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.	))))	Case No. EO-2022-0190

CO-MO'S LEGAL MEMORANDUM IN SUPPORT OF ITS RESPONSE IN OPPOSITION TO AMEREN MISSOURI'S MOTION FOR SUMMARY DETERMINATION

COMES NOW Co-Mo Electric Cooperative ("Co-Mo") pursuant to 20 CSR 4240-2.117, and for its Legal Memorandum In Support of Its Response in Opposition to Ameren Missouri's Motion for Summary Determination, concurrently filed herewith, respectfully states as follows:

Applicable Legal Principles and Statutory Framework

I. Case No. EA-87-159

Ameren Missouri asserts that it is entitled to summary determination in its favor, and that Co-Mo's Application should be dismissed as a matter of law, on the basis that the area certificate granted in Case No. EA-87-159 (as consolidated) somehow granted Ameren Missouri the "exclusive right" to serve the subdivision now at issue in this case. Ameren Missouri is partially correct to the extent that the competing electric supplier happens to be another Commission-regulated investor-owned utility, such as, for example, Evergy.[1] However, Ameren Missouri is completely wrong as a matter of law if the competing electric supplier happens to be a rural electric cooperative such as Co-Mo. In granting Ameren Missouri's predecessor's area certificate

[1] The Commission's records will reflect that the Commission historically has not granted overlapping service area certificates among Commission-regulated utilities, at least intentionally. The various "electric cooperative service company affiliate" cases referenced by Ameren Missouri are clear examples of this fundamental principle. In those cases, in an effort to address years of unending territorial disputes seven cooperatives (out of a total of 47) had formed affiliates that unsuccessfully filed for competing certificates with Union Electric and St. Joseph Light & Power. Co-Mo had not formed such an affiliate, was not seeking its own certificate, and its only role in those cases was as part of a larger cooperative group that opposed and argued against the expansion of the investor-owned utilities then-existing certificates.

in Case No. EA-87-159 pursuant to Section 393.170 RSMo, the Commission only *authorized* Ameren Missouri's predecessor *to lawfully serve* within the designated certificated area;[2] it did not and lawfully could not in any way restrict Co-Mo's legal authority to compete and also serve within Ameren Missouri's certificated area.

The Commission clearly recognized this critical distinction when it cited to a previous Commission decision and wrote:

> "The Commission's jurisdiction over the cooperatives is limited to safety matters pursuant to Section 394.160, RSMo 1986, as amended, and the settling of change of supplier disputes pursuant to Sections 393.106 and 394.315 RSMo 1986, as amended. The Commission lacks the jurisdiction necessary to prevent the cooperatives from duplicating facilities in order to compete for prospective customers unless in so doing the cooperatives violate safety rules or the change of supplier statutes. Section 386.310(2), RSMo 1986, as amended...Therefore, whether or not this certificate is granted, the cooperatives will be free to duplicate facilities in order to compete with other regulated providers there, provided they do so safely. ***Application of Sho-Me Power Corporation et al.***, 29 Mo. P.S.C. (N.S.) 415, 418 (1988).
>
> The Commission recognizes that the General Assembly statutorily has allowed competition between and among cooperatives, regulated utilities and municipalities. In fact, the General Assembly again acknowledged such competition with the passage of Section 394.312 RSMo (Cum. Supp. 1989)[3]." Case Nos. EA-87-159, EA-88-21, EA-88-33 and EA-88-113 as consolidated, ***In the Matter of the Application of Union Electric Company et al***., 30 Mo. P.S.C. (N.S.) 184, 193 (1990). *See also*, the other electric service company cases, decisions issued in separate orders, Case Nos. EA-88-124, EA-89-80, EA-87-102, EA-87--85, EA-87-123, EA-87-99, and EA-88-29, 30 Mo. P.S.C. (N.S.) 197 *et. seq.*

See **Ameren's Exhibit 6**, page 13.

II. Overlapping Service Area Maps

If Ameren Missouri's argument is correct, Co-Mo could not serve **anywhere** within

[2] In fact, the Commission in that case adopted the Staff's and OPC's recommendation to pare down the scope of the certificate requested to include only those areas within the land sections where Union Electric (Ameren) already had existing facilities.

[3] That statute provides in pertinent part: "*Competition to provide retail electric service, as between and among rural electric cooperatives, electrical corporations, and municipally owned utilities may be displaced by written territorial agreements....*"

Ameren Missouri's certificated area, which is a ridiculous result and entirely contrary to reality as evidenced by both suppliers' current respective service areas. See, for example, Co-Mo's services overlayed on the map that Ameren Missouri asserted as its "exclusive" service territory, the area around Boonville that lies within its certificated area. See **Exhibit B.** As evidenced by this exhibit, Co-Mo currently has 368 services within Ameren Missouri's certificated area; 226 of which were connected after Ameren Missouri's 1991 area certificate became effective. **Id**. Further, Ameren Missouri alleges that its tariff was approved on August 9, 1991. See **Ameren's Motion for Summary Determination** at Paragraph 2. Therefore, Ameren Missouri's argument necessarily is that after August 9, 1991, Co-Mo should not have connected any new services within this certificated area. Ameren has never raised an issue with these services and has never alleged Co-Mo is providing unauthorized service as it is aware of the well-settled law that Co-Mo has the right to compete with Ameren Missouri within its designated service territories.

To further illustrate the absurdity of Ameren Missouri's argument if it were to be expanded beyond the Boonville area and taken statewide, which if Ameren is correct it must be, see **Exhibits F and G** which show, respectively, the areas of Missouri where the Commission has issued certificates to investor-owned electric utilities (as of 2008) and the service areas of Missouri's forty rural electric distribution cooperatives. Place one map upon the other and it is obvious that the service areas of the investor-owned utilities and the rural electric cooperatives overlap. Neither map trumps the other with respect to "exclusivity" of service areas; they merely reflect the reality of competition between and among electric suppliers.

III. Missouri Electric Service Area Statutes

Unlike some other states, in Missouri the Commission does not have the authority to

draw electric service area maps and grant exclusive service areas between and among all electric suppliers. With certain specific exceptions, as a general rule, Missouri statutes provide that:

A. An investor-owned Commission-regulated electric utility lawfully may construct facilities and serve anywhere in the state provided it first obtains a certificate from the Commission. Section 393.170 RSMo. If it does not have a Commission certificate for a particular area, it may not serve there.[4]

B. A municipally-owned utility does not require Commission approval to construct facilities or to provide service, but subject to certain exceptions by statute it lawfully only may serve within, not outside, its municipality's corporate boundaries. Section 386.800 RSMo.

C. A rural electric cooperative does not require Commission approval to construct facilities or to provide service and lawfully may serve in any "rural area" of the state. Section 394.080 RSMo. "Rural area" is statutorily defined as "any area of the United States not included within the boundaries of any city, town, or village having a population in excess of 1600 inhabitants". Section 394.020(3) RSMo.[5] This statute is commonly known as "the 1600 rule" (previously the "1500 rule"). The only other restrictions on where a cooperative lawfully can serve is under a Commission-approved territorial agreement, where the cooperative has voluntarily ceded its rights to serve an area to another supplier, Section 394.312 RSMo, or possibly in some specific instances by virtue of the operation of the so-called "anti-flip-flop law", Sections 91.025, 393.106, 393.315 RSMo (as amended in 2021).

[4] This is so even in the context of territorial agreements. This is why at times the Commission will see a certificate application by an investor-owned utility submitted concurrently with request for approval of a territorial agreement.

[5] This 1939 statute originally set the population threshold at 1500 inhabitants and remained unchanged until 2021 when the General Assembly increased the threshold to 1600 inhabitants with an automatic 6% increase every ten years beginning in 2030.

IV. The "1600 Rule" versus Ameren Missouri's Purported "Exclusive" Certificate

It is the "1600 rule", and the impact of city annexation, not Ameren Missouri's purported "exclusive" certificate, that creates the legal obstacle to be overcome in order for Co-Mo to serve the Fox Hollow Subdivision. If it were not for the "1,600 rule", Co-Mo lawfully could compete for and serve new structures[6] inside the City of Boonville, or in any other city, and would not need prior approval by the Commission in order to do so. Moreover, if Mr. Thurman had not sought and received annexation by the City of Boonville, and the Fox Hollow Subdivision remained outside the city limits, Co-Mo and Ameren Missouri would both lawfully compete for the new load--with no Commission proceeding whatsoever and Mr. Thurman ultimately deciding which supplier would serve. This scenario would be exactly the same anywhere in the state between any investor-owned utility and any rural electric cooperative.

Annexation, however, necessarily triggers the "1600 rule" which, without the 2021 amendments to Section 386.800 RSMo, necessarily would result in the investor-owned (or a municipally-owned) utility serving within the city automatically obtaining the new load by default and foreclosing the option of service by the cooperative--despite the wishes of the landowner.

V. New Section 386.800 RSMo Creates a New Exception to the "1600 Rule"

The 2021 amendments to Section 386.800 RSMo provide a way around the decades old investor-owned/municipally-owned utility default scenario by providing a new, case-by-case exception to the "1600 rule". Simply put, the 2021 amendments:

1. Allow the owner of the land being annexed to choose service by an electric

[6] All electric suppliers generally are prohibited from competing for *existing* structures served by another supplier due to the "anti-flip-flop law", although in very limited instances the Commission may order a change of supplier in some specific circumstances.

cooperative for new structures that are built after the effective date of the annexation, provided that certain steps are followed; and

2. Gives the Commission the authority to ensure, after hearing, that allowing the cooperative to honor the landowner's wishes and to serve in the newly annexed area would not somehow be detrimental to the public interest.

In this Application before the Commission, the subdivision developer, Mr. Thurman desires Co-Mo, not Ameren Missouri, to provide electric service to his newly annexed subdivision which soon will be under construction. If it was a municipally-owned utility rather than Ameren Missouri involved here, the issue of which supplier may lawfully serve the subdivision already would be over, since Section 386.800.2 RSMo gives the landowner the final say and there would be no Commission proceeding. But since the competing supplier here is Ameren Missouri, Co-Mo pursuant to Section 386.800.3 RSMo has brought the matter before the Commission for its review and determination that granting Mr. Thurman's request would not somehow be detrimental to the public interest. In response, Ameren Missouri has sought to retain its pre-2021 "1600 rule" win-by-default advantage by seeking to have Co-Mo's Application dismissed on the basis of its so-called "exclusive" area certificate.

VI. Ameren Missouri's Own Tariffs

Finally, Ameren Missouri's own tariffs betray its argument that its certificate gives it "exclusive" authority to serve, and prevent Co-Mo from serving, the Fox Hollow Subdivision. That Ameren Missouri faces and always has faced competition inside of its certificated service areas is reflected in its own tariff sheets for "*Pilots, Variances and Promotional Practices" part "E. Unregulated Competition Waivers and Other Variances*". See **Exhibit A,** MO.P.S.C.

Schedule No. 6, Original Sheet 161 et. seq. This tariff illustrates the many instances in which Ameren Missouri has requested and received from the Commission expedited treatment and a waiver of its other tariff provisions in order to "meet unregulated competition" occurring within Ameren Missouri's certificated area. **Id**. If Ameren Missouri's area certificates are indeed "exclusive", why is Original Sheet 161 even needed?

In Ameren Missouri's own exhibit to its Motion for Summary Determination it further acknowledges that rural electric cooperatives, such as Co-Mo, are "unregulated" competitors of Ameren Missouri. See **Ameren's Exhibit 6**, at page 5, ¶ 12.

As recently as 2019, the Commission has addressed this very issue of competition between unregulated utilities and investor-owned utilities. In File No. EE-2019-0395, Ameren Missouri requested a variance from the Commission Rule 4 regarding prohibited promotional practices in order to allow it to compete with Cuivre River Electric Cooperative, Inc., an unregulated utility and rural electric cooperative like Co-Mo, for business in a new subdivision. In that case, Staff recommended approval of Ameren Missouri's request and stated "[a]s the Commission has noted in past cases involving similar requests, it is highly aware of the competition that can exist between cooperatives (like CREC) and regulated utilities (like Ameren Missouri)." See **Exhibit D** at page 5. Staff's Recommendation goes on to note that "[g]iven that the proposed subdivision lies in an unincorporated portion of St. Charles County, Grantham Estates is a project that is subject to competition for the requested underground electric service between Ameren Missouri and CREC." See **Exhibit D**. Similar facts and the same policy and legal reasoning can be found in all the cases listed in Ameren Missouri's MO.P.S.C. Schedule No. 6, Original Sheet No. 161 *et. seq*. See **Exhibit A.**

The same facts exist in this case. The same policy and legal reasoning should be applied.

Co-Mo is an unregulated rural electric cooperative like Cuivre River. The subject property known as Fox Hollow Subdivision was located in an unincorporated area of Cooper County, Missouri at the time the "majority of the existing developers, landowners, or prospective electric customers in the area proposed to be annexed [… and …] prior to the effective date of the annexation, submit[ted] a written request" to the" parties pursuant to Section 386.800 RSMo, making it subject to competition for service from Ameren and Co-Mo. In the Ameren Missouri and Cuivre River case, the Commission entered an Order adding the subject area into Ameren Missouri's revised tariff sheet which effectively added the subject property to Ameren Missouri's list of unregulated competition waivers. See **Exhibit C** at page 2.

Co-Mo further notes that in that case, the Commission supported the exact reason for expedited treatment as Co-Mo alleges in our present case. The Commission found that "[g]ood cause to grant the request for expedited treatment exists because Ameren Missouri must accommodate the developer's construction timeline." See **Exhibit C** at page 2. The developer in our present case also has a construction timeline which must be accommodated. See **Exhibit E**, Affidavit of Troy Thurman.

CONCLUSION

For all the reasons set forth herein and in Co-Mo's Response In Opposition To Ameren Missouri's Motion For Summary Determination, Ameren Missouri's request for Summary Determination and dismissal of Co-Mo's Application should be denied and the case move toward the filing of testimony and a hearing as expeditiously as possible in order to meet Mr. Thurman's construction schedule for his subdivision. Moreover, the Commission should not permit Ameren Missouri to continue to make spurious legal arguments or otherwise engage in procedural tactics that only unnecessarily delay this proceeding.

Even if all of Ameren Missouri's allegations are true, which Co-Mo strongly denies, Ameren Missouri is not entitled to Summary Determination in this case as the law does not support Ameren's argument that it has an exclusive right to serve locations within its designated service territory to the exclusion of Co-Mo and other unregulated utilities. Ameren's own exhibits filed with its Motion for Summary Determination contradict this allegation on their face. Under 20 CSR 4240-2.117(1)(E), "[t]he 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." Summary determination is not appropriate in this case as Ameren Missouri has not shown and cannot show that there is no genuine issue as to any material fact and that it is somehow entitled to a summary determination in its favor as a matter of law.

WHEREFORE, Co-Mo respectfully requests that the Commission issue an Order denying Ameren Missouri's Motion for Summary Determination and such other and further relief as is just and proper under the circumstances.

Respectfully submitted,

/s/ Megan E. Ray
Megan E. Ray #62037
Andereck Evans, L.L.C.
3816 S. Greystone Court, Suite B
Springfield, MO 65804
Telephone: 417-864-6401
Facsimile: 417-864-4967
Email: mray@lawofficemo.com

Attorney for Co-Mo Electric Cooperative

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail, on February 18, 2022, to the following:

Office of the Public Counsel
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, Missouri 65102
opcservice@ded.mo.gov

Missouri Public Service Commission
Staff Counsel Department
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, Missouri 65102
staffcounselservice@psc.mo.gov

Wendy Tatro
Director and Assistant General Counsel
1901 Chouteau Ave., MC 1310
St. Louis, MO 63103
AmerenMOService@ameren.com

James B. Lowery
JBL Law, LLC
3406 Whitney Ct.
Columbia, MO 65203
lowery@jbllawllc.com

/s/ Megan E. Ray