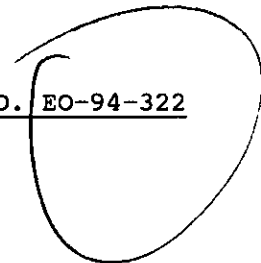


BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the application of Union
Electric Company and Laclede Electric
Cooperative, Inc., for approval of a written
territorial agreement designating the
boundaries of each electric service supplier
within portions of Miller and Camden
Counties, Missouri.

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) CASE NO. EO-94-322
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APPEARANCES: David C. Linton, Attorney at Law, P. O. Box 149,
 St. Louis, Missouri 63166, for Union Electric
 Company.

Patrick A. Baumhoer, Attorney at Law, Andereck, Evans,
 Milne, Peace & Baumhoer, P. O. Box 1280, Jefferson City,
 Missouri 65102, for Laclede Electric Cooperative, Inc.

Roger W. Steiner, Assistant General Counsel, P. O. Box 360,
 Jefferson City, Missouri 65102, for the Staff of the
 Missouri Public Service Commission.

Hearing
Examiner: Mark A. Grothoff

REPORT AND ORDER

On April 15, 1994, Union Electric Company (UE) and Laclede Electric Cooperative, Inc. (Laclede), collectively referenced as Applicants, filed a Joint Application seeking Commission approval of a territorial agreement (agreement) attached to the application as Exhibit A. On May 13, 1994, the Commission issued an Order and Notice which directed that notice of this matter be provided, set an intervention date, and established a procedural schedule. On May 17, 1994, the Commission amended the procedural schedule by Notice. No motions for intervention were filed.

On May 23, 1994, Applicants filed their direct testimony. On June 10, 1994, the Staff of the Commission (Staff) filed its rebuttal testimony. On June 21, 1994, UE filed a motion to strike a portion of Staff's rebuttal testimony. On June 30, 1994, Staff filed a response to UE's motion to strike and on July 1, 1994, the Commission issued an order denying UE's motion to strike.

On July 6, 1994, a prehearing conference and a hearing were convened with all parties participating. On July 12, 1994, the Commission established a briefing schedule by Notice and, subsequently, briefs were timely filed by the parties.

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:

UE is an electrical corporation rendering electric utility service to the public in the State of Missouri under regulation by the Commission. Laclede is a cooperative corporation organized pursuant to Chapter 394, RSMo, as amended, and as such is engaged in the distribution of electric energy and service to its members.

Applicants filed their Joint Application pursuant to Section 394.312, RSMo (Supp. 1993) which provides that competition to provide retail electric service, as between rural electric cooperatives and electric corporations, may be displaced by written territorial agreements to the extent provided by the statute. Section 394.312 states that such agreements shall specifically designate the boundaries of the electric service area of each electric service supplier subject to the agreement. The statute also states that the Commission

may approve the agreement if it is not detrimental to the public interest. Section 394.312, RSMo (Supp. 1993).

Within the agreement, Applicants state that they desire to promote the orderly development of the retail electric service system within portions of Miller and Camden Counties, Missouri to avoid wasteful duplication and to minimize disputes which may result in higher costs in serving the public. Applicants have agreed that from the effective date of the agreement, 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, neither party may provide electric service, directly or indirectly, within the electric service area of the other, except that each party shall have the right to continue to serve existing customers within the electric service area of the other. As part of the agreement and attached thereto as Exhibits 1 and 2 are metes and bounds descriptions of the respective electric service areas of each party and maps illustrating the respective electric service areas of each party.

The agreement also provides that UE and Laclede may agree on a case-by-case basis to deviate from the designated boundaries, allowing one to serve a structure located in the exclusive service area of the other. Such exceptions may be made only if the party permitted to serve the structure has facilities which are closer to the structure than any facilities of the other party. The agreement provides that such exceptions must be in writing and approved by both Applicants, but that exceptions for individual structures need not be approved by the Commission.

Applicants state that the agreement is in the public interest because it will prevent future duplication of services by assigning exclusive service

territories to UE and Laclede. Applicants argue that the agreement will increase customers' certainty as to their electric service provider and will allow UE and Laclede to obtain the best use of existing facilities and investments. Applicants also argue that the case-by-case exception clause does not violate Section 394.312, RSMo (Supp. 1993) and point out that the Commission has approved territorial agreements which included a case-by-case exception clause in Case Nos. EO-91-204 and EO-93-166.

Staff has taken the position that the agreement is not in the public interest because of the case-by-case exception clause. Staff argues that the case-by-case provision will increase uncertainty regarding service areas and is contrary to the intent of Section 394.312, RSMo (Supp. 1993). Staff also argues that the case-by-case clause specifically violates Section 394.312.3 which requires Commission approval of any "subsequent amendments" to the agreement or "the transfer or assignment of the agreement or any rights or obligations of any party to an agreement." Section 394.312.3, RSMo (Supp. 1993). Staff further argues that the case-by-case exception provision does not allow for Commission oversight of future alterations to the agreement.

Staff recommends that an addendum procedure be adopted which provides for notification of an exception agreed to by Applicants. Staff points out that an addendum procedure was approved by the Commission in Case No. EO-92-155 and that the Commission established its preference for addendum procedures in future territorial agreements in Case No. EO-93-166.

The decisions in Case Nos. EO-91-204 and EO-92-155 provide scant guidance on the issue of case-by-case exceptions. In Case No. EO-91-204, the Commission approved a territorial agreement containing a case-by-case exception clause. However, the issue was not raised by either party and the Commission

neither discussed nor considered the issue. In Case No. EO-92-155, while the Commission approved an addendum procedure, said procedure was contained within the agreement.

In Case No. EO-93-166, the Commission approved a territorial agreement between UE and Cuivre River Electric Cooperative, Inc. (Cuivre River) which contained a case-by-case exception clause. However, Case No. EO-93-166 involved unique facts and circumstances which led the Commission to determine that the agreement served the public interest despite the Commission's concern about the case-by-case exception clause. In addition, in approving the agreement, the Commission clearly stated its preference that future territorial agreements include an addendum procedure. The Commission stated in its Report and Order, "[a]s a caveat for future territorial agreements, however, the Commission would prefer the addendum procedure in...Case No. EO-92-155.... 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...herein states its preference for the addendum procedure." **Union Electric Company and Cuivre River Electric Cooperative, Inc.**, Case No. EO-93-166, Report and Order, pp. 11-12, March 5, 1993. The Commission also stated, "[t]he Commission has approved the addendum procedure for the case-by-case exception as set out in...Case No. EO-92-155. The Commission prefers this method to be utilized in territorial agreements as to future so-called case-by-case exceptions in future agreements." **UE and Cuivre River**, Case No. EO-93-166, Report and Order, p. 13, March 5, 1993. Furthermore, although the agreement in Case No. EO-93-166, was found to be in the public interest, the Commission is not obligated to mirror the findings in Case No. EO-93-166. While the Commission strives to

maintain consistency among its orders, it is not bound by previous findings and may reconsider issues within the facts and circumstances of a particular case.

In this case, Applicants' agreement provides for exceptions to be made to the agreement without Commission oversight or approval. The Commission finds that the case-by-case exception clause included in the agreement in this case violates the provisions of Section 394.312, RSMo (Supp. 1993). The statute requires the parties to "...specifically designate the boundaries of the electric service area of each electric service supplier subject to the agreement...." Section 394.312.2, RSMo (Supp. 1993). Section 394.312 also provides that "...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...." Section 394.312.3, RSMo (Supp. 1993). The Commission finds that an exception pursuant to the case-by-case exception clause would constitute an amendment as contemplated by Section 394.312 in that a territorial boundary is amended when a case-by-case exception is made.

The Commission is extremely disappointed that UE and Laclede chose to ignore its guidance and not include an addendum procedure in its agreement. The Commission pointedly stated its preference with the expectation that companies would then include an addendum procedure for case-by-case exceptions in their territorial agreements.

One of the Commission's responsibilities is to protect the public interest in the future, as well as in the present. The Commission takes its oversight responsibilities very seriously. The Commission considers addendum procedures an important tool in protecting the public interest in the future. An addendum procedure is a reasonable safeguard against improper use of the case-

by-case exception clause and improper boundary changes which places no onerous burdens on the electric service providers. Addendum procedures also decrease uncertainty in service area boundaries and ensure a clear understanding on the part of customers as to the identity of their electric supplier.

The Commission finds that an addendum procedure for a case-by-case exception clause is a necessary element in territorial agreements to protect the public interest in the future. The Commission also finds that territorial agreements which include a case-by-case exception clause but which do not include an addendum procedure are detrimental to the public interest. Thus, the Commission finds that the territorial agreement filed by UE and Laclede is detrimental to the public interest insofar as it lacks an addendum procedure for its case-by-case exception clause.

Conclusions of Law

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

UE is an electrical corporation rendering electric utility service to the public in the State of Missouri under regulation by the Commission pursuant to Chapters 386 and 393, RSMo 1986, as amended. Laclede is a cooperative corporation organized pursuant to Chapter 394, RSMo 1986, as amended, and is engaged in the distribution of electric energy and service to its members. Chapters 386 and 393, RSMo 1986, as amended, charge the Commission with protecting the public interest and provide the Commission with oversight authority to do so.

The Commission has such powers as are expressly conferred upon it by statute and those powers reasonably incident thereto. It has no power to declare

or enforce any principle of law or equity. *State ex rel. Fee Fee Trunk Sewer v. Litz*, 596 S.W.2d 466 (Mo. App. 1980).

While the Commission strives for consistency among its orders, it is not bound by its findings in previous cases. The Commission may reconsider issues within the facts and circumstances of a particular case. *State ex rel. Associated Natural Gas Company v. Public Service Commission*, 706 S.W.2d 870, 880 (Mo. App. 1985). The Commission is, however, bound by applicable statutory provisions. *Fee Fee Trunk Sewer*, 596 S.W.2d at 468.

Applicants filed the territorial agreement under consideration in this case pursuant to Section 394.312, RSMo (Supp. 1993). The Commission may approve a territorial agreement if it finds that the territorial agreement in total is not detrimental to the public interest. Section 394.312, RSMo (Supp. 1993).

The Commission has found that Applicants' territorial agreement violates Section 394.312, RSMo (Supp. 1993) and, therefore, the agreement is detrimental to the public interest. Thus, the Commission concludes that the territorial agreement filed by UE and Laclede should be rejected.

IT IS THEREFORE ORDERED:

1. That the territorial agreement filed in this case by Union Electric Company and Laclede Electric Cooperative, Inc., is hereby rejected.

2. That this Report and Order shall become effective on August 23,
1994.

BY THE COMMISSION

A handwritten signature in cursive script, reading "David L. Rauch".

David L. Rauch
Executive Secretary

(S E A L)

McClure, Perkins, Kincheloe,
and Crumpton, CC., Concur.
Mueller, Chm., Absent.

Dated at Jefferson City, Missouri,
on this 11th day of August, 1994.