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

PRE-HEARING LEGAL BRIEF
SUBMITTED BY OZARK ELECTRIC COOPERATIVE

This brief of one issue before the Commission is being submitted in advance of hearing for the benefit of the parties and the Commission.

Issue:

Does lack of a municipal franchise ordinance impede Ozark Electric Cooperative service within the incorporated limits of the City of Republic pursuant to an approved territorial agreement?

Answer:

No.

Discussion:

There is potential misunderstanding in this proceeding about the substance and effect of utility franchises. This has been visited judicially, with issuance of a very clear statement of law: "… A franchise only confers the privilege the sovereign can grant such as the right to use the public ways in a manner not available to the ordinary citizen." State ex rel. Union Electric Company v. Public Service Commission of Missouri, 770 S.W.2d 283, 286 (Mo. App. 1989).

A municipal franchise then, according to the Court, represents "local permission" (id. 285) for use of the public ways that is granted under delegated police power of the sovereign. The State of Missouri, as sovereign over the public rights of way, allows a municipality to share its police power, not to usurp it, or to displace it, and to exercise that power consistent with the dictates of the sovereign.

The Court of Appeals affirmed that in this delegation process, the granting municipal authority does not gain a right to dictate the level of utility business activity, to any extent greater than the State itself would be able to do. Further, it may not purport to grant an exclusive franchise because that is contrary to the Missouri Constitution's bar on special privileges.

Historically, a municipal or county franchise has provided the first level of approval for regulated utility operations. The showing of franchise authority was a condition precedent for consideration of grant of a certificate of public convenience and necessity from this Commission. The certificate authorized the regulated utility to exercise its franchise, that is, the right to place poles and equip on, over, and under the public rights of way.

Confusion arises when the notion of franchise authority is mistakenly mixed with the statutory powers of a corporation and is compounded by failure to distinguish between types of corporations.

The powers of an electric corporation are derived in Chapter 393 RSMo. Section 393.010 grants corporate power to sell electricity and to build a distribution system, and to use the streets and public ways of a city or town with consent of the municipal authority. So the franchise there represents municipal consent to exercise the power, and in turn the power and the franchise together are the basis for a Commission certificate.

The powers of an electric cooperative are enumerated in Section 394.080. A cooperative may distribute and sell electric energy in rural areas, defined to mean any

area not within the boundaries of any city or town having a population exceeding 1500 inhabitants (Section 394.020(3).) It has been concurrently given franchise authority to construct electric distribution lines along, under and across all public roads, streets and highways in this state, subject only to the same types of requirements that an authority with jurisdiction might impose on an electric corporation. (Section 394.080.1(10).) That would include providing for public safety, repairing ground damage, and complying with notice requirements, etc.

This rural area service limitation, going back to the first days of the Rural Electrification Act of 1939, served to keep cooperatives focused on using their resources, backed by low interest federal loans, to serve the populations that were bypassed by investor owned utilities and the towns and villages that were without sufficient population to achieve the economies of scale that are critical to reliable service and reasonable rates. It was a restriction on competition and nothing more. There is no inherent or implied difference in the electric service provided to customers.

In 1989, the Missouri Legislature in House Bill 813 changed the law to allow rural electric cooperatives to lawfully add services in towns in which a cooperative was the "predominant supplier" prior to the town becoming non-rural by its population growth (the Lake Saint Louis situation) and to lawfully serve new customers in other non-rural areas by virtue of an approved territorial agreement. The Legislature showed that as a rule restricting competition, the non-rural service limitation was subject to waiver (a) due to circumstances; or (b) pursuant to agreements given approval by the State's administrative utility experts.

Over the years, our courts have also fleshed out the impact of these powers to establish that:

a. A cooperative is not forced to sell its system that becomes annexed into a city or town. Missouri Public Service Company v. Platte Clay Electric Cooperative, 407 S.W.2d 883 (Mo. 1966).

b. The rural area determination is based on an official decennial census. Union Electric Company v. Cuivre River Electric Cooperative, 571 S.W.2d 790 (Mo. App. 1978).

c. The statutory franchise overrides the necessity of a local franchise. Missouri Utility Company v. Scott-New Madrid-Mississippi Electric Cooperative, 475 S.W.2d 25 (Mo. 1972).

It is the latter case, Scott-New Madrid-Mississippi, that fully discusses and disposes of the issue of municipal franchises for rural electric cooperatives. The lack of a municipal franchise does not curtail cooperative operations in a city, town, or village of less than 1500 population, and the grant of a municipal franchise does not alone remove the impediment from adding new services in a city, town, or village of greater than 1500 population.

The common thread is that these cases all had the effect of further defining the powers of a cooperative, and by so doing, they affect lawful competition between suppliers. As Mr. Beck has noted in his testimony, the law that allows territorial agreements also has the concurrent necessary effect of modifying the powers of a cooperative to permit non-rural service to new customers. (Beck, p. 7, line 14). The lines for lawful competition are essentially re-drawn with the stamp of Commission approval as the arbiter of public interest.

It is important to remember that the territory agreement law that brings us here today, takes the law as it existed when the territorial agreement law was enacted. It does not diminish pre-existing corporate powers, and it enlarges corporate powers only to the extent specifically provided. It does not elevate or increase the significance of franchises, and the law of utility franchises is not changed by the territory agreement law.

The territory agreement statute at Section 394.312 sets out the basic minimum content of a territory agreement. It requires specific designation of boundaries of the service areas subject to the agreement, enumeration of any powers that a city grants to a

cooperative inside the city, and any statement of authority that the city shall have beyond its corporate limits. The historical and statutory notes behind this section show that that language was lifted almost verbatim from a prior law that was barely disguised special legislation that could only affect Boone Electric Cooperative and the City of Columbia. Where, as in this case, a municipal system without the inherent disqualification from extra-municipal service is not a party, the statutory minimum content is reduced to the first named item, that being a specific designation of the boundaries of the service area subject to the agreement.

The only service area contemplated in this proceeding is the Lakes at Shuyler Ridge subdivision. All parties acknowledge that this subdivision is not within the present boundaries of the City of Republic. At this moment, the timing of any future annexation can only be speculative, and therefore has no part in the Commission's decision.

To get down to a basic concern for municipalities, one might ask about franchise fees chargeable for customers served by the Cooperative. Franchise fees are a tax that must be supported by a lawful ordinance. It is common but not necessary that municipalities will use the passage of a franchise ordinance as the vehicle for creating a revenue stream by way of a franchise tax. Public records show that the City of Republic did not go that route.

Beck Schedule 1 is a copy of certain City of Republic records reflecting multiple readings, consideration, and passage of a franchise ordinance in favor of The Empire District Electric Company. That Schedule more accurately reflects municipal action to renew a franchise previously granted in 1976 (Ordinance No. 4949) that did not involve a franchise tax. The City began to tax Empire's sales of electricity by virtue of a separate License and Occupation Agreement enacted through Ordinance No. 84-1004 in January, 1984. The City may make that tax applicable to Ozark Electric simply by enacting an amending ordinance that changes the narrow internal definition of companies that are within the scope of the tax ordinance. (The present wording describes only The Empire District by the definition employed.) We (Ozark) have discussed this possibility with the

City Attorney in the context that it allows the City to be financially indifferent to the identity of the provider of electric service in annexed areas.

Mr. Beck's testimony infers, without arguing directly, that a municipal franchise granted by the City of Republic in favor of the Cooperative is a missing piece of evidence that bears critical importance to disposition of this case (Beck p. 7-8). We suggest that this is a false issue tossed into this case without the benefit of proper legal analysis. The Scott-New Madrid-Mississippi case clearly established that the Cooperative does not require two levels of franchise authority to use the public ways. Mr. Beck's suggestion is a mere glancing reiteration of the dissenting position that was rejected in that case, and does not reflect the controlling law of the case. A municipal franchise here could only stand as a signal of city approval of the Territorial Agreement, if such approval is required. It could not affect the powers of the Cooperative.

If municipal approval is in fact required, there are undoubtedly countless ways to show it, as the City of Republic has done. A true franchise granted by the City of Republic could not build upon or take away from the franchise rights already granted to the Cooperative by the Legislature. Its absence does not impact the City's ability to tax the business of electric supply. Its presence does not fill any void in City jurisdiction to police and control damages to its public rights-of-way. Further, its consideration in this docket is premature to any rights not yet exercised by the City to annex this development.

Ratification of Mr. Beck's soft inference would, however, have the immediate consequence of delaying approval of such agreements and adding unnecessary expense not intended by the Legislature. This is because initial franchises granted by a municipality must be subject to voter approval in a regular or special election. (Section 88.251 RSMo.) Mr. Beck acknowledges that "The City had its own witness in the previous cases and it appears to be supportive of the current case. (Beck p. 13, lines 19-20). On this admission there is no reason or cause for the Commission to add to the law a new condition for the Commission's administrative approval of territory agreements, one

that was not deemed necessary by the Legislature acting with its full presumptive awareness of the state of the law and judicial interpretation of the law.

In conclusion, we urge agreement with the proposition that Ozark Electric Cooperative is fully vested with statutory powers and franchise authority to carry out the intent of this territory agreement regardless of subsequent annexation of the development. It has statutory franchise authority that allows the use of the public ways, and the Territory Agreement negates the curtailment of additional operations to serve new customers after annexation into a non-rural area. It is the territorial agreement, and not the franchise, that changes Ozark's ability to serve new customers in a non-rural annexed area.

Having fully addressed this issue, Ozark Electric Cooperative respectfully requests the Order of this Commission finding that the "territorial agreement in total is not detrimental to the public interest." Section 394.312.4 RSMo.

Respectfully submitted,

ANDERECK, EVANS, MILNE, WIDGER & JOHNSON, L.L.C.

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Certificate of Service

I hereby certify that copies of the foregoing have been transmitted by electronic mail to all counsel of record this 14th day of December 2007.

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