

**BEFORE THE PUBLIC SERVICE COMMISSION
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 an)	
Exclusive Service Area for Ozark within a Tract of)	Case No. EO-2008-0043
Land in Greene County, Missouri and Associated)	
Requests for Approval of a Transfer of Facilities and)	
Change of Supplier.)	

STAFF’S INITIAL POST-HEARING BRIEF

COMES NOW the Staff of the Missouri Public Service Commission and submits the following Initial Post-Hearing Brief:

SUMMARY

In this case The Empire District Electric Company (“Empire”) and Ozark Electric Cooperative (“Ozark”) seek Commission approval of a territorial agreement that would make, as between Empire and Ozark, Ozark the exclusive electrical supplier in The Lakes at Shuyler Ridge subdivision (“Shuyler Ridge”).¹ By its terms, the agreement is dependent on sale to Ozark of Empire’s electrical facilities in Shuyler Ridge (including those electrical facilities it acquired from Ozark in May of 2006²) and transfer from Empire to Ozark of electrical service to structures Empire serves in Shuyler Ridge.³ The Commission’s authority to approve territorial agreements, requests for authorization to sell electrical facilities and requests for authority to change electrical suppliers to structures arise from different statutes.

As explained in this brief the Staff’s public interest concerns with the relief requested in

¹ Ex. 1, First Territorial Agreement dated August 14, 2007.

² Ex. 5, Staff witness Beck Rebuttal, Attachment titled, “OZARK ELECTRIC COOPERATIVE, INC. invoice 2496,” dated May 18, 2006.

³ Ex. 1, First Territorial Agreement dated August 14, 2007, pp. 5, 6, Appendix 2 to First Territorial Agreement (Bill of Sale).

this application, aside from the applicants' failure to show in their direct case their territorial agreement is not detrimental to the public interest, are primarily two-fold. First, the Staff believes that not minimizing the patchwork of electrical service providers in and about the city of Republic is detrimental to the public interest. This is because such a patchwork contributes both to the duplication of electrical facilities and to confusion to emergency responders who may need for electrical lines or other electrical facilities to be de-energized. At the developer's request, Empire, not Ozark, is currently the only electrical supplier in Shuyler Ridge.⁴ Empire is the exclusive electrical supplier within the city of Republic where it adjoins Shuyler Ridge⁵ and Empire is the predominant electrical supplier in the unincorporated area surrounding Shuyler Ridge.⁶

Second, Empire, and the other electric utilities for whom the Commission sets rates, have line extension and street lighting tariff provisions that require developers to bear the risk of recovering the costs of electrical facilities in excess of those needed to provide safe and adequate street lighting and service to new structures in subdivisions—not those who consume the electricity.⁷ The Staff believes Empire's line extension and street lighting tariff provisions evince a Commission policy that Ozark does not follow. Ozark recovers from its members, not the subdivision developer, the costs of electrical facilities in excess of those needed to provide safe and adequate street lighting and service to new structures in subdivisions.⁸

Further, as the Staff pointed out in its position statements and explains again in this brief, under the plain language of the applicable statutes, approval of the territorial agreement in this case would not allow Ozark to lawfully add members in Shuyler Ridge after the City of Republic

⁴ Empire witness Palmer, Tr. 65; Ex. 1, pp. 5-6; Ozark witness Prewitt, Tr. 82.

⁵ Empire witness Palmer, Tr. 56.

⁶ Staff witness Beck, Tr. 103,

⁷ Empire witness Palmer, Tr. 67-69.

annexes Shuyler Ridge. While the Missouri Legislature allows municipalities, through territorial agreements, to confer authority on rural electric cooperatives to provide electrical service within the municipality, it has not authorized electrical corporations such as Empire and rural electric cooperatives such as Ozark to confer authority on the rural electric cooperative to provide electrical service within a municipality by means of a territorial agreement.⁹

Additionally, the Staff notes the sparse evidence regarding notice to Empire's customers of the potential change of their electrical supplier from Empire to Ozark. The evidence the Staff found is a statement in the territorial agreement that "[t]he developer of the Tract has informed Empire and Ozark that it is notifying all purchasers of the possibility of a change in electrical suppliers,"¹⁰ a statement in the Application that "[p]ersons who begin to receive permanent electric service while this application is pending will do so with the understanding that the supplier may be changed as part of this proceeding"¹¹ and Empire witness Palmer's testimony during the hearing that it is his understanding that all of Empire's customers in Shuyler Ridge have consented to a change in their electrical supplier from Empire to Ozark.¹² Notably, no customer consent was adduced during the hearing and no customer presented any evidence.

STANDARDS OF REVIEW

The statutory provision governing Commission approval of the sale of utility property has no express standard for Commission review; however, in the past, the Commission has made its review under the most lenient standard found in the Public Service Commission Act, as amended, the "not detrimental to the public interest" standard. § 393.190 RSMo 2000.

The statutory provision governing Commission authorization of a change in the supplier

⁸ Ozark witness Prewitt, Tr. 90.

⁹ § 394.312 RSMo Supp 2007.

¹⁰ Ex. 1, Attachment to Application "First Territorial Agreement," p. 4, ¶ 3.A.

¹¹ Ex. 1, Application p. 5, ¶ 6.

of electricity to an existing structure sets the standard for Commission authorization to be whether the changing the supplier is “in the public interest for a reason other than a rate differential.” § 393.106 RSMo 2000.

The statutory provision governing Commission review of territorial agreements sets the standard for approval to be whether the agreement is “not detrimental in the public interest.” § 394.312.4, RSMo Supp 2007.

Shuyler Ridge is an approximately 245-acre subdivision that adjoins the south side of the city of Republic.¹³ Presently, Empire is the only electrical supplier in Shuyler Ridge.¹⁴ Empire is the predominant electrical supplier in the city of Republic,¹⁵ Empire is the exclusive electrical supplier within the city of Republic where it adjoins Shuyler Ridge¹⁶ and Empire is the predominant electrical supplier in the unincorporated area surrounding Shuyler Ridge.¹⁷ Aside from the about one-third of its area that lies to the northeast toward Springfield, which was the Village of Brookline until about two years ago,¹⁸ Empire is essentially the exclusive electrical supplier in the city of Republic, serving some 99.8 percent of the city.¹⁹

Currently, Empire owns electrical facilities in Shuyler Ridge which it is using to provide electric service to its customers in Shuyler Ridge.²⁰ Empire acquired some of those electrical facilities from Ozark in May of 2006²¹ and, at the developer’s request,²² has been providing

¹² Empire witness Palmer, Tr. 69.

¹³ Ex. 1, p. 3, ¶ 4; Empire witness Palmer, Tr. 55-56.

¹⁴ Ex. 1, pp. 5-6; Ozark witness Prewitt, Tr. 82.

¹⁵ Empire witness Palmer, Tr. 56; Ozark witness Prewitt, Tr. 89.

¹⁶ Empire witness Palmer, Tr. 56.

¹⁷ Staff witness Beck, Tr. 103,

¹⁸ Empire witness Palmer, Tr. 57; Official Manual of the State of Missouri 2003-2004, p. 835; Staff witness Beck, Tr. 132.

¹⁹ Empire witness Palmer, Tr. 57.

²⁰ Ex. 1, pp. 4-5, First Territorial Agreement p. 6; Empire witness Palmer Tr. 68-69.

²¹ Ex. 5, Staff witness Beck Rebuttal, Attachment titled, “OZARK ELECTRIC COOPERATIVE, INC. invoice 2496,” dated May 18, 2006.

²² Empire witness Palmer, Tr. 65.

electrical service to its customers in Shuyler Ridge since at least December of 2006.²³ Ozark neither has facilities nor is providing electrical service in Shuyler Ridge.²⁴

Empire and Ozark agree that knowing where electrical suppliers provide service reduces confusion to emergency responders.²⁵ While it is Empire's position that the patchwork of electrical suppliers that should be minimized is the patchwork within Shuyler Ridge,²⁶ it is the Staff's position that the area that should be viewed is broader and more encompassing and includes all of the area surrounding Shuyler Ridge. As stated earlier, Empire is the predominant electrical supplier in the city of Republic, the exclusive provider in the city about Shuyler Ridge, the predominant electrical supplier in the unincorporated area surrounding Shuyler Ridge and the current electrical supplier in Shuyler Ridge.

Both Empire and Ozark urge that the territorial agreement should be approved, based, in part, on their understandings that if the City of Republic annexes Shuyler Ridge, Ozark could lawfully add service to structures in Shuyler Ridge after the annexation.²⁷ As it argued to the Commission in the prior cases between Empire and Ozark involving a territorial agreement, consolidated Case Nos. EO-2007-0029 and EE-2007-0030, the Staff believes Empire's and Ozark's understanding is wrong. Both by statute and court decisions, unless legislatively defined, words used in statutes are to be given their plain and ordinary meaning when ascertaining legislative intent.²⁸ For purposes of Chapter 394 of the Revised Statutes of Missouri, "rural area" is defined as follows:

²³ Empire witness Palmer, Tr. 52-53.

²⁴ Ozark witness Prewitt, Tr. 82.

²⁵ Empire witness Palmer, Tr. 58-61; Ozark witness Prewitt, Tr. 89-90.

²⁶ Empire witness Palmer, Tr. 49-51.

²⁷ Ex. 3, Empire witness Palmer Surrebuttall, p. 8; Empire witness Palmer, Tr. 50-51; Ozark witness Prewitt, Tr. 80-81.

²⁸ § 1.090 RSMo 2000; *State ex rel. Exchange Bank of Richmond v. Allison*, 155 Mo. 325, 56 S.W. 467 (1900); *State v. Brushwood*, 171 S.W.3d 143 (Mo. App. 2005).

"Rural area" shall be deemed to mean any area of the United States not included within the boundaries of any city, town or village having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both the farm and nonfarm population thereof.²⁹

Section 394.312 RSMo Supp 2007 of Chapter 394, in relevant part, provides:

1. Competition to provide retail electric service, as between rural electric cooperatives, electrical corporations and municipally owned utilities may be displaced by written territorial agreements, but only to the extent hereinafter provided for in this section.

2. Such territorial agreements shall specifically designate the boundaries of the electric service area of each electric service supplier subject to the agreement, ***any and all powers granted to a rural electric cooperative by a municipality, pursuant to the agreement, to operate within the corporate boundaries of that municipality, notwithstanding the provisions of section 394.020 and of section 394.080 to the contrary***, and any and all powers granted to a municipally owned utility, pursuant to the agreement, to operate in areas beyond the corporate municipal boundaries of its municipality. (Emphasis added.)

* * * *

6. Commission approval of any territorial agreement entered into under the provisions of this section shall in no way affect or diminish the rights and duties of any supplier not a party to the agreement or of any electrical corporation authorized by law to provide service within the boundaries designated in such territorial agreement. In the event any electrical corporation which is not a party to the territorial agreement and which is subject to the jurisdiction, control and regulation of the commission under chapters 386, RSMo, and 393, RSMo, has heretofore sought or hereafter seeks authorization from the commission to render electric service or construct, operate and maintain electric facilities within the boundaries designated in any such territorial agreement, the commission, in making its determination regarding such requested authority, shall give no consideration or weight to the existence of any such territorial agreement and any actual rendition of retail electric service by any of the parties to such territorial agreement will not preclude the commission from granting the requested authority. (Emphasis added.)

Further, Section 394.080 RSMo 2000, in pertinent part, provides:

A cooperative shall have power:

²⁹ § 394.020(3) RSMo 2000.

1. (1) To sue and be sued, in its corporate name;
- (2) To have succession by its corporate name for the period stated in its articles of incorporation or, if no period is stated in its articles of incorporation, to have such succession perpetually;
- (3) To adopt a corporate seal and alter the same at pleasure;
- (4) Except as provided in section 386.800, RSMo, to generate, manufacture, purchase, acquire, accumulate and transmit electric energy, and to distribute, sell, supply, and dispose of electric energy in *rural areas* to its members, to governmental agencies and political subdivisions, and to other persons not in excess of ten percent of the number of its members; provided, however, that where a cooperative has been transmitting, distributing, selling, supplying or disposing of electric energy in a *rural area* which, by reason of increase in its population, its inclusion in a city, town or village, or by reason of any other circumstance ceases to be a *rural area*, such cooperative shall have the power to continue to transmit, distribute, sell, supply or dispose of electric energy therein until such time as the municipality, or the holder of a franchise to furnish electric energy in such municipality, may purchase the physical property of such cooperative located within the boundaries of the municipality, pursuant to law, or until such time as the municipality may grant a franchise in the manner provided by law to a privately owned public utility to distribute electric power within the municipality and such privately owned public utility shall purchase the physical property of such cooperative located within the boundaries of the municipality. In case any of the parties to such purchase, as herein provided, cannot agree upon the fair and reasonable price to be paid for the physical property of such cooperative within the municipality, or if either party refuses to negotiate for the sale of such property upon the request of the other, the fair and reasonable value of such property for such purchase shall be fixed by the public service commission upon application of any one or more of the interested parties;

* * * *

2. In addition to all other powers granted in this section, rural electric cooperatives shall have the power to supply electric energy at retail after August 28, 1989, in cities, towns and villages having a population in excess of fifteen hundred inhabitants under the following conditions:

(1) The cooperative was the predominant supplier of retail electric energy within the city, town or village at the time any official United States Census Bureau "decennial census report" declares the population of such city, town or village to be in excess of fifteen hundred inhabitants;

(2) The city, town or village has granted to the cooperative a franchise to supply electric energy within the city, town or village.

(Emphases added).

Under the plain language of the foregoing statutes, particularly the provisions of § 394.312 RSMo Supp 2007 which pertain to territorial agreements, a territorial agreement between an electrical corporation, such as Empire, and a rural electric cooperative, such as Ozark, confers no right on the rural electric cooperative to provide electrical service within a municipality. In this respect, both Empire and Ozark misapprehend the effect of their territorial agreement.

Despite their suggestion and downplay of the likelihood of the imminent annexation of Shuyler Ridge by the City of Republic,³⁰ that likelihood cannot be discounted and is ripe for consideration by this Commission in determining the public interest.³¹ Such an annexation could result in Ozark having the stranded investment in Shuyler Ridge that Ozark witness Prewitt describes in his testimony.³²

The Staff recognizes that had Empire not begun providing electrical service in Shuyler Ridge the circumstances would be much different from those presented here. It was Empire and Ozark who chose to make their prior territorial agreement contingent on Empire obtaining a variance from its tariff to benefit a single developer—a solution the Commission appropriately found unlawful.³³ It was also Empire and Ozark who chose, despite Ozark’s agreement with the developer of Shuyler Ridge, to transfer Ozark’s facilities in Shuyler Ridge to Empire and for

³⁰ Ex. 3, Empire witness Palmer Surrebuttal, pp. 5 & 7.

³¹ Ex. 2, Empire witness Palmer Direct, p. 2; Empire witness Palmer Surrebuttal, p. 2; Empire witness Palmer, Tr. 44-45 & 61; Ozark witness Prewitt Direct, pp. 3-5; Ex. 5, Staff witness Beck Rebuttal, Attachment titled, “IRREVOCABLE CONSENT TO ANNEXATION AND AGREEMENT RELATING THERETO,” dated April 30, 2007..

³² Ex. 4, Ozark witness Prewitt Direct, p. 5; Ozark witness Prewitt, Tr. 80-81.

³³ *In the Matter 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 Nos. EO-2007-0029 and EE-2007-0030, Report and Order issued January 30, 2007 effective February 9, 2007. Such a variance also would have exposed Empire’s customers to the possibility that Empire would have sought to recover from its customers through rates in its next rate proceeding the costs the developer was to initially bear.

Empire to begin providing electrical service in Shuyler Ridge. Although Ozark makes much of its September 15, 2005 Agreement for the Purchase of Electric Power and Energy with the developer of Shuyler Ridge, it is undisputed that it is Empire that is providing electrical service in Shuyler Ridge and that Ozark has never provided electrical service in Shuyler Ridge—how relevant that agreement is to this proceeding is, at best, questionable. It is also Empire and Ozark who chose to present to this Commission a territorial agreement to make electrical service in Shuyler Ridge supplied by Ozark exclusive of Empire, rather than Empire exclusive of Ozark.

CONCLUSION

On the evidence before it in this case, for the reasons set forth above, the Commission should determine the proposed change in electrical suppliers is not in the public interest, the proposed sale of facilities is detrimental to the public interest and disapprove the territorial agreement for being detrimental to the public interest.

WHEREFORE, the Staff submits the above for its initial posthearing brief on the issues presented to the Commission for decision in this case.

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 electronically mailed to all counsel of record this 17th day of January 2008.

/s/ Nathan Williams