibit 28 NP).

the hiring and managing of third-party contractors to provide construction and operation services. He also has experience dealing directly with large industrial and commercial utility customers as Manager Energy Solutions of Kansas City Power & Light Company.

Messrs. Cattron and Pollard have ably served OEP as part of its regulatory team, including developing OEP's Feasibility Study in this case. The Feasibility Study contemplates that Cattron Enterprises will serve as interim managers of OEP once OEP obtains a certificate from the Commission. Although no personal services contracts have yet been entered into for that purpose, Cattron Enterprises will, at the least, work with OEP to identify and secure the services of seasoned professional utility managers to provide necessary management on a permanent basis. (Exh. 27 HC, p. 22; GA-2007-0168, T-317, l. 24 – T-318, l. 3; T-318, l. 14 – T-322, l. 5.) It is anticipated that Cattron Enterprises will serve in an interim management or advisory role for 2 to 3 years following OEP's certification by the Commission. (GA-2007-0168, T-320, ll. 3-7.)

SMNG sought to discredit Mr. Epps' qualifications by dredging up his guilty plea about ten years ago to a "federal offense." (T-166, l. 24 – T-167, l. 6.) The desired dramatic effect was quickly shattered, however, moments after Commissioner Murray observed that federal offenses are usually white-collar crimes involving frauds, and directly asked Mr. Epps exactly what federal offense he had plead guilty to. (T-176, ll. 3-7.)

The answer was that Mr. Epps had plead guilty to picking up pieces of arrowheads on Bull Shoals Lake. (T-176, ll. 8-9.) Although the transcript does not reflect the audible laughter that broke the silence and suspense in the hearing room at that moment, Mr. Epps referred to it in the second sentence of his answer to Commissioner Murray's question. (T-176, ll. 9-10.) Mr. Epps had returned to this familiar place, "on that river where we were raised," (T-176, ll. 15-16) to seek peace and solace after the death of his wife. (*Id.,* ll. 14-15.) His tranquility was broken when he was given a ticket by a Park Ranger for being in possession of arrow heads. Mr. Epps remains amazed to this day by the overzealous federal prosecutor who decided to make him an "example" of the consequences of violating a new and obscure federal law which Mr. Epps unknowingly violated. (T-176, ll. 14-18.) This incident has no reasonable bearing on Mr. Epp's moral character or OEP's qualifications to provide natural gas service in the Ozarks.

In another example of the lengths to which SMNG was willing to go to try to discredit Mr. Epps, the record will reflect that, on cross examination, Mr. Epps did not know how many therms there are in a CCF of natural gas. (T-168, ll. 13-15.) Nor does counsel for Ozark Energy Partners, who has nearly 30 years in and around regulated utilities, including twelve at the PSC. The question would make for an interesting pop quiz around the Commission's offices.

Mr. Epps made it clear in his testimony that one of OEP's strengths is its ability to assemble a team of highly-qualified experts and professionals to accomplish the task. (T-159, ll. 16-20; T-180, ll. 7-15.) In fact, Mr. Cattron testified that, at the time he took on the role of President and Chief Operating Officer of MGE, he did not have any experience in operating a gas utility, nor in the planning, design, or construction of natural gas transmission or distribution systems. (T-105, ll. 15-24.) Mr. Cattron testified that, based on his own experience, it is not essential to have already been in an industry in order to achieve success in that industry but, rather, it is important to surround oneself with a quality team to ensure success. (T-105, l. 25 – T-106, l. 4.)

There is clearly no requirement under Missouri law that each owner, partner or shareholder of a public utility must be educationally and experientially qualified to personally manage each aspect of the company's operations. Sometimes the owners also manage and operate the company, and sometimes they hire professional managers with the required expertise to perform those responsibilities. The record demonstrates that Ozark Energy Partners is technically and managerially qualified to provide natural gas service in its proposed service area.

Based upon the competent and substantial evidence in the record of this case, the Commission should find that Ozark Energy Partners, LLC is qualified to provide natural gas service in its proposed service area.

3. *FINANCIAL ABILITY TO PROVIDE THE PROPOSED SERVICE*

OEP has three partners, and additional equity owners. (Exh. 27 HC, 28 NP, pp. 53-55 and p. 24; T-164, l. 9 – T-165, l. 13.) OEP's equity owners have provided the initial capital required to support franchise development and regulatory requirements *** ____ ________________*** have expressed interest in participating in raising the next round of required capital. (Exh. 27 HC, 28 NP, p. 24.)

OEP has also established a number of contacts within the financing community that will provide access to both equity and debt financing sources once the Commission has granted a conditional certificate of convenience and necessity to OEP. (Exh. 27 HC, 28 NP, p. 24.) OEP has agreed have its certificate of convenience and necessity conditioned on the need for Commission approval of its final financing for the project.

As Mr. Cattron testified, it is difficult to obtain financing for a project such as this without a conditional certificate of convenience and necessity from the Commission. “It’s a chicken and egg issue that we all deal with.” (T-103, ll. 5-12.)[3] Prospective investors want to see a conditional certificate from the Commission before making financial commitments to the project. (T-104, ll. 4-6.) OEP has agreed (in its Stipulation and Agreement with Staff) to come back to the Commission with not just a financing plan, but with executed documents that will provide the funding necessary to get the system built, gas delivered and operating. It is OEP’s expectation that it would be presenting at least the first three years of capital requirements, and possibly the first five years, to the Commission with its financing application. (T-103, ll. 13-25.)

A *Stipulation and Agreement*, filed on November 8, 2007 in this case, was entered into between OEP and Staff. Its provisions were explained in detail in *Staff’s Memorandum in Support of the Stipulation and Agreement* filed by Staff on November 26, 2007 and submitted by Staff at hearing. (Exh. 24HC, 25NP.)

[3] Mr. Maffett of SMNG used the same analogy in his testimony in GA-2007-0212, SMNG’s Application for a certificate of convenience and necessity to serve Lebanon, Houston and Licking. *See,* GA-2007-0212, T-67, ll. 1-11. OEP requests that the Commission take official notice of this portion of that transcript in the Commission’s records.

The *Stipulation and Agreement* was supported by MGE in the *Stipulation and Agreement of OEP, MGE and Staff* filed on November 21, 2007.[4]

The *Stipulation and Agreement* provides that OEP should be granted a conditional certificate of convenience and necessity in this case. One of the conditions provided for in the *Stipulation and Agreement* concerns the financing of the OEP project. The *Stipulation and Agreement* provides that the certificate of convenience and necessity to Ozark Energy Partners should be conditioned on Commission approval of the financing arranged by OEP to effectuate the project. In fact, not only the financing plan must be submitted and approved, but final, executed financing documents must be submitted to the Staff. (*Stipulation and Agreement,* Section III. B. 4.(a), at p. 3.) It is Staff's position that the "ability of a company to actually obtain financing indicates that a lender has found the project to meet some objective criteria for economic feasibility." (*Staff' Brief,* at p. 9.) Staff goes on to suggest that neither OEP nor SMNG "should be permitted to exercise its Commission granted CCN until and unless it provides to Staff evidence that it has actually obtained financing for the project." (*Id.*)

Contrary to testimony from SMNG in GA-2007-0168 (GA-2007-0168, T-153, l. 12 – T-154), Mr. Cattron testified that the ***up-front costs of procuring financing*** are not $1-2 million, or even hundreds of thousands of dollars.

[4] OEP has requested that the Commission take administrative or official notice of the *Stipulation and Agreement of OEP, MGE and Staff*, and no party has opposed that motion. (*See, Motion for Admission of Late-Filed Exhibit or Administrative Notice,* filed by OEP on December 4, 2007.) If necessary, OEP also requests official notice of the *Stipulation and Agreement* itself, filed in the case November 8, 2007, which was not presented as a separate exhibit at hearing but is part of the Commission's official file in this case.

"Typically you might pay $25,000, maybe $50,000 on the front end to get financing in this magnitude completed." (T-104, ll. 7-16.) The remainder of the financing cost "is actually going to be more of a contingent fee based program where those funds are actually taken out of the dollars that you actually have invested in. So there really isn't any significant cost on the front end to address financing. Quite frankly, it hasn't even been a concern of [OEP's]." (T-104, ll. 17-22.)

As mentioned above, in its Feasibility Study, OEP revealed the existence of certain ***____________________*** of the company. (Exh. 27 HC, p. 24.) SMNG made every effort at hearing to obtain information concerning the identity of OEP's ***_____________________*** and other highly confidential information concerning the financing of OEP.[5] (T-165, ll. 9-25; T-174, ll. 11-25 – T-175, l. 5.) OEP will be entirely forthcoming to the Commission about its investors and funding sources in the financing phase of its application. However, it is not relevant to the issue of whether to grant a conditional certificate to OEP, conditioned, in part, on ultimate Commission approval of OEP's financing plans and final, executed financing documents, particularly in the presence of a competing applicant for the same or similar authority. (T-166, ll. 9-13.)

The evidence on the record in this case supports a finding by the Commission that OEP has the financial ability to provide the service requested in

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[5] Mr. Epps was unwittingly mistaken at hearing when he stated that OEP had not revealed the identity of its ***________________*** to Staff. (T-T-175, ll. 6-12.) He did not "recall" whether Staff had asked because he was not in attendance at the meeting of OEP Advisors with Staff in which the identity of the ***____________________*** was discussed.

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this case, at least on a conditional basis, pending subsequent Commission approval of OEP's financing plans and final, executed financing documents.

4. *THE APPLICANT'S PROPOSAL MUST BE ECONOMICALLY FEASIBLE*

a. Introduction to OEP Feasibility Study

Unlike the formulaic, system-wide financial model presented as a feasibility study by SMNG in Case No. GA-2007-0168, OEP crafted and presented in this case a thorough and thoughtful Feasibility Study, including narrative discussion and explanations, in support of its Application. This Feasibility Study demonstrates that OEP has a clear business strategy that will be efficacious in assuring that Ozark's efforts to bring natural gas to the Ozarks Region will be financially and technically successful. OEP's Feasibility Study was prepared by, and under the direction of, Steven Cattron, and by Greg Pollard, who collectively have more than 50 years of experience in public utility management and operations and in consulting businesses concerning enhancing efficiency. (T-93, ll. 2-3; Exh. 27 HC, pp. 57-58; *See also,* Affidavits of Steven W. Cattron and Greg Pollard, filed in this case on September 4, 2007 as part of OEP's *Supplement to Application* of that date.) Mr. Cattron explained the importance of a Feasibility Study based upon reasonable assumptions in his testimony. (T-97, ll. 7-19.)

b. History in the Region

As the Commission is well aware, there have been previous, unsuccessful efforts by SMNG's predecessors to provide natural gas service to the greater Branson area. In fact, the people of the Ozarks region of Missouri have been trying unsuccessfully to bring natural gas to the area for at least the last fourteen years, since the City of Hollister granted a franchise to a company called Ozark Natural Gas (ONG)[6] in 1994.[7] ONG and its corporate successor, Alliance Gas Energy Corporation, made repeated, failed promises to city officials and citizens in the region to construct a natural gas utility.

On December 3, 1997, ONG filed its Application with the Missouri Public Service Commission for a certificate of convenience and necessity.[8] **On August 4, 1998, the Public Service Commission issued an *Order Approving Stipulation and Agreement* in Case No. GA-98-227 granting to ONG a certificate of convenience and necessity. However, not a single Mcf of natural gas was ever delivered to customers in the Ozarks,** nor was any construction of natural gas facilities ever undertaken by ONG. As a result, the various municipal franchises that had been granted to Ozark Natural Gas lapsed, and its certificate from the Public Service Commission became void under Section 393.170.3. In the course of these events, apparently the owners of ONG

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[6] Ozark Natural Gas Co., Inc. (ONG) was not affiliated with the present applicant, Ozark Energy Partners, LLC, and, to the best of counsel's knowledge, no longer exists.

[7] Other municipal franchises subsequently were granted by: Forsyth (January 1996), Village of Bull Creek (January 1996), Reeds Spring (April 1996), Branson West (May 1996) and Branson (November 1997).

[8] *See,* Application of Ozark Natural Gas Co., Inc., MoPSC Case No. GA-98-227 (filed December 3, 1997), Schedule App-5 ("Franchise Documents"). The Commission is asked to take official notice of these documents in its records.

ended up embroiled in litigation among themselves rather than bringing natural gas to the Ozarks. (GA-2007-0168, T-116, ll. 12-19.)

Then, on January 26, 2004, the City of Branson enacted a new municipal franchise ordinance, yet again designed for natural gas service to be provided in the city by Ozark Natural Gas. (Bill No. 2806, Ordinance No. 2004-023.)[9] The history and experience concerning this franchise is set out in detail in the *Brief of Ozark Energy Partners* in Case No. GA-2007-0168, at pages 4-6, and is hereby incorporated by reference into the instant Brief.

This earlier failure to bring gas to the region, and the experience of companies like Tartan Energy (the predecessor of SMNG) have contributed to Staff's view that there is a high level of risk involved in creating a new natural gas utility in Missouri. This motivates Staff and the Office of the Public Counsel to urge positions that impose any risk of failure of the venture on shareholders, rather than on ratepayers. (*Staff Memorandum in Support of Stipulation and Agreement,* Exh. 24 HC, 25 NP; T-26, l. 20 – T-27, l. 19.)

c. The OEP Response to Past Failures of Others

The failed efforts of the last fourteen-plus years have all relied on a traditional approach to planning and building-out a natural gas utility, building a lengthy and expensive pipeline first. That same model has been proposed by SMNG in Case No. GA-2007-0168. **Only OEP has recognized the enormous challenges of that traditional model, and has pursued an innovative,**

[9] *See,* Application of Alliance Gas Energy, filed October 26, 2006 in Case No. GA-2007-0168, Appendix F.

alternative model designed to succeed where SMNG's predecessors have failed.

Ozark Energy Partners set out to develop a Feasibility Study and business plan that addressed the concerns raised by Staff and Public Counsel and avoided previous pitfalls.[10] The result is a business plan designed to: (1) reduce immediate, initial investment and operating costs; (2) focus initial build-out on new development in the region rather than on tenuous prospects for conversions of customers from existing energy sources in areas that are already highly-developed; and (3) use of an initial, interim supply system that permits OEP to provide service to more customers, more quickly and at less cost, than traditional methods. These factors combine to produce a plan that is economically feasible so that, at long last, the people of the Ozarks will receive natural gas service and not just more, empty promises.

OEP sought to directly comply with the requirements of the Commission in 4 CSR 240-3.205 (1) (A) 5 in its Feasibility Study. That rule requires that an applicant for a certificate of convenience and necessity to provide natural gas service must provide a feasibility study that contains, among other things, the applicant's proposed rates, and its estimated number of customers, revenues and expenses, for the first three years of operation. Ozark's Feasibility Study included this information for the first five years, for the specific Ozarks-region service area proposed by OEP in this case. (Exhibit 27 HC, Exhibit 28 NP; T-93, ll. 12-23.)

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[10] At hearing, Staff witness Straub acknowledged that OEP had met a number of times with Staff to try to meet its concerns, and that the conversion rates in OEP's Feasibility Study were "more conservative than others." (T-69, ll. 10-21; T-68, l. 3 – T-69, l. 3.)

The traditional model for building a gas utility would be to build the supply transmission pipeline or lateral first, and then begin to serve customers. Mr. Cattron observed that it would be “a challenge for anybody to do that” in this area, whether the cost of that supply facility is $18 million, $25 million, or another number, because there is a significant investment that has to be made over 6-18 months “that is necessary before you get one dollar of revenue. That puts a significant financial strain on any corporation.” (T-94, ll. 6-15) As stated by ***____

____*** (T-146 HC, ll. 9-12.) **This fact is borne out by the failure to bring natural gas to the greater Branson area despite more than fourteen years of effort by SMNG’s predecessors using the traditional build-out model.** Mr. Cattron described SMNG’s proposal (in Case No. GA-2007-01068) as “exactly the same business strategy that had been presented before” by SMNG’s predecessors. (T-106, ll. 5-19.)

d. Overall Business Strategy Reflected in OEP Feasibility Study

As Mr. Cattron explained at hearing, Ozark’s Feasibility Study includes both a basic business strategy and operating platform, and the economic and financial aspects of the resulting business strategy on the financial pro formas. (T-93, ll. 4-11.) **What Messrs. Cattron and Pollard did was “to create a business strategy that would allow us to do a much better job in matching investment dollars consistent with when revenue could be experienced.”** (T-94, ll. 16-20.) For example, instead of building a supply lateral on “day one,” upon which very little revenue could be generated in the early years, the OEP business strategy is to "match addition of customers with a much smaller investment, and as the system builds and grows, then we will expand." (T-94, l. 21 – T-95, l. 2.)

OEP's business plan includes the existence of the traditional supply lateral or pipeline at some point in the future, whether OEP builds and owns it or it is contracted from other suppliers. (T-95, ll. 3-9; Exh. 27 HC, pp. 7-8.) However, under the more traditional model, the 30-35 mile pipeline or lateral would have to be constructed, at a cost of between $18 and $25 million, in order to serve the first customer. (Exh. 27 HC, pp. 7, 10-11.) As stated in the OEP Feasibility Study: "OEP has determined that the feasibility of a gas project serving the above mentioned counties and municipalities rests upon ***___

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Residential and commercial new growth plays a large part in revenue generation and cost containment, due in part to higher customer density in new growth areas as compared to conversions. ***________________

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____*** (Exhibit 27 HC, at page 4, emphasis added.)

Thus, Mr. Cattron testified that the OEP Feasibility Study also is based on an **innovative supply strategy**, creating ***__________________________

*** (T-107, ll. 8-12.)

The fast growth in OEP's proposed service territory is essential to its business strategy. (T-98, ll. 20-24.) The Ozark Feasibility Study focuses on new growth in the early years of the system. (T-98, l. 24 – T-99, l. 2.) The areas contained in OEP's proposed certificated area have experienced, and continue to experience, a high population growth rate, higher than average for the State of Missouri. (Exh. 27 HC, Exh. 28 NP, at p.5.) ***

*** (*Id.*)

In addition, ***

*** (*Id.*)

Residential and commercial conversions will be sought as the distribution system grows throughout the service area. However, OEP understands the difficulty in obtaining conversions and based its Feasibility Study upon very conservative estimates of conversions to natural gas from existing fuel sources.

(T-99, ll. 3-4; Exh. 27 HC, p. 15.) For example, the **OEP Feasibility Study assumes zero conversions from all-electric to natural gas.** (T-99, ll. 17-22; Exh. 27 HC, 28 NP, p. 14 (last sentence) and Table 3 on pp. 16-17 (assumes conversions only from propane.) Although OEP will try to encourage such conversions, the reality is that when a residential customer, for example, has invested $3,000 to $5,000 in heating, ventilating and air conditioning (HVAC) equipment in their home, they are not going to change that investment simply "because they might be able to lower their operating costs." (T-100, ll. 7-14; and l. 25 – T-101, l. 3.) OEP utilized conversion rates in its Feasibility Study from ***________________________*** numbers that are conservative and, therefore, likely to be realized. (Exh. 27 HC, p. 15; T-99, l. 17 – T-100, l. 2.)

The approach of OEP's Feasibility Study was to take Taney and Stone Counties, where the majority of prospective OEP customers exist today and where the growth is in the region, and create from that information a customer penetration program primarily focused on new construction. Then construction cost estimates were applied based on SMNG cost estimates, which are some of the higher costs in the state. (T-95, l. 20 – T- 96, l. 2.) These construction costs are estimated at roughly $4,000 per customer. (T-96, ll. 22-23; Exh. 27 HC, p. 10.) To build within the City of Branson, however, would cost 1.5 to 2.5 times more, because it is so fully developed and would require digging up many paved areas. (T-96, ll. 3-9; Exh.27 HC and 28 NP, pp. 5. *See also,* Exhibit 1 to Feasibility Study, Exh. 27 HC, at p. 26.) SMNG's witnesses in GA-2007-0168 confirmed that building within the City of Branson would be much more expensive than building in developing areas. (GA-2007-0168, T-185, ll. 1-3; T-205, ll. 1-5.) Thus, OEP's business strategy does not include building in the City of Branson as a priority. As Mr. Cattron testified, "We see Branson as a late stage introduction into our business strategy. To start in Branson day one when you're looking at trying to match revenue with lower cost of construction, it creates more challenges. So instead of looking at ***____________________

___________________________*** to add a customer. Just puts more financial strain on the company." (T-96, ll. 18-24.)

Thus, in OEP's view, Branson would be a hindrance to its early entry business strategy, a strategy that will result in a much greater likelihood of ultimately bringing gas to that community. (T-97, ll. 3-6; Exh. 27 HC, Exh. 28 NP, p. 25.) OEP's business model is based on bringing service to lower-cost, developing areas first, carefully targeting its initial investment and expenses, and thus generating cash flow that can then be used to expand its system. (Exh. 27 HC, pp. 8 and 25.)

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___________________*** (T-115, ll. 19-25.)

Another aspect of OEP's business strategy that will enhance its economic feasibility is to use ***____

_________******* in the early years of the project. (Exh. 27 HC, pp. 21-22.) Under a more traditional approach to “building-out” a new natural gas distribution system, the utility would hire full-time employees to provide service and maintenance, meter-reading, service order and other services from the first day of the project, as well as buying or leasing trucks, renting office space, acquiring telephone systems and computers, etc. to support each of these full-time employees.

As part of its strategy of staying “light on its feet” in the early stages, in order to increase cash-flow and the ability to expand more quickly and efficiently, OEP plans to have ***_____*** full-time employees at the outset: a ***________

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______________*** (Exh. 27 HC, at 21-22.) ***________________________

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__________________*** (Exh. 27 HC, at 22.)

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____*** (Exh. 27 HC, at 22.) The operating and maintenance budget of OEP, within the Feasibility Study, were developed based upon the direct experience of Messrs. Cattron and Pollard in operating a gas distribution company. (Exh. 27 HC, p. 22, Table 10 and Exhibit 6 HC; *See* resumes of Messrs. Cattron and Pollard, EXh. 27 HC, at pages 57 and 58.)

Thus, SMNG's feigned argument that OEP's operations will not be adequately staffed is entirely specious, as is its claim that it will add about 20 employees to serve the Branson area. (T-47, ll. 5-22; T-67, ll. 2-7.) Actually, most of SMNG's employees will be construction workers, not personnel who will provide ongoing distribution functions. (GA-2997-0168, T-149, l. 14 – T-150, l. 7.)

e. Gas Supply Strategy

As stated earlier herein, OEP's business strategy includes postponing the need to invest in construction of a transmission pipeline (or supply lateral) itself, or to enter into an agreement with a pipeline company such as Southern Star Central Pipeline Company to build such a pipeline, which would require immediate payment by OEP of reservation charges for a much greater supply of natural gas than OEP would actually need in the early years of the project. Instead, OEP proposes to create ***______________________________

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__________________*** (T-107, ll. 4-12, HC.) This strategy would allow OEP to focus on new development in the service area for build-out first, and permit OEP to begin serving customers before a lengthy pipeline is constructed that is designed to serve thousands of customers when there are only a few at first. In addition to reducing initial capital outlays, this approach obviates the necessity of a *** *** (T-152 HC, ll. 6-14; Exh. 27 HC, p. 11.)

OEP plans to construct *** *** (*Id.*) As the customer base grows and volumes begin to level out, OEP will develop plans to construct a transmission line or contract for transportation services. (Exh. 27 HC, at pp. 8, 11-12; T-95, ll. 3-9.) *** ***(Exh. 27 HC, page 25.)

Contrary to SMNG's suggestion on cross-examination of Mr. Cattron, OEP would not need to install additional supply facilities within the city limits of

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Branson in order to ultimately provide service there. (T-116 HC, ll. 1-5.) OEP's supply facilities do not necessarily need to be located within a city in order to provide service within that city. In fact, all of those facilities may end up being located in unincorporated areas. (T-113, l. 16 – T-114, l. 5.)

OEP's expert on gas supply testified at hearing. That expert, ***_______

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____*** (T-120 HC, ll. 14-25.) After study and discussion, ***________________________________

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(T-121 HC, ll. 1-7.)

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____*** (Exh. 27 HC, page 7.) ***____

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(Exh. 27 HC, at 11-12.)

___ is more economical than a traditional supply approach to a new natural gas system. The OEP Feasibility Study reflects capital expenditures of approximately ***____*** which would eliminate the need for ***_______________*** of capital investment to construct a transmission pipeline until such an investment is advantageous to OEP's customers. (Exh. 27 HC, at 12, 68 and 69.) In addition, OEP's approach would eliminate costly reservation charges in the early stages. Reservation charges would have to be paid to the pipeline company to reserve capacity on its system to be able to carry OEP's gas supplies. As reflected in the OEP Feasibility Study, reservation charges are projected to range from ***______________________

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______________*** and would be based on an assumed contract demand level of ***___________*** per day. (Exh. 27 HC, p. 11.) This would be a cost to OEP of approximately ***______________________*** per year in reservation charges, to reserve far more pipeline capacity than would be needed in the early years of the project, in addition to the FERC-tariffed transportation rate. (Exh. 27 HC, 28 NP, pp. 10-11.)

____ _________________ (T-50 HC, ll. 17-25 – T-51 HC, l. 2; T-121 HC, l. 9 – T-122 HC, l. 12.) ***____ ____ ____ ____ ____ ____ ___________*** (T-121 HC, l. 9 – T-122, l. 12.) ***________________________ ____*** (T-144 HC, ll. 6-10.)

OEP's expert witness on supply options made several trips to Jefferson City to discuss the CNG proposal and characteristics with Staff. (T-123, ll. 3-9; T-68, ll. 3-16, l. 23-T-69, l. 3.) All areas of Staff expertise were represented in these meetings, including gas safety staff. (T-68, l. 3-T-69, l. 3.) ***________________ ____ ____*** (T-43 HC, ll. 7-15). ***____

*** (T-50 HC, ll. 23-25; T-51 HC, ll. 3-13.)

OEP's Feasibility Study is based on the assumption that OEP will *** *** (Exh. 27 HC, page 10.) That is consistent with the provision in the Stipulation and Agreement which provides that *** *** (Exh. 24 HC, 25 NP, at pp. 13-14; *Stipulation and Agreement,* Section III.I.14, at p. 7.) Staff's rationale for requesting this provision is explained in *Staff's Memorandum in Support of the Stipulation and Agreement* at page 14. (Exh. 24 HC, 25 NP.)

*** ”*** (T-145 HC, l. 21 – T-146, l.12, emphases added.)

i. SUPPLY CONFIGURATION AND COST

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*** (T-153 HC, ll. 5-15.)

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ii. RELIABILITY OF SUPPLY –

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iii. SAFETY OF SUPPLY

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Although SMNG tried to surprise the witness, and negatively influence the Commission, by showing the witness a *** ***

Ironically, the News Tribune on the same day as the hearing (November 29) carried a story on page A3 about a fire at a major oil pipeline in Minnesota that killed two workers, which also affected oil prices on the New York Mercantile Exchange. (“Fire at major U.S. oil pipeline kills 2: Oil prices soar briefly Thursday”.) *** .***

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__________ testified that **any form of natural gas is safer than propane or propane air.** He explained that methane rises if it leaks, while propane, which is heavier than air, is less safe in a leak situation. (T-144 HC, ll. 2-6; T-149 HC, l. 24 – T-150, l. 1.) In addition, natural gas facilities must meet “an incredibly high standard in federal laws.” (T-151 HC, ll. 21-25.) In the view of OEP’s expert witness, “propane has an unfair advantage over natural gas” because “we actually have state and federal agencies monitoring our industry to a much higher standard than say some of the private sector insurance inspections that propane plants have, so definitely, in my opinion, a double standard.” (T-151, l. 20 – T-152, l. 5.)

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In response to a question from the Bench, ***____

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OEP will work with the Commission's safety and operations Staff to ensure the ***____________*** will meet all necessary requirements and codes prior to construction. (Exh. 27 HC, at 12; *Stipulation and Agreement,* pp. 12-13; Exh. 24 HC, 25 NP, pp. 17-19.)

Counsel for SMNG tried to make an issue about OEP not having discussed its ***____________________________*** (T-183, ll. 3-7.) This tactic should be recognized by the Commission as the red herring that it is. OEP has developed very strong and open communications with city officials throughout the proposed service area. The existence of a competing application for the same service area is the reason the specific methodology has not been discussed in detail with city officials, out of legitimate concern that SMNG would become aware of this competitively advantageous proposal through inadvertent communication with one or more of those same officials. Those officials will be thrilled to see this project come to the Ozarks. OEP will discuss the matter fully with all public officials as soon as possible, and well ahead of undertaking any construction activities.

In addition, whether natural gas is transported by pipe underground, or ***____,*** OEP will meet all safety requirements to ensure the safe transportation of natural gas. OEP has committed to safety, and has the expertise to assure it, as reflected above.

iv. ADVANTAGES OF OEP SUPPLY ALTERNATIVE SUMMARIZED

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v. CONFIDENTIALITY ISSUE

SMNG sought to make an issue of the confidentiality with which OEP treated its testimony on the subject of its natural gas supply plans. (T-117 HC, ll. 13-18.) SMNG asserted for the record that the "Highly Confidential" designation was designed to assure that company executives of SMNG did not know who was going to testify on behalf of OEP on the subject. (T-117 HC, l. 24 – T-118 HC, l. 7.) However, as explained by counsel for OEP at hearing, **SMNG could have hired an outside expert at any time during the course of this case to review confidential information, as Ozark did in Case No. GA-2007-0168.** (T-

118, ll. 8-11.) At no time did SMNG challenge Ozark's "HC" designations in this case until, belatedly, during the hearing in GA-2007-0168. That motion was denied as being raised in the wrong case. No similar motion was ever made in Case No. GA-2006-0561.

The irony in this fuss by SMNG about confidentiality is that it filed its *entire feasibility study* as "Highly Confidential" in Case No. GA-2007-0168, rather than filing both an HC version and a Non-Proprietary (NP) version as OEP did of its Feasibility Study in the instant case. **In addition, SMNG's *entire proposed service area* was "Highly Confidential"** – both legal description and plat – until apparently released from that designation during the hearing in GA-2007-0168. OEP respected SMNG's right to make those designations, as unusual as they seemed.

The reasoning behind the "HC" designation concerning gas supply should be evident from the competitive nature of these proceedings. OEP believes that its gas supply option is unique and cost-effective, enhancing the economic feasibility of its proposal. To reveal this information directly to its competitor could have inspired SMNG to seek to explore and pursue a similar plan, diminishing the competitive advantage of the plan developed by OEP. As established in the record at hearing, the identity of OEP's expert on gas supply options could have ***____

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f. Financial Feasibility

The OEP Feasibility Study demonstrates that its innovative approach to finally bringing natural gas home to the Ozarks is financially feasible. In recognition of the fact that feasibility studies are estimates of future expectations, OEP has presented the financial information based upon a range of outcomes. This is identified in Exhbits 9a, 9b, 10a and 10b of the OEP Feasibility Study. (Exh. 27 HC, pp. 68-72.) The financial information under ***______________ ***

As shown in Exhibit 9b to the Study (Exh. 27 HC, p. 69), ***______________ ***

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Counsel for SMNG asked Staff witness Straub to read some numbers into the record from Exhibits 9a and 10a of the OEP Feasibility Study (Exh. 27 HC, pp. 68 and 70) which reflect ***____

________*** (T-48, ll. 8-25 – T-49, ll. 1-25.) However, **the implication of Mr. Fischer's question to Mr. Straub misrepresents what the OEP Feasibility Study shows.** The ***____

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While the schedules only show a ***____________________

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The huge initial investment to serve the initial set of customers creates financing hurdles that have continually contributed to the failed attempts at bringing natural gas to the Ozark region. ***____

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SMNG also referred several times at hearing to the 5-year OEP capital costs of ***$______________*** referred to in the ***_____________*** portion of the OEP Feasibility Study. (Exh. 27 HC, p. 24; T-62, ll. 3-6; T-173, ll. 17-25; T-174, ll. 1-10.) Those numbers reflect the ***_________________

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As seen in comparing Exhibits 9b and 10b, OEP's Mid Range estimate begins generating net income in ***__________________________________

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_ ______________________*** Income is generated because of the ability to manage cost and reduce capital expenditures. SMNG, on the other hand, is proposing the same approach that has failed to deliver gas to the Ozarks for the last 14 or more years. OEP sought and formulated an alternative approach to overcome the obstacles that have prevented this project from succeeding in the past.

CONCLUSION REGARDING FEASIBILITY

The competent and substantial evidence upon the whole record supports a finding by the Commission that OEP's proposal to provide natural gas service in its proposed service area is economically feasible.

5. *THE SERVICE MUST PROMOTE THE PUBLIC INTEREST*

A grant of a certificate of convenience and necessity to Ozark Energy Partners in this case will promote the public interest by providing consumers with an additional choice of fuel for their heating, cooking and water heating needs and for commercial and industrial processes. That consumer choice may be based on fuel costs, convenience and aesthetics (no propane tank in the back yard), as well as safety. Natural gas is clearly a safer fuel choice than propane, as discussed above.

The OEP Feasibility Study, and the record in Case Nos. GA-2006-0561 and GA-2007-0168, clearly demonstrate that natural gas prices are expected to be competitive with propane, electricity and home heating oil in the Ozarks region. (T-101, ll. 17-22.) Lower natural gas prices in the mix will reduce the region's overall energy costs, which is also in the public interest.

The capital expenditures proposed by OEP in the service area will increase tax revenues in the communities OEP serves; will promote business development and will increase jobs in those communities. (T-98, ll. 11-19.) Competitive business environments tend to result in lower costs. Thus, increasing energy competition will promote economic development by reducing overall energy costs in the region.

The evidence upon the whole record clearly establishes that bringing natural gas to the Ozarks region is in the public interest.

SMNG OPPOSITION AND COMPETING PROPOSAL

In Case No. GA-2007-0168, SMNG is promoting the same traditional strategy that has failed for more than 14 years to bring gas to the Ozarks, a strategy that continues to be plagued by increasing construction costs over the same period. In addition, the evidence in GA-2007-0168 shows that SMNG ***__

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____________________*** OEP is the only applicant absolutely committed to building this system and providing service to the Ozarks. (T-179, l. 19 – T-180, l. 6. T-180, ll. 20 – T-181, l. 11.)

Counsel for SMNG made it a point to repeatedly, and rather sarcastically, quote counsel for OEP's statement, in a pleading in another but related matter, that the two companies were engaged in a "race to serve the Ozarks." However, there is clearly a direct and vigorous competition between the two companies for the right to provide natural gas service to the greater Branson/Ozarks region of Missouri. Perhaps a football analogy would have seemed less offensive than a racing analogy, but the description of the contest should not have any effect on the merits of the application of OEP in this case.

It may also be that SMNG's interest in the phrase is that it believes that the City of Branson is the keystone of the proposed service area, and the competition between OEP and SMNG should not be over the "Ozarks" but over serving the City of Branson. SMNG has stated that it would not be economic to bring gas to the Ozark region unless the City of Branson is served first. (GA-2007-0168, T-33, ll. 18-22; T-34, ll. 1-9.) However, the City of Branson is becoming very fully developed and "has trapped itself … in its geographical area" in terms of the city limits. (T-156, ll. 4-8; T-157, l. 20 – T-158, l. 2.) Thus, success within the City of Branson would have to rely heavily on conversions of heating equipment in existing homes, and construction costs would include installing gas mains and lines under existing streets and pavement. (T-96, ll. 3-9; Exh.27 HC and 28 NP, pp. 5. *See also,* Exhibit 1 to Feasibility Study, Exh. 27 HC, at p. 26.)

Further, as discussed above, it is undisputed that construction costs in Branson are much higher than in new developments. SMNG's own witnesses in GA-2007-0168 confirmed that building within the City of Branson would be much more expensive than building in developing areas. (GA-2007-0168, T-185, ll. 1-3; T-205, ll. 1-5.) The greater growth, and potential for growth, lies in and around Hollister (T-158, ll. 4-8.) **However, SMNG does not know when it might even**

serve Hollister. (GA-2007-0168, T-206, ll. 13-15.) OEP plans to place its headquarters in Hollister, and plans for Hollister and the surrounding area to be the first focus of its build-out. (T-157, l. 17 – T-158, l. 8.)

At the present time, OEP does not hold a franchise from the City of Branson. (*Stipulation and Agreement,* at p. 5.) OEP has not considered it critical to seek to purchase or obtain that franchise, since Branson cannot be an immediate priority for building-out OEP's system under its Feasibility Study and business strategy. OEP has held meetings with Branson city officials and determined that, once OEP is operating its system, it will seek a franchise from the city at the earliest reasonable opportunity. As stated by Mr. Cattron, OEP sees Branson as an important community in the future. (T-97, ll. 1-2.)

However, based on the evidence adduced in GA-2007-0168, to focus on the City of Branson as SMNG has ***______________________________ ______________________________*** OEP's plan provides a greater likelihood that the City of Branson and surrounding communities will actually receive natural gas service.

STIPULATIONS AND AGREEMENTS

On November 8, 2007, a *Stipulation and Agreement* was filed in this matter on behalf of Ozark and Staff. (Exhibit 24 HC, Exhibit 25 NP.) Only SMNG, which has pending a competing application for much of the same proposed service territory in Case No. GA-2007-0168, objected to the *Stipulation and Agreement.* No other party objected to the *Stipulation and Agreement.* The provisions of the Stipulation and Agreement are analyzed and supported by Staff in its *Memorandum in Support of Stipulation and Agreement.* (Exh. 24 HC, 25 NP).

On November 21, 2007, the ***Stipulation and Agreement of OEP, MGE and Staff*** was filed in this case. No objections were filed to the *Stipulation and Agreement of OEP, MGE and Staff.* Counsel for SMNG specifically stated at hearing that SMNG "does not have any objection to the Stipulation between Missouri Gas Energy and Ozark related to the service territory issues." (T-19, ll. 1-4.)

The key, substantive provisions of the OEP, MGE and Staff Stipulation are in paragraphs 4, 5 and 6:

> 4. MGE joins the Stipulation and Agreement filed in this case on November 8, 2007.
>
> 5. OEP hereby voluntarily waives any right to seek a certificate of public convenience and necessity to provide natural gas service in any sections for which MGE has already received a certificate of convenience and necessity from the Commission.
>
> 6. If MGE files an application for a certificate of convenience and necessity to serve an area not in a section or sections in which MGE has already received a certificate from the Commission, OEP also voluntarily waives any right to file a competing application for the requested area.

Thus, OEP will not seek a certificate to provide natural gas service in any geographical section(s) for which MGE already has a certificate, and will not file a competing application for any section(s) for which MGE has a certificate application pending. Further, MGE supports the *Stipulation and Agreement* of November 8, 2007, between OEP and Staff.

OEP encourages the Commission to approve the *Stipulation and Agreement of OEP, MGE and Staff* in this case, and to adopt positions in the case that are consistent with the positions of Staff, OEP and MGE as reflected in the *Stipulation and Agreement* of November 8, 2007. (*See,* discussion of legal issues regarding non-unanimous stipulations, below.)

CONDITIONS

The *Stipulation and Agreement* includes a number of conditions that would apply to OEP in its conditional certificate of convenience and necessity, including conditions relating to gas safety, accounting and depreciation, customer service. The conditions are discussed in detail in Staff' *Memorandum in Support of the Stipulation.* (Ex. 24 HC, 25 NP.) OEP has agreed to each of these conditions. **Staff has stressed that it believes the same conditions should apply to both OEP and SMNG if the Commission grants a conditional certificate to each company, as recommended by Staff.** (T-53, ll. 2-9; *Staff's Brief,* GA-2007-0168, at 13.) **OEP strongly concurs.**

SMNG appears to only object to a single condition proposed by Staff in Case No. GA-2007-0168, which pertains to disposal of assets. (GA-2007-0168, T-78.) The same substantive provision (applicable to OEP) appears in the *Stipulation and Agreement* in the instant case, namely, Paragraph 3. That paragraph states:

> **Section III. A. 3**:
>
> OEP agrees that if, at any time, it sells or otherwise disposes of its assets in a sale, merger, consolidation or liquidation transaction at a fair value less than its net original cost for those assets, the purchaser/new owner shall be expected to reflect those assets on OEP's books at its purchase price or the fair value of the assets, rather than at the net original cost of the assets. OEP also acknowledges that it is the intention of the Parties that the

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> provisions of this paragraph shall apply to any successors or assigns of OEP.

Staff urges the inclusion of this language as a condition for any certificate granted to OEP (or to SMNG in GA-2007-0168) because of Staff's experience with several other start-up gas utilities that ran into early financial problems and were forced to sell their assets at less than their net original cost. (*See, Staff Memorandum in Support of the Stipulation and Agreement* (Exh. 24 HC, 25 NP); *See also, Staff Position on the Issues* in Case No. GA-2007-0168, filed November 27, 2007.) This is part of Staff's wanting assurance that investors, and not ratepayers, bear the risk of business failure. (*Id.*) The issue is argued thoroughly in the Staff's Brief in Case No. GA-2007-0168.

OEP is willing to accept this provision as a condition of its certfivate of convenience and necessity in this case because, unlike SMNG, OEP's single purpose is to build and operate the natural gas system serving the Ozarks region. **OEP has no intention of selling its franchises or assets.** (T-101, l. 25 – T-102, l. 18; T-179, l. 23 –T-180, l. 6; T-180, l. 20 – T-181, l. 11; T-161, ll. 6,7.)

Another condition of the *Stipulation and Agreement,* discussed earlier, is that OEP's financing, including final executed financing documents, must be approved by the Commission. (*Stipulation and Agreement,* Section III.B.4.(a); T-102, l. 19 – T-104, l. 6.) **It is important that the Commission condition a certificate in this case and in GA-2007-0168 not only the filing of a financing "plan," or even conditional promises of investors and lenders. The object of finally assuring that natural gas service is delivered to the Ozarks (greater Branson) region requires submission and review of final, executed**

financing documents. Only then can the Commission be certain that investors and lenders have "signed on the dotted line" and committed firm money to build-out the project. SMNG has stated that the only condition proposed by Staff in Case No. GA-2007-0168 to which it objects is Section III.B.3 (GA-2007-0168, T-78), so it does not object to the condition that final, executed financing documents must be to the Commission for review before a final, or unconditional, certificate of convenience and necessity is granted. Thus, even **if the Commission were to determine that it will grant conditional certificates to both OEP and SMNG, as recommended by Staff,** it should include this financing condition in both certificates, requiring Commission review of final, executed financing documents.

OEP is willing to accept each condition proposed by the Staff in the ***Stipulation and Agreement*** signed between OEP and Staff, and filed in this case, on November 8, 2007. However, **in the event that the Commission should decide to grant conditional certificates to both OEP in this case, and SMNG in Case No. GA-2007-0168,** it should not impose any condition on OEP that is more stringent than imposed on SMNG. Consistent with Staff's recommendations in each case, and simple fairness, **the conditions applicable to such conditional certificates should be the same.**

LEGAL QUESTION REGARDING THE STATUS OF NON-UNANIMOUS STIPULATIONS AND AGREEMENTS

At hearing, Judge Jones asked the parties to address the weight to be given to a non-unanimous stipulation and agreement. (T-18, l. 13 T-20, l. 5.) He stated that the "Commission has to either approve the whole Stipulation and

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Agreement or reject it." (T-19, ll. 6-8.) He observed that the *Stipulation of OEP, MGE and Staff* refers to, and supports, the *Stipulation and Agreement* between OEP and Staff, and that if the Commission were to approve the OEP, MGE and Staff stipulation, it "would be referring to something that now for all practical purposes is null." (T-19, ll. 13-24.)

While the Commission's rule on non-unanimous stipulations does not directly address the specific questions posed by Judge Jones, the rule and case precedent do provide some guidance. Regarding the notion of the Commission having to accept or reject the "whole Stipulation and Agreement," 4 CSR 240-2.115(1)(C) provides that a stipulation to which a timely objection is filed "shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it." The rule further states: "[A]ll issues shall remain for determination after hearing."

Thus, OEP would respectfully submit that approval or rejection of the stipulation as a whole does not appear to be the question before the Commission. Rather, the issues upon which Staff and OEP have made a joint recommendation to the Commission are to be determined based on the evidence presented in the hearing.

Neither Staff nor OEP has indicated an intention not to remain bound by the provisions of the *Stipulation and Agreement* in this case. In fact, both parties clearly continue to support its terms. Thus, the non-unanimous *Stipulation and Agreement* between Staff and OEP remains an important part of the record of the case, as it constitutes Staff and OEP's position on the issues addressed. The

Stipulation and Agreement reflects the significant effort by the parties through the course of this case – in filings, discovery, discussions and negotiations – to reach what they believe is the most reasonable determination of the issues in the public interest. The fact that the product of those efforts is now considered a joint recommendation to the Commission of the signatory parties, rather than as a "settlement" of the case to be approved or disapproved, as a whole, by the Commission, should not function to diminish the result of those efforts.

Regarding Judge Jones' comment that if the Commission were to approve the *Stipulation and Agreement of OEP, MGE and Staff*, "it would be referring to something that now for all practical purposes is null", (T-19, ll. 13-24), OEP would submit that this second stipulation is far from null. As suggested above, the objection to a non-unanimous stipulation and agreement does not render it a nullity – it changes its significance from one of a binding settlement agreement, to that of a statement of recommendations of the signatory parties. Section 4 of the second stipulation states, "MGE joins the Stipulation and Agreement filed in this case on November 8, 2007." The rational effect is that the provisions of the first stipulation (OEP-Staff) become the position of MGE on the issues in the case. Thus, Commission approval of the second stipulation in this case (*Stipulation and Agreement of OEP, MGE and Staff*) would not change the nature of the first stipulation, which became a joint recommendation or position statement when objected to. The other provisions of the second stipulation are still valid, and have not been objected to by any party. Approval of the "MGE" stipulation would simply mean that the provision in that stipulation supporting the first stipulation is now simply a non-binding position statement of MGE, under the rule.

For these reasons, OEP respectfully submits that approval of the first stipulation (*Stipulation and Agreement*), between OEP and Staff, is not a condition precedent to approval of the terms of the second stipulation (*Stipulation and Agreement of OEP, MGE and Staff*). Again, OEP encourages the Commission to approve the *Stipulation and Agreement of OEP, MGE and Staff.*

CONCLUSION

In conclusion, the Commission should approve the Application filed by Ozark Energy Partners, LLC for a certificate of public convenience and necessity to provide natural gas service to Hollister, Highlandville, Kimberling City and Reeds Spring and, upon receipt of a local franchise, Branson, Branson West, as well as the surrounding unincorporated areas, as requested by the Company and described in legal descriptions and plat in this case, and consistent with the *Stipulation and Agreement* of November 8, 2007 in this case. The certificate should also be conditioned on OEP obtaining Commission approval of its financing plan, and submission of final, executed financing documents to Staff. Consistent with Staff' recommendation in its Brief in this case (at page 5), if the Commission were to determine it should grant a CCN to only one of the Applicants (OEP or SMNG), the Commission should find it in the public interest and grant OEP that certificate, as conditioned above and in accordance with the *Stipulation and Agreement.* Based upon the competent and substantial evidence upon the whole record in this case, it is clear that there is a public need for the proposed service, that OEP is qualified and financially able to provide the service, and that the project is economically feasible and otherwise in the public interest. The approval of Ozark Energy Partners' application will provide significant benefits for the residents, business and industry in the proposed service area. The OEP project will have a positive impact on employment and tax base in the communities it serves, will provide an additional energy choice for customers and lower area-wide energy costs, and will promote economic development throughout the Ozarks region. In addition, OEP's business plan will accomplish what others have failed to do, successfully bring natural gas service to the Branson/Ozarks region.

WHEREFORE, Ozark Energy Partners, LLC, respectfully requests that the Commission promptly approve its Application in this case and grant a certificate of convenience and necessity to provide natural gas service to the cities and areas set out in the Company's Application, as modified by the *Stipulation and Agreement* filed on November 8, 2007, in this proceeding.

Respectfully submitted,

/s/ William D. Steinmeier

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served electronically on the General Counsel's Office, the Office of the Public Counsel, and counsel for each Intervenor, on this 8th day of January 2008.

/s/ William D. Steinmeier

William D. Steinmeier