

LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

PROFESSIONAL CORPORATION
312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-3847
E-MAIL: JOHNNYR@BRYDONLAW.COM

DEAN L. COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
DIANA C. FARR
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTONI

October 9, 2003

FILED

OCT 09 2003

**Missouri Public
Service Commission**

Dale H. Roberts
Secretary
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

**RE: Ozark Border Electric Cooperative v. City of Popular Bluff
Case No. EC-2003-0452**

Dear Mr. Roberts:

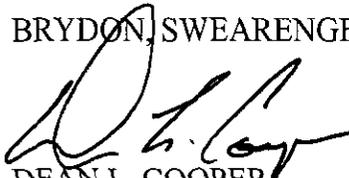
Enclosed for filing in the above-referenced matter are the original and eight (8) copies of the Answer of Respondent City of Popular Bluff to the Complaint of Ozark Border Electric Cooperative. Please file stamp the enclosed extra receipt copy and return to me for my records.

If you have any questions concerning this matter, then please do not hesitate to contact me. Thank you very much for your attention to this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:


DEAN L. COOPER

DLC/jar

Enclosures

cc: Office of the Public Counsel
Office of the General Counsel
Victor S. Scott/Lisa Cole Chase
Mark Kennedy
Doug Bagby

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

FILED
OCT 09 2003

Missouri Public
Service Commission

Ozark Border Electric Cooperative,)
Complainant)
v.)
City of Poplar Bluff,)
Respondent)

Case No. EC-2003-0452

ANSWER OF RESPONDENT CITY OF POPLAR BLUFF

Comes now The City of Poplar Bluff, Missouri ("the City" or "the Respondent"), pursuant to 4 CSR 240-2.070, and for its Answer to the Complaint of Ozark Border Electric Cooperative, states as follows:

1. The City admits the averments contained in paragraphs numbered 1, 2 and 3 of the Complaint.

2. The averments contained in paragraph numbered 4 do not appear to be allegations of fact for which an admission or denial is required, and therefore the City denies the same.

3. The City admits the averments contained in paragraph numbered 5 of the Complaint but adds that while the Missouri Public Service Commission issued its order in Case No. EO-98-143 approving the Territorial Agreement on December 31, 1997, as averred, the order by its terms was not effective until January 13, 1998.

4. With respect to the averments contained in paragraph numbered 6 of the Complaint, the City states that the Territorial Agreement referred to therein speaks for itself and therefore the City denies that the brief summary contained in paragraph

numbered 6 is anything other than a brief summary. As to the copy of the Territorial Agreement stated as being attached to the Complaint, the City denies that it is a full and complete copy of the Territorial Agreement approved by the Missouri Public Service Commission in Case No. EO-98-143 because the copy shown does not contain the map which was attached to the Territorial Agreement. The City admits that the copy of the text of the Territorial Agreement which was submitted with the Complaint, to the extent it is not a complete copy since it is missing the map, is nevertheless an accurate copy.

5. The City admits the averments contained in paragraph numbered 7 of the Complaint.

6. With respect to the averments contained in paragraph numbered 8 of the Complaint, the City admits that Complainant has accurately quoted paragraph 4B of the Territorial Agreement.

7. With respect to the averments contained in paragraph numbered 9 of the Complaint, the City admits that with regard to the 42 properties referred to in paragraph numbered 7, the City failed to provide the written notice to Complainant within 60 days as provided in paragraph 4B of the Territorial Agreement.

8. With respect to the averments contained in paragraph numbered 10 of the Complaint, the City admits that there is a controversy existing between the parties and that the public interest is served by territorial agreements. The City denies the remainder of the averments in paragraph numbered 10.

9. The City admits the averments contained in paragraph numbered 11 of the Complaint.

10. With respect to the averments contained in paragraph numbered 12 of the Complaint, the City admits that Counsel for the Complainant filed a Motion to Dismiss on or about December 10, 2002, and that Counsel for the Complainant also filed a Memorandum which contains the statement alleged to be contained in the Memorandum. The City denies the remainder of the averments in paragraph numbered 12.

11. The City admits the averments contained in paragraph numbered 13 of the Complaint.

12. With respect to the averments contained in paragraph numbered 14 of the Complaint, the City admits that Complainant has correctly stated the content of paragraph 15 of the Territorial Agreement, but denies that paragraph 15 of the Territorial Agreement provides a jurisdictional basis for the Missouri Public Service Commission to consider the legal effect of a notice provision in the Territorial Agreement since the Territorial Agreement is a contract, the Commission is not a court, and therefore the Commission does not have the power to construe contracts.

13. The City denies the averments contained in paragraph numbered 15 of the Complaint.

14. The City denies that the Complainant is entitled to the relief prayed for in the WHEREFORE clause of the Complaint or is entitled to any relief whatsoever in the premises.

15. For further answer and defense, pursuant to 4 CSR 240-2.070(8), the City provides the following additional grounds of defense, both of law and fact:

A. Respondent is a Missouri municipal corporation and Complainant is a

rural electric cooperative. A Territorial Agreement exists between Complainant and Respondent which was approved by the Commission in early 1998. That Territorial Agreement is somewhat unique among other territorial agreements because it provides a method (see Paragraph 4C) whereby the Complainant agreed, *in advance*, upon an annexation within certain designated areas, to sell its facilities to Respondent and transfer customers to Respondent. The sale price in each instance is to be determined by a formula specified in the agreement. The Territorial Agreement (see Paragraph 4B) called for two forms of notice concerning the annexations: notice by publication in a newspaper of general circulation, and written notice to Complainant by the City. Publicly filed documents indicate that the City may have failed to provide the direct written notice in certain instances but also indicate the City contends that Complainant had actual notice of such annexations, or sufficient notice from public events and the reporting thereof to be either aware of or sufficiently on notice of such annexations. Further, Complainant has not been prejudiced by any lack of direct written notice and can claim no actual damages as a result. The City contends that the controversy is one which can only be properly resolved by a circuit court because it involves the legal interpretation of a contract provision – a matter over which the Commission lacks jurisdiction for several reasons, as explained in detail below. Therefore, the City seeks dismissal of the Complaint.

B. The Commission lacks jurisdiction over the subject matter of the Complaint because, in violation of § 386.390 RSMo 2000 and 4 CSR 240-2.070(3) Complainant has not set forth in the Complaint any act or thing done or omitted to be done by the City in violation, or claimed to be in violation, of any provision of law, or of

any rule or order or decision of the Commission, and therefore has not invoked the Commission's complaint jurisdiction. The controversy is over the City's compliance with a contract provision, not a rule or order or decision of the Commission. The Commission's role in approving the Territorial Agreement in early 1998 was to determine if it was "in total not detrimental to the public interest." See § 394.312 RSMo. The context of this approval is also to provide an aspect of "state action" to avoid potential allegations that an agreement between two competitors is an unlawful restraint of trade. Therefore, the Territorial Agreement itself is a contract. The Commission issued an order approving the contract as not being, in total, detrimental to the public interest, and thus performed the function which allowed the contract to take effect. The contract is now in effect. The contract itself is not a "provision of law" or a "rule or order or decision of the Commission." While the Complainant may have alleged a violation of a contract provision, the Complainant has not pled anything to properly invoke the complaint jurisdiction of the Commission under either §386.390 RSMo 2000 or 4 CSR 240-2.070(3).

C. The Commission lacks jurisdiction over the subject matter of the controversy between the parties because the stated controversy is over the **legal effect** of the City's alleged failure to provide the written notice to Complainant required by the Territorial Agreement. As such, the controversy is over the **legal effect of a contractual provision**, and only the courts have such subject matter jurisdiction. The Commission is not a court, and therefore it does not have any power to declare or enforce any principle of law or equity and cannot determine damages or award

pecuniary relief. See, ***American Petroleum Exchange v. Public Service Commission***, 172 S.W.2d 952, transferred 176 S.W.2d 533 (Mo. 1943).

Consequently, the Commission does not have the authority to issue a opinion regarding the legal effect of the alleged failure to provide the type of notice required by the contract. Only a court can do that.

D. Complainant seeks to invoke the Commission's jurisdiction pursuant to the text of paragraph 15 of the Territorial Agreement. This is not appropriate. The Commission lacks subject matter jurisdiction over the Complaint because the current controversy is not over "the interpretation of any portion of this Agreement... ." No one is seeking an *interpretation* from the Commission over what "written notice" or "60 days" means. The controversy concerns the *legal effect* of the City's alleged failure to abide by a particular portion of the agreement and whether actual or sufficient constructive notice was attained. The Complainant apparently regards that notice provision as a critical, linch-pin to the Territorial Agreement instead of a ministerial or administrative provision. Since the Commission is not a court, it has no jurisdiction to determine the legal effect of the failure to abide by a particular provision in a contract, so the Commission's jurisdiction cannot properly be invoked in this instance.

E. The Commission lacks subject matter jurisdiction over the Complaint because, notwithstanding the text of paragraph 15 of the Territorial Agreement which calls for the parties to "jointly seek an ***informal opinion*** of the Public Service Commission to resolve any such issues," the Commission does not now provide and has never provided informal opinions, as the attached correspondence from the

Commission's Chief Judge demonstrates. The Complaint fails to point out that paragraph 15 of the Territorial Agreement also says that:

It is understood by both parties hereto, that from time to time questions may arise regarding specific situations and the impact of this Agreement upon the electrical service to be provided to some particular customer or prospective customer. The parties hereto agree that they shall at all times communicate with one another in the good faith implementation of this Agreement, it being the goal of the parties to work with one another to give a reasonable and practical implementation of the contents of this Agreement in any given situation.

The Commission should give due consideration to the fact that Complainant is apparently seeking to take advantage of an unintentional lapse in procedures by the City in order to further Complainant's own interests by allowing Complainant to escape from the bargain that it previously made.

F. The Commission lacks subject matter jurisdiction over the Complaint pursuant to § 386.250 RSMo. Nothing in that section purports to give the Commission jurisdiction to determine the legal effect of non-compliance with a contract provision.

G. The Commission lacks subject matter jurisdiction over the Complaint pursuant to § 386.800 RSMo, as alleged by Complainant, because that section deals with an application by a municipally owned utility seeking to force the transfer of customers after an annexation and pursuant to the process specifically set out in that section. The jurisdiction of the Commission under that section clearly is invoked only by a municipality filing an application with the Commission pursuant to subsection 6 of §

386.800 RSMo. No such application has been filed in this situation, so no such jurisdiction exists.

H. The Commission lacks subject matter jurisdiction over the Complaint pursuant to § 394.312.6 RSMo, as alleged by Complainant, because, in addition to the deficiencies noted above that the Complaint does not meet the requirements for the filing of a complaint, the Commission and the courts have held that a complaint against an existing territorial agreement must allege a substantial change in circumstances. See, ***State ex rel. Ozark Border Electric Cooperative v. Public Service Commission***, 924 S.W.2d 597 (Mo.App.W.D. 1996), where this Complainant tried to attack another territorial agreement and the Commission declined to hear its complaint then. Complainant has not alleged, and cannot demonstrate, a substantial change in circumstances surrounding the Territorial Agreement.

I. The Complaint fails to set forth facts showing the Complainant is entitled to the relief prayed for or any relief by the Commission whatsoever in the premises, and fails to state a claim upon which relief can be granted against the City. The Complainant seeks an Order of the Commission (Wherefore paragraph a) “directing that the City of Poplar Bluff, Missouri is bound by the 60 day notice requirement... .” This clearly calls for some sort of legal determination of contractual liability, which is beyond the scope of the Commission's jurisdiction. See, ***American Petroleum Exchange***, supra. The Complainant agreed in advance in the Territorial Agreement to make facility sales if and when annexations occurred within the specified area. There is no indication in the Territorial Agreement that Complainant will have the opportunity to

resist any such sale if annexation occurs. Whether the Complainant receives notice within 60 days after the effective date of the annexation, or 90 days after the annexation, or reads about it in the local newspaper prior to the effective date, it does not change the fact that the annexation has occurred and the Complainant has agreed in advance to sell the facilities after such an annexation.

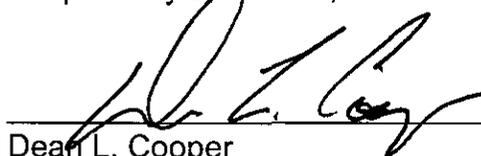
J. The Complaint fails to set forth facts showing the Complainant is entitled the relief prayed for or any relief by the Commission whatsoever in the premises, and fails to state a claim upon which relief can be granted against the City. In particular, the Complainant seeks an Order of the Commission (Wherefore paragraph b) on the grounds that "The Territorial Agreement is terminated because it is no longer in the public interest as it does not establish with certainty the exclusive service areas of Ozark Border Electric Cooperative." Complainant cites no provision of law or the Territorial Agreement which supports such a construction. The text of the Territorial Agreement remains the same as it was on the day it was approved by the Commission after it was agreed to by Complainant. Therefore, whatever language in the agreement dealt with establishing the boundaries (See the legal descriptions that are a part of the agreement) is the same as it was when Complainant signed the document. The nature of the two parties to the agreement remain the same as it was on the day the Territorial Agreement was approved by the Commission. There has been no change in the law or the physical location of the properties subject to the Territorial Agreement. In short, there has been no "substantial change in circumstances" sufficient to invoke the Commission's jurisdiction under § 394.312.6 RSMo to determine if the Territorial Agreement is no longer in the public interest.

K. The Complaint fails to set forth facts showing the Complainant is entitled the relief prayed for or any relief by the Commission whatsoever in the premises, and fails to state a claim upon which relief can be granted against the City. In particular, the Complainant seeks an Order of the Commission (Wherefore paragraph c) on the grounds that “The Territorial Agreement is no longer in the public interest and/or is void as there was an apparent failure of the parties to have a ‘meeting of the minds’ with respect to the 60 day notice provision ... whether said provision was a substantive provision that was to be strictly adhered to, or a procedural provision that need not be adhered to.” This allegation regarding a “meeting of the minds” comes out of textbook contract law rather than anything to do with the Commission’s regulation of electric utilities. It thus seeks to invoke equitable jurisdiction to set aside the contract which, on its face, is clearly not a matter within the jurisdiction of an administrative agency. See, ***American Petroleum Exchange***, supra.

WHEREFORE, Respondent City of Poplar Bluff prays for an order of the

Commission dismissing the Complaint.

Respectfully submitted,



Dean L. Cooper #36592

Gary W. Duffy #24905

BRYDON, SWEARENGEN & ENGLAND P.C.

312 E. Capitol Avenue

P. O. Box 456

Jefferson City, MO 65102

573-635-7166 voice

573-635-3847 facsimile

Email: duffy@brydonlaw.com

Email: dcooper@brydonlaw.com

Attorneys for

City of Poplar Bluff, Missouri

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was either hand delivered or sent by U.S. Mail, postage prepaid, on the 9th day of October, 2003, to:

Victor S. Scott
Lisa Cole Chase
Andereck, Evans, Milne,
Peace & Johnson, LLC
700 East Capitol
P.O. Box 1438
Jefferson City, Missouri 65102

Office of the Public Counsel
Governor Office Building, 6th Floor
Jefferson City, Missouri

Mark Kennedy
Kennedy, Kennedy & Robbins, LC
1165 Cherry Street
P.O. Box 696
Poplar Bluff, MO 63902

Office of the General Counsel
Missouri Public Service Commission
Governor Office Building, 8th Floor
Jefferson City, Missouri

