

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

In the Matter of the Application of the Empire District)	
Electric Company and Ozark Electric Cooperative for)	
Approval of a Written Territorial Agreement)	
Designating the Boundaries of an Exclusive Service)	
Area for Ozark within a Tract of Land in Greene)	Case No. EO-2008-0043
County, Missouri and Associated Requests for)	
Approval of a Transfer of Facilities and Change of)	
Supplier.)	

Staff's Post Hearing Reply Brief

The Staff agrees with Empire and Ozark that the standard that applies to approval of the territorial agreement in this case is that the Commission should not approve the agreement absent a showing it is “not detrimental in the public interest.” Such territorial agreements are to displace competition in a geographic area. However, in the territorial agreement Empire and Ozark have presented to the Commission in this case they have proposed not only displacement of competition in a subdivision, but they have packaged with their proposed territorial agreement the transfer of electrical facilities used to provide service from Empire to Ozark and a change of supplier from Empire to Ozark of structures to which Empire has begun, or is, providing permanent electric service, when the Commission issues an order approving their joint application. As the Staff pointed out in its initial post-hearing brief transfers of facilities must not be detrimental to the public interest and changing the electrical supplier to a structure must be in the public interest for a reason other than a rate differential.¹ The joint applicants have made the three requests interdependent, i.e., unless the Commission approves the territorial agreement, the transfer of facilities and the changes of supplier, it should approve none of them.

¹ This is discussed more thoroughly in Staff's initial post hearing brief, under the section Standards of Review, beginning on page 3.

The Staff also agrees with Empire the Commission should look at the total situation, including the future, not merely the past and present, when determining whether to grant the relief they seek in their joint application. See *State ex rel. AG Processing, Inc. v. Public Service Com'n of State* 120 S.W.3d 732, 736 (Mo. banc 2003). While Empire and Ozark have focused on the past and present, the Staff has focused on the future since the past and present matters Empire and Ozark raise are transient in comparison to the long-term impacts of their packaged proposal.²

That the Staff is the only party who voiced reservations about the package Empire and Ozark presented to the Commission does not render the reservations the Staff raised moot or inconsequential. As Empire and Ozark should be well aware, in proceedings before the Commission it is the applicants who bear the burdens of production and persuasion. Rather than focusing on the immediate issues surrounding why these applicants have presented the proposal they structured, the Staff has focused on the long-term impacts of their proposal.

One of those long-term impacts is the uncertainty to emergency responders of who to contact in the event of an emergency if an island of service by Ozark is allowed in an area exclusively served by Empire within the city of Republic and predominately served by Empire in the adjoining unincorporated county.

The other long-term impact the Staff raised is the uncertainty in the law as to who may lawfully provide service to new structures in the subdivision after the City of Republic annexes the subdivision. Under the statutory limit on where rural electric cooperatives may serve, Ozark could not lawfully provide new service to structures, but under the territorial agreement they have proposed, Empire would have agreed with Ozark that between them Ozark would be the exclusive provider. Given that territorial agreements are to displace competition and that after annexation Ozark would have no right to provide new service to structures, it seems a likely

² This is discussed more thoroughly in Staff's initial post hearing brief, beginning on page 8.

outcome would be that Empire would be the electric supplier who could provide new service to structures post annexation. The Staff does not hypothecate that a situation where the City of Republic annexes Shuyler Ridge before permanent service has been provided to all structures in the subdivision is a certainty, but given the history, it appears likely and anticipated by both Empire and Ozark. In fact, Empire states in its initial post-hearing brief the following:

The central component of this proposal calls for Ozark to be the exclusive provider of electric service to The Lakes at Shuyler Ridge. This is designed to allow Ozark to continue to be the provider even if the subdivision is annexed into the City of Republic. One of the goals of this endeavor is to respect the expressed desire of the City of Republic that there not be a hodgepodge of electrical suppliers within the city; a situation that can present safety concerns.”

The testimony in this case shows that about the northeast third of the City of Republic is served by a mix of electrical suppliers, but that the remainder of the city is served all but exclusively by Empire. The territorial agreement Empire and Ozark have presented, if approved, would promote the creation of a hodgepodge of electrical suppliers in and about the southern part of the city of Republic, not ameliorate it.³

Additionally, the Staff notes that if the City of Republic does not anticipate annexing Shuyler Ridge, then its support of the proposed territorial agreement is of little if any relevance.

In response to Empire’s discussion of history and explanation of why it acquired facilities from Ozark, the Staff takes no position as to whether it was reasonable of Empire to acquire those assets from Ozark in anticipation of what action the Commission would take on the prior territorial agreement and variance request Empire and Ozark presented to the Commission; however, the Staff does have a position on Empire’s failure to abide by the terms of its tariff for installation of underground lines and decorative street lights in new subdivisions in unincorporated areas. The Staff is preparing a complaint for filing with the Commission seeking

³ This is discussed more thoroughly in Staff’s initial post hearing brief, beginning on page 4.

authorization for the Commission's general counsel to seek penalties for the serious matter of Empire's intentional and knowing violation of its tariff.

While Empire and Ozark make much of the agreement between Ozark and the developer for Ozark to provide electrical service in Shuyler Ridge, the only thing certain about that agreement is that Ozark has not provided electrical service in Shuyler Ridge pursuant to it. Absent approval of the package Empire and Ozark present here, there is no evidence in this case that Ozark is any more likely than Empire to provide electrical service in the phase one of Shuyler Ridge where Empire is currently providing the electrical service, and it is far from certain Ozark will provide electrical service in any of the later phases if the Commission does not approve the proposed territorial agreement, transfer of facilities and changes in suppliers.

Ozark appears to argue that Empire is merely carrying out Ozark's obligations to provide electrical service in Shuyler Ridge. Empire's witness Palmer testified the developer of Shuyler Ridge had requested Ozark to provide service there. By law, in Missouri, an electrical corporation such as Empire is required to provide electrical service to someone who requests service and agrees to abide by the terms of the utility's line extension tariff provision. *State ex rel. St. Louis County Gas Co. v. Public Service Commission of Missouri*, 315 Mo. 312, 286 S.W. 84 (1926).

Ozark argues a franchise is nothing more than the right to use the public rights-of-way for placement of its facilities and that it has that power from § 394.080.1.(10) RSMo, which provides:

A cooperative shall have the power to construct, maintain and operate electric transmission and distribution lines along, upon, under and across all public thoroughfares, including without limitation, all roads, highways, streets, alleys, bridges and causeways, and upon, under and across all publicly owned lands....

The Staff agrees Ozark has authority under § 394.080.1.(10) RSMo to use public rights-of-way for placement of its facilities; however, the franchise Ozark would need from the City of Republic in order to provide electric service to members in that city is specified in § 394.080.2.(2) RSMo, which clarifies that a REC may only supply electric energy at retail in non-rural areas when the REC was the predominant electrical supplier at the time the area became non-rural *and* “[t]he city, town or village has granted to the cooperative a franchise *to supply electric energy* within the city, town or village.” (emphasis added). Under Ozark’s argument, § 394.080.2(2) RSMo would be meaningless surplusage, a result to be avoided if an interpretation of statutory language exists which avoids rendering language in a statute surplusage.

Despite the attempts of Empire and Ozark to make the Staff appear inconsistent and confused, the Staff has been consistent in its position that Empire and Ozark failed to present sufficient evidence in their direct filing to carry their burdens of proof, much less their burdens of persuasion; and, for all the foregoing reasons and those set forth in its initial post-hearing brief, the Staff believes Empire and Ozark have failed to carry their burdens of persuasion in this case.

Respectfully submitted,

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I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 6th day of February 2008.

/s/ Nathan Williams