

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)
the City of Carthage, Missouri, for approval of a)
Territorial Agreement designating the boundaries of) Case No. EO-95-48
each electrical supplier within a certain area of)
Jasper County, Missouri.)
)

APPEARANCES

Gary W. Duffy, Brydon, Swearingen & England, P.C., Post Office Box 458,
Jefferson City, Missouri 65102, for The Empire District Electric Company.

David C. Dally, Crandall & Dally, Post Office Box 411, Carthage, Missouri 64836,
for the City of Carthage, Missouri.

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

HEARING

EXAMINER: Thomas H. Luckenbill.

REPORT AND ORDER

On August 16, 1994, The Empire District Electric Company of Joplin, Missouri (Empire), and the City of Carthage, Missouri (Carthage or City), hereinafter referred to jointly as Applicants, filed a Joint Application requesting the Commission approve the Applicants' Territorial Agreement, pursuant to Sections 394.312 and 416.041.3, R.S.Mo. (Supp. 1993), and further requesting the Commission allow such other actions as are necessary to carry out the agreement. On August 22, 1994, the Commission issued its Order And Notice which included notice provisions for the area affected and an intervention date of September 13, 1994. The Commission received no applications for intervention and on November 2, 1994, an evidentiary hearing was held.

On November 2, 1994, the parties filed a Stipulation And Agreement which addresses Staff's concerns about the addendum procedure. The Stipulation And Agreement is attached hereto as Attachment B.

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.

On September 26, 1994, Myron McKinney filed direct testimony on behalf of Empire and Donald Riley filed direct testimony on behalf of Carthage. Mr. McKinney and Mr. Riley each support approval of the Territorial Agreement. On October 14, 1994, B.J. Washburn of the Missouri Public Service Commission Staff filed rebuttal testimony. Mr. Washburn expressed concern, on behalf of Staff, regarding the addendum procedure proposed in the Territorial Agreement. The proposed Territorial Agreement contains a procedure for dealing with exceptions to the designated boundary between the electric suppliers (hereinafter referred to as addendum procedure). Specifically, Mr. Washburn recommended that the Territorial Agreement language be modified so that addendums filed pursuant to the terms of the Territorial Agreement would be filed with the Secretary of the Commission rather than directed to the Director of Utility Services Division of the Commission's Staff. In addition, Mr. Washburn expressed concern with language in the Territorial Agreement providing that addendums filed pursuant to the Territorial Agreement would be deemed approved by the Commission so long as no pleading objecting to the addendum is filed with the Commission within 60 days after the filing of the addendums.

On October 21, 1994, Empire witness McKinney filed surrebuttal testimony which included potential modifications to the addendum procedure intended to address Mr. Washburn's concerns. On October 24, 1994, Carthage

witness Riley filed surrebuttal testimony which identified difficulties that the City would have in securing the required approval of amendments to the agreement. However, Mr. Riley stated that if the Commission deems it wise to adopt any of the changes suggested by Mr. Washburn the City will not object and will allow the agreement to go into effect with the amendments that are approved by the Commission.

At the hearing held on November 2, 1994, the parties stipulated to the reception of all of the prefiled testimony and waived objection to the exhibits or cross-examination of the witnesses. The parties further stated that a Territorial Agreement designating the boundaries of each electrical supplier had been reached. Exhibits containing the testimony of Myron McKinney, Donald Riley and B.J. Washburn were received into the record as well as the Territorial Agreement and Stipulation And Agreement. The territory affected by this agreement is close to the currently existing city limits of Carthage, Missouri.

The Staff of the Missouri Public Service Commission (Staff) voiced its support of the proposed Territorial Agreement and recommended that the Commission approve it. The Office of the Public Counsel did not appear at the hearing.

The Stipulation And Agreement amends Paragraph 3.A. of the Territorial Agreement to provide that any addendums to the Territorial Agreement shall be filed in Case No. EO-95-48 with the Executive Secretary of the Commission in the same manner as a motion or other pleading, with a copy submitted to the Office of the Public Counsel. The Stipulation And Agreement further amends Paragraph 3.G. of the Territorial Agreement to provide that if the Staff of the Commission, or the Office of the Public Counsel, or the Public Service Commission 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 Commission that an order be promptly issued approving the addendum. The

amendment of Paragraph 3.G. causes the deletion of the "deemed approved by the PSC" language to which the Staff objected in testimony.

The Commission is of the opinion that the amendments to the Territorial Agreement contained in the Stipulation And Agreement are reasonable because a Commission order approving a particular addendum will provide greater certainty than a process where the Commission's silence is deemed to be approval.

In the Commission's opinion, the Stipulation And Agreement, in conjunction with the written Territorial Agreement, is not adverse to the public interest and provides for adequate future electric service to the affected area, and should be approved for disposition of all the matters presented herein.

In the Commission's opinion, the proposed Territorial Agreement, in conjunction with the Stipulation And Agreement, is in the public interest because it allows the Applicants to avoid unnecessary duplication of facilities in that area of Jasper County which is affected by this agreement, and, further, it will permit the efficient development and operation of the respective distribution systems. By having a known service area, each electric provider may more efficiently plan and use its electrical distribution system in the future.

For all of these reasons, the Commission is of the opinion that the Territorial Agreement, together with the Stipulation And Agreement, is in the public interest and should be approved.

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, Revised Statutes of Missouri.

The intent of the General Assembly in enacting those sections 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.

IT IS THEREFORE ORDERED:

1. That the Territorial Agreement filed by The Empire District Electric Company and the City of Carthage, Missouri, on August 16, 1994, and submitted at the hearing on November 2, 1994, be approved and the Applicants are authorized to perform in accordance with the terms and conditions of the Territorial Agreement (Attachment A), subject to the modifications to the agreement contained in the Stipulation And Agreement (Attachment B).

2. That the Stipulation And Agreement filed by The Empire District Electric Company, the City of Carthage, Missouri, and Commission Staff on November 2, 1994 (Attachment B), be approved and the Applicants and Staff are to perform in accordance with the terms and conditions contained in the Stipulation And Agreement (Attachment B).

3. That this Report And Order shall become effective on the 28th day of November, 1994.

BY THE COMMISSION

A handwritten signature in cursive script, reading "David L. Rauch".

David L. Rauch
Executive Secretary

(S E A L)

Mueller, Chm., McClure, Perkins
and Crumpton, CC., concur.
Kincheloe, C., absent.

Dated at Jefferson City, Missouri,
on this 18th day of November, 1994.

TERRITORIAL AGREEMENT

THIS AGREEMENT, made and entered into this 18th day of July, 1994, by and between the City of Carthage, Missouri, a municipal corporation, by and through its utility operations known as Carthage Water and Electric, with its principal offices located at 149 East Third, Carthage, Missouri 64836 (hereinafter "City") and The Empire District Electric Company, a Kansas corporation, with principal offices located at 602 Joplin Street, Joplin, Missouri 64802 (hereinafter "Empire").

WITNESSETH:

WHEREAS, City and Empire are authorized by law to provide electric service within certain areas of Jasper County Missouri; and

WHEREAS, sections 386.800 and 394.312 RSMo. provide that competition to provide retail electric service as between municipally-owned utilities such as City, and electrical corporations such as Empire, may be displaced by written territorial agreements; and

WHEREAS, City and Empire desire to promote the orderly development of retail electric service within a specified portion of Jasper County, Missouri, prior to any potential annexation by City, and in so doing, to avoid unnecessary duplication of electric facilities and to assist in minimizing the potential for territorial disputes.

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

1. Condition Precedent - Regulatory Approval.

This Agreement is conditioned upon approval by the Missouri Public Service Commission ("PSC") pursuant to section 394.312 RSMo, such approval being satisfactory in form and content to both City and Empire. If neither party notifies the other in writing within ten (10) days after the effective date of such a final order of the PSC, it shall be presumed that the approval is satisfactory in form and content to both parties.

2. Service to the Area.

A. The Area:

1. This Agreement applies to the parcels depicted in cross-hatching on Exhibit 1 (Map), the outside perimeter of which is described in Exhibit 2 (legal description) (hereinafter "the Area") attached hereto and made a part hereof. As used in the attached exhibits, the land description shall control over the map. The map is merely an estimate of the land description.

B. Existing Structures:

1. For purposes of this Agreement, references to "structure" have the same meaning as the statutory definition of that term found in sections 393.106 and 91.025 RSMo. and, in any

event, shall be construed to include electric service to the type of underground facilities and operations now or hereafter operated by CARMAR Group Inc., or its successors or assigns, in the Area, and any expansion or modification thereof, and to anything else using or designed to use electricity that is located within the Area.

2. Empire shall have the right to continue to serve, and the City shall not have the right to serve, those structures within the Area receiving service from Empire on the date this Agreement is executed (hereinafter "Existing Structures").

3. This Agreement does not affect any structures within the Area that are receiving service from a supplier other than Empire on the date this Agreement is executed. As provided in §394.312.5 RSMo, this Agreement does not affect or diminish the rights of any supplier not a party to this Agreement.

C. New Structures.

1. Empire shall have the right to serve, and the City shall not have the right to serve, any structures constructed, erected, reconstructed, or otherwise created within the Area (hereinafter "New Structures") after the date this Agreement is executed and during its term.

D. Boundary Structures.

1. The location of a structure for purposes of this Agreement is the location at which electric power and energy is or is capable of being utilized by a customer, regardless of the

location of the meter or the location where the sale of electricity from the supplier to the customer takes place. In the event of a situation where the facilities of a customer cross the boundary of the Area ("Boundary Structure"), the structure shall be served by the party whose territory includes the facilities which utilize or are capable of utilizing more than fifty percent (50%) of the total electrical power and energy demand of the Boundary Structure.

E. Service After Annexation.

1. If the portion of the Area not currently within the corporate limits of City is subsequently annexed into City, the City shall not take any actions which cause Empire's operations in the Area to be disadvantaged as the result of the Area being annexed. The City shall also permit Empire to occupy or cross any public rights of way subsequently created in the Area in the same manner as other utilities are permitted to occupy and cross public rights of way within the City.

3. Deviation from this Agreement

City and Empire 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.

A. Each such agreement shall be treated as an Addendum to this Agreement and a copy thereof shall be submitted to the Staff of the PSC, directed to the Utility Services Division director, and a copy submitted to the Office of the Public Counsel.

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

C. 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.

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

E. 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.

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

G. 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 sixty (60) days of the filing thereof, the Addendum shall be deemed approved by the PSC. 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.

H. 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.

4. Indirect Provision of Service Not Permitted

A. The intent of this Agreement is to designate an exclusive provider (as between the parties hereto) for electric service for all structures using or capable of using electricity that are located within the Area during the term of this Agreement. Neither party shall furnish, make available, assist in providing, render or extend electric service to a structure using or designed to use electricity, which that party would not be permitted to serve directly pursuant to this Agreement, by any indirect means such as, for example, through a subsidiary corporation, through another

entity, or by metering electricity outside of the boundaries for delivery inside.

B. Neither party shall take any actions to induce anyone lawfully receiving service pursuant to this Agreement to change suppliers.

C. Empire and the City have service areas outside of the Area designated in this Agreement. This Agreement shall have no effect upon the service provided in those areas.

5. Term; Termination.

A. The Initial Term of this Agreement shall be thirty-five (35) years from and after the effective date of approval of the Agreement by the PSC. If either party wishes to terminate this Agreement at the expiration of the Initial Term, it shall give written notice to the other of such intent to terminate not less than one (1) year prior to the end of the Initial Term. If no such notice to terminate is given, then this Agreement shall automatically be renewed for successive thirty-five (35) year Renewal Terms with the anniversary date being the effective date of the PSC order approving this Agreement. Any party may terminate this Agreement during one of the Renewal Terms by giving the other written notice of intent to terminate at least one (1) year in advance of the end of said Renewal Term.

B. Termination of this Agreement shall eliminate the exclusive service territory 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 Area, unless such a change is otherwise permitted by law.

6. Tax on Electric Service Within the Area.

City agrees that if the Area should be annexed into the City during the term hereof, City shall not exercise its discretion to impose any tax, whether in the nature of a license or franchise tax, or other fee or charge, or payment in lieu of tax, on the monetary value of electric service provided by Empire within the Area, except for sales taxes authorized by Missouri statute and uniformly applied throughout the City. If such a tax, or other fee or charge, or payment in lieu of tax, is nevertheless imposed during the term hereof, the City agrees to pay Empire, from City's utility operations revenues, an amount exactly equal to the amount of any such tax, fee, charge or payment, such amount to be due and payable to Empire by City at the same time as the tax, fee, charge or payment is due and payable by Empire to City. Empire is authorized to and hereby agrees that it shall credit such amount to any customer who was required to pay such tax, fee, charge or payment as a part of its bill for electric service under Empire's rate schedules.

7. Cooperation.

City and Empire agree to undertake all actions reasonably necessary to implement and effectuate this Agreement. City and Empire shall cooperate in presenting a joint application to the PSC demonstrating that this Agreement is in the public interest. City and Empire shall share equally any filing fees or other costs required to be incurred in the PSC approval process, except that each party shall bear its own attorneys fees.

8. Waiver.

No failure of the City or Empire to enforce any term hereof shall be deemed a waiver hereof. No waiver or any breach of this Agreement or of any covenant or representation hereunder shall be deemed to be a waiver of any other breach by a party, of any kind or nature, whether preceding or succeeding and whether or not of the same or similar nature.

9. Modifications.

Neither the Area described in this Agreement nor any provision of this Agreement may be modified or repealed except by a signed writing of both parties which is approved by all applicable regulatory authorities. If any part of this Agreement is declared invalid or void by a court or other agency with competent jurisdiction, then the parties shall replace such provision as similar 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.

10. Survival.

This Agreement shall inure to the benefit of and be binding upon the parties, their respective successors or assigns.

11. Lack of Required Approval.

If the PSC or any other regulatory body having jurisdiction fails to approve this Agreement, or if the condition precedent does not take place, or if for any other reason this Agreement is not implemented for the initial term pursuant to its terms, this Agreement shall be null and void and of no legal effect between the parties, and neither shall be liable to the other for any damages as a result thereof.

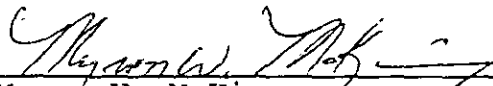
12. Entire agreement. This Agreement contains the entire agreement between the parties respecting the matters herein set forth and supersedes all prior agreements between them respecting such matters.

13. Governing Law. This Agreement shall be construed and enforced in accordance with the laws of Missouri.

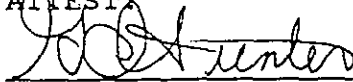
14. Headings. Section headings are for purposes of convenience and identification only and shall not be used to interpret or construe this document.

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

THE EMPIRE DISTRICT ELECTRIC COMPANY

By: 
Myron W. McKinney
Vice President Customer Services

ATTEST:



Secretary

(seal)

THE CITY OF CARTHAGE, MISSOURI

By: 
Mayor

ATTEST:


City Clerk

(seal)

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 the City of)
Carthage, Missouri for approval of a) Case No. EO-95-48
territorial agreement designating the)
boundaries of each electrical supplier)
within a certain area in Jasper County,)
Missouri.)

STIPULATION AND AGREEMENT

On August 16, 1994, The Empire District Electric Company ("Empire") and the City of Carthage ("the City") submitted for filing a joint application for approval of a territorial agreement. On August 22, 1994, the Commission issued an order and notice in this case giving notice to interested persons and establishing an intervention date.

No one sought intervention.

In accordance with the procedural schedule established by Order dated September 6, 1994, Empire submitted the prepared direct testimony of Mr. Myron McKinney and the City submitted the prepared direct testimony of the Hon. Donald Riley, Mayor, on September 28, 1994.

On October 14, 1994, the Staff of the Commission submitted the prepared rebuttal testimony of Mr. B.J. Washburn.

On October 21, 1994, Empire and the City both submitted surrebuttal testimony prepared by the same witness who had prepared direct testimony.

The Office of the Public Counsel has not participated in this proceeding.

Subsequent to the filing of the prepared testimony, the parties held informal discussions regarding the settlement of this case. In response to those discussions, Empire, the City, and the Staff of the Commission have reached the following stipulation and agreement to completely resolve this proceeding:

1. The Commission should issue an order approving the territorial agreement with two conditions. The first condition is that Paragraph 3.A. of the territorial agreement is amended to read as follows:

A. Each such agreement shall be treated as an Addendum to this Agreement and the Addendum shall be filed in Case No. EO-95-48 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.

The second condition is that the first sentence of Paragraph 3.G. of the territorial agreement is amended to read as follows:

G. 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.

2. Both Empire and the City represent that if the Commission's order approving the territorial agreement contains these two conditions, and no others, and there are no other perceived problems with the form or content of the order, they will not exercise their right under paragraph 1 of the agreement to notify the other party of an objection to the form or content of the order, and thus the agreement will be modified to conform to the Commission's order.

3. In the event the Commission accepts the specific terms of this Stipulation and Agreement, the parties stipulate that the prefiled direct and surrebuttal testimony of Mr. Myron McKinney and the Hon. Donald Riley and the rebuttal testimony of Mr. B.J. Washburn shall be received in evidence without the necessity of those witnesses taking the witness stand.

4. None of the signatories hereto shall be deemed to have approved or acquiesced in any ratemaking principle or any method of cost determination or cost allocation underlying or allegedly underlying the Stipulation and Agreement.

5. This Stipulation and Agreement has resulted from extensive negotiations among the parties and the terms hereof are interdependent. In the event the Commission does not approve and adopt this Stipulation and Agreement in total, or in the event there is not an order approving the territorial agreement issued before the 120 day statutory period from its submission, this

FILED

NOV 2 1994

MISSOURI
PUBLIC SERVICE COMMISSION

Stipulation and Agreement shall be void and no party shall be bound by any of the agreements or provisions hereof.

6. In the event the Commission accepts the specific terms of this Stipulation and Agreement, the parties waive their respective rights to cross-examine witnesses and to present oral argument and written briefs pursuant to Section 536.080.1 RSMo 1986; their respective rights to the reading of the transcript by the Commission pursuant to Section 536.080.2 RSMo 1986; and their respective rights to judicial review pursuant to Section 386.510 RSMo 1986.

7. This Stipulation and Agreement represents a negotiated settlement for the sole purpose of disposing of this case, and none of the signatories to this Stipulation and Agreement shall be prejudiced or bound in any manner by the terms of the Stipulation and Agreement in any other proceeding, except as otherwise specified herein.

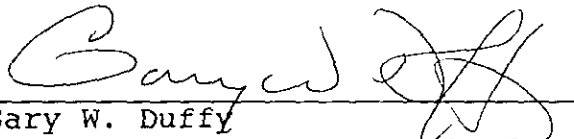
8. If requested by the Commission, the Staff shall have the right to submit to the Commission a memorandum explaining its rationale for entering into this Stipulation and Agreement. Each party of record shall be served with a copy of any memorandum and shall be entitled to submit to the Commission, within five (5) days of receipt of Staff's memorandum, a responsive memorandum which shall also be served on all parties. All memoranda submitted by the parties shall be considered privileged in the same manner as are settlement discussions under the Commission's rules, shall be

maintained on a confidential basis by all parties, and shall not become a part of the record of this proceeding or bind or prejudice the party submitting such memorandum in any future proceeding or in this proceeding whether or not the Commission approves this Stipulation and Agreement. The contents of any memorandum provided by any party are its own and are not acquiesced in or otherwise adopted by the other signatories to the Stipulation and Agreement, whether or not the Commission approves and adopts this Stipulation and Agreement.

The Staff shall also have the right to provide, at any agenda meeting at which this Stipulation and Agreement is noticed to be considered by the Commission, whatever oral explanation the Commission requests, provided that the Staff shall, to the extent reasonably practicable, provide the other parties with advance notice of when the Staff shall respond to the Commission's request for such explanation once such explanation is requested from Staff. Staff's oral explanation shall be subject to public disclosure, except to the extent it refers to matters that are privileged or otherwise protected from disclosure.

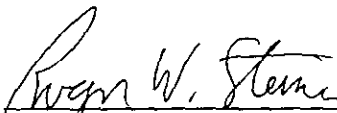
WHEREFORE, for the foregoing reasons, the undersigned parties respectfully request that the Commission issue its Order approving the territorial agreement with the specified conditions contained herein, and such further relief as may be appropriate and necessary to implement the Stipulation and Agreement.

Respectfully submitted,




Gary W. Duffy
Brydon, Swearingen & England P.C.
P.O. Box 456
Jefferson City, Missouri 65102-0456

Attorneys for The Empire
District Electric Company



Roger W. Steiner
Assistant General Counsel
P.O. Box 360
Jefferson City, Missouri 65102

Attorney for the Staff of the
Missouri Public Service Commission

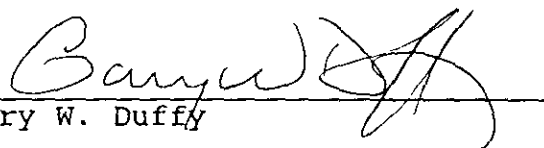


David C. Dally
Crandall & Dally, P.C.
341 South Main Street
P.O. Box 411
Carthage, MO 64836

Attorney for the City of
Carthage, Missouri

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown above this 2nd day of November, 1994.



Gary W. Duffy