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

POST-HEARING BRIEF
SUBMITTED BY OZARK ELECTRIC COOPERATIVE

The pre-hearing List of Issues, filed by Staff and responded to by all participants, sets out three propositions in question form to frame the issues before the Commission and an additional question designed to allow Staff to opine on a matter of law beyond the scope of the Commission's jurisdiction. The first three address the public interest component of the subject territorial agreement, and the requisite sale of facilities and change of electric suppliers to accommodate that territorial agreement. The fourth "issue," involving Staff speculation about the powers of electric cooperatives and the law of municipal franchise, is a false issue that is not properly before the Commission. It is clear that it is a false or "red herring" issue because the answer to the franchise question posed by Staff is acknowledged to have no impact on Staff's legal conclusions and position. (Staff's Statement of Position, p. 4) Those legal conclusions are founded on faulty analysis and a muddled reading of the law.

Territorial Agreement and Related Transactions

All parties now agree that the applicable standard for Commission review of territorial agreement applications is established at Section 394.312.4 RSMo. The Legislature there demonstrated its favor for territorial agreements in its directive that such are to be approved upon finding that an agreement "in total is not detrimental to the

public interest." (id) This is a low standard that focuses on failure of a showing of detriment.

This low standard is based on the notions that competing suppliers will sufficiently safeguard their respective self interests in making a voluntary agreement that displaces competition in a specific area. It relies upon public notice and intervention procedures to uncover detriment other than that which the suppliers are willing to accept for themselves. Such intervention may supply the "good cause" to delay an otherwise expeditious (120 days) approval process.

By contrast, the Legislature provided that an involuntary agreement, one in which the parties essentially consent to allow the Commission to act as an arbitrator to establish service areas, requires an affirmative finding that the Commission's (underlined for emphasis) designation of service areas is in fact in the public interest. (Section 394.312.2 RSMo.) That is a higher standard that anticipates the objections of one or more of the parties that submit to the Commission's discretion in drawing the lines for them. It is not the standard for this proceeding.

In a case such as this, and to some extent in all territory agreement cases, the concepts of "benefit" and "detriment" are equally difficult to quantify. This is why the Legislature's easy approach is instructive. Given the alternative of unnecessary electric facilities duplication and the inherent safety and aesthetic ramifications of the same, the very fact that competitors can come to agreement is in itself an indicator of positive support of the public interest and public benefit. The Commission is directed by the Legislature to focus on the hidden or undervalued detriments.

Any private detriment in a voluntary agreement, whether real or theoretical, is suffered by the one who would willingly abide it. To the extent that it is a matter of business judgment, it is in the hands of those actors who are actually charged with exercising judgment and it is not subject to second guessing by Commission Staff members. Objection must be based on something more than a sense that one party gains more value than the other.

Staff witness Daniel Beck was reluctant to acknowledge any benefits to The Empire District Electric Company if they could not be quantified. (Transcript p. 116-121) That reluctance is the dilemma of a narrow outlook. The larger problem is that his

premise is erroneous. A lack of measurable benefit, even for the sake of argument, does not equal the presence of an immeasurable detriment. It is the latter that is critical.

Staff's persistent opposition to this territorial agreement shows that Staff has accurately apprehended neither the law nor the facts. The law was presumptively intended to solve problems and not to stifle solutions. Staff's error is encapsulated in the testimony of Mr. Beck:

> "I do not believe that the Applicants have put forth an argument that explains why this application is in the interest of Empire's customers." (Exhibit 5, pg. 14, lines 6-7)

After prolonged cross examination, Staff witness Beck admitted to Public Counsel Mills:

> "I don't think the record is clear enough that I can point to anyone that clearly will suffer a detriment." (Transcript, p. 135, lines 21-23).

Given the last word, however, on redirect examination, he reverted to Staff's theme:

> "I think that they just needed to clearly state the various public entities and what the – why it was in the public interest for those entities. I don't believe the record shows that." (Transcript p. 138, lines 2-5).

That last statement is a reflection of Staff's dogged application of the absolutely incorrect legal standard.

The position presented and defended by the Staff witness completely misstates the Applicants' burden in this proceeding. Not only does Mr. Beck's statement misstate the law and usurp the business judgment of the management of The Empire District, but it also re-shapes the role of the Commission. It improperly assumes that the narrow task of the Commission and its Staff is that they serve only as zealous advocates for regulated companies and ratepayers. On the record before the Commission, the better observation is this: There has not been a single witness, including from Staff, who has put forth a coherent argument why this territorial agreement is, in total, a detriment to the public interest.

Staff's view of the lack of benefit to The Empire District seems to be based on the factual misconception that The Empire District would here voluntarily give up something that it is entitled to keep. That ignores the history of this case. It is openly acknowledged

that this case is a follow-on case intended by the affected parties to repair damage and to set right the consequences of their failure to gain Commission approval of a prior proposed territorial agreement. Staff acknowledges this in its "Brief Statement of the Case" contained in its Statement of Position but it does not deal with the ramifications of that reality.

The Staff position does not accommodate the true jeopardy of the situation on the ground. Its approach has been to ask in effect, "Why should The Empire District give up its right to serve this subdivision?" On the facts, the better question is, "By what right may Empire continue to serve this subdivision?"

There has been no evidence presented in this case to show that the developer has entered into a contractual relationship with The Empire District. That evidence is lacking because no such agreement exists. Further, there is no evidence of assignment of the developer's contract with Ozark Electric Cooperative to The Empire District because no assignment exists. The Empire District's investment in this subdivision is not at the request of the developer, but pursuant to a gentleman's agreement arising in the first administrative proceeding about how to fulfill the needs of the developer and minimize the ultimate expense for everyone while the administrative processes were running their course. The initial transfer that Ozark made to Empire was reasonable and was only done in anticipation of approval of the territorial agreement and tariff waiver application. It was not reduced to writing beyond an invoice, but was conducted with a clear understanding of the contingent nature of the transfer. A transfer back now is only held up by the necessity of gaining PSC approval of the transfer of assets and customers.

Municipal Franchise

Staff's insistence on creation and exploration of a municipal "franchise" issue in this proceeding is an improper invitation for the Commission to go beyond its ordinary jurisdiction. The basic and long standing understanding is that the Commission "has no authority to declare or enforce principles of law or equity." State ex rel. Util. Consumers Council, Inc. v. Pub. Serv. Comm'n, 585 S.W.2d 41, 47 (Mo. banc 1979).

Ozark Electric filed a Pre-hearing Legal Brief on the law of franchises and rural electric cooperative corporate powers. This was done in order to aid the Commission's

understanding and to minimize the confusion that this issue would introduce into the proceedings. Ozark Electric here re-adopts that brief as its statement of the law and adds the following points.

First, it should not be missed that Staff did not oppose the parties' former Territorial Agreement that was proposed in Case No. EO-2007-0029, even though the same non-rural service circumstance was presented. That Territorial Agreement was acceptable to Staff but was ultimately fatally flawed by its linkage to a request for waiver of The Empire District's tariff provisions applicable to line extensions to developers. No explanation has been given for discovery of this franchise issue now even though the same anticipation of municipal annexation existed in the first case.

Second, the Staff should not be allowed to lead the Commission, under any theory of construction of a statute, to proceed in a manner contrary to the plain terms of the statute. The Commission "has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature." State ex rel. Springfield Warehouse & Transfer Co. v. Pub. Serv. Comm'n., 225 S.W.2d 792, 794 (Mo. App. W.D. 1949).

The will of the Legislature as expressed in House Bill 813, 1989, is determinable from the changes that Bill made to the existing law. The law created the "predominant supplier" exception for non-rural service by an electric cooperative and this exception was codified at Section 394.080.2 et seq. It created the territorial agreement exception for non-rural service by an electric cooperative and this was codified at Section 394.312. For good measure such territorial agreements were given protection from charges of anti-trust violations with the addition of Section 416.041.3.

The "predominant supplier" exception sets a benchmark for substantial prior electric cooperative service to a city, town or village and subjects the future status of the rural electric cooperative to franchise approval. Technically speaking, this franchise is redundant in terms of the power it grants, but it is the accepted mark of public approval. Investor owned utilities are already accustomed to that requirement.

The territorial agreement exception was crafted and enacted concurrently with the former. It is based on the agreement of competing power suppliers and the approval of the Commission. The Legislature did not order that there be municipal approval by way

of franchise as a condition of such agreements, though it was fully cognizant of the use of a franchise in the "predominant supplier" circumstance. A city is a passive beneficiary of the good things accomplished by territorial agreements. The notice and intervention processes allow it to be heard if it objects.

It is not proper statutory construction now for Staff to attempt to merge the distinct approval mechanisms that the Legislature deliberately left separate. To borrow and meld a franchise approval requirement into the territorial agreement statute is of the same magnitude of error as to borrow and meld the Commission approval process into the predominant supplier law. It doesn't make sense and it is contrary to the discernible will of the Legislature.

Conclusion

On the law and the record before it, Ozark Electric Cooperative respectfully urges that the Commission find that the territorial agreement presented by the parties is not detrimental to the public interest, that the sale of assets by The Empire District is necessary for implementation of the agreement and is not detrimental to the public interest, and that the related transfer of customers in The Lakes at Shuyler Ridge subdivision is in the public interest for reasons other than rate differential.

Respectfully submitted,

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

By: /s/ Rodric A. Widger

Rodric A. Widger, #31458
1111 S. Glenstone, Suite 2-100
Springfield, MO 65804
(417) 864-6401 Phone
(417) 864-4967 Facsimile

Certificate of Service

I hereby certify that copies of the foregoing have been transmitted by electronic mail to all counsel of record this 15th day of January, 2008.

/s/ Rodric A. Widger