

Exhibit No.:

Issues: Territorial Agreements

Witness: Daniel I. Beck

Sponsoring Party: MO PSC Staff

Type of Exhibit: Rebuttal Testimony

Case No.: EO-2008-0043

Date Testimony Prepared: November 9, 2007

MISSOURI PUBLIC SERVICE COMMISSION

UTILITY OPERATIONS DIVISION

REBUTTAL TESTIMONY

OF

DANIEL I. BECK

THE EMPIRE DISTRICT ELECTRIC COMPANY

AND

OZARK ELECTRIC COOPERATIVE

CASE NO. EO-2008-0043

Jefferson City, Missouri

November 2007

CARLA K. CIEDERS
a Public - Notary Seal
Mate of Missouri
County of Cole
M Commission Ex .06/07/2008

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1 and rate design. Since June 2001, I have been in the Engineering Analysis Section of the
2 Energy Department, which was created by combining the Gas and Electric Departments. I am
3 a Registered Professional Engineer in the State of Missouri. My registration number is E-
4 26953.

5 **Executive Summary**

6 Q. What are Empire District Electric Company (Empire) and Ozark Electric
7 Cooperative (Ozark) requesting in their Joint Application?

8 A. Empire and Ozark (collective referred to as Applicants) are seeking the following:

9 a) Approval of a territorial agreement granting exclusive territory to Ozark;

10 b) The sale of facilities from Empire to Ozark; and

11 c) A change of supplier for existing customers of Empire in the proposed territory
12 from Empire to Ozark.

13 Q. What is your understanding of the legal standard that must be met for these three
14 items?

15 A. It is my understanding that a territorial agreement and the sale of facilities must not
16 be detrimental to the public interest and the change of supplier must be in the public interest
17 for a reason other than rate differential.

18 Q. Does the Application meet these standards?

19 A. In paragraph 9 of the Application, the Applicants state that the Territorial
20 Agreement is in the public interest because it establishes exclusive service obligations for
21 existing and new structures. They also states that future duplication of electric service
22 facilities will be prevented and customers will know with certainty the supplier of electric
23 service. However, Empire's witness only states that "In the face of possible annexation of the

1 development by the City, it will provide certainty as to the electric supplier in this particular
2 subdivision.” I do not believe the public interest that is affected by this Application is limited
3 to the existing and new customers in this subdivision. Instead, the public to be considered
4 needs to include the interests of the customers of Empire and Ozark as well as the interests of
5 the City of Republic before a proper determination of the public interest can be made.

6 Q. Are there any other issues related to the Application?

7 A. Yes. The Application and the direct testimony discuss the sale of facilities from
8 Empire to Ozark but never mention how the fees collected by Empire from the developer or
9 the current customers would be treated as part of this sale. Based on Empire’s Data Request
10 responses, Staff believes that Empire has not collected the fees that are established in its
11 extension policy that is part of its tariff. Instead, Empire only collected those fees that
12 Ozark’s tariffs would have collected from the developer and customers. There are no
13 provisions of Empire’s tariff that allow Empire to collect fees based on Ozark’s tariffs without
14 approval of a variance and such a request for variance was rejected in Case No. EE-2007-
15 0030.

16 **Background Regarding This Case**

17 Q. Do Empire’s witness Michael E. Palmer and Ozark’s witness Patrick Prewitt
18 discuss in their direct testimony background facts to the filing of the Joint Application in this
19 case?

20 A. Yes. Both witnesses discussed the facts surrounding Case Nos. EO-2007-0029
21 and EE-2007-0030. Both witnesses also described the current Application as an attempt to
22 return “the parties to their prior status” [Prewitt Direct, page 5, line 81] or “to put everyone

1 back in the place they were in before the previous attempt at a territorial agreement” [Palmer
2 Direct, page 4, Lines 6-7].

3 Q. How would you characterize the facts surrounding Case Nos. EO-2007-0029 and
4 EE-2007-0030?

5 A. In general, I think the Order, testimony, transcripts and other documents in the
6 Official Case file speak for themselves; however, since the emphasis seems to be on returning
7 to the status prior to these two Cases, I offer the following timeline to aid in understanding
8 both these two Cases and this case.

- 9 • February 14, 1994 – Franchise Agreement between Empire and the City of
10 Republic is passed and approved by the Board of Alderman. Attached to my
11 testimony as Schedule 1 is a copy of the Franchise Agreement that was
12 provided to Staff by the City of Republic.
- 13 • June 16, 2005 – Development Agreement signed by the developer of The
14 Lakes at Shuyler Ridge and the City of Republic which included Section C,
15 Annexation, which referred to the “Irrevocable Consent to Annexation” which
16 was attached. Attached to my testimony as Schedule 2 is a copy of the
17 Development Agreement that was provided to Staff by the City of Republic.
- 18 • July 15, 2005 – Executed Development Agreement sent to the City of Republic
19 from the Shuyler Ridge Development.
- 20 • September 15, 2005 – Agreement for the Purchase of Electric Power and
21 Energy between Ozark and developer was signed. Attached to my testimony
22 as Schedule 3 is a copy of this Agreement that was included in the Application
23 for Variance in Case No. EE-2007-0030.

- March 23, 2006 – Meeting between Empire, Ozark, the City of Republic and two different sets of developers to finalize any issues regarding a territorial agreement between Empire and Ozark.
- May 18, 2006 – Ozark sent invoice for \$177,921.74 to Empire for facilities at The Lakes at Shuyler Ridge. Attached to my testimony as Schedule 4 is a copy of the invoice that was provided to Staff by Empire in response to Staff Data Request No. 1.
- June 12, 2006 – Invoice for \$3,800.00 to supply and install thirty-eight (38) lights on fiberglass light poles sent from Empire to The Lakes at Shuyler Ridge Property Owners Association, Inc. Invoice paid on January 1, 2007. Attached to my testimony as Schedule 5 is a copy of the Staff Data Request No. 6 that includes the invoice dated June 12, 2006.
- June 15, 2006 – Invoice for \$800.00 sent from Empire to the developer of The Lakes at Shuyler Ridge to supply and install eight (8) lights on fiberglass light poles. Invoice paid on July 17, 2006. Attached to my testimony as Schedule 6 is a copy of the Staff Data Request No. 6 that includes the invoice dated June 15, 2006.
- June 29, 2006 – First Territorial Agreement signed by Empire and Ozark with Empire's exclusive territory containing approximately 4.5 square miles including The Lakes at Shuyler Ridge and Ozark's exclusive territory containing approximately 4.0 square miles.

- July 18, 2006 – Ozark and Empire file Joint Application for approval of First Territorial Agreement and Empire files Application for Variance with the Commission in Case Nos. EO-2007-0029 and EE-2007-0030, respectively.
- January 30, 2007 – Commission issues its *Report and Order* for Case Nos. EO-2007-0029 and EE-2007-0030, denies the requested variance and, therefore does not approve the territorial agreement, since the territorial agreement was expressly dependent on Empire obtaining the requested variance from its own tariff.
- August 14, 2007 - First Territorial Agreement signed by Empire and Ozark with Empire receiving no exclusive territory and Ozark's exclusive territory being The Lakes at Shuyler Ridge subdivision, which is approximately 245.15 acres.
- August 15, 2007 – Application filed creating the current case, Case No. EO-2007-0043.

Q. Are the Staff's concerns in this case the same concerns the Staff had in Case Nos. EO-2007-0029 AND EE-2007-0030, which were tried together?

A. No. In the previous cases, Staff supported the territorial agreement, which covered approximately 8.5 square miles (or approximately 5,440 acres) and would have essentially divided the area equally between the two utilities, but opposed the requested variance from Empire tariff provisions for The Lakes at Shuyler Ridge subdivision; variances that, in the Staff's opinion, would have resulted in undue preferences for the developers of a single subdivision, The Lakes at Shuyler Ridge subdivision. The previous cases did not include a change of supplier since no customers were being served when those cases were filed and

1 neither included the sale of any of Empire's facilities. In contrast, the current application only
2 involves the subdivision itself, about 245.15 acres (or approximately 4.5% of the area covered
3 by the previous agreements) with only one utility receiving an exclusive service area, requires
4 that customers within the subdivision change suppliers, and requires the sale of Empire's
5 facilities of at least \$793,244.81 in value. In addition, in the current case, Staff is concerned
6 that Empire has neither complied with nor enforced its tariffs with regards to The Lakes at
7 Shuyler Ridge subdivision.

8 Q. In the timeline that you gave, the first item was the approval of the Franchise
9 Agreement between Empire and the City of Republic which was passed and approved by the
10 Board of Alderman February 14, 1994. Is this document significant?

11 A. Yes. First, this document establishes that Empire has a franchise to serve
12 customers inside the city limits of Republic until 2014. In Staff's Data Request No. 7, which
13 is attached to my testimony as Schedule 7, Empire confirms that it is the predominant supplier
14 within the City of Republic. Since electric cooperatives are excluded from serving new
15 customers in cities with populations greater than 1,500 if the cooperative is not the
16 predominant supplier (except in cases where a territorial agreement approved by the
17 Commission allows for the Cooperative to serve new customers), Staff is unaware of any
18 statute under which Ozark can lawfully add new member or customers within the City of
19 Republic at this time.

20 Second, while Staff obtained from the City of Republic a copy of Empire's currently
21 effective franchise agreement with Republic, although also requested, Republic could not
22 provide a franchise agreement for Ozark. For most, if not all, investor-owned utilities a
23 franchise agreement is required for the utility to provide utility service within the city. It

1 appears to the Staff that, under Missouri law, for a cooperative to be able to add new service
2 and customers within a municipality of over 1,500 in population, at a minimum the City must
3 express its consent to the cooperative doing so. A city franchise to the cooperative may be
4 sufficient with a territorial agreement the city has not joined to allow the cooperative to
5 lawfully add new customers within the city. RSMo 394.312.2 refers to “any and all powers
6 granted to a rural electric cooperative by a municipality, pursuant to the agreement to operate
7 within the corporate boundaries of the municipality.” More certainty is provided where the
8 city and the cooperative are both participants in a territorial agreement.

9 Q. The second document that you refer to in your timeline is the Development
10 Agreement. What is this document?

11 A. It is an agreement between the developer of The Lakes at Shuyler Ridge
12 subdivision and the City of Republic.

13 Q. Is it important to this case?

14 A. Yes. The Development Agreement addresses a number of topics related to the
15 Shuyler Ridge subdivision and City of Republic. Here is a list of the sections to this
16 document:

- 17 a) Streets
- 18 b) Water and Sewer
- 19 c) Annexation
- 20 d) Street Signs
- 21 e) Street Lighting
- 22 f) Storm sirens
- 23 g) Construction of Public Infrastructure
- 24 h) Building Permits and Inspections
- 25 i) General Obligations
- 26

1 While the section titled Annexation is of particular importance in this case, the other sections
2 outline the terms of other critical infrastructure that would need to be resolved to proceed with
3 development of The Lakes at Shuyler Ridge.

4 The first paragraph of the Annexation section includes the following:

5 “Developer/Owner has agreed to execute an Irrevocable Consent to Annex
6 Agreement, a copy of which is attached hereto and marked Exhibit 4, and
7 which irrevocably requests voluntary annexation into the City. The City may
8 act upon the voluntary annexation request for Subdivision at such time as it
9 may elect. The obligations of Developer/Owner under this Agreement shall
10 continue to exist regardless of whether annexation has occurred.”
11

12 Q. Is there any reason why the developer might have been unaware of the Annexation
13 Section of this Development Agreement?

14 A. No, not that I am aware of. Since Annexation is a one of the section titles and
15 Exhibit 4, Irrevocable Consent to Annex Agreement, is attached to the Developer Agreement,
16 it seems unlikely that the developer was unaware of the Annexation provisions. In addition,
17 the next document that is included in my timeline is the Agreement for the Purchase of
18 Electric Power and Energy, which was executed approximately two months after the
19 execution of the Development Agreement between Ozark and the developer of Lakes at
20 Shuyler Ridge subdivision, and it includes the following description of the development
21 agreement between the developer and the City of Republic:

22 “[The development agreement] grants the City the right to govern the timing
23 of voluntary municipal annexation of the development tract.”
24

25 This description appears to confirm the City’s right to control of the timing of
26 annexation of The Lakes at Shuyler Ridge Subdivision.

1 Q. If the developer of the Lakes at Shuyler Ridge subdivision arranged for
2 electrical service from Ozark, before Ozark and Empire entered into a territorial agreement,
3 why have Ozark and Empire filed this Application?

4 A. It is Staff's understanding that Empire owns the installed facilities that are serving
5 customers in The Lakes at Shuyler Ridge and they are Empire's customers, not Ozark's
6 customers.

7 Q. Did Ozark and the developer of the Lakes at Shuyler Ridge enter into any other
8 later agreements?

9 A. Yes. They entered into an agreement called a "Memorandum Letter of
10 Understanding" dated January 27, 2006, and last signed by a party on February 2, 2006. This
11 agreement specifically deals with Phase One of the Lakes at Shuyler Ridge subdivision and
12 the trenching associated with that phase, but I did not include this document in my timeline,
13 since I do not believe that this document is important to the issues in this case.

14 Q. Have Empire, Ozark, the City of Republic and the developer of The Lakes at
15 Shuyler Ridge held any meetings?

16 A. Yes. They, together with another developer, met on March 23, 2006.

17 Q. What do you know about that meeting?

18 A. Only what appears in the applications filed in this case and in Case Nos. EO-2007-
19 0029 and EE-2007-0030. That information comports with statements made by various
20 witnesses in the previous cases. To my knowledge no Commission Staff or representative
21 from the Office of the Public Counsel attended.

22 Q. In paragraph 6 of its Application for Variances in Case No. EE-2007-0030,
23 Empire stated, "Generally speaking, the meeting revealed sharply opposing interests as to the

1 timing of annexation of the developments by the City due to several aspects of state law.” Do
2 you have any information that would shed light on what the “sharply opposing interests”
3 were?

4 A. It is my understanding the City of Republic wanted to annex the Lakes at
5 Shuyler Ridge in the months following the 2006 meeting. However, the developer wished to
6 delay the annexation until after all the houses have been built, so that he could take advantage
7 of the “Agreement for the Purchase of Electric Power and Energy” he has with Ozark. That
8 agreement has more favorable terms to the developer for the costs of the installation of
9 facilities, including decorative street lights, than Empire’s tariff.

10 Q. Do you know why a developer might give up control of when his development
11 would be annexed by a municipality?

12 A. Based on my experience and understanding of issues related to development
13 and annexation for other municipalities, a developer is often concerned about many utility
14 services and public services. As the list of sections of the Developer Agreement indicates, the
15 City of Republic provides both water and sewer services through its department of public
16 works. Since it is costly to permit, build, and operate a water and/or sewer plant to serve
17 individual homes or subdivisions in unincorporated areas, developers often choose to take
18 advantage municipal water and sewer services, if they can. In return, cities often require
19 agreements regarding the timing of annexation. Sewer services alone can easily result in
20 installation costs of \$10,000 per home for a single dwelling design like a septic tank.

21 Q. The next date on your timeline is May 18, 2006, which is the date of an invoice
22 sent to Empire for facilities at the Lakes at Shuyler Ridge. What is the significance of this
23 document?

1 A. This document transferred the facilities that Ozark had installed to serve The Lakes
2 at Shuyler Ridge. Notably, this transfer was for facilities totaling \$177,921.74 in value.
3 Since that time, Empire has invested another \$600,000 plus in facilities to serve customers at
4 The Lakes at Shuyler Ridge. So a relatively small portion of the facilities had been installed
5 on May 18, 2006. No customers were being served in the subdivision on May 18, 2006.

6 Q. The next two dates on your timeline refer to Empire invoices for \$3,800.00 and
7 \$800.00 for lights on fiberglass poles. Is a cost of \$4,600.00 for 46 lights on fiberglass poles
8 consistent with Empire's tariffs?

9 A. No. The invoices show that all remaining costs are currently waived pending PSC
10 approval. However, the tariffs provide for waiving cost after the PSC has approved a request
11 for variance, not before.

12 Q. Do you know if Empire has otherwise complied with its tariff, as the tariff applies
13 to The Lakes at Shuyler Ridge?

14 A. Yes, I believe it has not. It is my understanding that, under Empire's tariff, the
15 developer would have been required to pay for in advance over \$1,700,000 in costs to extend
16 facilities not related to street lighting, and that, even after Empire paid the developer refunds
17 based on customers beginning new service in the subdivision, the would never have been
18 refunded approximately \$300,000. These costs were discussed in great detail in the two
19 previous cases.

20 Q. The next three dates all pertain to the previous territorial agreement and the two
21 previous cases. Are these dates and the associated documents important?

1 A. Yes. However, this is all part of the record in Case Nos. EO-2007-0029 and EE-
2 2007-0030 and is discussed in the direct testimony of Empire's and Ozark's witnesses in the
3 current case.

4 Q. The final two dates refer to the new territorial agreement and the Application that
5 started the current case. Are these dates important?

6 A. Yes. This is the reason that the current case exists.

7 Q. Earlier, you mentioned that public interest should be considered for several
8 different entities or groups. Would you explain?

9 A. Yes. I believe each of the following entities or groups have a different interest in
10 this case:

- 11 1. The developer;
- 12 2. The City of Republic;
- 13 3. The existing customers in The Lakes at Shuyler Ridge subdivision;
- 14 4. The existing customers of Ozark;
- 15 5. The shareholders of Empire; and
- 16 6. The customers of Empire.

17 I believe it is fairly clear that the developer would save a significant amount of money if it
18 could both avoid Empire's extension fees and pay the \$100 per light pole that Ozark would
19 require. The City had its own witness in the previous cases and appears to be supportive of
20 the current case. The existing customers of The Lakes at Shuyler Ridge would also save a
21 significant amount of money if they could avoid Empire's extension fees, since the home
22 owner's association for the subdivision will be responsible for the cost of street lighting under
23 Empire's tariffs. From the information provided to Staff, there is nothing in the record that

1 indicates that the existing customer at The Lakes at Shuyler Ridge subdivision either support
2 or oppose the Application. Since Ozark is a member-owned electric cooperative, the interest
3 of Ozark's customers and Ozark should be one and the same. Empire has a responsibility to
4 act in the best interest of its shareholders and, therefore, the shareholders are represented in
5 this case. That leaves the final group that I listed, Empire's customers.

6 I do not believe the Applicants have put forth an argument that explains why this
7 Application is in the interest of Empire's customers. In the previous cases, the undue
8 preference resulted when the customers and the developer of The Lakes at Shuyler Ridge
9 were compared to the rest of Empire's customers. Said another way, Empire's other
10 customers would not have been able to avoid the fees associated with Empire's extension
11 policy. In this case, other than the fact that these extension policies have not been enforced
12 for the The Lakes at Shuyler Ridge, the concern about undue preference would go away if
13 Ozark were the supplier and would be enforcing its standard extension policy. However, this
14 doesn't explain why it is in the interest of Empire's other customers.

15 Q. Do you know of any argument that might support the idea that this Application is
16 in the public interest?

17 A. Yes. Empire has added a significant amount of new generation capacity since the
18 early 1990's. In addition, Empire's Regulatory Plan lays out Empire's plans to add two new
19 base generation units in the next 5 years. The effect of this new generation is that rates have
20 risen. In the early 1990's a residential customer with 1000 kWh usage would have an annual
21 bill of \$672.38. Today, the same customer would pay \$1000.56 and Empire is currently
22 requesting another rate increase. Given these price increases, one has to wonder if additional

1 the addition of load that would be added from The Lakes at Shuyler Ridge benefits all of
2 Empire's customers.

3 Q. Earlier, you mentioned that only one utility would receive an exclusive service
4 area if the Application is approved. Does that fact raise any concerns for you?

5 A. Yes. In Case No. Eo-2007-0029, Michael E. Palmer's Direct Testimony on page
6 6, lines 6-14 stated the following:

7 So, if that developer of the Lakes at Shuyler Ridge has no incentive to
8 take service from Empire because he can get a better deal from Ozark, then a
9 key portion of the territory Empire would obtain under the proposed territorial
10 agreement would be served by Ozark instead of Empire. If that happens, we
11 do not have a relatively even division of the territory on the south side of the
12 City. With that, Empire's interest in the territorial agreement rapidly
13 disappears because we would be giving up a large portion of potential territory
14 to Ozark for perhaps decades or more, for basically nothing in return. I cannot
15 in good conscience say that is a good thing for either Empire's customers or
16 shareholders.
17

18 This statement seems to be in sharp contrast to current Application which will make
19 The Lakes at Shuyler Ridge subdivision the exclusive service area of Ozark and Empire will
20 receive no exclusive service area in return.

21 Q. Should Empire better explain the public interest aspects of this Application in its
22 Surrebuttal testimony?

23 A. In my opinion, yes.

24 Q. Do you have any further testimony at this time?

25 A. No.