

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at Harris-Stowe  
State University in St. Louis,  
Missouri on the 8th day of July,  
2009.

In the Matter of the Joint Application of The Empire District     )  
Electric Company and White River Valley Electric Cooperative )  
for Approval of a Second Addendum to the Parties' Second     ) File No. EO-2009-0428  
Territorial Agreement Designating Service for a Lot Located in )  
Taney County, Missouri     )

**REPORT AND ORDER APPROVING ADDENDUM  
TO TERRITORIAL AGREEMENT**

Issue Date: July 8, 2009

Effective Date: July 18, 2009

**Syllabus:** This Report and Order approves the joint application for approval of an addendum to a territorial agreement. The Report and Order also directs The Empire District Electric Company to file revised tariff sheets updating the map and legal description of its service territory to reflect the transfer of the property subject to the addendum to the White River Valley Electric Cooperative's service territory.

**Procedural History**

On May 29, 2009, The Empire District Electric Company ("Empire") and the White River Valley Electric Cooperative ("White River") (collectively "Applicants") filed a joint application requesting that the Commission approve an addendum to their Second Territorial Agreement. The addendum (Applicants' "Second Addendum") would allow White River to provide electric service to a single lot that is currently situated in Empire's service territory.

On June 1, the Commission issued notice,<sup>1</sup> set an intervention deadline and directed its Staff to file a recommendation. No interested person or entity requested intervention. On June 29, the Commission's Staff filed its recommendation and verified memorandum in support of approving the joint application.

### **Findings of Fact**

Because Section 394.312 requires that the legal rights, duties and privileges associated with the proposed addendum to the Applicants' territorial agreement be determined after an evidentiary hearing, this is a contested case pursuant to Section 536.010.4.<sup>2</sup> Section 536.090 allows the Commission to issue decisions in contested cases when they are disposed of by agreement of all of the parties without *separately stating* findings of fact and conclusions of law.<sup>3</sup> However, this permissive edict does not relieve the Commission of its statutory duty to properly evaluate Applicants' request and determine if the proposed addendum to the territorial agreement is in the public interest.<sup>4</sup> The

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<sup>1</sup> Notice was reissued to the lot owner once his proper mailing address was identified. See EFIS Docket Entry 3, Order of Correction, issued on June 2, 2009 and EFIS Docket Entry 5, Order Directing Notice, issued on June 8, 2009.

<sup>2</sup> See Section 394.312.5, RSMo Cum. Supp. 2008. The relevant issue under § 536.010(4)'s definition of a "contested case" is whether an agency is required to hold a hearing by substantive law outside Chapter 536, not whether a hearing was actually conducted. *Painter v. Missouri Com'n on Human Rights*, 251 S.W.3d 408, 410-411 (Mo. App. 2008). "Further, the simple fact that a proceeding is "contested" in the colloquial sense of being "disputed" or "adversarial" does not render the matter a "contested case" for purposes of Missouri's Administrative Procedure Act. The fact that there is some contest between the parties does not, in and of itself, make for a contested case." *Id.* at 411. (Internal citations omitted).

<sup>3</sup> Lifting the "separately stated" requirement also does not relieve the Commission of articulating the factual basis for its legal conclusions. This requirement goes the format of findings of fact, not the requirement to elucidate findings of fact.

<sup>4</sup> Litigants cannot stipulate as to questions of law. *State v. Biddle*, 599 S.W.2d 182, 186 and n. 4 (Mo banc 1980).

Commission must independently and impartially review the facts and make a separate and independent determination.<sup>5</sup>

Moreover, when interpreting Section 386.420, the statute delineating the Commission's procedural requirements for conducting hearings and making its reports, Missouri Courts have held that in contested cases the Commission must include findings of fact in its written report.<sup>6</sup> Merely adopting the parties' agreement or position on the ultimate legal issues is insufficient and does not satisfy the competent and substantial evidence standard embodied in the Missouri Constitution, Article V, Section 18.<sup>7</sup> Consequently, the Commission will include separately stated findings of fact and conclusions of law supporting its decision in this matter.

The Missouri Public Service Commission makes the following findings of fact:

### **The Applicants**

1. Empire is a Kansas Corporation, with its principal office and place of business located at 602 Joplin Street, Joplin, Missouri, 64801.<sup>8</sup>

2. Empire provides electric and water utility services in Missouri to customers in its service areas and has a certificate of service authority to provide certain telecommunications services.<sup>9</sup>

3. White River is a Chapter 394 rural electric cooperative engaged in the distribution of electric energy and service to its members in Taney County, Missouri.<sup>10</sup>

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<sup>5</sup> *Kennedy v. Missouri Real Estate Comm'n*, 762 S.W.2d 454, 457 (Mo. App. 1988).

<sup>6</sup> Section 386.420, RSMo 2000; *State ex rel. Monsanto Co. v. Public Serv. Comm'n of Missouri*, 716 S.W.2d 791, 794-795 (Mo. banc 1986); *State ex rel. Rice v. Public Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61, 65 (Mo. banc 1949); *State ex rel. Fischer v. Public Serv. Comm'n*, 645 S.W.2d 39, 42-43 (Mo. App. 1982).

<sup>7</sup> *Id.*

<sup>8</sup> Verified "Joint Motion for Approval of Second Addendum," EFIS Docket Entry No. 1, p. 1, filed May 29, 2009.

4. White River's principal office and place of business is on East Highway 76, Branson, Missouri 65616.<sup>11</sup>

### **The Proposed Addendum to the Applicants' Second Territorial Agreement**

5. The Applicants entered into their Second Territorial Agreement on April 11, 1995.<sup>12</sup>

6. The Applicants' Second Territorial Agreement was approved by order of the Commission issued on March 8, 1996; becoming effective on March 19, 1996.<sup>13</sup>

7. The Second Territorial Agreement specifically designates the exclusive boundaries of the electric service areas of Empire and the White River within certain portions of Taney County.<sup>14</sup>

8. The Second Territorial Agreement included descriptions of the territory affected, including the Lake Taneycomo Acres subdivision.<sup>15</sup>

9. Lot 313, Lake Taneycomo Acres, located at 313 Macbeth, Branson, Missouri 65616, is the subject property of the proposed addendum to the Second Territorial

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at p. 2-3.

<sup>11</sup> *Id.* at p. 2.

<sup>12</sup> Verified "Joint Motion for Approval of Second Addendum," EFIS Docket Entry No. 1, Appendix A, filed May 29, 2009. See also Footnote 12, *infra*.

<sup>13</sup> *In the Matter of the Joint Application of The Empire District Electric Company of Joplin, Missouri and White River Valley Electric Cooperative, Branson, Missouri, for Approval of a Second Territorial Agreement Designating the Boundaries of Each Electrical Supplier within Certain Areas in Taney County, Missouri, and for Approval of a First Amendment to the First Territorial Agreement Between the Parties Providing for Boundary Structures in a Manner Identical to that in the Second Territorial Agreement*, Case No. EO-96-176, 4 Mo. P.S.C. 3d, 353-358, Report and Order, issued March 8, 1996, effective March 19, 1996.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

Agreement, and service to Lot 313 is encompassed within the Second Territorial Agreement.<sup>16</sup>

10. Lot 313 is within the boundaries of Empire's service territory.<sup>17</sup>

11. Presently, Empire is unable to obtain right-of-way from neighboring lots to extend their distribution lines to Lot 313.<sup>18</sup>

12. If Empire could attain proper right-of-way, providing electric service to Lot 313 would require Empire to build over difficult terrain, which would pose hazards in construction and future maintenance.<sup>19</sup>

13. White River has existing electrical facilities positioned adjacent to the Lot 313, requiring only a service drop from an existing transformer to establish service.<sup>20</sup>

14. Mr. Jose Luis Nunez is the owner of Lot 313.<sup>21</sup>

15. Mr. Nunez has consented to have White River provide electric service to Lot 313.<sup>22</sup>

16. The joint application and the proposed addendum to the territorial agreement meet the requirements of the applicable statutes and the applicable Commission Rules.<sup>23</sup>

17. No party has objected to the approval of the proposed addendum to the territorial agreement.

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<sup>16</sup> *Id.*; Verified "Joint Motion for Approval of Second Addendum," EFIS Docket Entry No. 1, pp. 3-4, filed May 29, 2009.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at p. 4.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at Appendix C.

<sup>22</sup> *Id.*

<sup>23</sup> Sections 394.312 and 416.041.3; 4 CSR 240-2.060 and 4 CSR 240-3.130.

18. It is in the public interest to allow White River to serve Lot 313 as this is the safest and most efficient means of providing service to Lot 313, despite its current location within Empire's service territory.

### **Conclusions of Law**

The Missouri Public Service Commission has arrived at the following conclusions of law.

#### **Jurisdiction**

Empire is an “electrical corporation,” a “water corporation,” a “telecommunications company” and a “public utility,” as defined in Section 386.020, RSMo 2000, and is subject to the jurisdiction and supervision of the Commission.<sup>24</sup> White River is subject to the jurisdiction and supervision of the Commission, to the extent provided in Chapter 394; including the Commission’s authority to rule upon the proposed addendum to the territorial agreement.<sup>25</sup>

#### **Requirement for a Hearing**

Section 394.312 RSMo 2000, requires that an addendum to a territorial agreement be submitted to the Missouri Public Service Commission for approval. The statute requires the Commission to hold an evidentiary hearing,<sup>26</sup> and issue its decision by report and order.<sup>27</sup> The term “hearing” presupposes a proceeding before a competent tribunal for the *trial of issues* between *adversary parties*, the presentation and the consideration of proofs and arguments, and determinative action by the tribunal with respect to the issues ...

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<sup>24</sup> Verified “Joint Motion for Approval of Second Addendum,” EFIS Docket Entry No. 1, p. 1, filed May 29, 2009. See also Section 386.020(15), (59), (52) and (43), RSMo Cum. Supp. 2008.

<sup>25</sup> Chapter 394. See in particular Sections 394.160 and 394.312.

<sup>26</sup> Section 394.312.2 and .4 All statutory references are to RSMO 2000 unless otherwise noted.

‘Hearing’ involves an *opposite party*; ... it contemplates a listening to facts and evidence for the sake of *adjudication* ... The term has been held synonymous with ‘opportunity to be heard’.<sup>28</sup> (Emphasis added.) The requirement for a hearing is met when the opportunity for hearing was provided and no proper party requested the opportunity to present evidence.<sup>29</sup>

The Commission met its requirement for the hearing when it issued notice, allowed interested entities to intervene, and allowed an opportunity for any party to be heard on any identified issue in this matter. No party requested an evidentiary hearing or trial-type contested proceeding when given the opportunity, and the Commission concludes that no evidentiary hearing is required.

### **Standard for Approval and Burden of Proof**

Section 394.312 provides that the Commission may approve the submitted agreement if it determines that the agreement is in the public interest.<sup>30</sup> As petitioners, the Applicants have the burden of proving that the requested addendum to their territorial agreement is in the public interest. To carry their burden, the Applicants must meet the preponderance of the evidence standard.<sup>31</sup> And in order to meet this standard, the Applicants must convince the Commission it is “more likely than not” that approval of the

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<sup>27</sup> Section 394.312.3.

<sup>28</sup> *Id.*; See also 39A C.J.S. Hearing, p. 632, et seq.

<sup>29</sup> *Id.*

<sup>30</sup> It should be noted that Section 394.312 contains two conflicting standards for approval. Subsection 3 of the statute provides that the Commission must make a final determination that any territorial agreement is in the public interest, whereas subsection 5 requires the Commission to make a finding that the proposed agreement is not detrimental to the public interest. By reviewing the Applicant’s request under the higher “in the public interest standard” the Commission satisfies the requirements of both standards.

<sup>31</sup> *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007). See *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003). See also *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996), citing to, *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979).

requested addendum to their territorial agreement is in the public interest.<sup>32</sup>

## **Decision**

Having considered the Applicant's Joint Application, the facts verified in the pleadings, the lot owners' signed and sworn consent and Staff's recommendation and verified memorandum in support of approval, the Commission concludes that the addendum to the Second Territorial Agreement between Empire and White River is in the public interest. The Commission shall approve the Joint Application.

### **IT IS ORDERED THAT:**

1. The Joint Application for approval of The Empire District Electric Company's and White River Valley Electric Cooperative's Second Addendum to the Second Territorial Agreement, filed on May 29, 2009, is approved.

2. No later than 30 days after effective date of this order, The Empire District Electric Company shall file with the Missouri Public Service Commission revised tariff sheets to correct the map and legal description of its exclusive service territory that has changed as a result of approval of Second Addendum to the Second Territorial Agreement between The Empire District Electric Company and White River Valley Electric Cooperative.

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<sup>32</sup> *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 109 -111 (Mo. banc 1996); *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).



3. This order shall become effective on July 18, 2009.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale  
Secretary

( S E A L )

Clayton, Chm., Davis, Jarrett,  
and Gunn, CC., concur and certify compliance  
with the provisions of Section 536.080,  
RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 8<sup>th</sup> day of July 2009.