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FILED

OCT 4 1999

Missouri Public
Service Commission

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
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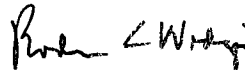
Re: Case No: EA-99-172
In the Matter of the Application of The Empire District Electric Company

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case are an original and fourteen (14) copies of the **REPLY BRIEF OF THE INTERVENOR ELECTRIC COOPERATIVES**.

Copies of this filing have on this date been mailed to counsel for parties of record. Thank you for your consideration.

Sincerely yours,



Rodric A. Widger

RAW/hr
Enclosures
cc: counsel for parties of record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED

OCT 4 1999

Missouri Public
Service Commission

In the matter of the application of The Empire)
District Electric Company for a certificate of public)
convenience and necessity authorizing it to)
construct, install, own, operate, control, manage and)
maintain an electric transmission and distribution)
system to provide electric service in an area)
in Greene County, Missouri.)

Case No. EA-99-172

REPLY BRIEF OF
INTERVENORS OZARK ELECTRIC COOPERATIVE, SOUTHWEST
ELECTRIC COOPERATIVE, AND WEBSTER ELECTRIC COOPERATIVE

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October 5, 1999

REPLY BRIEF

The Intervenor electric cooperatives submit this Reply Brief for the limited purpose of clarifying a single legal issue that might affect the Commission's decision process. One of the questions discussed in these proceedings has been directed to the relative authority of electric suppliers to serve new customers under various circumstances. These Intervenor suggest the following analysis.

BACKGROUND

A. Rural Electric Cooperatives: Rural electric cooperatives derive their operating authority from Chapter 394 RSMo. They are empowered to distribute electric energy in statutory "rural areas" and in cities and towns having a population in excess of fifteen hundred inhabitants if: the cooperative was the predominant supplier before that census mark was reached; and the city or town has granted to the cooperative a franchise. §394.080.1 (4), §394.080.2, RSMo. 1994.

The municipal franchise referenced in §394.080.2 is duplicative of franchise authority previously granted by the state. Electric cooperatives have sufficient authority to use the streets, roads, alleys, highways and public lands without the municipal approval. Missouri Utilities Co. v. Scott New Madrid- Mississippi Electric Cooperative, 475 SW2d 25, 32 (Mo. 1972). A municipal franchise cannot empower a cooperative to serve new customers beyond the cooperative statutory powers. While the statute grants sufficient franchise, i.e. public use, authority for a cooperative to build lines through any city, it is barred from serving new accounts in non-rural areas. Missouri Public Service

Company v. Platte-Clay Electric Cooperative, Inc., 407 SW2d 883 (Mo. 1966). Based on the foregoing, it is clear that a municipal "franchise" in the context of the "predominant supplier" exception, represents no more than an expression of local consent to add new customers to the lines built pursuant to a pre-existing statewide franchise authority.

None of the intervenor cooperatives are predominant suppliers in the non-rural cities of Republic and Willard. None of the cooperatives expect to qualify as a "predominant supplier" when the city of Strafford ceases to be a statutory rural area pursuant to the next official census. For these reasons, the electric cooperatives would not be eligible to serve new customers in these areas after municipal annexations. Sufficient franchise authority remains but without a necessary power to supply new service locations. The testimony in this case is generally consistent with this understanding of cooperative operations.

B. Regulated Electric Companies. Electric corporations are granted basic franchise, i.e. public use, rights at §393.010. Execution of that right is subject to further municipal consent evidenced by an ordinance, §71.520, and Public Service Commission oversight, §386.320. While the municipal ordinance is commonly called a "franchise", it presents a redundancy that yields an expression of local approval. The Commission requires evidence of municipal and other local consent before granting a certificate of public convenience or necessity. The electric corporation cannot exercise any franchise privilege without prior Commission approval. §393.170.

In this case, Empire has statutory and administrative authority to build lines along streets and roads in its current certificate area. Its operation in Republic, Willard, and

Strafford is affirmed by local ordinances. While the cooperatives and City Utilities now operate lawfully outside those cities (and Southwest Electric Cooperative inside Strafford until that town ceases to be a statutory rural area), only Empire possesses the required local consent for service in areas brought in by future expansions of those towns municipal limits.

C. City of Springfield ("City Utilities"). City Utilities operates on the basis of a unique hybrid authority. While it is a municipal owned system, it has been allowed to function like an electric company beyond Springfield's municipal boundaries.

The general rule has been that municipal electric utilities are prohibited from providing retail electric service outside their city limits. Taylor v. Dimmitt, 78 SW2d 841 (Mo. 1934). In the case of Associated Electric Cooperative, Inc. et al v. City of Springfield, Missouri, 793 SW2d 517 (Mo. 1990), a challenge was heard against City Utilities service outside the incorporated limits of the City of Springfield. When the dust settled, the Court of Appeals affirmed that Springfield's municipal utility could serve outside city limits to the extent of the Commission certified area of its predecessor, Springfield Gas and Electric Company ("SG&E").

The City Utilities exception is now codified at §386.800.RSMo. By statute the Legislature generally forgave extra-municipal services established prior to July 11, 1991 and forbade new services outside municipal corporate boundaries after that date that did not meet an enumerated exception, such as one that carefully defined City Utilities succession to the SG&E service territory. §386.800.1(4) RSMo. Within the City of

Springfield, City Utilities exercises the right and privilege of the City. Outside of Springfield's municipal boundaries, it competes like the former SG&E.

DISCUSSION

The foregoing analysis is presented in light of statements made in the Initial Briefs of Staff and City Utilities. In regard to Strafford and Willard, Staff has stated:

Empire is the only electric utility with a franchise for the cities of Strafford and Willard. As such, Empire is the only utility company with authorization to use the public right of way within the City of Willard, and after census in the year 2000 it will be the only electric utility company with authorization to use the public right of way in Strafford. (Staff Brief, p.3)

This is not wholly accurate. Each of the electric suppliers have sufficient statutory authority to criss-cross the cities of Strafford and Willard with poles and lines on public right of way. For that matter, Empire and the Cooperatives could build lines through downtown Springfield. The local franchise in the context of this case does not represent an ability to deny access to public lands. Though it contains words of permission, its purpose is to satisfy a condition precedent to lawfully serving customers. For example, an electric cooperative does not lose its customers, and its facilities to serve those customers, when a town ceases to be rural. It may even construct new pole routes to those customers. When a cooperative was the predominant supplier, a franchise is no more than approval to add new customers that otherwise could not be lawfully served. Similarly, Empire and City Utilities, in the exercise of statutory rights granted by the

state, have to submit themselves to local authority in exchange for the privilege of serving the citizens of a city, town, or village.

Throughout its Initial Brief, City Utilities suggests that it is somehow immune to these ordinary utility conventions. The law cited at its page 4, however, only confirms that it has been allowed to serve beyond its municipal boundaries. The restriction to serving within the old SG&E certified area suggests that City Utilities is constrained in the same manner and to the same extent as that former electric company. Just as SG&E could not have served in another town without acknowledgement of local municipal control of what happens within the town's corporate boundaries, neither can City Utilities.

The rationale of the old rule remains true and effective today: A municipal power supplier ceases to perform its municipal function and enters the field of private business when it operates outside its city limits. Taylor *supra*. The cities of Willard and Strafford have the right to regulate the use of their public ways and to require that private electric suppliers have a municipal franchise expressing agreement for the business use of city streets, alleys and right-of-ways to serve city residents. §71.520 RSMo.

City Utilities' discussion of franchises leads it to conclude that it does not need municipal franchises from other towns. We agree that City Utilities, Empire and the Cooperatives have rights to use the public rights-of-way that are independent of municipal consent. Local franchises however, carry a different meaning when employed as a mechanism for the enforcement of municipal autonomy. For that reason, the Cooperative Intervenor believe that City Utilities' argument does not present the full

view of applicable law. We do not agree that City Utilities would be legally competent to serve new customers in areas presently outside Strafford or Willard after these areas are annexed. (City Utilities Initial Brief, p.5,10,16,17) The spare statement of Mr. Coffman for the Office of Public Counsel, which is used by City Utilities to suggest otherwise, simply supports orderly utility development. (Tr. 28) More accurately paraphrased, Mr. Coffman is saying that, all other things being equal, any of these companies would do a good job.

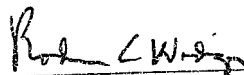
If City Utilities' legal position on this issue is tenable, there is no reason why it should not be serving in all parts of every town in the old SG&E territory. Following its theory, it would be qualified to compete with municipal power suppliers and franchised electric companies without regard to municipal boundaries or dates of annexation. The holder of a valid franchise could test that theory with an action for injunctive relief to protect itself from a competitor acting unlawfully and without authority. Missouri Utilities, supra.

CONCLUSION

The Cooperative Intervenors suggest to the Commission that future annexations by Strafford and Willard could in fact create circumstances under which the Cooperatives could not serve due to their rural service limitation, where City Utilities could not serve due to lack of municipal franchise and where Empire could not serve due to lack of certificate authority. The Cooperative Intervenors affirm their support for an Order of the Commission consistent with the Non-Unanimous Stipulation and Agreement filed in this case. This Reply Brief is for the purpose of drawing the Commissions' attention to

matters of law that were incompletely or inaccurately presented in the Initial Briefs of the parties.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Rodric A. Widger", written over a horizontal line.

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Certificate of Service

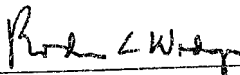
The undersigned certifies that a true and correct copy of the foregoing was served by either hand delivery or by placement with the U.S. Postal Service addressed to the following counsel this ~~Xth~~^{1st} day of October, 1999.

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