

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Union Electric Company,)
)
 Complainant,)
)
 vs.)
)
 SSM Health Care, Inc.)
 and)
 Cuivre River Electric)
 Cooperative, Inc.,)
)
 Respondents.)

Case No. EC-91-165

11-91

APPEARANCES: Debra H. Janoski, Attorney at Law, P.O. Box 149, St. Louis, Missouri 63166, for Union Electric Company.

David M. Harris, Attorney at Law, Greensfelder, Hemker & Gale, P.C., 10 South Broadway, Suite 1800, St. Louis, Missouri 63102, for SSM Health Care, Inc.

Rodric A. Widger, Attorney at Law, Stockard, Andereck, Hauck, Sharp & Evans, P.O. Box 1280, Jefferson City, Missouri 65102, for Cuivre River Electric Cooperative, Inc.

Douglas E. Micheel, Assistant Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for Office of the Public Counsel and the Public.

Robert J. Hack, Assistant General Counsel, Missouri Public Service Commission, P.O. Box 360, Jefferson City, Missouri 65102, for Staff of the Missouri Public Service Commission.

HEARING

EXAMINER: Michael F. Pfaff

REPORT AND ORDER

Procedural History

On October 26, 1990, Union Electric Company (UE or Complainant) filed a formal complaint against Respondents SSM Health Care, Inc. (Hospital) and Cuivre River Electric Cooperative, Inc. (Co-op or Cuivre River). UE alleges that it, not Cuivre River, is legally entitled to serve the Hospital

and medical office complex attached thereto and seeks an order to that effect from the Commission.

On November 9, 1990, the Commission issued an order which, in part, required all parties to specifically state the jurisdiction of the Commission regarding the subject matter of the complaint. Each subsequently filed statements affirming the Commission's jurisdiction, and on December 13, 1990, Hospital filed its answer and affirmative defenses to UE's complaint. On January 18, 1991, Co-op answered UE's complaint and filed a cross-complaint alleging, inter-alia, that (a) UE's claim is based on an alleged contractual right to serve Hospital, (b) that the public interest favors Co-op's continued service, and (c) praying for an order that the Co-op, not UE, is the "appropriate supplier" of electrical service to Hospital.

Following the submission of direct, rebuttal, and surrebuttal testimony, the Commission conducted a prehearing conference on April 10, 1991, and a full evidentiary hearing on April 11, 1991. Initial and reply briefs having been submitted, this matter is duly before the Commission for determination.

Findings of Fact

Having considered all the competent and substantial evidence upon the whole record, the Missouri Public Service Commission makes the following findings of fact:

The Earlier Complaint

This case arises out of an earlier complaint filed with the Commission by Cuivre River against UE in Case No. EC-86-88. Briefly, the facts giving rise to this and the original Complaint are as follows: During the construction of the medical complex in Lake St. Louis, the general contractor, J. S. Alberici, obtained electrical power from Cuivre River.

Co-op's service to the Hospital continued during construction and, apparently, after part of the facility began operating. In November, 1985, Hospital asked UE to provide permanent service, and made written application for same. In December, 1985, Cuivre River complained to the Public Service Commission, alleging that under the "anti-flip-flop" laws¹ Cuivre River was legally entitled to continue its service to the Hospital and UE was prohibited from doing so. Cuivre River also pointed out that UE had no area certificate to serve, and that UE's existing line certificate was inadequate for said service.

Approximately a year later, by a 3-2 margin, the Commission voted in Co-op's favor and on December 14, 1986, ordered UE to cease and desist from serving the Hospital.² Pursuant to Hospital's request, UE had commenced service only a few months before, in July, 1986. In response to the Commission's order, UE stopped service in April, 1987, having provided permanent service for only nine months. UE's appeal to the Cole County Circuit Court was unavailing, but on November 29, 1988, the Western District Court of Appeals overturned the Commission's decision. The Court's decision centered on the fact that the Hospital had a statutory right as a "person" under Section 393.106 to obtain electrical service from the supplier of its choice. As stated by the Court, "Under the clear wording of the statute, however, if the person changes, the service may change."³

¹Sections 393.106 and 394.315, RSMo. 1986.

²*Cuivre River Electric Cooperative, Inc. v. Union Electric Company*, 29 Mo.P.S.C. (N.S.) 16 (1986).

³*State ex rel. Union Electric Co. v. Public Service Commission*, 765 S.W.2d 626, 629. (Mo. App. 1988).

Both statutes giving rise to the Court's interpretation have since been repealed. Two new statutes, either of which should prevent the recurrence of supplier disputes of this nature, became effective on July 11, 1991.⁴ While these new statutes do not apply to the matter at hand, they demonstrate the underpinning of the Court's decision and how the legislature intends to resolve such competing supplier situations in the future. As remarked, the effective date of the new statutes occurred well after the facts giving rise to the instant dispute; as a result, the Commission must consider only those Commission statutes or rules which had legal effect during the time of the dispute herein.

The Commission's Jurisdiction

Although a specific allegation of wrongdoing is fundamental to the Commission's complaint jurisdiction, UE does not specifically allege any statutes or Commission Rules transgressed by Co-op. In UE's "Statement of Jurisdiction" requested by the Commission on November 9 and December 5, 1990, UE attached the case of *UtiliCorp United, Inc., d/b/a Missouri Public Service Company vs. Platte-Clay Electric Cooperative, Inc.*, 799 S.W.2d 108 (Mo. App. 1990) to support the Commission's jurisdiction. At page 111 of *UtiliCorp*, the Court states:

. . . the legislature has established that disputes between utilities, when a consumer is already being supplied electric energy, are in the first instance, within the jurisdiction of the Public Service Commission. In such a case, the Public Service Commission must first decide whether the change requested should be required as in the "public interest". Sections 393.106.2 and 394.315.2.

⁴Senate Bill No. 221, 86th General Assembly, repealed Sections 393.106 and 394.315, enacting new sections in lieu thereof.

Thus, although UE has not specifically pleaded Co-op's violation of a statute or Rule, the Commission finds that Complainant's intention is manifest in UE's reliance on *UtiliCorp*, cited above. The briefs of UE and Co-op seem to confirm this hypothesis: Each advises the Commission that the only issue now pending before it is whether it is in the public interest to order a change of Hospital's present supplier, Cuivre River, to Complainant Union Electric. The only statutes under which Complainant's case may proceed, therefore, are repealed Sections 394.315(2) and 393.106(2) which, in pertinent part, provide:

394.315(2). Every rural electric cooperative shall be entitled to continue to supply retail electric energy to persons at structures at which service is being provided on August 13, 1986. Notwithstanding any other provision of law to the contrary, no rural electric cooperative shall be permitted or required to supply retail electric energy to any person at a structure where said person is receiving, or has within the last sixty days received, retail electric energy from another supplier of electric energy. Provided, however, that the public service commission may order otherwise after a finding that a change of suppliers 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. (Emphasis added).

393.106(2). Every electrical corporation and joint municipal utility commission shall be entitled to continue to supply retail electric energy to persons at structures at which service is being provided on August 13, 1986. Notwithstanding any other provision of law to the contrary, no electrical corporation or joint municipal utility commission shall be permitted or required to supply retail electric energy to any person at a structure where said person is receiving, or has within the last sixty days received, retail electric energy from another supplier of electric energy. Provided, however, that the commission may order otherwise after a finding that a change of suppliers is in the public interest for a reason other than a rate differential. (Emphasis added).

After winning its case before the Commission, but before losing it on appeal, Cuivre River entered into a Facilities Purchase Agreement

(Agreement) with Union Electric. This 3-page Agreement (Sch. 4, Exh. 7), provides in paragraph 4 that:

In the event that UE appeals the Commission's Order and prevails in having that Order reversed, Cooperative shall sell to UE any of the installed facilities desired by UE to resume service at the Hospital site. The purchase price in such event shall be cooperative's installed original cost less accumulated depreciation as normally booked by UE. The parties shall at that time coordinate to reverse the transfer under the same general terms and conditions set forth above for the first transfer.

After prevailing on Appeal, UE sought to enforce this agreement and to reinstitute service to the Hospital. However, Hospital had since decided it preferred Co-op's system and service and neither it nor the Co-op acceded to UE's demands.

Union Electric contends that this Agreement, in concert with Hospital's request for UE's service and the 3 year duration of UE's applicable tariff comprises a complete agreement which legally binds Union Electric, the Co-op, and the Hospital. UE's initial complaint pleaded this complete agreement, and little more. As a result, the Commission, which has no power to declare rights and obligations under a contract, requested the Statement of Jurisdiction mentioned above.

Prior to filing its complaint herein, Union Electric brought an action for injunction and damages in the Circuit Court of St. Charles County, a case which has been stayed until the Commission decides the public interest issue presented herein.

Although Cuivre River denies the existence of a legally enforceable contract, it properly states that UE's contract claims can only be resolved in the pending Circuit Court case, not before this Commission. Co-op also states that it is in the public interest for the Hospital to obtain electrical power from the supplier of its choice, as was stated by the Court, and that Cuivre

River's Hospital electrical delivery system is not only equal to Union Electric's, but superior to it.

Co-op's and UE's Electrical Systems

Evidence regarding the electrical system proposed by UE and that which is currently being operated by Cuivre River strongly suggests that Co-op's present system is technologically superior to that which Union Electric proposes. Cuivre River's system, which employs an underground "loop" of electrical current provided by two independent substations, uses an automatic relay system which, in the event of an outage, will provide power from the other substation in 2.5 seconds or less. Co-op's witness Didion described Hospital's electrical system as unique, stating "it is rare to have the need for redundant power systems and the capability for alternate power supply to come together as it has in this instance." The same witness produced evidence of recent outages in which, owing to the Co-op's automatic switch, Hospital's loss of service lasted only 2.5 seconds.

An outage on Union Electric's proposed radial system would require a manual or technician-assisted procedure to reintroduce power. When asked how long it would take UE to switch from its primary substation to a subsidiary substation, UE's witness stated "We have a work headquarters located very near the Callahan substation. And we have line service workers that work out of the O'Fallon area. And as quickly as either one of those -- we could get workers from either direction, is how fast we could switch it." When pressed for a more precise time estimate, the witness said ". . . We would have somebody dispatched almost immediately to head in that direction. So I would guess five minutes, if we had people working." Cuivre River contends that it could take UE "hours" to reintroduce service. The Hospital has backup

generators, but such generators would not provide power to all areas of both the medical complex and Hospital.

Another salient difference between the two systems is that Union Electric, to bring power to the site, must cross Interstate 70 via an overhead crossing. Although testimony indicates that such crossings are built to the highest standards and rarely are subject to a major outage, the Commission finds that Co-op's largely underground system is inherently more reliable.

Hospital's witness Schoenhard said that it was his decision to remain with the Co-op, notwithstanding his 1985 choice of UE as supplier. Schoenhard said he would continue to recommend the Co-op even if its rates were higher than UE's.⁵ Hospital's witness Dick, after noting his familiarity with the power systems of both UE and the Co-op, testified that Hospital had compared both systems in 1990 and concluded that "Cuivre River was better suited to service the needs of the Hospital." Hospital's reasons, which appear in Exhibit 11, are: (a) Co-op has two separate substations and an automatic [2.5 second] switching device, (b) a proven "track record" of reliability with Co-op service, (c) Co-op's largely underground facilities, (d) Co-op's good customer service and willingness to respond to Hospital's special requests. Of these factors, the witness said that reliability was the most important, stating:

". . . the Hospital and Medical Office Building live on a continuous supply of electrical energy. Not only does our diagnostic, monitoring and treatment equipment rely on power, but the whole operation. Although we do have a generator to supply a limited amount of power for a short period of time, many vital aspects to our operation go away, like all elective surgery would be cancelled, HVAC would be out, the doctors offices in the Medical Office

⁵The record demonstrates that Co-op's rates are appreciably lower than UE's.

Building would totally shutdown, and other similar components."

UE's response is that it can match Co-op in both service and reliability. UE also states that Hospital's concern about a total disruption to its operation, should the Commission order a switch in suppliers, are misplaced and that little, if any, disruption would occur. On this point, the Commission agrees with UE. The record reveals that a supplier change would cause only a 10-minute interruption in Hospital's power supply.

Although UE is of the opinion that Co-op's more favorable rates were an important factor in Hospital's decision to take Co-op's service, the record does not disclose that Hospital put rates at the top of its "list" in opting for Co-op over UE. The Hospital did request rate comparisons, which Co-op provided, but the evidence does not show that the rate differential was the pivotal, or the most crucial component in Hospital's choice.

The Commission finds that as Complainant, UE has the burden of showing that the public interest would either be advanced by UE re-assuming such service, or that permitting Co-op to continue would be inimical to the public interest. UE has shown neither; for this reason alone, UE's complaint is subject to dismissal. Also, both as a matter of policy and to achieve stability in Hospital's supply of electrical power, the Commission finds that the public interest will be promoted by continuity in Hospital's electrical supplier, absent a persuasive showing to the contrary.

Complainant has made no such showing. The Commission finds that it would not promote or benefit the public interest by, in effect, compelling

Hospital to contract for three years⁶ with an electrical supplier not of its choosing. Nor does the Commission find the public interest would be advanced by requiring Hospital to use an electric transmission and distribution system which, if only marginally, the Commission finds is less reliable than Co-op's. Lastly, the Commission finds that the rate differential between Co-op and UE is not the predisposing cause of Hospital's election to remain with Co-op.

For these reasons, the Commission finds that UE's complaint should be dismissed. Having dismissed said complaint, the Commission finds no good reason to entertain the cross-complaint by Co-op. It too is dismissed.

Conclusions of Law

The Commission has arrived at the following conclusions: Jurisdiction over the subject matter of this complaint is conferred by Sections 393.106 and 394.315. The Commission finds in each Section a mandate that supplier disputes between Cooperatives and Electrical Corporations are to be settled by this Commission by employing a public interest standard, a conclusion also supported by *UtiliCorp*, cited above.

Union Electric's initial reliance on the Facilities Use Agreement between it and Co-op to confer jurisdiction was, as Complainant will no doubt acknowledge, somewhat misplaced. Instead, UE now urges the Commission to consider the Facilities Use Agreement in the context of making its public policy determination, citing *Junkins v. Local Union No. 6313, CWA*, 271 S.W.2d 71 (Mo. App. 1954). UE cites *Junkins* for the proposition that a "directive" which condones a breach of contract is against public policy. The point, one assumes, is that the Commission should not permit or "direct" Co-op to get

⁶UE's General Service Tariff purports to obligate Hospital to UE's service for three years.

"out of" its Agreement with UE, because to do so would contravene public policy and *Junkins*. One difficulty with UE's position is that the "directive" in *Junkins* was a trade union policy, not the judgment or order of a court or an administrative tribunal. The trade union directive in *Junkins* had the effect of preventing individual union members from accepting contractual benefits from their employer. Another difficulty is that in *Junkins*, there was no question, as here, whether the contract or agreement was legally enforceable. Notwithstanding Union Electric's reliance on *Junkins*, the Commission finds nothing therein which applies to the facts in this case.

Of more interest are cases which articulate the concept of "public interest." While the term public interest is not defined in the anti-flip-flop laws, Union Electric correctly states that the public interest is a matter of policy to be determined by the Commission, citing *State ex rel. Public Water Supply District v. Public Service Commission*, 600 S.W.2d 147 (Mo. App. 1980). This case involved competition between a public water supply district (District) and the Cedar Hill Estates Water Company (Cedar Hill). The Commission, after a contested hearing, granted Cedar Hill a certificate to serve in an area which Intervenor District could have served. District's appeal to the Circuit Court was successful, the District having claimed that the Commission's decision was not supported by competent and substantial evidence. However, the Court of Appeals made its own findings of fact and conclusions of law and arrived at the same conclusion as the Commission. At page 153, the Court quotes from the Commission's decision as follows: "Cedar and the District are equally suitable to serve the proposed area, and the residents of the area are entitled to the service they desire." At page 154, the Court observed:

It needs to be pointed out that it is within the discretion of the P.S.C. to determine when the evidence

indicates the public interest will be served in the award of a certificate to a competing utility. See *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973). That discretion and the exercise however are not absolute and are subject to a review by the courts for determining whether orders of the P.S.C. are lawful and reasonable.

Having concluded it has jurisdiction to entertain this complaint, and having found that the public interest will not be promoted by ordering a switch in Hospital's present supplier, the Commission concludes that Hospital's electrical service should remain with Cuivre River.

IT IS THEREFORE ORDERED:

1. That the Complaint filed on October 26, 1990, by Union Electric Company against Cuivre River Electric Cooperative, Inc. and SSM Health Care, Inc. is hereby dismissed.
2. That the Cross-Complaint filed by Cuivre River Electric Cooperative, Inc. on January 18, 1991, against Union Electric Company, Inc. is hereby dismissed.
3. That this Order shall be effective on November 26, 1991.

BY THE COMMISSION



Brent Stewart
Executive Secretary

(S E A L)

Rauch, McClure and
Perkins, CC., Concur;
Mueller, C., Dissents;
and certify compliance
with the provisions of
Section 536.080, RSMo 1986.

Steinmeier, Chm., Absent.

Dated at Jefferson City, Missouri,
on this 15th day of November, 1991.