

**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.        )

**UNION ELECTRIC d/b/a AMERENUE's  
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS  
FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR A  
DETERMINATION ON THE PLEADINGS**

**COMES NOW** Union Electric Company d/b/a AmerenUE (AmerenUE), and for its memorandum of law in support of its motion to dismiss for lack of subject matter jurisdiction and for a determination on the pleadings regarding the request for a change of electric supplier filed by Jerry and Sharon West (the Wests), pursuant to Missouri Public Service Commission (Commission) rule 4 CSR 240-2.117(2), states as follows:

**I.       Introduction and Summary**

Commission rule 4 CSR 240-2.117(2) authorizes the Commission to dispose of any case on the pleadings when not contrary to the law or the public interest. As discussed below, the Commission lacks subject matter jurisdiction to grant the relief sought by the Wests because Cuivre River Electric Cooperative lacks the power to serve the Wests' new home. Thus, the Company entitled to relief as a matter of law. Indeed, a judgment on the pleadings is particularly appropriate here since the stipulated facts in this case, and the law, clearly establish "from the face of the pleadings [that AmerenUE] ... is entitled to a judgment as a matter of law."<sup>1</sup>

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<sup>1</sup> *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122,134 (Mo. banc 2000).

## **II. Material Facts**

The material facts at issue in this matter have already been resolved by the Joint Stipulation of Facts and Law filed by the parties in this case. This is attached as Exhibit A, hereby incorporated as though fully set forth herein.

## **III. Discussion**

Electric cooperatives may only “distribute, sell, supply and dispose of electric energy in rural areas . . .”<sup>2</sup> A “rural area” is defined as an area “not included within the boundaries of any city, town or village having a population in excess of fifteen hundred inhabitants . . .”<sup>3</sup> It is undisputed that the City of Dardenne Prairie has in excess of 1,500 inhabitants, and it is undisputed that the Wests’ property is located within the boundaries of the City. Consequently, absent other statutory authority, Cuivre River lacks the power to serve the Wests.

There is only one other possible source of state law that would permit Cuivre River to serve the Wests; that is, § 394.312, RSMo., which deals with territorial agreements. § 394.312, by its express terms, is an exception to § 393.020 and § 394.080, which as noted above, limit the areas within which a cooperative has the power to serve customers. In this case, there is a Commission approved territorial agreement; however, that agreement specifies that any new structure at this location is to be served by AmerenUE. There is no territorial agreement which grants Cuivre River any right to serve the Wests’ new home.

The Wests argue, incorrectly, that § 393.106.2 authorizes Cuivre River to serve its property. The Wests misinterpret § 393.106.2, as demonstrated by *Union Elec. Co. v.*

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<sup>2</sup> § 394.080(4), RSMo.

<sup>3</sup> § 394.020(3), RSMo.

*Platte-Clay Elec. Coop.*<sup>4</sup> In *Platte-Clay*, Union Electric sought injunctive relief in the Platte County Circuit Court against Platte-Clay to prevent Platte-Clay from serving a new building under construction on a parcel of land within Excelsior Springs, Missouri. The Cooperative contended that the Commission had jurisdiction over the matter, and the trial court agreed and dismissed Union Electric’s petition. As discussed below, the Court of Appeals reversed the trial court, and held that Platte-Clay had no authority to serve the new structure. This is because like Dardenne Prairie, Excelsior Springs was an incorporated city with a population in excess of 1,500 inhabitants and thus was not a “rural area.” Moreover, like Dardenne Prairie, Excelsior Springs was within Union Electric’s service territory and Union Electric held a franchise from the City. Platte-Clay nevertheless argued that because it had formerly served a barn on this parcel (the barn no longer existed) it had the right, under § 394.315,<sup>5</sup> to continue to serve the new structure.

As noted earlier, the Court of Appeals disagreed. The Court of Appeals found that § 394.315 (the same reasoning necessarily applies to the identical language of § 393.106) prohibits a rural electric cooperative from serving a new structure on land not within a rural area *even if* the rural electric cooperative formerly served a different structure on that same land before the area ceased to be rural. Calling the cooperative’s contention “without merit,” the Court of Appeals explained that the Commission’s jurisdiction under § 393.106 and 394.315 is limited to determining “whether a change of

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<sup>4</sup> 814 S.W.2d 643 (Mo. App. W.D. 1991). The *Platte-Clay* case was recently applied by the Commission when it dismissed a similar, and also misplaced, application for a change of supplier in *In the matter of the Application of Wastach Investments, L.C.*, Case No. EO-2008-0031, 2008 WL 2444659 (Mo. P.S.C.), Order Granting Summary Determination and Dismissing Application (June 8, 2008).

<sup>5</sup> § 394.315 is essentially identical to § 393.106, except that it applies to structures formerly served by a rural electric cooperative, whereas § 393.106 applies to structures served by an electrical corporation or joint municipal utility commission.

suppliers is in the public interest between two electric suppliers *with concomitant rights*” to serve an area.

Concomitant rights to serve the new home at issue on this property do not exist, for the reasons outlined earlier: the Wests’ new home property is not in a rural area and the territorial agreement grants AmerenUE the exclusive right to serve the Wests’ new home. As stated succinctly by the Court of Appeals in construing § 394.315, “a rural electric cooperative . . . is not authorized to supply service to a new structure built on property which has ceased to be in a rural area...”

The bottom line is that § 393.106 (as is § 394.315), cited by the Wests, is completely irrelevant to this case. The Commission simply has no jurisdiction to apply 393.106 (or 394.315) because the Wests have no other supplier to “switch to.” If AmerenUE and Cuivre River had concomitant rights to serve the Wests new home, then the Wests could ask the Commission to allow it to switch from AmerenUE to Cuivre River, or vice-versa, for reasons other than rate differential if the Commission determined the switch was in the public interest. However, absent those concomitant rights, the Wests are not entitled to ask for this switch, the Commission cannot grant the Wests’ request. The Commission thus has only one option as a matter of law and that is to dismiss this action for lack of subject matter jurisdiction. *See, e.g., State Tax Comm’n v. Admin. Hearing Comm’n*,<sup>6</sup> wherein the Supreme Court ordered the Administrative Hearing Commission to dismiss a case for which it lacked subject matter jurisdiction, explaining that “subject matter jurisdiction concerns ‘the nature of the cause of action or the relief sought’ and exists only when the tribunal ‘has the right to proceed to determine the controversy or question in issue between the parties or grant the relief prayed.’”

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<sup>6</sup> 641 S.W.2d 69, 72 (Mo. 1982)

(citations omitted). Like the Administrative Hearing Commission, lacking subject matter jurisdiction, the Commission must dismiss the Wests' application.

WHEREFORE, AmerenUE respectfully requests that the Commission determine this case on the pleadings, and that is dismiss with Wests' application with prejudice.

Respectfully Submitted,

/s/ Wendy K. Tatro

**Steven R. Sullivan**, # 33102

Sr. Vice President, General  
Counsel and Secretary

**Wendy K. Tatro**, # 60261

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## 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 23<sup>rd</sup> day of September, 2009.

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/s/ Wendy K. Tatro

Wendy K. Tatro

**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                        )  
Supplier for Part of their Property.                                )           Case No. EO-2009-0272

**Joint Stipulation of Facts and of Law**

COMES NOW Union Electric Company d/b/a AmerenUE (AmerenUE), Staff of the Missouri Public Service Commission (Staff), Jerry and Sharon West (the Wests), WIK, L.L.C. (WIK) and Cuivre River Electric Cooperative, Inc. (Cuivre River), and for their Stipulation of Facts and Law, state as follows:

**The Parties**

1. AmerenUE 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. The Wests are the named Cuivre River members<sup>1</sup> for the electric accounts at 7331 and 7333 Weldon Springs Road. Kevin West, who is the Wests' son, is the named Cuivre River member for the electric account at 7335 Weldon Springs Road.
4. The Wests are the owners of the property located at 7335 Weldon Springs Road.
5. The provider of electric service for 7333 and 7335<sup>2</sup> Weldon Springs Road is not at issue in this case.

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<sup>1</sup> Customer of Record

<sup>2</sup> This address, 7335 Weldon Springs Road, was an issue in the Applicants initial Complaint, but is no longer.

6. The provider of electric service for 7331 Weldon Springs Road is at issue in this case.

7. WIK is a Missouri limited liability company and its sole members are Jerry and Sharon West.

8. WIK is the owner of the properties located at 7331 and 7333 Weldon Springs Road.

9. Pursuant to Commission rule, Staff of the Commission is a party to this case.<sup>3</sup>

10. The Office of Public Counsel (OPC) is also a party to this case by Commission rule.<sup>4</sup> Counsel for AmerenUE contacted the Public Counsel and was told that OPC did not object to this pleading and, further, that OPC would not be participating in this case.

### **The Property and Territorial Agreement**

11. Cuivre River and AmerenUE have a Territorial Agreement<sup>5</sup> which allocates between AmerenUE and Cuivre River territory in which each may exclusively provide electric service. The properties located at 7331, 7333 and 7335 Weldon Springs Road (collectively, the Weldon Springs Road properties) in Dardenne Prairie are within the territory allocated to AmerenUE by the Territorial Agreement. A copy of the Territorial Agreement is attached to this Joint Stipulation of Facts and Law as Exhibit 1.

12. For many years, the Wests have had a home at 7335 Weldon Springs Road and have operated (and continue to operate) a business at 7333 Weldon Springs Road which consists of multiple buildings. Prior to the demolition of the home (discussed

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<sup>3</sup> 4 CSR 240-2.010(11)

<sup>4</sup> Id.

<sup>5</sup> The Territorial Agreement was approved by the Commission on March 5, 1993 in Case No. EO-93-166.



below) in June of 2008, all buildings were served by Cuivre River, consistent with the terms of the Territorial Agreement.

13. In June of 2008, the Wests demolished the existing home at 7335 Weldon Springs Road and subsequently constructed two new homes, 7331 and 7335 Weldon Springs Road, on the property. A hand drawn map of the area showing the buildings is attached as Exhibit 2.

14. The home on the map labeled New House #2 at 7331 Weldon Springs Road is a “new structure” as the term is used in the Territorial Agreement between AmerenUE and Cuivre River. It is currently the residence of the Wests.

15. The home on the map labeled New House #1 is the current residence of the Wests’ son, who is a Cuivre River member/consumer. The address for this home is 7335 Weldon Springs Road. It is a replacement of the previous home and was constructed adjacent to the location of the previous home, except that the new home’s garage is located on an area within the footprint of the previous home.

16. The home at 7335 Weldon Springs Road is not a “new structure” as the term is used in the Territorial Agreement between AmerenUE and Cuivre River. (Staff does not believe that this statement is accurate and does not stipulate that it is an agreed upon fact, but AmerenUE, Cuivre River and the Wests do believe that the statement is accurate.)

17. The Territorial Agreement provides that Cuivre River may continue to serve the business facilities on the Weldon Springs Road location.

18. The Territorial Agreement provides that new structures on the Weldon Springs Road properties shall be served by AmerenUE.

19. The Territorial Agreement allows AmerenUE and Cuivre River to enter into agreements to change which utility would serve a property on a case-by-case basis.

20. AmerenUE and Cuivre River have not entered into any agreement to change which utility could serve any new structure at the Weldon Springs Road location.

21. The Wests currently receive temporary electric service to 7331 Weldon Springs Road from Cuivre River.

22. AmerenUE plans to provide underground service to 7331 Weldon Springs Road. AmerenUE believes the work (placing a pole, installing a transformer, etc.) to connect this property to AmerenUE's distribution system will take no more than 20 hours.

#### **Other Facts and Law**

23. Cuivre River has the power to "...generate, manufacture, purchase, acquire, accumulate and transmit electric energy, and to distribute sell, supply, and dispose of electric energy in rural areas to its members, to governmental agencies and political subdivisions, and to other persons not in excess of ten percent of the number of its members." § 394.080.1(4) RSMo. 2000.

24. A "rural area" is 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 fifteen hundred inhabitants." § 394.020(3) RSMo. 2000.

25. The Weldon Springs Road properties are located within the City of Dardenne Prairie.

26. The City of Dardenne Prairie has a population of 7,423 according to the US Census Bureau's 2000 census report as published in the 2007-2008 edition of the Missouri State Manual.

27. The City of Dardenne Prairie is not a "rural area" as defined by §394.020(3) RSMo. 2000.

28. Currently, Cuivre River serves customers within the city limits of Dardenne Prairie. These are customers that Cuivre River served prior to such area being incorporated by Dardenne Prairie.

29. AmerenUE has a franchise agreement with Dardenne Prairie.

30. Cuivre River does not have a franchise agreement with Dardenne Prairie.

31. Missouri's anti-flip-flop statutes are found at § 393.106.2 and § 394.315.2, RSMo 2000.

Respectfully submitted,

UNION ELECTRIC COMPANY,  
d/b/a AmerenUE

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Attorney for Applicants

## 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 16th day of September, 2009.

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/s/ Wendy K. Tatro

Wendy K. Tatro

TERRITORIAL AGREEMENT

THIS AGREEMENT is entered into between Union Electric Company, hereinafter referred to as "Company", and Culvre River Electric Cooperative, Inc., hereinafter referred to as "Cooperative".

WHEREAS, Company and Cooperative are authorized by law to provide electric service within the State of Missouri, including portions of St. Charles County; and

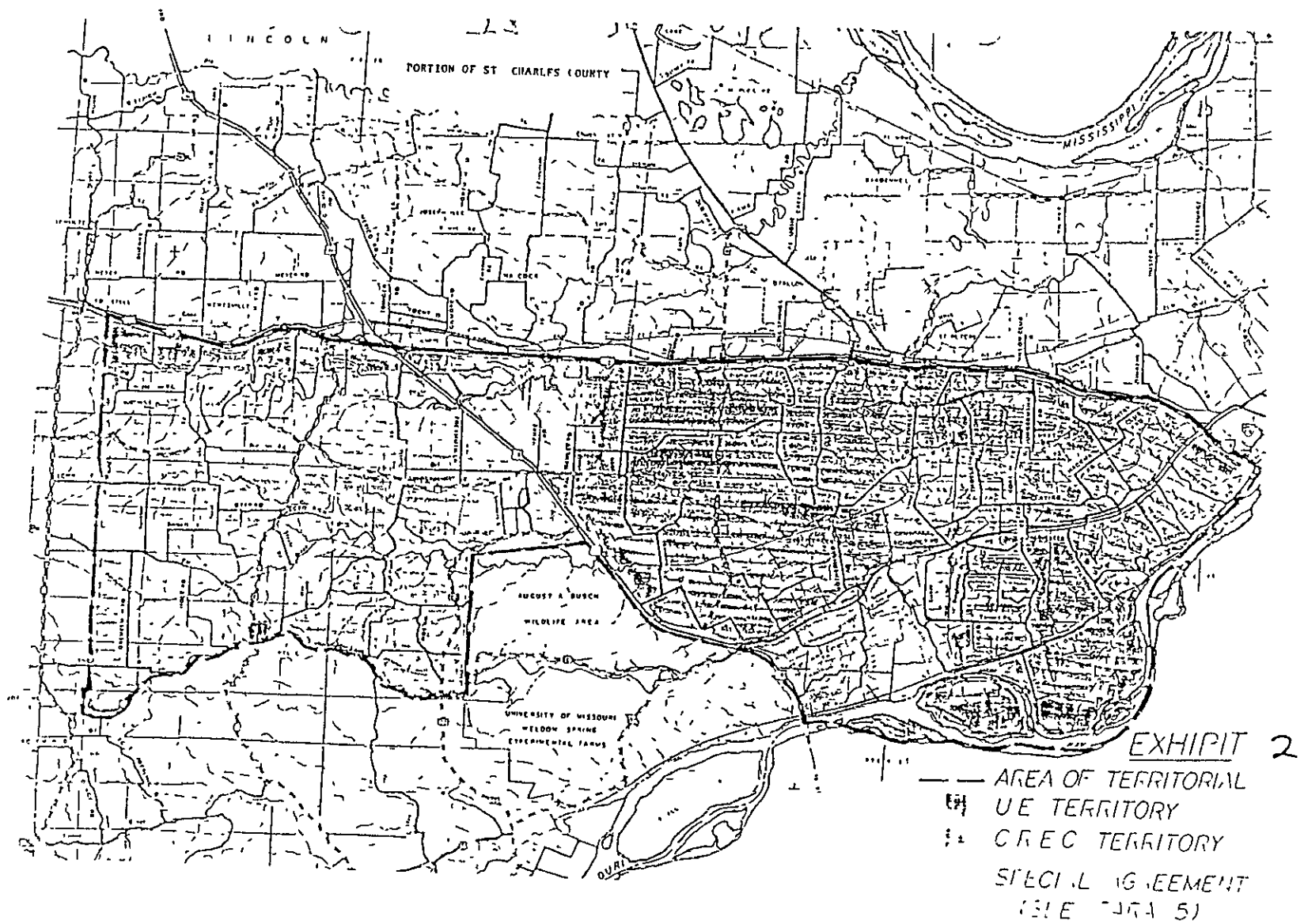
WHEREAS, the Missouri Legislature has authorized electrical corporations and rural electric cooperatives to enter into written territorial agreements; and

WHEREAS, Company and Cooperative 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;

NOW, THEREFORE, Company and Cooperative, in consideration of the mutual covenants and agreements herein contained, agree as follows:

1. For purposes of this Agreement:

(a) "Customer" includes any natural person, firm, association, partnership, business trust, public or private corporation, political subdivision or any agency, board, department or bureau of the state or federal government or any other legal entity which has requested or is receiving electric service. Any customer who has requested or is receiving electric



service at one structure shall be a new and different customer at each structure at which electric service has been requested.

(b) "Structure" is defined as agricultural, residential, commercial, industrial or other building or a mechanical installation, machinery or apparatus but shall not include customer-owned meter wiring. "Structure" shall include contiguous additions to and expansions of previously existing structures and replacements of previously existing structures if the replacement structures are used for the same purposes and have basically the same power usage characteristics as the original structure.

(c) "Company" shall mean Union Electric Company and any subsidiary or other corporate entity owned or controlled by Union Electric Company.

(d) "Cooperative" shall mean Cuivre River Electric Cooperative, Inc. and any subsidiary or other corporate entity owned and controlled by Cuivre River Electric Cooperative, Inc.

(e) "New Structure" shall mean any structure which did not receive electric energy from either party prior to the effective date of this Agreement.

2. From the effective date of this Agreement, as between the parties hereto, each 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, regardless of the size of the load or the characteristics of the customers' requirements. Except as



provided expressly herein, neither party may furnish, make available, render or extend electric service to structures or for use within the electric service area of the other party, either directly, indirectly or through a subsidiary corporation or other entity controlled by the party. Each party shall have the right to continue to serve those structures located in the electric service area of the other party which it is serving on the effective date of this Agreement. In addition, each party shall have the right to serve new structures in multi-tract contiguous development areas identified on Exhibit 4, which are within either party's service area as defined in paragraph 3 and 4 of this agreement. Exhibit 4 is attached hereto and made a part hereof. Cooperative's right to serve new structures within such multi-tract development areas located within the Company's electric service area defined in paragraph 3 shall cease if and when such development areas are annexed into the city limits of a city with a population in excess of 1500 inhabitants unless the Cooperative has installed primary distribution facilities designed for and capable of providing service to such structures prior to annexation.

3. The electric service area of Company under this Agreement shall be that portion of St. Charles County as described by metes and bounds in Exhibit 1 to this Agreement excluding those portions of St. Charles County described by metes and bounds in Exhibit 3 and as substantially illustrated by the map marked Exhibit 2 to the Agreement, all exhibits being

incorporated herein by reference and made a part of this Agreement as if fully set out verbatim.

4. The electric service area of Cooperative under this Agreement shall be those portions of St. Charles County as described by metes and bounds in Exhibit 3 to this Agreement and as substantially illustrated by the map marked Exhibit 2 to this Agreement, both exhibits being incorporated herein by reference and made a part of this Agreement as if fully set out verbatim.

5. The parties to this agreement reserve for purposes of a future territorial agreement a portion of St. Charles county, more specifically described as sections 6, 7, 18, 19, 30 and 31 of Township 46 North, Range 1 East; sections 30 and 31 of Township 47 North, Range 1 East; such portion of section 19 of Township 47 North, Range 1 East in St. Charles county, Missouri, as is south of the center line of U.S. Highway 70; and such portion of section 6 of Township 45 North, Range 1 East in St. Charles county, Missouri, as is north of State Highway T and State Highway D. Both parties shall have the right to serve new structures in such portion of St. Charles county as they would have under the principles of law of the state of Missouri. Company shall have the additional right to waive in whole or in part any charge for any service, including wiring, piping, appliances or equipment, required by its tariffs on file with the Missouri Public Service Commission or by the Commission's Promotional Practice Rule, 4 CSR 240-14.010 et seq., to new structures located within such portion of St. Charles county as

it deems justified, the Commission's Promotional Practices Rule notwithstanding. Cooperative hereby waives any right it may have to file a Complaint either with the Commission or a court alleging the Company's violation of the Commission's Promotional Practices Rule within such portion of St. Charles county.

6. The location of a structure for purposes of this Agreement shall be the geographical location at which electric power and energy is used, regardless of the point of delivery. The first owner of a new structure located on or crossed by any line described in paragraphs 3 and 4 dividing the electric service territories of the parties shall be permitted to choose either party for permanent electric service provided that the customer's meter is installed within that supplier's service area, and thereafter that supplier shall exclusively serve that structure.

7. 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. Such agreements shall be in writing and approved by both parties.

8. Company and Cooperative agree to undertake all actions reasonably necessary to implement this Agreement. Company and Cooperative will cooperate in presenting a joint application showing this Agreement to be in the public interest. Company and Cooperative will share equally in the costs assessed by the Public Service Commission for seeking of administrative approval

of this Agreement. All other costs will be borne by the respective party incurring the costs

9. Except as expressly provided herein, neither the boundaries described by this Agreement nor any term of this Agreement may be modified, repealed or changed except by a writing mutually approved by the respective parties and by the Missouri Public Service Commission.

9. This Agreement shall be binding on the parties and all subsidiaries, successors, assigns and corporate parents or affiliates of Company and Cooperative.

10. This Agreement shall become effective upon approval by the Missouri Public Service Commission pursuant to Section 394.312 RSMo. and the Boards of Directors of the parties. The term of this Agreement shall be perpetual. Performance of the parties is contingent upon all of the following having occurred no later than March 31, 1993:

(a) All required approvals of the Cooperative's Board of Directors.

(b) Approval of the transaction by the Public Service Commission of Missouri, including but not limited to the following:

(1) a finding that this agreement shall not impair the Company's certificates of convenience and necessity in any respect within St. Charles county.

(2) an order granting the Company the authority to make offers described in paragraph 5 to potential customers.

Such order may not limit Company's authority to exercise such right upon condition of prior Commission approval of such offer. However, recovery of the cost of extending service to the new structure may be conditioned upon a finding by the Commission based upon evidence submitted by the Company that it will receive a benefit by providing service to the new structure and that such service will benefit its existing customers.

(c) Approval of the transaction, if necessary, to the extent of its jurisdiction, by the Federal Energy Regulatory Commission.

11. Both of the parties to this Agreement have service territories outside of the area covered by this Agreement. Within the service areas outside of that covered by this Agreement, each party will continue to operate without regard to this Agreement. The principles of law, rules and regulations applicable to the business of retail sales of electricity shall apply without regard to this Agreement.

12. As a part of this Agreement, the parties agree that all claims pending in the lawsuits styled Union Electric Company v. Cuiivre River Electric Cooperative and Union Electric v. SSM Health Care System, Case No. CV190-5138CC, and Union Electric v. Cuiivre River Electric Cooperative, Case No. CV190-5239CC, shall be dismissed with prejudice, each party to bear their own costs.

13. This Agreement shall in no way affect either party's right to construct such electric distribution and transmission

facilities within the designated electric service area of the other as that party deems necessary, appropriate or convenient to provide electric service to its customers under the terms of this Agreement or otherwise.

14. This contract constitutes the entire agreement between the parties relating to the allocation of service rights in the territory described herein. If the Public Service Commission of Missouri does not approve the provisions of this Agreement, then it shall be nullified and of no legal effect between the parties. Further, if any part of this Agreement is declared invalid or void by a Court or agency of competent jurisdiction, then the whole Agreement shall be deemed invalid or void.

IN WITNESS WHEREOF, the parties have executed this Agreement this 30th day of October, 1992.

UNION ELECTRIC COMPANY

By William J. Bass

ATTEST:

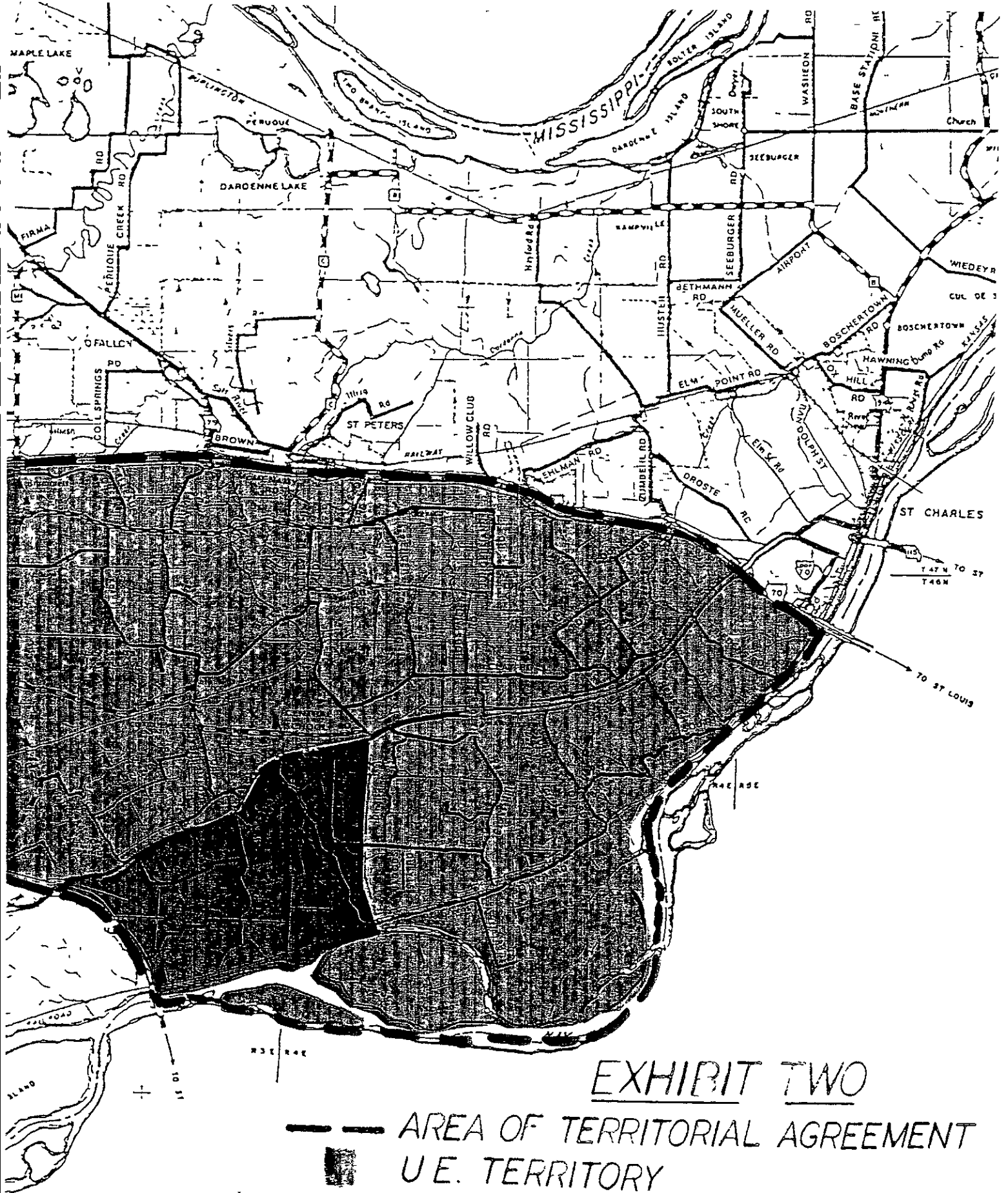
James J. Langston

CUIVRE RIVER ELECTRIC  
COOPERATIVE



By Wm. L. Brown

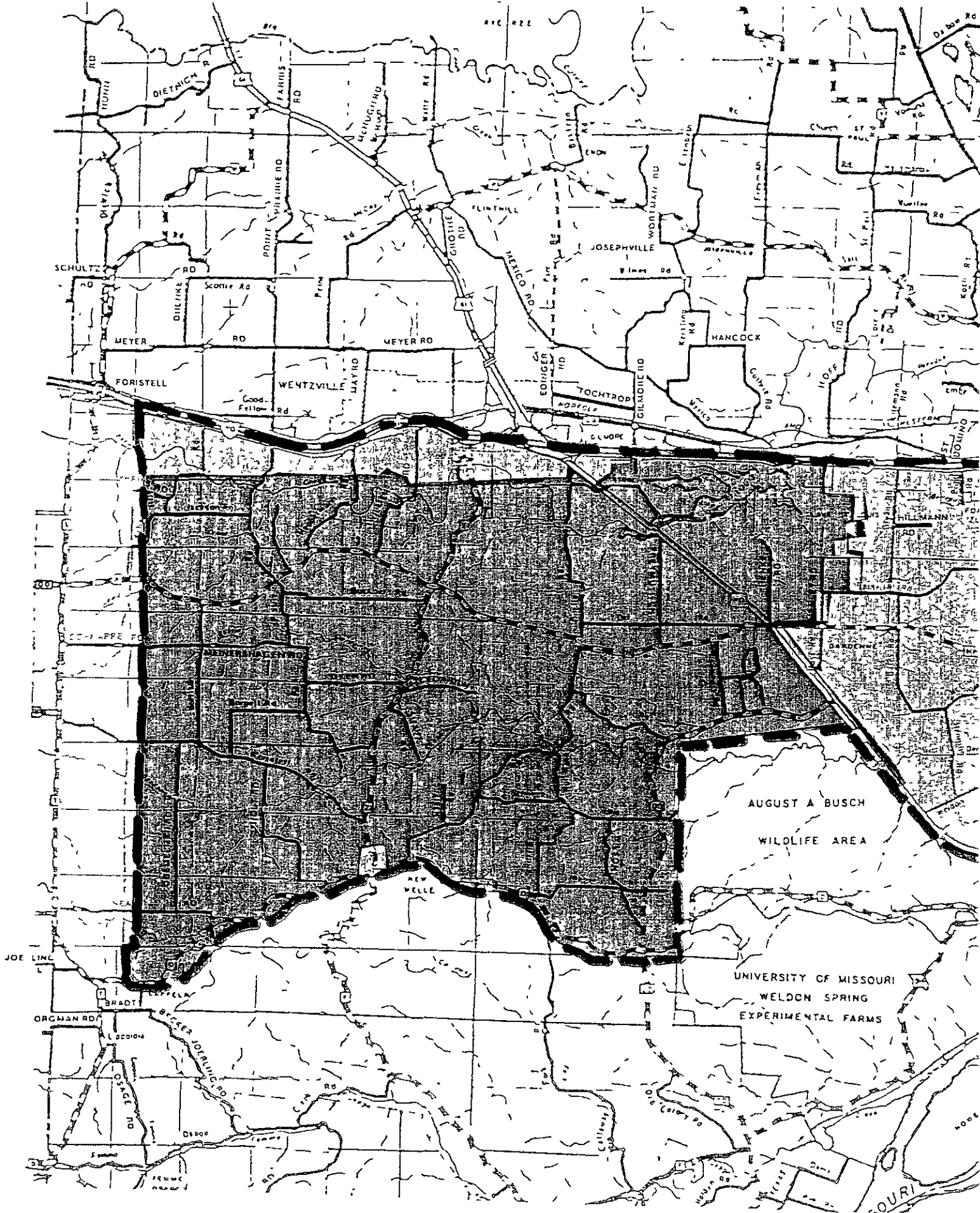
ATTEST:

R. H. L. L.  
Asst. Secretary



## EXHIBIT TWO

- — — AREA OF TERRITORIAL AGREEMENT
-  U.E. TERRITORY
-  C.R.E.C. TERRITORY
- SPECIAL AGREEMENT AREA  
(SEE PARA. 5)





NEW House #1  
 NEW House #2  
 Cuivre Pole Transformer  
 Well That Serves property  
 R-Registration Office  
 Training Bldg  
 Kennel 1 & 2 Office  
 Current Buildings That are Served by Cuivre River and will remain with Cuivre Service  
 Buildings Ameren wants to serve

\* - Location of Ameren proposed Transformer

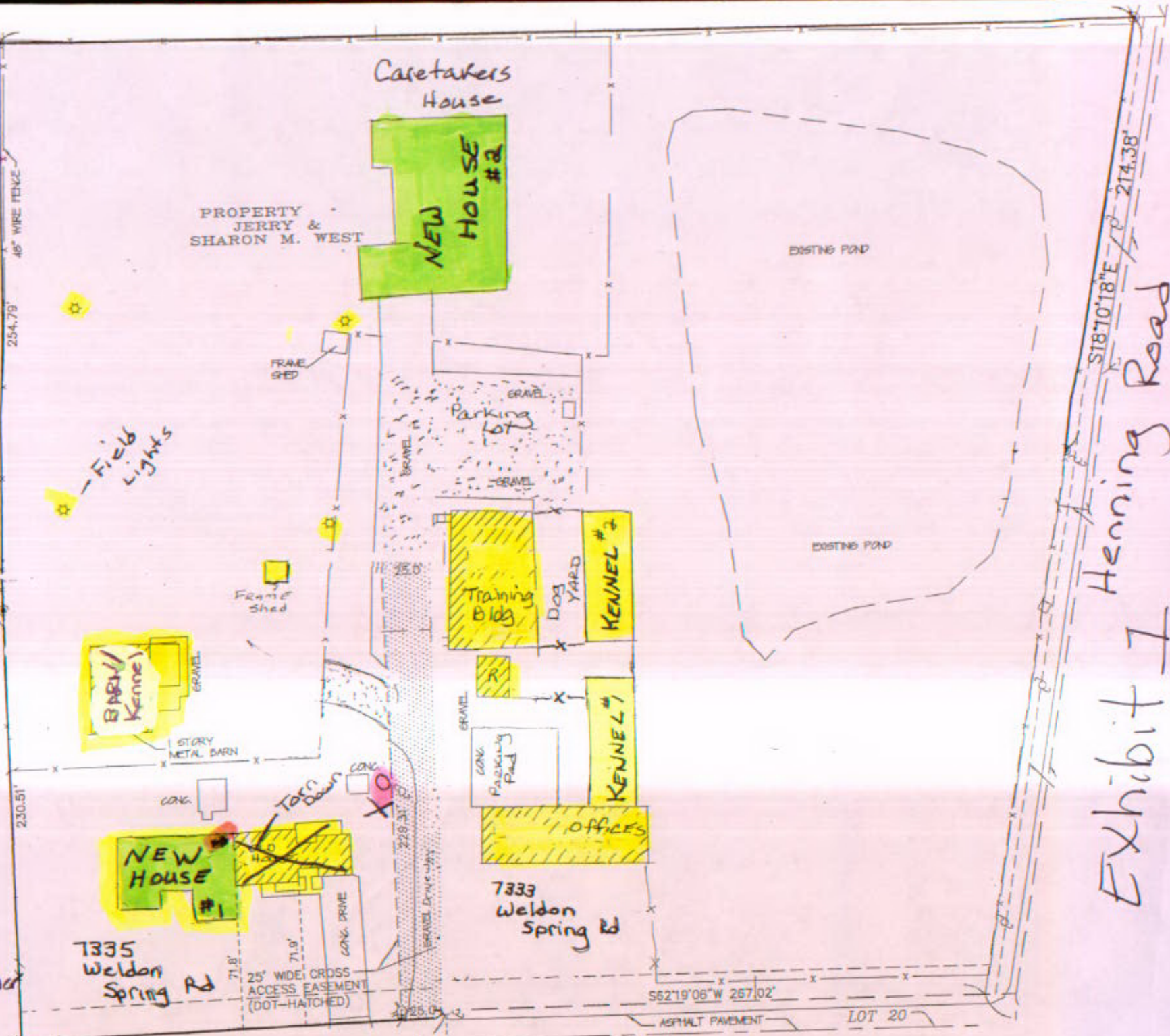


Exhibit I  
 Henning Road