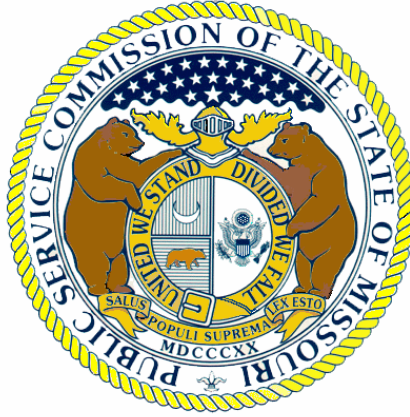


**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**



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

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**REPORT AND ORDER**

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**Issue Date:**                      **March 4, 2008**

**Effective Date:**                **March 14, 2008**

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### **APPEARANCES**

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**Nathan Williams**, Deputy Counsel, Missouri Public Service Commission, Post Office Box 360, 200 Madison Street, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

**REGULATORY LAW JUDGE:** Cherlyn D. Voss, Regulatory Law Judge.

## **REPORT AND ORDER**

### **I. Syllabus**

This order approves the First Territorial Agreement between The Empire District Electric Company and Ozark Electric Cooperative, approves the transfer of assets between the companies, and approves the change of electric supplier for approximately thirty-two structures.

### **II. Procedural History**

On August 15, 2007, The Empire District Electric Company (“Empire”) and Ozark Electric Cooperative (“Ozark” or collectively “the Applicants”) filed a joint application asking that the Missouri Public Service Commission issue an order: (1) approving a change in the electric supplier for approximately thirty-two structures located in a single tract of land in Greene County south of the City of Republic, Missouri, or alternately identified as the Lakes at Shuyler Ridge (“Shuyler Ridge”), from Empire to Ozark pursuant to Section 393.106, RSMo<sup>1</sup>; (2) authorizing the sale, transfer, and assignment of certain substations, electric distribution facilities, easements, and other assets pursuant to Section 393.190; (3) approving the Applicants’ First Territorial Agreement (“the Agreement”) pursuant to Section 394.312; and (4) authorizing Empire to perform in accordance with the terms and conditions of the Agreement.<sup>2</sup>

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<sup>1</sup> Unless otherwise specified, all statutory references are to the Revised Statutes of Missouri (RSMo), revision of 2000.

<sup>2</sup> The First Territorial Agreement is attached as Appendix A to the Application which was marked and admitted into evidence as Exhibit 1.

The Commission issued an Order Directing Notice and Setting Date for Submission of Intervention Requests on August 17, 2007, directing parties wishing to intervene in the case to do so by September 6, 2007. Notice was also sent to each customer for whom a change of supplier was requested, as well as, the county commission, members of the General Assembly, and newspapers representing and serving Greene County, Missouri. No intervention requests were received.

On October 2, 2007, the Commission issued an Order Adopting Procedural Schedule. In that order, in addition to adopting a procedural schedule, the Commission found that due to the complexity of the issues and transactions involved in this case, good cause existed for purposes of Section 392.312.3, RSMo, 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.

Empire and Ozark each filed direct testimony on October 12, 2007. Rebuttal testimony was filed by Staff on November 9, 2007. Empire filed surrebuttal testimony on December 7, 2007. On December 10, 2007, the parties filed a List of Issues, Order of Witnesses, and Order of Cross-examination. On December 14, 2007, Staff, Empire and Ozark each filed Statements of Position and Ozark also filed a Pre-Hearing Legal Brief. On December 17, 2007, Public Counsel filed its Position Statement and Motion for Leave to Late File.

The Commission held an evidentiary hearing on December 18, 2007. All parties were represented at the evidentiary hearing. Public Counsel did not present any direct, rebuttal or surrebuttal testimony; however, Public Counsel did cross-examine witnesses.

### **III. Issues Before the Commission**

The issues before the Commission in this case are:

1. Is the Agreement in total not detrimental to the public interest?
2. In conjunction with the Agreement, is the sale to Ozark of facilities Empire is presently using to provide electric service to customers in Shuyler Ridge not detrimental to the public interest?
3. In conjunction with the Agreement, is changing the supplier of electric service for the customers in Shuyler Ridge from Empire to Ozark in the public interest for a reason other than a rate differential?
4. Can a rural electric cooperative lawfully add service to new structures in an area annexed by a city with inhabitants of over 1,500 when it does not have a franchise with that city, but it does have a territorial agreement with an electrical corporation regulated by the Public Service Commission which gives the rural electric cooperative exclusivity with respect to that electrical corporation in the provision of electric service in that area annexed by the city?
  - A. If the rural electric cooperative does have a franchise with the city, does that change the result?

### **IV. Findings of Fact**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

#### **Facts Related to 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>3</sup>

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<sup>3</sup> Application, Ex. 1, page 1.

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>4</sup>

3. Empire is an “electrical corporation,” a “water corporation,” a “telecommunications company” and a “public utility,” as defined in Section 386.020, RSMo, and is subject to the jurisdiction and supervision of the Commission.<sup>5</sup>

4. Ozark is a rural electric cooperative organized and existing pursuant the laws of the State of Missouri. Specifically, Ozark is a Chapter 394 rural electric cooperative engaged in the distribution of electric energy and service to its members within certain Missouri Counties, including Greene County.<sup>6</sup>

5. Ozark’s principal office and place of business is on 10943 N. Highway 39, Mount Vernon, Missouri 65712.<sup>7</sup>

#### **Facts Related to Motivation to File Application**

6. In 1994, the Board of Alderman of City of Republic (“Republic”), Missouri, passed and approved a franchise agreement between Empire and Republic.<sup>8</sup>

7. The areas to the South and East of Republic, including Shuyler Ridge, are rural undeveloped areas and therefore open to competition between Empire and Ozark.<sup>9</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> <sup>5</sup> Application, Ex. 1, pages 1-2.

<sup>6</sup> *Id.*

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

<sup>8</sup> Beck Rebuttal, Ex. 5, page 4, lines 10-12.

<sup>9</sup> Tr. page 59, lines 5-8.

8. In mid-2005, the developer of Shuyler Ridge (“the Developer”) and Republic signed and executed a Development Agreement allowing the Developer to develop Shuyler Ridge. That agreement included an “Irrevocable Consent to Annexation.”<sup>10</sup>

9. In September 2005, an Agreement for the Purchase of Electric Power and Energy was executed between the Developer and Ozark.<sup>11</sup> That agreement called for the Developer to pay rates that were consistent with Ozark’s standing policies of application to similarly situated customers.<sup>12</sup> That agreement called for the Developer to pay Ozark significantly less than Empire’s tariffed rates to install street lighting and install service extensions to units in Shuyler Ridge.<sup>13</sup>

10. At some point in late 2005 or early 2006, Republic began taking steps to pave the way for the possible future annexation of an area that would include Shuyler Ridge.<sup>14</sup>

11. In March of 2006, Empire, Ozark, Republic and two sets of developers met and finalized plans to address issues regarding a territorial agreement between Empire and Ozark.<sup>15</sup>

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<sup>10</sup> *Id.* at lines 13-19.

<sup>11</sup> *Id.* at lines 20-23.

<sup>12</sup> Prewitt Direct, Ex. 4, page 4, lines 53-56.

<sup>13</sup> Under Empire’s tariff, the Developer would have had to pay significantly more upfront in costs to extend facilities not related to street lighting, and Shuyler Ridge homeowner’s association would have had to pay significantly more for the cost of street lighting under Empire’s tariffs. Beck, Rebuttal Testimony, pages 13-14.

<sup>14</sup> Prewitt Direct, Ex. 4, page 3, lines 45-47.

<sup>15</sup> Beck Rebuttal, Ex. 5, page 5, lines 1-3.

12. Under the territorial agreement resulting from the March 2006 meeting, the Developer only agreed to take service from Empire if it received the same installation rates it had contracted to receive from Ozark.<sup>16</sup>

13. In July 2006, Empire and Ozark filed a Joint Application for Approval of a First Territorial Agreement (“EO-2007-0029 Territorial Agreement”) which resulted in the opening of Commission Case No. EO-2007-0029.<sup>17</sup>

14. Also in July 2006, concurrent with its EO-2007-0029 Territorial Agreement, Empire filed an Application for Variance which resulted in the opening of Commission Case No. EE-2007-0030.

15. The variance Empire sought in Commission Case No. EE-2007-0030 asked the Commission to allow Empire to charge the Developer rates for installation of electric service and decorative street lighting that were comparable to those charged by Ozark. Those rates were significantly lower than the rates contained in Empire’s operable tariff.<sup>18</sup>

16. In January of 2007, the Commission denied Empire’s variance request in Commission Case No. EE-2007-0030.<sup>19</sup>

17. Since the EO-2007-0029 Territorial Agreement was contingent upon the approval of the variance request in Case No. EE-2007-0030, the Commission rejected the EO-2007-0029 Territorial Agreement.<sup>20</sup>

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<sup>16</sup> Palmer Surrebuttal, Ex. 3, page 3, lines 4-7.

<sup>17</sup> July 18, 2006 Joint Application, Commission Case No. EO-2007-0029.

<sup>18</sup> July 18, 2006 Application for Variance, Commission Case No. EE-2007-0030.

<sup>19</sup> January 30, 2007 Report and Order, Commission Case Nos. EO-2007-0029 and EE-2007-0030.

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



18. Assuming that the EO-2007-0029 Territorial Agreement and EE-2007-0030 variance request would be approved, Empire and Ozark prematurely began executing and operating under the EO-2007-0029 Territorial Agreement.<sup>21</sup>

19. Assuming that the EO-2007-0029 Territorial Agreement and EE-2007-0030 variance request would be approved, Empire purchased the facilities Ozark had installed to serve Shuyler Ridge in or around May of 2006.<sup>22</sup>

20. Empire has been serving customers, as well as installing additional facilities in Shuyler Ridge, including both extensions to new residences and street lighting, since December 2006.<sup>23</sup>

21. Further, in violation of its approved tariff, Empire submitted billing invoices to the Developer for the extensions and lights it installed in Shuyler Ridge that did not reflect the rates contained in Empire's approved tariff. The invoices were instead based on the rates asked for under the variance request.<sup>24</sup>

22. Following the Commission's denial of the EO-2008-0029 Territorial Agreement and the EE-2007-0030 variance request, Empire requested that the Developer

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<sup>21</sup> Palmer Surrebuttal, Ex. 3, page 10; Beck Rebuttal, Ex. 5, pages 11-12; and Application, Ex. 1, page 4.

<sup>22</sup> Application, Ex. 1, pages 4-5, and Appendix A, the First Territorial Agreement, pages 4 -6 and Appendix 2; and Tr. page 46, line 25 to page 47, line 6.

<sup>23</sup> Tr. page 52, line 22 to page 53, line 2; and Application, Ex. 1, pages 4-5, and Appendix A, the First Territorial Agreement, pages 4 -6.

<sup>24</sup> Beck Rebuttal, Ex. 5, page 3, lines 7-15, and page 12, lines 6-19, and attached copies of invoices from June 12, 2006, and June 15, 2006 submitted to The Lakes at Shuyler Ridge Property Owners Association, Inc., by The Empire District Electric Company; and Ex. 3, Palmer Surrebuttal, page 11, lines 6-20; See also: Ex. 6 and Ex. 7, which include portions of The Empire District Electric Company's Tariff P.S.C.Mo. No. 5.

pay the difference in the amounts billed and the amounts owed under Empire's approved tariff.<sup>25</sup>

23. Empire's witness, Mr. Palmer, testified without objection or rebuttal that the Developer refused to pay Empire its tariffed rates for the facilities Empire had already installed in Shuyler Ridge and refused to pay Empire's tariffed rates for facilities Empire might subsequently install.<sup>26</sup>

24. Empire's witness, Mr. Palmer, testified without objection or rebuttal that the Developer stated that it did not have and could not borrow enough money to pay Empire the amounts due under Empire's tariff for the facilities Empire installed in Shuyler Ridge and that if it was required to pay such amounts it would be driven into bankruptcy.<sup>27</sup>

25. Empire's witness, Mr. Palmer, testified without objection or rebuttal that approval of the Agreement would allow Empire to be reimbursed for its expenses related to Shuyler Ridge without having to pursue legal action against the Developer.<sup>28</sup>

### **Facts Related to the Application**

26. On August 15, 2007, Empire and Ozark filed an Application with the Commission which resulted in the opening of this case ("the Application").

27. The Application asks the Commission to approve the Agreement executed by Empire and Ozark on August 14, 2007.<sup>29</sup>

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<sup>25</sup> Palmer Surrebuttal, Ex. 3, page 11, lines 20-22.

<sup>26</sup> Palmer Surrebuttal, Ex. 3, page 3, lines 7-10 and page 11, line 20 to page 12, line 10.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at page 13, lines 5-9.

<sup>29</sup> Application, Ex. 1, page 1.

28. Under the Agreement the electric supplier of approximately thirty-two structures would be changed from Empire to Ozark.<sup>30</sup> The Agreement states that there are no other electric suppliers serving in the areas covered by the Agreement.<sup>31</sup>

29. Under the Agreement, to allow Ozark to provide service to the customers for whom a change of supplier is requested, certain assets described in the Agreement would also be transferred from Empire to Ozark.<sup>32</sup>

30. Concurrent with the filing of the Application, the Applicants submitted the fee required by Section 394.312.7 and delineated in Commission Rule 4 CSR 240-3.130(3).<sup>33</sup>

31. The Agreement specifically designates the boundaries of an exclusive electric service area of Ozark within Shuyler Ridge located in Greene County, Missouri.<sup>34</sup>

32. The Agreement establishes a separate exclusive service territory for Ozark for all new structures for more orderly future development of electric service to the public.<sup>35</sup>

33. Empire and Ozark would continue to have service responsibilities beyond the boundaries of the Agreement unaffected by the terms of the Agreement.<sup>36</sup>

34. The approval of the Agreement would not impair Empire's existing certificates of public convenience and necessity except as specifically limited by the Agreement.<sup>37</sup>

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<sup>30</sup> Application, Ex. 1, Appendix A, the First Territorial Agreement, pages 1 and 6.

<sup>31</sup> Application, Ex. 1, page 6.

<sup>32</sup> Application, Ex. 1, pages 4-5, and Appendix A, the First Territorial Agreement pages 6-7 Appendix 2.

<sup>33</sup> Application, Ex. 1, page 6.

<sup>34</sup> Application, Ex. 1, page 3, and Appendix A, the First Territorial Agreement, pages 2 and 4, and Appendix 1.

<sup>35</sup> *Id.*

<sup>36</sup> Application, Ex. 1, page 6.

<sup>37</sup> *Id.*

35. A copy of the Agreement is attached as Appendix A to the Application which was marked as Exhibit 1 and admitted into evidence during the evidentiary hearing.

36. A legal description of the exclusive service area and maps depicting the service area are a part of the Agreement, as required by Commission Rule 4 CSR 240-3.130(1) (A), and appear on page 2 and in Appendix A to the Agreement.<sup>38</sup>

37. By its terms, the Agreement is dependent on the sale to Ozark of Empire's electrical facilities in Shuyler Ridge, including those facilities Empire acquired from Ozark in May 2006,<sup>39</sup> and the transfer of Empire's current electrical service customers in Shuyler Ridge to Ozark.<sup>40</sup>

38. Empire, Ozark and Public Counsel all agree that the Application and the Agreement meet the requirements of the applicable statutes as well as applicable Commission Rules.<sup>41</sup>

### **Facts Related to Public Interest**

#### **Parties' Positions**

39. Empire, Ozark and Public Counsel agree that the Agreement in total is not detrimental to the public interest.<sup>42</sup>

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<sup>38</sup> Application, Ex. 1, Appendix A, First Territorial Agreement, page 2 and Appendix 1.

<sup>39</sup> Beck Rebuttal, Ex. 5, Attachment titled, "OZARK ELECTRIC COOPERATIVE, INC. invoice 2496," dated May 18, 2006.

<sup>40</sup> Application, Ex. 1, Appendix A, First Territorial Agreement, pages 5-6 and Appendix 2.

<sup>41</sup> See: Initial Brief of The Empire District Electric Company; Reply Brief of The Empire District Electric Company; Post Hearing Brief Submitted by Ozark Electric Cooperative; Rebuttal Brief Submitted by Ozark Electric Cooperative; Public Counsel's Notice of Concurrence in Briefs of Ozark Electric Cooperative and Empire District Electric Company filed on January 17, 2007; and Public Counsel's Notice of Concurrence in Briefs of Ozark Electric Cooperative and Empire District Electric Company filed on February 6, 2008.

<sup>42</sup> *Id.*

40. Empire, Ozark and Public Counsel agree that the transfer of facilities is not detrimental to the public interest<sup>43</sup>

41. Empire, Ozark and Public Counsel agree that the change of supplier request is in the public interest for a reason other than a rate differential<sup>44</sup>

42. Staff witness, Mr. Beck, identified the following six parties as having interests that the Commission should consider in determining whether to approve the Agreement, transfer of facilities and change of supplier request: the Developer, Republic, existing customers in Shuyler Ridge, Ozark's existing customers, Empire's shareholders and Empire's customers outside Shuyler Ridge.<sup>45</sup>

43. Staff contends that the Agreement, transfer of facilities and change of supplier request could be detrimental to the interest of Empire's customers outside Shuyler Ridge because the Agreement would not minimize the patchwork of electrical service providers in all areas around Republic, and if Republic annexes Shuyler Ridge before permanent service is supplied to the entire subdivision, it could result in increased patchwork of electric suppliers, stranded Ozark facilities, and increased confusion for emergency responders.<sup>46</sup>

44. Staff's witness, Mr. Beck, testified that approval of the Agreement would benefit Ozark's customers, current and future electric service customers in Shuyler Ridge, Empire's shareholders, the Developer and Republic.<sup>47</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Beck Rebuttal, Ex. 5, page 13, lines 7-16.

<sup>46</sup> See: Staff's Initial Post-Hearing Brief and Staff's Post-Hearing Reply Brief.

<sup>47</sup> Tr. page 112, line 19 to page 114, line 6, page 115, lines 21-23; page 119, lines 7-11, and page 120, lines 3-18; and Beck Rebuttal, Ex. 5, page 13, line 17 to page 14, line 5.

45. Staff's witness, Mr. Beck, testified that approval of the Agreement would benefit both Empire's shareholders and customers to the extent it would avoid duplication of facilities in Shuyler Ridge, allow Empire to maintain a good relationship with Republic and Ozark, and allow Empire to recover its costs in Shuyler Ridge if the Developer is unable to pay Empire for those facilities.<sup>48</sup>

46. Staff's witness, Mr. Beck, argued that the benefits, as described in finding of fact number 45, to Empire's customers under the Agreement would not exist, but for Empire failing to follow its tariff in providing services in Shuyler Ridge, and therefore should not be the basis for approval of the Agreement.

47. Under Empire's Commission approved tariff a developer requesting an extension of electric service to a subdivision in an area not served by existing facilities must pay Empire the estimated direct and indirect costs to construct all necessary facilities.<sup>49</sup>

48. Staff witness, Mr. Beck, acknowledged that there is no evidence in the record that would point to any individual or group that would be detrimentally impacted if the Commission approves the Agreement.<sup>50</sup>

#### Ozark's Ability to Serve

49. No party argued or presented any evidence questioning the ability of Ozark to safely provide the electric power supply, service, and maintenance needs of the customers in its service areas as designated in the Agreement.

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<sup>48</sup> Tr. page 134 line 12 to page 135, line 9.

<sup>49</sup> Ex. 6, The Empire District Electric Company's Tariff P.S.C.Mo. No. 5, at Section 5, Original Sheet No. 17c; and Ex. 7, The Empire District Electric Company's Tariff P.S.C.Mo. No. 5, at Section 5, Original Sheet No. 17c.

<sup>50</sup> Tr. page 135, line 12 to page 136, line 2.

50. The Commission finds that Ozark is capable of adequately and safely providing the electric power supply, service, and maintenance needs of the customers in its service areas as designated in the Agreement.<sup>51</sup>

#### Annexation Considerations

51. Shuyler Ridge is an approximately 245-acre subdivision that adjoins the south side of Republic.<sup>52</sup>

52. Empire is presently the only electric supplier in Shuyler Ridge.<sup>53</sup>

53. Empire is the predominant electrical supplier in Republic.<sup>54</sup>

54. Shuyler Ridge is not located within the corporate limits of Republic, or any other city, town or village with a population of over fifteen hundred inhabitants.<sup>55</sup>

55. Republic has no pending annexation proceedings affecting Shuyler Ridge.<sup>56</sup>

56. Republic submitted a letter to the Commission, which was admitted into evidence as Late Filed Exhibit 8, expressing its support for Commission approval of the Agreement.<sup>57</sup>

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<sup>51</sup> Tr. page 69, lines 3-5, and page 77, lines 3-14.

<sup>52</sup> Application, Ex. 1, page 3; and Tr. pages 55-56.

<sup>53</sup> Application, Ex. 1, pages 5-6; and Tr. page 82.

<sup>54</sup> Tr. pages 56, 89 and 103.

<sup>55</sup> Palmer Surrebuttal, Ex. 3, page 7, lines 8-9 and 17-18.

<sup>56</sup> *Id.* at line 9-15.

<sup>57</sup> Position Letter of City of Republic, Ex. 8.

### Adequacy of Payment for Facilities

57. Empire owns electric facilities in Shuyler Ridge which it is using to provide electric service to its customers in Shuyler Ridge. Some of those facilities were purchased from Ozark in July or August 2006.<sup>58</sup>

58. Empire's witness, Mr. Palmer, testified that under the facilities transfer incorporated into the Agreement, Empire would be fully paid for any effort that it extended and any work it has done in Shuyler Ridge, and would in effect be made completely whole for every investment it has made in Shuyler Ridge.<sup>59</sup>

59. Ozark witness Prewitt testified that under the Agreement Ozark would pay Empire an amount equal to Empire's cost to purchase and install all the facilities Empire seeks authority to transfer to Ozark under the Agreement.<sup>60</sup>

60. No party offered evidence that the amount Ozark would pay to Empire for the facilities to be transferred to Ozark under the Agreement is not equal to Empire's cost to purchase and install those facilities.

61. A set sale price has not been established for Ozark to pay for the facilities to be transferred to it from Empire, because the addition of facilities is ongoing.<sup>61</sup>

62. The set price Ozark will pay Empire for the Shuyler Ridge facilities that were in place when the Agreement was signed and a set price for each service line added

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<sup>58</sup> Tr. pages 52-53 and 68-69; and Application, Ex. 1, pages 4-5, and Appendix A, First Territorial Agreement, pages 4-6 and Appendix 2.

<sup>59</sup> Palmer Direct, Ex. 2, page 5, lines 2-5; Palmer Surrebuttal, Ex. 3, page 2, lines 7-9; Tr. page 70, lines 7-13, page 71, line 13 to page 72, line 5, page 72, line 14 through line page 73, line 20; and page 74, lines 19-23.

<sup>60</sup> Tr. page 88, lines 15-22.

<sup>61</sup> Palmer Direct, Ex. 2, page 4, lines 19-22.



between that date and the date the sale is finalized are set out in Appendix 2 to the Agreement.<sup>62</sup>

### Benefits

63. The areas adjoining Shuyler Ridge to the South and East are currently undeveloped and therefore open to competition between Empire and Ozark.<sup>63</sup>

64. Empire does not have the exclusive right to be the electric service provider for all of Shuyler Ridge, and Shuyler Ridge is currently open to competition between Empire and Ozark for electric service customers.<sup>64</sup>

65. By making Ozark the exclusive service provider in Shuyler Ridge, the Agreement would benefit current and future residents in Shuyler Ridge, as well as, emergency responders by decreasing the confusion and the time required for emergency personnel to respond to crisis situations where electric lines need to be deenergized by clarifying who to contact to get lines deenergized in Shuyler Ridge.<sup>65</sup>

66. Approving the Agreement, transfer of assets and change of supplier, would avoid potential duplication of facilities and avoid patchwork service within Shuyler Ridge.<sup>66</sup>

67. Approving the Agreement, transfer of assets and change of supplier, would allow electric service customers within Shuyler Ridge to know with certainty the supplier of their electric service.<sup>67</sup>

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<sup>62</sup> Application, Ex. 1, Appendix A, First Territorial Agreement, Appendix 2.

<sup>63</sup> Tr. page 59, lines 5-8.

<sup>64</sup> Tr. page 60, lines 5-10.

<sup>65</sup> Tr. 53, lines 12-21 and page 58, lines 15-23; and Palmer Surrebuttal, Ex. 3, page 15, lines 2-5.

<sup>66</sup> Tr. page 53, lines 12-21

<sup>67</sup> Palmer Surrebuttal, Ex. 3, page 15, lines 2-5

68. Approving the Agreement, transfer of assets and change of supplier, and making thereby Ozark the exclusive service provider in Shuyler Ridge would benefit Ozark's customers by improving the meter density, number of meters per mile of transmission line, and thereby spreading the per mile transmission line cost among a larger number of customers.<sup>68</sup>

69. The Commission finds that the proposed transfer of assets is not detrimental to the public interest, including the interest of Empire's customers, provided Empire's share holders bear any loss resulting from the proposed transfer of assets.

#### Adequacy of Notice to Shuyler Ridge Customers

70. In Staff's Initial Post Hearing Brief, Staff argued that the Applicants had not presented sufficient evidence in support of the Agreement, transfer of assets and change of supplier requests, because there is inadequate evidence in the record that the current customers in Shuyler Ridge received notice of the Application.<sup>69</sup>

71. In addition to the notice provided to the customers in question by the Developer,<sup>70</sup> the Commission sent notice of the Application and intervention deadline to each customer for whom a change of supplier was requested, as well as, the county commission, members of the General Assembly, and newspapers representing and serving Greene County, Missouri.<sup>71</sup> No intervention requests were received.<sup>72</sup>

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<sup>68</sup> Tr. page 85, lines 1-4, and page 85, line 21 to page 86, line 7.

<sup>69</sup> Staff's Initial Post Hearing Brief, page 3.

<sup>70</sup> Application, Ex. 1, Appendix A, the First Territorial Agreement, page 4.

<sup>71</sup> August 17, 2007 *Order Directing Notice and Setting Date for Submission of Intervention Requests*, Commission Case No. EO-2008-0043.

<sup>72</sup> *Id.*

72. The Commission finds that the current residents of Shuyler Ridge received adequate notice of the Application and were afforded a reasonable opportunity to intervene.

#### **IV. Conclusions of Law**

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

##### **Jurisdiction and Standards of Review**

The Missouri Public Service Commission has jurisdiction over the services, activities, and rates of Empire pursuant to Section 386.250 and Chapter 393. The Commission does not have jurisdiction over the services, activities, and rates of rural electric cooperatives such as Ozark except as specified in Section 394.160 and Section 394.312.

The Commission has jurisdiction to approve a sale, transfer and assignment of assets between Empire and Ozark.<sup>73</sup> Section 393.190 RSMo requires an electrical corporation to get Commission approval before selling its assets. The Commission may not withhold approval of the sale unless the sale would be detrimental to the public interest.<sup>74</sup>

When a cooperative enters into a territorial agreement with a regulated public utility the agreement may be approved by the Commission after hearing.<sup>75</sup> The Commission may approve a territorial agreement if the agreement in total is not detrimental to the public

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<sup>73</sup> Section 393.190 RSMo.

<sup>74</sup> See: *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo.App.E.D. 1980).

<sup>75</sup> Section 394.312 RSMo (2007 Cum. Supp.)

interest.<sup>76</sup> The Commission may approve a change in electric supplier if the change is in the public interest for a reason other than rate differential.<sup>77</sup>

The existence of a Commission approved territorial agreement between a regulated electrical corporation and a rural electric cooperative confers no additional right or authority, outside of those granted by Missouri statute, upon the rural electric cooperative to provide electrical service within the corporate limits of a municipality.<sup>78</sup>

### **Rural Cooperative Authority to Compete in Rural Areas**

Section 394.080 states in pertinent part that:

1. A cooperative shall have power:
  - (1) To sue and be sued, in its corporate name;
  - . . . .
  - (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; . . . (emphasis added).

A rural area is defined in Section 394.020(3) as:

. . . 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.

### **Filed Rate Doctrine**

Both the United States Supreme Court and Western District Appellate Court have consistently held that the filed rate doctrine forbids a regulated entity to charge rates for its

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<sup>76</sup> Section 394.312.5 RSMo (2007 Cum. Supp.)

<sup>77</sup> Section 393.106.2 RSMo.

<sup>78</sup> Section 394.312 RSMo (2007 Cum. Supp.); See also: Section 394.080.

services other than those properly filed with the appropriate regulatory authority.<sup>79</sup> The Supreme Court has further held that “[t]he filed rate doctrine has its origins in this Court’s cases interpreting the Interstate Commerce Act, . . . and has been extended across the spectrum of regulated utilities.”<sup>80</sup> The United States Supreme Court has also held that a customer is required to pay the tariffed rate even if rates were misquoted or intentionally misrepresented to that customer,<sup>81</sup> or lower rates were agreed to by contract.<sup>82</sup>

Both the Supreme Court and the Western District Appellate Court have consistently held that a Commission may not retroactively alter a rate, even if it finds it to be unreasonable or unjust, but may only set just and reasonable rates to be used prospectively.<sup>83</sup> Both Courts further held, “an entity may not impose a retroactive rate alteration, and in particular may not order reparations.”<sup>84</sup>

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<sup>79</sup> *Maislin Industries, U.S. Inc., et al. v. Primary Steel, Inc., et al.*, 497 U.S. 116, 130 (1990); *Arkansas Louisiana Gas Co. v. Hall et al.*, 453 U.S. 571, 577 (1981); *Louisville & Nashville Railroad Company v. Maxwell*, 237 U.S. 94 (1915); *Texas and Pacific Railway Company v. MUGG*, 202 U.S. 242 (1906). *State of Missouri ex rel. Associated Natural Gas Company v. Public Service Commission of the State of Missouri*, 954 S.W.2d 520, 531 (Mo. App. WD 1997); *A.C. Jacobs and Company, Inc., and Tesson Heights Limited Partnership v. Union Electric Company*, 17 S.W.3d 579 (Mo. App. 2000) *National Food Stores, Inc. v. Union Electric Company*, 494 S.W.2d 379, 381 (Mo. App. 1973).

<sup>80</sup> *Arkansas Louisiana Gas Co. v. Hall et al.*, 453 U.S. 571, 577 (1981).

<sup>81</sup> *Louisville & Nashville Railroad Company v. Maxwell*, 237 U.S. 94 (1915); and *Texas and Pacific Railway Company v. MUGG*, 202 U.S. 242 (1906).

<sup>82</sup> *Maislin Industries, U.S. Inc., et al. v. Primary Steel, Inc., et al.*, 497 U.S. 116, 130 (1990).

<sup>83</sup> *Arkansas Louisiana Gas Co. v. Hall et al.*, 453 U.S. 571, 577 (1981); and *State of Missouri ex rel. Associated Natural Gas Company v. Public Service Commission of the State of Missouri*, 954 S.W.2d 520, 531 (Mo. App. WD 1997).

<sup>84</sup> *Id.*

### **Staff Authority to File a Complaint**

If aggrieved by a violation of any statute, rule, order or decision within the Commission's jurisdiction the Staff through the general counsel may file a complaint against the party in violation thereof.<sup>85</sup>

## **V. Decision**

The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

### **Issue 4 and 4A:**

The Commission shall first address Issues 4 and 4A, because they involve questions of law not properly before the Commission in this case.

4. Can a rural electric cooperative lawfully add service to new structures in an area annexed by a city with inhabitants of over 1,500 when it does not have a franchise with that city, but it does have a territorial agreement with an electrical corporation regulated by the Public Service Commission which gives the rural electric cooperative exclusivity with respect to that electrical corporation in the provision of electric service in that area annexed by the city?
  - A. If the rural electric cooperative does have a franchise with the city, does that change the result?

Staff argues that the Agreement is detrimental to the public interest because Republic might annex Shuyler Ridge before permanent electric service is connected to each residence in the subdivision, and, as a rural electric cooperative, Ozark could not

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<sup>85</sup> Sections 386.071 and 386.390.1, RSMo and 4 CSR 240-2.070(1).

connect additional customers in Shuyler Ridge following annexation. Staff argued that this scenario could lead to stranded investment for Ozark and increased patchwork of electric service providers in Shuyler Ridge. Ozark, Empire and Public Counsel dispute Staff's analysis on a variety of legal grounds, including an argument that a Commission approved territorial agreement alone would allow Ozark to add customers in Shuyler Ridge following any annexation by Republic.

While the Commission disagrees with the contention that Commission approval of a territorial agreement could somehow usurp a municipality's authority to grant or withhold a franchise to provide electric service within its corporate limits, a decision on this issue is not relevant to the Commission's decision in this case. Republic has not, and may never, annex Shuyler Ridge. The timing of any future annexation of Shuyler Ridge by Republic can only be speculative. To deny approval of a territorial agreement on the allegation that an area might be annexed into a municipality at a future date is not reasonable. Further, Republic has expressly stated its support for Commission approval of the Agreement.

If an area included within a Commission approved territorial agreement is annexed into a city, town or village containing over fifteen hundred inhabitants, the question of whether a rural cooperative signatory to that agreement can lawfully serve new customers within the annexed area should be addressed between the city and the cooperative, and, if necessary, the courts.

The Commission finds that the legal issues raised in Issues 4 and 4A are not ripe for a Commission decision and involve legal issues not appropriately before the Commission.

### **Issues 1, 2 and 3:**

1. Is the Agreement in total not detrimental to the public interest?
2. In conjunction with the Agreement is the sale to Ozark of facilities Empire is presently using to provide electric service to customers in Shuyler Ridge not detrimental to the public interest?
3. In conjunction with the Agreement is changing the supplier of electric service for the customers in Shuyler Ridge from Empire to Ozark in the public interest for a reason other than a rate differential?

Although set out as individual issues by the parties, the parties addressed issues 1, 2 and 3 together under a general public interest analysis. Because the Agreement is conditioned upon approval of the transfer of facilities and change of supplier requests, the Commission shall likewise address issues 1, 2 and 3 together under a general public interest analysis.

The standard for approval of the Agreement and the transfer of assets is that the territorial agreement and the transfer are not detrimental to the public interest. The standard for approval of a change of electric suppliers is that the transfer is in the public interest. Thus, the Commission shall examine all the relevant factors to determine the benefits and detriments of the complete proposal.

### **Elimination of the Duplication of Facilities**

The first factor the Commission will consider in deciding the appropriateness of the Agreement is the extent to which the Agreement eliminates or avoids unnecessary duplication of facilities.

Empire's and Ozark's witnesses testified that the Agreement would continue to eliminate any future duplication of facilities because there will continue to be exclusive rights, with regard to these companies, to serve customers within the boundaries of the



Agreement. The Agreement designates the boundaries of the exclusive electric service area for service of new structures.

Staff argues that the territorial agreement is detrimental to the public interest because it does not minimize the duplication of electrical service providers in the entire area in and around Republic. The Commission does not find Staff's argument convincing. Although the territorial agreement would not minimize the duplication of electrical facilities in all the area surrounding the City, it would prevent the duplication of electrical service providers within the 240-acre subdivision. The Commission finds that the Agreement is beneficial in that it is designed to avoid duplication of facilities in Shuyler Ridge.

#### Ability to Provide Adequate Service

Second, the Commission will consider the ability of Ozark to provide adequate service to the customers in its exclusive service area.

No party indicated any concern or presented any evidence questioning the ability of Ozark to provide adequate service to the customers in this service area. There was also no evidence presented which would lead the Commission to conclude that Empire's ability to provide service to its remaining customers would be compromised by this transfer. The Commission finds that Ozark is capable of adequately and safely providing the electric power supply, service, and maintenance needs of the customers in its service areas as designated in the Agreement, including the approximately thirty-two customers for whom a change of service is requested.

#### Effect on Current Customers

The third area for Commission concern is the effect of approval of the Agreement on customers of the Applicants.

No party, including Staff, presented evidence identifying any individual or group interest that would be detrimentally impacted by the Agreement or the associated transfer of facilities and change of supplier requests. However, Staff objects to their approval based on alleged inadequacy of notice to Shuyler Ridge customers, the change of supplier request not being in the public interest for a reason other than a rate differential, and that, but for Empire's violation of its tariff in providing service to Shuyler Ridge, the Agreement would be detrimental to Empire's current customers.

Staff first argued that there is insufficient evidence in the record to prove that the current customers in Shuyler Ridge were given notice of the Agreement and accordingly might not have had a chance to voice their objections thereto. The Commission does not find Staff's argument persuasive. In addition to the notice provided to the customers in question by the Developer, the Commission served notice on each Empire customer in the Shuyler Ridge as of the date of the filing of the Application and served notice on the media and members of the general assembly serving Shuyler Ridge. Although provided with direct notice from the Commission and given an opportunity to intervene, no Empire customer in Shuyler Ridge sought intervention.

The Commission finds unconvincing Staff's argument that the change of supplier request for approximately thirty-two customers is not in the public interest for a reason other than a rate differential. As set out in detail in the Findings of Fact, there are significant non-rate related benefits flowing from the Agreement, and associated transfer of facilities and change of supplier requests, to the approximately thirty-two customers for whom the change of supplier is requested. Further, as also set out in detail in the Findings of Fact, there are significant benefits flowing from the Agreement, and associated transfer of

facilities and change of supplier requests, to each of the six public interest groups identified by Staff's witness Mr. Beck.

Staff next argues that the Agreement should be denied because, but for Empire's failure to comply with its tariff in installing facilities and providing service in Shuyler Ridge, the Agreement would be detrimental to Empire's current customers. The Commission agrees that part of the benefit afforded to Empire's current customers under the Agreement is the result of Empire's management failing to comply with its approved tariff. Specifically, Empire's tariff requires a developer requesting an extension of electric service to a subdivision in an area not served by existing facilities to pay Empire the estimated direct and indirect costs to construct all necessary facilities. If Empire had complied with its tariff, it would not be in its present situation.

While the Commission appreciates Staff's concern over Empire's apparent failure to comply with its approved tariff, the interest of concern here is the interest of Empire's customers irrespective of the cause of the potential risk of monetary detriment. The appropriate place to address the apparent transgressions of Empire's management is in a complaint proceeding.

#### Other Costs and Safety Benefits

Fourth, the Commission will consider a category of other cost and safety benefits attributed to the proposed Agreement.

Staff argued that approval of the territorial agreement could result in a long-term detrimental impact to customers in and around Shuyler Ridge in that it could result in a patchwork of electric service providers with Shuyler Ridge becoming an island inside

Empire service territory. Staff expressed concern that under its scenario future emergency responders could be uncertain as to who to contact in the event of an emergency.

The Commission does not find Staff's argument convincing, given that the entire area to the South and East of Republic, including Shuyler Ridge, is currently undeveloped and therefore open to competition between Empire and Ozark. Accordingly, if the Agreement is not approved there is the potential for a patchwork of electric service providers inside Shuyler Ridge. By making Ozark the exclusive service provider in Shuyler Ridge, the Agreement would benefit current and future residents in Shuyler Ridge, as well as, emergency responders by decreasing the confusion and the time required for emergency personnel to respond to crisis situations where electric lines need to be deenergized by clarifying who to contact to get lines deenergized in Shuyler Ridge.

#### General Public Interest Determination

Based on the findings of fact and conclusions of law it has made, the Commission concludes that the Agreement proposed by Empire and Ozark in total is not detrimental to the public interest and should be approved. Based on the findings of fact and conclusions of law it has made, the Commission concludes that the change in electric supplier for approximately thirty-two structures located in Shuyler Ridge, a single tract of land in Greene County located south of Republic, from Empire to Ozark, is in the public interest for a reason other than a rate differential and should be approved.

Based on its findings of fact and conclusions of law, the Commission concludes that the sale, transfer and assignment of assets between Empire and Ozark is not detrimental to the public interest and should be approved, provided Empire's shareholders bear the financial risk that the amount Empire receives under the Agreement in exchange for the

sale, transfer and assignment of the assets in question, does not fully cover the actual cost of those assets.

**IT IS ORDERED THAT:**

1. The First Territorial Agreement attached to this order as Attachment A and signed by The Empire District Electric Company and Ozark Electric Cooperative is approved.

2. The change in electric supplier for approximately thirty-two structures located in a single tract of land in Greene County located south of the City of Republic, Missouri, alternately identified as the Lakes at Shuyler Ridge, from The Empire District Electric Company to Ozark Electric Cooperative is approved.

3. The Empire District Electric Company is authorized to sell, transfer and assign to Ozark Electric Cooperative the assets, as more particularly described in the Bill of Sale and the attached document titled “Lakes at Shuyler Ridge Subdivision – Expenses as of 7/14/2007.”<sup>86</sup>

4. The Empire District Electric Company is authorized to perform in accordance with the terms of the First Territorial Agreement and Bill of Sale and to enter into and execute all other documents reasonably necessary and incidental to the performance of the transactions therein.

5. Nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the assets herein involved.

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<sup>86</sup> The Bill of Sale and the “Lakes at Shuyler Ridge Subdivision – Expenses as of 7/14/2007” are contained in Appendix 2 to the First Territorial Agreement approved in Ordered Paragraph 1.

6. The Commission reserves the right to consider any ratemaking treatment to be afforded the assets herein involved in later proceedings.

7. The Empire District Electric Company's shareholders, not its customers, shall bear any loss resulting from the proposed transfer of assets.

8. No more than 30 days after the effective date of this order, The Empire District Electric Company shall file revised tariff sheets in compliance with the First Territorial Agreement approved in Ordered Paragraph 1.

9. Any modifications in, or amendments to, the First Territorial Agreement between The Empire District Electric Company and Ozark Electric Cooperative must be reviewed and approved by the Commission.

10. This Report and Order shall become effective on March 14, 2008.

11. This case shall be closed on March 15, 2008.

**BY THE COMMISSION**



Colleen M. Dale  
Secretary

( S E A L )

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

Dated at Jefferson City, Missouri,  
on this 4<sup>th</sup> day of March, 2008.