

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

In the Matter of the Application of Cardwell)	
Lumber, Inc. for Approval of a Change of)	
Electrical Suppliers at its 5927 Highway 50 West,)	Case No. EO-2011-0052
Jefferson City, Missouri, Location from Union)	
Electric Company to Three Rivers Electric)	
Cooperative.)	

**POST HEARING BRIEF
of
CARDWELL LUMBER, INC.**

COMES NOW the Cardwell Lumber Inc. (Cardwell), and submits the following Post Hearing Brief.

Introduction

Cardwell has demonstrated that its request for a change of electric suppliers is for reasons that are in the public interest, not because Three River Electric Cooperative's (Three Rivers) rates are cheaper than Union Electric's (UE).

UE's opposition to Cardwell's request is pro forma. UE is concerned about the "greater principle" —if UE does it for Cardwell, "where do you draw the line?"¹ UE's opposition forced Cardwell to shoulder the burden of taking its

¹ UE transcript p.196.

request to hearing, which Cardwell has done. This is no light burden. It is not an easy task for a single customer to take on UE.

The Commission now must decide if Cardwell's request is for reasons in the public interest other than a rate differential. The future of Cardwell's business in the St. Martins area is now in the Commission's hands. The costs of a denial of Cardwell's request are large—Cardwell will shut down the business. The costs of granting Cardwell's request are small—UE will have no stranded investment, and little lost revenue.

Cardwell owns and operates three sites in Missouri, employing 83 people. One site is in Novelty, Missouri, a second is in Frankford, Missouri, and the third is the "Cardwell Tract" in St. Martins, the subject of this proceeding. At Novelty and Frankford Cardwell's power is supplied by rural electric cooperatives. UE supplies the Cardwell Tract.

The Cardwell Tract consists of 26 acres located at 5927 Business Highway 50 West, in St. Martins, Missouri, commonly referred to as Apache Flats. The Cardwell Tract abuts Business Highway 50 on the North, and Highway 50 on the South. This tract of land is well-situated for development. The structures are located on the northern half of the Tract. The southern half of the Tract is undeveloped. The Cardwell Tract structures house, have housed, or are capable of

housing saws, planers, dry storage, air sheds, kilns, boilers, and steamers used to treat wood.

When Cardwell acquired this Tract in 2004 from Capital Hardwoods, it acquired ownership of the existing electrical facilities on the Tract. These facilities consisted of an old and poorly designed system of poles, lines, and transformers that strung both single phase and three phase power to eleven different structures.² The parties have stipulated that Cardwell's electrical facilities are in need of replacement. They are over 30 years old.³

UE delivers electricity to Cardwell on the Cardwell Tract via a primary metered electrical service. This means Cardwell owns facilities that operate at the 12,000 volt level. Cardwell's electrical facilities include the 12,000 volt primary facilities, as well as 120/240 volt secondary facilities most customers are accustomed to. These facilities consist of fifteen poles, five three-phase transformer banks, three single phase transformers, primary fuses, transformer fuses, and the other appurtenances required for an operation electrical distribution network.

Cardwell is responsible for maintaining this primary voltage system downstream from the interconnection with UE. Cardwell is not qualified to maintain primary metered facilities, and has no desire to do so. At Novelty and

² These facilities are unique both in terms of the number of poles, and their layout. Staff transcript p. 216.

³ Staff transcript p. 216.

Frankford the rural electric cooperatives maintain the primary facilities serving Cardwell's plants at those locations.

The parties have stipulated that Cardwell's primary facilities on the Cardwell Tract need to be replaced. Cardwell seeks to replace the existing electrical system with one designed to meet Cardwell's future business plans. Cardwell anticipates new structures will be built on the Cardwell Tract, and Cardwell has decided it will have them served by Three Rivers Electric Cooperative, not UE. Cardwell prefers to replace its electrical system with one to be supplied by Three Rivers, so there will be a single supplier with a single set of lines for all present and future structures.

Changing suppliers is important to Cardwell's future business plans. Cardwell Lumber expects to open a new millwork facility soon. It has definitive plans to install a sanding operation. It will bring several jobs to the community in which the millwork is established. Cardwell will not place this mill or the sanding operation on the Cardwell Tract unless it is permitted to change suppliers to Three Rivers. If Cardwell does not obtain permission to change suppliers from UE, it will simply shut down its operations on the Cardwell Tract.⁴

Cardwell's change of suppliers request is justified for the following reasons:

- a. Cardwell's need to replace the primary facility distribution system;

⁴ Cardwell transcript pp.122-123.

- b. Cardwell's desire to replace its primary distribution system with facilities that Cardwell is not responsible to maintain;
- c. Cardwell's preference for rural electric cooperative service, and dissatisfaction with UE's service;
- d. Cardwell's right to use Three Rivers to serve new structures;
- e. Cardwell's desire to have a single power supplier, not two separate suppliers with power line duplication on the Cardwell Tract;
- f. absence of adverse impact on UE.

Implicit or included within these specifically enumerated factors are other recognized factors justifying a change of suppliers, such as safety, line duplication, quality of power, and the reliability of service.

Controlling Law

Under § 393.106 RSMo, the PSC decides when a requested change is in the public interest for a reason other than a rate differential. The burden of persuasion is on Cardwell. The PSC makes such decisions on a case-by-case basis.

For customer-initiated requests the Commission balances the cumulative effect of several factors. These factors include, but are not limited to, whether customer needs are being met by the present supplier in terms of amount or quality of power, health issues involving the amount or quality of power, what alternatives the customer has considered, including alternatives with the present supplier,

whether the customer's equipment has been damaged or destroyed as a result of a problem with the electric supply, the effect the loss of the customer would have on the present supplier, whether a change would result in a duplication of service or facilities, the overall burden on the customer caused by inadequate service, the efforts made by the present supplier to solve or mitigate the problems, the individual or cumulative impact the decision may have on economic development, the effect a change of suppliers may have on territorial agreements or the negotiation thereof. See *In the Matter of Cominco American, Inc. for Authority to Change Electrical Suppliers*, EO-88-196, Report and Order issued April 29, 1988; *In the Matter of the Application of Thomas and Barbara Bakie for Change of Electric Suppliers*, EO-93-160, Report and Order issued August 6, 1993; *In the Matter of the Applications of Carol June Tyndall, et al., for Change of Power Supplier*, EO-93-295, et al., Report and Order issued May 27, 1994; *In the Matter of the Application of Martin J. Sinclair for Change of Electric Supplier*, EO-95-165, Report and Order issued September 5, 1995; and *In the Matter of the Application of Ronald Albright, et al., for Change of Electric Supplier*, EO-97-314, et al., Report and Order issued January 27, 1998.

The hearing consisted of the testimony and exhibits of Mark Cardwell on behalf of Cardwell Lumber Inc., David Hagan on behalf of Union Electric

Company, and Alan Bax on behalf of the Commission Staff. Their testimony will be referred to as “Cardwell”, “UE”, and “Staff”, with transcript page references.

ARGUMENT

Issue 1: Is the location of the Ameren Missouri primary voltage metering device on the Cardwell Tract structures, or adjacent to the Cardwell Tract structures, for purposes of §393.106.1 RSMo (2000)?

Cardwell’s Argument:

If Cardwell’s structures are not served by meters located “on or adjacent to” the Cardwell structures, §393.106 RSMo does not apply. If the statute does not apply, Cardwell would be entitled to change suppliers to Three Rivers without obtaining a Commission Order authorizing the change.

Here is the complete text of §393.106 RSMo, with statutory language supporting Cardwell’s argument bolded for emphasis:

393.106. 1. As used in this section, the following terms mean:

(1) "Permanent service", electrical service provided through facilities which have been permanently installed on a structure and which are designed to provide electric service **for the structure's anticipated needs** for the indefinite future, as contrasted with facilities installed temporarily to provide electrical service during construction. Service provided temporarily shall be at the risk of the electrical supplier and shall not be determinative of the rights of the provider or recipient of permanent service;

(2) "Structure" or "structures", an agricultural, residential, commercial, industrial or other building or a mechanical installation, machinery or apparatus at which retail electric energy is being delivered **through a metering device which is located on or adjacent to the structure** and connected to the lines of an electrical supplier. Such terms shall include any contiguous or adjacent additions to or expansions of a particular structure. Nothing in this section shall be construed to confer any right on an electric supplier to serve new structures on a particular tract of land because it was serving an existing structure on that tract.

2. Once an electrical corporation or joint municipal utility commission, or its predecessor in interest, lawfully commences supplying retail electric energy to a structure through permanent service facilities, it shall have the right to continue serving such structure, and other suppliers of electrical energy shall not have the right to provide service to the structure except as might be otherwise permitted in the context of municipal annexation, pursuant to section 386.800 and section 394.080, or pursuant to a territorial agreement approved under section 394.312. The public service commission, upon application made by an affected party, may order a change of suppliers on the basis that it is in the public interest for a reason other than a rate differential. The commission's jurisdiction under this section is limited to public interest determinations and excludes questions as to the lawfulness of the provision of service, such questions being reserved to courts of competent jurisdiction. Except as provided in this section, nothing contained herein shall affect the rights, privileges or duties of existing corporations pursuant to this chapter. Nothing in this section shall be construed to make lawful any provision of service which was unlawful prior to July 11, 1991. Nothing in this section shall be construed to make unlawful the continued lawful provision of service to any structure which may have had a different supplier in the past, if such a change in supplier was lawful at the time it occurred. However, those customers who had canceled service with their previous supplier or had requested cancellation by May 1, 1991, shall be eligible to change suppliers as per previous procedures. No customer shall be allowed to change electric suppliers by disconnecting service between May 1, 1991, and July 11, 1991.

On the Cardwell Tract the meter is located on the pole enumerated as pole # 1 on Cardwell Exhibits 5, 1, 2, and 3. The statute's definition of a "structure" does not include a meter pole. The statute requires a structure to have needs for electric service, which the pole lacks. There is no dispute that the meter pole is not located "on" a structure.

The question of whether the meter is located "adjacent to" a structure is more difficult to evaluate. The structure closest to the meter is the "old mill" building #2. There is no dispute this building is a structure for purposes of the statute. The edge of the old mill building # 2 closest to the meter is over 50 feet

away.⁵ The distance from the meter to the electrical service entrance on building #2 is even further. The rest of the structures on the Cardwell tract are more distant from the meter. The furthest structure is approximately 600 feet from the meter.⁶

Cardwell does not believe the meter is located “adjacent to” any structure. Black’s Law Dictionary, Fifth Edition, defines adjacent as “lying near or close to; sometimes, contiguous; neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch.” This definition does not give much guidance as to whether separation by a distance of 50 feet or more can be considered “adjacent”.

Missouri statutes use the term “adjacent” in describing what areas are available for annexation by towns or municipalities. The Eastern District Court of Appeals considered the meaning of the word “adjacent” in an annexation statute in *City of St. Ann v Spanos*, 490 SW2d 653 (Mo App 1973). The Court held that a parcel separated from the City by other parcels was not “adjacent”. In doing so the Court observed that there is no precise meaning of the word “adjacent”, with the meaning varying on setting and circumstance:

It is true that adjacent has been defined in non-annexation cases as 'not necessarily meaning contiguous', *Hauber v. Gentry*, Mo., 215 S.W.2d 754, 758, and as being 'near or close at hand', *Nomath Hotel Co. v. Kansas City Gas Co.*, 204 Mo.App. 214, 223 S.W. 975, 982. However, the precise and exact meaning of adjacent is determined principally by context in which it is used

⁵ Cardwell transcript p. 65.

⁶ Cardwell transcript pp. 63-69, Cardwell Exhibits 5, 1, 2, and 3.

and the facts of each particular case or by the subject matter of which it applies. *Nomath Hotel Co.*, supra, p. 983.

.....

Likewise, we believe that construing adjacent to mean close or nearby would result in endless controversy concerning the meaning of close or nearby.

Bituminous Casualty Corporation v Walsh & Wells, 170 SW2d 117, 121 (Mo App E D 1943), in interpreting the word “adjacent” in an insurance policy, observed that:

"Adjacent" is lexically defined as lying near, close, or contiguous, neighboring, or bordering on, as, a field adjacent to a highway. It is not a definite and absolute term, and its exact meaning is determinable principally by the context in which it is used and the facts of each particular case, or by the subject matter to which it is applied and the object sought to be accomplished. It finds its most frequent use in such phrases as adjacent cities, adjacent counties, adjacent districts, adjacent land, adjacent lots, adjacent premises, adjacent property, adjacent real estate, adjacent territory, and adjacent streets. 1 C.J. 1196. The word, as it is commonly used and popularly understood, signifies a horizontal relation. It does not signify on or under.

It appears to Cardwell that the words “adjacent to” in §393.106 RSMo have no precise meaning capable of specific application in terms of distance for purposes of the anti-flip flop statute. As that statute limits the right of property owners to change power suppliers, the words “adjacent to” should be construed narrowly, in favor of the constitutional rights of property owners to manage their own property.

In this regard, Cardwell notes that primary metered systems are utilized by businesses with separate structures with separate electrical needs. Primary metering allows UE to save the investment that would otherwise be required to

place separate meters on or adjacent to each separate structure.⁷ So when a primary metered system is installed, the utility and the customer make a conscious decision NOT to locate meters on or adjacent to all structures served. The utility and customer utilizing a primary metering arrangement can be deemed to have made a conscious decision not to make those structures subject to the anti-flip flop law.

If the Commission agrees, it should enter an order holding that Commission approval of the requested change in suppliers is not necessary, as Cardwell is not required to obtain Commission approval to change power suppliers for the structures on the Cardwell Tract.

Issue 2: Does Cardwell Lumber have a reason or reasons other than a rate differential for changing electric power suppliers from Ameren Missouri to Three Rivers Electric Cooperative?

Cardwell's Argument:

As set forth in the introduction, Cardwell has identified the following reasons for changing power suppliers from UE to Three Rivers. Each reason is listed first, with the evidentiary support and argument for each reason following.

⁷ UE transcript p.148.

a. Cardwell's need to replace the primary facility distribution system;

When Cardwell acquired this Tract in 2004 from Capital Hardwoods, it came with an old and poorly designed electrical system running single and three phase power to eleven structures. These electrical facilities include 15 electrical poles, upon which five separate three phase transformer banks, and three single phase transformers sit.⁸ These facilities distribute electricity to the 11 structures on the Cardwell Tract to operate the electrical equipment therein.⁹

These facilities are now in excess of 30 years old. They are of a “unique” design and layout. Cardwell believes that continued operation with these facilities constitutes safety and liability concerns. UE believes there is decay in the poles.¹⁰ UE agreed that there were liability concerns.¹¹ UE and Three Rivers have both been approached with respect to designing a replacement system that fits Cardwell's needs. Both UE and Three Rivers have made it clear they were not interested in incorporating Cardwell's existing facilities into a replacement.¹²

The parties, including UE, have stipulated that Cardwell's facilities should be replaced. See the Joint Stipulation of Facts, paragraph 13. It is Cardwell's

⁸ Cardwell transcript pp. 52-53, Cardwell Exhibits 1-13.

⁹ Cardwell transcript pp. 40-44, Cardwell Exhibits 1-13.

¹⁰ UE transcript p.190.

¹¹ UE transcript pp. 177-178.

¹² Cardwell transcript pp.78-79, UE transcript 169, 177.

decision as to what replacement facilities should be constructed. Cardwell's decision depends upon whether it will be allowed to change suppliers.

b. Cardwell's desire to replace its primary distribution system with high voltage facilities that Cardwell is not responsible to maintain;

UE delivers electricity to Cardwell on the Cardwell Tract via a primary metered electrical service. This means Cardwell owns the electrical distribution system on the Cardwell Tract, which includes both the 12,000 volt primary facilities as well as 120/240 volt secondary facilities, the transformers that step the voltage down from primary to secondary voltage levels, and "primary fuses" which, when "blown", disconnect the Cardwell primary system from UE's primary system.

Under UE's tariffs, Cardwell is responsible for maintaining this primary voltage system downstream from the interconnection with UE. Being responsible for maintaining 12,000 volt facilities is a responsibility Cardwell does not want, and is not qualified to do. Cardwell wants to be in the lumber and wood products industry, not the electric supply or maintenance industry. Staff agreed that getting a utility to take over this responsibility is a legitimate business decision of Cardwell.¹³

¹³ Staff transcript p. 217.

Cardwell is concerned about the dangers of high voltages, and the liability associated with employees or other persons injured by high voltage lines.

Cardwell is not in the electricity distribution business, has no employees that are qualified to work on high voltage primary lines, and they don't deal with them.¹⁴

Cardwell also has reason to be concerned regarding the applicability of OSHA regulations pertaining to Electric Power Generation, Transmission, and Distribution, found at 29 CFR 1910.269. Those regulations apply not only to traditional utilities, but also to "equivalent installations of industrial establishments" (according to the Note following §29.269(a)(A)). If applicable these regulations would require employees with specialization in high voltage electricity, ongoing special training, special equipment, and special operational requirements.

For Cardwell the special concerns arising from the obligation to maintain high voltage equipment only exist at the Cardwell Tract supplied by UE. At Cardwell's Novelty and Frankford sites, which are also primary metered, Lewis County Rural Electric Cooperative, and Ralls County Electrical Cooperative, respectively, maintains the high voltage equipment.

The high voltage maintenance obligations at the Cardwell Tract have necessitated special attention and expense. Cardwell has had to employ Meyer

¹⁴ Cardwell transcript pp. 76-77.

Electric to perform maintenance at the Cardwell Tract. Cardwell has paid Meyer Electric \$13,000 for this maintenance work.¹⁵ At its Novelty and Frankford sites Cardwell does not have to pay contractors to work on primary voltage facilities, as the rural electric cooperatives provide that service. As will be discussed more subsequently in this brief, Cardwell prefers the rural electric cooperative service arrangements over UE's.¹⁶

Cardwell seeks to replace and redesign the electrical system on the Cardwell Tract in a manner where Cardwell can avoid or minimize its electrical facility maintenance responsibility, safety concerns, and liability concerns. In arriving at a facility design to replace those now on the Tract, an important factor to Cardwell is whether they will be able to be supplied by Three Rivers, who will maintain the system to the traditional demarcation point of service responsibility—downstream from the primary voltage transformers where the traditional 120/240 voltage begins.

c. Cardwell's preference for electrical cooperative service, and dissatisfaction with UE's service;

Since 2004 Cardwell's efforts at managing the maintenance of this primary voltage system on the Cardwell Tract in cooperation with UE has been a source of frustration and irritation. Two years ago, in December of 2008 Cardwell described

¹⁵ Cardwell transcript p. 88.

¹⁶ Cardwell transcript pp. 78, 97.

its relationship with UE as “seriously strained”, and informed UE and the Commission it would like to work with Three Rivers.¹⁷

When Cardwell purchased the Cardwell Tract, it transferred the electrical account with UE to Cardwell’s name from Capital Hardwood.¹⁸ Power was never disconnected, and UE did not have to set foot on the premises to take a meter reading or reconnect service.¹⁹

Responsibility for the primary fuses was a source of misunderstanding from the start. Each of the three primary 12,000 volt distribution phases has a fuse located at or near the demarcation point between the facilities of Cardwell and UE. They are important safety devices. When these fuses “blow”, they operate to disconnect Cardwell from UE’s power supply. When they do blow, Cardwell cannot operate its lumber business, and UE is not selling electricity.

Cardwell believed that the primary meter pole, the meter on that pole, the potential transformers on that pole, and the primary fuses atop that pole, all belonged to UE, and all were UE’s maintenance responsibility.²⁰ Cardwell believed that only UE could touch the primary fuses, either to connect or disconnect the systems. This belief made intuitive sense, as the primary fuses

¹⁷ Exhibit 16, Mark Cardwell response to #5 and #6.

¹⁸ Cardwell transcript pp. 37-38.

¹⁹ Cardwell transcript pp. 38-39

²⁰ Cardwell transcript pp. 61-64, 66.

electrically are located “upstream” from the meter. If the primary fuses trip, de-energizing the Cardwell Tract, UE’s meter will also be de-energized.²¹

At hearing UE testified that it did own the meter and potential transformers located on the primary meter pole.²² But UE stated that the primary pole and the primary fuses located on the primary pole belonged to Cardwell, and were Cardwell’s responsibility. So there is a division as to responsibility for primary fuse maintenance.

It is the obligation of a responsible power supplier to advise a customer of special service characteristics. At hearing UE attempted to satisfy this obligation by stating this information, while not available in its tariffs, was set forth in a manual available on UE’s website.²³ Placing a manual on a website is a poor substitute for directly informing a primary customer that it is responsible for the primary fuses. This is particularly so here, where the evidence indicates Cardwell requested a meeting with UE representatives to specifically discuss these obligations.²⁴

UE’s actual practice contradicts its position the primary customer was responsible for the primary fuses. UE testified that it did permit its own crews to

²¹ UE transcript p. 186.

²² UE transcript pp. 149-151.

²³ UE transcript pp. 191-192.

²⁴ Cardwell transcript p. 82.

change primary fuses of a primary customer.²⁵ By sending its personnel to replace the primary fuses, UE sent Cardwell the message it was a UE responsibility. The evidence further indicates that even professional electrical contractors such as Meyer Electric are not clear as to who can work on the primary fuses.

Shortly after initiating service with UE, Cardwell requested UE to connect power to a newly installed garage door on one of the tract structures. UE stated it was not UE's responsibility to do this on a primary metered system, and that Cardwell should hire Meyer Electric to hook it up.²⁶ Cardwell employed Meyer for the task. In order to have the work performed on de-energized lines, the primary fuses needed to be disconnected. Meyer informed Cardwell that the primary fuses belonged to UE, and Meyer could not disconnect the primary fuses, only UE could do that.²⁷ Instead of disconnecting the fuses, Meyer hooked up the new door "hot", which naturally made Cardwell nervous about the safety of Meyer employees working on energized lines.²⁸

This incident reinforced Cardwell's belief the primary fuses belonged to UE, and neither Cardwell nor its contractors could touch them. Cardwell believed it had to contact UE in order to disconnect the primary fuses, de-energizing the Tract, or in order to reconnect "blown" fuses, restoring power to the Tract.

²⁵ UE transcript p.159, 162.

²⁶ Cardwell transcript p. 74.

²⁷ Cardwell transcript p. 75.

²⁸ Cardwell transcript p. 76.

When a primary fuse subsequently “blew”, Cardwell contacted UE to replace it and restore electricity. This was necessary to get Cardwell’s operation back up and running. Contrary to its position that this is not UE’s responsibility, UE did arrive to replace the fuse. Again UE’s actions contradicted its position at hearing. But the UE lineman refused to replace it until Cardwell obtained delivery of a load of rock for the UE truck to drive on.²⁹ Cardwell did so, whereupon UE did in fact replace the fuse.

UE personnel refused to do it using a “hot stick”, or extendo stick, from the ground. Cardwell was familiar with Lewis County REC employees replacing primary fuses from the ground using an extendo stick at Cardwell’s Novelty plant in order to save down time at the lumber yard.³⁰

The electric cooperatives serving Cardwell at Novelty and Frankford do connects and disconnects without having Cardwell do any work or hire a contractor.³¹ This is preferred by Cardwell, as the power supplier, with personnel and equipment trained and designed to work on primary voltage lines, does this work.³²

Sometime after the blown fuse incident, Cardwell requested a meeting with UE representatives to discuss maintenance responsibilities, and the possibility of

²⁹ Cardwell transcript pp. 79-80.

³⁰ Cardwell transcript pp. 80-82.

³¹ Cardwell transcript p. 74.

³² Cardwell transcript pp. 74-78.

UE replacing and taking over maintenance of the primary facilities.³³ UE did not inform Cardwell that Cardwell was responsible for primary fuse maintenance, and did not refer Cardwell to any website manual.

At this meeting the parties discussed Cardwell's desire to replace the primary system with a new system that would eliminate or minimize its safety and liability concerns. The representatives UE sent indicated to Cardwell that the Cardwell system was very deteriorated, a poor system, needed a lot of work, was not a common configuration, constituted a hazard, that UE was not interested in taking over this system, and that it would be "very expensive" to replace.

Cardwell asked for a specific quote in dollar figures, but UE did not provide one.³⁴

Mark Cardwell subsequently made a trip to UE's crew office on Industrial Drive in Jefferson City and again asked for a specific proposal. Again no specific estimate was forthcoming, only that it would cost "an arm and a leg".³⁵ Mark Cardwell was frustrated at having been refused twice.³⁶

Then the December 2007 ice storm hit. It produced outages on UE's system, and also downed trees on the line segment to the mill on the Cardwell primary system. Cardwell informed UE it had lines down in its yard, and was concerned that there could be a safety hazard when UE re-energized its lines without

³³ Cardwell transcript p. 82.

³⁴ Cardwell transcript pp. 82-83, Cardwell Exhibit 15, response to items 5 and 6.

³⁵ Cardwell transcript pp. 83-84.

³⁶ Cardwell transcript p. 84.

disconnecting the primary fuses at the Cardwell location. Cardwell was also concerned about being able to run its boilers to keep its kiln from freezing. UE's response indicated UE was concerned with its system, not about Cardwell's boiler, and not about the safety of personnel around the downed Cardwell line.³⁷ UE did not inquire as to whether the downed line on the Cardwell system was located so as to create a hazard.³⁸

After the ice storm, Cardwell began experiencing frequent outages at its boiler. Cardwell's records showed 25 outages in four and one-half months. UE did perform a study, and told Cardwell the low voltage was not being caused on UE's side of the primary meter. But the timing of the outages, mostly in the early morning before Cardwell turned on its equipment, caused Cardwell to doubt the results.³⁹

Cardwell's frustration got to the point where, in December of 2008, Cardwell filed its own application asking for a change of suppliers from UE to Three Rivers.⁴⁰ The case eventually was dismissed as Cardwell needed to employ an attorney to file the request on its behalf. However, the cover letter for this application, as well as the written responses to items 5 and 6 for "Section 2" of that application, again informed UE that Cardwell was dissatisfied with the

³⁷ Cardwell transcript pp. 84-88.

³⁸ Cardwell transcript pp. 86-88.

³⁹ Cardwell Exhibit 14, Cardwell transcript pp. 88-93.

⁴⁰ Cardwell Exhibit 15, Case No. EO-2009-0246.

transformer, pole, and line liability, low voltage problems effecting boilers and motors.

This complaint again expressed frustration with UE's refusal to develop a replacement facility proposal. In its filing Cardwell described its relationship with UE as "seriously strained", and that it would be looking at Three Rivers as its best option.⁴¹ Cardwell had not experienced these type of difficulties at its facilities served by electric cooperatives.⁴²

At about the time of the 2008 change of supplier request, Cardwell asked for a meeting with UE at the local State Representative's office.⁴³ At this level UE's Capital District Supervising Engineer, David Hagan, became involved. During this meeting Cardwell and UE officials again discussed UE providing an estimate for a replacement facility.⁴⁴ UE attempted to persuade Cardwell to keep the existing system, which Cardwell did not want to do.⁴⁵ UE again indicated it was not interested in taking over the Cardwell facilities.

In June of 2010 Cardwell again contacted UE about replacing the primary metered system.⁴⁶ UE proposed a route that would use poles placed within the

⁴¹ Cardwell Exhibit 15, response to #5 and #6.

⁴² Cardwell transcript p. 133.

⁴³ Cardwell transcript pp. 98-99.

⁴⁴ Cardwell transcript pp. 98-101.

⁴⁵ Cardwell transcript pp. 99-101, 128-129.

⁴⁶ Cardwell transcript pp. 102-105.

interior of Cardwell's tract.⁴⁷ Cardwell preferred a route crossing Business Highway 50 closer to Cardwell's office, one which would not use the existing route to an existing pole in the lumber yard.⁴⁸ But for the first time in over three years UE at least provided a specific estimate.⁴⁹ It was apparent to Cardwell that UE resisted Cardwell's desired route because the existing route blocked Three Rivers.

After the present change of supplier request was filed, Cardwell asked Mr. Hagan for an estimate to come directly across Business Highway 50 to Cardwell's office, the route Cardwell preferred. UE obliged, and for the first time put the estimate in writing.⁵⁰ At hearing Cardwell testified that if UE had provided a quote for the route Cardwell wanted when it first requested a quote, this proceeding would not have been necessary.⁵¹ Cardwell believes UE resisted providing an estimate for the route Cardwell wanted

Cardwell also obtained an estimate from Three Rivers.⁵²

d. Cardwell's right to use Three Rivers to serve new structures;

Cardwell Lumber hopes to open a new millwork facility soon.⁵³ It has definitive plans to install a sanding operation. There is a potential for several jobs

⁴⁷ Cardwell transcript pp115-116.

⁴⁸ Cardwell transcript pp. 116-119, 128-129.

⁴⁹ Cardwell transcript p. 104.

⁵⁰ Cardwell transcript pp. 105.

⁵¹ Cardwell transcript pp 106.

⁵² Cardwell transcript pp. 109-111.

to be brought to the area.⁵⁴ If this work is brought to the Cardwell tract, a new structure will be required, as the existing structures would not be suitable.⁵⁵ Cardwell would prefer to place the new structure on the Cardwell tract, as it is a better market area than Novelty or Frankford.⁵⁶

For a new structure Cardwell has the right to have it served by Three Rivers. Cardwell knows it has the right to have new structures supplied by Three Rivers.⁵⁷ Cardwell will not place this mill or sanding operation on the Cardwell Tract unless it is permitted to change suppliers for all existing structures to Three Rivers.⁵⁸ If Cardwell does not obtain permission to change suppliers from UE, it will simply shut down all operations on the Cardwell Tract.⁵⁹ Changing suppliers is that important to Cardwell's business decisions.

e. Cardwell's desire to have a single power supplier, not two separate suppliers with power line duplication on the Cardwell Tract;

Cardwell does not want both Three Rivers and UE to have two separate systems supplying different structures on the Cardwell Tract.⁶⁰

⁵³ Cardwell transcript pp. 36-37

⁵⁴ Cardwell transcript pp. 36-37.

⁵⁵ Cardwell transcript pp. 45-47.

⁵⁶ Cardwell transcript pp. 36-37.

⁵⁷ Cardwell transcript p. 106-107.

⁵⁸ Cardwell transcript pp 122-123, 126-127.

⁵⁹ Cardwell transcript pp. 122-123.

⁶⁰ Cardwell transcript pp. 106-108.

UE's power line goes east/west along the North side of Business Highway 50. The line extension that serves the present structures on the Cardwell Tract crosses the highway in a southerly direction along the western edge of the Cardwell Tract to a crossing pole, then on to the meter pole.⁶¹

Three River's lines are also already on the Cardwell tract. Three River's power line goes east/west along the South side of Business Highway 50. This is shown in Cardwell Exhibit 13.⁶² Three River's line is only 10 feet above the Cardwell office.⁶³ Utilizing Three Rivers to serve Cardwell's office building would avoid the parallel line duplication suggested by Mr. Hagan's first proposal.

Cardwell would prefer power line minimization, not duplication, to free up the sky.⁶⁴ Any safe operator of a lumber operator would prefer line minimization from safety standpoint. An additional reason Cardwell prefers a single Three River's system is Three River's proposal to extend three phase underground from Cardwell's office to a location within another structure on the tract.⁶⁵

f. absence of adverse impact on UE.

UE did not have to invest in any facilities in order to begin serving Cardwell in November, 2004. The UE facilities present on the Cardwell tract have been

⁶¹ Cardwell Exhibits 1, 13.

⁶² Cardwell transcript pp 72-73.

⁶³ Cardwell transcript pp. 110.

⁶⁴ Cardwell transcript pp. 118-120.

⁶⁵ Cardwell transcript pp. 110, 120-121..

there 30 years or more. At hearing UE agreed that a change of suppliers would not cause UE to suffer stranded investment.⁶⁶ For a utility with \$2.6 Billion in Missouri jurisdictional assets, a loss of zero plan investment is not significant.⁶⁷

Losing Cardwell as a customer would not cause a significant loss of revenues to UE. For the last few months Cardwell has used only 644 to 975 kW hours of electricity, with bills ranging between \$645 and \$975.⁶⁸ For a utility with \$2.9 billion in annual Missouri Operating Revenues, this amount is insignificant.⁶⁹

Cardwell Response to the position of Staff and UE that a “rate differential” is the basis of Cardwell’s Request.

Cardwell is not requesting a change of suppliers because Three River’s electric rates are cheaper than UE’s. Cardwell testified it was not aware of Three River’s rates, had not compared them to UE’s rates, didn’t know if there was a difference, or whose rates were cheaper.⁷⁰

Staff and UE got together to take an unusual position with respect to the meaning of “rate differential”. In the Joint List of Issues and Statement of Position, Staff stated “It is Staff’s position that under Ameren Missouri’s tariffs any estimate rendered pursuant to request for an enlargement or modification of

⁶⁶ UE transcript p. 196.

⁶⁷ UE 2009 Annual Report, as officially noticed at hearing.

⁶⁸ UE Exhibit 16.

⁶⁹ UE 2009 Annual Report, as officially noticed at hearing.

⁷⁰ Cardwell transcript pp. 111-113.

Ameren Missouri's distribution system constitutes a "rate", and as such, any difference in like estimates amounts to a "rate differential" as used in Sections 393.106 and 394.315 RSMo (2000) and is to be excluded from the public interest analysis conducted pursuant to a change of supplier request." Both Staff and UE referred to this position in their opening statements.⁷¹

This unusual position needs further explanation: Staff witness Alan Bax's memorandum upon which Staff's Recommendation⁷² was based, at pages 5-8, provides it. Mr. Bax reports that Cardwell obtained estimates from both Three Rivers and UE to replace the electrical facilities on the Cardwell Tract. He reports that UE's estimate was coupled with an "offer" from UE for Cardwell to switch from UE's primary rate to UE's small general service rate.

As the electrical configuration included in UE's estimate would require the installation of a new service point in order to become a small general service rate customer, Mr. Bax then refers to UE's Tariff Sheet 159⁷³ to point out that the tariff would require Cardwell to pay UE to move the service point if Cardwell requested the change.⁷⁴ Mr. Bax then assumes the cost estimated by UE to build the new service point was less than the cost in Three River's estimate to build Cardwell the new service Three Rivers proposed. Staff concludes that since the Three Rivers

⁷¹ Transcript pp. 19-23, 25-27.

⁷² Cardwell Exhibit 19.

⁷³ Cardwell Exh. 18.

⁷⁴ Staff transcript p. 205-207.

estimate was less than the UE estimate, Cardwell's application to change suppliers is based on a "rate differential".⁷⁵

This unusual position is premised upon disjointed logic, and finds no support in the clear language of §393.106 RSMo. There are several problems with this position:

First, a difference in quotes to replace an electrical system is not a rate differential. When confronted by Judge Jones with the rather obvious observation that the statutory words "rate differential" pertained to the amount paid per kilowatt hour of electrical usage, and not to estimates to build facilities, Staff cited a court case which described a purpose of the anti-flip flop statute being to preclude customers from switching between suppliers on the basis of rates and charges.⁷⁶ (Underlining added). The case Staff cited is *UE v Cuivre River Electric Cooperative*, 726 SW2d 415 (Mo App ED 1987). Page 417 contains the passage upon which Staff and UE rely:

"Essentially the second sentence is designed to preclude customers from switching back and forth between electrical suppliers on the basis of rates and charges."

This case was discussing a prior version of the anti-flip flop statute. That predecessor statute contained the following phrase, which is identical to that of current §393.106 applicable here:

⁷⁵ Staff transcript p. 211.

⁷⁶ Transcript pp 25-27.

“...in the public interest for a reason other than a rate differential.”

The legislature used the words “rate differential”. It did not use the words “and charges”, which it easily could have done. The Eastern District is powerless to add words to a statute. It is only empowered to interpret statutes that need interpretation. When the Eastern District used the phrase containing the words “and charges”, it was not attempting to interpret the words “rate differential”. It was merely engaging in an attempt to generally describe the statute’s purpose. The unfortunate addition of the words “and charges” was merely dicta.

Second, it was prudent business for Cardwell to obtain estimates as to alternate designs, and the costs of such designs, for constructing replacement facilities, and for removing the existing facilities. Obtaining estimates, or “bids”, does not constitute a commitment to pay anything, be it characterized as either a “rate” or a “cost”.

Third, Cardwell did not accept UE’s “offer” to switch Cardwell from a small primary rate to a small general service rate. Cardwell is still on the UE primary service rate.⁷⁷ See UE Exhibit 16. UE witness Hagan agreed.⁷⁸ Staff witness Bax agreed.⁷⁹ Staff’s Recommendation at paragraph 6, and Mr. Bax’s memo which is

⁷⁷ Cardwell transcript p. 113.

⁷⁸ UE transcript pp. 147-148.

⁷⁹ Staff transcript p. 214.

Appendix A thereto, also state that Cardwell currently takes service from UE under UE's small primary service (SPS) rate.⁸⁰

Fourth, Cardwell did not accept UE's estimate to build a single phase service across the Business Highway 50 to Cardwell's office/retail store. Cardwell has not "requested" UE to modify or enlarge its distribution system to build single phase across Business Highway 50 to serve Cardwell's office/retail store.

Fifth, the estimates of UE and Three Rivers were different. UE's June 2010 \$8600 estimate included leaving the highway crossing point the same, and placing the poles on the interior of the Cardwell Tract where Cardwell did not want them.⁸¹ UE's later estimate, delivered the day of the prehearing conference, was for \$10,800 including an overhead three phase component, was "higher in amount" than the \$8600 estimate, but would have crossed the highway at the point Cardwell desired.⁸²

Three River's estimate was for dropping a line from its facilities near the Cardwell office, which did not require a highway crossing.⁸³ Three River's proposal also included three phase extensions via underground facilities.⁸⁴ Three River's estimate was for Cardwell to pay \$4000-\$5000.⁸⁵

⁸⁰ Cardwell Exhibit 19.

⁸¹ Cardwell transcript 116-119, 128-130.

⁸² Cardwell transcript 130-131, 169.

⁸³ Cardwell transcript pp 110.

⁸⁴ Cardwell transcript pp. 118-120.

⁸⁵ Cardwell transcript pp109-110.

Attempting to compare these estimates is an apples or oranges exercise. They involved different facility proposals, and different costs to Cardwell. They cannot accurately be described as being “a” differential, much less a “rate” differential proscribed by §393.106 RSMo.

Seventh, Cardwell has not accepted Three River’s estimate. Cardwell can’t have Three Rivers serve an existing structure on the Cardwell Tract without a Commission Order (unless the Commission determines that §393.106 RSMo does not apply to the location of UE’s meter not being adjacent to the Cardwell structures). There is no reason for Cardwell to further consider Three River’s estimate until such an Order is forthcoming.

Issue 3: If so, are any of these reasons for changing suppliers in the public interest?

Cardwell Argument:

All factors the Commission has enumerated as justifying requests for changes of power suppliers must be capable of being considered to be in the public interest. See the Commission decisions, and factors which may justify a change of suppliers, as enumerated before under the “Controlling Law” section of this brief. As Commission precedent has identified them as factors that can justify a change of power suppliers, they must be in the public interest. Otherwise, the Commission

would not have enumerated them. Cardwell has presented its case with these factors specifically in mind.

Conclusion

UE opposes Cardwell's request due to the "greater principle" that if Cardwell is allowed to change, where does UE draw the line? This "greater principle" is merely disguised obstructionism. The Missouri legislature in enacting 393.106 RSMo delegated to the Commission the power to draw the line between changes that are in the public interest and those that are not. UE would like to reserve to itself the decision to draw this line.

The line is not UE's to draw. The Commission has laid out case law indicating that these cases will be decided on a case by case evaluation, based on factors the Commission has enumerated are in the public interest.

Cardwell bought, owns, and has been responsible to maintain the primary distribution facilities on the Cardwell Tract. All parties have agreed that Cardwell needs to replace them. Replacing an old, decayed, poorly designed, and potentially hazardous system with a newer, safer one a legitimate business decision Cardwell can make. It is in the public interest.

Cardwell would prefer that the replacement system be one in which it is not responsible to maintain dangerous primary high voltage facilities. Cardwell is not in that business, and is not qualified to do it. For the past six years they have had

to pay a contractor to do this. It should be Cardwell's own business decision as to what replacement system to build. It is a legitimate business decision for Cardwell to decide to get out of the high voltage business. Allowing Cardwell to decide that for itself is in the public interest. Allowing Cardwell to get out of the high voltage business is in the public interest.

Cardwell owns the existing system. UE made no new investment to serve Cardwell. UE will suffer no stranded investment if Cardwell changes suppliers. UE has enjoyed supplying power to Cardwell for six years, without having to maintain these decrepit primary facilities.

Now that Cardwell has decided what replacement system is best for Cardwell and its business, and that it will not be built or served by UE, Staff and UE attempt to deny Cardwell its own choice for its own business. UE and Staff say Cardwell's only choice is to request a new service classification with UE, remain a customer of UE, and pay UE to replace the system.

This is a country that honors the rights of property owners to make the decisions that affect their property, their business pursuits. Cardwell is in the lumber business. UE is not. Staff is not. Allowing UE to limit Cardwell's choice to UE only is not in the public interest. Cardwell doesn't attempt to tell UE what lumber and poles to buy, or who UE must buy them from. There is competition in the business of replacing electrical facilities inside buildings. Electricians submit

competitive bids for this work routinely. There is competition in the business of building, rebuilding, repairing and replacing power company facilities. UE and other utilities go out for competitive bids for this work routinely. Why shouldn't this same competitive bidding process be enjoyed by industrial customers that own primary facilities? Cardwell should be afforded the same right building owners and power companies are afforded.

Cardwell prefers the service provided by rural electric cooperatives over the service provided by UE. It is Cardwell's right to have this preference. It is Cardwell's right to choose Three Rivers Electric Cooperative to serve new structures erected on the Cardwell Tract.

While Cardwell's ability to have Three Rivers also serve the existing structures on the Tract is dependent upon the Commission's decision in this case, it is undeniable that there are legitimate reasons for Cardwell to prefer one supplier on its land. It is reasonable to prefer one distribution system owned by one power supplier over two separate system owned and operated by two separate suppliers. No one wants line duplication. It ruins the aesthetics, creates operational problems, and increases the risk of accidents. There is only one supplier to interface with for service and billing, not two. Three Rivers is just as close or closer to Cardwell's structures than is UE. Three Rivers has a superior proposal as to how to extend three phase service underground in the future. Underground is

superior in terms of aesthetics and the lack of surface obstructions poles present, and likely safer than un-insulated overhead power lines. All of these factors are in the public interest.

Request for Relief

Wherefore, on the basis of Cardwell's Application for a Change of Suppliers, the evidence adduced at hearing, and for the reasons set forth in this Brief, Cardwell respectfully requests that the Commission enter an Order authorizing Cardwell Lumber Inc. to change suppliers from Union Electric Company, d/b/a Ameren Missouri, to Three Rivers Electric Cooperative, for all Structures existing on the Cardwell Tract as of the date of the Commission's Order.

In the alternative, if the Commission agrees that UE's meter is not located "adjacent to" a structure on the Cardwell Tract, the Commission is requested to enter an order holding that Commission approval of the requested change in suppliers is not necessary, as Cardwell is not required to obtain Commission approval to change power suppliers for the structures on the Cardwell Tract.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading was electronically mailed to the following attorneys of record in this proceeding this 24th day of November, 2010:

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