

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

In the Matter of the Application of	)	
Thomas L. Chaney for a Change of Electric	)	<b><u>File No. EO-2011-0391</u></b>
Supplier	)	

**STAFF’S MEMORANDUM OF LAW TO SUPPORT  
SUBJECT MATTER JURISDICTION**

**COMES NOW** the Staff of the Missouri Public Service Commission (Staff), by and through the undersigned counsel, and files *Staff’s Memorandum Of Law To Support Subject Matter Jurisdiction* with the Missouri Public Service Commission (Commission) in opposition to Union Electric Company d/b/a Ameren Missouri’s (Ameren Missouri) and Cuivre River Electric Cooperative, Inc.’s (Cuivre River) joint motion for summary determination. The Staff requests the Commission find jurisdiction in this matter to determine the Applicant’s change of supplier request, and in support, respectfully states the following:

**Introduction and Summary**

On June 10, 2011, Thomas L. Chaney (Applicant) filed an application with the Missouri Public Service Commission (Commission) requesting a change in supplier from Cuivre River to Ameren Missouri. After several responsive pleadings and a prehearing conference, Cuivre River and Ameren Missouri filed on April 19, 2012, a *Joint Motion To Dismiss for Lack of Subject Matter Jurisdiction and for a Determination on the Pleadings* and a *Joint Memorandum of Law in Support of Motion To Dismiss For Lack Of Subject Matter Jurisdiction and for a Determination on the Pleadings (Joint Memorandum)*. Both Ameren Missouri and Cuivre River attempt to hide behind a territorial agreement to argue that the Commission lacks jurisdiction to determine the change of supplier request.

Commission Rule 4 CSR 240-2.117 I1)(A) allows a party to “...seek disposition of all or any part of a case by summary determination...” Further, the Commission:

...may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on files 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.

Ameren Missouri and Cuivre River are not entitled to relief as a matter of law because the Commission retains jurisdiction over this matter to determine whether a change of supplier is in the public interest for a reason other than a rate differential. For the reasons provided herein, the Staff recommends the Commission deny Ameren Missouri’s and Cuivre River’s *Joint Motion To Dismiss for Lack of Subject Matter Jurisdiction and for a Determination on the Pleadings*. The Staff requests the Commission to allow further briefing on the issue of whether the change of supplier is in the public interest after the Commission issues an Order finding jurisdiction in this matter.

#### **Facts Admitted by Staff**

1. Ameren Missouri is an electric utility subject to the jurisdiction of the Missouri Public Service Commission (Commission). § 386.250 RSMo.
2. Cuivre River is a rural electric cooperative, organized pursuant to Chapter 394 of the Revised Statutes of Missouri.
3. Mr. Chaney is the named Cuivre River member for the electric account having a mailing address of 1110 St. Theresa Lane, O’Fallon, Missouri, but which is actually located in the city of Dardenne Prairie, Missouri.
4. Staff of the Commission is a party to this case.
5. The Office of the Public Counsel is also a party to this case.

6. Cuivre River and Ameren Missouri have a Commission-approved Territorial Agreement of which numbered paragraph two (2) describes territories that, between them, each may provide electric service to new structures exclusive of the other.

7. The Applicant's property is within the ambit of the Territorial Agreement referenced in Movants' paragraph 6 and that the terms of that territorial agreement do not purport to divest Cuivre River of its right to continue to provide electric service to structures it was serving before entering into that territorial agreement.

8. The property located at 1110 St. Theresa Lane is in the city of Dardenne Prairie is in territory where, between Movants, Ameren Missouri may provide electric service to new structures exclusive of Cuivre River.

#### **Additional Material Facts**

9. The Applicant's property is located at 1110 St. Theresa Lane in Dardenne Prairie, Missouri.

10. The city of Dardenne Prairie, Missouri, has a population of greater than fifteen hundred (1500) inhabitants. Staff's *Memorandum* and *Affidavit of Daniel I. Beck* filed July 20, 2011.

11. Pursuant to 394.315.2, RSMo (2000), Cuivre River has the authority to continue to provide electricity to structures located at 1110 St. Theresa Lane in Dardenne Prairie, Missouri, that it was serving before the effective date of the Territorial Agreement referenced in Movants' paragraph 6.

12. Ameren Missouri has authority from the Public Service Commission of Missouri to provide electric service to the public in areas of Missouri that include structures located at 1110 St. Theresa Lane in Dardenne Prairie, Missouri.

13. The Territorial Agreement, page 6, paragraph (10)(b)(1), states “This Agreement shall become effective upon approval by the Missouri Public Service Commission...Performance of the parties is contingent upon all of the following having occurred no later than March 31, 1993:...(b)(1) a finding that this agreement shall not impair the Company’s certificates of convenience and necessity in any respect within St. Charles county.”

14. As stated in paragraph nine (9) of the Territorial Agreement, the agreement is only binding on the parties to the agreement and all subsidiaries, successors, assigns and corporate parents or affiliates of the Company and Cooperative.

15. As stated in paragraph (7) of the Territorial Agreement, the parties may agree on a case-by-case basis to allow structures to receive service from one party though the structure is located in the electric service area of the other.

16. Regardless of their Territorial Agreement referenced in Movants’ paragraph 6, both Cuivre River and Ameren Missouri have the authority to serve the Applicant’s property.

17. Both Ameren Missouri and Cuivre River provide electric service to other structures located on St. Theresa Lane in Dardenne Prairie, Missouri.

### **Discussion**

Sections 394.315 and 393.106, RSMo are the statutes that address a request for change of supplier from an electric cooperative and from an electrical corporation to another electric utility, respectively. These statutes are commonly referred to as the “anti-flip-flop statutes”. Both sections contain the standard for allowing a change of supplier:

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, and the commission is hereby given jurisdiction over rural electric cooperatives to accomplish the purpose of this section.

Section 394.315.2 RSMo (2000). The Commission noted in *Smith v. Union Elec. Co.* 2006 WL 3612848, (Mo.P.S.C., 2006) the legislative intent of territorial agreements; "...the legislative intent of Sections 393.106 and 394.315, RSMo Supp., is to prevent duplication of facilities and the waste inherent in competing for customers."

"Under the statute the Public Service Commission is vested with jurisdiction over electric cooperatives only in those limited circumstances where both the cooperative and an electrical corporation have concomitant rights to serve the same area." *Union Elec. Co., v. Cuivre River Elec. Co-op., Inc.*, 726 S.W.2d 415, 417 (Mo.App. E.D. 1987). While the case does not define "concomitant", the dictionary provides the following: "occurring or existing concurrently..." *The American Heritage Dictionary of the English Language*, 3<sup>rd</sup> Edition. Both Cuivre River and Ameren Missouri have a concomitant right to serve the Applicant's structure.

Pursuant to 394.080.2, RSMo (2000), Cuivre River has the "grandfathered" authority to continue to provide electricity to structures in Dardenne Prairie, Missouri, including the Applicant's structure located at 1110 St. Theresa Lane, now that the area exceeds fifteen hundred (1500) inhabitants. Also, the Territorial Agreement states that Cuivre River may continue to provide electricity to structures that it was serving before the effective date of the Territorial Agreement.

Regarding Ameren Missouri, Section 386.250 RSMo grants the Commission jurisdiction over Ameren Missouri, and Ameren Missouri has authority from the Commission to provide electric service to the public in areas of Missouri that include the structures located at 1110 St. Theresa Lane. The Territorial Agreement itself is premised on the agreement not impairing the Company's certificates of convenience and necessity in any respect within St. Charles County.

Therefore, both Cuivre River and Ameren Missouri have the concomitant right to serve the Applicant's structure.

A territorial agreement in itself admits the fact that two parties have the right to serve an area and have made an agreement only between the two of them as to who will serve exclusive of the other within all or parts of it. This is supported by the fact that paragraph seven (7) of the Territorial Agreement states the parties may agree on a case-by-case basis to allow structures to receive service from one party although the structure is located in an area to be exclusively served by the other.

The Territorial Agreement is not a binding agreement to a non-party, such as the Applicant. Paragraph nine (9) of the Territorial Agreement states the agreement is only binding on the parties to the agreement and all subsidiaries, successors, assigns and corporate parents or affiliates of the Company and Cooperative. As noted by the Movants' *Joint Memorandum*, "if Ameren Missouri and Cuivre River had concomitant rights to serve the property, then Mr. Chaney could ask the Commission to allow it to switch to Ameren Missouri (for reasons other than rate differential) if the Commission determined the switch was in the public interest." The Staff recommends the Commission find jurisdiction in this matter and allow this matter to proceed in determining whether the Applicant's request is in the public interest for a reason other than a rate differential.

**WHEREFORE,** The Staff requests the Commission deny the Cuivre River's and Ameren Missouri's *Joint Motion To Dismiss for Lack of Subject Matter Jurisdiction and for a Determination on the Pleadings* and find jurisdiction in this matter to determine whether the Applicant's change of supplier request is in the public interest for a reason other than a rate differential.

Respectfully submitted,

**/s/Jennifer Hernandez**

Jennifer Hernandez

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### **CERTIFICATE OF SERVICE**

I hereby certify that true and accurate copies of the foregoing have been sent by electronic mail to Thomas L. Chaney at [tomeygun@gmail.com](mailto:tomeygun@gmail.com); Wendy K. Tatro, counsel for Ameren Missouri at [AmerenMOService@ameren.com](mailto:AmerenMOService@ameren.com); Rodric A. Widger, counsel for Cuivre River at [rwidger@lawofficemo.com](mailto:rwidger@lawofficemo.com); and Lewis Mills, counsel for the Office of the Public Counsel at [opcservice@ded.mo.gov](mailto:opcservice@ded.mo.gov) on this 21<sup>st</sup> day of May, 2012.

**/s/Jennifer Hernandez**