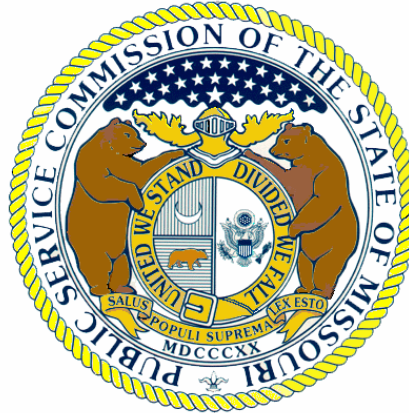


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



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 Exclusive)
Service Areas for Each within Two Tracts of Land in)
Greene County and Christian County, Missouri.)

Case No. EO-2007-0029

In the Matter of the Application of The Empire)
District Electric Company for a Waiver of the)
Provisions of its Tariff and 4 CSR 240-14.020 with)
Regard to The Lakes at Shuyler Ridge Subdivision)
in Conjunction with a Proposed First Territorial)
Agreement with Ozark Electric Cooperative.)

Case No. EE-2007-0030

REPORT AND ORDER

Issue Date: January 30, 2007

Effective Date: February 9, 2007

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Regard to The Lakes at Shuyler Ridge Subdivision)
in Conjunction with a Proposed First Territorial)
Agreement with Ozark Electric Cooperative.)

Appearances

Gary W. Duffy, Attorney at Law, Brydon, Swearingen & England, P.C., 312 East Capitol Avenue, P.O. Box 456, Jefferson City, Missouri 65102, for The Empire District Electric Company.

Rodric A. Widger, Attorney at Law, Andereck, Evans, Milne, Peace & Widger, 1111 Glenstone, Springfield, Missouri 65804, for Ozark Electric Cooperative.

Lewis R. Mills, Jr., Public Counsel, 200 Madison Street, Suite 650, P.O. Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Nathan Williams, Deputy General Counsel, 200 Madison Street, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Colleen M. Dale, Chief Regulatory Law Judge

REPORT AND ORDER

On July 18, 2006, The Empire District Electric Company and Ozark Electric Cooperative filed a joint application for approval of a territorial agreement. Concurrently, Empire filed a request for variance. The Commission has determined good cause has been shown for purposes of Section 394.312.3, RSMo 2000, for the Commission to take more than 120 days from the filing of the Application for the Commission to approve or disapprove the territorial agreement.

Findings of Fact

On November 22, 2006, the parties filed a joint Stipulation of Facts, which provided, in pertinent part:

3. Empire is an “electrical corporation” and a “public utility” as those terms are defined in §386.020 RSMo 2000, and is subject to the jurisdiction and supervision of the Commission as provided by law.
5. Ozark Electric Cooperative (“Ozark”) is a rural electric cooperative organized and existing pursuant to Chapter 394 RSMo [...]. Although certain safety aspects of its operations are subject to the jurisdiction of the Commission, the Commission does not have jurisdiction over the terms and conditions of the electrical service Ozark offers to its members.
6. Ozark is engaged in the distribution of electric energy and service to its members within certain counties in Missouri, including Greene and Christian Counties.
8. Empire and Ozark have entered into an agreement titled “First Territorial Agreement” (“Agreement”) that is dated June 29, 2006 and a copy of which was filed as part of Appendix A to their joint application that initiated the above captioned Case No. EO-2007-0029. That Agreement is admissible as evidence in these consolidated cases.
9. Under the Agreement, Empire would have a service area located in unincorporated areas of both Greene and Christian Counties, Missouri, and abutting the City of Republic, Missouri, exclusive of retail electric competition from Ozark and comprising approximately 4.5 square miles; and Ozark would have a service area exclusive of retail electric competition from Empire in a part of unincorporated Christian County, Missouri, comprising approximately 4.0 square miles, that does not abut the present corporate limits of the City of Republic, Missouri. Both Empire and Ozark currently have authority to serve all of the area that is the subject of the Agreement.
10. Concurrently with Empire and Ozark’s filing of the joint application to the

Commission for approval of the Agreement, Empire filed an application with the Commission, which initiated Case No. EE-2007-0030, for variances from Commission rule 4 CSR 240-14.020 and Empire's tariff regarding installation costs for electric service and the costs for installation of decorative street lighting for one specific platted subdivision located near Republic, Missouri—The Lakes at Shuyler Ridge.

14. Ozark and the developer of The Lakes at Shuyler Ridge [...] entered into a contract [...] dated September 15, 2005 ("Contract"). ***

16. Empire's current electric tariff provisions ... require that a developer pay Empire all installation costs in advance. [...] the developer is then entitled to receive a rebate for each lot that receives permanent power from Empire within a five-year period. The rebate ... has a value of \$2,679 per lot [...]. ... Empire's current estimate ... to extend service to Phase I is \$591,772.74. Under Empire's tariff, the developer would only be eligible for \$436,677.00 (163 lots in Phase I x \$2,679 per lot) in rebates; therefore, a balance of \$155,095.74 would be nonrefundable to the developer.

17. The second aspect of the Empire variance request deals with the costs for installation of decorative street lighting [...]. *** Empire's current estimate to install the desired decorative street lighting ... is \$60,800.00, based on an estimated cost of \$1,600.00 per light for 38 decorative street lights.

18. Ozark has contracted with the developer to install \$57,000.00 of street lighting for Phase I of The Lakes at Shuyler Ridge at no cost to the developer.

19. The Staff has quantified the projected cost to Empire if the Commission grants the requested variances for installation costs for electric service to be \$322,499.74 (for the entire subdivision), that, otherwise, the developer would contribute. *** The Staff has quantified the projected cost to Empire if the Commission grants the requested variances for decorative street lighting to be \$163,500 for the 109 decorative street lights for the entire subdivision. Empire has projected in its application, subject to the noted assumptions, that after ten years, Empire's service (priced at current prices) would produce approximately \$5.6 million in revenue compared to \$1.8 million in installation costs for the entire subdivision.

20. No party is seeking an express ratemaking determination on the cost of the variance in this proceeding, or is any party asserting that a ratemaking determination in this case would be appropriate. ***

21. The variances sought by Empire here would apply only to The Lakes at Shuyler Ridge subdivision [...].

On December 7, the Commission held a hearing in this matter to determine whether the territorial agreement should be approved and whether Empire could be given a waiver of its tariff provisions and the provisions of 4 CSR 240-14.020, which governs promotional practices by electric utilities. The Staff opposes the proposed variance on two grounds.

First, it asserts that the variance would permit Empire to discriminate against customers not subject to the variance. Second, it asserts that, while the Commission unquestionably has the authority to waive a rule provision, it does not have the authority to waive a tariff provision. Empire agrees that, if the Commission were to grant the variance, Empire would file a compliance tariff that established a new class of customers to allow for the charges it proposes in this matter.

The territorial agreement between Empire and Ozark appears to be reasonable and could be approved. Specifically, the Commission finds that the proposed territorial agreement is not detrimental to the public interest. However, those parties have indicated an unwillingness to proceed with the territorial agreement if the waiver is not granted.

Conclusions of Law

Prior to determining whether the requested waiver from the Commission's regulations may be granted, the Commission must determine whether the proposed activity contravenes §393.130 RSMo, which provides:

2. No gas corporation, electrical corporation, water corporation or sewer corporation shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas, electricity, water, sewer or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.
3. No gas corporation, electrical corporation, water corporation or sewer corporation shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The Commission's interpretation of these subsections of §393.130 is that Empire's proposal constitutes an undue preference for developers of a single subdivision. While the Commission recognizes the need for utilities to charge different classes of customer based on difference in types of service (for example, customers willing to accept interruptible service are usually given a lower rate) or differences in the utility's cost to provide service, there seems to be insufficient justification for giving a special rate to the developer of this single subdivision. No evidence was provided to support the contention that it will be less costly to provide the proposed installation services to this particular development; on the contrary, it is a stipulated fact in this case that Empire's cost of installation will exceed the price charged to the developer.

The Commission has promulgated rules to allow regulated utilities to charge lower rates in order to meet the demands of competition. Chapter 14 includes two provisions at issue:

14.010(2) On written application by a utility the commission may grant variances from the rules contained in this chapter for good cause shown. The utility filing the application shall show proof of service of a copy of the application on each public utility providing the same or competing utility service in all or any portion of the service area of the filing utility.

14.020 Generally prohibits a utility from providing installation or equipment at a price that is "less than actual cost or value." The Commission has the authority to allow utilities the flexibility to charge different classes of customers differently, but would not allow a utility to create an artificial class to facilitate rate discrimination. Moreover, that flexibility specifically excludes the ability to price services below their cost. Even if the Commission were to find that the discrimination was justified, the provisions of 4CSR 240-14.010 et seq., would

preclude Empire from providing the installation services as requested. Therefore, the Commission shall not grant Empire's waiver request.

The territorial agreement, which in isolation appears to be reasonable, is contingent upon the grant of the requested waiver. As the waiver request is denied, the territorial agreement will not be approved.

IT IS ORDERED THAT:

1. The proposed territorial agreement is not approved.
2. The requested waiver of the provisions of Chapter 14 of the Commission's rules is denied.
3. This order shall become effective on February 9, 2007.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Gaw and Appling, CC., concur;
Clayton, C., dissents;
all certify compliance with the provisions of
Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 30th day of January, 2007.