

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED²

SEP 05 2003

Missouri Public
Service Commission

In the Matter of the Joint Application of)
the City of Thayer, Missouri and Howell-)
Oregon Electric Cooperative, Inc., for an)
Order Approving Proposed Territorial)
Agreement.)

Case No. EO-2004-0071

STAFF RESPONSE TO COMMISSION ORDER DIRECTING FILINGS

Comes now the Staff of the Missouri Public Service Commission (Staff) in response to the August 14, 2003 Order Directing Filings issued by the Missouri Public Service Commission (Commission). The Commission directed that the Staff and Howell-Oregon Electric Cooperative Inc. (Howell-Oregon) file on August 26, 2003 briefs addressing certain matters set out in the Commission's Order Directing Filings and file responsive briefs on September 2, 2003. On August 25, 2003, the Staff filed a Motion For Extension Of Time To File Brief. On August 29, 2003, the Commission issued an Order Adding Party And Granting Extension Of Time. Said Order extended to September 5, 2003 the date for the filing of initial briefs and to September 12, 2003 the date for filing responsive briefs. The Staff sets out below not only the matters relevant to Howell-Oregon's filings with the Commission in this case, but identifies preceding and subsequent territorial agreement cases to provide a concise perspective. In doing so, the Staff also desires that there be no misunderstanding. The Staff is not opposed to the Addendum No. 1 filed by Howell-Oregon. The Staff should note that in Case No. EO-2003-0518 the Staff recommended that the Commission approve the change of electric suppliers for the Thayer High School from the City of Thayer to Howell-Oregon, and also recommend that the Commission direct Howell-Oregon and the City of Thayer to file Addendum No. 1 with the Commission.

Therefore, as its response to the Commission's Order Directing Filings, the Staff states as follows:

On February 28, 1992, the Commission issued a Report And Order in Case No. EM-92-157, 1 Mo.P.S.C.3d 278 (In the matter of the joint application of Sho-Me Power Corporation, Howell-Oregon Electric Cooperative, and the City of Thayer, Missouri for an order authorizing the sale, transfer and assignment of certain assets, real estate, easements and licenses from Sho-Me Power Co. to Howell-Oregon to and, in connection therewith, certain other related transactions and for approval of a written territorial agreement designating the boundaries of Howell-Oregon Electric Cooperative and the City of Thayer, Missouri within Oregon County, Missouri).

In said Report And Order the Commission found that "the proposed territorial agreement between the City and Howell-Oregon is reasonable and proper and should be approved." 1 Mo.P.S.C.3d at 280. The Commission specifically held that (1) "[b]y virtue of Section 394.080, RSMo, a cooperative such as Howell-Oregon is only authorized to provide service in rural areas," (2) "the City of Thayer is not a rural area, as that term is defined by Section 394.020," (3) "Howell-Oregon would be precluded from rendering service in the City in the absence of approval by the Commission of the proposed territorial agreement pursuant to Section 394.312, RSMo," (4) the proposed territorial agreement executes the intent of the Legislature in enacting Section 394.312 of encouraging voluntary agreements which displace competition that might result in duplication and wasteful facilities, and (5) the proposed territorial agreement should be approved. *Id.* at 280-81.

Paragraph 8 of the Territorial Agreement approved by the Commission in Case No. EM-92-157 states as follows:

8. Neither the boundaries described by this Agreement nor any term of this Agreement may be modified, repealed, or changed except by writing mutually approved by the respective governing bodies of the parties and by the Missouri Public Service Commission, except the City and Cooperative may agree in writing on a case-by-case basis to allow any structure to receive service from one party even though the structure is located in the territory of the other party. Each such instance will be treated as an addendum to this Agreement and a copy of the addendum supplied to the Public Service Commission.

Case No. EO-92-155:

A case that slightly predates Case No. EM-92-157 is Case No. EO-92-155. On January 8, 1992, in Case No. EO-92-155, Missouri Public Service (MPS), a division of UtiliCorp United, Inc., and Platte-Clay Electric Cooperative, Inc. (Platte-Clay) filed a joint application for approval of a territorial agreement designating the boundaries of each as an electric service supplier at and near Platte City in Platte County, Missouri. An amendment to the territorial agreement, designed to address some of the concerns of the Staff, was executed by the joint applicants and filed with the Commission. The Commission issued a Report And Order on April 10, 1992 approving the territorial agreement as altered by the amendment to the territorial agreement. *Re UtiliCorp United, Inc. and Platte-Clay Electric Cooperative, Inc.*, 1 Mo.P.S.C.3d 298, 301 (1992).

The amendment set out the procedure to be followed if MPS and Platte-Clay agreed to allow any structure to receive service from MPS or Platte-Clay when the structure was located wholly or partially in the territory of the other. Each instance was to be called an addendum to the agreement. *Id.* at 302. The addendum procedure was as follows:

. . . the agreed-upon Addendum to the Agreement would be filed and submitted to the Commission's Staff (Staff) and a copy sent to the Office of Public Counsel (Public Counsel). The Amendment has specified requirements for the submission of an Addendum, including an explanation of the justification that electric service should be provided in the agreed manner. The Amendment specifically states: "If the Staff or the Office of Public Counsel, or the Commission on its own motion, does not submit a pleading objecting to the Addendum within sixty days

of the filing thereof, the Addendum shall be deemed approved by the Commission.”

On May 21, 1993, MPS filed in Case No. EO-92-155, a first addendum to the territorial agreement between MPS and Platte-Clay. On June 10, 1993, the Staff filed a recommendation that the first addendum be approved by the Commission, noting that the owner of the new structure covered by the first addendum agreed and consented by affidavit to the switch of suppliers. Rather than the Commission doing nothing further when the Staff, Public Counsel, or the Commission itself did not object within 60 days of the addendum being filed, the Commission issued an Order Approving Addendum To Territorial Agreement on August 18, 1993 stating as follows:

After considering the Addendum and attachments and Staff's recommendation, the Commission determines that, pursuant to the Amendment to the Agreement, sixty days have elapsed since the filing of the Addendum with neither Staff nor Public Counsel submitting a pleading objecting to the Addendum, and that all requirements to the Agreement have been satisfied. Therefore, the Commission determines that it is appropriate to approve the Addendum as filed.

Case No. EO-93-166:

On November 19, 1992, Union Electric Company (UE) and Cuivre River Electric Cooperative, Inc. (Cuivre River) filed a joint application requesting approval of a territorial agreement. Among other things, the applicants agreed that on a case-by-case basis they might agree to allow structures to receive service from the other supplier. The Staff took the position that the agreement was in the public interest with the exception of two provisions, one of which, the case-by-case addendum procedure. *Re Union Electric Co. and Cuivre River Electric Cooperative, Inc.*, Case No. EO-93-166, 2 Mo.P.S.C.3d 110 (1993).

In the UE - Cuivre River case, the Staff and Public Counsel opposed the case-by-case procedure because they believed that it was in violation of Section 394.312.3 “which requires all

territorial agreements 'including any subsequent amendments to such agreements' to receive the approval of the Public Service Commission by Report And Order." 2 Mo.P.S.C.3d at 117 UE and Cuivre River argued that the case-by-case procedure was not an amendment to the territorial agreement and was identical to the procedure approved by the Commission in *Re Union Electric Co. and Crawford Electric Cooperative, Inc.*, Case No. EO-91-204, 1 Mo.P.S.C.3d 29, Report And Order (1991). The Staff and Public Counsel noted the addendum procedure in the amendment to the MPS - Platte-Clay territorial agreement. The Commission in the UE - Cuivre River territorial agreement case held that the case-by-case procedure "does not specifically violate terms of the territorial agreement statute" in that a territorial boundary is not being amended when a case-by-case exception is made. 2 Mo.P.S.C.3d at 117 The Commission stated "[a]s a caveat for future territorial agreements, however, the Commission would prefer the 'addendum procedure'." 2 Mo.P.S.C.3d at 118

The Commission noted the following procedures regarding the MPS - Platte-Clay addendum procedure:

- (1) Applies to new structures only
- (2) Submission to the Staff of change of supplier and customer consent to the change of supplier.
- (3) Explanation of justification for the change.
- (4) If Staff, Public Counsel or Commission, on its own motion, does not submit a pleading objecting to the addendum within 60 days, the addendum is deemed approved by the Commission.
- (5) If a pleading objecting to the addendum is filed, an evidentiary hearing is scheduled.

Id.

The Commission specifically held as follows in the UE Cuivre River case

. . . The Commission determines that the "case-by-case" exception contemplated by the parties to the agreement does not violate the dictates of the statute in that a "territorial boundary" is not being amended when a "case-by-case" exception is made. Of course, an actual amendment to the boundary line would fall within the amendment portion of the statute. Likewise, if the "case-by-case" exception was abused by the parties to the agreement, it could conceivably be construed as a violation of the amendment portion of the statute. As Cuivre River points out in its initial brief,

[t]his agreement cannot be expanded to cover additional geographic territory under a case by case exception. The case by case exception is limited to situations where one power supplier is allow[ed] to serve a new structure located in the assigned territory of the other. The case by case exception does not involve exchanging customers or any other modifications of the normal service supply rules. It simply permits a situation where a customer in one service provider's territory should logically be served by the other provider.

The Commission understands this to be the meaning of the provision in the agreement.

As a caveat for future territorial agreements, however, the Commission would prefer the "addendum procedure" as set out in *In Re: Missouri Public Service Company and Platte-Clay Electric Cooperative*, Case No. EO-92-155, and described herein. Such procedure allows for Staff consideration of any alteration to the territorial agreement without any onerous burdens placed on the electric service providers. The Commission to this point has approved two methods for the "case-by-case" exception and herein states its preference for the "addendum procedure".

2 Mo.P.S.C.3d at 117-18.

Case No. EO-94-322:

In Re Union Electric Co., Case No. EO-94-322, 3 Mo.P.S.C.3d 122 (1994), UE and Laclede Electric Cooperative, Inc. (Laclede) filed for approval of a territorial agreement which provides, among other things, that they may agree on a case-by-case basis to allow one of them to serve a structure in the exclusive service area of the other. The territorial agreement further permits that such exceptions to the exclusive service territories must be in writing, approved by each other, but need not be approved by the Commission. UE and Laclede argued that the case-

by-case exception clause did not violate Section 394.312 and stated that the Commission had approved territorial agreements that included a case-by-case exception clause in Case Nos. EO-91-204 and EO-93-166. *Id.* at 124.

The Staff contended, among other things in Case No. EO-94-322, that the case-by-case exception clause violated Section 394.312.3 which requires Commission approval of any subsequent amendments to the agreement, or the transfer or assignment of the agreement or any rights or obligations of any party to an agreement. The Staff recommended that an addendum procedure be adopted which would provide for notification. The Staff noted that an addendum procedure was approved by the Commission in Case No. EO-92-155 and the Commission established in Case No. EO-93-166 its preference for addendum procedures in future territorial agreements. The Commission distinguished its decisions in Case Nos. EO-91-204 and EO-93-166 accepting case-by-case exception clauses. 3 Mo.P.S.C.3d at 124-25. The Commission stated that “[w]hile the Commission strives to maintain consistency among its orders, it is not bound by previous findings and may reconsider issues within the facts and circumstances of a particular case.” *Id.* at 125, 127.

The Commission found that the provision for exceptions to be made to the agreement without Commission oversight or approval violated Section 394.312.3 and .4 stating that “an exception pursuant to the case-by-case exception clause would constitute an amendment as contemplated by Section 394.312 in that a territorial boundary is amended when a case-by-case exception is made.” 3 Mo.P.S.C.3d at 126.

Case No. EO-95-151:

In *Re Union Electric Co.*, Case No. EO-95-151, 3 Mo.P.S.C.3d 351 (1994), UE and Laclede filed for approval of a territorial agreement which was essentially the same agreement

which the Commission rejected in Case No. EO-94-322 due to the provision for case-by-case exceptions that would allow for one utility to serve in the territory of the other utility without Commission approval. The Commission found that the matter of case-by-case exceptions has “been resolved herein by virtue of an addendum which provides for Commission review . . .” *Id.* at 352

Case Nos. EO-95-400, et al.:

The Commission initially did not approve the UE – Black River Electric Cooperative territorial agreement. *Re Union Electric Co.*, Case Nos. EO-95-400, et al., Report And Order, 4 Mo.P.S.C.3d 66 (1995); *Re Union Electric Co.*, Case Nos. EO-95-400, et al., Order Granting Rehearing, 4 Mo.P.S.C.3d 76 (1995); *Re Union Electric Co.*, Case Nos. EO-95-400, et al., Report And Order On Rehearing, 4 Mo.P.S.C.3d 77 (1996); *Re Union Electric Co.*, Case Nos. EO-95-400, et al., Order Finalizing Approval Of Territorial Agreement, Granting Certificate Of Convenience And Necessity, And Approving Tariffs, 5 Mo.P.S.C.3d 43 (1996). Although the Commission’s bases for at first rejecting the territorial agreement are not directly related to the issues in this proceeding, one of the bases is not completely unrelated to the issues herein and warrants being noted. A hearing was held before the Commission and at hearing, exhibit number “10” was reserved and the record was held open for receipt of this late-filed exhibit entitled “Addendum A to a Territorial Agreement,” signed by UE and Black River Electric Cooperative. Late-filed Exhibit 10 was a modification of language in Paragraph 7 of the territorial agreement referred to as the addendum provision. The late-filed Exhibit 10 addendum permitted a structure to receive service from one of the applicants even though it is located in the other party’s designated service territory. The party desiring this arrangement would have to file with the Commission and the arrangement would be subject to Commission approval. In addition, the

addendum included language prohibiting the Commission from disallowing in a subsequent rate case any expenditures involved with providing temporary service in good faith. The Commission rejected the territorial agreement declining to limit its authority as sought by the addendum and found the addendum to be detrimental to the public interest:

. . . The attempt to prohibit the Commission from disallowing expenditures associated with the provision of temporary service presents an obstacle to the approval of the territorial agreement. The Commission is not a party to the territorial agreement and its jurisdiction and duty to the public interest are statutory and not contractual. There is no statutory provision which requires the Commission to allow expenses because they are incurred in good faith. The Commission may consider all relevant factors in the case before it; the Applicants are entitled to have their good faith considered as a factor if proven to the Commission's satisfaction but the Commission may not be bound to the language of the addendum to the extent that it purports to limit the Commission's discretion in the proceedings before it. The Commission finds that the above quoted language goes beyond the acceptable parameters of the addendum approved in Case No. EO-95-151 and that the addendum clause is detrimental to the public interest.

4 Mo.P.S.C.3d at 70-71

On rehearing, the Commission again rejected the language in late-filed Exhibit 10 and also rejected language proposed by the Staff in Exhibit 16. The Commission found that if the Staff revised certain language in Exhibit 16 intended for Paragraph 7 of the territorial agreement and Paragraph 7 were reformed to delete the language attempting to limit the ratemaking discretion of the Commission, as UE and Black River Electric Cooperative agreed to do, then Paragraph 7 would not be detrimental to the public interest. 4 Mo.P.S.C.3d at 82-83.

¹ The Commission stated in its Report And Order On Rehearing as follows:

. . . The Commission is reluctant to approve either Addendum provision as proposed because of the apparent attempt to bind the Commission to a particular addendum procedure. The Commission is not a party to the territorial agreement and its jurisdiction and duty to the public interest are statutory and not contractual. Territorial agreements and amendments are governed by § 394.312 RSMo which addresses the Commission's obligation to conduct a hearing. Interpretation of that statute, and the choice of how to proceed in carrying out duties delegated to it by the legislature, are matters for the Commission's discretion and not for contractual agreement by the parties. The Commission may not be bound to the language of the addendum to the extent

Case No. EO-96-188:

In *Re Grundy Electric Cooperative, Farmers Electric Cooperative and Northwest Missouri Electric Cooperative*, Case No. EO-96-188, 4 Mo.P.S.C.3d 363, Report And Order (1966), the three electric cooperatives filed, on December 8, 1995, a joint application with the Commission for a territorial agreement among them. Paragraph 10 of the territorial agreement provides that a party desiring that a structure in one of the joint applicants' service territories receive service from one of the joint applicants that is not the supplier for the service territory in which the structure is located, would have to file an Addendum with the Commission, and the matter would be subject to Commission approval. The Report And Order notes that such a provision had been approved in other cases regarding territorial agreements, including Case No. EO-95-151 respecting UE and Laclede.

Paragraph 10 of the proposed territorial agreements stated as follows:

If the Staff, Office of Public Counsel, or the Commission on its own motion, do not submit a pleading objecting to the Addendum within forty-five (45) days of the filing thereof, the Addendum shall be deemed approved by the aforesaid parties and the Staff shall file a recommendation with the Commission and the Commission may then issue an Order approving the Addendum. However, if a pleading in opposition to the Addendum is filed, then the Commission shall schedule an evidentiary hearing at the earliest opportunity to determine whether the Addendum should be approved.

4 Mo.P.S.C.3d at 367.

The Commission noted that "[a]lthough the language used in this territorial agreement has been approved in other cases the Commission is no longer convinced that such language is harmless." The Commission found that on condition that paragraph 10 was reformed as follows,

that it purports to limit the Commission's discretion. See generally, e.g., May Department Stores Co. v. Union Electric Light & Power Co., 107 S.W.2d 41 (Mo. 1927).

4 Mo.P.S.C.3d at 82-83.

the agreement should be approved as not detrimental to the public interest: "If the Staff or Office of the Public Counsel do not submit a pleading objecting to the Addendum within forty-five (45) days of the filing thereof, the Addendum shall be deemed approved by the aforesaid parties."

Case No. EO-98-279:

In Re Union Electric Company and Gascosage Electric Cooperative, 7 Mo.P.S.C.3d 301 (1998) the Commission approved a territorial agreement that included "the provision for case-by-case addendum to the agreement":

. . . The addendum provision would permit a structure to receive service from one party even though it is located in the other party's designated service area. The party wishing the special arrangement would have to file appropriate documentation (called an "Addendum") with the Commission and the arrangement would be subject to Commission approval. A similar provision was approved in Case No. EO-95-151 as part of a territorial agreement between U.E. and Laclede Electric Cooperative, Inc.

The Commission Staff reviewed the addendum provision and Staff's witness testified that the language is acceptable to Staff. In general the addendum is acceptable to the Commission as substantially in conformance with the approved addendum in Case No. EO-95-151.

The Commission has also inquired regarding the effect of 4 CSR 240-2.060(1), 4 CSR 240-3.130 and 4CSR 240-3.135 respecting Howell-Oregon's filing of its Addendum No. 1. The procedure recognized by the Commission in Case No. EM-92-157, the Howell-Oregon/City of Thayer territorial agreement case, did not contemplate addenda as being treated as the filing of a new territorial agreement or as the filing of an amendment to the Case No. EM-92-157 territorial agreement.

Wherefore the Staff submits the foregoing as its initial response to the Commission's August 14, 2003 Order Directing Filings.

Respectfully submitted,
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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record as shown on the attached service list.

/s/ Steve Dottheim

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