BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Co-Mo Electric Cooperative for Approval of Designated Service Boundaries Within Portions of Cooper County, Missouri.	))))	File No. EO-2022-0190

AMEREN MISSOURI'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY DETERMINATION

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company") and, pursuant to 20 CSR 4240-2.117(B), hereby submits the following memorandum of law in support of its motion for summary determination filed concurrently herewith.

Applicable Legal Principles

The Commission's summary disposition rule is intended to promote efficient resolution of matters where there is no genuine dispute as to any material fact. The standard for granting a motion for summary disposition is set forth in 20 CSR 4240-2.117(1)(E), which states:

> The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest.

The Commission has recognized that "[t]he time and cost to hold hearings on [a] matter when there is no genuine issue as to any material fact would be contrary to the public interest." *Determination on the Pleadings*, Case No. EU-2005-0041 (*In the Matter of the Application of Aquila Inc. for an Accounting Authority Order Concerning Fuel Purchases,* on October 7, 2004). The standard for granting a motion for summary determination is essentially the same as the standard for summary judgment set forth in the Missouri Rules of Civil Procedure. *Cf.* Mo. R. Civ. P. 74.04(c)(6).

The Commission is a body of limited jurisdiction, having only the powers given it by the General Assembly**.** ***State ex rel. Pub. Counsel v. Pub. Serv.*** **Comm'n**, 397 S.W.3d 441, 446 (Mo. App. W.D. 2013) ("Because the [PSC] is purely a creature of statute, its powers are limited to those conferred by statute either expressly, or by clear implication as necessary to carry out the powers specifically granted").

Argument

An application fails to state a claim upon which relief can be granted if, accepting the well-pleaded factual allegations as true, the applicant nevertheless fails to establish that it is entitled to the relief sought. *See, e.g.,* ***Tari Christ v. Southwestern Bell Tele. Co. et al.,*** 2003 Mo. PSC LEXIS 37 (Case No. TC-2003-0066, *Order Regarding Motions to Dismiss*, Jan. 9, 2003), *citing* ***Nazeri v. Missouri Valley College,*** 860 S.W.2d 303, 306 (Mo. *banc* 1993). Even assuming that the allegations in Co-Mo's Application respecting Boonville's annexation of the subject property, the developer's preference, and negotiations relating to a possible territorial agreement are true, because the subject statute does not apply on the facts presented here, where the subject property is within the Company's exclusive service territory as determined by the Commission, the Commission has no authority to grant the relief requested by Co-Mo, necessitating the dismissal of Co-Mo's application as a matter of law.

Under Missouri law, different electric service providers are allowed to compete for electric customers unless and until this Commission designates an area as being within the exclusive service territory of a given provider. This is because it is up to the Commission to decide whether to issue certificates of convenience and necessity to public utilities and thereby create a monopoly within the certificated areas. *State ex rel. Electric Co. of Missouri v. Atkinson et al.*, 204 S.W.897,

898-900 (Mo. banc 1918) (Standing for the proposition that whether a certificate should be granted is a question for the Commission, subject of course to applicable principles of judicial review, and affirming the Commission's decision in that case to grant a certificate to an electric service provider within the City of Maplewood, there having been no certificate previously granted to the prior provider in the city). Such designations, prior to the 2021 amendments to §386.800, happened in one of two ways. For Commission-regulated providers like Ameren Missouri, the Commission designates such areas by granting an "area certificate" under §393.170.2. *See also* 20 CSR 4240-20.045(4). As earlier noted, an area certificate for the property in question here was granted to Ameren Missouri in 1991 in File No. EA-87-159. Ameren Missouri's tariffs have reflected that the subject property (and the entire area shaded in yellow on page 1 of Exhibit 11 to the Company's Motion for Summary Determination ("Motion") were within Ameren Missouri's exclusive service territory since the Commission approved the first set of tariffs so providing in August 1991. The most recent such tariff is attached to the Motion as Exhibit 10.

In general, the Commission does not establish service territories for rural electric cooperatives, but there was one exception to this general rule (prior to 2021) and there is a second exception post-2021 that applies, *under certain circumstances*. The first exception arises under §394.312, RSMo. (2016) if and only if a cooperative and a Commission-regulated electric utility or municipal utility (as applicable) voluntarily reach agreement on establishing exclusive service territories and if the Commission determines such an agreement should be approved. There is no such agreement here.

The 2021 amendments to §386.800 created a second exception, but it only confers authority on the Commission to designate a given area as the territory of a cooperative or a Commission-regulated provider or a municipal utility *if the area in question is subject to open competition*. If

the Fox Hollow subdivision were not within Ameren Missouri's exclusive service territory, Ameren Missouri concedes that even though it is the exclusive electric service provider within the pre-annexation city limits of Boonville, the statutory amendments would give Co-Mo the *opportunity* to convince the Commission that Co-Mo should serve this newly annexed area if the newly annexed had, pre-annexation, been an area of open competition. But it wasn't.

Under these circumstances, Section 386.800 cannot be interpreted to authorize the Commission to allow Co-Mo to serve the area in question. The purpose of statutory interpretation is to "'ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning.'" ***State ex rel. Hillman v. Beger***, 566 S.W.3d 600, 604–05 (Mo. banc 2019) (quoting ***S. Metro. Fire Prot. Dist. v. City of Lee's Summit***, 278 S.W.3d 659, 666 (Mo. banc 2009). "In construing a statute, courts cannot add statutory language where it does not exist; rather, courts must interpret the statutory language as written by the legislature." ***Peters v. Wady Indus., Inc.***, 489 S.W.3d 784, 792 (Mo. banc 2016) (quotation marks omitted). Put another way, "This Court enforces statutes as they are written, not as they might have been written." ***Turner v. Sch. Dist. of Clayton***, 318 S.W.3d 660, 667 (Mo. banc 2010). An examination of §386.800, as amended, in light of these binding principles of law demonstrates that it does not apply here.

Attached to the Motion as Exhibit 12 is a compare version of §386.800 prior to the 2021 amendments as compared to the statute post-the amendments. Focusing first on subsection 1, the plain terms of that subsection, irrespective of the 2021 amendments, demonstrate that it does not apply to the circumstances at bar. The question then is, do subsections 2 or 3, as amended, apply? It is true that subsection 3 made subsection 2 applicable to electrical corporations if the electrical corporation "rather than a municipally owned electric utility lawfully is providing electric service

in the municipality . . . [at the time of the annexation at issue]." §386.800.3. Therefore, we must next look to subsection 2 and see if *its terms* apply to the facts at issue. Subsection 2 provides that a "municipally owned utility may *extend* pursuant to lawful annexation, its electric service territory to include areas where another electric supplier is not providing permanent service to a structure" (emphasis added). No such supplier is/was at the time of the annexation providing service to any structure within the subdivision property because there are no structures there – the land is vacant. But the issue in this case is not extension by a *municipal* utility of the *municipal utility's service territory* – Boonville does not have a municipal utility. Rather, since subsection 3 provides that subsection 2 applies to electrical corporations (Ameren Missouri here), subsection 3 means that subsection 2, when an electrical corporation serves the municipality, reads as follows: an "~~municipally owned utility~~ [electrical corporation] may *extend* pursuant to lawful annexation, its electric service territory to include areas where another electric supplier is not providing permanent service to a structure" (emphasis added). By the plain terms of the statute, Ameren Missouri did not extend its service territory to include Fox Hollow because its service territory *already included Fox Hollow*. The verb "extend" simply does not apply; there is nothing to extend, indeed an extension is not possible. For the same reasons, neither did (or could) Boonville's annexation of Fox Hollow "extend" Ameren Missouri's service territory to include it.

The clear intent of the General Assembly in amending subsections 2 and 3 of §386.800 was to not *automatically* give a municipally owned electric utility or an electrical corporation serving a municipality under a municipal franchise the right to serve undeveloped, *open competition* land annexed by the municipality. Prior to the amendments, that right would have been automatic even if the facts on the ground and the factors enumerated in subsection 2 would have, in the Commission's judgment, favored cooperative service. The amendments changed this as to open

competition land. However, this land is not open competition land. The Commission already decided in litigation involving, not surprisingly, a 4-year battle between Missouri cooperatives and Ameren Missouri, that the public convenience and necessity dictated that Ameren Missouri be granted an exclusive right and obligation to serve the land in question. Had the General Assembly intended the statutory amendments to apply here, subsection 2 would not be triggered only when the annexation results in an *extension* of the service territory. Instead, the General Assembly would have amended subsection 2 to read something like "If a municipality annexes land, pursuant to lawful annexation, to include areas where another electric supplier is not providing permanent service to a structure, then …." In that case, even if the annexed area is within a certificated service territory if no service has yet been provided within annexed area subsection 3's process which Co-Mo attempts to invoke in this docket would apply. But those are not the words the General Assembly used. Under the plain words the General Assembly used, subsection 3 simply does not apply.

In summary, because the statute, as amended, does not apply unless the annexed area in question is open competition area, Co-Mo is unable to invoke any authority or jurisdiction on the part of the Commission to designate Fox Hollow as its service area because the Commission simply has no such authority. Lacking authority to grant the relief sought, the Commission must dismiss the Application.

WHEREFORE, for the reasons outlined herein, Ameren Missouri prays that the Commission make and enter its order granting summary determination in favor of Ameren Missouri and dismissing Co-Mo's Application with prejudice.

(*Signature block appears on the following page*)

Respectfully submitted,

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ATTORNEYS FOR UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14th day of February 2022, served the foregoing either by electronic means, or by U. S. Mail, postage prepaid addressed to all parties of record.

/s/James B. Lowery
James B. Lowery