

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

In the Matter of the Application of Jerry West            )  
And Sharon West to Change the Electrical            )        Case No. EO-2009-0272  
Supplier for Part of their Property.                    )

**JOINT RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO AMEND  
APPLICATION AND TO FIRST AMENDED APPLICATION FOR CHANGE  
OF ELECTRICAL SUPPLIER**

COMES NOW Union Electric Company d/b/a AmerenUE (AmerenUE) and Cuivre River Electric Cooperative, Inc. (Cuivre River) and responds in opposition to the *Motion for Leave to Amend Application* (Motion to Amend) and *First Amended Application for Change of Electrical Supplier* (Amended Application), filed on September 10, 2009, as follows:

1. Jerry and Sharon West (the Wests) originally filed a complaint case in which they asked for a change in electric supplier on November 14, 2008. On January 22, 2009, the Commission converted the improperly filed complaint case to a request for a change of electrical supplier from AmerenUE to Cuivre River.

2. On September 10, 2009, 10 months after the original filing and just 19 days before the scheduled hearing on the change of electrical supplier request, the Wests filed to amend their request to set aside a Missouri Public Service Commission (Commission) approved Territorial Agreement between AmerenUE and Cuivre River, which governs which electrical supplier is to serve the Wests' property.

**The Wests' Motion to Amend is Insufficient  
to Justify Amending the Application**

3. The Wests' Motion to Amend does not set forth a good cause explanation as to why they raise this new issue so late in the proceedings. Instead, the

West's rely on a Commission rule, 4 CSR 240-2.080(15), providing that responses to pleadings be filed within 10 days, as justification that the amendment would not harm the proceeding. Of course, this not only fails as a good cause explanation but is inaccurate because, as explained below, under the Commission's rules, AmerenUE would be entitled to 30 days to supply its answer to the new allegation in the West's Amended Application.

4. The West's fail to assert a change in facts or a new fact which would justify amending the application. The Motion to Amend speaks only of the West's "discovery" of an additional basis for their request but does not explicitly identify this additional basis. The additional basis, found in the Amended Application, is the (faulty) claim that the Territorial Agreement did not foresee a property having two electrical suppliers and so is no longer in the public interest. However, this additional basis is not based upon the discovery of a fact of which the West's previously had no knowledge nor does it stem from a change in facts. This alleged additional basis has been available to the West's since November of 2008 (when the initial filing was made by the West's) and to allow the introduction of a new claim at this late stage is not justified.

5. If the Commission allows the Amended Application, the completely new cause of action in the proceeding will require further preparation on the part of AmerenUE and Cuivre River to rebut the West's underlying legal assertion (that the Territorial Agreement is detrimental to the public interest). Part of that preparation may require AmerenUE and Cuivre River to conduct discovery, an action which was not necessary for a hearing on the current application because the parties filed a Joint

Stipulation of Facts and Law. Certainly new discovery cannot be properly completed in the week remaining prior to the currently scheduled hearing.

6. Section 394.312.7 RSMo sets forth the manner in which the Wests must assert their brand new claim that the Territorial Agreement is no longer in the public interest. The statute reads:

The commission shall have jurisdiction to entertain and hear complaints involving any commission-approved territorial agreement. **Such complaints shall be brought and prosecuted in the same manner as other complaints before the commission.** The commission shall hold an evidentiary hearing regarding such complaints, except that in those instances where the matter is resolved by a stipulation and agreement submitted to the commission by all the parties, such hearings may be waived by agreement of the parties. If the commission determines that a territorial agreement that is the subject of a complaint is no longer in the public interest, it shall have the authority to suspend or revoke the territorial agreement. If the commission determines that the territorial agreement is still in the public interest, such territorial agreement shall remain in full force and effect. (emphasis added.)

7. The Commission's rules on complaints are found at 4 CSR 240-1.070. Section (7) of the rule allows the utility that is the subject of a complaint 30 days to respond.

8. The Wests explanation for their late request falls far short of justifying amending the application and would deprive AmerenUE and Cuivre River the time it needs to properly address the new claim. The Wests' Motion to Amend should be rejected by the Commission.

**The West's Application to Amend is an Impermissible  
Collateral Attack on a Final Order of the Commission**

9. The Territorial Agreement in question was approved by the Commission on March 5, 1993, in Case No. EO-93-166 after proper notice was given and a hearing was held. No party filed to intervene and there was no objection to the Territorial Agreement.

10. Missouri law provides that orders of the Commission which have become final shall be conclusive and cannot be attacked in a collateral proceeding. Section 386.550 RSMo.

11. Section 394.312.7 RSMo allows a customer impacted by (or party to) a territorial agreement to ask the Commission to set aside the territorial agreement as no longer in the public interest. This is an exception to the collateral attack statute.

12. This exception, however, is not without limit. In *Ozark Border Electric Coop v. PSC*, the Commission was asked to find that a previously approved territorial agreement was no longer in the public interest. The Commission examined the complaint and found that it did not allege violation of any law, rule or Commission order, nor did it allege a change in circumstances since the territorial agreement had been approved, thereby precluding Commission jurisdiction under Section 394.312.6 RSMo [now Section 394.312.7 RSMo].<sup>1</sup>

13. The Missouri Court of Appeals agreed with the Commission and held:

If a complaint does not allege a change in circumstances it would be in conflict with this section [386.550 RSMo] providing for finality. If a change in circumstance has occurred since the last order, the complaint would not be attacking the previous order and would not be in conflict with section 396.550. It would be an independent

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<sup>1</sup> *Ozark Border Electric Coop v. PSC*, 924 S.W.2d 597, 600 (Mo. App. W.D. 1996).

proceeding to determine whether the change in circumstances causes the territorial agreement to no longer be in the public interest. If a change in circumstances were not required, section 386.550, which specifically applies to 394.312, would have no effect. The legislature is presumed not to enact legislation that would result in meaningless provisions.<sup>2</sup>

The Court concluded:

Ozark must allege a change in circumstance to invoke the jurisdiction of the Commission under 394.312.6 [now 394.312.7]. Otherwise, their complaint would amount to a collateral attack on the final order of the commission, which is prohibited.<sup>3</sup>

14. The Wests' Motion to Amend does not allege a violation of any law, rule or Commission order. Instead, the Motion to Amend alleges a change in circumstances, but only quotes the standard in a conclusionary statement. Stating a conclusion without providing underlying facts to support the conclusion does not provide a basis which invokes the jurisdiction of the Commission.

15. One must examine the Amended Application to discover the "additional basis" on which the Wests rely. The Amended Application claims that "neither the parties to the Territorial Agreement nor the Commission anticipated the scenario at issue in the case at bar...when a property owner erects an additional structure on the same parcel of property where the owner is already serviced by one supplier but is now subject to having multiple suppliers on the property."<sup>4</sup>

16. The language of the Territorial Agreement demonstrates that there is no truth to this assertion. The Territorial Agreement recognizes the possibility that property

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<sup>2</sup> Id. at 601.

<sup>3</sup> Id.

<sup>4</sup> EO-2009-0272, First Amended Application for Change of Electrical Supplier, September 10, 2009, p. 1.

served by Cuivre River (or AmerenUE) could have new buildings constructed upon it at some later date.<sup>5</sup> In the event of that occurrence, the Territorial Agreement says that the “new’ buildings are to be served by AmerenUE. The circumstances before the Commission in the case at bar were anticipated by and provided for in the Territorial Agreement. Accordingly, the occurrence of an anticipated event cannot constitute a change of circumstance and cannot be used to justify Commission reassessment of the public interest of a previously approved Territorial Agreement. The Wests’ Motion to Amend should be denied as an impermissible collateral attack upon a previous Commission order.

WHEREFORE, for the reasons cited above, AmerenUE and Cuivre River respectfully requests this Commission to enter its order denying the Wests’ Application to Amend, and for such other and further relief deemed proper under the circumstances.

Respectfully submitted,

/s/ Wendy K. Tatro  
**Steven R. Sullivan**, # 33102  
Sr. Vice President, General  
Counsel and Secretary  
**Wendy K. Tatro**, # 60261  
Assoc. General Counsel  
Ameren Services Company  
P.O. Box 66149  
St. Louis, MO 63166-6149  
(314) 554-3484 (phone)  
(314) 554-4014 (fax)  
[ssullivan@ameren.com](mailto:ssullivan@ameren.com)  
[wtatro@ameren.com](mailto:wtatro@ameren.com)

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<sup>5</sup> Case No. EO-93-166, Territorial Agreement, p. 2 states that the parties [AmerenUE and Cuivre River] “...shall have the exclusive right to furnish electric service to all new structures located within its respective electric service area described in paragraphs 3 and 4 of this Agreement...”

ANDERECK, EVANS, MILNE,  
WIDGER & JOHNSON, L.L.C.

By /s/ Andrew J. Sporleder  
Andrew J. Sporleder, # 51197  
The Col. Darwin Marmaduke House  
700 East Capitol  
Post Office Box 1438  
Jefferson City, Missouri 65102  
Telephone: (573) 634-3422  
Facsimile: (573) 634-7822  
Email: [asporleder@aempb.com](mailto:asporleder@aempb.com)

ATTORNEYS FOR CUIVRE RIVER  
ELECTRIC COOPERATIVE, INC.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Response was served on the following parties via electronic mail (e-mail) or via regular mail on this 21<sup>st</sup> day of September, 2009.

General Counsel Office  
Missouri Public Service Commission  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
[GenCounsel@psc.mo.gov](mailto:GenCounsel@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](mailto:opcservice@ded.mo.gov)

Jeff R. Wagener  
Suite 400  
7701 Forsyth  
St. Louis MO 63105  
[jwagener@lathropgage.com](mailto:jwagener@lathropgage.com)

Jerry and Sharon West  
7333 Weldon Spring Road  
Dardenne Prairie, MO 63368

Jaime Ott  
General Counsel Office  
Missouri Public Service Commission  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
[jaime.ott@psc.mo.gov](mailto:jaime.ott@psc.mo.gov)

Andrew Sporleder  
Cuivre River Electric Cooperative, Inc.  
P.O. Box 1438  
700 E. Capital Ave  
Jefferson City MO 65102  
[asporleder@lawofficemo.com](mailto:asporleder@lawofficemo.com)

Nathan Williams  
Missouri Public Service Commission  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
[nathan.williams@psc.mo.gov](mailto:nathan.williams@psc.mo.gov)

*/s/ Wendy K. Tatro*

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Wendy K. Tatro