

**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)	Case No. EO-2007-0029
Agreement Designating the Boundaries of)	
Exclusive Service Areas for Each within Two)	
Tracts of Land in Greene County and Christian)	
County, Missouri)	

In the matter of the Application of The Empire)	
District Electric Company for a Waiver of the)	
Provision of Its Tariff and 4 CSR 240-14.020)	
With Regard to The Lakes at Shuyler Ridge)	Case No. EE-2007-0030
Subdivision in Conjunction with a Proposed)	
First Territorial Agreement with Ozark Electric)	
Cooperative.)	

**JOINT RESPONSE TO “STAFF MOTION FOR
DETERMINATION ON PLEADINGS”**

Comes now The Empire District Electric Company (“Empire”), and Ozark Electric Cooperative (“Ozark”) by and through their respective counsel, and for their joint response to the “Staff Motion for Determination on Pleadings” filed on November 17, 2006, respectfully state as follows:

1. The Commission should reject the Staff motion for the reasons set out herein.
2. A brief review of the procedural events in this case provides a relevant and important background for the Staff’s motion.
3. On July 18, 2006, Empire and Ozark filed a joint application for approval of a proposed territorial agreement. That is the subject of what was designated by the Commission as Case No. EO-2007-0029. Concurrently, Empire filed a request for a

waiver/variance that is directly tied to the approval of the territorial agreement. That is the subject of what was designated as Case No. EE-2007-0030.

4. On September 28, 2006, the Commission issued an Order Directing Filing in which it noted that on August 14, 2006, it had ordered the Staff to file a recommendation or a Status Report by September 13, 2006, and that no such pleading had been filed. The Commission again ordered its Staff to file a recommendation or Status Report, and provided a new deadline of October 30, 2006.

5. On October 3, 2006, Staff asked the Commission to consolidate those two cases. Empire and Ozark did not object. The Commission issued an order consolidating the cases on October 11, 2006, and designated Case No. EO-2007-0029 as the “lead case.”

6. Staff filed its Recommendation on October 10, one week shy of three months after the applications had been filed. Subsection 3 of 394.312 RSMo requires the Commission to rule on applications for approval of territorial agreements within 120 days (essentially four months) of when they are properly filed, unless otherwise ordered by the Commission for good cause shown. The 120 days prescribed in the statute expired on November 16, 2006, but the Commission determined good cause had been shown to extend the deadline. Therefore, the Staff took up three-fourths of the time prescribed by law for the Commission to consider the application just to produce a written recommendation/memorandum.

7. The Staff Recommendation filed on October 10, 2006, contains essentially the same legal argument found in the “Staff Motion for Determination on Pleadings” filed on November 17, 2006.

8. On October 18, 2006, Staff, on behalf of all the parties, filed a proposed procedural schedule, which the Commission adopted by order issued on October 24, 2006. This procedural schedule included the filing of a stipulation of facts on November 13, 2006, the pre-filing of testimony combining direct and rebuttal on November 20, 2006, and a hearing on December 7, 2006. This schedule was designed to present the case to the Commission for determination as soon as practical given that so much of the allotted time had already been consumed by the Staff.

9. Subsection 4 of 394.312 RSMo explicitly requires the Commission to “hold evidentiary hearings to determine whether such territorial agreements should be approved or disapproved.” As a result of the consolidation at the motion of the Staff, the law now explicitly requires a hearing in this case.

10. Staff filed its “Staff Motion for Determination on Pleadings” 19 days before the scheduled evidentiary hearing. The essence of the motion is that the Commission should not hold a hearing, but rather summarily dismiss the case on the pleadings, apparently without considering the prepared testimony that was filed on November 20, 2006, the stipulated facts, or the evidence that may be admitted by the Commission at the hearing on December 7, 2006. If Staff had chosen to submit its pleading as a motion for summary determination under 4 CSR 240-2.117(1), it could not have done so without first seeking leave of the Commission since it would have been within the period of 60 days prior to the hearing.

11. Instead, Staff chose to make its Motion for Determination on Pleadings pursuant to 4 CSR 240-2.117(2). That provides as follows: “Except in a case seeking a rate increase or which is subject to an operation of law date, the commission may, on its

own motion or the motion of any party, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.”

12. The fact that a hearing is explicitly required by state law in territorial agreement approval cases would appear to fit the category of “is not otherwise contrary to law” in the rule. In other words, since subsection 4 of section 394.312 RSMo explicitly requires a hearing in this case, the Commission summarily dismissing this case on the pleadings as Staff requests would be “contrary to law” since it would eliminate the hearing that is required by statute. Furthermore, the essence of the determination to be made in this case is whether the approval of the territorial agreement and the accompanying waiver is “in total ... not detrimental to the public interest.” *Id.* Therefore, it would appear that the Commission ought to hear and fully evaluate the evidence regarding *the public interest* instead of summarily dismissing this case.

13. No one has claimed that either of the applications filed in this case were improperly filed. 4 CSR 240-14.010(2) explicitly recognizes that “On written application by a utility the Commission may grant variances from the rules contained in this chapter for good cause shown.” Empire has invoked that authority of the Commission in the application for variance Empire filed. The Commission has granted variances from the promotional practices rules on several occasions in the past in order to meet unregulated competition.

14. The Commission has another rule that applies to attorneys filing pleadings with the Commission. 4 CSR 240-2.080(7) says that by presenting an argument in a

pleading, the attorney is certifying that it is not being made for any improper purpose, such as to harass, and that the legal contentions therein are warranted by existing law or a nonfrivolous argument for the modification of existing law or the establishment of new law. Given that the Staff took up three-fourths of the time allotted for this case, moved for consolidation of these cases while it was fully aware that state law requires a hearing in territorial agreement cases, and then agreed to a procedural schedule that included a hearing, it certainly raises a question about why the Staff now claims that the hearing Staff agreed to and that is required by state law should be summarily ignored by the Commission.

15. Since, as explained above, there are ample grounds for the Commission to dismiss Staff's motion without even reaching the substantive aspects, Empire and Ozark will decline to respond here to Staff's legal theories. Staff agreed to a procedural schedule in this case that, in the interest of the time constraints largely created by Staff, provided for oral arguments at the close of the evidentiary proceeding. Empire and Ozark will make legal arguments in response to Staff's theories at the time designated in the procedural schedule.

WHEREFORE, Empire and Ozark move that the Staff Motion be rejected by the Commission.

Respectfully submitted,

/s/Gary W. Duffy

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ATTORNEYS FOR OZARK
ELECTRIC COOPERATIVE

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent electronically, by U.S. Mail, postage prepaid, or hand-delivered, on this 27th day of November, 2006, to all parties of record.

_____/s/Gary W. Duffy_____