

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 7th
day of March, 1995.

Complaint of Ozark Border Electric)	
Cooperative as to Territorial)	<u>CASE NO. EC-95-198</u>
Agreement between Union Electric)	
Company and the City of Poplar Bluff.)	

ORDER DISMISSING COMPLAINT

On December 30, 1994, Ozark Border Electric Cooperative (Ozark) filed with the Commission a Complaint directed against the territorial agreement between Union Electric Company (UE) and the City of Poplar Bluff, Missouri (City), approved in Commission Case No. EM-94-90. Ozark filed its Complaint pursuant to § 394.312 RSMo 1994¹, which grants the Commission jurisdiction to entertain complaints regarding Commission-approved territorial agreements. The statute provides for such complaints to be initiated and prosecuted in the same manner as other complaints and provides for a hearing.

Ozark alleged that the territorial agreement approved by the Commission is not in the public interest because it increases the duplication of electric distribution facilities in the area covered by the agreement, because the City lacks the long term capability to adequately serve the electrical needs of all of the consumers within the territory set aside to it, and because no evidentiary hearing was held prior to approval of the agreement.

1. All future references to sections of the Revised Statutes of Missouri will be to the 1994 edition.

The City filed its answer and Motion to Dismiss on January 24, 1995. UE filed its answer and Comments in Support of the Motion to Dismiss on January 30, 1995. Complainant Ozark filed Suggestions in Opposition to the Motion to Dismiss on February 3, 1995. The City filed a reply to Ozark's Suggestions on February 10, 1995. Staff filed a Motion To Clarify Issues on March 2, 1995. The City filed a response to Staff's motion.

Having considered the applicable statutes and the pleadings, the Commission is of the opinion that the Motion to Dismiss filed by the City should be granted. § 394.312.6 RSMo states that complaints regarding territorial agreements shall be brought and prosecuted in the same manner as other complaints before the Commission. Other complaints are governed by § 386.390.1 RSMo which provides that a complaint may be made by "setting forth in writing any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge . . . claimed to be in violation of any provision of law, or of any rule or order or decision of the Commission". § 394.312.6 RSMo allows the Commission to review whether a previously approved territorial agreement is still in the public interest.

Ozark alleged that the territorial agreement between the City and UE was approved without the hearing required by § 394.312.4 RSMo. Ozark argued that the hearing held on December 1, 1993, to present the stipulation of the parties for approval did not constitute an evidentiary hearing sufficient to satisfy the statutory requirement and cited *Ehrhart v. Ehrhart*, 776 S.W.2d 450 (Mo.App. 1989), in support of its position. In that case the Court of Appeals remarked on the facts that there was no testamentary or documentary evidence offered in the hearing complained of, no opportunity to cross-examine witnesses, and no adversarial proceeding

of any kind in a case which contained a contested issue. In Case No. EM-94-90 the parties offered two pieces of documentary evidence: Exhibit No. 1, Contract for Purchase and Sale of Distribution Facilities between UE, Company and City of Poplar Bluff; and Exhibit No. 2, Stipulation and Agreement. The parties specifically waived their rights to cross-examine witnesses in the Stipulation and Agreement which was the result of extensive negotiations between the parties. This case does not fall in the category of cases addressed by *Ehrhart*. A case which is more applicable is *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494 (Mo.App. 1989), in which the Court held that the requirement of "due hearing" was met by the Commission when parties were offered the opportunity to intervene and request a hearing but no proper party requested the opportunity to present evidence. The same situation exists here where the Order and Notice issued in Case No. EM-94-90 set an intervention date, the applicants presented their request by means of a verified application, and no party intervened or requested a hearing.

Ozark alleged that the territorial agreement is no longer in the public interest because it increases duplication of electric distribution facilities in the area, and because the City lacks the long term capability to adequately service the electrical needs of all of the consumers in its assigned territory. Neither of these allegations constitutes a violation of law, rule or Commission order as required by § 386.390 RSMo. The objections Ozark has raised are among the types of objections properly considered in the original proceeding, Case No. EM-94-90.

Furthermore, Ozark has not alleged facts indicating that there has been a substantial change in circumstances since the territorial

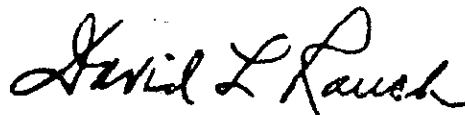
agreement was approved 15 months ago. If such a substantial change had taken place in the facts surrounding a territorial agreement, a party might successfully invoke the Commission's jurisdiction to review the agreement pursuant to § 394.312.6.

Since Ozark has not alleged facts indicating a substantial change in circumstances, and has not alleged a violation of law, rule or Commission order, the Commission is of the opinion that its Complaint should be dismissed.

IT IS THEREFORE ORDERED:

1. That the Complaint filed on December 30, 1994, by Ozark Border Electric Cooperative be dismissed.
2. That this order shall become effective on March 17, 1995.

BY THE COMMISSION



David L. Rauch
Executive Secretary

(S E A L)

McClure, Perkins, Kincheloe,
and Crumpton, CC., Concur.
Mueller, Chm., Absent.