

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the joint application of The Empire)
District Electric Company of Joplin, Missouri, and)
White River Valley Electric Cooperative, Branson,)
Missouri, for approval of a Second Territorial Agree-)
ment designating the boundaries of each electrical)
supplier within certain areas in Taney County, Missouri,) Case No. EO-96-176
and for approval of a First Amendment to the First)
Territorial Agreement between the parties providing for)
boundary structures in a manner identical to that in the)
Second Territorial Agreement.)
)

REPORT AND ORDER

Issue Date: March 8, 1996

Effective Date: March 19, 1996

OF THE STATE OF MISSOURI

Case No. EO-96-176

APPEARANCES

Gary W. Duffy, Brydon, Swearngen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102-0456, for The Empire District Electric Company.

Rodric A. Widger, Anderreck, Evans, Milne, Peace & Baumhoer, 1111 South Glenstone, Post Office Box 4929, Springfield, Missouri 65808, for White River Valley Electric Cooperative.

Lewis R. Mills, Jr., Deputy Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Aisha Ginwalla, Assistant General Counsel, Missouri Public Service Commission,
Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the
Missouri Public Service Commission.

ADMINISTRATIVE

LAW JUDGE: Thomas H. Luckenbill, Deputy Chief.

REPORT AND ORDER

On November 27, 1995, The Empire District Electric Company (Empire) and White River Valley Electric Cooperative (White River), hereinafter referred to jointly as Applicants, filed a joint application requesting that the Commission hold an evidentiary hearing for the purpose of determining whether the designation of electric service territories as shown in the Applicants' territorial agreement is detrimental to the public interest, and that the Commission

thereafter issue a Report And Order approving the territorial agreement. The Applicants also submitted an amendment to their First Territorial Agreement and requested that the Commission approve that amendment. On November 29, 1995, the Commission issued an Order And Notice which included notice provisions for the area affected and an intervention date of December 19, 1995. The Commission received no applications for intervention and on February 15, 1996, an evidentiary hearing was held.

In addition to filing a territorial agreement which is designated "Second Territorial Agreement", which agreement is dated April 11, 1995, the Applicants have also mutually agreed to amend the First Territorial Agreement between them. The amendment to the First Territorial Agreement is designated "First Amendment to First Territorial Agreement". The First Territorial Agreement to which the amendment applies is dated February 19, 1993. That agreement was approved by the Commission by its order dated June 11, 1993, in Case No. EO-93-258. The First Amendment to First Territorial Agreement causes the agreement, as amended, to include a provision regarding boundary structures. This provision has been incorporated in other territorial agreements approved by the Commission and a similar provision is contained in the text of the Second Territorial Agreement which has been filed by Applicants in this case.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

Mr. William L. Gipson, Empire's Director of Commercial Operations for the Branson and Aurora operating areas, filed direct testimony on behalf of Empire. Mr. Christopher Hamon, Manager of Operations and Engineering for White River, filed direct testimony on behalf of White River. Staff witness

B.J. Washburn filed rebuttal testimony. All parties to the case support approval of the application, First Amendment to First Territorial Agreement, and the Second Territorial Agreement. Empire witness Mr. Gipson states that the Second Territorial Agreement represents an equitable compromise that was the product of negotiations with both sides making compromises. Mr. Gipson recommends that the Commission issue an order approving the Second Territorial Agreement so that Empire and White River can start operating under it.

Mr. Gipson states his belief that the agreement supports orderly growth in electric service for the area. He states that the agreement enables Empire and White River to more carefully plan for the expansion of present facilities in that area because it eliminates the prospect of future unnecessary duplication of facilities. Mr. Gipson states that the agreement will hopefully lead to lower costs for both suppliers compared to the present situation.

Mr. Gipson states that the amendment to the First Territorial Agreement seeks to make that agreement conform with boundary structure provisions that the Commission has indicated it prefers. Mr. Gipson states that the First Amendment to First Territorial Agreement would make it similar to the Second Territorial Agreement in its operation.

White River witness Christopher Hamon supports approval of the Second Territorial Agreement and the First Amendment to First Territorial Agreement. Mr. Hamon has the following testimony regarding the First Amendment to First Territorial Agreement. Mr. Hamon states that this amendment pertains to a territorial agreement dated February 19, 1993, which agreement pertains to The Falls Subdivision. Mr. Hamon states at that time Empire and White River did not anticipate a need for a procedure to handle exceptional customer locations because the territory boundary line was based on platted streets. Mr. Hamon continues that the amendment makes the First Territorial Agreement consistent with other territorial agreements by utilizing a procedure that has satisfied the

Commission in other cases. Mr. Hamon states that the amendment provides the electric suppliers a degree of flexibility that allows them to meet the needs of customers in the most reasonable and economic way. He continues by stating that the amendment gives the electric service providers a method and time frame for gaining administrative approval of variations from the territorial agreement, and it lets the Commission and its Staff anticipate a degree of uniformity with respect to territorial agreements.

Mr. Hamon testifies to the following with regard to the Second Territorial Agreement dated April 11, 1995. Mr. Hamon states that the Second Territorial Agreement defines service responsibilities at nine tracts or parcels of land in rural Taney County. The language of the Second Territorial Agreement is very similar to the language in the First Territorial Agreement, according to Mr. Hamon. Mr. Hamon testifies that the Second Territorial Agreement does not involve switching any existing customers or members. Mr. Hamon testifies that Empire and White River each have lawful authority to compete for the service at new structures to be built on the tracts covered by the agreement. Mr. Hamon continues that without some general agreement, this competition would lead to duplication of effort and inefficient investments. Mr. Hamon states that displacement of the natural competition between Empire and White River in this area will allow each supplier to plan, construct and operate its respective facilities under rates and conditions that have been fairly and equitably established. Mr. Hamon states that the Second Territorial Agreement builds on the cooperative effort and experience of the First Territorial Agreement between these parties. Mr. Hamon testifies that the agreement enhances the public good through utility efficiency, reduced duplication, and avoided costs.

Staff witness Washburn testifies that he does not object to the amendment of the First Territorial Agreement which was approved in Case No. EO-93-258. Mr. Washburn states that the amendment contains the same language

as that used in earlier territorial agreements and it avoids language which the Staff has found objectionable.

Mr. Washburn recommends that the Commission approve the Second Territorial Agreement. Mr. Washburn testifies to the Staff's belief that it is in the public interest to define the boundary line between suppliers. Mr. Washburn states that without an agreement, both suppliers are authorized to compete for the electric service of new structures to be built on these tracts. He further states that without some agreement as to the boundary line between Empire and White River, duplication of facilities will result. Mr. Washburn testifies that by defining the exclusive service area of each applicant within the tracts included in this application, duplication of facilities will be eliminated, future customers will know who their service provider will be, and disagreements between suppliers on who should serve any new customer will be eliminated.

Based on the testimony, the written agreement and the maps depicting the agreement, the Commission finds that the Second Territorial Agreement is not detrimental to the public interest because it will avoid duplication of facilities among these providers. In addition, the Commission finds that the Second Territorial Agreement will benefit future customers because they will know with certainty who their electric service provider will be. Also, the Second Territorial Agreement benefits the public in that it avoids wasteful disagreements between suppliers on who should serve new customers within this area. The Commission further finds that the Second Territorial Agreement promotes the efficient use of resources.

The Commission is of the opinion that by enacting the electrical territorial agreement laws (Sections 394.312 and 416.041.3, R.S.Mo. 1994), the Missouri General Assembly sought to encourage voluntary agreements between rural electric cooperatives, electric corporations, and municipally owned electric

utilities to displace competition which frequently results in wasteful duplication or inefficient use of resources. The Commission further finds that when a proposed territorial agreement, such as the one presented in this case, furthers that legislative intent, it should be approved.

The Commission finds that the First Amendment to First Territorial Agreement should be approved because a provision dealing with boundary structures is needed by Empire and White River to afford them an adequate degree of flexibility. The Commission finds that the language contained in the boundary structure provision is similar to the language approved by the Commission in recent territorial agreement filings. Therefore, the Commission will approve the application in its entirety, the Second Territorial Agreement and the First Amendment to First Territorial Agreement.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Missouri Public Service Commission has jurisdiction over the matters at issue in this application pursuant to Sections 394.312 and 416.041, R.S.Mo.

In deciding whether to approve a territorial agreement, the Commission must determine whether approval of the agreement is detrimental to the public interest. Section 394.312, R.S.Mo. The Commission concludes that the Second Territorial Agreement filed in this docket is not detrimental to the public interest.

The intent of the General Assembly in enacting Sections 394.312 and 416.041.3, R.S.Mo. 1994, was to encourage voluntary agreements between rural electric cooperatives, electric corporations, and municipally owned utilities to displace competition which may result in duplication or inefficient use of

facilities. The Commission concludes that when a proposed territorial agreement, such as the one presented in this matter, furthers that legislative intent, it should be approved.

The Commission concludes that the First Amendment to First Territorial Agreement is not detrimental to the public interest because it brings the language of the boundary structure provision into conformance with language preferred by the Commission.

IT IS THEREFORE ORDERED:

1. That the Second Territorial Agreement filed by The Empire District Electric Company and White River Valley Electric Cooperative on November 27, 1995, and submitted at the hearing on February 15, 1996, be, and is hereby, approved, and the Applicants are authorized to perform in accordance with the terms and conditions of the Second Territorial Agreement (Attachment A).

2. That the First Amendment to First Territorial Agreement, which territorial agreement was approved by this Commission by its order dated June 11, 1993, in Case No. EO-93-258, be, and is hereby, approved.

3. That this Report And Order shall become effective on the 19th day of March, 1996.

BY THE COMMISSION

(S E A L)



David L. Rauch
Executive Secretary

Zobrist, Chm., McClure, Kincheloe,
Crumpton and Drainer, CC., concur
and certify compliance with the
provisions of Section 536.080,
R.S.Mo. 1994.

Dated at Jefferson City, Missouri,
on this 8th day of March, 1996.

SECOND TERRITORIAL AGREEMENT

THIS AGREEMENT, made and entered into this 11th day of April 1995, by and between The Empire District Electric Company, a Kansas corporation, with its principal office located in Joplin, Missouri ("Empire") and White River Valley Electric Cooperative, a Missouri co-operative pursuant to Chapter 394, RSMo, with its offices located on East Highway 76, Branson, Missouri ("White River").

WITNESSETH:

WHEREAS, Empire and White River are authorized by law to provide electric service within certain areas of Missouri, including Taney County, Missouri; and

WHEREAS, Section 394.312, RSMo., provides that competition to provide retail electrical service as between rural electric cooperatives such as White River and electrical corporations such as Empire may be displaced by written territorial agreements; and

WHEREAS, Empire and White River entered into a Territorial Agreement dated February 19, 1993, involving a subdivision in Taney County known as "The Falls", which was approved by the Missouri Public Service Commission by order dated June 11, 1993; and

WHEREAS, Empire and White River desire 1) to promote the orderly development of retail electrical service within another portion of Taney County, Missouri, 2) to avoid unnecessary duplication of electrical facilities therein; and 3) to assist in minimizing territorial disputes;

NOW, THEREFORE, Empire and White River, in consideration of the mutual covenants and agreements herein contained, the adequacy and sufficiency of which are hereby acknowledged, agree as follows:

1. Description of Territory Affected. This Agreement pertains only to the following tracts and subdivisions in Taney County, Missouri, and shall have no effect whatsoever upon service by White River or Empire in any other area:

A. A parcel identified for purposes of this agreement as the "Dr. Schmoll Property", which is more particularly described in Appendix A hereto.

B. A portion of the "Commerce Park South" subdivision which is more particularly described in Appendix B hereto.

C. "The Woods" subdivision which is more particularly

described in Appendix C hereto.

D. "Lake Taneycomo Acres" subdivision which is more particularly described in Appendix D hereto.

E. "The Mill and the Meadows" subdivision which is more particularly described in Appendix E hereto.

F. "Table Rock Terrace" subdivision which is more particularly described in Appendix F hereto.

G. A parcel identified for purposes of this agreement as the "Lynn and Janet Robinson Property," which is more particularly described in Appendix G hereto.

H. A parcel in Section 14, Township 22 North, Range 22 West, identified for purposes of this agreement as the "Branson Group Property," which is more particularly described in Appendix H hereto.

I. Lot 5A in Commerce Park West subdivision, which is more particularly described in Appendix I hereto.

2. Division of Territory

A. For purposes of this Agreement, the references to "structure" have the same meaning as the statutory definition of the term "structure" found in Sections 393.106 and 394.315 RSMo in effect at the relevant time. In the event no such statutory definitions exist or are not otherwise applicable, the term shall be construed to give effect to the intent of this agreement which is to designate an exclusive provider, as between the parties hereto, of retail electric service for anything using or designed to use electricity that is located within the respective service areas described herein.

B. Except as otherwise provided in this Second Territorial Agreement, Empire shall have the right to serve all structures located within its service area, White River shall have the right to serve all structures within its service area, White River shall not serve any structures within the Empire service area, and Empire shall not serve any structures within the White River service area.

C. **Empire Service Area:** The service area for Empire under this Second Territorial Agreement, as shown in the respective Appendices to this Agreement, shall consist of:

i. all of lots 48, 49, 53, 65, 66, 67, 68, 70, 152, 153 and 154 in Lake Taneycomo Acres subdivision as depicted in Appendix D;

ii. all of the land in The Mill and the Meadows

subdivision as depicted in Appendix E;
iii. all of the land in Table Rock Terrace
subdivision as depicted in Appendix F;
iv. the Branson Group property as depicted in
Appendix I.

D. **White River Service Area:** The service area for White River under this Second Territorial Agreement, as shown in the respective Appendices to this Agreement, shall consist of:

- i. all of the "Dr. Schmoll Property" as depicted in Appendix A;
- ii. all of lot Numbers 32, 33, 34, 35, 36, 37, 38, 39, 40, and 41 in Commerce Park South subdivision as depicted in Appendix B;
- iii. all of The Woods subdivision as depicted in Appendix C;
- iv. all of the lots in Lake Taneycomo Acres subdivision except lots 48, 49, 43, 65, 66, 67, 68, 70, 152, 153 and 154 as depicted in Appendix D;
- v. all of the "Lynn and Janet Robinson Property," as depicted in Appendix G;
- vi. all of lot 5A in Commerce Park West subdivision, as depicted in Appendix J.

3. Condition Precedent - Regulatory Approvals

This Agreement is conditioned upon receipt of approval by the Missouri Public Service Commission ("PSC"), with such approval being satisfactory in form and content to Empire and White River. If neither party notifies the other in writing within thirty (30) days after the effective date of a final order of the PSC approving this Agreement, it shall be presumed that the approval is satisfactory in form and content to both parties.

4. Service to Structures Receiving Service as of the Date of this Agreement. There are numerous structures located within the respective Service Areas on the date of this agreement which are being, or have been, served with electricity by White River or Empire ("existing structures"). It is the understanding of the parties that retail electric service to all existing structures is in accordance with the exclusive Service Areas established herein so that no customer at an existing structure will be required to change suppliers to be in compliance with this Agreement.

5. New Structures After Approval of this Agreement

A. After the date of approval of this Agreement by the PSC, White River shall have the exclusive right to serve all structures ("new structures") constructed within the White River Service Area. Empire shall not serve any new structures within the White River Service Area.

B. After the date of approval of this Agreement by the PSC, Empire shall have the exclusive right to serve all structures

("new structures") constructed within the Empire Service Area. White River shall not serve any new structures within the Empire Service Area.

C. Boundary Structures. Empire and White River may subsequently agree in writing, on a case by case basis, to allow any structure to receive service from the other party even though the structure is served, or required to be served, by the other party to this Agreement, when the interests of both parties and the owner of the structure are advanced thereby. Such situations shall be dealt with on a case by case basis, and shall not be deemed to be precedent for any future situations even if the facts may be similar.

i. Each such agreement shall be treated as an Addendum to this Agreement and the Addendum shall be filed, under the same case number as was assigned to the docket for approval of this document, with the Executive Secretary of the PSC in the same manner as a motion or other pleading, with a copy submitted to the Office of the Public Counsel.

ii. There will be no filing fee for the submission of such Addendums.

iii. The Addendums subject to this process apply to New Structures only, and not to structures receiving service on the effective date of the PSC's order approving the Agreement.

iv. Each Addendum shall be accompanied by a notarized statement indicating that the two affected electric service providers support the Addendum.

v. Each Addendum shall be accompanied by a notarized statement, signed by the customer to be served, which acknowledges such customer's receipt of notice of the contemplated electric service to be provided and that the Addendum represents an exception to the territorial boundaries approved by the PSC, and shall indicate the customer's consent to be served by the service provider contemplated by the Addendum.

vi. Each Addendum shall include, or be accompanied by an explanation of the justification that electric service should be provided in the agreed manner.

vii. 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 (50th) 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.

viii. Each party, pursuant to an executed Addendum, shall have the right to provide temporary service, as defined in section 393.106 RSMo., until the PSC approves or disapproves the Addendum. No party shall be required to remove any facilities installed pursuant to an Addendum until the effective date of a final and non-appealable order of the PSC or a court regarding the removal of same.

D. During the interim period between the date of execution of this Agreement and the date it is approved by the PSC

pursuant to Section 394.312, RSMo, the parties shall not be bound by the territorial division provisions of this Agreement and may provide service to any customer seeking service if the supplier can lawfully provide such service in the particular location. Pending the issuance of a decision either approving or denying approval of this agreement by the PSC, however, neither White River nor Empire shall construct primary or secondary electric facilities within the territory assigned exclusively to the other pursuant to this Agreement, unless ordered to do so by the PSC or a court of competent jurisdiction. If in the interim before this Agreement is approved by the PSC a new customer should locate on one side of the proposed boundary and request service from the party on the opposite side of the boundary, and the party has the existing right to provide such service, the parties agree to submit the matter to the PSC for determination in the docket set up for approval of this Agreement. The parties agree to propose to the PSC in such case that the party which will have the exclusive right to serve the customer if this Agreement is approved by the PSC should have the exclusive right and obligation to serve the customer in the interim.

6. Indirect Provision of Service to Structures Not Permitted. The intent of this Agreement is to designate an exclusive provider of electric service for structures or anything else using or designed to use electricity to be located within the described area. Neither party shall furnish, make available, assist in providing, render or extend electric service to a structure, which that party would not be permitted to serve directly pursuant to this Agreement, by indirect means such as through a subsidiary corporation, through another entity, or by metering service outside of the area for delivery within the area. This shall not be construed to otherwise prohibit sales of electric power and energy between the parties to this Agreement.

7. Term. The initial term of this Agreement shall be thirty-five (35) years from and after the effective date of an order of the PSC approving this Agreement ("initial term"). Thereafter, this Agreement shall be renewed for successive five (5) year terms ("renewal terms") unless either party hereto shall notify the other party in writing of its intent to terminate this Agreement at least one (1) year in advance of any such renewal date. The parties agree that a copy of any notice of termination of this Agreement shall be simultaneously served upon the Executive Secretary of the PSC and the Office of the Public Counsel. Termination of this Agreement shall eliminate the exclusive service territories provided for herein, but shall not entitle a party to provide service to a structure lawfully being served by the other party, or allow a change of suppliers to any structure in the other's service area hereunder, unless such a change is otherwise permitted by law.

8. Cooperation. Empire and White River agree to undertake

all actions reasonably necessary to implement this Agreement. Empire and White River will cooperate in presenting a joint application to the PSC demonstrating that this Agreement is in the public interest. Empire and White River shall share equally in the costs assessed by the PSC for seeking administrative approval of this Agreement. All other costs will be borne by the respective party incurring the costs.

9. General Terms

A. Land Descriptions: The surveys in the Appendices to this Agreement are assumed by the parties to be accurate and reliable and to match the plats; however, where there are maps and the map does not correspond with the metes and bounds description, the map shall be controlling.

B. No Constructive Waiver: No failure of Empire or White River to enforce any provision hereof shall be deemed to be a waiver.

C. Modifications: Neither the boundaries described in this Agreement nor any provision of this Agreement may be modified or repealed except by a signed writing of the parties which is approved by all applicable regulatory authorities.

D. Survival: This Agreement shall inure to the benefit and be binding upon the parties, their respective successors and assigns.

E. Lack of Approval or Termination: If the PSC or any other regulatory authority having jurisdiction does not approve this Agreement, or if the Condition Precedent is not fulfilled, or if this Agreement is terminated pursuant to its terms, this Agreement shall be nullified and of no legal effect between the parties. Further, if any part of this Agreement is declared invalid or void by a court or agency of competent jurisdiction, then the parties shall replace such provision as similarly as possible to the provision which was declared invalid or void so as to return each of them, as much as practical, to the status quo prior to the declaration.

F. This Agreement shall not be construed to prevent either party from obtaining easements or right of way through or in any part of the Service Area of the other if the acquisition of such easement or right of way is reasonably necessary to or desirable for the performance of the party's duties to provide electric service to its customers in other areas.

G. The subsequent platting, replatting, subdividing, resubdividing, or renaming of any parcel or subdivision covered by this Agreement shall not affect the respective rights of Empire or White River established by this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement
this 11th day of April, 1995.

THE EMPIRE DISTRICT
ELECTRIC COMPANY

WHITE RIVER VALLEY
ELECTRIC COOPERATIVE

By: Myron W. McK...
Attest: [Signature]

(seal)

By: [Signature]
Attest: [Signature]
(seal)

(Appendices A through I)

(Appendices A through I are not shown because they are voluminous. Appendices A through I are in the Commission's official Exhibit File and are hereby incorporated by reference.)