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June 14, 2004

**FILED<sup>4</sup>**

**JUN 14 2004**

**Missouri Public  
Service Commission**

Mr. Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, Missouri 65102

RE: *Ozark Border Electric Cooperative v. City of Poplar Bluff*  
Case No. EC-2003-0452

Mr. Roberts:

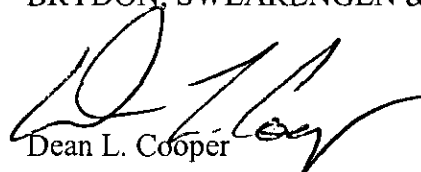
Enclosed for filing in the above-referenced matter are the original and eight (8) copies of the Position Statement of the City of Poplar Bluff, Missouri.

If you have any questions concerning this matter, then please do not hesitate to contact me.  
Thank you for your attention to this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:

  
Dean L. Cooper

DLC/jar

Enclosures

cc: Steve Dottheim  
Office of the Public Counsel  
Lisa Chase  
Wallace L. Duncan  
Doug Bagby

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

Ozark Border Electric Cooperative,     )  
Complainant                                 )  
vs   )  
City of Poplar Bluff,                         )  
Respondent                                     )

Case No. EC-2003-0452

**FILED<sup>4</sup>**  
JUN 14 2004  
Missouri Public  
Service Commission

**POSITION STATEMENT  
OF THE CITY OF POPLAR BLUFF, MISSOURI**

COMES NOW Respondent The City of Poplar Bluff, Missouri ("Poplar Bluff" or the "City"), and in accordance with the Order Establishing Procedural Schedule in this proceeding, submits the following position statements relating to the List of Issues filed on June 4, 2004:

**ISSUE 1. Does the notice provision in section 4.B. of the Territorial Agreement require written notice by the city to the cooperative within sixty days after the effective date of an annexation?**

**POPLAR BLUFF'S POSITION:** The City acknowledges that the text of section 4.B. of the agreement provides that the City will give Ozark Border written notice of the City's intent to include any structure served by Cooperative within the annexed area into the City's service territory within 60 days after the effective date of annexation. Due to an inadvertent oversight, the City's written notice was late for certain annexations. Under the circumstances, however, the late notice should not be considered a material breach of the agreement, thus allowing Ozark Border to escape from its agreement to sell its properties and facilities used in serving the annexed parcels. This is because: 1) Ozark Border was on notice of the possibility of annexations within specifically defined areas in the Territorial Agreement due to the nature of

the agreement itself; 2) the annexations at issue were matters of public record on which public hearings were held; 3) Ozark Border has not demonstrated any measurable or material harm attributable to the late notice in these circumstances; and 4) Ozark Border will be fully compensated for its properties and facilities in any sale under the “fair and reasonable compensation” formula contained in the agreement.

**ISSUE 2. If the Commission finds that written notice is required pursuant to section 4.B. of the Territorial Agreement, and that written notice was not timely given with respect to the annexations in dispute in this matter, then under the terms of the Territorial Agreement is the cooperative allowed to continue to serve the annexed customers it was serving prior to these annexations or is the city allowed to serve the annexed customers?**

**POPLAR BLUFF’S POSITION:** There is no express language in the Territorial Agreement that provides that the time period for such notice is a critical and material condition. There is no express language in the Territorial Agreement that indicates that the failure of the City to provide timely written notice of intent to serve the annexed parcels automatically allows Ozark Border to escape from its agreement to sell its facilities.

**ISSUE 3. Does the Commission have subject matter jurisdiction over the complaint?**

**POPLAR BLUFF’S POSITION:** No. The Commission’s complaint jurisdiction is set, and limited, by statute – section 386.390 RSMo. A complainant is required by that statute to allege a violation of law, a violation of a rule of the Commission, or a violation of an order or decision of the Commission. In its complaint, Ozark Border did not allege any such violation. Therefore, the complaint does not properly invoke the Commission’s jurisdiction and should be dismissed.

Further, the controversy itself is over the *legal effect* of a contract provision calling for notice. Only the courts have subject matter jurisdiction over the construction of contracts. Long-standing Missouri case law says the Commission is not a court and therefore it does not have the power to construe contracts or the authority to issue a declaratory judgment.

The Commission does not have jurisdiction over the complaint pursuant to section 386.800 RSMo because that section deals with a municipality filing an application with the Commission seeking an exclusive service territory. No such application is under consideration by the Commission.

The Commission does not have jurisdiction over the complaint pursuant to section 394.312.6 RSMo because the complainant has not alleged a substantial change of circumstances since the Commission's approval of the agreement in 1997.

**ISSUE 4. Does the Commission have subject matter jurisdiction over the controversy pursuant to paragraph 15 of the Territorial Agreement?**

**POPLAR BLUFF'S POSITION:** No. Subject matter jurisdiction is created only by constitution or statute. Parties to a contract cannot, by agreement, confer subject matter jurisdiction on the Commission where it does not already exist. As pointed out above, it does not exist in this situation because of the nature of the controversy. Further, the parties are not "jointly seek[ing] an informal opinion" of the Commission.

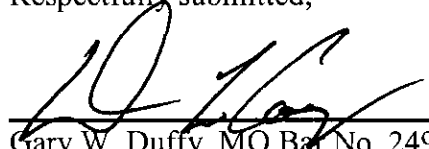
**ISSUE 5. Does the Commission have the authority to issue an informal opinion to resolve the controversy?**

**POPLAR BLUFF'S POSITION:** The City is unaware of any provision of Missouri law that gives the Commission the power to resolve disputes by "informal opinion." The City is unaware of any "informal opinion" ever being issued by the Commission.

**ISSUE 6. Does the complaint state a claim upon which relief can be granted by the Commission?**

**POPLAR BLUFF'S POSITION:** No. As explained above, the complaint does not set forth facts or allegations properly showing that Ozark Border is entitled to the relief it seeks.

Respectfully submitted,



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Attorneys for Respondent  
The City of Poplar Bluff

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 14th day of June 2004.

