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 Service Provider from Cuivre River Electric Cooperative to Union Electric Company d/b/a Ameren Missouri	))))))	**Case No. EO-2011-0391**

BRIEF OF CUIVRE RIVER ELECTRIC COOPERATIVE

COMES NOW Cuivre River Electric Cooperative, Inc., (CREC) by and through its undersigned counsel, and for its post hearing brief respectfully states the following:

STATEMENT OF FACTS:

The relevant facts of this case have been amicably agreed and without dispute. By Joint Stipulation of Fact (Ameren Exhibit 1) Ameren and Cuivre River have supplied the record with descriptive information about the applicant's project, its financial impact on ratepayers, and references to applicable statutes. (Tr.89)

In regard to the feasibility of applicant's proposed solar generation project, it has been established that the applicant's investment is economically rational only with public participation through tax credits and a utility rebate. (Didion, Tr.95-96, Cuivre River Exhibit 5) The analysis at Exhibit 5 demonstrates that the applicant would be the sole financial beneficiary of a Commission order in his favor.

Mr. Didion established that ordinary rebate programs are for the purpose of aiding an electric supplier to shape or affect its base load electric generation requirements. (Tr.98-99) Cuivre River rebates are related to conservation of demand on generation resources rather than for creating fuel preferences. (Tr.105) There is evidence in the record that this legislatively mandated rebate cost Ameren's ratepayers almost

Three Million Dollars in 2011. (Beck, Tr.71) It is incorporated in Ameren's approved tariffs. (Beck, Tr.79) The applicant's sole reason for requesting a change of electric supplier is to gain access to the solar power co-generation rebate. (Chaney.Tr.114)

ARGUMENT:

a. Burden of persuasion. It is the applicant's exclusive burden to present testimonial evidence and theories to satisfy the legal standard for approval of his request for change of electric supplier. He took on the task of representing himself in this proceeding to gain a pecuniary benefit for himself. He is not due any deference for his effort.

There is no evidence, statement, or theory posited by Applicant in the record that approaches the requirements of the legal standard. The effect of his position is akin to cloaking his application in a veil of "res ipsa loquitur", hoping that "the thing speaks for itself." That rule of evidence that applies to negligence of a wrongdoer has no counterpart in administrative law.

The Applicant had the opportunity and the obligation to present acceptable evidence that his change of supplier request was in the public interest for reason other than rate differential. He totally skipped that step. His case is void of any suggestion or proof that the change is justified because it is by agreement of the supplier parties, or that it would promote utility efficiency, or that it would negate utility duplication, or that it would improve utility operations, or that it would spur greater utility responsiveness to operate as reliable power suppliers.

The "thing" here does not speak for itself, and it is not proper for the applicant to rely on the Administrative Law Judge or the Commissioners to fill in

his gaps. He did not employ counsel, and the Office of Public Counsel took no interest in this case. There has been no shifting of the burden of proof or burden of persuasion to Staff or the electric supplier parties.

b. Ineligibility of Ameren service. Cuivre River incorporates and affirms as though fully re-stated herein the Ameren Missouri and Cuivre River Electric Cooperative's Joint Memorandum of Law in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction. (filed August 19, 2012, denied June 20, 2012) and the comments of Ameren counsel at hearing on the same subject (Tatro, Tr.35-48) There is no question that the Territorial Agreement approved by the Commission (Order included with Ameren Exhibit 1) is binding on Ameren Missouri, Cuivre River, and their customers. The inescapable effect, if the Agreement is to have any credibility at all, is to disqualify Ameren Missouri from eligibility to provide service to Applicant Chaney.

In answer to Judge Jones' reasonable question, (Tr.48) Mr. Chaney was in fact a party to the Territorial Agreement case in no less manner than an Ameren Missouri customer is party to a rate case. It is binding on him. His interest in the abatement of competition between Ameren and Cuivre River was represented by the electric supplier parties, Staff, Public Counsel, and ultimately the Commission itself. A narrow range of non-bound utility non-parties in the procedural sense is set out at Section 394.312.6 RSMo and it does not include the Applicant and similarly situated persons. By the nature of its mission and purpose, Commission orders are binding on the public.

Absent a qualified alternative electric supplier, regardless of whether the approach is from Applicant's standing to request relief or from the Commission's jurisdiction to consider such relief, this application can only be a nullity. The Commission should rescind and reverse its prior Order on this issue.

c. Rate differential defect. This application is flawed by the view that the Ameren "rebate" is not within the domain of "rate" for purposes of Section 394.315. That position rests on a narrow definition of "rate" that adds a condition to the ordinary understanding of "rate" in a regulated utility context. It suggests that if a rate must be understood to encompass only a package of detriments to a customer, then a favorable flow of value from company to customer is not a rate. That analysis is without basis in law. It does not matter that the rebate is a benefit rather than a detriment to a single customer.

It is only the Public Service Commission's ratemaking jurisdiction that gives it administrative reach over rebates. A rebate for one customer is an imbedded cost in the rates for all customers. There is no other place for the money to come from. A flow of special value to a customer is lawful only if it is accepted into the whole bundle of relationships and rules represented by a utility's approved rate tariffs.

This position is supported by Missouri law. The relevant definition of "rate" is found at Section 386.020(45). There "Rate" is defined as "every individual or joint rate, fare, toll, charge, reconsigning charge, switching charge, rental or other compensation of any corporation, person or public utility, or any two or more such individual or joint rates, fares, tolls, charges, reconsigning charges, switching charges,

rentals or other compensations of any corporation, person or public utility or any schedule or tariff thereof." (emphasis added)

That is a convoluted definition of "rate". At its conclusion the drafters seem to run out of steam and to say, in effect, that a rate is all of these things, and anything else we missed that is in a public utility schedule or tariff.

By this statutory definition, anything that is in the approved schedule or tariff is inherently part of the utility rates. This is a very sensible conclusion. It recognizes that any special utility benefit to one individual customer is a detriment to all other customers. A promotional rebate that is authorized by a tariff may have the appearance of being a gift to one customer but the reality is that the cost of the gift is folded into the electric rates of all customers.

Misunderstanding of the meaning of "rate" is increased by the failure to examine the misuse of the word "rebate". There is no statutory definition of rebate in Chapter 386. According to Black's Law Dictionary (9th Ed. 2009), a rebate is "a return of part of a payment, serving as a discount or reduction." The solar investment "rebate" that Mr. Chaney seeks is no rebate at all under that definition. It does not represent a return, discount or reduction of any sum that Mr. Chaney is paying to Ameren. He is not buying a solar generation system from Ameren; he is buying one for Ameren. This rebate is in fact a legislatively mandated co-investment by all other Ameren customers. Tariff authority to make Ameren participate in this customer investment serves also as tariff authority to collect the cost of that participation in the rates paid by all customers. This is already occurring in Ameren rate cases. (Beck, Tr.71)

There is no dispute against the fact that it is because the rebate is in Ameren's published rates and conditions of service that this application has been made. Cuivre River has its own programs and has no brief against the rebate here as such, but it appeals to consistency. The Cooperative does not want to encourage Ameren customers to apply to leave Ameren in order to enjoy Cooperative specific benefits. Having had this solar investment payment to individuals legislatively declared to be a rebate for public policy purposes, and with it thereafter duly accepted by the Commission in its rate approval authority, the rebate should not now be extracted from the concept of rates for administrative purposes.

There is incongruity in the Staff position that Ameren rebates are unrelated to Ameren rates in the face of testimony about inclusion of the rebates in the Ameren rate case. (Beck, Tr. 71) That position in this case of "first impression" opens the way for potential creation of a precedent that would lead to an increased Commission caseload as customers pursue the rebate programs of alternative suppliers.

d. Public interest. The public benefit, if any, in Mr. Chaney's investment initiative cannot be measured and cannot be described without resort to philosophical appeals. He is free to do his project at his cost and for his own satisfaction and without public ratepayer support. Energy that he generates in excess of his own requirements is subject to treatment under Missouri's "Net Metering and Connection Act", Section 396.890 RSMo.

The public interest standard supported in Section 394.315 is not confined to, or even defined by, the interest of a single customer. It is nothing against Mr. Chaney to point out that the only entity who comes out ahead with this change of supplier action

is Mr. Chaney. The Ameren ratepayers will contribute to Mr. Chaney's windfall of cash. The Missouri and Federal tax payers will contribute to Mr. Chaney by relieving his tax burden with income tax credits. Ameren will be required to provide approximately 15KVA of additional generation in order to support the Chaney account when solar is not available or effective (downtime, evenings, overcast sky). (Didion, Tr.97) Those gaps will be more than 7117 hours per year even if he achieves his maximum exposure of 4.5 hours per day. (Chaney, Tr.57) The Cuivre River customers will pay in their rates for the Cooperative's stranded investment in facilities and generation resources. (Ameren Ex.1) For these reasons, Mr. Chaney's interest is actually contrary to the public interest.

In the historic context and spirit of Section 394.315, "rate differential" represents any benefit that is offered by a competing utility. A rate differential is a personal or private benefit that has nothing to do with the quality of service provided by the current supplier. Mr. Chaney is very honest and does not allege any dissatisfaction with the availability and reliability of Cuivre River service. (Chaney, Tr.114) He acknowledges that he simply wants to gain a monetary benefit offered by another utility. His impediment is the fact that the rebate is enabled by operation of an approved tariff. That is sufficient to disqualify Mr. Chaney's application from favorable consideration for reason that it is a rate-based request for change of supplier. He has advanced no public interest cause that overcomes his disqualification.

e. Public policy overtones. Every law represents public policy on its subject matter, but public policy is not the law of that subject matter. To the extent that there

may be a determinable consensus opinion about the public policy element of a law, its remains no more than a coherent rationale for that law. The fact of consensus itself is as subjective as the words used to describe the policies. How to state the public interest and how to gauge the strength of that interest will never have unanimous support.

The coalition of supporters for the solar rebate initiative included many separate interests and each would state the public policy expression in a different manner and with varied intensity. As a publicly initiated law it was a compromise of those separate public interests. The Commission is not equipped to reverse-engineer the law to say which interest or policy prevailed.

Commissioner Kenney has posed the thoughtful question, "As I'm reading the statute, I'm thinking to myself, assuming for the sake of argument that it is a rate differential, does it matter?" (Tr.115) The answer is, "Yes, it does matter."

1) Once it is acknowledged that a rebate motivated request derives its essence from a "rate differential", the inquiry stops. The intellectual ability to imagine a greater public interest that is served does not evaporate the fact that the remedy requested and granted is designed to provide access to a tariff based rebate. The Commission should prefer what is real over that which is theoretical.
2) It greatly matters when the proposition is whether or not an undefined public interest should overcome clearly stated laws. The imaginable public interest favoring small scale solar generation investment cannot be found to be so

clear or so absolute that it carries a mandate to trample and ignore all lawful constraints. There is no "public interest" excuse for ignoring laws.

3) The question requires that the public interest found in the laws that would be abrogated must also receive scrutiny for the public policies and interests they serve. At the most basic level, the solar rebates mandate law (Section 393.1030.3) says, in essence, that customer premises solar electric systems are a good thing. Cost sharing for those systems is imposed on regulated electric utilities and not on Cooperative and municipal systems.

The territorial agreement law, (Section 394.312) applicable to all utility, Cooperative, and municipal systems tells us, in essence, that it is good that suppliers focus their investments to avoid utility duplication.

The anti-flip-flop statutes (Section 91.025, 393.106 and 394.315) declare, in essence, that utility duplication is bad and that the customers of one electric supplier should not be allowed to be enticed to switch suppliers to get benefits offered by another. As longstanding law these statutes reflect the State's public policy determination that allowing retail customers to switch suppliers at will is at the cost of wasteful and inefficient duplication of facilities, stranded investments, frustration of long range utility infrastructure/load growth planning, and unnecessary expense to all ratepayers.

These statutes (territory agreement and anti-flip-flop) were the legislative solution to years of bitter and costly litigation between electric suppliers and they effectively brought an end to the days when a customer could change his supplier on minimal notice for no cause. The Commission was wearied of dealing with

requests for exceptions to promotional practices rules brought for reason of matching the programs of unregulated competition. Too many roadways were burdened with duplicative electric distribution facilities running along parallel right-of-ways. With this case the applicant is asking the Commission to create a "renewables exemption" that would return electric supplier managers back to the old days of planning and investment uncertainty that preceded these laws.

New laws are considered to be enacted in light of knowledge of prior laws. Where a new law is in conflict with an old law, it is presumed that a change was intended. That rule of statutory construction applies to the clear statutory language used. It has no application in an esoteric discussion of the public interests that may underlie a law. It would be wrong for the Commission to set aside or to violate the intent and meaning of the territorial agreement and anti-flip-flop laws in pursuit of obedience to a public interest notion that can only be subjectively discerned in the mandate of the solar rebate law. Proposition C clearly mandated renewable energy programs for regulated utilities but did not purport to override other laws.

4) The solar rebate law does not require extraordinary action by the Commission in this case in order to be effective. Ameren has responded to numerous public requests representing significant solar generation investments. (Beck, Tr.74-75) The direction of this public interest inquiry is misguided if it takes the Commission beyond the scope of the pleadings and testimony, places it in the role of an advocate, and tempts it to be seated in the desks of the Legislature. As part of the executive branch, the Commission rigorously deals with all

laws as they are written. This concept in itself is an important part of the public interest. Regulatory certainty and predictability is vital for the entire citizenry of the state.

CONCLUSION:

On the record before it and the law presented, the Commission must deny the relief requested in this proceeding.

Respectfully submitted,

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

By: _____

Rodric A. Widger, #31458
3816 S. Greystone Court, Suite B
Springfield, MO 65804
(417) 864-6401 Phone
(417) 864-4967 Facsimile

ATTORNEYS FOR
CUIVRE RIVER ELECTRIC
COOPERATIVE, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that a complete copy of the foregoing was served upon:

General Counsel
P.O. Box 360
200 Madison Street, Suite 800
Jefferson City, MO 65102

Lewis R. Mills, Jr.
P.O. Box 2230
200 Madison Street, Suite 650
Jefferson City, MO 65102

Union Electric Company
Legal Department
1901 Chouteau Avenue
P.O. Box 66149, Mail Code 1310
St. Louis, MO 63166-6149

Thomas L. Chaney
1110 St. Theresa Lane
O'Fallon, MO 63368

By e-mail and/or enclosing same in envelopes addressed to the attorneys of record of said parties at their business addresses as disclosed in the pleadings of record therein, with first class postage fully prepaid, and by depositing said envelope in a U.S. Post Office mail box in Springfield, Missouri, on October 19, 2012.

Rodric A. Widger