

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the application of Union Electric
Company and Cuivre River Electric Cooperative, Inc., for
approval of a written territorial agreement designating
the boundaries of each as electric service supplier
within a portion of St. Charles County, Missouri.

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) Case No. EO-93-166
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APPEARANCES

David C. Linton, Attorney, Union Electric Company, Post Office Box 149,
St. Louis, Missouri 63166, for Union Electric Company.

Patrick A. Baumhoer, Andereck, Evans, Milne, Peace & Baumhoer, Post Office
Box 1280, Jefferson City, Missouri 65102, for Cuivre River Electric Cooperative,
Inc.

John B. Coffman, Assistant Public Counsel, Office of Public Counsel, Post Office
Box 7800, Jefferson City, Missouri 65102, for the Office of Public Counsel and
the public.

Thomas H. Luckenbill, Assistant General Counsel, Missouri Public Service Commis-
sion, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the
Missouri Public Service Commission.

HEARING EXAMINER: Edward C. Graham.

REPORT AND ORDER

Procedural History

On November 19, 1992, Union Electric Company (UE) and Cuivre River Electric Cooperative, Inc. (Cuivre River), hereinafter referred to collectively as Applicants, filed a Joint Application requesting approval of a territorial agreement (agreement) attached to the application as Exhibit A. On November 25, 1992 the Commission issued an Order And Notice which ordered notice to proper interested parties, set an intervention date of December 15, 1992 and adopted a procedural schedule, which was subsequently amended by Notice on January 19, 1993 to require the filing of a hearing memorandum. No one filed a motion to intervene in this proceeding. On January 4, 1993 Applicants filed their direct testimony. On January 15, 1993 the Commission's Staff (Staff) filed its direct and

rebuttal testimony. On January 25, 1993, UE filed surrebuttal testimony. On February 5, 1993 the parties filed a hearing memorandum. On February 17, 1993 a hearing was convened at the Commission's hearing room located in the Truman Building in Jefferson City, Missouri, with all parties participating. An amendment to the territorial agreement was filed by the Applicants during the course of the hearing. A briefing schedule was ordered by Notice of the Commission immediately after the hearing and, subsequently, the parties filed simultaneous initial briefs on March 1, 1993 and simultaneous reply briefs on March 3, 1993.

Findings of Fact

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

Background

Applicant, UE, is an electrical corporation rendering electric utility service to the public in the state of Missouri, including St. Charles County, Missouri, under regulation of the Commission pursuant to Chapters 386 and 393, R.S.Mo. 1986, as amended, with its principal office located at 1901 Chouteau Avenue, St. Louis, Missouri 63166.

Applicant, Cuivre River, is a cooperative corporation organized pursuant to Chapter 394, R.S.Mo., as amended, and as such is engaged in the distribution of electric energy and service to its members, including those within St. Charles County, Missouri, with its principal office located at 1112 East Cherry Street, Troy, Missouri 63379.

Applicants filed their Joint Application pursuant to Section 394.312, R.S.Mo. (Supp. 1992) wherein the General Assembly states that competition to provide retail electric service, as between rural electric cooperatives and

electrical corporations, may be displaced by written territorial agreements to the extent provided by the statute. The said statute states that such territorial agreements shall specifically designate the boundaries of the electric service area of each electric service supplier subject to the agreement, *inter alia*. The statute further states that the Commission may approve the application if it shall, after hearing, determine that approval of the territorial agreement in total is not detrimental to the public interest.

Applicants state that they 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. Applicants agree that from the effective date of the agreement as between the parties, each shall have the exclusive right to furnish electric service to all new structures located within its respective electric service area regardless of the size of the load or the characteristics of the customers' requirements. Also, each party may not provide electric service, directly or indirectly, within the electric service area of the other party except that 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 the agreement. The parties also agree to make exceptions to the agreement so that each party shall have the right to serve new structures in multitract contiguous development areas specifically identified by the parties through exhibits to the agreement. As part of the agreement and attached thereto as Exhibits 1, 2 and 3 are metes and bounds descriptions of the respective electric service area of each party and a map illustrating the respective electric service area of each party.

The parties to the agreement reserve for purposes of a future territorial agreement a portion of St. Charles County specifically described therein and referred to herein as the "Highway T corridor". In said Highway T corridor the

Applicants agree that both parties shall have the right to serve new structures and specifically that UE 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 Commission or by way of the Commission's promotional practices rules, 4 CSR 240-14.010 *et seq.*, to new structures located within the Highway T corridor.

Applicants also agree that on a case-by-case basis they may agree to allow structures to receive service from one party although the structure is located in the electric service area of the other. Such agreements shall be in writing and approved by both parties.

As part of the agreement the parties also agree that all claims pending in certain lawsuits filed by UE against Cuivre River shall be dismissed without prejudice. Also, the 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 deemed necessary to provide electric service to its customers under the terms of the agreement.

The Applicants specifically state that if the Commission does not approve the provisions of the agreement, then it shall be nullified and of no legal effect between the parties and that if any part of the 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 requesting approval of the Joint Application, Applicants state that the agreement presents a unique situation in that it allocates service rights over a portion of the service territories of two electric service providers with a complicated configuration of electric service systems, and that the agreement will allow electric service customers to know with certainty the supplier of their electric service. Applicants request a finding of the Commission that the designated electric service areas are in the public interest, approval of the

territorial agreement in total, a finding of necessity and waiver of the promotional practices rules for UE as specified in the agreement pertaining to the Highway T corridor, a finding that the agreement shall not impair UE's certificates of convenience and necessity except as specifically limited by the agreement, and authority for Applicants to implement the agreement.

Public Interest

The Commission is charged under the governing statute regarding territorial agreements, Section 394.312, R.S.Mo. (Supp. 1992), *inter alia*, as follows:

2. "The commission shall base its final determination upon a finding that the commission's designation of electric service area is in the public interest"; and

4. "The commission may approve the application if it shall after hearing determine that approval of the territorial agreement in total is not detrimental to the public interest."

The record reflects that heretofore the relationship between UE and Cuivre River has been decidedly antagonistic. The relationship between the two organizations has produced a substantial amount of wasteful duplication of facilities, inefficient use of assets, and substantial litigation. To avoid these societal costs, UE and Cuivre River have negotiated a territorial agreement governing a part of their coextensive service territories. The Commission finds in this territorial agreement many advantages to the public. They include the reduction of unnecessary duplication of services, the ability to more accurately predict future growth and capacity needs in the area, an increased efficiency in design and operation of the electric system, an increase in aesthetics and safety as a result of a reduction in duplicate facilities, and a reduction in customer confusion regarding the appropriate electric service supplier. This agreement recognizes what is in place and attempts to use it as efficiently as possible

while preventing future inefficiencies. To that end the parties have designated exclusive service territories for each supplier. All new customers within the exclusive territory of UE or Cuivre River shall automatically go to that supplier. Existing customers will remain with the supplier they chose. Specific exception was made toward already installed facilities to serve particular subdivisions or developments not yet completed.

Staff believes that the agreement is in the public interest with the exception of two provisions which were the two contested issues of the hearing. The Commission is charged by the statute to approve the agreement "in total". The Commission specifically concludes and finds herein that the agreement "in total" should be approved in that it is not detrimental to the public interest and, in fact, is in the public interest. In so finding, the Commission herein expresses certain reservations as to the two issues raised by Staff and Public Counsel as reasons for disapproval of the agreement. These issues will be addressed by the Commission so that its reservations will be made clear.

"Highway T Corridor" Blanket Waiver

The "Highway T corridor" is a small portion of St. Charles County reserved by the parties to the agreement "for purposes of a future territorial agreement." In the Highway T corridor UE has a 34 kv line with a 12 kv under-build which runs the entire distance of the corridor along the east side of Highway T. At the intersection of Highways T and D the line follows Highway D to the north toward New Melle. The corridor is one mile wide. UE serves 104 customers in the Highway T corridor and Cuivre River serves 49 customers. Both parties agree that the Highway T corridor is not a high growth area, is sparsely populated, and that the need to compete for new customers is remote. However, during the course of the negotiations, each party assumed that the Highway T corridor was part of what would eventually be its service territory. Toward the

conclusion of the negotiations, it became clear that the parties had a misunderstanding and that neither party was willing to give up the Highway T corridor in the context of the agreement. The parties to the agreement set the Highway T corridor aside for future discussion. The parties to the agreement also agreed that they must be on an equal competitive footing in the Highway T corridor to protect their respective investments. The blanket waiver of the Commission's utility promotional practices rules, 4 CSR 240-14.010 *et seq.* was felt by the parties to the agreement to be a necessary compromise to allow UE to come to a substantially equal competitive position with Cuivre River in the Highway T corridor. UE states that the circumstances would suggest that the competitive efforts would be used in a "defensive capacity". Also, UE states that any offers would be made only if it believed the investment to be "justified". Thus UE, specifically, has limited the recovery of the cost of extending service to new structures upon a finding by the Commission, based upon evidence submitted by UE, that it will receive a benefit by providing service to the new structures and that such service will benefit its existing customers. UE states that the blanket waiver is to a charge for any service, including wiring, piping, appliances or equipment. It does not permit UE to offer the potential customer a special rate not found in UE's filed tariff. The blanket waiver applies to new structures in the Highway T corridor. UE states that it has a "business" reason for seeking a blanket waiver of the utility promotional practices rules in the Highway T corridor in that it has a significant investment in a distribution line that runs the entire distance of the corridor and that its studies indicate that it has a distinct disadvantage in meeting Cuivre River's competition in St. Charles County and, therefore, its investment is at risk. UE and Cuivre River believe that as a practical matter, the Highway T corridor area is so small and so sparsely populated as to make this a "*de minimis*" situation.

The Staff and Public Counsel's position is that the Commission should reject the blanket waiver from the Commission's utility promotional practices rules because: (1) it may result in unjust discrimination among UE ratepayers; (2) it encourages duplication of facilities within the Highway T corridor; (3) it is contrary to Commission precedent; and (4) it would be granted in a manner contrary to Commission procedure.

The Commission first of all determines that a blanket waiver of the utility promotional practices rules should be granted to UE as requested in regards to the Highway T corridor only. Individual or blanket waivers of the utility promotional practices rules are granted on a limited, case-by-case consideration only. The Commission in this ruling is not opening the door to blanket waivers of its utility promotional practices rules. Such blanket waivers have limited application. Furthermore, the Commission does not believe that the approval in this case creates unjust discrimination, encourages duplication of facilities or is contrary to Commission precedent. The Commission determines that the limitation in the agreement that allows for the recovery of the cost by UE of extending service to a new structure to be conditioned upon a finding by the Commission based upon evidence submitted by UE that it will receive a benefit by providing service to the new structure and that such service will benefit its existing customers, with proper notice to the Commission when there is an offer made by UE, will provide sufficient protection against unjust discrimination. The Commission also determines that the blanket waiver provision of the agreement in this case will not encourage duplication of facilities in that they are already in place. The Commission has addressed blanket waivers in *In Re: Union Electric Company*, 30 Mo. P.S.C. (N.S.) 171-175 (1990). In that case UE requested a blanket waiver of the Commission's utility promotional practices rules to meet the unregulated competition of Platte-Clay Electric Cooperative in the city of Kearney, Missouri. In that case the Commission, in rejecting the waiver request,

stated that the primary reason was that UE had not yet sought a territorial agreement with the Platte-Clay Electric Cooperative. Also, the Commission was concerned with its inability to look at the costs being waived for a particular customer and at the revenue to be generated by that customer. In the case decided herein, the parties have negotiated a territorial agreement first and UE has placed a limitation in the agreement that allows for Staff's consideration of the costs and revenues of extending services to new structures in the Highway T corridor to ensure that such service will benefit its existing customers.

The Commission's primary reservation as to this issue concerns Staff's belief that granting the blanket waiver to the Commission's promotional practices rules in this manner is contrary to Commission procedure. The Commission has specifically allowed for waivers to its utility promotional practices rules in 4 CSR 240-14.010, *et seq.* Without referring specifically to the arguments of Staff that these procedures were not followed, the Commission would say that in formulating the rules as to waivers of the utility promotional practices rules, it intended those procedures to be the exclusive procedures to be followed in requesting a waiver from the Commission. The Commission does not believe that a territorial agreement is the proper place to include a purported request for a waiver of the Commission's utility promotional practices rules. Section 394.312, R.S.Mo. (Supp. 1992), says that: "[s]uch territorial agreements shall specifically designate the boundaries of the electric service area of each electric service supplier subject to the agreement...." Parties to territorial agreements in the future should consider waivers, blanket or individual, of the Commission's utility promotional practices rules to be separate from territorial agreements and available exclusively through the procedures set up in 4 CSR 240-14.010 *et seq.* While the Commission understands that territorial agreements and waivers are often integrally related, it does not believe that it will be

precluded in the future from approving a territorial agreement and disallowing a waiver of the utility promotional practices rules contained therein for the reason that it is the wrong procedural method.

Case-by-Case Exceptions

A term in the agreement permits the Applicants to mutually agree that one party could serve a customer in the other party's exclusive territory. The Staff and Public Counsel object to the "case-by-case" procedure because it is, in their belief, a violation of the statute which requires all territorial agreements "including any subsequent amendments to such agreements" to receive the approval of the Public Service Commission by Report And Order. Section 394.312.3, R.S.Mo. (Supp. 1992). Applicants state that the "case-by-case" procedure is not an amendment to the agreement and is identical to one already approved by the Commission in *In Re: Union Electric Company and Crawford Electric Cooperative, Inc.*, Case No. EO-91-204, a case approving a territorial agreement. Staff and Public Counsel point out that the Commission approved an "addendum procedure" in another case requesting approval of a territorial agreement. *In Re: Missouri Public Service Company and Platte-Clay Electric Cooperative, Inc.*, Case No. EO-92-155. This "addendum procedure" was agreed to by the parties and filed as an amendment to the territorial agreement in that case at the request of Staff. The addendum procedure applied to new structures only and required them to be submitted to the Staff along with a customer consent to be served by the service provider contemplated by the addendum. Also, there was a requirement that each addendum include an explanation of the justification that electric service should be provided in the agreed manner. If the Staff or the Public Counsel, or the Commission on its own motion, did not submit a pleading objecting to the addendum within sixty days of the filing thereof, the addendum

was deemed to be approved by the Commission. If such a pleading was filed, an evidentiary hearing would be scheduled.

The Commission determines that the so-called "case-by-case" exception as provided in the agreement does not specifically violate terms of the territorial agreement statute. Section 394.312, R.S.Mo. (Supp. 1992), requires the parties to "specifically designate the boundaries of the electric service area of each electric service supplier subject to the agreement..." Furthermore, the statute provides: "all territorial agreements entered into under the provisions of this section, including any subsequent amendments to such agreements, ... shall receive the approval of the public service commission by report and order." The Commission determines that the "case-by-case" exception contemplated by the parties to the agreement does not violate the dictates of the statute in that a "territorial boundary" is not being amended when a "case-by-case" exception is made. Of course, an actual amendment to the boundary line would fall within the amendment portion of the statute. Likewise, if the "case-by-case" exception was abused by the parties to the agreement, it could conceivably be construed as a violation of the amendment portion of the statute. As Cuivre River points out in its initial brief,

[t]his agreement cannot be expanded to cover additional geographic territory under a case by case exception. The case by case exception is limited to situations where one power supplier is allow[ed] to serve a new structure located in the assigned territory of the other. The case by case exception does not involve exchanging customers or any other modifications of the normal service supply rules. It simply permits a situation where a customer in one service provider's territory should logically be served by the other provider.

The Commission understands this to be the meaning of the provision in the agreement.

As a caveat for future territorial agreements, however, the Commission would prefer the "addendum procedure" as set out in *In Re: Missouri Public*

Service Company and Platte-Clay Electric Cooperative, Case No. EO-92-155, and described herein. Such procedure allows for Staff consideration of any alteration to the territorial agreement without any onerous burdens placed on the electric service providers. The Commission to this point has approved two methods for the "case-by-case" exception and herein states its preference for the "addendum procedure".

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

(1) The territorial agreement herein under consideration was filed pursuant to Section 394.312, R.S.Mo. (Supp. 1992). Pertinent sections therein require that:

"The commission shall base its final determination upon a finding that the commission's designation of electric service areas is in the public interest."

"The commission may approve the application if it shall after hearing determine that approval of the territorial agreement in total is not detrimental to the public interest."

The Commission concludes that the territorial agreement filed by UE and Cuivre River in total is not detrimental to the public interest, but is in fact in the public interest.

(2) In the case of *In Re: Union Electric Company*, 30 Mo. P.S.C. (N.S.) 171-175 (1990), the Commission stated as follows:

Authorizing additional duplication of facilities is not in the public interest and the Commission will not authorize such duplication without first encouraging the parties to

attempt to negotiate a territorial agreement. The legislature has provided this new method of reducing the competition among suppliers of electric energy and the Commission believes the negotiation process should be given a chance.

. . . .

The cooperative's policy of offering undergrounding free of charge, no charge for temporary service and no charge for meter bases places regulated utilities at a disadvantage. If a territorial agreement is not forthcoming between Platte-Clay and UE, the Commission may, in the future, determine that a blanket waiver is the only method by which UE can effectively compete with Platte-Clay. If no agreement is reached by December 31, 1990, the Commission would expect UE to again seek a blanket waiver as sought in this case. (Emphasis added.)

The case herein is consistent in that the Commission is approving a blanket waiver of the utility promotional practices rules after the parties have reached a territorial agreement.

(3) The Commission's procedure for a waiver to the utility promotional practices rules are as set out in 4 CSR 240-14.010 *et seq.* and the Commission concludes that these are the exclusive procedures to be followed for waivers, individual or blanket, in future cases.

(4) The Commission has specifically approved the "case-by-case" exception procedure as set forth in the agreement in this case in the previous case of *In Re: Union Electric Company and Crawford Electric Cooperative, Inc.*, Case No. EO-91-204.

(5) The Commission has approved the "addendum procedure" for the "case-by-case" exception as set out in *In Re: Missouri Public Service Company and Platte-Clay Electric Cooperative*, Case No. EO-92-155. The Commission prefers this method to be utilized in territorial agreements as to the future so-called "case-by-case" exceptions in future agreements.

IT IS THEREFORE ORDERED:

1. That the Joint Application filed herein by Union Electric Company and Cuivre River Electric Cooperative, Inc. on November 19, 1992 for the approval of a territorial agreement attached thereto as Exhibit A and its attached Exhibits 1, 2, 3 and 4 and accompanying Exhibits B and C and as amended by Exhibit 6 filed at the hearing, all being incorporated herein by reference, be hereby approved in total.
2. That Joint Applicants are hereby authorized to perform any and all acts, and execute any and all documents necessary to perform in accordance with the terms and conditions of the territorial agreement, as amended, herein approved.
3. That Union Electric Company be authorized to make offers described in paragraph 5 of the territorial agreement to potential customers in the Highway T corridor described herein, the same constituting a waiver of the Commission's Public Utility Promotional Practices Rules, 4 CSR 240-14.020, insofar as are specifically described in the said agreement.
4. That Union Electric Company shall not be required to exercise the offers described in Ordered Section 3 hereof with prior Commission approval; but, that recovery of the cost of extending service to a new structure wherein an offer was made shall only be allowed upon a finding by the Commission based upon evidence submitted by Union Electric Company that it will receive a benefit by providing service to the new structure and that such service will benefit its existing customers.
5. That Union Electric Company shall report specific waivers of charges pursuant to the waiver granted in Ordered Section 3 hereof which occur in the Highway T corridor to the Commission's Staff within two (2) weeks.
6. That Union Electric Company shall report any case-by-case exception as agreed between it and Cuivre River Electric Cooperative, Inc., and

in accordance with paragraph 7 of the territorial agreement to the Commission's Staff within two (2) weeks. Any case-by-case exception made by the parties that adds a new service customer to Union Electric Company shall automatically include that new service customer within Union Electric Company's service territory.

7. That the territorial agreement approved herein shall not impair Union Electric Company's certificate of convenience and necessity except as specifically limited by the said agreement.

8. That this Report And Order shall become effective on the 19th day of March, 1993.

BY THE COMMISSION



Brent Stewart
Executive Secretary

(S E A L)

Mueller, Rauch, Perkins and
Kincheloe, CC., concur and
certify compliance with the
provisions of Section 536.080,
R.S.Mo. 1986.
McClure, Chm., absent.

Dated at Jefferson City, Missouri,
on this 5th day of March, 1993.