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STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
TRANSCRIPT OF PROCEEDINGS  
Hearing and Oral Argument  
December 7, 2006  
Jefferson City, Missouri  
Volume 1

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 )Case No. EO-2007-0029,  
Boundaries of Exclusive )et al.  
Service Areas for Each )  
within Two Tracts of Land )  
in Greene County and )  
Christian County, Missouri. )

CHERLYN D. VOSS, Presiding,  
REGULATORY LAW JUDGE  
JEFF DAVIS, Chairman,  
CONNIE MURRAY,  
STEVE GAW,  
ROBERT M. CLAYTON III,  
LINWARD "LIN" APPLING,  
Commissioners.

REPORTED BY:

PAMELA FICK, RMR, RPR, CCR #447, CSR  
MIDWEST LITIGATION SERVICES

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APPEARANCES:

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FOR: Office of the Public Counsel  
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FOR: Staff of the Missouri Public  
Service Commission.



1 Widger. I'm with the law firm of Andereck, Evans,  
2 Milne, Peace & Widger. Our address is 1111 South  
3 Glenstone, Springfield, Missouri 65808. I'm  
4 appearing for Ozark Electric.

5 JUDGE VOSS: And Commission Staff?

6 MR. WILLIAMS: Nathan Williams, Deputy  
7 General Counsel, Post Office Box 360, Jefferson City,  
8 Missouri 65102.

9 JUDGE VOSS: And the Office of Public  
10 Counsel?

11 MR. MILLS: Appearing on behalf of the  
12 Office of Public Counsel and the public, my name is  
13 Lewis Mills. My address is Post Office Box 2230,  
14 Jefferson City, Missouri 65102.

15 JUDGE VOSS: All right. We'll now go  
16 off the record until I can get the Commissioners. So  
17 we'll go off.

18 (A RECESS WAS TAKEN.)

19 (EXHIBIT NOS. 1 THROUGH 7 WERE MARKED  
20 FOR IDENTIFICATION.)

21 JUDGE VOSS: I believe we're ready for  
22 opening statements. It's my understanding that the  
23 Office of Public Counsel doesn't have an opening  
24 statement and the parties have agreed to go Empire,  
25 Ozark and Staff.

1                   So Mr. Duffy, are you ready to give your  
2 opening statement?

3                   MR. DUFFY: Yes, ma'am. Good morning.  
4 I'm Gary Duffy representing the Empire District  
5 Electric Company. I'll try to give you a very brief  
6 factual overview of this case because I know there's  
7 a lot of other things going on.

8                   You're here on two consolidated cases:  
9 One's approval of a territorial agreement governing  
10 approximately nine and a half square miles of  
11 territory immediately south of the city limits of the  
12 City of Republic, Missouri. There's also a variance  
13 that's been requested by Empire in order to make this  
14 territorial agreement work.

15                   Very briefly, there was a meeting back  
16 in March with the City of Republic at the invitation  
17 of the city because there were issues about  
18 annexation of a subdivision south of the city limits.  
19 Empire attended, Ozark Electric Cooperative attended,  
20 the developers attended and the city was there.

21                   In brief, what occurred was there was a  
22 lot of controversy about annexation of the city, who  
23 had the right to supply electricity in these areas.  
24 There was a lot of discussion, some threats of  
25 litigation. The city said, "We would like to have

1 you-all work out a territorial agreement." The  
2 parties broke up, we worked out a territorial  
3 agreement.

4                   Part of the territorial agreement,  
5 though, is that Empire needs to match the price  
6 structure that the cooperative gives to developers in  
7 terms of they run so much free service or lines or  
8 they allow so much in terms of street lighting.

9                   As you know, the cooperatives can set  
10 their own terms because they're member-owned. Empire  
11 doesn't have the ability to do that. You set our  
12 tariffs as to how you want us to provide service.  
13 Our terms differ from theirs.

14                   So we said to all of the people at the  
15 meeting, "We will go to the Commission, we will ask  
16 permission of the Commission to match the price  
17 structure of the cooperative in order to have this  
18 one subdivision on the west side be served by Empire,  
19 another subdivision on the east side would be served  
20 by the cooperative."

21                   The parties then kind of drew  
22 territorial agreements that were -- territorial areas  
23 that were logical around those things. All of the  
24 parties seemed to be happy with this proposal, so we  
25 filed these at the Commission and we said, "Here we

1 go, we think this will work, this is a good deal."

2                   The Staff has raised concerns about the  
3 variance. The Staff memorandum I read said, "We  
4 don't have a problem with the territorial agreement.  
5 We just don't like the territorial agreement being  
6 tied to the variance." And we will have a  
7 representative of the city, the Assistant City  
8 Administrator, Mr. Coulter, will be the first witness  
9 a representative of the co-op will be here, and  
10 Empire has two witnesses, one on numbers, one on kind  
11 of policy.

12                   Our position is that when it comes to  
13 variances, you've done this in the past. I can cite  
14 you at least half a dozen cases where there has been  
15 a variance application for meeting unregulated  
16 competition exactly the same as what we have here,  
17 and the Commission has said, "Yes, we grant that  
18 variance." So you have done this before, you can do  
19 this again, is our position.

20                   The Staff has raised a concern about it  
21 being discriminatory. We will cite you to a case at  
22 the Court of Appeals that we think is much more  
23 relevant than the 1926 case the Staff's citing, that  
24 we say the Court of Appeals has said, "You do have  
25 the ability to make your rules with variance

1 procedures in them, everything's fine."

2                   So our position is you've done this  
3 before, you can do it again, no problem. And we  
4 encourage you to ask questions of our witnesses if  
5 you have particular concerns. Thank you.

6                   MR. WIDGER: May it please the  
7 Commission, my name is Rod Widger and I'm here today  
8 representing Ozark Electric Cooperative. I concur  
9 fully with what Mr. Duffy has said. I'd like to just  
10 add a little bit for perspective.

11                   There were two very important laws that  
12 were passed back in the mid 1980's that were very  
13 important to electric utilities and electric  
14 cooperatives. Those were the Anti Flip-Flop Law  
15 which -- and on the co-op statutes it's codified as  
16 394.315, and the Territorial Agreement Law which in  
17 our statute is at 394.312.

18                   Both of these were laws that were  
19 developed with a great lead given by the  
20 Commission. These were very important and they --  
21 they satisfied and addressed the growing conflicts  
22 that we had between regulated and nonregulated  
23 electric suppliers and they worked well.

24                   We've had -- we have had a lot of  
25 territorial agreements presented to this Commission



1 that have been without objection that have come up  
2 here and you-all are generally happy to see that the  
3 utilities are getting along.

4           The area that we're talking about today  
5 is just a gem in southwest Missouri. I've brought  
6 this week's -- a copy of this week's "Springfield  
7 Business Journal" which features the City of Republic  
8 on its front page with the headline that it's  
9 readying for a housing explosion. That -- the area  
10 we're talking about is part of an area where they are  
11 looking for 20 subdivisions with possibly 20,000 new  
12 residents in the next ten years.

13           So it's incumbent on the utilities to  
14 get together and figure out how to prepare to serve  
15 these people in an orderly way which preserves prior  
16 investments and which makes possible good investment  
17 decisions for the future.

18           The Staff opposition to this particular  
19 filing has been scattered, and in the writings it's  
20 been somewhat self-contradictory. It's taken the  
21 position at times that the variances are inherently  
22 unlawful, that they are not even within Commission  
23 discretion.

24           There are writings which yield to the  
25 position that variances are lawful but rarely done,

1 and finally down to a notion that, well, variances  
2 are lawful but only if they are precisely in the same  
3 scope and scale as any previous variances.

4           Well, this is Empire's fight regarding  
5 its variance. Our position is that the main issue  
6 here is whether the Commission should grant a  
7 variance that allows Empire District to meet the  
8 terms and conditions of service offered by its  
9 competitor with such variance to be effective only  
10 within the narrow confines of a 245-acre subdivision  
11 development in order to provide for the bigger issue,  
12 the orderly utility development that this area  
13 desperately needs.

14           We believe the Staff's position is wrong  
15 to oppose the variance on its merits. We believe the  
16 Commission should find that the public benefit is  
17 served by granting the variance and approving the  
18 territorial agreement that we have filed. Thank you.

19           COMMISSIONER APPLING: Hey, Rod? Can I  
20 ask one question, Judge, just for a second?

21           JUDGE VOSS: Sure.

22           COMMISSIONER APPLING: I just wanted my  
23 fellow Commission to know that Rod and I served in  
24 Panama together in 1978 and '79. This is the first  
25 time I've seen him since then. We worked for the

1 same guy. Good to see you, Rod.

2 MR. WIDGER: Thank you. Thank you.

3 JUDGE VOSS: Staff?

4 MR. WILLIAMS: May it please the  
5 Commission, I'm gonna try and draw something. The  
6 Staff doesn't disagree with Empire's characterization  
7 of the agreement, but I think a diagram might be of  
8 some assistance.

9 Basically, there's the city limits of  
10 the City of Republic, and outside of it are the two  
11 areas that the parties have their agreement about who  
12 would have exclusive rights to serve. This area  
13 would be for Empire, and this area would be for  
14 Ozark, and I believe they actually touch -- well,  
15 they may actually touch the current existing city  
16 limits. I'm not sure about that.

17 But in any event, within this area,  
18 comprising about one-twelfth of it, is an existing  
19 development that's undergoing development, a  
20 subdivision. That's the area that Empire's asking  
21 the Commission to grant it a variance from or allow  
22 it to provide service in a way that varies from its  
23 existing tariff and from the Commission rule book.

24 There's another subdivision over here  
25 that I believe has probably got similar

1 circumstances. It's our understanding that both of  
2 these subdividers have development agreements with  
3 the City of Republic. However, we've not seen those  
4 agreements at this point so we don't know what the  
5 terms of those are.

6           The Staff's taken the position that the  
7 request for the variance is unlawful, that the  
8 Commission does not have the authority to grant the  
9 utility a waiver from its tariff provisions. The  
10 utility can come in and ask for a change in its  
11 tariff provisions and the Commission would have the  
12 right to grant or deny that. That's different than  
13 the Commission having the authority to tell the  
14 utility, "You can treat this customer differently  
15 than everyone else that's similarly situated."

16           Now, the Commission understands that  
17 the -- or the Staff understands that the Commission  
18 may have taken a different view in the past and as a  
19 result, the Staff has also made a policy argument as  
20 to why it would -- the Commission shouldn't, and it's  
21 basically the same.

22           The Commission shouldn't allow utilities  
23 to treat somebody differently when they're similarly  
24 situated. It sets a bad policy. You're going to see  
25 more cases that are similar. So Staff's not being

1 inconsistent, it's just being realistic about what  
2 may occur depending on what the Commission's views  
3 are. That's the primary concern the Staff has.

4           Additionally, the Staff believes it's  
5 not clear that -- it's our understanding there's an  
6 anticipation that the City of Republic is going to  
7 annex these particular areas that the parties are  
8 agreeing between them as to who would have exclusive  
9 service in the near future.

10           It's not clear, I think, under the  
11 statutes that the cooperative would have the right to  
12 serve additional customers within the City of  
13 Republic after that annexation takes place.

14           Cooperatives are authorized to serve in  
15 rural areas which doesn't include municipalities of  
16 over 1500. And I understand the cooperative has a  
17 different view on that, but I don't see that it's  
18 clear under the statutes that it would have that  
19 right to serve, and that's an additional concern.

20           And those are basically the Staff's  
21 concerns about this territorial agreement, and it's  
22 because the territorial agreement is predicated upon  
23 the grant of the variances that have been requested  
24 from the tariffs as well as Commission rule.

25           COMMISSIONER MURRAY: Mr. Williams, I'm

1 not sure I was listening carefully enough, but did  
2 you say that you thought that the area in question is  
3 becoming an area that would not be considered a rural  
4 area that the cooperative would still be able to  
5 serve? Is that -- did you say that or did I miss --

6 MR. WILLIAMS: The concern is generally  
7 cooperatives are -- under the statutes, generally the  
8 cooperatives are only allowed to serve in rural areas  
9 which do not include cities that have over 1500.  
10 There are certain exceptions under which they're  
11 allowed to continue to serve, or if there's a  
12 territorial agreement with a municipality, they could  
13 serve otherwise despite that restriction.

14 This territorial agreement's between two  
15 utilities. The City of Republic's not involved. I  
16 don't believe it's clear under the statutes that  
17 if the city annexes this territory before it's built  
18 out, that Ozark would have the lawful right under the  
19 statutes to serve additional customers beyond those  
20 it was currently serving at the time of the  
21 annexation.

22 COMMISSIONER MURRAY: All right. Thank  
23 you.

24 MR. WILLIAMS: That's a concern.

25 COMMISSIONER GAW: I'd like to follow up

1 if I could. In regard to your diagram, first of all,  
2 so I understand what I'm looking at here, the little  
3 circle that you have to the left there, could you put  
4 an "A" or something on that so I can --

5 MR. WILLIAMS: How about "Empire"?

6 COMMISSIONER GAW: That would be fine.  
7 And then the other one, whatever you want to put on  
8 it.

9 MR. WILLIAMS: "Ozark." And this would  
10 be -- the subdivision here is Shuyler Ridge.

11 COMMISSIONER GAW: What's the name  
12 again?

13 MR. WILLIAMS: The Lakes at Shuyler  
14 Ridge.

15 COMMISSIONER GAW: Okay.

16 MR. WILLIAMS: And this one is Terrell  
17 Creek.

18 COMMISSIONER GAW: Okay. Now, this is  
19 rather factual in nature but I assume that you have a  
20 Stipulation of Facts. There's probably not too much  
21 dispute on this, but the portion that's in the Empire  
22 circle that's -- is that Shuyler Ridge did you say?

23 MR. WILLIAMS: Yes.

24 COMMISSIONER GAW: That is currently  
25 being served by whom?

1                   MR. WILLIAMS: Currently the developer  
2 has an agreement with Ozark to put in infrastructure.  
3 In fact, they've built lines and they put in  
4 decorative street lighting.

5                   COMMISSIONER GAW: Okay. With Ozark?  
6 Ozark did that or the developer did it? If someone  
7 else knows, that's fine. I'm just looking for  
8 information real quick.

9                   MR. WILLIAMS: I know the developer has  
10 an agreement with Ozark to supply power, and it would  
11 be phase one. It's actually a five-phase  
12 subdivision, and the first phase is 163 units, I  
13 believe, and --

14                  COMMISSIONER GAW: And I don't want to  
15 get too many facts here in this -- in this portion.  
16 I just want a basic understanding.

17                  MR. DUFFY: Your Honor, whoever --  
18 what's going on is that Mr. Williams is correct, the  
19 developer of the Lakes at Shuyler Ridge has a  
20 contract for service with Ozark Electric Cooperative.  
21 Because of the tentative agreement that everybody  
22 struck and because of the urgency to get something  
23 done, what happened was that Ozark agreed to sell its  
24 facilities that it had built in there -- namely,  
25 underground lines and streetlights -- to Empire.



1                    Empire has then added additional  
2 facilities of its own in terms of undergrounding and  
3 street lighting. There are no houses under  
4 construction at this point. It's simply this  
5 primary --

6                    COMMISSIONER GAW: So no one's being  
7 served?

8                    MR. DUFFY: No one is being served at  
9 this point.

10                    COMMISSIONER GAW: Okay. So the little  
11 Shuyler Ridge property there is a project in  
12 development that has no individuals receiving  
13 electricity at the present time?

14                    MR. DUFFY: That's correct.

15                    COMMISSIONER GAW: And then what about  
16 the other -- the other portion over there? Is it --  
17 what did you say that was?

18                    MR. DUFFY: Are you talking about the  
19 Terrell Creek one?

20                    COMMISSIONER GAW: Terrell Creek, yeah.  
21 I'm sorry. I can't read the writing.

22                    MR. DUFFY: I'm not as clear as to  
23 what's going on in Terrell Creek because Ozark had a  
24 contract with that developer and is presumably going  
25 to continue with that developer because that's the

1 area that was allocated to the cooperative. And  
2 behind you I think --

3 MR. WIDGER: I think it actually lies  
4 south of the Empire area and does not yet have a  
5 final plat.

6 COMMISSIONER GAW: Okay. But no one's  
7 receiving electricity there either?

8 MR. WIDGER: Other than a farmhouse or  
9 something, yeah.

10 COMMISSIONER GAW: Okay. And that would  
11 be if there was someone receiving it, electricity in  
12 this area, it would be receiving it from Ozark,  
13 correct?

14 MR. WIDGER: Yes.

15 COMMISSIONER GAW: Now, just so I'm  
16 following this diagram, outside of these circles,  
17 this area that's outside of the city limits, anyone  
18 in that territory currently would be receiving  
19 electricity from Ozark, right, or not necessarily?

20 MR. DUFFY: Outside of the circle there  
21 are some customers for Ozark, there are some  
22 customers of Empire, depending on where you are.

23 COMMISSIONER GAW: Is there an  
24 assignment of territory currently that caused that  
25 service to be with one provider or the other?

1                   MR. DUFFY: There is no territorial  
2 agreement that deals with that. Empire, of course,  
3 has its own certificates so it's serving in its  
4 certificated areas, and those boundaries vary.  
5 Ozark's -- Ozark serves throughout the area.

6                   COMMISSIONER GAW: Is there a map  
7 somewhere that's gonna be put in the record that will  
8 show us where those -- where those lines are?

9                   MR. WIDGER: Judge, there's a much  
10 better presentation in the actual territorial  
11 agreement. I have problems with the sketch that's  
12 been made because it doesn't reflect the truth of the  
13 maps.

14                  MR. WILLIAMS: And I wasn't trying to be  
15 accurate.

16                  COMMISSIONER GAW: I understand. Since  
17 it's up here, I wanted to -- I'm trying to follow a  
18 little bit before we get -- we get into the  
19 presentation of testimony. So I'll take a look at  
20 that when it's time to do that.

21                  MR. WIDGER: Can I give you a copy of  
22 the territorial agreement?

23                  COMMISSIONER GAW: That would be great.  
24 Have you got more than one?

25                  MR. WIDGER: I have three.



1 that is the 4.5 square miles that Empire would get as  
2 its exclusive territory under this agreement.

3 COMMISSIONER GAW: Okay.

4 MR. DUFFY: Empire -- currently, Empire  
5 has some customers in that area, Ozark has some  
6 customers in that area.

7 COMMISSIONER GAW: And what I'm trying  
8 to clarify, Mr. Duffy, and I'm sorry it's taking me  
9 so long to get there, but is there a current  
10 designated -- designation of areas prior to this  
11 agreement?

12 MR. DUFFY: No.

13 COMMISSIONER GAW: So how did customers  
14 develop competition?

15 MR. DUFFY: Whoever -- whoever wanted  
16 service from whomever got service from whomever.  
17 It's intermixed.

18 COMMISSIONER GAW: Okay. Now I'm  
19 following you.

20 MR. DUFFY: And that's why -- that's why  
21 in this Empire area represented in A-1, we have opted  
22 out of trying to serve or take the existing Ozark  
23 customers. I understand there's a couple dozen of  
24 them in there. They would not be disturbed.

25 COMMISSIONER GAW: Okay. Now, from the

1 standpoint of the legal issues that you're raising,  
2 Mr. Williams, when you get into the questions here,  
3 first of all, someone raised in agenda the other day  
4 the possibility of a filed rate doctrine being an  
5 issue in this case. Is Staff raising that issue?

6 MR. WILLIAMS: If by filed rate doctrine  
7 you mean that the Commission can't do something  
8 different than what the tariffs permit, yes.

9 COMMISSIONER GAW: So you are raising  
10 that, in effect, if that's the proper -- appropriate  
11 name for it?

12 MR. WILLIAMS: Yes.

13 COMMISSIONER GAW: Okay. Now, is it  
14 Staff's position, then, that we can't vary or waive a  
15 tariff provision under any circumstances?

16 MR. WILLIAMS: I think it's Staff's  
17 position that the Commission doesn't have the  
18 authority to waive a tariff provision if it's going  
19 to result in discrimination -- discriminatory  
20 treatment within a class.

21 COMMISSIONER GAW: Let's just -- let's  
22 take away that as a factor for a moment. Does the  
23 Commission have the authority to waive or to -- to  
24 address or to have -- make a decision that is  
25 contrary to a tariff provision? And if so, under

1 what -- what findings or requirements are there to do  
2 that?

3 MR. WILLIAMS: Perhaps -- I think it  
4 would require a circumstance where it would not be  
5 violating the law.

6 COMMISSIONER GAW: Would not be  
7 violating the law. Well, the tariff is, in effect,  
8 the law, isn't it, in -- at least under some case  
9 law?

10 MR. WILLIAMS: Yes.

11 COMMISSIONER GAW: So it's rather  
12 circular, but how do you vary from the provisions of  
13 the tariff if it is --

14 MR. WILLIAMS: I'm saying if it wouldn't  
15 otherwise violate a statute. There may be  
16 circumstances where you could do something different  
17 than literally what a tariff says.

18 COMMISSIONER GAW: Okay. And Mr. Duffy,  
19 this is an issue that cuts both ways for clients of  
20 yours, so I'm -- at least I could imagine that  
21 possibility. Can -- and I have a feeling we're  
22 dealing with a nuance here, and I'm trying to see  
23 whether that's the case. I apologize because I'm  
24 going afield for a moment. But is it -- do you  
25 believe the Commission can make a decision that's

1 contrary to a tariff -- tariff provision?

2 MR. DUFFY: Well, let me limit it to  
3 this situation.

4 COMMISSIONER GAW: That's the safe thing  
5 to do probably.

6 MR. DUFFY: Right.

7 COMMISSIONER GAW: Because otherwise you  
8 might be quoted in some other case.

9 MR. DUFFY: Let me give you just some  
10 background. The Promotional Practices Rules came  
11 into existence in 1971 with a thing called General  
12 Order 51. It's now your Chapter 14 in your rules.

13 COMMISSIONER GAW: Okay.

14 MR. DUFFY: In the original order, there  
15 was a paragraph in the order that said that upon  
16 proper application, a regulated utility can come into  
17 the Commission and ask for a variance from these  
18 Promotional Practices Rules to meet unregulated  
19 competition.

20 COMMISSIONER GAW: Okay.

21 MR. DUFFY: That has been tweaked a  
22 little bit. They took out the "to meet unregulated  
23 competition" but they put the variance provision in  
24 your existing rules in Chapter 14. So it says very  
25 clearly, here's the Promotional Practices Rules. You



1 can ask for a variance for good cause shown. I can  
2 cite you to -- I was gonna cite you to a case in my  
3 closing argument where General Order 51 went up to  
4 the Court of Appeals in the mid 1970's.

5                   There was another variance provision put  
6 into that Order 51 because essentially Order 51,  
7 there were all these contracts in existence in the  
8 early '70's.

9                   COMMISSIONER GAW: Okay.

10                   MR. DUFFY: The gas companies were  
11 taking people to the Bahamas in order to get gas  
12 appliances put in apartment buildings. The electric  
13 company was trying to do the same thing. There was  
14 competition. The Commission said, "We've got to stop  
15 this, this is crazy."

16                   COMMISSIONER GAW: You've got to stop  
17 that -- those trips to the Bahamas or the  
18 competition --

19                   MR. DUFFY: Right. Right. And so they  
20 put in General Order 51. Well, there were all these  
21 contracts, legally binding contracts in effect when  
22 the Commission put that order in.

23                   COMMISSIONER GAW: Okay.

24                   MR. DUFFY: So the Commission put in a  
25 special variance provision that said if you can show

1 there were -- there's gonna be detriments flowing  
2 from a legally binding contract, you can get a  
3 variance, a variance from Order 51. Long story  
4 short: Commission denied a variance to a builder,  
5 builder took it to the Court of Appeals twice, and in  
6 those two cases, I think it's in McBride & Son -- or,  
7 no, I can give you the cite later.

8 COMMISSIONER GAW: That's fine.

9 MR. DUFFY: They looked at the variance  
10 provision and they said it's okay for the Commission  
11 to have a variance from their rules and, in fact,  
12 we're gonna overturn the Commission's ruling and say  
13 they should have granted a variance to this guy that  
14 they denied one to.

15 So my position, very simply, is that the  
16 variance provisions, although not this particular  
17 one, but another variance provision in the same rule  
18 we're talking about here today has been to the Court  
19 of Appeals. They've blessed it and said, "There's  
20 nothing wrong with this so you've got the ability to  
21 grant a variance under your Promotional Practices  
22 Rules."

23 COMMISSIONER GAW: Now, I think that's  
24 one piece to this argument, but I'm still back on  
25 this initial piece that I raised, and that is, this

1 is -- at least according to Staff, this is -- this is  
2 a tariff provision that would have to be waived. At  
3 least that's -- I'm hearing Staff saying -- saying  
4 that, which is different than saying the Commission  
5 can waive a rule that it's made.

6 MR. WILLIAMS: And if I may, the Staff  
7 agrees that the Commission can waive rules.

8 COMMISSIONER GAW: I assumed that was  
9 the case, I don't think there's any dispute --  
10 dispute about that. I want to see that case because  
11 those -- those cases because I think that they're  
12 important to this.

13 MR. DUFFY: I don't think the cases  
14 address the tariff provision because we weren't in a  
15 situation that the Commission ordered the companies  
16 to put in their tariffs the same thing that's in the  
17 rules.

18 COMMISSIONER GAW: Yes.

19 MR. DUFFY: That's what we have here, is  
20 that you've ordered us to put into our tariffs the  
21 provisions that's in the rules. I think that the  
22 solution to this is, as I think you've done in the  
23 past, is you order Empire to file a tariff and if  
24 you're gonna grant the variance that we've asked for,  
25 you order them to file a tariff that says in this

1 particular subdivision -- and we -- we draw the  
2 geographic boundaries by meets and bounds because  
3 we've got that, the utility company is allowed to do  
4 the following --

5 COMMISSIONER GAW: Yes.

6 MR. DUFFY: -- only in this area so that  
7 there is a tariff on file that says these people are  
8 gonna be treated differently than other people. And  
9 our position is you've done that in the past because  
10 you've got flex tariffs for gas companies that, you  
11 know, allow you to charge -- allow a company to  
12 charge something different than the tariff rate. As  
13 long as we've dotted the I's, crossed the T's and got  
14 a tariff, it ought to be okay.

15 COMMISSIONER GAW: Well, and let me --  
16 I'm following, I think, what you're suggesting here.  
17 It does seem to me that if you -- what I'm trying to  
18 get out of Staff, I think in this is, if we were  
19 dealing with a situation where the Commission found,  
20 assuming the Commission found, that it was -- this  
21 was not discriminatory for some reason or that it was  
22 appropriate under these circumstances, could the  
23 Commission simply say that the Commission gives  
24 permission, not orders, but gives permission to  
25 Empire to file something in its tariff which would

1 allow, then, some sort of a variance and not be --  
2 not be a variance from the tariff itself, which I --  
3 I thought I heard you say, Mr. Williams, earlier, was  
4 one of the Staff's concerns?

5                   We can't just go in and say the  
6 Commission is authorizing a variance from the filed  
7 tariff rather than saying the Commission is giving  
8 permission for their -- for the company to change its  
9 tariff despite the rules that may be in effect to  
10 allow for this circumstance if Empire chooses to do  
11 that. And it's a subtle distinction, but I'm trying  
12 to understand if that's the distinction that Staff is  
13 making here.

14                   MR. WILLIAMS: I don't think it's a  
15 subtle distinction myself.

16                   COMMISSIONER GAW: It may not be, but  
17 I'm trying to understand whether that is -- that's  
18 part of Staff's argument.

19                   MR. WILLIAMS: If there were a change to  
20 the tariff where this was a permissible event and it  
21 were -- you know, nobody's challenging and it was  
22 presumed lawful and found to be -- and the Commission  
23 made a determination it's not discriminatory, I don't  
24 know why that wouldn't be a route the Commission  
25 could go.

1                   And as to the difference between rules  
2 and tariffs, I'm aware of a case, Deaconess Manor,  
3 where the Commission granted somebody variance from  
4 the Commission's rule regarding master metering.

5                   COMMISSIONER GAW: Yes.

6                   MR. WILLIAMS: And then there was a  
7 challenge about the rates that were to be paid  
8 because the rates were done on a master metering  
9 basis and the court said the tariff applied. Just  
10 because you get to master meter, doesn't mean you get  
11 the master meter rate, which was a case involving  
12 Union Electric.

13                   COMMISSIONER GAW: Mr. Duffy, or whoever  
14 else wants to answer this, it seems to me like --  
15 that, number one, I don't want get hung up on this  
16 nuance if there's -- if it's clear there's a way to  
17 avoid this legal issue and get to the real -- real  
18 heart of the matter which is whether or not this is  
19 good policy. So from the -- and within -- within  
20 what's allowed under the statutes.

21                   But is it -- would -- can we get around  
22 this -- do you agree -- let me put it this way: Do  
23 you agree that without changing the tariff, this  
24 couldn't be done, that the Commission couldn't order  
25 that these rates go into effect without having

1 something change with that tariff that would allow  
2 it?

3 MR. DUFFY: I think the appropriate  
4 thing to do is to order Empire to -- or authorize  
5 Empire to file a compliance tariff to comply with the  
6 Commission's order. That way -- and, you know,  
7 that's been done all over the place.

8 COMMISSIONER GAW: No, I don't  
9 dispute -- I don't think I disagree with that. I'm  
10 just -- but I thought that was part of Staff's  
11 initial argument, that we don't have the authority to  
12 do this while the tariff is in effect the way it is.

13 And if that's the case, I'd like to get  
14 that out of the way so we can talk about what's --  
15 what's really the issue here is whether or not this  
16 is discriminatory, whether or not that's allowed,  
17 whether it's appropriate policy if it can be allowed,  
18 those kinds of things.

19 MR. DUFFY: I'd feel more comfortable if  
20 Empire had a tariff specifically allowing this to  
21 take place.

22 COMMISSIONER GAW: Mr. Williams?

23 MR. WILLIAMS: Yes.

24 COMMISSIONER GAW: Do you agree with  
25 that? I think you said that a while ago. I'm

1 just...

2 MR. WILLIAMS: If the tariff permitted  
3 it, that would be a different circumstance than we're  
4 faced with currently.

5 COMMISSIONER GAW: And then if that's  
6 the case, then is Staff's argument confined to the  
7 discriminatory nature of this and --

8 MR. WILLIAMS: Well, there would be an  
9 issue about whether that tariff provision would be  
10 appropriate or not, yes, because of discriminatory  
11 treatment.

12 COMMISSIONER GAW: Yes, yes. Anything  
13 else that would be an argument from a legal  
14 standpoint that Staff would be concerned about?

15 MR. WILLIAMS: Not with regard to  
16 Empire, I believe.

17 COMMISSIONER GAW: And what about in  
18 regard to someone else? Because I raised something  
19 else in regard to the city, and I don't know if  
20 that's what you're referring to.

21 MR. WILLIAMS: Yes. I was referring to  
22 whether or not Ozark would legally have the authority  
23 to add new customers if Republic annexes part -- part  
24 or all of their territory before they finish building  
25 it out in terms of putting in infrastructure.



1                   COMMISSIONER GAW: What's the status of  
2 that portion in regard to Ozark and Empire? How do  
3 you-all feel about that argument? Is that an issue?

4                   MR. WIDGER: Our position is that that  
5 is not an issue, that Mr. Williams is stretching to  
6 overcome what's been accepted as a law for the last  
7 15 years.

8                   COMMISSIONER GAW: But explain --  
9 explain to me what you believe the law to be in  
10 regard to annexation.

11                  MR. WIDGER: Okay. Our position is that  
12 the rural service limitation in Chapter 394 allows  
13 the cooperatives to serve in any area, including  
14 towns and villages of less than 1500, all right? Our  
15 view is that annexation into a town of more than 1500  
16 takes away our authority to add new services.

17                  It does not -- it does not chase us out  
18 of town. We keep what we have. So we can end up  
19 serving in a town under a variety of ways: One is,  
20 we were there before annexation.

21                  COMMISSIONER GAW: Okay.

22                  MR. WIDGER: The second, there is now a  
23 predominant supplier exception in the law which was  
24 really created, I think, by the Lake St. Louis  
25 situation. When you -- when we are with the town and

1 it grows and becomes nonrural, should we have to step  
2 aside and let someone else serve? So there's a  
3 predominant supplier exception.

4 And we believe the third is by  
5 territorial agreement. The territorial agreement law  
6 is a law of competition. So was the 1500 rule.  
7 There's nothing here in the law about the sanctity of  
8 city limits. It's all about where it's appropriate  
9 for us to freely compete.

10 COMMISSIONER GAW: Okay. Now, under the  
11 first -- under the first exception, let's say you're  
12 serving part of this -- what is it, Terrell Creek  
13 area, in the future you're serving part of it. The  
14 entire area is annexed, and then there are new  
15 customers wanting to come on line in that  
16 subdivision.

17 MR. WIDGER: Correct.

18 COMMISSIONER GAW: That first exception  
19 wouldn't allow you necessarily to add them, would it?

20 MR. WIDGER: That is correct. We would  
21 have to step aside and allow duplication of services.  
22 If there was -- if Republic had a municipal system,  
23 the law gives them a window of time to basically  
24 condemn our system and buy it from us.

25 COMMISSIONER GAW: I see.

1                   MR. WIDGER: But that doesn't apply here  
2 because it's Empire.

3                   COMMISSIONER GAW: Okay. But what  
4 about -- what about the other two exceptions? Would  
5 they -- would they put you in a position -- the  
6 territorial agreement, I assume, if that applies, if  
7 you're correct on that, that would take care of it?

8                   MR. WIDGER: Right. Predominant  
9 supplier does not help us here because --

10                  COMMISSIONER GAW: That's what I was  
11 looking for.

12                  MR. WIDGER: -- Empire is obviously  
13 predominant in any way you want to measure  
14 predominance. Number of customers, you know,  
15 delivery of power, whatever, in the City of Republic.

16                  COMMISSIONER GAW: Okay. So the real  
17 question, then, is about whether this third exception  
18 applies from a legal standpoint --

19                  MR. WIDGER: That's the only new --

20                  COMMISSIONER GAW: -- as far as you're  
21 concerned?

22                  MR. WIDGER: Yes.

23                  COMMISSIONER GAW: And Mr. Williams?

24                  MR. WILLIAMS: I believe that's correct.  
25 However, my reading of it is that it would be

1 permissible if the city were a party to a territorial  
2 agreement, and that would normally be the situation  
3 whenever it were a municipal supplier. This  
4 agreement is setting rights as between -- exclusive  
5 territories as between Empire and Ozark, and that's  
6 why I've raised the issue.

7 MR. WIDGER: Judge, the way we've  
8 handled this in the past is generally, when a city  
9 does its annexation, part of that annexation is  
10 approval of the fact that the co-op is serving. So,  
11 I mean, we don't -- we don't treat a city as a -- as  
12 a mere bystander. The cities are involved and  
13 they -- and they're well aware of who is supplying  
14 electricity in the areas that they annex.

15 COMMISSIONER GAW: I guess my question  
16 on this issue is whether or not it's ripe since we  
17 don't have -- since no one is -- is in the process of  
18 annexing this, if I understand it correctly. As we  
19 speak today, it's anticipated that it will -- it may  
20 occur; is that true --

21 MR. WILLIAMS: That's my --

22 COMMISSIONER GAW: -- That it's  
23 anticipated?

24 MR. WILLIAMS: That's my understanding.  
25 But the Commission is to make a determination on

1 territorial agreements and whether or not it's in the  
2 public interest. And the real concern I have is  
3 Empire's the one, from what I understand, that has a  
4 franchise with the City of Republic.

5 COMMISSIONER GAW: Okay.

6 MR. WILLIAMS: By this territorial  
7 agreement, if it goes through, Empire will not be  
8 able to serve in this area that includes the Terrell  
9 Creek subdivision. If the City of Republic annexes  
10 that area, who's lawfully able to provide service to  
11 new customers within it if it --

12 COMMISSIONER GAW: Is that an issue that  
13 we should be dealing with today rather than it be  
14 having been an issue -- will it not be an issue at  
15 the time the annexation occurs rather than it being  
16 appropriate today? Otherwise --

17 MR. DUFFY: My position is you're  
18 absolutely correct. It's not ripe. I don't think  
19 from a practical standpoint it would ever come to  
20 pass. The whole concept of the territorial agreement  
21 statute was to inject the Public Service Commission  
22 as the state action in an otherwise antitrust  
23 situation.

24 COMMISSIONER GAW: Yes.

25 MR. DUFFY: So you're the one that

1 says -- and these two people come together and say,  
2 "I want this area exclusive to me, I want this area  
3 exclusive to me." And we say, "Is that okay with  
4 you," and you say "yes." All right, let's say that  
5 happens. Let's say Republic annexes Terrell Creek.  
6 Yes, Empire would have a franchise, but it would not  
7 have permission from you to serve Terrell Creek  
8 because we're under this territorial agreement that  
9 says we're over here, the co-op is over there. I  
10 don't see -- from a practical standpoint, I don't see  
11 what Mr. Williams is talking about ever happening.

12 COMMISSIONER GAW: But I guess -- I  
13 guess I'd be willing to leave that open because lots  
14 of things can happen that you don't anticipate. My  
15 real question is just whether or not this is a right  
16 time for us to be dealing with this. Otherwise,  
17 every case that came in front of us, how would we  
18 know whether or not we're going to be -- not going to  
19 be dealing with this situation? Every area that's  
20 outside of the city boundaries could potentially be  
21 annexed.

22 MR. WIDGER: And Commissioner, I would  
23 agree, and I think that there's another issue, and  
24 that is the issue of standing. I don't think  
25 Commission Staff has the standing to raise that

1 particular challenge. At that time the city could  
2 challenge it, Empire could challenge it, the members  
3 of the co-op could challenge it, but I don't think  
4 the Staff has standing for this.

5 COMMISSIONER GAW: Well, I don't -- I  
6 don't have a problem with Staff raising the issue for  
7 us to know personally, but the others may disagree  
8 with me. My real question is whether or not, from  
9 the present standpoint, it's an issue that we need to  
10 consider. And I guess the real question there, then,  
11 becomes is the City of Republic somehow bound by this  
12 decision in a way that it couldn't address it in the  
13 future if we make some sort of a decision here?

14 MR. WILLIAMS: And I think the law is  
15 clear, no.

16 COMMISSIONER GAW: So then, is it really  
17 an issue that we need to deal with in this case?

18 MR. WILLIAMS: It's a consideration I  
19 wanted to make sure the Commission was aware of.

20 COMMISSIONER GAW: Okay. Public Counsel  
21 has an interesting expression which makes me think he  
22 may want to say something.

23 MR. MILLS: No, not really. I think --  
24 I think it certainly is something the Commission  
25 should keep in mind. It isn't -- from a technical

1 standpoint it is not a ripe issue, but I don't think  
2 it -- I don't think the sort of catch-22 situation  
3 that Mr. Williams envisioned can come to pass.

4 I think once the territorial agreement  
5 is there, it allows Ozark to continue to serve new  
6 customers. You won't get to a situation where  
7 there's a block of territory within the territorial  
8 agreement designated to Ozark.

9 If that becomes annexed, Ozark will  
10 still be allowed to serve new customers in there,  
11 even though it is within the city limits of a city of  
12 more than 1500 because that's the way the territorial  
13 agreement works, which is, I think, basically what  
14 Mr. Widger said, and I agree with that.

15 COMMISSIONER GAW: Well, it's not --  
16 that's not totally clear to me based upon this  
17 discussion, but I appreciate that perspective. The  
18 real question is whether or not that issue wouldn't  
19 then be teed up if someone wanted to tee it up, which  
20 I would assume would either be Empire's or the City  
21 of Republic's, although I would think Empire would be  
22 bound by its agreement. City of Republic would  
23 not -- isn't here, but don't we have some lines --  
24 isn't there a case or two out there that suggests  
25 that entities that are not parties can be bound to



1 these decisions?

2 MR. WILLIAMS: I'm pretty sure I've seen  
3 a case where a party -- someone that wasn't a party  
4 to the agreement isn't bound by it.

5 MR. DUFFY: The territory agreement  
6 statute says that -- very explicitly that nonparties  
7 are not bound by the terms of a territorial agreement.

8 COMMISSIONER GAW: Thank you.

9 MR. DUFFY: So, for example, the City  
10 Utilities of Springfield, as a municipal system, if  
11 it somehow thought it had the authority to come in  
12 and serve all this area, the territorial agreement  
13 would not block them from doing that.

14 COMMISSIONER GAW: Okay. Well, that  
15 makes sense to me, but there's something in the back  
16 of my mind about a case in regard to whether or not  
17 there was a hearing held under the requirement to  
18 have a hearing. I was -- I'm not sure --

19 MR. DUFFY: That was my case.

20 COMMISSIONER GAW: I'm not sure whether  
21 it's relevant to this or not.

22 MR. DUFFY: I don't think it is. That  
23 was a -- that was Poplar Bluff. Ameren -- Union  
24 Electric and Poplar Bluff entered into a territorial  
25 agreement that established some territory that was

1 UE's outside the city and gave it to the city.

2 COMMISSIONER GAW: Yes.

3 MR. DUFFY: The co-op didn't participate  
4 in the agreement, had notice of the hearing, didn't  
5 come, and then a year later said, "Well, wait a  
6 minute, we don't like this and we want to challenge  
7 it."

8 COMMISSIONER GAW: Okay.

9 MR. DUFFY: And we took them to the  
10 Court of Appeals twice and shut them out and said,  
11 "You've had -- you know, there was a hearing, you had  
12 the right to be there, you had the right to say what  
13 you wanted to say, but you're not affected by the  
14 territorial agreement and there's nothing you can do  
15 about it at this point because you're free to do  
16 whatever you want to do whenever you -- you know,  
17 wherever you can do it."

18 COMMISSIONER GAW: Okay.

19 MR. WILLIAMS: All I was getting at is  
20 that if the law doesn't allow Ozark to add new  
21 customers after an annexation, and Empire's barred  
22 from serving because of the territorial agreement,  
23 what happens? Just teeing it up.

24 MR. WIDGER: And Judge, that would be  
25 true if the law is not an exception, all right? But

1 this whole thing was developed as a big exception.  
2 It started with the City of Columbia and Boone  
3 Electric. And they had special legislation which  
4 ended up turning into general legislation because it  
5 provided a good model, but is exactly designed to  
6 allow co-ops to serve inside nonrural areas.

7 MR. WILLIAMS: And my reading of the  
8 statutes doesn't show how that circumstance would be  
9 resolved down the road.

10 COMMISSIONER GAW: Okay. But Empire --  
11 as far as Empire's concerned, you don't see -- do you  
12 agree with the co-op's counsel on -- in regard to how  
13 that would work?

14 MR. DUFFY: Yes. I think if we're  
15 establishing an exclusive service territory, Empire's  
16 bound to respect that territory. And sitting here, I  
17 cannot imagine a situation where we would say despite  
18 the territorial agreement, we get to serve in Ozark's  
19 exclusive service territory.

20 COMMISSIONER GAW: I can't either, but I  
21 just wanted to hear you say it. And okay, I think  
22 that's all the questions I have right now. I  
23 apologize for taking so long, but that is very  
24 helpful to me.

25 JUDGE VOSS: Commissioner Clayton, do

1 you have any questions?

2 COMMISSIONER CLAYTON: (Shook head.)

3 JUDGE VOSS: Commissioner Appling, do  
4 you have any questions?

5 COMMISSIONER APPLING: No questions,  
6 Judge.

7 JUDGE VOSS: Do you have any questions,  
8 Mr. Chairman?

9 CHAIRMAN DAVIS: Not at this time,  
10 Judge, thank you.

11 JUDGE VOSS: I have one quick question  
12 just to understand something. One, is this something  
13 that the Commissioners would like to have briefed?  
14 There's going to be closing arguments, but to more  
15 fully clarify the -- especially the filed tariff  
16 doctrine issue and the parties' positions, would you  
17 want that to be briefed in addition to closing  
18 arguments?

19 MR. WILLIAMS: Judge, I don't know what  
20 I could add that I haven't already put in some prior  
21 pleadings.

22 JUDGE VOSS: Okay. I just wanted to  
23 make sure. And I had a question for Ozark. Given  
24 that the city could annex the territory in the future  
25 and you knew that and entered into this territorial

1 agreement, do you feel that Ozark is now putting in  
2 service in that area at its own risk?

3 MR. WIDGER: We put a lot of services in  
4 in a lot of places at a lot of risk. Everywhere  
5 around Springfield, the co-op is always at risk when  
6 it works up in these suburban areas, if you will.  
7 But we don't control the timing and we have to  
8 basically manage our risk through contracts and how  
9 we manage projects.

10 JUDGE VOSS: It seems that you are very  
11 aware of the statute and how it affects territorial  
12 agreements and using nonbinding parties, so it seems  
13 like you entered into the agreement and are doing --  
14 your actions in your territory are subject to risk  
15 that the co-op is willing to take; is that correct?

16 MR. WIDGER: Well, at the time -- coming  
17 back to this particular case, the timing of  
18 annexation was something we understood to be farther  
19 off into the future. And when that -- and when the  
20 discussion started accelerating the concept of  
21 timing, then we knew we had a problem.

22 JUDGE VOSS: All right. Thank you. And  
23 I would like to clarify the record -- no other  
24 Commission questions during opening statements?

25 (NO RESPONSE.)

1                   JUDGE VOSS: I did want to state for the  
2 record that nothing said by an attorney constitutes  
3 evidence, and that if you want something that was  
4 said here to be evidence to be considered by the  
5 Commission as opposed to a legal argument, you're  
6 gonna have to get a sworn witness to say it on the  
7 stand.

8                   All right. Great. Okay. Are we ready  
9 to call the first witness? Or is there anything --  
10 actually, would you like to get the Stipulation of  
11 Facts entered into evidence prior to calling the  
12 first witness if you would like to offer that?

13                   MR. MILLS: We can all offer it.

14                   JUDGE VOSS: Public Counsel?

15                   MR. MILLS: I was gonna say, I think we  
16 can all offer it. It's a joint stipulation. It's  
17 signed by all the parties.

18                   JUDGE VOSS: I was just waiting for  
19 someone to officially offer it. Are there any  
20 objections to the Stipulation of Facts marked  
21 Exhibit 1 being entered into evidence?

22                   (NO RESPONSE.)

23                   JUDGE VOSS: All right. It is admitted.

24                   (EXHIBIT NO. 1 WAS RECEIVED INTO  
25 EVIDENCE AND MADE A PART OF THE RECORD.)



1 offer into evidence Exhibit No. 2 and tender the  
2 witness for cross-examination.

3 MR. WILLIAMS: Staff has some objections  
4 it would like to make.

5 JUDGE VOSS: Proceed.

6 MR. WILLIAMS: On page 2 in response to  
7 the question about whether you have any knowledge of  
8 the origins of the proposed territorial agreement,  
9 you provide an answer. I object to that on the --  
10 response on the basis that there's a lack of  
11 foundation. There's no showing -- or nothing  
12 presented to show that you know this information of  
13 your own personal knowledge.

14 JUDGE VOSS: Mr. Duffy, did you want to  
15 respond to Staff's objection?

16 MR. DUFFY: Well, we can certainly voir  
17 dire the witness about his personal knowledge of the  
18 development agreements if -- if things -- if the  
19 Commission thinks there's a foundation lacking there.  
20 I personally don't think there is. I mean, he's an  
21 assistant city administrator, he deals with these  
22 things. But we can voir dire him if you would like.

23 MR. WIDGER: Are we dealing with the  
24 answer to the question at line 30 or the question at  
25 line 40?



1 MR. WILLIAMS: 30.

2 MR. WIDGER: 30. Thank you.

3 JUDGE VOSS: I guess I would ask the  
4 witness, do you have the background to answer this  
5 question? Could you state...

6 THE WITNESS: The question being, do I  
7 have the background to -- as the assistant city  
8 administrator of the City of Republic, I have two  
9 roles: Not only as the assistant city administrator,  
10 I also am the Director for Planning and Development  
11 for the City of Republic.

12 Having those two roles, I am involved in  
13 all development aspects for the City of Republic, and  
14 any time we have a development come in and talk to us  
15 about water/sewer facilities and wanting to move  
16 forward on development, I am involved in that from  
17 the beginning all the way through the end.

18 MR. WILLIAMS: May I inquire?

19 JUDGE VOSS: Sure.

20 QUESTIONS BY MR. WILLIAMS:

21 Q. Have you seen these development  
22 agreements that you refer to with the several  
23 developers on line 32?

24 A. If I could, could I review the...

25 As far as the actual developer company,

1 development companies or the subdivision names, I  
2 would be --

3 Q. I'm not asking you that. I'm just  
4 asking if you actually saw the development agreements  
5 you're referring to?

6 A. Yes, sir.

7 Q. And then on line 33 you refer to the  
8 differences of opinion being developed. Were you  
9 involved in discussions that led you to this  
10 conclusion you're saying there were differences of  
11 opinion?

12 A. Yes, sir.

13 Q. And you say the city decided we would  
14 try to get Ozark Electric Cooperative and Empire to  
15 agree on the division of service territories; does  
16 that -- were you involved in that decision?

17 A. Yes, sir.

18 MR. WILLIAMS: Okay.

19 JUDGE VOSS: Is Staff withdrawing its  
20 objection?

21 MR. WILLIAMS: No, but I think he's --  
22 I'm not -- I'll withdraw it if that will make it  
23 easier.

24 JUDGE VOSS: Thank you. Are there any  
25 other objections to portions of this witness's

1 testimony?

2 MR. WILLIAMS: Yes. I also have an  
3 objection to the response to question 40 which is a  
4 discussion of, in general, what development  
5 agreements are, and I don't think that's relevant to  
6 this case.

7 It seems to me like the development  
8 agreements that are -- that the parties are saying  
9 are the root of why there is a territorial agreement  
10 are the relevant agreements, and that a broad  
11 discussion of development agreements in general is  
12 irrelevant.

13 JUDGE VOSS: Mr. Duffy, do you have a  
14 response?

15 MR. DUFFY: I think that the witness is  
16 trying to provide a background as to why we're here.  
17 It involves territorial -- it involves development  
18 agreements and the witness is simply trying to, I  
19 guess, lay a foundation that Mr. Williams had a  
20 problem with earlier, explaining what developers'  
21 agreements are. So I think that it's perfectly okay.  
22 And if Mr. Williams wants to inquire more about  
23 what's in those, he's free to do so with this  
24 witness.

25 JUDGE VOSS: I think the relevance of

1 the information will speak for itself as we go  
2 forward, so I'll overrule that objection.

3 MR. WILLIAMS: And then his response to  
4 the question that begins on page 2 at line 47 where  
5 he expresses an opinion about whether or not the  
6 development agreements benefit the public, again, I  
7 think there's a lack of foundation to show that he's  
8 qualified to express that opinion, and I also think a  
9 general statement about a development agreements is  
10 irrelevant to -- the benefit of development  
11 agreements is irrelevant to this case. I think the  
12 issues in this case hinge on particular development  
13 agreements.

14 MR. DUFFY: Your Honor, as an official  
15 of the City of Republic who's charged with dealing  
16 with the development of areas and potential  
17 annexation, I think he's qualified to talk about the  
18 benefits of the public. In any event, what he said  
19 goes to the weight of -- that should be afforded his  
20 testimony, not the admissibility.

21 JUDGE VOSS: Okay. Again, I think the  
22 relevance of the information will prove itself out.

23 MR. WILLIAMS: So you're overruling the  
24 objection?

25 JUDGE VOSS: I'm overruling the

1 objection.

2 MR. WILLIAMS: And if I may inquire  
3 before I make an objection on -- to the response to  
4 the question on page 3 at line 54 which reads, "Could  
5 you summarize what took place at the meeting the city  
6 hosted in late March?"

7 JUDGE VOSS: Yes, go ahead.

8 QUESTIONS BY MR. WILLIAMS:

9 Q. Mr. Coulter, were you present at that  
10 meeting that's referred to in that question?

11 A. Yes, sir.

12 MR. WILLIAMS: On page 4, his further  
13 response to that question, there's a statement made  
14 on line 73 to 74 which reads, "The developer of Lakes  
15 at Shuyler Ridge was happy with it and stated that if  
16 the tariff was removed, his threat of a lawsuit would  
17 not be needed." I ask that that -- I object to that  
18 on the basis it's hearsay and request that it be  
19 stricken.

20 JUDGE VOSS: Mr. Duffy, do you have any  
21 comments?

22 MR. DUFFY: Your Honor, it's important  
23 that it was said. Whether the truth of it or not can  
24 be explored. But the fact that it was said is one of  
25 the reasons why the agreement was -- the agreement

1 took place. So I think it's an exception to the  
2 hearsay rule. Hearsay also goes to determine what  
3 the, you know, the reliance or the -- and I'm trying  
4 to -- I'm struggling for the word, I think the key  
5 point here is that because they're worried about it  
6 not being reliable.

7                   We've got in this room at least one, two,  
8 three, four people that were present and saw this guy  
9 saying what he said, and Mr. Coulter's one of the  
10 four. So I don't think there's any concern about the  
11 accuracy of what Mr. Coulter is representing here  
12 because we can document that by other people.

13                   JUDGE VOSS: I'm still not certain what  
14 exception to the hearsay rule you're saying it falls  
15 under because four people saying it's hearsay is  
16 still hearsay, I think.

17                   MR. DUFFY: What I'm saying is whether  
18 the developer -- it says the developer of Shuyler  
19 Ridge was happy with it, and, you know, whether  
20 that's true or not, whether he was happy with it or  
21 not, I'm saying that the exception is it's being  
22 offered not for the truth of what was there, but that  
23 it was said, that that's what he said.

24                   And so we then proceeded on the basis  
25 and we relied upon his representation that this would

1 be okay with him if we got the variance. So whether  
2 he was happy about it or not is irrelevant. It's not  
3 being offered for the proof of that aspect of it.

4 JUDGE VOSS: Now, I think I'm gonna have  
5 to uphold the objection to that one because it is  
6 hearsay. If on redirect you want to clarify what his  
7 impression of their opinion was, but it is a  
8 statement that says he was happy, so...

9 MR. DUFFY: So what exactly are you  
10 striking so I can mark that?

11 JUDGE VOSS: I would say line 73, "The  
12 developer of Lakes," through the end of that  
13 sentence.

14 MR. DUFFY: So that one sentence on 73  
15 and 74 is stricken?

16 JUDGE VOSS: I believe so. That's  
17 the...

18 MR. WILLIAMS: Then on page 5, the  
19 question that begins at the top of that page where it  
20 states, "Do you think it would be better to have  
21 these exclusive service areas than to have Empire and  
22 Ozark competing for new customers in this area," I'm  
23 gonna object to the response of that for lack of  
24 foundation. He hasn't shown that he has any  
25 qualifications to express that opinion.

1                   MR. DUFFY: He's an assistant city  
2 administrator, he's in charge of all of the  
3 development of areas that are gonna be annexed out  
4 into the city, and I think we've already established  
5 his foundation and his qualifications for making  
6 these statements.

7                   JUDGE VOSS: I would have to agree with  
8 Mr. Duffy. That objection is overruled.

9                   MR. WILLIAMS: And then on the same page  
10 at line 107, there's a question that refers to the  
11 Staff memorandum and a request for an opinion on what  
12 would happen if the variance were denied, and I'm  
13 gonna object to that response -- to that question as  
14 calling for speculation.

15                   MR. DUFFY: I would agree it's calling  
16 for speculation, but it's speculation that can take  
17 place. And he was a party to the discussions. He  
18 can certainly respond to a question, well, what  
19 happens if we can't do this, and he can, based on his  
20 experience, come up with an opinion as to what may  
21 happen.

22                   JUDGE VOSS: I'd have to agree with  
23 Mr. Duffy. It is clearly speculation, but witnesses  
24 are often called upon to speculate based on their  
25 expertise in that area, so that's overruled.



1                   MR. WILLIAMS: I don't have any further  
2 objections to this testimony.

3                   JUDGE VOSS: Are there any other  
4 objections to this testimony by any other party?

5                   (NO RESPONSE.)

6                   JUDGE VOSS: Then with the exception of  
7 the stricken section, Exhibit 2 is admitted into  
8 evidence.

9                   (EXHIBIT NO. 2 WAS RECEIVED INTO  
10 EVIDENCE AND MADE A PART OF THE RECORD.)

11                  JUDGE VOSS: And I believe, Mr. Duffy,  
12 you were ready to tender this witness for  
13 cross-examination?

14                  MR. DUFFY: I had already tendered him,  
15 your Honor.

16                  JUDGE VOSS: I thought so. That was a  
17 while ago so I was just clarifying. All right.  
18 Let's see. Cross-examination by Staff?

19                  MR. WILLIAMS: Thank you.

20 CROSS-EXAMINATION BY MR. WILLIAMS:

21                  Q.       Mr. Coulter, do you know if Ozark  
22 Electric collects and remits to the City of Republic  
23 franchise taxes?

24                  A.       I would need to check with my Director  
25 of Finance, but I do know that we are working on an

1 agreement for that.

2 Q. Does Ozark Electric Cooperative have a  
3 franchise with the City of Republic to provide  
4 electric service?

5 A. Not at this time.

6 Q. Are there any discussions between the  
7 cooperative and the city regarding a franchise  
8 agreement?

9 A. We are talking to all municipalities that  
10 we have inside the city limits of Republic, City  
11 Utilities of Springfield. Of course, we have an  
12 existing franchise agreement with Empire Electric and  
13 then Ozark Electric Cooperative. We are working forward  
14 and talking to our municipal attorneys and looking at  
15 franchise agreements with those municipalities.

16 Q. Do you have copies of the development  
17 agreements between the City of Republic and the  
18 developer of Shuyler Ridge?

19 A. Yes, we do at our office in Republic,  
20 Missouri.

21 Q. Do you also have copies of the  
22 development agreement between the City of Republic  
23 and the developer of Terrell Creek?

24 A. Yes, we do, again at our office in  
25 Republic, Missouri.

1           Q.       Would you be willing to provide copies  
2 of those agreements to the Commission?

3           A.       Yes, sir.

4           Q.       Does the agreement between -- if you  
5 know, does the development agreement between the City  
6 of Republic and the developer of Shuyler Ridge  
7 address payment of fees the city may have to pay to  
8 the fire protection district?

9           A.       Yes, it does.

10          Q.       And do you know what that provision  
11 provides with regard to payment of those fees?

12          A.       The state statute is very specific on  
13 when a municipality annexes into an area that's  
14 covered by a rural fire protection district, and  
15 there's a five-year pay-out based on the assessed  
16 value of that property. And that is to cover debt  
17 the fire district has incurred for apparatus that  
18 they have monies or loans out for.

19                   And then once the city annexes, then the  
20 pay-out starts at that point, 100 percent of the  
21 assessed value at year one, 80, 60, 40, 20 over the  
22 course of five years. And when we enter into the  
23 developer's agreement to annex property, we require  
24 that developer to front those costs. So therefore,  
25 it's not a burden on the city to pay those back to

1 the developer -- or to the fire protection district.

2 Q. Are there any economic -- let me try  
3 this again. Are there any economic incentives for  
4 the City of Republic to annex the area that includes  
5 all or part of the Lakes at Shuyler Ridge subdivision  
6 sooner rather than later?

7 A. As far as annexing sooner, there isn't  
8 any, other than trying to make sure that the  
9 development is done in an orderly fashion under the  
10 codes for the City of Republic. There is some  
11 commercial property on the southern part of that, but  
12 that would be developed later as the developer moves  
13 from south to -- or from north to south.

14 Q. If that property were part of the city,  
15 wouldn't it be subject to city taxes?

16 A. Well, any -- any property within the  
17 municipal boundaries would be subject to city taxes.

18 Q. So there is a tax incentive at least?

19 A. You could -- you could argue that.

20 Q. And with regard to the area that  
21 includes Terrell Creek subdivision, is the City of --  
22 are there any economic incentives for the City of  
23 Republic to annex the Terrell Creek subdivision  
24 sooner rather than later?

25 A. No. Terrell Creek is a very rural

1 subdivision, 20-acre tracts going down to the  
2 largest -- the smallest being one-acre tracts, and at  
3 this point there is not any economic incentive to  
4 annex Terrell Creek.

5 Q. Have the city's plan for annexation of  
6 the property that includes -- or the area that  
7 includes the Lakes at Shuyler Ridge subdivision  
8 changed?

9 A. No, sir, it has not.

10 Q. And is there a particular time frame by  
11 which the city was contemplating annexing that  
12 subdivision?

13 A. There is no specific time frame on the  
14 annexation of those properties.

15 Q. Is the City of Republic wanting to annex  
16 the property that includes the Lakes at Shuyler Ridge  
17 subdivision at any time in the near future?

18 A. Working with the developer and with  
19 Greene County, again, to try to minimize the amount  
20 of confusion during the construction process, Greene  
21 County has their set of building officials, we have  
22 our set of building officials.

23 Even though we have the same set of  
24 building codes and development codes that are  
25 similar, having it under one roof, so to speak, makes

1 it much easier on our clients, which are obviously  
2 the general public, for the development process as  
3 well as emergency services.

4           If we can get everything under one roof  
5 with one utility company if there happens to be a  
6 structure fire or something out there, our fire  
7 department does not have to worry about is this house  
8 served by what utility company? Is this an Ozark  
9 house, is this an Empire house? And they know  
10 there's only one number to call to have that utility  
11 disconnected and don't have to worry about their  
12 response.

13           Q.       Aside from an involuntary annexation,  
14 does the City of Republic have any control on when  
15 the area that includes Shuyler -- the Shuyler Ridge  
16 subdivision may be annexed to the City of Republic?

17           A.       That is at our determination.

18           Q.       And what gives you that right?

19           A.       Because we have a consent to annex on  
20 file in the offices of the city clerk.

21           Q.       So the developer doesn't have the right  
22 to determine whenever that property would be annexed?

23           A.       No.

24           Q.       No, he does not?

25           A.       Correct. He does not have the right to

1 say "I'd like to be annexed tomorrow."

2 Q. Do you know of any reason why the  
3 developers' agreements between the City of Republic  
4 and the developers of Lakes at Shuyler Ridge and  
5 Terrell Creek subdivisions haven't been disclosed to  
6 the Commission?

7 A. We were not asked by PSC Staff to supply  
8 those.

9 MR. WILLIAMS: Judge, I would like to  
10 have a couple of exhibits left open for -- for those  
11 two development agreements to be provided to the  
12 Commission as exhibits.

13 JUDGE VOSS: So is it Shuyler Ridge?

14 THE WITNESS: Lakes at Shuyler Ridge.

15 JUDGE VOSS: Shuyler Ridge.

16 THE WITNESS: Uh-huh.

17 JUDGE VOSS: Late-filed Exhibit 8 and  
18 then the developmental agreement for Terrell Creek,  
19 late-filed Exhibit 9.

20 I will ask a question: Given that there  
21 are going to be closing statements in lieu of  
22 briefing, when are those gonna be submitted and what  
23 are you gonna do with them? Just have them in the  
24 record generally or did you want to --

25 MR. WILLIAMS: If the other parties will

1 stipulate to their admissibility, even though we  
2 don't have them in front of us yet.

3 MR. DUFFY: You know, we don't have a --  
4 any reason to say that the Commission can't look at  
5 them. Our perspective is if the Staff thought these  
6 were important, they had several months to ask for  
7 them and look at them and make them exhibits if they  
8 wanted to make them exhibits.

9 So I guess I would go on the record as  
10 saying they are matters of public record. They  
11 always have been matters of public record since  
12 they're the city's agreements. We didn't think they  
13 were particularly relevant to this case or we would  
14 have attached them to something.

15 So I would say I don't see any point in  
16 putting them in the record, but at the same time, if  
17 the Commission thinks they need to look at them,  
18 we'll certainly supply them.

19 JUDGE VOSS: I was just asking what  
20 timeline you thought they would be filed by, and if  
21 there's something in there when Staff looks at them  
22 they want a red flag, are you going to have an  
23 opportunity to do that since there's not going to be  
24 a brief filed? That was --

25 MR. DUFFY: I would say that if there's



1 not going to be a brief and Mr. Williams is going to  
2 make closing argument like I am, I don't know how  
3 he's going to be able to raise an argument about a  
4 document that he's never seen.

5                   So as to the mechanics of when, I'm  
6 assuming that, you know, within a couple of days  
7 getting them in the mail and making copies and  
8 bringing them over here, I would say by the first  
9 part or so of next week we could supply them if  
10 that's the Commission's desire.

11                   JUDGE VOSS: That was just my concern,  
12 Mr. Williams, is I'm not sure that you'll be able to  
13 adequately use them if you find anything in them that  
14 you...

15                   MR. WILLIAMS: I think the Commission  
16 would be very interested in seeing them since they've  
17 been put forth as one of the bases for why this  
18 territorial agreement's even in front of the  
19 Commission and in particular with regard to the  
20 variances.

21                   JUDGE VOSS: That's fine.

22                   MR. DUFFY: Well, I don't know that --  
23 since he's never seen one, I mean, I've seen one and  
24 it's pretty thick and there's a lot of stuff in there  
25 that doesn't have anything to do with this. I think

1 the relevant aspect of it is that there's this  
2 consent to annexation that the witness has testified  
3 about. And what the Staff seems to be arguing here  
4 is that, well, you know, the city's got the right to  
5 annex this territory, so what's the big deal, you  
6 know, why do we need this.

7                   And it goes back to, you know, the whole  
8 reason for the agreement and the meeting in March  
9 that the city said "We've got the right to annex" and  
10 the developer said, "Well, I didn't think you were  
11 gonna do it so fast and I don't want it and, you  
12 know, I want service from Ozark, and if you annex, I  
13 can't get service from Ozark," and so that -- that's  
14 what's going on here.

15                   The relevant thing is that the city has  
16 the right to annex and you've heard testimony about  
17 that. You don't need to see the development  
18 agreement to know that that's in place.

19                   MR. WILLIAMS: And Staff doesn't dispute  
20 that that is a relevant factor, but in the pleadings  
21 I looked at, part of the argument was that the timing  
22 that the city was going under was -- had economic  
23 ramifications to it.

24                   JUDGE VOSS: That's fine, and if the  
25 witness is willing to provide them into the record,

1 again, late-filed Exhibit 8 and late-filed Exhibit 9  
2 which will be the Shuyler Ridge and Terrell Creek  
3 respectively.

4 CHAIRMAN DAVIS: Judge, could I just --  
5 I just want to remind counsel for Staff that I  
6 believe those are public documents and could have  
7 been obtained in advance of this hearing. Could they  
8 not have been --

9 MR. WILLIAMS: I don't know if they're  
10 public documents or not. I know we attempted to  
11 request them in EFIS and apparently there was an  
12 issue with the data request actually going out, so...

13 CHAIRMAN DAVIS: Okay. Well, we can  
14 have that discussion with our EFIS people here at a  
15 later date.

16 MR. WILLIAMS: What I'm saying is there  
17 was some effort made to try to obtain them.

18 CHAIRMAN DAVIS: Okay. All right.

19 MR. WILLIAMS: I won't dispute it --

20 CHAIRMAN DAVIS: I appreciate your good  
21 faith efforts there, counsel.

22 MR. DUFFY: And just so it's clear,  
23 today's the first I've heard of any attempt to serve  
24 us with a data request about it. We never have  
25 received a data request about it.

1                   MR. WILLIAMS: It's not in EFIS so I  
2 don't know what happened.

3                   JUDGE VOSS: All right. Are there any  
4 further questions from Staff for this witness?

5                   MR. WILLIAMS: No.

6                   JUDGE VOSS: Okay. Public Counsel, did  
7 you have any cross-examination for this witness?

8                   MR. MILLS: No. My only question was  
9 going to be how do you pronounce that word, and you  
10 already asked that so I'm good, thank you.

11                  JUDGE VOSS: And we normally frown on  
12 friendly cross.

13                  MR. WIDGER: Please don't frown. He  
14 raised an issue that I really need to deal with  
15 because he went into the issue of the city's  
16 relationship with Ozark Electric, so I do need to ask  
17 him a question.

18                  JUDGE VOSS: Okay. Just be ready for  
19 potential objections, so okay.

20                  MR. WIDGER: I've heard them all.

21                  First of all, I'd like to ask the  
22 Commission to take notice of Section 384.080-1 (10)  
23 of the Revised Statutes of Missouri which sets out  
24 the statutory franchise authority of the cooperative  
25 to serve any -- to place its materials, its system

1 along the roads and public ways of any city and town  
2 in this state.

3 I'd like to ask a couple of questions of  
4 the witness regarding franchises.

5 CROSS-EXAMINATION BY MR. WIDGER:

6 Q. We've established you were not asked to  
7 provide the developer agreements. Were you asked to  
8 provide a copy of your franchise with Empire?

9 A. Not that I'm aware of.

10 Q. Okay. Now, is it true, Chris, that, in  
11 fact, there are two ordinances which relate to the  
12 provision of service? One is the franchise to Empire  
13 District, and the second is a business tax which  
14 actually provides the revenue mechanism for the city;  
15 is that correct?

16 A. That is correct.

17 Q. Okay. So does -- does the franchise  
18 ordinance itself have any provision for payment of  
19 money?

20 A. Not that I'm aware of.

21 Q. All right. It yields to the business  
22 tax ordinance?

23 A. Correct.

24 Q. Okay. And is it your understanding that  
25 the issue with that business tax ordinance is that

1 it's written in such a narrow way that it only  
2 defines the Empire District and does not define the  
3 Ozark Electric Cooperative?

4 A. That is correct.

5 Q. So what we're dealing with here is the  
6 authority and ability of the city to amend its  
7 ordinance to broaden the definition of electric  
8 suppliers so it also captures Ozark Electric  
9 Cooperative?

10 A. That is correct.

11 Q. Okay.

12 A. As well as City Utilities of  
13 Springfield.

14 MR. WIDGER: Yes, thank you. No other  
15 questions.

16 JUDGE VOSS: Are there questions from  
17 the bench, Commissioner Murray?

18 COMMISSIONER MURRAY: I have none.

19 JUDGE VOSS: Commissioner Gaw?

20 COMMISSIONER GAW: I don't think I do.

21 Thank you.

22 JUDGE VOSS: Okay. Commissioner  
23 Appling?

24 COMMISSIONER APPLING: No questions.

25 JUDGE VOSS: Is there any redirect,

1 Mr. Duffy?

2 MR. DUFFY: No, ma'am.

3 JUDGE VOSS: All right. Then this  
4 witness may be excused. You may step down.

5 THE WITNESS: Thank you.

6 MR. DUFFY: May this witness be  
7 permanently excused from this hearing, your Honor?

8 JUDGE VOSS: I believe so. I believe  
9 the next witness scheduled is Ozark witness,  
10 Mr. Prewitt. Mr. Prewitt, will you state your full  
11 name for the record, please?

12 THE WITNESS: Patrick Prewitt.

13 (The witness was sworn.)

14 JUDGE VOSS: Mr. Widger, your witness.

15 MR. WIDGER: Thank you.

16 DIRECT EXAMINATION BY MR. WIDGER:

17 Q. Mr. Prewitt, do you have with you a copy  
18 of what's been marked as Exhibit 5 in this  
19 proceeding?

20 A. Yes.

21 Q. Do you recognize that as the prefiled  
22 direct testimony that you participated in preparation  
23 of prior to this hearing?

24 A. Yes, it is.

25 Q. If the same questions were asked of you

1 today, would your answers be the same?

2 A. Yes.

3 Q. Are there any corrections that you need  
4 to make to Exhibit 5?

5 A. No.

6 MR. WIDGER: At this time we would offer  
7 Exhibit 5 into evidence and tender the witness for  
8 cross-examination.

9 MR. WILLIAMS: Judge, I have an  
10 objection.

11 JUDGE VOSS: Okay.

12 MR. WILLIAMS: On page 3 at line 42, you  
13 have a question, "Could you have refused to serve  
14 them in light of the annexation plans of the City of  
15 Republic?"

16 At line 52 there's a sentence that runs  
17 through line 54 that says, "To refuse to compete with  
18 the Empire District when we may lawfully do so would  
19 seem to be tantamount to engaging in an antitrust law  
20 violation." I object to that as being nonresponsive  
21 to the question.

22 JUDGE VOSS: It also may be a legal  
23 conclusion. Do you have any response to that,  
24 Mr. Widger?

25 MR. WIDGER: The -- the question --



1 well, I think -- I think that it does adequately  
2 answer the question. He purports here to not be an  
3 attorney, but he is testifying as to his  
4 understanding, that he is not free to refuse to  
5 compete with Empire District.

6 And, in fact, the -- an important part  
7 of the territorial agreement law is the accompanying  
8 provision which creates -- or allows territorial  
9 agreements to be an exception to the antitrust law.

10 JUDGE VOSS: I'm inclined to agree with  
11 Staff on this one. That seems to be more of a legal  
12 conclusion, actually, even if it was intended as a  
13 joke. And on redirect you might be able to get a  
14 similar type statement that didn't involve a legal  
15 conclusion.

16 MR. WIDGER: Thank you.

17 JUDGE VOSS: Okay. So it will be --  
18 line 52, page 3, from "To refuse" to line 54, "law  
19 violation," period.

20 MR. WILLIAMS: I'm not gonna raise any  
21 more objections on this witness.

22 JUDGE VOSS: Are there any other  
23 objections to any portion of this witness's  
24 testimony?

25 (NO RESPONSE.)

1                   JUDGE VOSS: Hearing none, with the  
2 exception to the part stricken, Exhibit 5 is admitted  
3 into evidence.

4                   (EXHIBIT NO. 5 WAS RECEIVED INTO  
5 EVIDENCE AND MADE A PART OF THE RECORD.)

6                   JUDGE VOSS: And Staff, your witness.

7                   MR. WILLIAMS: Thank you.

8 CROSS-EXAMINATION BY MR. WILLIAMS:

9                   Q.       Mr. Prewitt, does the cooperative have a  
10 policy that it treats all of its members that are  
11 similarly situated the same?

12                  A.       Yes, we do.

13                  Q.       Does the cooperative ever deviate from  
14 that policy?

15                  A.       No, we do not.

16                  MR. WILLIAMS: No further questions.

17                  JUDGE VOSS: Public Counsel, do you have  
18 any questions?

19                  MR. MILLS: No questions.

20                  JUDGE VOSS: Mr. Duffy, with the  
21 understanding that friendly cross is frowned upon?

22                  MR. DUFFY: I want to explore that  
23 question and answer.

24 CROSS-EXAMINATION BY MR. DUFFY:

25                  Q.       You said you treated all your customers

1 the same. You don't -- you have different rates for  
2 different classes of customers, do you not?

3 A. That is correct, yes.

4 Q. So you do not treat all of your  
5 customers exactly the same?

6 A. That would be correct.

7 Q. And in this factual situation, as I  
8 understand it, you offer developers certain  
9 conditions that you wouldn't offer to an individual  
10 who is building his own house?

11 A. Yes. That was our subdivision policy.

12 Q. Okay. So you treat developers the same  
13 with regard to developing a subdivision?

14 A. That would be correct.

15 Q. But if I were putting in my -- if I were  
16 asking to run your service to my house and it's not a  
17 subdivision, I would be treated differently than that  
18 developer would be?

19 A. That would be a different extension  
20 policy, yes.

21 MR. DUFFY: Okay. Thank you.

22 JUDGE VOSS: Are there questions from  
23 the bench, Commissioner Murray?

24 COMMISSIONER MURRAY: No, thank you.

25 JUDGE VOSS: Commissioner Gaw?

1 COMMISSIONER GAW: No, thank you.

2 COMMISSIONER APPLING: No questions,  
3 Judge.

4 JUDGE VOSS: Is there any redirect?

5 MR. WIDGER: No, ma'am.

6 JUDGE VOSS: Then this witness is  
7 excused. You may step down.

8 MR. WIDGER: Is he free to leave the  
9 hearing?

10 JUDGE VOSS: He's free to leave the  
11 hearing. I believe, Mr. Duffy, you're back up with  
12 Mr. Penning?

13 MR. DUFFY: Yes. Call Martin Penning to  
14 the stand.

15 JUDGE VOSS: Will you please state your  
16 full name for the record?

17 THE WITNESS: Martin O. Penning.

18 (The witness was sworn.)

19 JUDGE VOSS: Mr. Duffy, your witness.

20 DIRECT EXAMINATION BY MR. DUFFY:

21 Q. Mr. Penning, did you cause to be  
22 prepared what's been marked for purposes of  
23 identification as Exhibit No. 3, entitled "Prepared  
24 Testimony of Martin O. Penning" in this proceeding?

25 A. Yes, I did.

1 Q. Do you have any corrections or additions  
2 to that document?

3 A. No.

4 Q. If I asked you the same questions that  
5 appear therein, would your answers be the same as  
6 they appear?

7 A. Yes.

8 Q. Are those answers true and correct to  
9 the best of your knowledge, information and belief?

10 A. Yes, they are.

11 MR. DUFFY: I would offer into evidence  
12 Exhibit No. 3 and tender the witness for  
13 cross-examination.

14 MR. WILLIAMS: Staff has a few  
15 objections.

16 JUDGE VOSS: Okay. Proceed.

17 MR. WILLIAMS: On page 4 at line 67,  
18 there's a question, "Does a proposed variance apply  
19 to the cost of electricity itself?" And then in the  
20 last sentence in response to that question on line 70  
21 through 71, there's a statement, "...and that is only  
22 necessary so Empire can meet the terms that Ozark  
23 Electric Cooperative has contractually agreed to  
24 provide to the developer." I object to that as  
25 nonresponsive to the question and ask that it be

1 stricken.

2 MR. DUFFY: I think that's ridiculous.

3 JUDGE VOSS: Could you be a little more  
4 specific, Mr. Duffy?

5 MR. DUFFY: He's trying to give  
6 background to, you know, to distinguish between the  
7 variance is not with regard to the cost of  
8 electricity, it's with regard to the facilities. And  
9 the only reason that we're asking for this variance,  
10 to do it, is so we can fulfill the obligations that  
11 we agreed to in the meeting in Republic. So he's  
12 just trying to give background there.

13 MR. WILLIAMS: And I repeat, it goes  
14 well beyond the scope of the question.

15 MR. MILLS: If I may respond? I mean, I  
16 don't necessarily have a dog in the fight on this  
17 particular piece of testimony, but I think that the  
18 testimony that's filed with the Commission is  
19 essentially a narrative in direct testimony. It's  
20 not intended to be cross-examination.

21 And to unduly limit the scope of the  
22 witnesses and their writing style so that each  
23 separate sentence has to be preceded with a specific  
24 question, would make the testimony probably much  
25 longer, much less easy to read and probably less easy

1 to understand by the reader.

2                   So I think -- I think that the notion  
3 that there is a valid objection in that the answer in  
4 a prefiled piece of testimony does not respond to the  
5 question posed, I don't even think that it is a valid  
6 objection.

7                   MR. WILLIAMS: And I'm not objecting to  
8 the full answer, just the last sentence.

9                   MR. MILLS: Right. But my point is I  
10 don't think that it's valid to object on the basis  
11 that it doesn't respond to the question posed.

12                   MR. DUFFY: And I wish I were as  
13 articulate and smart as Mr. Mills.

14                   JUDGE VOSS: I was gonna say, articulate.  
15 I was thinking the same thing myself because I think  
16 it clarifies the background to the answer, although  
17 not a direct answer. I will overrule that objection.

18                   MR. WILLIAMS: I'm not gonna raise any  
19 more objections to this witness.

20                   JUDGE VOSS: Are there any other  
21 objections to any portion of this witness's  
22 testimony?

23                   (NO RESPONSE.)

24                   JUDGE VOSS: Hearing none, Exhibit 3 is  
25 admitted into the record and the witness is tendered

1 for cross-examination.

2 (EXHIBIT NO. 3 WAS RECEIVED INTO  
3 EVIDENCE AND MADE A PART OF THE RECORD.)

4 JUDGE VOSS: I believe Staff?

5 MR. WILLIAMS: Thank you.

6 CROSS-EXAMINATION BY MR. WILLIAMS:

7 Q. Mr. Penning, has Empire made any  
8 improvements at the Shuyler Ridge subdivision  
9 location?

10 A. We completed the primary facilities that  
11 were in place ready to provide service for houses as  
12 they be -- as they are built.

13 Q. And what constituted those primary  
14 facilities? Are you talking about line extensions  
15 that provide service to connections for service drops  
16 or are you talking about decorative lighting or are  
17 you talking about something else?

18 A. The underground facilities and the  
19 decorative lighting.

20 Q. Were some of those facilities already in  
21 place before Empire began putting in the same types  
22 of facilities?

23 A. Yes.

24 Q. And do you know who put in the  
25 facilities that were already in place?



1           A.       I believe Ozark Electric.

2           Q.       Was the genesis of this territorial  
3 agreement that encompasses some 9.5 miles simply the  
4 Lakes at Shuyler Ridge subdivision and the Terrell  
5 Creek subdivisions?

6           A.       Could you restate that?

7           Q.       Is the reason why you entered into a  
8 territorial agreement with Ozark simply because of  
9 the Lakes at Shuyler Ridge subdivisions and the  
10 Terrell Creek subdivisions, the issues surrounding  
11 them?

12          A.       I believe, yes.

13          Q.       Then why is it that we're dealing with a  
14 territorial agreement that encompasses some 9.5 miles  
15 when there's in the neighborhood of 500 acres  
16 involved in those two subdivisions?

17          A.       Well, I was not involved in the  
18 particular meetings that took place, but my  
19 understanding was that there were a lot of issues  
20 surrounding this, and the parties that were involved  
21 had this meeting and developed this plan to remedy  
22 those problems.

23          Q.       On page 5 at lines 95 to 96 of your  
24 testimony, you state the projected total cost of the  
25 facilities to serve this development is approximately

1 1.8 million, and that's in reference to the Lakes at  
2 Shuyler Ridge, is it not?

3 A. Yes, sir.

4 Q. And you go on to state "The projected  
5 tendered revenue is 5.6 million"?

6 A. Right.

7 Q. And then you also say, "Empire believes  
8 this project provides a good return on investment"?

9 A. Yes.

10 Q. Wasn't the 1.8 million based on the  
11 original filing Empire made, and that if corrected,  
12 it would now be 1.88 million?

13 A. Yes.

14 Q. And the 5.6 million, wouldn't that now  
15 be 5.68 million?

16 A. That's correct.

17 Q. And the 1. -- what we've agreed now or  
18 you've agreed now should be 1.88 million, is that  
19 something that would generally be referred to as a  
20 rate base item?

21 A. Yes.

22 Q. And does that 1.88 million value include  
23 all the costs that Empire would incur to serve this  
24 development for a ten-year period?

25 A. Yes, it does.

1 Q. Does that 1.88 million include cost to  
2 serve customers over the ten-year period for  
3 operation and maintenance costs?

4 A. No.

5 Q. Does it include production cost?

6 A. No.

7 Q. Does it include transmission cost?

8 A. No.

9 Q. Does it include distribution cost?

10 A. No, nothing other than what's here at  
11 the facility.

12 Q. So it wouldn't include customer service  
13 costs or administrative and general costs?

14 A. That's correct.

15 Q. And it wouldn't include amortization  
16 expense or taxes?

17 A. Correct.

18 Q. And also it wouldn't include  
19 depreciation expense associated with production and  
20 transmission?

21 A. Correct.

22 Q. And it wouldn't include return on rate  
23 base associated with production and transmission?

24 A. Correct.

25 Q. Would you find it out of line if I told

1 you that the Staff's accounting schedules in Empire's  
2 current rate case show that 65 percent of the revenue  
3 requirement needed by Empire is due to operation and  
4 maintenance costs?

5 A. I wouldn't know.

6 Q. Do you agree that it will cost Empire  
7 more than 1.88 million to serve the customers at the  
8 Lakes at Shuyler Ridge over the ten-year period?

9 A. The 1.8 was strictly for the facilities,  
10 and yes, there would be other expenses involved.

11 MR. WILLIAMS: That's all the questions  
12 I have.

13 JUDGE VOSS: Public Counsel?

14 MR. MILLS: No questions.

15 JUDGE VOSS: Mr. Widger?

16 MR. WIDGER: No questions.

17 JUDGE VOSS: Other questions from the  
18 bench, Commissioner Murray?

19 COMMISSIONER MURRAY: (Shook head.)

20 JUDGE VOSS: Commissioner Gaw?

21 COMMISSIONER GAW: Maybe a clarification  
22 from counsel first for Empire. Who is the -- who is  
23 a witness that would be more likely to be able to  
24 address the -- how the revenues that will come from  
25 these particular customers will -- will relate to the

1 expenses in this area? Is it this witness?

2 MR. DUFFY: I would say if you've got a  
3 question, try it on this witness; if you don't, we  
4 have Mr. Palmer who will be up next and he may have a  
5 broader perspective. He may be able to, but I'd say  
6 ask and let's see what happens.

7 COMMISSIONER GAW: Okay. All right.  
8 Thanks, Mr. Duffy.

9 QUESTIONS BY COMMISSIONER GAW:

10 Q. I'm trying to understand a little bit  
11 about -- about the comparison of the revenues that  
12 you expect based upon the rates that are being set  
13 here in comparison with the expenses that -- that  
14 will be ongoing in this area. Can you give me some  
15 perspective on that? Counsel was just inquiring  
16 about that.

17 A. I really couldn't. This is what was  
18 presented in my testimony was a very simple cost  
19 benefit analysis.

20 COMMISSIONER GAW: What I'm wanting to  
21 have some information on is whether or not other  
22 Empire District customers would be required to  
23 subsidize the rates that are being proposed in this  
24 particular area. Mr. Duffy?

25 MR. DUFFY: Well, I could take a stab at

1 that. First of all, we're not setting any rates in  
2 this case. We're not asking the Commission to set  
3 rates. The Commission sets rates in a general rate  
4 case. When development occurs in this subdivision,  
5 Empire would follow its normal course and book its  
6 investment as those things go along just as it does  
7 with everybody else.

8                   If there was some question -- well,  
9 whether there would be a subsidization or not really  
10 becomes a question in a future rate case, because you  
11 would be setting rates based upon the rate base that  
12 is presented to you in that particular test year.

13                   I would submit that I don't think it's  
14 reasonable to expect that all of the houses will  
15 develop in one year and show up in one test period in  
16 one rate case in this -- in the future. Whether  
17 there would be any kind of subsidization or not would  
18 be a question that would have to be necessarily  
19 addressed in a future rate case.

20                   COMMISSIONER GAW: Well, to follow up on  
21 that, the rates here, as I understand it, that are  
22 being proposed by Empire will be lower than the rates  
23 that are being charged to other similar customers of  
24 Empire; is that accurate or not?

25                   MR. DUFFY: If you grant the variance

1 that Empire has requested, Empire would not charge  
2 the developer of this subdivision the same amount  
3 that it would charge a developer under its existing  
4 tariff.

5 COMMISSIONER GAW: All right.

6 MR. DUFFY: As a result, there will be  
7 some accumulation of dollars that would be different.

8 COMMISSIONER GAW: Okay.

9 MR. DUFFY: If you want to deal with  
10 that accumulation of dollars in a future rate case,  
11 you have the ability to do that.

12 COMMISSIONER GAW: Okay.

13 MR. DUFFY: And very frankly, you could  
14 say at some point in the future the Commission could  
15 determine that the shareholders of Empire should eat  
16 all of those dollars.

17 COMMISSIONER GAW: Okay.

18 MR. DUFFY: Whether -- whether Empire  
19 would want to appeal that or not, you know, that's up  
20 to them, but you could issue an order saying that.  
21 You could also issue an order that doesn't even  
22 address it, in which case those dollars would get  
23 rolled in with all of the other dollars and spread  
24 over all of the customers of Empire, and I guess you  
25 could do something in between those two extremes.

1                   COMMISSIONER GAW: Once there are  
2 individual customers that are actually paying for  
3 their own electricity within this development, is it  
4 proposed that those rates would be the same as other  
5 Empire customers? That's not an issue here; is that  
6 correct?

7                   MR. DUFFY: You're absolutely correct.  
8 The rates for electricity for service for the  
9 customers in these subdivisions will be absolutely no  
10 different than customers anywhere else. It is simply  
11 that the installation costs of the primary facilities  
12 and what are called these decorative streetlights  
13 that are basically better than a wood pole with a  
14 dusk-to-dawn light on them.

15                   COMMISSIONER GAW: I see. Now, does  
16 Staff or Public Counsel want to weigh in on that?

17                   MR. WILLIAMS: Commissioner, I don't  
18 disagree with Mr. Duffy that it would be a rate case  
19 issue. However, it's likely to be buried and perhaps  
20 forgotten by the time we get to a rate case. And our  
21 one concern is that those dollars would -- the cost  
22 from those -- the benefit that this particular  
23 developer's getting would be then spread upon all of  
24 the ratepayers of Empire.

25                   COMMISSIONER GAW: Is it possible for



1 the Commission, if it chose to, to enter into some  
2 sort of an order in this case to prevent that from  
3 occurring?

4 MR. WILLIAMS: I don't see why not.

5 MR. DUFFY: I would concur that you  
6 could order Empire to track the dollars so that they  
7 would be available for consideration in a future rate  
8 case. I don't think that you can order Empire to eat  
9 the dollars, let's put it that way, in this  
10 particular case. I think that's because it's a --  
11 number one, we don't know what dollars are going to  
12 be involved until it actually occurs, so it's not  
13 ripe at this point.

14 COMMISSIONER GAW: We could make it a  
15 condition of acceptance of this territorial  
16 agreement, though, could we not?

17 MR. MILLS: Yes. And I disagree with  
18 Mr. Duffy. I think you could order that in future  
19 rate cases they be treated separately. I suppose,  
20 you know, there's a fine distinction. There wouldn't  
21 be any rates changed as a result of this order, but  
22 it would determine how -- you know, unless a future  
23 Commission overruled that order, it would determine  
24 how they would be treated in a future rate case, and  
25 I think you could do that in this case.

1                   Typically, the Commission in a case like  
2 this would include the standard boilerplate language  
3 that says no rate making treatment is being  
4 contemplated and it's entirely left open. But the  
5 Commission could jump either way and say, yes, we  
6 plan in the future to stick this all on ratepayers or  
7 we plan in the future to stick this all on  
8 shareholders. There's nothing that prevents you from  
9 saying that in this order.

10                   MR. WILLIAMS: Commissioner, I know that  
11 in the past the Commission has, as it typically does  
12 with tariffs whenever somebody comes in with a  
13 general rate case, not approve the agreement that was  
14 presented, that said if you present one that has  
15 these terms, we will approve it.

16                   COMMISSIONER GAW: Okay. All right.  
17 I'm sorry to vary off the track here. I don't  
18 believe I have any questions of this witness. Thank  
19 you.

20                   JUDGE VOSS: Commissioner Appling, do  
21 you have any questions?

22                   COMMISSIONER APPLING: (Shook head.)

23                   JUDGE VOSS: All right. Is there  
24 redirect?

25                   MR. DUFFY: Just a quick clarification.

1 REDIRECT EXAMINATION BY MR. DUFFY:

2 Q. Mr. Penning, on page 5, line 97, we were  
3 talking about a ten-year revenue projection of  
4 5.6-something million. Was that calculated based on  
5 your rates in effect now, or was that anticipating  
6 future rate increases?

7 A. Present rates.

8 Q. So if you have future increases in your  
9 rates, that \$5.6 million number would go up or would  
10 it go down?

11 A. It would go up.

12 MR. DUFFY: That's all I have for this  
13 witness.

14 JUDGE VOSS: Great. Then this witness  
15 may be excused. You may step down -- or is excused.  
16 You may step down. Mr. Duffy, would you like to call  
17 your next witness?

18 MR. DUFFY: Call Michael Palmer to the  
19 stand. After we get him sworn, could we take a  
20 ten-minute break maybe?

21 JUDGE VOSS: We can take a ten-minute  
22 break before we have him sworn if you'd like.

23 MR. DUFFY: Sometime in the near future.

24 JUDGE VOSS: Let's go ahead and take a  
25 break until ten till, like 15 minutes.

1 (A RECESS WAS TAKEN.)

2 JUDGE VOSS: I believe Mr. Duffy was  
3 about to call Mr. Palmer.

4 MR. DUFFY: Yes, your Honor. If  
5 possible, I'd like to take care of one housekeeping  
6 matter before that.

7 JUDGE VOSS: Okay.

8 MR. DUFFY: And that is I would -- in  
9 the Stipulation of Facts, we ask the Commission to  
10 take official notice of several of the Commission's  
11 orders that had previously granted waivers regarding  
12 unregulated competition, and off the record I had  
13 indicated that I found an additional case and I  
14 passed out copies of that to everyone.

15 So at this point I would like to -- I  
16 would ask the Commission to take official notice  
17 additionally of their order granting waivers in Case  
18 Number EO-91-386 issued on June 25th, 1991, and I  
19 think maybe we've also marked that as Exhibit No. --

20 JUDGE VOSS: 7.

21 MR. DUFFY: -- 7. So at this time I  
22 would move for the admission of Exhibit No. 7.

23 MR. WILLIAMS: Staff has no objection.

24 MR. MILLS: No objection.

25 JUDGE VOSS: Any other objections?

1 (NO RESPONSE.)

2 JUDGE VOSS: Okay. No objections.

3 Exhibit 7 will be admitted into the record.

4 (EXHIBIT NO. 7 WAS RECEIVED INTO  
5 EVIDENCE AND MADE A PART OF THE RECORD.)

6 MR. DUFFY: At this time Empire would  
7 call Michael Palmer to the stand.

8 JUDGE VOSS: Mr. Palmer, would you state  
9 your full name for the record?

10 THE WITNESS: Michael E. Palmer.

11 (The witness was sworn.)

12 JUDGE VOSS: Your witness, Mr. Duffy.

13 DIRECT EXAMINATION BY MR. DUFFY:

14 Q. Mr. Palmer, did you cause to be prepared  
15 what's been identified and marked as Exhibit No. 4,  
16 the direct testimony of Michael E. Palmer?

17 A. Yes, I did.

18 Q. Do you have any changes or corrections  
19 to that document?

20 A. I do not.

21 Q. If I asked you the questions that appear  
22 therein this morning, would your answers be the same?

23 A. Yes, they would.

24 Q. Are those answers true and correct to  
25 the best of your knowledge, information and belief?

1           A.       Yes, sir.

2                   MR. DUFFY:  With that, I would offer  
3 into evidence Exhibit No. 4 and I tender the witness  
4 for cross-examination.

5                   MR. WILLIAMS:  Staff has an objection.

6                   JUDGE VOSS:  Proceed.

7                   MR. WILLIAMS:  On page 4, line 1, the  
8 beginning of a sentence that goes on and finishes at  
9 the end of the next line, "I recall at least one of  
10 the developers saying that he would consider bringing  
11 the lawsuit to stop the annexation."  Object to that  
12 on the basis of hearsay and ask that it be stricken.

13                   MR. DUFFY:  Your Honor, that's a  
14 statement by this witness of something that he  
15 observed, and so I don't think it qualifies as  
16 hearsay.

17                   JUDGE VOSS:  It seems like that's the  
18 definition of hearsay.

19                   MR. MILLS:  May I?

20                   JUDGE VOSS:  Yes, please.

21                   MR. MILLS:  The definition of hearsay is  
22 an out-of-court statement offered --

23                   MR. WILLIAMS:  Cut to the chase.

24                   MR. MILLS:  -- for the truth -- the  
25 truth of the utterance.  In this case what this is

1 offered for is to say, from Mr. Palmer's perspective,  
2 why they were talking about an agreement, not that  
3 this particular person was or was not going to bring  
4 a lawsuit or was even considering it, but that this  
5 person heard him say that and so discussions went  
6 forward because of that statement. Whether the  
7 statement is true or not is not even an issue. It's  
8 the question of whether this statement was made, and  
9 apparently Mr. Palmer did hear that statement  
10 personally, so it's not even hearsay. It doesn't  
11 even fit in -- it doesn't even need to be an  
12 exception to the hearsay rule because it is not  
13 hearsay.

14 JUDGE VOSS: I agree. It looks like the  
15 statement is -- saying that he heard the statement  
16 would, of course, not be accepted as proof that the  
17 statement was made, so the objection will be  
18 overruled.

19 MR. WILLIAMS: And then on page 8 at  
20 line 10, there's a question, "Do you see anything in  
21 that declaration of public policy that you think  
22 pertains to this case?" I object to the response in  
23 that he's making statements of his interpretation of  
24 what the Commission meant by its rule. I think the  
25 rule speaks for itself and there's nothing added to

1 this Commission's record by his speculation about  
2 what he thinks it means.

3 JUDGE VOSS: Can you restate the lines?  
4 I'm sorry.

5 MR. WILLIAMS: It's his answer in  
6 response to the question that begins on line 10 on  
7 page 8, and the answer continues over to line 8 on  
8 page 9.

9 JUDGE VOSS: I think it clarifies that  
10 he's not a lawyer and not answering as a lawyer but  
11 just giving his opinion as a layperson.

12 MR. WILLIAMS: And I'm not objecting on  
13 the basis that it's a legal opinion. I'm just  
14 objecting on the basis that it's irrelevant and he's  
15 engaging in speculation, in particular, as to most of  
16 the first paragraph which begins, "First, it's  
17 apparent to me from the first sentence," and then  
18 he's providing an interpretation of the rule, and the  
19 rule speaks for itself or the general order which  
20 he's already quoted above.

21 MR. DUFFY: Your Honor, what he's doing  
22 is trying to factually distinguish this situation in  
23 this case from the reason the promotional practices  
24 rule was created in the first place. And he's  
25 entitled to read something and say, you know, "I



1 don't think this applies." As a layman, that's all  
2 he's doing. And so, his opinion on this goes to the  
3 weight to be afforded this testimony, not necessarily  
4 to its admissibility.

5 MR. WILLIAMS: And, Judge, I'd point out  
6 that on lines 14 of page 7, he said he wasn't even in  
7 the public utility business in 1971 whenever the  
8 general order was promulgated.

9 MR. DUFFY: Well, that doesn't stop  
10 preachers from interpreting the Bible if they...

11 MR. WIDGER: Judge, I think it's -- I  
12 think that the speculations even of the general  
13 manager of a \$100 million corporation or 200 million,  
14 whatever it is, are important because I'm interested  
15 in the mindset of someone who is -- who is walking  
16 the line between regulations and laws and trying to  
17 provide lawful service to the public and compete with  
18 my client. So he's entitled to speculation because  
19 his speculation affects the operation of his  
20 business.

21 JUDGE VOSS: I don't see clear relevance  
22 of the statements, but I don't see a reason  
23 sufficient to justify striking it. I think it will  
24 be taken for the weight of whatever it is worth.

25 MR. WILLIAMS: So you're overruling the

1 objection?

2 JUDGE VOSS: Yes.

3 MR. WILLIAMS: Thank you. No further  
4 objections.

5 JUDGE VOSS: Are there any other  
6 objections to anyone else -- to portions of this  
7 witness's testimony?

8 (NO RESPONSE.)

9 JUDGE VOSS: Hearing none, Exhibit 4 is  
10 admitted into evidence.

11 (EXHIBIT NO. 4 WAS RECEIVED INTO  
12 EVIDENCE AND MADE A PART OF THE RECORD.)

13 JUDGE VOSS: And Mr. Duffy, your  
14 witness.

15 MR. DUFFY: I tender the witness for  
16 cross.

17 MR. WILLIAMS: Thank you.

18 CROSS-EXAMINATION BY MR. WILLIAMS:

19 Q. Let's see. On page 4 of your testimony  
20 at line 8, you reference an agreement that was  
21 acceptable to everyone; is that correct?

22 A. Yes.

23 Q. Who is "everyone"?

24 A. It was Ozark Electric Cooperative, the  
25 developers of the Lakes at Shuyler Ridge, the City of

1 Republic and Empire Electric.

2 Q. And those were the only parties that  
3 found that agreement acceptable at that point in  
4 time?

5 A. I think that's all the parties that were  
6 pertinent to the issue.

7 Q. So the Staff wasn't involved at that  
8 point in time?

9 A. No.

10 Q. And the Commission was not?

11 A. Only with the fact that we told the  
12 developers of the Lakes of Shuyler Ridge that what we  
13 proposed would need to be approved through a  
14 process -- process at the Public Service Commission  
15 and that would include hearings and that type of  
16 thing.

17 Q. And was the Office of the Public Counsel  
18 involved in any of these discussions at this point in  
19 time?

20 A. Not at that point in time.

21 Q. Were any representatives of Empire's  
22 customers involved in those discussions at that point  
23 in time?

24 A. No.

25 Q. Would you agree that approximately

1 65 percent of Empire's revenue requirement is due to  
2 operation and maintenance costs?

3 A. I would not agree with that.

4 Q. Do you have an opinion as to  
5 approximately how much of Empire's revenue  
6 requirement is due to operation and maintenance  
7 costs?

8 A. No, I do not.

9 MR. WILLIAMS: No further questions.

10 JUDGE VOSS: Public Counsel?

11 MR. MILLS: No questions.

12 MR. WIDGER: No questions.

13 JUDGE VOSS: Mr. Duffy, any redirect?

14 REDIRECT EXAMINATION BY MR. DUFFY:

15 Q. One clarification. Mr. Williams asked  
16 you, I think the question was, "There were no  
17 representatives of Empire's customers present at the  
18 meeting in March," and you said "That's correct." Do  
19 you consider yourself a representative of Empire's  
20 customers or not?

21 A. Well, I do. I do.

22 Q. So do you want to change your response  
23 to Mr. Williams' question then?

24 A. I think in further review, that would be  
25 an appropriate change in my response. I do take the

1 welfare and condition of our customers very  
2 seriously. I am a customer of Empire, my  
3 father-in-law is, whom I take his opinion very  
4 seriously as to the condition and rates at Empire. I  
5 attend church with many other customers of Empire and  
6 listen carefully to what they have to say about our  
7 rates and conditions, and do think that is important.

8 MR. DUFFY: That's all I have, your  
9 Honor.

10 JUDGE VOSS: Since there are no  
11 Commissioners present, you may be excused. You may  
12 step down.

13 THE WITNESS: Thank you.

14 JUDGE VOSS: And does anyone have a  
15 significant cross for Mr. Beck?

16 MR. DUFFY: I do not.

17 JUDGE VOSS: Okay. Do you want to go  
18 ahead and get Mr. Beck finished and we can have a  
19 recess and do closing arguments after lunch when  
20 hopefully the Commissioners will be present?

21 MR. DUFFY: Can we go off the record for  
22 a second?

23 JUDGE VOSS: Sure.

24 (DISCUSSION HELD OFF THE RECORD.)

25 JUDGE VOSS: Before we proceed with

1 Mr. Beck, Staff, did you want to make a clarification  
2 regarding potentially late-filed Exhibits 8 and 9?

3 MR. WILLIAMS: Well, with regard to  
4 exhibits that would have been reserved for late  
5 filing, Exhibits 8 and 9, the Shuyler Ridge  
6 development agreement and the Terrell Creek  
7 development agreement between the developers and the  
8 City of Republic, I'd ask whether those could be  
9 late-filed as exhibits, and I've done that for the  
10 Commission's benefit. And if the Commission doesn't  
11 have an interest in seeing them, I'm not concerned  
12 with whether or not they're late-filed or not.

13 JUDGE VOSS: Okay. I'll issue an order  
14 either later today or tomorrow that will clarify that  
15 issue whether they need to be filed. Thank you.  
16 Mr. Beck, please state your full name for the record,  
17 please.

18 THE WITNESS: Daniel I. Beck.

19 (The witness was sworn.)

20 JUDGE VOSS: Your witness.

21 DIRECT EXAMINATION BY MR. WILLIAMS:

22 Q. Mr. Beck, did you prepare testimony  
23 that's been prefiled and premarked as Exhibit No. 6?

24 A. Yes.

25 Q. And if I were to ask you the questions

1 that are contained in that exhibit here today, would  
2 your answers be the same as they are set forth in  
3 that exhibit?

4 A. Yes.

5 MR. WILLIAMS: I offer Exhibit No. 6.

6 JUDGE VOSS: Are there any objections to  
7 this exhibit?

8 (NO RESPONSE.)

9 JUDGE VOSS: Hearing none, Exhibit 6  
10 will be admitted into evidence.

11 (EXHIBIT NO. 6 WAS RECEIVED INTO  
12 EVIDENCE AND MADE A PART OF THE RECORD.)

13 JUDGE VOSS: And the witness has been  
14 tendered for cross-examination. Empire?  
15 CROSS-EXAMINATION BY MR. DUFFY:

16 Q. Mr. Beck, I think you stated this in  
17 your memorandum that was filed. It may not be in  
18 your testimony. But is it my understanding that the  
19 Staff's position is if the variance request didn't  
20 exist, that the Staff wouldn't have a problem with  
21 the territorial agreement itself?

22 A. That's correct.

23 Q. Is it your belief or is it your  
24 understanding that the Commission in the past has  
25 granted variances or waivers from the Promotional

1 Practices Rules to allow utilities to meet  
2 unregulated competition?

3 A. I hesitate because I'm not 100 percent  
4 sure whether those variances were granted for  
5 Promotional Practices Rules or -- or for variances in  
6 the tariffs or both. It is my belief that -- that --  
7 that actually they were granted in certain cases for  
8 both.

9 MR. DUFFY: Okay. Thank you. That's  
10 all I have.

11 JUDGE VOSS: Ozark?

12 MR. WIDGER: One moment.

13 CROSS-EXAMINATION BY MR. WIDGER:

14 Q. Mr. Beck, Mr. Duffy brought to your mind  
15 the memorandum that was prepared by Staff. Did you  
16 participate in that preparation?

17 A. Yes.

18 Q. Okay. And was that -- did that become  
19 the framework which later resulted in your -- in your  
20 testimony?

21 A. I really couldn't characterize it that  
22 way.

23 Q. Okay. Did you -- when you prepared your  
24 testimony, did you -- do you recall significantly  
25 varying from the thinking and conclusions that were



1 in your memorandum?

2 A. The general -- a lot of the general  
3 themes were the same. There was number changes,  
4 there was additional information brought in  
5 testimony, that type of thing, but, yes, a lot of the  
6 same subjects were the same.

7 Q. Okay. Do you have -- happen to have a  
8 copy of that memorandum with you today?

9 A. I do if I can find it. Yes, I do.

10 Q. Okay. I'd direct your attention to the  
11 first sentence of the last paragraph on the second  
12 page. It begins with the words, "Recognizing the  
13 Commission..."

14 A. You said first sentence --

15 Q. Of the last paragraph of the second  
16 page.

17 A. Second page. Yes, I'm there.

18 Q. Okay. And correct me if I don't read  
19 this correctly, "Recognizing the Commission has  
20 granted similar variances in the past, the Staff also  
21 suggests that under no circumstances here, the  
22 Commission should not approve the requested variance  
23 regarding decorative street lighting." Did I read  
24 that correctly?

25 A. Yes.

1 Q. Is there a double negative in that that  
2 really crosses up your intent?

3 A. Seems to now, yes.

4 Q. Okay. So basically, your -- your brief  
5 here was against the issue of the decorative street  
6 lighting variance?

7 A. That's correct.

8 Q. All right. But you do recognize that  
9 there's some similarity in the variances that have  
10 been granted in the past?

11 A. For the installation of services, yes.

12 Q. Okay. So -- so then, is it accurate to  
13 say that your objection here relates to the -- the  
14 details of the variance, the scope or the particular  
15 purpose of the variance?

16 A. That's one of our objections.

17 Q. Okay. And what would be another  
18 objection?

19 A. Another objection is the fact that the  
20 variance -- variances -- because there's actually a  
21 couple -- are tied to the territorial agreement, and  
22 I'm not familiar with any case where a territorial  
23 agreement and variance were tied together.

24 Q. Okay. So it's the context in which the  
25 variance is being presented; that's your problem?

1           A.       With regard to the service that that  
2 context is a problem, yes, the installation of  
3 services.

4           Q.       But you understand that but for the  
5 territorial agreement, this variance would not even  
6 be presented to you. Do you understand that?

7           A.       I've -- I understand there's  
8 representations, but I also know that Empire has  
9 filed multiple requests for variance in the past, and  
10 I don't see how -- how I can sit here and tell you  
11 that that would or would not happen. It's purely  
12 speculation.

13          Q.       Is it -- is it your opinion that how the  
14 Commission rules on this variance request would  
15 dictate the results of the ruling on another variance  
16 request?

17          A.       No, I don't believe it would -- it would  
18 dictate, nor do I believe that the previous rulings  
19 dictated anything that the Commission does for this  
20 ruling.

21          Q.       Okay. Now, is it your testimony that  
22 aside from this variance condition, that the  
23 territorial agreement that we have presented is in  
24 the public interest?

25          A.       Yes.

1           Q.       Tying -- the issue of tying the  
2 variances together with the territorial agreements --  
3 let me ask a question: Did you work on a territorial  
4 agreement between Ameren UE and Cuivre River Electric  
5 several years ago?

6           A.       I honestly couldn't say with 100 percent  
7 certainty. I've worked on a few and I honestly don't  
8 know.

9           Q.       Okay. If I -- if I represented to you,  
10 based on my information and belief, that due to a  
11 mapping error there was a highway corridor in which  
12 the Cuivre River co-op and Ameren were allowed to  
13 compete, there's an area that they failed to divide  
14 between the two, and that Ameren UE was given  
15 exemption from the Promotional Practices Rule so it  
16 could compete with the co-op in that strip, does that  
17 ring any bells with you?

18          A.       It -- it certainly wasn't a case that I  
19 worked on. I seem to recall something about a  
20 competition zone maybe was the term that I seem to  
21 remember, but that is just, you know, just maybe  
22 something I heard in passing.

23          Q.       Okay. Yeah, I think you're getting to  
24 the right area and the -- it became a competition  
25 zone because they messed up with the maps, it was not

1 clearly assigned to either party, and to compete  
2 effectively, Ameren UE had to be relieved of the  
3 Promotional Practices Rule; does that -- would that  
4 make sense?

5 A. It -- it -- I -- I really don't have any  
6 recollection of anything that that had to do with the  
7 Promotional Practices Rule. Obviously, if there's  
8 competition, it would seem promotional practices  
9 would be an issue.

10 Q. Okay. Is it easier to -- from an  
11 engineering standpoint, is it -- does it make sense  
12 that a territorial agreement should include as much  
13 area as possible to gain the efficiencies that may be  
14 obtained in planning for service to the public?

15 A. If the utilities can reasonably serve  
16 that -- that area, yes.

17 Q. Okay. Do you have any reason to believe  
18 that Empire or Ozark Electric cannot serve in areas  
19 that they have allocated for themselves?

20 A. In this particular agreement, no.

21 Q. Okay. And isn't it true -- back to the  
22 engineering question, isn't it true that the  
23 efficiencies in the electric industry are gained by  
24 dealing with bigger numbers when you plan for  
25 transmission, when you plan for substation siting and

1 those sorts of huge investments?

2 A. Could you clarify what you mean by  
3 bigger numbers, I guess? I'm having trouble.

4 Q. All right. All right. Would -- would  
5 it make sense for a utility to build a substation to  
6 serve a 245-acre tract of land?

7 A. Depends on the load that would be on  
8 that 245 acres.

9 Q. Right. So when -- when you're talking  
10 about the transmission substations, you're talking  
11 about service to a lot of people, aren't you?

12 A. Generally, yes.

13 Q. And the numbers, the investment it takes  
14 for any utility to serve those is gonna increase with  
15 the capacity of the transformation and the  
16 transmission lines; is that correct?

17 A. I'm sorry. Could you restate that  
18 question?

19 Q. Probably not.

20 A. Okay.

21 Q. Isn't it true that the -- that to plan  
22 to serve for the most people, the most efficient plan  
23 requires some certainty about the kind of load you  
24 can serve from a substation?

25 A. Since you said "some certainty," I guess

1 that is -- that is a true statement.

2 Q. Well, I mean, I don't want to quibble  
3 with you.

4 A. Yeah.

5 Q. But doesn't it all come down to density?  
6 Isn't a substation investment considered most  
7 efficient when you get the most people served off of  
8 it?

9 A. The -- you keep mentioning people and I  
10 keep getting the -- stumped on that one. It's more  
11 about the load that the substation is serving and  
12 ultimately this -- the proper sizing of that -- of  
13 that substation to meet that load that it is gonna  
14 serve.

15 Q. Okay.

16 A. And there becomes a distance issue as  
17 well.

18 Q. Right. And I think the Commission  
19 probably thinks of people when engineers think about  
20 load, but --

21 A. Yeah.

22 Q. Okay. So the basic question I was  
23 asking, because there was some testimony earlier or a  
24 question was raised, maybe it was just legal  
25 argument, why does this territorial agreement have to

1 include so much land, all right? Do you agree that  
2 the larger the man -- land mass that you can tie to  
3 for future -- that you can tie it up for future  
4 planning purposes, the bigger the land mass you can  
5 tie down for future planning, the better it is for  
6 the utility?

7 A. I think that's just one factor because  
8 you -- you say "the larger," and again, it becomes a  
9 trade-off between the size of the substation, the  
10 load it's serving and the distances that are serving,  
11 and you get into reliability, and these are the  
12 problems that engineers worry about that -- that  
13 complicate that -- that simple question.

14 Q. Let me refer your attention to the last  
15 page of the memorandum before you. And the  
16 second-to-the-last paragraph includes three Staff  
17 suggestions. I'd like to read the first one for the  
18 record and see if you would agree that I read it  
19 accurately. Are you at that page?

20 A. Yes.

21 Q. Okay. And it's Staff's suggestion  
22 No. 1. "Ozark could serve new customers inside the  
23 City of Republic, provided there was a territorial  
24 agreement with Empire that allowed them to serve that  
25 portion of Republic." Do you agree with that



1 suggestion?

2 A. Yes.

3 MR. WIDGER: Thank you. No further  
4 questions.

5 JUDGE VOSS: Redirect?

6 DIRECT EXAMINATION BY MR. WILLIAMS:

7 Q. Mr. Beck, are you an attorney?

8 A. No.

9 Q. Do you have an opinion about what  
10 Staff's position would be on this territorial  
11 agreement if the Shuyler -- let's see, the Lakes at  
12 Shuyler Ridge subdivision and the Terrell Creek  
13 subdivision were not involved in it? In other words,  
14 if they were excepted from the 4. -- or the 9.5  
15 square miles?

16 MR. DUFFY: I'll object on the basis of  
17 speculation because no one has even suggested that  
18 there would be such an animal. So, you know, what  
19 his opinion is on something that isn't before the  
20 Commission is irrelevant.

21 MR. WILLIAMS: Mr. Widger just inquired  
22 about the size of the area, and I'm reducing the size  
23 about what's involved in this agreement and asking  
24 Mr. Beck whether Staff has a -- whether he has an  
25 opinion about what Staff's position would be on that.

1 MR. DUFFY: Same objection.

2 JUDGE VOSS: I think overruled. I'll  
3 let the witness answer the question.

4 THE WITNESS: I think generally it's  
5 Staff's opinion that territorial agreements are  
6 beneficial. And so I think the fact that the area  
7 would be reduced, I heard earlier by one-twelfth, for  
8 example, I don't think would change our opinion of a  
9 territorial agreement.

10 BY MR. WILLIAMS:

11 Q. But if the subdivisions were not  
12 involved in the territorial agreement, wouldn't that  
13 eliminate the variance issue?

14 A. Yes.

15 MR. WILLIAMS: No further questions.

16 JUDGE VOSS: Mr. Beck, you are excused  
17 and we'll take a break.

18 It is 12:20 now. We're going to take  
19 a break until 1:00, and then by then, hopefully, I  
20 will know whether the Commissioners want to be  
21 present for closing arguments. Okay. Let's go off  
22 the record.

23 (A RECESS WAS TAKEN.)

24 JUDGE VOSS: We are ready for closing  
25 arguments beginning with Empire.

1                   MR. DUFFY: Thank you. I'm gonna try to  
2 be pretty brief, and just to set the context, I'm  
3 going to try to respond to the legal arguments that  
4 I've heard or have read that the Staff has presented.  
5 If they come up with something new in their closing  
6 arguments, I would reserve the right to have rebuttal  
7 opportunity for that.

8                   Basically, my position -- Empire's  
9 position is, as I stated in my opening statement,  
10 that the Commission has done this before. There is  
11 no impediment that we can see for them to do this  
12 again, if they wish to do that, if they believe the  
13 evidence in this case justifies the granting of a  
14 variance.

15                   The Commission has approved variances of  
16 this nature to meet unregulated competition in the  
17 past. The promotional practices rule including the  
18 provision allowing for variances has been before the  
19 appellate courts in this state several times.

20                   One, in particular, looked at a variance  
21 procedure the Commission had adopted, and I think  
22 this is in sharp contrast to the argument that I've  
23 seen the Staff make, that language that they are  
24 reading out of a 1926 Missouri Supreme Court case  
25 means the Commission cannot lawfully do what Empire

1 is asking it to do in this case and what the  
2 Commission has done in the past.

3           To demonstrate my point, I will delve a  
4 little bit into history. Commission adopted a  
5 general order regarding promotional practices in June  
6 of 1971. It's called General Order 51. Today we  
7 would call that general order an administrative rule.  
8 General Order 51 is essentially what appears in  
9 Chapter 14 of the Commission's rules today.

10           General Order 51 appears in the PSC  
11 reports, volume 16 of the new series starting on  
12 page 67. You saw some excerpts of it in Mr. Palmer's  
13 testimony. Section 7 of General Order 51 adopted in  
14 1971 specifically referred to unregulated  
15 competition, and it specifically said that on written  
16 application of the utility that is faced with and  
17 must meet unregulated competition, quote, the  
18 Commission may grant a departure from these rules to  
19 the extent requested, unquote.

20           So my point is that this variance  
21 procedure from the Promotional Practices Rules has  
22 been in place for about 35 years. The point is that  
23 from its inception in 1971, the Commission has  
24 recognized that variances or waivers, whichever you  
25 want to call them, to meet unregulated competition

1 should be permitted.

2                   The Commission has acted on that  
3 provision several times. In the Stipulation of  
4 Facts, paragraph 13, the parties have asked the  
5 Commission to take administrative notice of five such  
6 cases where variances were granted. Four of those  
7 cases involved Empire District Electric Company back  
8 in the 1990's, and one involved the formerly  
9 St. Joseph Light and Power Company.

10                   As I've indicated, I have also located  
11 another order granting waiver, one that involved  
12 Union Electric Company that the Commission granted in  
13 1991. It was Case Number EO-91-386. In particular,  
14 the order in that case notes that the PSC has granted  
15 waivers in many instances in the past, and it  
16 specifically rejects the Staff argument that granting  
17 a waiver would be discriminatory.

18                   It also encouraged Union Electric  
19 Company in that order to reach a territorial  
20 agreement in the Kearney area. So I would direct the  
21 Commission's attention to that order granting waiver  
22 as providing important background in this proceeding.

23                   I've located four cases where the  
24 appellate courts of this state have examined General  
25 Order 51 or the Promotional Practices Rules. The

1 first was a declaratory judgment action brought by  
2 Union Electric and a builder to have General Order 51  
3 declared null and void.

4           That case is Union Electric versus  
5 Clark, 511 S.W. 2d 822, cited by Division II of the  
6 Supreme Court in 1974. Unfortunately, the Supreme  
7 Court didn't reach the merits. They ruled on a  
8 procedural basis so we didn't get any kind of clear  
9 guidance from them on whether General Order 51 was  
10 good, bad or indifferent.

11           The next case I found was McBride & Son  
12 Builders, 526 S.W. 2d 310. That was a Supreme Court  
13 case, Division I, decided in August 1975. The  
14 plaintiffs in that case attacked the general validity  
15 of General Order 51, and the Supreme Court in that  
16 case said the Commission, quote, has authority to  
17 make rules for that purpose, unquote. That quote's  
18 from page 313 in the S.W. 2d.

19           Next, there's a case of State ex rel  
20 Hoffman versus PSC, 530 S.W. 2d 434. This was the  
21 Kansas City District of the Court of Appeals'  
22 decision dated November 3rd, 1975. In that case, a  
23 builder was denied a variance by the Public Service  
24 Commission under another variance procedure that had  
25 been adopted to deal with contracts that existed when



1 the Circuit Court in Cole County. And on remand,  
2 Judge Riley affirmed the Commission's denial of the  
3 variance. So the builder took it up on appeal again.  
4 That later case was State ex rel Hoffman versus PSC  
5 decided by the Missouri Court of Appeals, Kansas City  
6 District, April 1977. Citation on that case is 550  
7 S.W. 2d 875.

8 In this second review, the Court of  
9 Appeals said on page 878 that, quote, it is clear the  
10 Commission had the power to determine whether or not  
11 Hoffman met the requirements of the exception to be  
12 entitled to receive the balance of the promotional  
13 payments, unquote.

14 The court went on to examine the  
15 evidence and decided from a legal standpoint Hoffman  
16 had demonstrated a legal detriment overruling the  
17 Commission's determination to the contrary.

18 My point in discussing these cases from  
19 the 1970's is that they are much more on point in any  
20 discussion of the validity of a variance under the  
21 Promotional Practices Rules than the case that's been  
22 cited by the Staff from 1926 which was about 45 years  
23 before the promotional practice rules even existed.

24 What I've cited to you here today is  
25 case law that has looked at a variance procedure



1 under the Promotional Practices Rules and found that  
2 the Commission has authority to utilize such an  
3 approach.

4 In short, in my opinion, these cases are  
5 much more convincing on this point than a case  
6 decided about ten years after the creation of the  
7 Public Service Commission.

8 So I think the Commission is on solid  
9 legal grounds in going ahead and granting a variance  
10 as requested by Empire in this particular situation.  
11 We've tried to lay out for you the unique facts that  
12 have prompted us to even ask for the variance in this  
13 situation.

14 But for the unique facts in this  
15 situation, we would not have asked for a variance.  
16 Empire had made a decision several years ago not to  
17 try to get into heavy competition with the rural  
18 electric cooperatives, and it's only because of the  
19 various interests that are at stake here that Empire  
20 proceeded with this and is presenting this position.

21 I think that the Commission is gonna  
22 want to focus on what's in the public interest. And  
23 I think that there seems to be some kind of a  
24 misconception that by granting a variance that  
25 somehow the Commission is going to be disadvantaging

1 the ratepayers of Empire District Electric.

2 I'd like to step back just a minute and  
3 kind of try to put that in perspective. As the  
4 Commission knows, rural electric cooperatives are  
5 governed by their members. Their members vote on who  
6 the directors are going to be and the directors  
7 supervise the managers and make policy.

8 In this situation, the rural electric  
9 cooperative has determined, and this was reflected in  
10 the testimony of Mr. Prewitt, that they think it is a  
11 wise, long-term business decision to treat developers  
12 of subdivisions differently and not charge them  
13 perhaps the full amount that they could otherwise  
14 charge them in order to get that particular business.

15 Now, I think it's important to note that  
16 because a cooperative is member-owned, its members,  
17 its customers have implicitly said that that is okay  
18 with them, that it is okay to treat developers  
19 differently because of the long-range implications  
20 that are brought about as a result of that.

21 So I think that it is somewhat  
22 presumptuous for the Staff of the Commission to jump  
23 into the role of protecting the ratepayers of Empire  
24 and say, "Oh, well, this is bad because there's gonna  
25 be discrimination and some kind of a potential

1 subsidization here."

2                   Well, it apparently doesn't bother the  
3 member-owners of the cooperative because they allow  
4 that to take place and they consider that to be a  
5 reasonable and justifiable business practice.

6                   I submit to you that the -- the general  
7 nature of customers of rural electric cooperatives is  
8 no different than the general nature of customers of  
9 the Empire District Electric Company. So that if you  
10 want to know what the public interest or the public  
11 opinion of this particular practice is, the  
12 indication is that the co-op members are perfectly  
13 satisfied with it, they don't find it to be a  
14 problem.

15                   And so I don't think that it's  
16 appropriate for the Public Service Commission Staff  
17 to say we know better than what all these customers  
18 know, and therefore, we think it's bad and therefore,  
19 it should not happen.

20                   Empire believes that the Commission  
21 should grant the variance, that it has the power to  
22 grant the variance and that it should approve the  
23 territorial agreement.

24                   We have no problem whatsoever, as I  
25 stated earlier, that if the Commission believes that

1 to implement it, that we'd be ordered to file a  
2 tariff to implement it restricting the conditions of  
3 the variance to just this particular subdivision and  
4 this particular fact situation. Thank you.

5 JUDGE VOSS: Ozark?

6 MR. WIDGER: Thank you. I think it's  
7 real important, and I urge that the consideration of  
8 these matters not be complicated by side issues and  
9 speculations and musings about things that have never  
10 been challenged before.

11 The -- the laws that we operate under  
12 are basically interlocking and they serve a lot like  
13 a set of blueprints. Blueprints are a plan to  
14 assemble something is comprehended best when you have  
15 some vision for the -- for the finished project --  
16 the finished product.

17 Blueprints make more sense when you can  
18 visualize, when you can see what is being  
19 accomplished. And on the other hand, a misreading of  
20 a plan, a misreading of the interlocking  
21 relationships of various conditions and laws, would  
22 tend to pervert the very purpose of those laws.

23 One of the things that we've dealt with  
24 here, we've talked about franchises, we've talked  
25 about rural areas, and these things really are side

1 issues. It's the obligation of the power suppliers  
2 to provide lawful service. You know, respectfully,  
3 we are the ones who are making the day-to-day  
4 decisions that make our service lawful or unlawful.  
5 And so I think that has some weight.

6                   The -- the concern for the 1500 rule is  
7 a side issue. The 1500 rule had nothing to do with  
8 the inherent quality of the service provided by a  
9 cooperative organization. It had nothing to do with  
10 the sanctity of the inherent -- the sanctity of  
11 municipal boundaries. It is merely a statutory  
12 standard for what is rural and what is nonrural, and  
13 the effect of it was to direct where federal loan  
14 dollars would be directed for competition with  
15 investment-run utilities and municipal citizens.

16                   The fact is that that rule includes  
17 towns and villages, so, I mean, that, in itself,  
18 speaks to the fact that it's not -- there's no power  
19 of its own in an incorporated limit. Incorporation  
20 is not a bar in itself.

21                   So the authority -- we have already  
22 pointed out that we have authority to use the public  
23 ways, and that's found in our Bible, our statute,  
24 394.080. So there's nothing inherently wrong with a  
25 cooperative serving inside a city.

1                   So the purpose of the 1500 rule was  
2 about competition. It was to cause the benefit, the  
3 relief and the modern services that could be provided  
4 through the power of electricity to be focused on  
5 areas not typically served by a municipal generation  
6 system or investor-owned transmission.

7                   So it was a rule that affected natural  
8 competition and promoted public good while  
9 acknowledging the benefit of nondiscriminatory  
10 service via a regulated monopoly business. The  
11 territorial agreement law is an extension of that  
12 early thought process. The territorial agreement  
13 laws allowed displacement of competition without  
14 creating any antitrust violations.

15                   So all that being said, that's all  
16 backdrop. The key here is the straightforward  
17 decision that we're asking the Commission to make.  
18 Is the territorial agreement in the public interest?  
19 Yes. Even the Staff agrees with that.

20                   Is the variance requested, quote, just  
21 and reasonable under the circumstances? The Staff  
22 does not agree with that. But it does -- it has not  
23 given compelling reason that negates the great  
24 benefits of the displaced competition that we have  
25 laid before the Commission today.

1                   So we believe that the answer to both  
2 questions, is it in the public interest and is the  
3 variance just and reasonable, should both be answered  
4 in the affirmative, yes and yes. And we urge that  
5 our application in both areas be granted.

6                   JUDGE VOSS: Thank you. Staff?

7                   MR. WILLIAMS: I think most of Staff's  
8 positions were laid out in the opening statement and  
9 in the motion that Staff filed for determination on  
10 the pleadings with the Commission, and I'd direct the  
11 Commission to review the argument that was made at  
12 the beginning of the hearing today and at the Staff's  
13 motion.

14                   In addition, I think it would -- the  
15 Commission should look at Chapter 394.312 which deals  
16 with territorial agreements and each subsection  
17 thereof. I believe that it should also look at  
18 394.310 which deals with rural electric cooperatives.

19                   I also believe it should take a look at  
20 the definition sections of Chapter 394 which are  
21 394.020, that it should look at what -- the formation  
22 of cooperative corporations which is found at  
23 394.030. And as Mr. Widger's indicated, the  
24 Commission should also take a look at 394.080 which  
25 enumerates numerous powers that are given to

1 cooperatives.

2           The Commission may also find of some  
3 interest, although perhaps not as much as it might  
4 have earlier before the testimony today, in Chapter  
5 321.322 which addresses fire protection districts and  
6 cities' annexation of property that's within the fire  
7 protection district and payments relative to that --  
8 thereto.

9           Earlier today I mentioned a case,  
10 Deaconess Manor. I don't have the cite for that  
11 handy. That was the case that dealt with the  
12 distinction between a variance from a Commission rule  
13 and compliance with a tariff provision. If the  
14 Commission will permit, I can provide a citation to  
15 that at a later time.

16           Basically, it's Staff's position that  
17 the relief requested which is a variance from a  
18 tariff as well as from a rule, that the Commission  
19 doesn't have the authority to grant a variance from a  
20 tariff.

21           Secondarily to that is the question of  
22 should the Commission afford some relief in some  
23 fashion such as, say, if you file a tariff in this  
24 form, will it approve it. It's the Staff's position  
25 that while, without having seen the language, that



1 would be proposed under the circumstances here if the  
2 tariff language were to track the variance request,  
3 Staff believes it would be unduly discriminatory and  
4 should be rejected.

5 And I think that concludes my remarks.

6 JUDGE VOSS: Would you like to just file  
7 a one-page citation?

8 MR. WILLIAMS: Sure, I could do that.

9 JUDGE VOSS: Just for the record?

10 MR. WILLIAMS: I just don't know the  
11 cite offhand.

12 JUDGE VOSS: Okay. Public Counsel?

13 MR. MILLS: Your Honor, I'll waive  
14 closing statement. Thank you.

15 JUDGE VOSS: Given the nature of the  
16 proceeding, Mr. Duffy, did you have any additional?

17 MR. DUFFY: No, ma'am, I don't think  
18 that Mr. Williams said anything that requires me to  
19 respond to it.

20 JUDGE VOSS: Great. With that, we will  
21 get ready to go off the record. Before we do, I will  
22 as soon as possible issue a notice letting Empire and  
23 the co-op know whether they need to late-file those  
24 developmental agreements, and then I think that's  
25 about it.

1                   I know the transcript is going to be  
2 expedited. Cully will be doing the order, so she  
3 says. You never know what you might get tapped to  
4 do. But -- so I can't tell you what her time frame  
5 will be. Does anyone have any questions or any other  
6 issues before we go off the record?

7                   (NO RESPONSE.)

8                   JUDGE VOSS: All right. Thank you. You  
9 guys have a great afternoon.

10                  (WHEREUPON, the hearing and oral  
11 argument in this case was concluded.)

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