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

REPLY BRIEF OF
THE EMPIRE DISTRICT ELECTRIC COMPANY

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SUMMARY

While Ozark, Empire and the Office of the Public Counsel all support the grant of the relief requested, Staff chose to construct its opposition on four pillars as shown in the "Summary" portion of Staff's initial brief (pp. 1-3). One concerns an alleged failure to minimize the "patchwork" of electric service providers "in and about" the City of Republic (p. 2). One has to do with the public interest question of who bears what portion of the risk related to residential developments (p. 2). The one Staff appears to rely upon most employs a contrived and erroneous interpretation of Missouri law regarding the authority of rural electric cooperatives to provide service within municipalities (pp. 2-3). And finally, one rests on Staff's fundamentally incorrect claim about the adequacy of notice provided affected customers (p.3). This reply brief will carefully examine each of these claims in detail and demonstrate how each lacks a rational foundation, and therefore should be disregarded by the Commission.

HOW IS THE PUBLIC INTEREST AFFECTED BY THIS PROPOSAL?

The Patchwork Issue:

The Staff says it wants less of a "patchwork" of electrical service providers in and around the City of Republic because that would be in the public interest (Staff brief, p. 2). Staff argues that the focus should be on an area well beyond the boundaries of the subdivision that is the factual basis of this case[1]. (Staff brief, p. 5)

Well, it so happens that Empire, Ozark, and the City of Republic presented a proposal to the Commission in 2006 that would have created a distinctly larger and more regional approach to supplying electricity to the south of the City of Republic. It would have accomplished that goal through two service areas of roughly four square miles each. But the

[1] "… it is the Staff's position that the area that should be viewed is broader and more encompassing and includes all of the area surrounding Shuyler Ridge."

Staff *opposed* a critical component of that proposal, which ultimately led to its rejection by the Commission in Case Nos. EO-2007-0029 and EE-2007-0030.

The instant proposal is the direct result of the failure of the earlier proposal but it nevertheless also attempts to minimize the "patchwork." It is for a 245-acre tract, being a complete and distinct residential subdivision. That is apparently not enough territory to suit the Staff but we must remember Staff is not one of the parties authorized by statute to negotiate territorial agreements, and what is presented is the totality of the area the parties could reach agreement upon in this situation. Whether the Staff likes it or not, the proposal now before the Commission only concerns The Lakes at Shuyler Ridge subdivision -- not all of the area surrounding it.

It should be clear that the instant proposal meets the public interest criteria invoked by Staff because it *does* eliminate the potential for a "patchwork" of suppliers within this subdivision. It ensures that Ozark will be the only retail electricity provider. Emergency responders will therefore all be aware that Ozark is the supplier in The Lakes at Shuyler Ridge and in that manner the potential for confusion will be reduced. So, on an objective basis, this should satisfy Staff's stated goal to minimize confusion by emergency responders and the Staff should have no problem with Ozark being the sole supplier. One would think that the Staff would be indifferent as to the identity of the supplier in that subdivision, as long as the supplier can provide a reasonable level of public service. There was no evidence submitted in this proceeding that Ozark is incapable of providing service comparable to Empire.

In advancing its "patchwork" argument, Staff also glosses over the standard applicable to the Commission's decision. The applicable standard is whether the agreement "in total is not detrimental to the public interest." See, § 394.312.4 RSMo. The agreement establishes a single supplier for a 245-acre tract. Staff says reducing patchwork is in the public interest.

The proposed agreement eliminates the potential for the "patchwork" within this rural subdivision. The patchwork can arise where annexation occurs in a piecemeal fashion over time and there is no territorial agreement. Outside of cities in many areas there is competition between suppliers such as Empire and Ozark. If Ozark starts serving customers in The Lakes at Shuyler Ridge, and then annexation of all or part of it occurs, the patchwork arises. This is because Empire, as the franchised supplier in a city with a population greater than 1,500, would have the right under Missouri law to serve all new structures created after the date of annexation. Ozark would have the right to continue serving any structures it was serving prior to annexation. That is the law in this state, as confirmed in ***St. Joseph Light & Power Co. v. United Electric Co-op,*** (Mo. App. W.D. 2001) 43 S.W.3d 330. So the proposed agreement, under the Staff's own criteria, is *in the public interest* as far as the "patchwork issue" is concerned, and thereby satisfies a standard higher than is required by the statute.

Who Bears the Risk of Development?

The Staff's brief talks about the difference between the extension policies of Ozark and those approved for Empire by the Commission. Simply put, Empire's tariff causes the developer to bear more of the risk of failure by requiring the payment of more of the costs up front. Ozark's policy allows it to absorb more of the installation costs. "The Staff believes Empire's line extension and street lighting tariff provisions evince a Commission policy that Ozark does not follow." (Staff brief, p. 2)

The Staff does not come out directly and say so, but the quoted comment implies the Staff believes the Commission is the superior arbiter of public policy in this state on line extensions and that consequently Ozark has failed to select the enlightened and appropriate

path. The implication from the Staff brief is that the Commission therefore needs to protect the unsuspecting public from the bad policy of Ozark.

The extension policy differences between Ozark and Empire arise from the fact that separate but nevertheless officially sanctioned groups have made *different* decisions, each reflecting its own view of "the public interest." The General Assembly only entrusts the Commission to make these judgment calls for regulated utilities, but leaves it to the members of rural electric cooperatives to periodically elect directors from their own membership to perform that task for them. See § 394.140 RSMo. Similarly, elected city councils, or boards of public works appointed by elected officials, make the judgment calls for municipally owned electric utilities.

No one can dispute that the members of rural electric cooperatives represent a segment of the general public. That particular segment of the general public has decided that it wants to take a different, and perhaps longer-term view of residential development, and therefore it chooses to invest more of its member's capital when it makes service proposals to developers. The General Assembly has not given the Commission authority to approve, alter or judge the development policies of either rural electric cooperatives (see § 394.315.2 RSMo) or municipally owned utilities (see § 91.025.2 RSMo). Until the General Assembly gives one of those three groups control over the residential development policies of the others, there may be different policies reflecting different views of what benefits the public within each group. On a larger scale, that is undoubtedly why there are differences in the laws between the 50 states in this country.

There simply is no factual or legal basis in the evidentiary record to justify the Staff holding the Commission-approved tariff of Empire up as the sole embodiment of the public

interest when it comes to line extensions, and thereby conclude that allowing Ozark's policy to prevail in this particular subdivision would be against the public interest.

THE LAW APPLICABLE TO RURAL ELECTRIC COOPERATIVES:

Empire's position is that the Staff is requesting the Commission to make a declaratory judgment on a hypothetical question of law by asking the Commission to endorse Staff's belief that Ozark would not be able to lawfully serve new customers in the subdivision after annexation. (Staff brief, pp. 2-3) Staff has not cited any reported appellate case in this state that declares that to be the law so all we have are Staff's untested assertions. It is undisputed that the subdivision has not been annexed by the City of Republic. What may or may not happen after annexation at this point is speculation.

On a fundamental basis, if a dispute regarding service to new structures arises after annexation, it is highly questionable whether either the Staff or the Commission would have legal standing to argue about the rights of Ozark since neither would be affected. Without resorting to speculation though, we can logically project the expected conduct of two entities that would have a vested interest in who supplies new structures inside the city. One, namely Empire, has voluntarily given up its right to serve the subdivision through the proposed territorial agreement. Thus, it would be illogical to assume Empire would intentionally violate the terms of its agreement. The other, the City of Republic, has publicly indicated its support of the proposal in Exhibit 8 on the assumption Ozark will serve the entire subdivision.

Thus, all the Staff has presented is a hypothetical legal question. The Commission is not a court. It has not been given the authority by the General Assembly to render judgments declaring hypothetical questions of law. It does not have the power to declare or enforce any

principle of law or equity. ***American Petroleum Exchange v. Public Service Commission*** (Mo. 1943) 172 S.W.2d 952***.***

Empire believes that Ozark is fully capable of explaining the law applicable to rural electric cooperatives and therefore will not undertake that task here. Instead, Empire will focus on the text of § 394.312 RSMo, which Staff relies upon for its argument that Ozark cannot lawfully serve new customers after annexation. Empire has had more than a passing involvement (certainly more than the Staff has had) in the history of § 394.312 RSMo and related situations where the interests of regulated electric companies and rural electric cooperatives overlap or collide.

Empire was very much involved in the legislative process that produced the territorial agreement and the anti-flip flop provisions[2] in the 1980's and the refinements of the language since then. Section 394.312 was designed to provide a procedure for the Commission to be involved in territorial agreements between competing suppliers of retail electric service in order to provide "state action" and thereby officially sanction proposed agreements presented to it by competitors. Subsection 1 shows there are three groups who may take advantage of the statute: rural electric cooperatives, (PSC regulated) electrical corporations, and municipally owned utilities. See § 394.312.1, RSMo Supp. 2007.

Subsection 2 lists the minimum requirements for the content of the territorial agreement. The first is to "specifically designate the boundaries of the electric service area of each electric service supplier subject to the agreement." The proposal in this case does that. There is one service area and there is a map and a metes and bounds description of The Lakes at Shuyler Ridge, which is the one service area.

[2] See sections 91.025, 393.106 and 394.315 RSMo.

The second requirement, which is where the Staff has chosen to place its focus (Staff brief, pp. 6-8), is to specifically designate ”any and all powers granted to a rural electric cooperative by a municipality, pursuant to the agreement, to operate within the corporate boundaries of that municipality, notwithstanding the provisions of § 394.020 and of § 394.080 to the contrary … .” This phrase clearly recognizes that the right of rural electric cooperatives to operate within municipalities is not unlimited.

The Staff brief (at page 8), however, interprets this phrase to mean that if the territorial agreement *itself* does not contain any powers being granted by a particular municipality to the rural electric cooperative, there can be no right for that cooperative to operate within the municipal boundaries. The General Assembly could have phrased a theoretical statute that way, but that is not what it did.

Staff’s argument does not consider the general context of § 394.312 and it conveniently ignores two modifying phrases that, when considered, produce a totally different and more reasonable interpretation. Statutes must not be interpreted narrowly if that interpretation would defeat the purpose of the statute. ***L.C. Development Co. Inc. v. Lincoln County,*** 26 S.W.3d 336, 340 (Mo. App. E.D. 2000). Moreover, it is presumed every word, clause, sentence and provision of a statute have effect. ***St. Louis County v. B.A.P. Inc.***, 25 S.W.3d 629, 631 (Mo.App. E.D. 2000). Again, the statute says the territorial agreement must specifically designate ”any and all powers granted to a rural electric cooperative by a municipality, *pursuant to the agreement*, to operate within the corporate boundaries of *that* municipality… .” (Emphasis supplied). Unlike the situation with Staff’s interpretation, these italicized words all have meaning. Here is how to determine that meaning. Look at the immediately preceding subsection where the general scope is described. It refers to *municipally owned utilities* as one of the three sets of entities that can make use of territorial agreements. Note that the

section does not purport to apply to all cities, towns and villages or establish the rights of rural electric cooperatives to operate inside of all municipalities. It is a section that narrowly focuses on how territorial agreements between *these three sets of competing retail electric suppliers* must be structured, presented to the Commission, and the effect they have or do not have on "any suppliers not a party to the agreement." See § 394.312.5, RSMo.

One of the obvious possibilities envisioned by the General Assembly under this section is a territorial agreement between a *municipally owned utility* and a rural electric cooperative. In that context, the requirement that the territorial agreement specifically designate any and all powers granted *pursuant to the agreement* by the municipality to the cooperative to operate within the boundaries of "*that municipality,*" makes perfect sense. If you also look at the last part of the complete sentence, you see that it includes the parallel requirement that a territorial agreement specifically designate "any and all powers granted to a municipally owned utility, pursuant to the agreement, to operate in areas beyond the corporate municipal boundaries of its municipality."

Thus, in order for the statutory phrase to give effect to all of the words chosen by the General Assembly, there has to be (1) a municipality (2) that is granting powers to a rural electric cooperative (3) to operate within *that* municipality (4) *pursuant to* the territorial agreement being submitted for approval. So the powers have to be pursuant to the territorial agreement. The ordinary meaning of "pursuant to" means "in conformance to" or "in accordance with." Thus, it means in accordance with the territorial agreement. The *only* municipalities that are authorized to enter into retail electric service territorial agreements in this state under § 394.312 RSMo are those that *own* retail electric systems. The City of Republic does not own a retail electric system. So we do not have the factual situation here necessary to trigger the language as relied upon by Staff. The City of Republic, while it may

be a “municipality,” is certainly not a municipally owned utility. The City of Republic therefore is not granting powers to a rural electric cooperative *pursuant to* a proposed territorial agreement to operate within *that municipality*. The tract in question is not even located within the boundaries of a municipality. Therefore, it should be clear that the phrase selected by the Staff as the basis for its legal argument does not apply to a municipality that does not own its own electric distribution system. The phrase simply does not apply to this case.

NOTICE TO CUSTOMERS:

On page 3, under the heading “Summary,” the Staff’s brief contains a paragraph intended to raise doubt in the mind of the Commissioners that the customers affected by this proceeding had adequate notice of it. The brief says “The Staff notes the sparse evidence of notice to Empire’s customers of the potential change of their electrical supplier from Empire to Ozark.” To support this innuendo, the Staff’s brief concedes -- but discounts – that there were statements in evidence that the customers had received notice of the potential change. The Staff concludes with the observation that “no customer consent was adduced during the hearing and no customer presented any evidence.” (Staff initial brief, p. 3) So the Staff, without coming out and saying it directly, is surmising that since no customers chose to intervene, they must not have received notice of the proceeding, apparently because the Staff believes if they had received notice, they would have been troubled by the proposal, and therefore would have obviously intervened and opposed it.

Fortunately there are facts that completely refute this Staff conjecture. The Staff either overlooked or chose not to mention the “Order Directing Notice and Setting Date for Intervention Requests” issued by the Commission on August 17, 2007. In that order, the

Commission directed its Data Center to provide notice of this proceeding to not only *the affected customers*, but also the general public:

> The Commission finds that notice of this application should be given to the general public and potentially interested parties. A date for intervention of proper parties should also be set. The Commission's Data Center shall mail a copy of this notice to the County Commission of Greene County. Because the Application did not indicate that the customers for whom the change of supplier is requested are amenable to the requested change, the Commission determines that those customers should be provided with notice of the Application and afforded an opportunity to intervene. Accordingly, the Commission's Data Center shall also mail a copy of this notice to each customer listed under "Service as of July 14, 2007" in Appendix 2 to the Joint Application. In addition, the Commission's public information officer shall make notice of this order available to the media serving Greene County and to the members of the General Assembly representing Greene County.

So according to the record, actual notice of this proceeding was given to the customers by the developer and the Commission. Thus, there is simply no factual basis on which the Staff can rest its claim that there was "sparse evidence" of notice to the customers. There is also no factual basis for the Staff to create a negative inference from the lack of intervention by any customers. As Exhibit 8 clearly demonstrates, the City of Republic supports the proposed agreement even though it chose not to go to the expense of intervening just to say that.

CONCLUSION

The Staff's sole witness was given an opportunity while testifying to identify someone who would suffer a detriment were the Commission to approve the proposal as submitted. Mr. Beck said: "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).

The Commission can approve a territorial agreement if it determines the agreement, in total, to not be detrimental to the public interest. The Staff's witness admitted 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,

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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 6th day of February, 2008.

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