BEFORE THE PUBLIC SERVICE COMMISSION
OF THE 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 County, Missouri and Associated Requests for Approval of a Transfer of Facilities and Change of Supplier.	)	Case No. EO-2008-0043

REBUTTAL BRIEF
SUBMITTED BY OZARK ELECTRIC COOPERATIVE

Most of the concerns raised by Staff in its testimony and in its Brief are related to differences in philosophy and preference, and as such they carry only the weight duly accorded to an opinion.

A. "Patchwork"

Staff's notion that exclusive Ozark service in a 245 acre development would constitute "patchwork" (Staff Brief, p. 2) is conceptually out of touch with the state of competitive electric supply service in Southwest Missouri. A 245 acre development with approximately 517 planned residences and commercial customers (Exhibit 4, p. 5, line 84) served by a single supplier is not patchwork in the view of utilities and communities. Staff's sense of scale is out of proportion to common understanding.

The logical end of Staff's argument is that since The Empire District serves inside the City of Republic and has presence outside the City of Republic, the Cooperative should just go away. To determine the seriousness of that logic, one could ask if in those areas where the reverse circumstance is true, where Cooperative investment serves many people and large tracts of land and an investor owned utility serves few people and small tracts of land, should the investor owned utility pack up and leave? If the answer is not a principled answer, then it is mere bias and prejudice against the rural electric cooperative segment of this industry.

In much of the area around the City of Springfield, the public is accustomed to the presence of as many as three overlapping electric suppliers, those being The Empire District Electric Company, the City Utilities of Springfield (which has a unique and historic presence in rural areas), and one of the four electric cooperatives (Ozark, Southwest, Webster, and White River) whose service areas abut the City of Springfield. Electric cooperatives exist throughout the State of Missouri, blanketing most of the entire state with services that pre-date many investor owned properties. In a large part of South-Central Missouri, there are no certificated investor-owned utilities. If there is to be an equitable objection by Staff based on being first to serve an area, one must understand that it is the cities and towns that are growing out into the country, and not vice versa.

Staff's argument about Empire's "predominant supplier" status in the larger area around the Lakes at Shuyler Ridge is irrelevant. (Staff Brief, p. 4) It shows a continuing pattern of borrowing and merging bits and pieces of different statutes for desired effect. "Predominant supplier" as a legal standard is applicable only for one circumstance of expanded electric cooperative service in a non-rural area. (Section 394.080.2 RSMo.) It is not a necessary component of the territorial agreement law at Section 394.312 RSMo., and is not applied in law to affect the rights of investor-owned companies.

The principal point of rebuttal on this topic is that the definition of "patchwork" argued by Staff is not consistent with that of the industry. Real patchwork that detrimentally affects public safety exists when competing suppliers have installed systems on opposite sides of streets and roads. A 245 acre tract does in fact provide for greater utility service certainty for the public, for informed public emergency response services, and for more effective utility investment planning than Staff is willing to concede. (Transcript, pp. 107-108)

B. Tariffs vs. Line Extension Policies

Staff advocates a preference for how infrastructure investment risks should be allocated as though one method is inherently superior to another. (Staff Brief, p. 2) This is not Staff's call to make and it is also irrelevant argument. The truth of electric service investment is that the customers always pay, and the question is only a choice between collection mechanisms.

The approved tariff scheme for regulated utilities causes a developer to loan infrastructure investment money to the utility subject to substantial refunds over time. The

developer is expected to recover his development costs, including those electric infrastructure costs, from the ultimate buyers of improved subdivision lots and homes. In this scenario the developer takes a full measure of risk that proportionally lessens the utility's risk, and then subsequently reduces his debt exposure through sales of lots and homes.

Under the Cooperative's line extension policies, the Cooperative participates with reasonable investments in electric infrastructure that reduces the developer's initial up-front costs. (Exhibit 4, pg. 4, lines 56-58) The developer still takes risks that are associated with the costs of land, installed water and wastewater systems, street paving and drainage systems. The Cooperative manages its utility risk through just-in-time electric installations on a phase by phase basis that allows home sales to keep up with infrastructure investment. Mr. Prewitt testified for Ozark that the utility risk is spread to all the member customers, and that risk is offset by gains that are also shared as all customers benefit from the system efficiencies achieved by improved customer density (members per mile of line).

The Staff's preference for the tariff system over Ozark's proven alternative system is a matter of opinion. A difference of opinion on this subject does not reach the merit of whether this territorial agreement is detrimental to the public interest.

C. Non-Rural Service

Staff's legal opinion about territorial agreements and consequential non-rural service by electric cooperatives is reached without the benefit of the Commission's internal institutional memory of the development of the law, without critical analysis that goes beyond mere recitation of the words of the statutes, and without regard for upsetting and deeming illegal those territorial agreements that the Commission has found lawful in the past. The history of the law, and the history of its application by the Commission, are now collaterally rebutted by Staff.

As Ozark has previously argued, the rural and non-rural measure is an artificial distinction created to guide the natural competition between municipal systems with service confined to their incorporated limits and investor owned utilities serving city populations on one hand, and the member owned electric cooperatives, that were created to bring the benefits of electrification to the remainder of the inhabitants of the state, on the other. That artificial measure is merely a number. It was established by statute in 1939 when a town of 1500 persons

was a significant size community and when the State of Missouri was largely undeveloped. As a bench mark, it may be changed at any time by the will of the Legislature.

The impact of that population standard is observable across the state. "Rural" for this purpose now includes many areas outside of a city that would not be considered "rural" if "rural" was equated with "pastoral." The legal standard, however, does not mandate that electric cooperative service be confined to rustic areas. By statutory definition "rural" includes many urbanized and suburban areas. The lawfulness of cooperative service does not turn on how the area looks or how the land is used.

Staff's position in this case has been that the non-rural service limitation of an electric cooperative, in the absence of predominant supplier status, is only lifted by territorial agreements between a municipal supplier and an electric cooperative. We have previously argued that that is not the law, but further, it does not make logical sense. In the first instance, "predominant supplier" is a separate exception to the rural service rule and it has no application in territorial agreement cases. A cooperative with "predominant supplier" status is not required to submit a territorial agreement for Commission approval. Secondly, there is no legal or practical difference between electric cooperative service in a non-rural area by agreement with a municipal utility system or by agreement with an investor owned utility serving in a municipality. The municipality that would someday annex The Lakes at Shuyler Ridge has given its approval of the actions of the utility parties in the proceeding. (Exhibit 8)

The first iteration of the territorial agreement law was enacted with S.B. No. 689 in 1988. Its language, with descriptions that made it specifically applicable only to the City of Columbia and Boone Electric Cooperative, established the principle for allowing both municipal service outside city limits and rural electric cooperative service inside non-rural areas by approved agreement. The 1989 amendment by way of H.B. 813 did not detract from that principle but rather expanded the universe of parties who could join in agreements that had the same effects. The pre-existing ordinary rules that restricted competition, including the rural service limitation of electric cooperatives, could thereafter be altered by agreement of affected rural electric cooperatives, electrical corporations, and municipally owned utilities. Any other result would not have met the Legislature's desire to eliminate wasteful duplication of utility investment. Staff's defective argument would diminish the solution agreed by the Legislature. It detracts

from the heart of the Legislative intent, which was to allow competing utilities to directly resolve utility competition issues under the oversight of the Commission.

Staff's admission that a rural electric cooperative can in fact add service in a non-rural area pursuant to agreement with a municipal electric supplier is Staff's confirmation that the non-rural service limitation is, as a matter of law, not an absolute standard. If it is lawful to add cooperative service in a non-rural area by agreement with a municipal system supplying that non-rural area, then the "rural" area limitation is obviously subject to exception. Staff's argument thus is logically reduced to saying that the Legislature did not clearly state the full range of exceptions it intended. The weight of the law, including its history and past Commission actions as an administrator of the law, is that the rural service limitation is equally lifted by either a rural electric cooperative's historic predominant supplier status, or by any territorial agreement between the affected competing suppliers of retail electric service.

D. Blame the Parties

Staff's recognition that the case would be different if The Empire District was not already providing electrical service in the Lakes at Shuyler Ridge subdivision (Staff's Brief, p. 8) does not justify Staff's opposition to this territorial agreement. This present circumstance was foreseen in the testimony of Mike Palmer on behalf of The Empire District in the consolidated cases numbered EO-2007-029 and EO-2007-0030, where he said the following: "If the variance is denied, I foresee the whole thing unraveling and that would put everyone back into the same situation that we had at the March meeting with the City." (Exhibit 4, Palmer Testimony, pg. 10, lines 4-6).

After the course of the two related proceedings, Staff must be charged to be aware of what that means. (Transcript pp. 108-111) The status quo of March 2006 was that Ozark Electric had the only contractual right and obligation to serve the developer of The Lakes at Shuyler Ridge. The record shows that The Empire District is only providing electrical service in the Lakes at Shuyler Ridge subdivision because of voluntary actions by Ozark Electric Cooperative and The Empire District to act upon the substance of their agreement prior to hearing at the Commission. It was only due to the parties' attempt to avoid adding change of supplier issues to the first case that has created the change of supplier issue in this present case.

That mutual mistake however has no bearing on the meaning of the law, the legal standards for the case, the stand alone merit of this territorial agreement, and the proper disposition of this proceeding. The Commission is not in the business of punishing those who bring valid business before it. Staff is clearly overstepping its advisory role when it suggests its preference for the form of agreement that Staff deems the parties should have presented (Transcript p. 103, lines 3-19, Staff Brief, p. 5, p. 9), rather than attributing good faith to the parties under the facts as they exist.

Conclusion

Having rebutted the arguments against favorable consideration of this territorial agreement, Ozark Electric Cooperative renews its request that all of the relief requested be expeditiously granted.

Respectfully submitted,

ANDERECK, EVANS, MILNE, WIDGER & JOHNSON, L.L.C.

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Certificate of Service

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

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