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September 5, 2003

Secretary of PSC
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

FILED[2]
SEP 0 5 2003
Missouri Public
Service Commission

Re: Case No. EM-2004-0071

Dear Secretary:

Enclosed for filing, please find an original and eight copies of the Joint Response of Howell-Oregon Electric Cooperative and the City of Thayer to Commission Order Directing Filings in the above cited case.

Thank you for seeing this filed. If you should have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Lisa Chase

Lisa Cole Chase

LCC:sw
Enc.
Cc: Michael Dandino
Dan Joyce
Harvey Allen
Dan Singletary
Allen Deckard

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the Joint Application	)	
of City of Thayer, Missouri and Howell-Oregon	)	
Electric Cooperative, Inc. for an order approving	)	Case No. EM-2004-0071
proposed Territorial Agreement.	)	

JOINT RESPONSE OF HOWELL-OREGON ELECTRIC COOPERATIVE AND THE CITY OF THAYER TO COMMISSION ORDER DIRECTING FILINGS

COMES NOW Howell-Oregon Electric Cooperative, Inc. and the City of Thayer, by and through their respective counsel of record, and hereby file their Joint Response to the Commission Order Directing Filings, and states as follows:

1. Howell-Oregon filed its Notice of Addendum to Approved Territorial Agreement on July 30, 2003, and supplemented its Notice on July 31, 2003 with copies of the Territorial Agreement and Addendum. That notice was filed under Case No. EM-92-157, the case in which the parties sought and received approval of their proposed Territorial Agreement. The Commission has given this proceeding a different Case Number, and Howell-Oregon and the City of Thayer respectfully suggest the Commission similarly provide a different caption to reflect that this proceeding does not involve a proposed Territorial Agreement, but an addendum to an approved territorial agreement.

2. Howell-Oregon noted in its Notice that notice of the Addendum No. 1 was also provided to the Commission in Case No. EO-2003-0518 on May 23, 2003. Notice of the Addendum was provided pursuant to the terms of the Territorial Agreement approved by the Commission on February 28, 1992 in Case No. EM-92-157. The terms of the Territorial Agreement, at paragraph 8, provide:

"Neither the boundaries described by this Agreement nor any term of this Agreement may be modified, repealed, or changed except by writing mutually approved by the respective governing bodies of the parties and by the Missouri Public Service Commission, *except the City and Cooperative may agree in writing on a case-by-case basis to allow any structure to receive service from one party even though the structure is located in the territory of the other party. Each such instance will be treated as an addendum to this Agreement and a copy of the addendum supplied to the Public Service Commission.*" (emphasis added).

No Conflict Between the Territorial Agreement and Stipulation

3. The Commission, in its Order Directing Filings, correctly pointed out that the stipulation and agreement entered into in Case No. EM-92-157 "clarifies that 'Staff shall have the right to recommend to the Commission suspension of the operation of any addendum that may be filed pursuant to said paragraph 8 of the territorial agreement.'" *Procedurally, these two provisions are not inconsistent.* First, Notice was provided to the Commission pursuant to paragraph 8 of the Territorial Agreement. Second, if Staff believes the addendum is not in the public interest, then Staff has the right, and the obligation, to bring its concerns to the Commission by recommending the suspension of the operation of any addendum filed pursuant to paragraph 8 of the Territorial Agreement. However, if Staff believes the Addendum is in the public interest, then no further action is required.

4. The Addendum No. 1 states at paragraph 2:

"Pursuant to paragraph 8, the City and Cooperative hereby exercise their option under their Territorial Agreement to transfer the right to be the exclusive electric service provider to an elementary school being constructed by Thayer R-II School District and any other buildings to be built on approximately 35 acres of property owned by the Thayer R-II School District located on East Highway 142."

The right to serve new structures applies to the new elementary school being constructed as well as any other new buildings the Thayer R-II School District constructs on its 35 acre parcel of property. The 35 acre description is just that, a description of the area that the Thayer R-II School District owns and will be using to construct an elementary school. The 35 acres may also be used by the school to construct other buildings which may or may not need their own metering points. As such, the Cooperative and City, in negotiating the addendum, wrote it broadly enough to insure that all of the electric needs of the Thayer R-II School District on the above described property located on East Highway 142 can be met by the Cooperative. If the Thayer R-II School District were to sell any portion of the 35 acre property, then the property would no longer be "owned by the Thayer R-II School District," and any structures on the sold property would no longer fall within the terms of the Addendum. As such, any electric service to any structure on the sold property would be provided by the City of Thayer as part of its exclusive service territory pursuant to the Territorial Agreement. Similarly, to the extent the Thayer R-II School District may own property within the exclusive service territory of the City of Thayer, other than the 35 acre parcel located on East Highway 142, if any, the City of Thayer will provide electric service to such property. The terms of the Territorial Agreement have not changed; the Applicants *DO NOT* change the boundaries of the existing Territorial Agreement, including the 35 acres of property owned by the Thayer R-II School District. Applicants continue to operate pursuant to the terms of their existing, approved Territorial Agreement.

No Conflict with Missouri Law

5. The Commission has directed Howell-Oregon to address its Notice of Addendum in light of Section 394.312.3, RSMo 2000, 4 CSR 240-3.130, 4 CSR 240-3.135, and 4 CSR 240-2.060(1). The Commission cites the following language in Section 394.312.3, RSMo 2000:

> ... [A]ll territorial agreements entered into under the provision of this section, *including any subsequent amendments to such agreements, ... shall receive the approval of the public service commission* by report and order. Applications for commission approval shall be made and notice of such filing shall be given to other electrical suppliers pursuant to the rules and regulations of the commission governing applications for certificates of public convenience and necessity." [Emphasis added.]

6. The Commission has previously addressed this provision as it relates to case-by-case addendum provisions like the one in the Howell-Oregon/City of Thayer Territorial Agreement. In the case of Union Electric and Cuivre River Electric Cooperative, Case No. EO-93-166, the Territorial Agreement being approved by the Commission contained a case-by-case provision that allowed the parties to agree to permit one party to service a structure even though the structure is located in the electric service territory of the other party. The procedure under the Agreement is that "[s]uch agreements shall be in writing and approved by both parties." *Id.* p. 113. There is no requirement that notice of such agreements be filed with the Commission. The Commission approved this procedure in its *Report and Order* on March 5, 1993.[1]

After approving the terms of the Agreement, the Commission expressed its reservations with respect to the case-by-case provision for the benefit of future Territorial Agreement transactions. The Commission stated that:

> "[t]he Staff and Public Counsel object to the 'case-by-case' procedure because it is, in their belief, a violation of the statute which requires all territorial agreements 'including any subsequent amendments to such agreements' to receive the approval of the Public Service Commission by Report and Order. Section 394.312.3, R.S.Mo. (Supp. 1992). Applicants state that the 'case-by-case' procedure is not an amendment to the agreement and is identical to one already approved by the Commission in In Re: Union Electric Company and Crawford Electric Cooperative, Inc., Case No. EO-91-204, a case approving a territorial agreement. ...
>
> The Commission determines that the so-called 'case-by-case' exception as provided in the agreement does not specifically violate terms of the territorial agreement statute. ... The Commission determines that the 'case-by-case' exception contemplated by

[1] Re Union Electric Co. and Cuivre River Electric Cooperative, Inc., Case No. EO-93-166, Report and Order, 2 Mo.P.S.C.3d 110, 114 (1993).

> the parties to the agreement does not violate the dictates of the statute in that a 'territorial boundary' is not being amended when a 'case-by-case' exception is made." *Id.* at 117.

The Commission further stated that "[a]s a caveat for future territorial agreements, however, the

> Commission would prefer the 'addendum procedure' as set out in In Re: Missouri Public Service Company and Platte-Clay Electric Cooperative, Case No. EO-92-155, and described herein. Such procedure allows for Staff consideration of any alteration to the territorial agreement without any onerous burdens placed on the electric service providers. The Commission to this point has approved two methods for the 'case-by-case' exception and herein states its preference for the 'addendum procedure'." *Id.* at 118.

7. In this proceeding, the 'addendum procedure' is the procedure in the Territorial Agreement between Howell-Oregon and the City of Thayer that has been approved by the Commission pursuant to *its Report and Order*, and it is the procedure that has been followed. Howell-Oregon filed the Notice of Addendum pursuant to the terms of the Territorial Agreement; it does not change or amend the terms of the Territorial Agreement. Paragraph 8 of the Territorial Agreement provides for "the City and Cooperative to agree in writing on a case-by-case basis to allow any structure to receive service from one party even though the structure is located in the territory of the other party." Upon filing of the Notice of such an agreement in the form of an addendum, the Staff has the right to recommend suspension of the operation of any such addendum if it considers the addendum to not be in the public interest. This procedure provides an opportunity for Commission review, and it provides for either 'implicit' Commission approval if the Commission or its staff find the addendum to be in the public interest and do not recommend suspension, or 'explicit' Commission approval if there is a recommended suspension of the Addendum.

8. Under 4 CSR 240-2.060(1) and 4 CSR 240-3.130, parties are required to file an Application for commission approval of a territorial agreement which must be verified under oath and filed with the initial filing fee ($500.00) set forth in 4 CSR 240-3.135. Section 4 CSR

240-3.135(4) waives the $500.00 filing fee for commission review of proposed amendments to an existing territorial agreement. However, the parties already have an approved territorial agreement. They do not seek to amend their current territorial agreement or to create a new territorial agreement. As discussed above, Howell-Oregon and the City of Thayer are simply complying with the terms of their existing Territorial Agreement which were approved pursuant to Commission Order along with the Stipulation that provides for Staff oversight. Because this is not a new Territorial Agreement or an amendment to the terms of an existing Territorial Agreement, compliance with the above regulations is not required. As stated, this does not mean there are not existing safeguards to ensure an addendum is in the public interest. Staff already has the opportunity to review and recommend suspension of the addendum pursuant to the Stipulation approved by the Commission.

Addendum Procedure is Consistent with Commission Precedent

9. As stated above, Commission has stated that with respect to case-by-case provisions in Territorial Agreements, the Commission prefers the 'addendum' procedure.[2] The Commission recognized that two separate procedures had been used in Territorial Agreements: the 'case-by-case' procedure and the 'addendum' procedure. Under the case-by-case procedure, the parties simply reach an agreement between themselves and do not file anything with the Commission. This is the procedure the Commission voiced reservations about in the *Re Union Electric Co. and Cuivre River Electric Cooperative, Inc.*, Case No. EO-93-166. The 'addendum' procedure requires the parties to the Territorial Agreement to file notice of any

[2] Re Union Electric Co. and Cuivre River Electric Cooperative, Inc., Case No. EO-93-166, *Report and Order*, 2 Mo.P.S.C.3d 110, 114 (1993) ("The Commission would prefer the 'addendum procedure' as set out in In Re: Missouri Public Service Company and Platte-Clay Electric Cooperative, Case No. EO-92-155, and described herein.")

addendums with the Commission. This is the procedure that is contained in the Territorial Agreement between Howell-Oregon and the City of Thayer, and which has been followed by these parties.

10. In the Order Approving Addendum to Territorial Agreement decided on August 18, 1993 in UtiliCorp United, Inc. and Platte-Clay Electric Cooperative, Case No. EO-92-155, the Commission acknowledged that it approved an amendment to the Territorial Agreement in 1992 that changed the terms of the agreement to specify the Addendum procedure to be followed if the Company and Cooperative agreed to allow any structure to receive service from one provider even though the structure is located in the territory of the other provider. The Amendment to the Territorial Agreement specified that the Addendum would be filed with Staff and the OPC, and if neither Staff or the OPC filed a pleading objecting to the Addendum within 60 days, the addendum shall be deemed approved by the Commission. In 1993, the Parties filed an Addendum, and the Commission found that, pursuant to the Amendment to the Agreement, the Addendum was approved as all of the requirements in the Agreement had been satisfied. Thus, the Commission recognized that (1) an Amendment to the Agreement is different from an Addendum to the Agreement, and (2) the Addendum to the Agreement had to meet the requirements *of the Agreement.*[3]

[3] The *Order Approving Addendum to Territorial Agreement* in Case No. EO-92-155, Re Missouri Public Service, a division of Utilicorp United, Inc. and Platte-Clay Electric Cooperative, Inc. and the *Report and Order* in Case No. EO-93-166, Re Union Electric Co. and Cuivre River Electric Cooperative, Inc. were both cited by Staff in its Recommendation and Motion for Commission Order Directing Response by Joint Applicants, pp. 5-6. In addition, Staff cited to a series of decisions by the Commission in Case No. EO-95-400, *Re Union Electric Co. and Black River Electric Cooperative, Inc.* This series of Orders cited pertain to Commission approval of the terms of a territorial agreement, not an addendum. Once the terms of the territorial agreement were approved, the Commission, when presented with an Addendum in 1997, approved the addendum determining that it complied with the requirements of the Territorial Agreement and was in the public interest. Re Union Electric Co. and Black River Electric Cooperative, Inc., Case No. EO-95-400, *Order Approving Addendum to Territorial Agreement*, (January 28, 1997).

Addendum provisions are specific to each Territorial Agreement

11. The Staff has indicated that "it has no objection to the proposed change regarding service to the elementary school under construction and to any future structures built on the Thayer R-II School District campus by the Thayer R-II School District."[4] Staff goes on to state that "[w]hat is at issue at the present time is simply the proper procedure by which it should be accomplished." The proper procedure was determined by the Commission when it issued its *Report and Order* approving the Territorial Agreement between Howell-Oregon and the City of Thayer in 1992 and Stipulation pursuant thereto. The Staff recommended approval of the Territorial Agreement and agreed to the terms of the Stipulation. Today, the Staff is not interested in the process the Commission approved for these parties. Instead, Staff has reviewed various case-by-case addendum procedures that have been approved in different Territorial Agreements over the past decade to cull out a 'preferred procedure' under the guise of 'determining the proper procedure' for the parties to follow.[5] In essence, Staff would prefer to

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[4] See Staff's *Motion for Extension of Time to File Briefs*, in this proceeding – In the Matter of the para. 6 (Aug. 25, 2003)

[5] Staff cited a series of Orders by the Commission in response to an application of approval of a territorial agreement filed by Union Electric Company and Black River Electric Cooperative. This series of Orders cited pertain to Commission approval of the terms of a territorial agreement, not an addendum. The Commission took issue with the Case-by-Case Addendum procedure of the territorial agreement because it contained language that would "prohibit the Commission from disallowing expenditures associated with the provision of temporary service [in any subsequent rate case]." Re Union Electric Co. and Black River Electric Cooperative, Inc., Case No. EO-95-400, *Report and Order*, 4 Mo.P.S.C.3d 66, 70 (1995).

Upon rehearing, the Commission stated that it "may not be bound to the language of the addendum to the extent that it purports to limit the Commission's discretion. .... Although the bulk of the language in Exhibit 10 has been approved in other territorial agreements, the Commission is no longer convinced that such language is harmless. Parties who might otherwise pursue valid challenges to an amendment or addendum could forego their legal rights on the belief that the addendum procedure precludes all objections not made within 45 days of the filing of an Addendum." Re Union Electric Co. and Black River Electric Cooperative, Inc., Case No. EO-95-400, *Report and Order on Rehearing*, 4 Mo.P.S.C.3d 77, 83 (1996).

In addressing this concern, the Commission suggested the following language:

> "If the Staff [or] Office of the Public Counsel do not submit a pleading objecting to the Addendum within forty-five (45) days of the filing thereof, the Addendum shall be deemed approved by the aforesaid parties." *Id.*

The Commission stated that "on condition that paragraph 7 of the Territorial Agreement be reformed as described above, the case-by-case addendum would not be detrimental to the public interest." *Id.* The Commission also noted that the case-by-case provision of the territorial agreement provided that "[t]he party wishing the special

impose terms of territorial agreements to which neither Howell-Oregon or the City of Thayer were a party on these two parties.

12. Commission Orders pertaining to Territorial Agreements do not become irrelevant with the passage of time. Howell-Oregon and the City of Thayer must still follow the terms of their Territorial Agreement as approved by Commission Order. It is unlawful to impose terms of agreements to which these parties have not been made party upon these parties. [6] Even if current addendum procedures could be imposed on these parties, the process of notification and 45 days of Staff consideration contemplated by the Commission in the *Black River* case have been met in this case.[7] Staff has clearly indicated that it is not opposed to the substance of the addendum. Staff has not found that service to the new elementary school and any other structures of the Thayer R-II School District by Howell-Oregon pursuant to the Addendum is not in the public interest. Staff's concern with the Addendum procedure is misplaced.

13. When the Commission has expressed a preference to revise the addendum process, it has either not approved an addendum provision while in the process of considering a territorial agreement, or has made it clear that any proposed change is for future Territorial

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arrangement would have to file appropriate documentation (called an 'Addendum') with the Commission and the arrangement would be subject to Commission approval." *Id.* at 81. Finally, in its Order Finalizing Approval of Territorial Agreement, Granting Certificate of Convenience and Necessity, and Approving Tariffs, (Re Union Electric Co. and Black River Electric Cooperative, Inc., Case No. EO-95-400, 5 Mo.P.S.C.3d 43, 44-45 (1996)) the Commission stated "the language attempting to limit the Commission's ratemaking discretion and attempting to bind the Commission with respect to the addendum procedure has been deleted from paragraph 7 of the Territorial Agreement, as required by the Commission's order" and approved the territorial agreement.

Once the terms of the territorial agreement were approved, the Commission, when presented with an Addendum in 1997, approved the addendum determining that it complied with the requirements of the Territorial Agreement and was in the public interest. Re Union Electric Co. and Black River Electric Cooperative, Inc., Case No. EO-95-400, *Order Approving Addendum to Territorial Agreement*, (January 28, 1997).

[6] *Wallace et al. v. Rahm*, 963 S.W.2d 419, 422 (Mo.App.W.D. 1998).

[7] As noted in Howell-Oregon's Notice of Addendum filed on July 30, 2003, actual notice was provided on May 23, 2003 in Case No. EO-2003-0518, a proceeding with regard to the Joint Application of Howell-Oregon and the City of Thayer for a change of supplier for the Thayer High School made at the request of the Thayer School District.

Agreements.[8] In the *Black River* proceeding, the Commission properly considered the terms of the Territorial Agreement and rejected the Agreement until a case-by-case addendum provision was revised. The Commission found that an addendum procedure that provided notice and an opportunity for Staff or Office of the Public Counsel to submit a pleading objecting to the Addendum within forty-five (45) days of the filing or the Addendum shall be deemed approved was in the public interest. Once the Territorial Agreement was approved by the Commission, the parties to that agreement became bound by the Commission Order approving the Agreement and the terms contained therein. The Black River proceeding reflects how Addendum procedures approved in various Territorial Agreements have evolved to some extent over the past decade. The counsel representing Howell-Oregon in this proceeding has represented many electric cooperatives over the past decade and can affirmatively state that the language for case-by-case addendum procedures developed in 1996 has been used in every Territorial Agreement filed by this firm on behalf of electric cooperatives since that time.

Change of a Commission-Approved Addendum procedure

The Staff, with Commission approval, has two options for amending a Commission-approved addendum process contained within a Territorial Agreement. The Staff may issue a complaint case if it believes the parties are not in compliance with the terms of the Territorial Agreement or that the terms are unlawful. This process for changing a specific addendum in a specific Territorial Agreement and only affect the parties to that case. The other option is to promulgate a rule on the addendum process that will affect all utilities with territorial agreements and govern the manner in which addenda are to be processed from the effective date of the rule

[8] See Re Union Electric Co. and Black River Electric Cooperative, Inc., Case No. EO-95-400, *Report and Order on Rehearing*, 4 Mo.P.S.C.3d 77 (1996), and Re Union Electric Co. and Cuivre River Electric Cooperative, Inc. , Case No. EO-93-166, Report and Order, 2 Mo.P.S.C.3d 110, 114 (1993).

forward. Staff has not exercised either of these two lawful options, nor has Staff requested the Addendum to be suspended for not being in the public interest.

Howell-Oregon and the City of Thayer respectfully request the Commission deem the Addendum to be approved as being in the public interest and conclude this matter. If the Commission or Staff would like the addendum process revised, then Howell-Oregon and the City of Thayer would respectfully request that a separate proceeding, either a contested case or rulemaking, be initiated. The addendum procedure is specific to each agreement. The parties to each Territorial Agreement are bound by the respective terms of their own agreements. The parties to this Territorial Agreement have relied on the Commission's 1992 Order approving their Territorial Agreement, and have lawfully followed the addendum procedure contained in that agreement.

Respectfully submitted,

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ATTORNEYS FOR HOWELL-OREGON
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served on all Parties of Record, via first-class U.S. Mail, postage prepaid, on this 5th day of September, 2003.

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