

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

In the Matter of the Application of Black River)
Electric Cooperative and the City of)
Fredericktown, Missouri, for Approval of a)
Written Territorial Agreement Designating the)
Boundaries of Each Electric Service Supplier)
Within a Portion of Madison County, Missouri.)

File No. EO-2012-0047

STAFF’S RECOMMENDATION TO APPROVE TERRITORIAL AGREEMENT

COMES NOW the Staff of the Missouri Public Service Commission, and for its recommendation that the Commission approve the June 27, 2011, territorial agreement between Black River Electric Cooperative and the City of Fredericktown, Missouri, as amended September 26, 2011, states:

1. Black River and Fredericktown jointly filed their application for Commission approval of their June 27, 2011, retail electric service territorial agreement on August 11, 2011. At Staff’s suggestion, they amended their territorial agreement to clarify that, except to the extent permitted by Section 386.800, RSMo.,¹ their agreement does not authorize Fredericktown to provide retail electric service outside its corporate boundaries. Staff made that suggestion because Black River is agreeing to not provide retail electric service in a parcel of about fifty acres that presently is outside Fredericktown.

2. Subsection 394.312.5, RSMo. Supp. 2011, in part, provides, “The commission may approve the application [for approval of a territorial agreement] if it determines that approval of the territorial agreement in total is not detrimental to the public interest.”

¹ Statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted.

3. In the attached Memorandum, which is labeled Appendix A, Staff recommends the Commission find that, in total, the June 27, 2011, territorial agreement between Black River and Fredericktown, as amended September 26, 2011, is not detrimental to the public interest, and approve it.

4. A primary Staff concern with the agreement is that Black River is agreeing to not provide retail electric service in about fifty acres that presently are outside Fredericktown, and Fredericktown is agreeing to provide retail electric service there.

5. As explained in the following, it is the opinion of the Office of Staff Counsel that the most compelling interpretation of Subsection 386.800.1, RSMo., is that a territorial agreement only allows a city to serve beyond its corporate boundaries if it could have lawfully done so before July 11, 1991. The controlling law is Subsection 386.800.1, RSMo., which took effect with Section 386.800, RSMo., on July 11, 1991.

6. Subsection 386.800.1, RSMo., provides:

386.800. 1. No municipally owned electric utility may provide electric energy at retail to any structure located outside the municipality's corporate boundaries after July 11, 1991, unless:

(1) The structure was lawfully receiving permanent service from the municipally owned electric utility prior to July 11, 1991; or

(2) The service is provided pursuant to an approved territorial agreement under section 394.312;

(3) The service is provided pursuant to lawful municipal annexation and subject to the provisions of this section; or

(4) The structure is located in an area which was previously served by an electrical corporation regulated under chapter 386, and chapter 393, and the electrical corporation's authorized service territory was contiguous to or inclusive of the municipality's previous corporate boundaries, and the electrical corporation's ownership or operating rights within the area were acquired in total

by the municipally owned electrical system prior to July 11, 1991. In the event that a municipally owned electric utility in a city with a population of more than one hundred twenty-five thousand located in a county of the first class not having a charter form of government and not adjacent to any other county of the first class desires to serve customers beyond the authorized service territory in an area which was previously served by an electrical corporation regulated under the provisions of chapter 386, and chapter 393, as provided in this subdivision, the municipally owned utility shall apply to the public service commission for an order assigning nonexclusive service territories. The proposed service area shall be contiguous to the authorized service territory which was previously served by an electrical corporation regulated under the provisions of chapter 386, and chapter 393, as a condition precedent to the granting of the application. The commission shall have one hundred twenty days from the date of application to grant or deny the requested order. The commission may grant the order upon a finding that granting of the applicant's request is not detrimental to the public interest. In granting the applicant's request the commission shall give due regard to territories previously granted to other electric suppliers.

7. The Legislature passed Section 386.800, RSMo., following the Missouri Southern District Court of Appeal's June 21, 1990, opinion in *Associated Electric Cooperative, Inc. v. City of Springfield*, 793 S.W.2d 517, (Mo. App. 1990). In that case the Southern District held that the City of Springfield, governed by a city charter, could lawfully provide retail electric service beyond its corporate boundaries. Thus, Section 386.800, RSMo., limited the City of Springfield's authority to provide retail electric service beyond its corporate boundaries, as well as those of other municipalities.

8. The above-quoted exception, in subpart 2 of subsection 386.800.1, RSMo., may be read to permit a municipality to provide electric service outside of corporate boundaries regardless of whether it could have done so before July 12, 1991. Based on the Commission *Reports and Orders* listed below, it is apparent that in the past the Commission has adopted that interpretation. Although in some of these *Reports and Orders* the Commission expressed

concern with the fact that those outside the city limits who are served by the city do not have direct representation within the city government, there is no indication in these *Reports and Orders* that any party raised any other concerns or suggested a different interpretation of subpart 2 of subsection 386.800.1, RSMo. The *Reports and Orders* are:

- *In the Matter of the Joint Application of Union Electric Company and the City of Sikeston for an Order Authorizing the Sale, Transfer, and Assignment of Certain Electric Distributing Facilities, Easements and Other Rights Generally Constituting Union Electric Company's Electric Utility Business Within and Near the City of Sikeston, Approving a Territorial Agreement, and Authorizing the City of Sikeston to Provide Electrical Service to One Customer Outside Its Municipal Limits*, 2 MoP.S.C. 3d. 187, 190-192, Case No. EM-93-243 (Report and Order, May 25, 1993);
- *In the Matter of the Application of Marshall Municipal Utilities and Central Missouri Electric Cooperative, Inc., for Approval of a Written Territorial Agreement Designating the Boundaries of Each Electric Service Supplier Within Portions of Saline County, Missouri*, 4 MoP.S.C. 3d 358, Case No. EO-96-165 (Report and Order, March 08, 1996);
- *In the Matter of Ralls County Electric Cooperative and the City of Vandalia, Missouri, for Approval of a Written Territorial Agreement Designating the Boundaries of Each Electric Service Supplier in the Counties of Audrain, Pike and Ralls in Missouri*, 4 MoP.S.C. 3d 347, Case No. EO-96-174 (Report and Order, March 8, 1996); and
- *In the Matter of the Application of Farmers' Electric Cooperative and the City of Gallatin, Missouri, for Approval of a Written Territorial Agreement Designating the Boundaries of Each Electric Service Supplier in the County of Daviess in Missouri*, 6 MoP.S.C. 3d 22, Case No. EO-97-181 (Report and Order, February 18, 1997).

9. For several reasons, it is the opinion of the Office of the Staff Counsel the most compelling interpretation of the territorial agreement exception to the prohibition on a city providing retail electric service beyond its corporate limits is that it lifts the restriction Subsection 386.800.1, RSMo., imposes on the city that prevents it from serving new structures outside its corporate boundaries, and it does not give the city a new right. Those reasons follow:

- Territorial agreements are effective only as to the parties to the agreement. Section 394.312.6, RSMo. It is not compelling that an agreement between a city and

one cooperative alone would empower the city to compete with other cooperatives or investor-owned utilities outside the city's corporate boundaries when the city could not have done so absent the territorial agreement.

- Subpart 386.800.1(1), RSMo., allows a city to continue serving a structure outside its corporate boundaries after July 11, 1991, if the city lawfully served the structure before July 11, 1991. This subpart lifts the restriction imposed by Subsection 386.800.1, RSMo., and does not change the law as to cities providing retail electric service beyond their corporate boundaries as it existed before July 11, 1991.
- Subpart 386.800.1(3), RSMo., allows a city to serve structures outside its July 11, 1991, corporate boundaries, if the structure comes within the city's corporate boundaries due to annexation. This exception may be read as lifting the restriction imposed by Subsection 386.800.1, RSMo., since it does not change the law as to cities providing retail electric service beyond their corporate boundaries as it existed before July 11, 1991.
- Subpart 386.800.1(4), RSMo., allows a city to obtain nonexclusive rights to serve beyond its corporate boundaries in certain limited circumstances that are described in that subpart. This subpart does change the limitations on cities serving beyond their corporate boundaries that existed before July 11, 1991, but only in limited circumstances, and it does not make the city the exclusive service provider.

10. Also important to considering whether to approve this territorial agreement is the fact that Black River is not obligated to provide retail electric service to everyone who applies for it. Black River has provided to Staff a copy of its proprietary bylaws which is attached. The bylaws provide that an applicant does not become a member of Black River “unless or until he or it has been accepted for Membership by the Board of Directors or members.”

11. As stated in its Memorandum, Staff understands from discussions with Fredericktown that Fredericktown currently has no plans to provide retail electric service in the about fifty acres it is to serve under the territorial agreement that are beyond its corporate boundaries unless it annexes them. This may alleviate any concerns that Fredericktown might suggest to anyone seeking retail electric service on that fifty acres from the city that by approving this territorial agreement the Commission has authorized Fredericktown to provide that service without first annexing the property.

12. As Staff states in its Memorandum, while Black River's commitment now to not serve a parcel of about fifty acres that lie outside the corporate boundaries of Fredericktown (which is less than five percent of the area exclusive to Fredericktown) is detrimental to the public, that detriment is outweighed by (1) Black River obtaining authority to serve new members in parts of Fredericktown, both within the current corporate boundaries and as they may expand; (2) Black River's existing significant investment in facilities within parts of Fredericktown; (3) the certainty given to Fredericktown where it is to serve; (4) and the certainty given to those wishing new service in and about Fredericktown as to from whom they should seek that service.

13. Neither Black River nor Fredericktown are required to provide annual reports or assessments to the Commission, and they have paid the filing fee required by 4 CSR 240-3.130(3).

WHEREFORE, Staff recommends the Commission determine that, in total, the June 27, 2011 territorial agreement between Black River and Fredericktown, as amended September 26, 2011, is not detrimental to the public interest, and approve the agreement.

Respectfully submitted,

/s/ Nathan Williams

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed; hand-delivered, transmitted by facsimile or emailed to all counsel of record this 4th day of October 2011.

/s/ Nathan Williams