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July 13, 1999

FILED

JUL 13 1999

Missouri Public
Service Commission

Mr. Dale Hardy Roberts
Executive Secretary
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

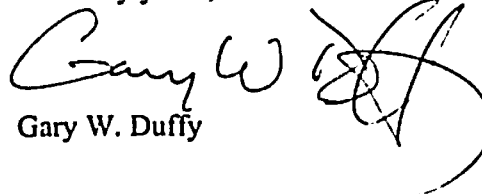
**RE: Case No. EO-99-599
Territorial Agreement between Ozark Border and AmerenUE**

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding on behalf of the City of Poplar Bluff, Missouri, please find an original and fourteen copies of its Application to Intervene, Objection to Portions of Proposed Territorial Agreement, And Request for Show Cause Order.

If you have any questions, please give me a call.

Sincerely yours,


Gary W. Duffy

Enclosures
cc w/encl:

William B. Bobnar, Esq.
Mark Kennedy, Esq.
Office of Public Counsel
Doug Bagby

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

In the Matter of the Application of Union Electric)
Company d/b/a AmerenUE and Ozark Border)
Electric Cooperative for Approval of a Written)
Territorial Agreement Designating the Boundaries)
of Each Electric Service Supplier within Portions)
of Bollinger, Butler, Carter, Dunklin, Iron,)
Madison, New Madrid, Reynolds, Ripley, Stoddard)
and Wayne Counties, Authorizing the Sale,)
Transfer and Assignment of Certain Electric)
Distribution Facilities, Easements and Other Rights,)
Generally Constituting the Applicants' Electric)
Utility Business Associated with its Customers)
Transferred Pursuant to the Territorial Agreement.)

FILED

JUL 13 1999

Missouri Public
Service Commission

Case No. EO-99-599

**APPLICATION TO INTERVENE,
OBJECTION TO PORTIONS OF PROPOSED TERRITORIAL AGREEMENT,
AND REQUEST FOR SHOW CAUSE ORDER**

Comes now The City of Poplar Bluff, Missouri, ("the City" or "Poplar Bluff") by and through its Municipal Utilities, by and through its counsel, pursuant to 4 CSR 240-2.075, and the "Order and Notice of Application" issued by the Commission on June 24, 1999, and for its application to intervene, objection to portions of the proposed territorial agreement, and request for Show Cause order, respectfully states as follows:

1. On June 24, 1999, the Commission issued an "Order and Notice" in this proceeding which described a "Territorial and Exchange Agreement" ("Territorial Agreement") entered into between Ozark Border Electric Cooperative and Union Electric Company d/b/a AmerenUE. It provided for notice to be given to electric suppliers in the area covered by the territorial agreement and others. It set an intervention deadline of July 14, 1999. The Municipal Utilities system owned and operated by the City of Poplar Bluff, Missouri received a copy of

such Order and Notice although it did not contain a copy of the Territorial Agreement.

2. The City has since obtained a copy of the proposed Territorial Agreement and from its review, believes there are portions of the agreement that are unlawful, beyond the jurisdiction of the Commission, not in the public interest, and which will adversely affect the interests of the City of Poplar Bluff as a municipally-owned electric utility. To stop these unlawful and inappropriate actions, which appear to be perpetrated solely by Ozark Border Electric Cooperative, the City seeks intervention in this proceeding to bring these matters to the attention of the Commission and to have them removed from any proposed Territorial Agreement before it is approved by the Commission.

3. The City is a political subdivision of the State of Missouri. The City provides electric service through its municipally-owned and operated "Municipal Utilities." The principal office and place of business of Municipal Utilities is 101 Oak Street, P.O. Box 1268, Poplar Bluff, Missouri 63902.

4. All pleadings, correspondence, communications, notices, and orders in regard to this proceeding should be addressed to the following:

Gary W. Duffy, attorney at law
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Telephone: 573 635-7166
Facsimile: 573 635-3847

Doug Bagby, General Manager
Municipal Utilities
101 Oak Street
P.O. Box 1268
Poplar Bluff, Missouri 63902
Telephone: 573 686-8003
Facsimile: 573 686-8003

5. The City has an interest in this proceeding which is different from that of the general public. The City believes that portions of the proposed Territorial Agreement have been purposely worded by Ozark Border Electric Cooperative ("Ozark Border") to adversely affect the interests of the City and its Municipal Utilities.

6. The Commission's rules provide for intervention on a showing that (A) the applicant for intervention has an interest in the proceeding which is different from that of the general public; (B) that the applicant is a municipality or other political subdivision; or (C) granting intervention would serve the public interest. Only one of the above is required to be demonstrated for intervention. The City respectfully submits that it meets all three tests in this instance and that its intervention in this proceeding will serve the public interest.

7. For purposes of 4 CSR 240-2.075(2), the City states that it opposes the relief sought by Ozark Border in the Territorial Agreement regarding the provision of electric service by Ozark Border in Butler County. If all of the objectionable provisions are ultimately removed, the City does not oppose the Commission approving the Territorial Agreement. The City understands the law to be, however, that the Commission only has the authority to either approve or disapprove a territorial agreement. See, §394.312.4 RSMo. It does not have the authority to condition its approval on changes.

8. The City does not oppose territorial agreements in general, or between electric suppliers who do not attempt to adversely affect the interests of non-parties. Indeed, the City and Union Electric Company entered into such a territorial agreement in 1993 which the Commission approved. *In Re Joint Application of Union Electric Company and the City of Poplar Bluff*, 2 MoPSC 3rd 470 (Case No. EM-94-90, Dec. 3, 1993). That agreement specifically provided that it did not affect the interests of non-parties to the agreement. Nevertheless, Ozark Border made several unsuccessful attempts to disrupt or interfere with that agreement, filing two separate

complaints with the Commission which were ultimately rejected. See, *Ozark Border Electric Cooperative v. City of Poplar Bluff and Union Electric Company*, 5 MoPSC 3rd 1 (Case No. EC-96-269, May 1, 1996), which refers to an earlier dismissed complaint, Case No. EC-95-198. The Commission's actions in dismissing the complaints were ultimately upheld by the Missouri Court of Appeals. See, *State ex rel. Ozark Border Electric Cooperative v. Public Service Commission*, 924 S.W.2d 597 (Mo.App.W.D. 1996).

8. While the City has not had sufficient time to determine whether it has access to all of the documents which may contain objectionable provisions, it has preliminarily identified several in the documents it has seen. It is making a request for a complete copy of the filing. The City will briefly address the provisions it has identified in order to provide the Commission with an explanation of the objectionable provisions. This brief listing shall not be construed to be a complete listing or to preclude the City from identifying additional objectionable provisions later in the course of this proceeding.

A. Trying To Foreclose Poplar Bluff from Its Rights Under §386.800 RSMo

It is apparent to the City that Ozark Border has included language in the Territorial Agreement which, if approved by the Commission, would be used by Ozark Border to block future annexations by the City, and the concomitant right of the City to seek to exclusively serve those annexed areas under an order of the Commission pursuant to §386.800 RSMo. In simple terms, if this Territorial Agreement is approved by the Commission, and the City later annexes land in Butler County, Ozark Border will undoubtedly wave the Commission's order around, saying that it would be a waste of time for the City to seek "an order assigning exclusive service territories within the annexed area" under §386.800.6 RSMo because the Commission has already declared Ozark Border to be the "exclusive service provider" in Butler County under this

Territorial Agreement.

Section 2.1 of "Article 2. Exclusive Right to Serve" in the proposed Territorial Agreement provides: "After the Effective Date, each party shall have the exclusive right to furnish electric service to all New Structures located within its respective exclusive service area described in Articles 3 and 4 of this Agreement" "Article 3. Exclusive Service Area of Cooperative" says that "The exclusive service area of Cooperative under this Agreement shall be all of Butler County (Figure 3), Carter County (Figure 4) Cooperative may serve within municipalities that are located in Cooperative's exclusive service area, pursuant to this Agreement."

The Commission should note that this language purports to establish all of Butler County, in which the City is located, as the "*exclusive service area*" of Ozark Border. Therefore, the Territorial Agreement, on its face, purports to authorize Ozark Border to serve any "New Structures" inside Butler County, which would include any new structures inside the City of Poplar Bluff. Since the law of this state (§394.080 RSMo) prohibits a rural electric cooperative such as Ozark Border from serving in non-rural areas such as that within the boundaries of the City of Poplar Bluff, this also appears to be an attempt by Ozark Border to obtain governmental sanction through the guise of a territorial agreement to operate *inside* the City of Poplar Bluff in violation of the City's rights to determine who it may franchise to provide electric service inside its boundaries.

There is no language in the territorial agreement statute, § 394.312 RSMo, which compels Ozark Border to utilize the phrase "exclusive service territory" in the manner it has in the proposed Territorial Agreement. However, "exclusive service territories" is an operative term in §386.800.6 RSMo where the General Assembly has declared the public interest to be that a municipality be allowed to establish exclusive service

territories in newly annexed areas. Because there is no language in the proposed Territorial Agreement which the City can locate which restricts the "exclusive service territories" set out in the agreement to the notion that they are *only exclusive as between Ozark Border and Union Electric Company*, the City is forced to conclude that it is Ozark Border's intent to utilize the Commission as an unwitting accomplice in this maneuver.

B. Dividing Up Municipal Utilities When It Is Not Even For Sale

In section 5.1 of the Territorial Agreement, Ozark Border boldly states that "The exclusive service area of Cooperative, as defined in Article 3, includes the city of Poplar Bluff, which operates and maintains municipally-owned electric facilities.

Notwithstanding this Agreement, should Poplar Bluff cease to operate and maintain its municipally-owned electric facilities and sell such facilities to either party, either party may serve within the incorporated boundaries of Poplar Bluff, as it exists on the date municipality and such party agree on a sale of Poplar Bluff's facilities to such party ("Sale Date"), pursuant to the following terms and conditions: ... "

This is not some simple territorial agreement where two parties have agreed to divide up territory among themselves without affecting the rights of third parties. This is the contractual equivalent of the buzzards circling overhead and mentally dividing up the carcass before the cow even feels sick.

Municipal Utilities is not for sale to anyone, much less Union Electric Company or Ozark Border. The City strenuously objects to the Commission even considering a Territorial Agreement, which purports to be "perpetual" on its face, attempting to carve up Municipal Utilities when Municipal Utilities is not even a party to the agreement. There is no justifiable reason why a Territorial Agreement between Ozark Border and

Union Electric Company even needs to discuss future unlikely events involving non-party electric suppliers. Indeed, the territorial agreement statute provides that "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" § 394.312.5 RSMo. That is not only a statement implying that territorial agreements can only lawfully involve the parties; it is also an admonition to the Commission that it shall not approve an agreement which purports to affect or diminish the rights of any supplier not a party to the agreement. From what the City can observe initially, Ozark Border has loaded this Territorial Agreement with provisions contrary to that statutory provision which Ozark Border will likely use in an attempt to defeat the City's rights under § 386.800 RSMo and statutory provisions which allow the City to determine who it will franchise as electric suppliers within its boundaries. The Commission should realize that there is no other *bona fide* reason for Ozark Border to have these provisions in the Territorial Agreement.

Motion for Show Cause Order

9. It should be apparent that Ozark Border has included provisions in this perpetual Territorial Agreement that it intends to use to disadvantage Municipal Utilities. It should also be apparent that those provisions are not essential to an agreement between two suppliers purporting to divide territory or customers, or both, between themselves in a logical and rational fashion. The Commission should be wary of the intentions of Ozark Border and should, prior to entertaining the approval of this Territorial Agreement, require Ozark Border to show cause, in a pleading filed with the Commission, why these provisions are essential to this Agreement. Ozark Border should be required to make this showing to the Commission prior to any evidentiary hearing in this case.

Other Procedural Matters

10. The City is aware that the Commission has scheduled this matter for hearing on August 23, 1999. It is also aware that Ozark Border and Union Electric have been ordered to submit a procedural schedule on or before July 16, 1999. They are apparently not required by the terms of the order to consult with the City before submitting such a schedule. The City believes that, in addition to requiring Ozark Border to show cause as explained above, the Commission should require the filing of prepared direct testimony by Ozark Border to address these objections by no later than July 28, 1999. The Commission should then establish a filing date for prepared rebuttal testimony by the City (and any other party such as the Staff wishing to file rebuttal) by no later than August 12, 1999, in order to accommodate a hearing on August 23. Having said that, however, the City would not oppose an extension in the procedural schedule, which the Commission has the authority to order for good cause, if the Commission wishes to afford more time for prepared testimony.

WHEREFORE, having stated its grounds for seeking intervention, the City of Poplar Bluff requests

- a) an order from the Commission granting it intervention in this proceeding;
- b) that the Commission reject the Territorial Agreement so long as it contains the referenced or similar objectionable provisions; and
- c) requests that the Commission order Ozark Border to show cause why such provisions are essential to this Territorial Agreement in the first place.

Respectfully submitted,



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ATTORNEYS FOR THE CITY OF POPLAR
BLUFF, MISSOURI

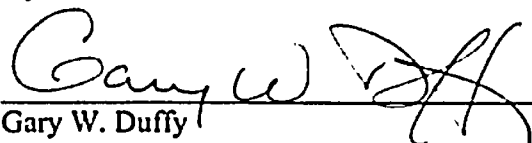
MBE #24905

MBE #41647

VERIFICATION

State of Missouri)
)ss
County of Cole)

Gary W. Duffy, being first duly sworn, states upon his oath that he has read the foregoing document and the statements contained therein are true and correct to the best of his knowledge, information and belief and the above-indicated attorneys are authorized to file this document on behalf of the City of Poplar Bluff, Missouri.



Gary W. Duffy

Subscribed and sworn to before me this 13th day of July, 1999.

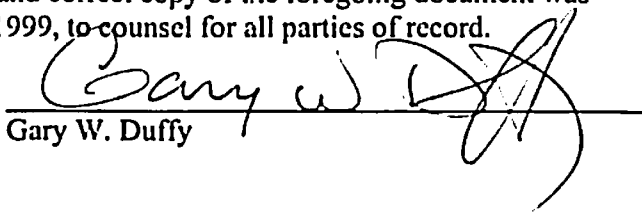


Notary Public

ROBBIN HENLEY GRIFFITH
A Notary Public of
Miller County, Missouri
My Commission Expires 12/28/2001

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was either mailed or hand-delivered on July 13, 1999, to counsel for all parties of record.



Gary W. Duffy