

**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

**INITIAL BRIEF OF  
THE EMPIRE DISTRICT ELECTRIC COMPANY**

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## SUMMARY

This case is a request for the Commission to approve a proposed territorial agreement for a 245 acre tract just south of the present city limits of the City of Republic that is in the process of being developed into a residential subdivision. The development is known as “The Lakes at Shuyler Ridge.” The Empire District Electric Company (Empire) and Ozark Electric Cooperative (Ozark) submitted a proposed agreement on August 15, 2007, that calls for Ozark to be the exclusive supplier of electricity within the subdivision as between Ozark and Empire. Such an agreement is permitted under Missouri law if approved by the Commission. The Commission is authorized to approve a proposed territorial agreement if it determines it “in total is not detrimental to the public interest.” Section 394.312.4 RSMo Supp. 2007.

The particular phrasing of that provision strongly indicates the General Assembly was aware some proposed territorial agreements might contain aspects viewed as detrimental to the public interest. Nevertheless, the General Assembly directs the Commission to balance the negatives and positives and make a determination on the matter *as a whole*. So, as the statute provides: “The commission may approve the application if it determines that approval of the territorial agreement in total is not detrimental to the public interest.”

The Staff was the only party to voice any opposition to this application. The Staff’s opposition was not articulated clearly, its position was inconsistent, and overall it was difficult to comprehend. At the hearing, the Staff failed to produce any clear evidence that *any aspect* of the proposed agreement was detrimental to the public interest. The Staff raised a legal challenge centering on the ability of a city to grant a

franchise to a rural electric cooperative. That argument, based on the facts presented, is simply a hypothetical question of law and therefore beyond the jurisdiction of the Commission because the subdivision is not located inside of any city. The Commission should not be lured into the trap of trying to assume a set of facts and then acting like a court by trying to apply law to a hypothetical situation.

The Office of the Public Counsel, charged by law with representing the interests of the public in these proceedings, filed a position statement stating the proposed agreement was in the public interest. Both Empire and Ozark support the agreement as being in the public interest. As attested to by Late Filed Exhibit No. 8, the City of Republic fully supports the application.

## **FACTUAL BACKGROUND**

As explained in the testimony, this is the second time a proposed territorial agreement involving this subdivision has come before the Commission. This proposal is the result of the fact that the Commission did not approve the initial one. The initial one, filed on July 18, 2006, covered an area more than ten times larger than this subdivision and included a proposed waiver of the tariff provisions for Empire in order to match provisions that had been offered by Ozark to the developer of The Lakes at Shuyler Ridge. The Commission declined to approve the requested waiver in Case Nos. EO-2007-0029 and EE-2007-0030. As a result of that action, the parties regrouped and have presented this proposal that essentially puts everyone back where they were before the first one. There do not appear to be any factual disputes concerning this proposal.

The central component of this proposal calls for Ozark to be the exclusive provider of electric service to The Lakes at Shuyler Ridge. This is designed to allow Ozark to continue to be the provider even if the subdivision is annexed into the City of Republic. One of the goals of this endeavor is to respect the expressed desire of the City of Republic that there not be a hodgepodge of electrical suppliers inside the city; a situation that can present safety concerns.

Under Missouri statute and case law, annexation by a municipality greater than 1,500 in population “freezes” the right of a rural electric cooperative because it is only (subject to a few exceptions not applicable here) allowed to operate in “rural areas.” Section 394.080 RSMo 2000. Basically, the cooperative can continue serving its *existing* customers at the time of annexation by a city but it cannot serve *new* customers after the annexation because the area ceases to be “rural” when it becomes a part of the city. ***St. Joseph Light & Power v. United Electric Coop.*** (Mo. App. W.D. 2001) 43 S.W.3d 330. New customers after annexation must be served by the supplier authorized by the municipality – usually a PSC-regulated company or a municipally-owned utility. In this case, Empire is the franchised supplier for the City of Republic. The City of Republic has a population greater than 1,500. (Tr. 139, ll.1-5) Therefore, the area within Republic is not a rural area and Empire would be required to serve new customers in any areas annexed by the City of Republic. Mr. Prewitt, the manager of Ozark, discussed this potential. (Ex. 4, p. 4, ll. 65-70) This proposed territorial agreement attempts to solve that potential problem since Empire would be giving up the right to serve in the subdivision after annexation for the term of the agreement.

As noted, this proposal essentially puts everyone back where they were prior to the first proposal. Ozark has had an agreement with the developer of the subdivision to serve the subdivision since September 15, 2005. (Ex. 5, page 4, ll. 20-23) This proposal allows Ozark and the developer to go forward with that agreement.

In anticipation of Commission approval of the first proposal, Ozark sold Empire the facilities it had in place in the subdivision in May of 2006. (Ex. 5, p. 5, ll. 4-7) This was a reasonable thing to do at the time because it was designed to eliminate the potential of a lot of expense in changing out facilities after approval of the first proposal. Empire continued the construction of the facilities since lots were being sold and houses were under construction, with the result being that at the time of the hearing in this case, there were approximately thirty structures receiving service from Empire.

The fact that Empire is serving customers within the subdivision creates the reason for the other two aspects of this proposal – the request for approval of the sale of the facilities associated with the subdivision from Empire to Ozark (see paragraph 5 of Ex. 1) and the request for a change of supplier of all the customers from Empire to Ozark (see paragraph 6 of Ex. 1). The facilities need to be sold to Ozark so Ozark can serve the subdivision under the terms of the proposed agreement. The sale is required to be approved by the Commission because of section 393.190.1 RSMo 2000 since it involves facilities “useful in the performance of [Empire’s] duties to the public.” The proposed sale calls for Empire to be essentially made whole for its investment. (Ex. 2, p. 5, ll. 1-7) The change of supplier authorization is required in order to comply with section 393.106.2 RSMo 2000 which gives Empire the right to continue serving structures to which it is providing permanent service unless otherwise permitted by a

territorial agreement or the Commission orders a change of supplier for a reason other than a rate differential. Thus, the Commission must also authorize the change of supplier from Empire to Ozark for the affected customers in order to comply with the statutes.

## **HOW IS THE PUBLIC INTEREST AFFECTED BY THIS PROPOSAL?**

The public interest is difficult to define. What we can do is examine the various parties and segments of the public that presumably would be affected by this proposal to see if there are any obvious disadvantages posed by the change of supplier in this subdivision.

The developer of the subdivision does not appear to suffer any adverse consequences. Indeed, the developer would be allowed to gain the benefit of its agreement with Ozark that dates from July 2005. There are differences in the terms of service between Empire and Ozark when it comes to developers. The developer only agreed to go along with the first proposal if it was held harmless from the effect of the difference between Ozark's service provisions and Empire's tariff. (Ex. 3, p. 12, ll. 20-22) (We are not talking here about the cost of the electricity itself but rather the cost to supply the facilities used to deliver the electricity, including streetlights.) Multiplied by the number of homes planned for this subdivision, it comes to a substantial sum of money. Ozark's member/owners apparently have decided to compete for new customers in this manner since they believe they will receive a return on their investment over the long term. Empire's tariff does not allow it to make the investment in facilities that Ozark chooses to make. So the developer would receive a benefit in

that the developer's costs appear to be lower over the long term with Ozark as the supplier as opposed to Empire. Mr. Beck acknowledged this. (Tr. 113, l. 20-24) The developer has also indicated to Empire that it cannot afford to pay the costs that Empire's tariff would require it to pay (Ex. 3, p. 11, l. 16-p. 12, l. 6), so being able to avoid Empire's tariff provisions in this situation would be a benefit.

Ozark receives the benefit of knowing that it is assured of serving the customers in the subdivision even if the City of Republic annexes all or part of it. This presumably gives Ozark greater certainty regarding long-range planning of its generation, distribution and transmission needs. (Tr. 80) Ozark also gets the benefit of increasing its meter density, or number of customers per miles of distribution line, because this subdivision presents the potential for a large number of customers in a relatively small area. (Tr. 85, l. 23 – Tr. 86, l. 7)

Empire receives some certainty for long-range planning, since it knows that it will not be required to serve inside the subdivision. Empire also receives the benefit of recouping the investment it made in serving the subdivision. (Tr. 70, ll. 7-13) Allowing Ozark to serve the subdivision allows Empire to avoid the potential of the developer failing to pay the amounts Empire's tariff would require, and thus potentially creating a monetary loss for Empire because of an uncollectible account. Mr. Palmer testified that Empire was acting in the best interests of its shareholders and other customers when it attempted to help the City of Republic achieve a more orderly process of annexation on the south side of the city, and that is why it was willing to enter into the original proposed agreement, and in agreeing to the instant proposal. (Ex. 4, p. 14, l. 15 to p. 15, l. 5)

There were approximately 30 customers receiving service in the subdivision from Empire at the time of the hearing, with about 15 or 20 homes under construction. (Tr. 48, l. 24 – Tr. 41, l. 1) Existing customers in the subdivision, and potential new customers in the subdivision, should not be adversely affected by the approval of the application. The existing customers may receive an economic benefit in that Ozark's policies do not require as large a contribution from the customers as Empire's do. (Ex. 4, p. 14, ll. 1-3) Ozark provides service in the same general region as Empire and there was no evidence in this proceeding that Ozark's quality of service is materially different from that provided by Empire. There also do not appear to be major differences in the cost of service to the customers. In any event, trying to predict the cost of service of a particular supplier of electricity and how it may vary over future decades would be a very inexact prediction.

The City of Republic does not appear to be adversely affected. The city was part of the discussions that led to the current application. (Ex. 4, p. 13, l. 19) Mr. Prewit testified that the city supported this application in the discussions leading up to its filing. (Tr. 96, l. 22 – Tr. 97, l. 11) Mr. Prewit's testimony is corroborated by Late Filed Exhibit 8 (filed January 15, 2008) in which the City indicates it "greatly supports" this application. The city's stated interest in the previous cases was in having a certainty of supplier rather than the patchwork of different suppliers serving in the same subdivision. (Tr. 50, l. 12 – Tr. 51, l. 11) It can achieve that here. Approval of the proposed agreement presumably removes the threats of legal action against the city by the developer and would allow that to take place sooner rather than later, if that is the city's desire. Even Mr. Beck acknowledged that approval of this proposal may eliminate the



threat of litigation by the developer. (Tr. 113, l. 9-13) So the city's interests are served by the approval of this application.

Emergency service responders would be benefited by approval of the proposal because there would be certainty as to the identity of the electric supplier in the subdivision. Having one supplier reduces the potential of confusion compared to having two suppliers. (Tr. 58, ll. 8-9) Confusion about who the supplier is can be a critical factor in emergency situations where power needs to be shut off in an emergency situation and delays can be dangerous.

The preceding paragraphs highlight the benefits to the public interest in the approval of this application. Near the conclusion of the hearing, Mr. Mills asked Mr. Beck if he could identify anybody who would suffer a detriment if this application were approved. Mr. Beck replied: "I don't think the record is clear enough that I can point to anyone who clearly will suffer a detriment. ... No one comes to mind." (Tr. 135, l. 21 – Tr. 136, l. 2)

## **CONCLUSION**

The Commission can approve a territorial agreement if it determines the agreement, in total, to not be detrimental to the public interest. The only stated opposition to the proposed agreement came from the Staff. The Staff's only witness admitted on the stand that he could not identify anyone that would suffer a detriment were the Commission to approve this agreement and the associated requests to accomplish the goal of the agreement. Clearly, the evidence demonstrates that the Commission can, and should, approve the application.

Respectfully submitted,

**/s/ Gary W. Duffy**

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Certificate of Service

I hereby certify that copies of the foregoing have been transmitted by electronic mail to all counsel of record this 17<sup>th</sup> day of January 2008.

**/s/ Gary W. Duffy**