

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

In the Matter of the Application of The	)	
Empire District Electric Company and	)	
White River Valley Electric Cooperative	)	
for Approval of a First Addendum to	)	Case No. EO-2005-0275
the Parties' Second Territorial	)	
Agreement Designating Service for a	)	
New Structure Located in Branson, Missouri	)	

**JOINT RESPONSE TO THE COMMISSION'S ORDER AND NOTICE**

COME NOW The Empire District Electric Company (Empire), White River Valley Electric Cooperative (White River), the Staff of the Missouri Public Service Commission (Staff) and the Office of the Public Counsel (Public Counsel) (collectively, the Parties), and for their Joint Response to the Commission's Order and Notice, respectfully state as follows:

**SUMMARY**

No party objects to the First Addendum that is the subject of this case. The Parties believe that under the provisions of the previously approved Second Territorial Agreement, the First Addendum may be approved without an "evidentiary hearing." In the alternative, the Parties believe that because there is no objection to the Addendum and no request for an opportunity to present evidence, any requirement for a hearing will be satisfied by a Commission decision based on the verified Joint Motion. *State ex rel. Rex Deffenderfer Enterprises v. Public Service Commission*, 776 S.W.2d 494 (Mo.App. W.D. 1989). Accordingly, the Parties do not believe that it is necessary to establish a procedural schedule or to set this case for a "live" hearing.

## RESPONSE

1. On February 16, 2005, Empire and White River filed a verified Joint Motion for Approval of First Addendum. This pleading sought approval of a First Addendum to the Second Territorial Agreement between Empire and White River, dated April 11, 1995, which was approved by the Commission on March 19, 1996 (Case No. EO-96-176). The Second Territorial Agreement specifically designated the boundaries of two exclusive electric service areas within Taney County, Missouri.

2. On February 18, 2005, the Commission issued its Order and Notice in this case. The Order and Notice provided for Notice to the public of this case and set an intervention deadline of March 10, 2005. No application to intervene has been filed in this case.

3. The Order and Notice also directed that the Parties, by March 20, 2005, “file a proposed procedural schedule including a date for evidentiary hearing” or, in the alternative, “file a pleading stating why they believe an evidentiary hearing is not necessary.”

4. Section 394.312, RSMo provides that competition to provide retail electrical service as between a rural electric cooperative, such as White River, and an electrical corporation, such as Empire, may be displaced by a written territorial agreement. Before becoming effective, a territorial agreement must “receive the approval of the public service commission by report and order.” Section 394.312.3, RSMo.

5. Section 394.312 further states that:

The commission shall hold *evidentiary hearings* to determine whether such territorial agreement should be approved or disapproved. The commission may

approve the application if it shall after hearing determine that approval of the territorial agreement in total is not detrimental to the public interest.

Section 394.312.4, RSMo (emphasis added). As stated above, the Commission previously held a hearing and approved the subject Second Territorial Agreement.

6. Paragraph 5C of the Second Territorial Agreement addresses agreements to vary the boundaries of the Territorial Agreement on a case by case basis for “boundary structures.”

Section vii of this paragraph provides as follows:

If the Staff of the PSC, or the Office of the Public Counsel, or the PSC on its own motion, does not submit a *pleading* objecting to the Addendum within forty-five (45) days of the filing thereof, the Staff shall on the fiftieth (50<sup>th</sup>) day after receipt of the Addendum file a *recommendation* with the PSC that an order be promptly issued approving the Addendum. If such a *pleading* is filed, then the PSC shall schedule an evidentiary hearing at the earliest reasonable opportunity to determine whether the Addendum should be approved.

(Emphasis added).

7. This provision requires an evidentiary hearing only where a “pleading objecting to the Addendum” has been filed. While the forty-fifth day after the filing of the addendum has not yet been reached, neither the Staff nor the Public Counsel will be submitting a “pleading objecting to the Addendum.” Accordingly, the terms of the Second Territorial Agreement do not require an evidentiary hearing and indicate that the Staff should file a recommendation “that an order be promptly issued approving the Addendum.”

8. Even if an evidentiary hearing were required, in this circumstance the requirement for a hearing can be met without a formal proceeding before a court reporter. The Court of Appeals previously discussed in *State ex rel. Rex Deffenderfer Enterprises v. Public Service Commission*, 776 S.W.2d 494 (Mo.App. W.D. 1989) what was required by the word "hearing" in Section 393.170.3 RSMo. That statute provides the Commission with the power to grant a certificate of convenience and necessity "after due hearing." The Court of Appeals found that:

. . . the requirement for a hearing contained in §393.170 was met when the opportunity for hearing was provided and no proper party requested the opportunity to present evidence. There were no adverse parties and under the circumstances of the case at bar it was proper for the Commission to grant appellant's Certificate on the basis of appellant's verified Application after affording notice and an opportunity to be heard to all proper parties.

*Deffenderfer* at 496.

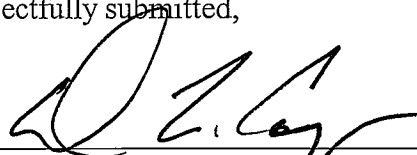
9. Similarly in this case an opportunity for hearing has been provided, no party has requested the opportunity to present evidence and there are no adverse parties. Even if Section 394.312 does require a hearing in spite of the terms of the Second Territorial Agreement, the Commission may issue its order based upon the verified Joint Motion without violating Section 394.312.

WHEREFORE, the Parties respectfully request that after the filing of a Staff Recommendation, the Commission issue its order:

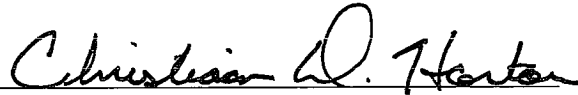
(a) Finding that the exclusive provision of electric service by Empire to the Belair Theater, a new structure, is not detrimental to the public interest and approving the First Addendum to Second Territorial Agreement; and

(b) Authorizing Empire and White River to perform in accordance with the terms and conditions of the First Addendum.

Respectfully submitted,



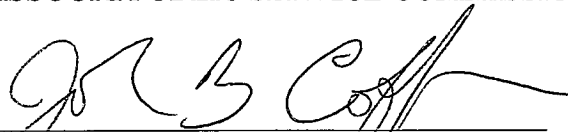
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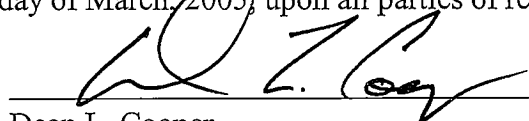
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**Certificate of Service**

The undersigned certifies that a true and correct copy of the foregoing Motion was served by hand delivery or electronic mail this 21<sup>st</sup> day of March, 2005, upon all parties of record.



Dean L. Cooper