

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

In the Matter of the Application of Thomas L.)
Chaney for Change of Electrical Supplier.) Case No. EO-2011-0391

**JOINT RESPONSE TO STAFF'S RESPONSE AND
REQUEST TO ACCEPT RESPONSE OUT OF TIME**

COMES NOW Union Electric Company d/b/a Ameren Missouri (Ameren Missouri) and Cuivre River Electric Cooperative (Cuivre River) and in response to the Staff's Response to Deny Ameren Missouri's and Cuivre River Electric Cooperative, Inc.'s Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Determination on the Pleadings (Staff Response), states as follows:

1. On April 19, 2012, Ameren Missouri and Cuivre River filed a Joint Motion to Dismiss for Lack of Subject Matter Jurisdiction and for a Determination on the Pleadings (Joint Motion).

2. On May 21, 2012, the Staff of the Missouri Public Service Commission (Staff) filed its response, which recommended rejection of the Joint Motion. The basis for Staff's recommendation was two portions of the governing Territorial Agreement.

3. The first portion of the Territorial Agreement claimed by the Staff to support its recommendation states that the agreement does not impair Ameren Missouri's certificates of convenience and necessity for that area. The second portion of the Territorial Agreement cited by the Staff allows Cuivre River and Ameren Missouri to switch service providers for some customers on a case-by-case basis. We address the second provision first.

4. A condition precedent that must be satisfied before any existing structure served by either Ameren Missouri or Cuivre River can be switched to the other is that Ameren Missouri and Cuivre River must enter into an agreement in writing. (Territorial Agreement, ¶ 7.) Cuivre River and Ameren Missouri have not entered into any such agreement. Unless and until such time as Cuivre River and Ameren Missouri enter into an agreement allowing the customer to switch service providers, the condition remains unsatisfied and the portion of the Territorial Agreement cited by Staff is irrelevant. This demonstrates that Staff's conclusion that Ameren Missouri has "concomitant" rights to serve Mr. Chaney is simply incorrect. Under the Territorial Agreement, Ameren Missouri has no right to serve Mr. Chaney (or any other existing structure being served by Cuivre River) if Cuivre River (and Ameren Missouri) has not agreed to such service.¹

5. The first basis for Staff's argument is the general language of the Territorial Agreement, found at ¶ 10(b)(1), which provides that the agreement shall not impair the Company's certificate of convenience and necessity within St. Charles County. First of all, the general language of this portion of the Territorial Agreement cannot be read to trump the specific language which reserves the right for Cuivre River to continue serving those structures it was already serving that were located in the electric service area of Ameren Missouri as of the date of the agreement. (Territorial Agreement, ¶ 2.)

6. Second of all, Ameren Missouri's certificate is not impaired by this Territorial Agreement. Obviously, when the Commission approved the territorial

¹ And absent such a right, the Commission has no jurisdiction to entertain a change of supplier request under Section 394.315.

agreement in the first place, the Commission determined that it was not detrimental to the public interest for Cuivre River to keep serving the structures (like Mr. Chaney's home) that it was then serving. And when it made that determination, it obviously concluded that this did not "impair" Ameren Missouri's certificate, for if it did, the Commission would not have approved the territorial agreement in the first place. What that means is that the Commission decided that for any so long as Ameren Missouri had the right to serve any *new* structure its certificate of convenience and necessity is not impaired. If Mr. Chaney's home was a newly constructed home, Ameren Missouri would have the sole right to provide electrical service to it, just as it does for all new customers within the area reserved to it in the Territorial Agreement.²

7. Thirdly, Staff's conclusion regarding concomitant service rights seems to be based on a distorted notion of certificate authority. A certificate of public convenience and necessity, both here and elsewhere, does not guarantee the right to serve any specific customer. The certificate stands as general authority to exercise franchise rights to conduct business and to use the public right-of-ways in a manner not available to other citizens for the purpose of offering and delivering utility service to the public not already receiving electric service. Service to specific customers is assured or denied by operation of other laws that work to qualify or to disqualify the service of competing service providers. The disqualification of any electric supplier for a given situation may be based on lack of franchise authority, lack of certificate

² Staff's argument that Mr. Chaney is "not bound by" the Territorial Agreement makes no sense. Every customer within a certificated service territory is "bound" to accept service from the provider in that area. Every customer in an area that has been divided-up via a territorial agreement is "bound" in the same way. The only exception is if the customer can properly invoke the switch-of-supplier statutes, and here Mr. Chaney cannot because there is no concomitant right to serve.

authority, constraints of the anti-flip-flop law, or by restrictions of the territorial agreement law. It is not incongruous to consider that Ameren Missouri's service opportunity in relation to a specific member of the public, as here, may be extinguished without impairment of the general service area authority of its certificate of public convenience and necessity.

8. Staff's interpretation would turn this Territorial Agreements on its head and would nullify its purpose. Part of the purpose of the Territorial Agreement, as set forth in the preamble, is the "...desire to promote the orderly development of the retail electric service system within portions of St. Charles County, Missouri, to avoid wasteful duplication and to minimize disputes which may result in higher costs in serving the public." (Territorial Agreement, p. 1.) The Territorial Agreement allowed both utilities to continue serving current customers. That meant that Cuivre River would not have to construct a line to serve a structure Ameren Missouri served and vice-versa. The Territorial Agreement clearly determined which utility would serve new customers in various portions of St. Charles County, and within Ameren Missouri's certificated area, that would be Ameren Missouri. The Staff's interpretation, if adopted, is not only contrary to the terms of this Territorial Agreement, but could undermine a fundamental premise of territorial agreements generally because it would have the Commission allowing changes of suppliers when the agreement has already determined the electrical supplier.³ The Territorial Agreement has previously been found to be not detrimental to the public. The

³ Absent suspension or revocation of a territorial agreement under Section 393.312.6 (after complaint and hearing and a determination that the agreement is not in the public interest) the agreement remains effective, and the Commission can't disregard its terms (including assuming "jurisdiction" in a change of supplier case that the change of supplier statute (393.315) does not allow to proceed, for the reasons discussed in the Joint Motion).

Commission should not now disregard the weight of its prior orders and accept Staff's argument which, at best, amounts to a modification to the language of the Territorial Agreement or, at worst, is an improper challenge to a prior judgment attempted through a proceeding, in other words, an improper collateral attack on the order approving the Territorial Agreement.

9. Ameren Missouri asks the Commission to accept this Response out of time. Because of Ameren Missouri's Missouri Energy Efficiency Investment Act filing and all of the activity related to settlement of that case, Ameren Missouri could not respond to the Staff Response in a timely fashion.

WHEREFORE, for the reasons cited above, Ameren Missouri and Cuivre River respectfully request this Commission to enter an order accepting this pleading out of time and denying Mr. Chaney's Application and for such other and further relief deemed proper under the circumstances.

Respectfully submitted,

UNION ELECTRIC COMPANY,
d/b/a Ameren Missouri

/s/ *Wendy K. Tatro*

Wendy K. Tatro, #60261
Associate General Counsel
Thomas M. Byrne, #33340
Managing Associate General Counsel
1901 Chouteau Avenue
P.O. Box 66149, MC-1310
St. Louis, MO 63166-6149
(314) 554-3484 (Telephone)
(314) 554-2514 (Telephone)
(314) 554-4014 (Facsimile)
AmerenMOService@ameren.com

Attorneys for Ameren Missouri

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 4th day of June, 2012.

General Counsel Office
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
GenCounsel@psc.mo.gov
Nathan.Williams@psc.mo.gov

Lewis Mills
Office Of Public Counsel
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102
opcservice@ded.mo.gov

Rodric A. Widger
Anderek, Evans, Widger, Johnson &
Lewis, L.L.C.
3816 S. Greystone Ct., Suite B
Springfield, MO 65804
rwidger@lawofficemo.com

Thomas L. Chaney
1110 St. Theresa Lane
O'Fallon, MO 63368
tomeygun@gmail.com

/s/ Wendy K. Tatro

Wendy K. Tatro