

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of the Application of Cardwell Lumber    )  
Inc. for Approval of a Change of Electrical Suppliers    )  
at its 5927 Highway 50 West, Jefferson City, Missouri    ) **Case No. EO-2011-0052**  
Location from Union Electric Company to Three        )  
Rivers Electric Cooperative.                                 )

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**POST-HEARING BRIEF OF THE STAFF OF THE  
MISSOURI PUBLIC SERVICE COMMISSION**

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**PURSUANT TO COMMISSION ORDER**

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**November 24, 2010**

## **1. BACKGROUND AND PROCEDURAL HISTORY**

On August 25, 2010<sup>1</sup>, Cardwell Lumber Inc. (“Cardwell” or “the Applicant”) filed with the Missouri Public Service Commission (“the Commission”) an *Application* and a *Motion for Expedited Treatment*, requesting that the Commission approve by November 1, Cardwell’s request to change electrical suppliers from Union Electric Company d/b/a AmerenUE (“AmerenUE” or “the Company”) to Three Rivers Electric Cooperative (“Three Rivers”). Both the Staff of the Missouri Public Service Commission (“Staff”) and AmerenUE oppose Cardwell’s request. Three Rivers and the Office of Public Counsel (“OPC”) have expressed no position on the merits of Cardwell’s request. Staff, OPC, AmerenUE, Cardwell, and Three Rivers (collectively referred to hereinafter as “the Parties”) filed a *Joint Stipulation of Facts and of Law* (“*JSFL*”) on November 5 and participated in an evidentiary hearing on November 12.

## **2. LAW GOVERNING CHANGE OF SUPPLIER**

AmerenUE currently provides electric service to Cardwell and has done so since November 4, 2004. *JSFL*, p. 2. Section 393.106.2, RSMo (2000)<sup>2</sup> states that “[o]nce an electrical corporation...lawfully commences supplying retail electric energy to a structure through permanent service facilities, it shall have the right to continue serving such structure...” A companion statute, applicable to rural electric cooperatives such as Three Rivers, is found at Section 394.315.2. These provisions, collectively, are what many of the Parties refer to as Missouri’s “anti flip-flop law.” Despite this “anti-flip-flop law,” Section 393.106.2 states in relevant portion that “[t]he public service commission, upon application made by an affected party, may order a change of suppliers on the basis that it is in the public interest for a reason

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<sup>1</sup> Unless otherwise noted, all calendar references are to the year 2010.

<sup>2</sup> Unless otherwise noted, all references to statute refer to the Missouri Revised Statutes (2000), as currently supplemented.

other than a rate differential.” As certified by the Parties in a pleading filed on November 9, the questions presented are (1) whether Cardwell has any reason other than a rate differential for changing power suppliers, and if so, (2) are any of those reasons in the public interest. Staff answers the former in the positive and the latter in the negative. It is Cardwell that bears the burden of proving that the requested change of suppliers is in the public interest. *Smith v. Union Elec. Co.*, 2006 WL 3612848, (Mo.P.S.C. Dec 05, 2006) (Case No. EC-2007-0106) (internal citation omitted).

### **3. FACTORS AFFECTING THE PUBLIC INTEREST**

Cardwell offers a number of justifications for a change of supplier. These justifications range in magnitude from mere customer preference to reasons involving more serious health and safety concerns. While these factors may be relevant in examining what constitutes the public interest, many of them, namely customer preference, are not factors that have traditionally been considered by the Commission to be dispositive in change of supplier determinations.

#### **a. EFFECT OF CUSTOMER OR UTILITY PREFERENCE**

The Commission has examined the extent to which customer preference should be considered in a change of supplier request and has clearly stated that “[it] does not believe that customer preference by itself is sufficient reason to find that it is in the public interest to change suppliers.” *Id.* In doing so, the Commission noted “that the legislative intent of Sections 393.106 and 394.315, RSMo Supp. 1984, is to prevent duplication of facilities and the waste inherent in competing for customers. The purpose of these statutes would be defeated if customer preference alone was considered sufficient reason to change suppliers . . .” *Id.* Similarly, finding customer preference to be a legitimate basis to change suppliers would increase the number of requests, causing more duplication of facilities. *See Cuivre River Elec. Coop., Inc. v. Union Elec. Co.*,

*Sisters of St. Mary, d/b/a St. Joseph Hospital West*, 79 P.U.R.4th 591, 601, (Mo.P.S.C. Nov 14, 1986) (Case No. EC-86-88).

This concept is not one-sided, but also applies to preferences expressed by utilities: "The customer's choice of the two companies is a persuasive showing but is not entirely controlling, and the wishes of the two utilities likewise is not the final determining factor to be considered...." *Id.* (citing *In Re Union Elec. Co.*, 19 PUR3d 251 (Mo.P.S.C.1957)). Simply stated, in order to lawfully attain a change of supplier, an applicant must demonstrate other non-preference public interest justifications. The Applicant has failed to meet this burden.

**b. OTHER CONTROLLING FACTORS**

"The Commission does not use a single factor test when determining whether an application for a change of electric suppliers should be granted. Instead, it conducts a case-by-case analysis applying a ten-factor balancing test." *Smith v. Union Elec. Co.* (internal citations omitted). These ten factors, applied to the facts presented in this case are as follows:

**(A) WHETHER THE CUSTOMER'S NEEDS CANNOT ADEQUATELY BE MET BY THE PRESENT SUPPLIER WITH RESPECT TO EITHER THE AMOUNT OR QUALITY OF POWER**

Cardwell's current electricity demands have been and can continue to be met by AmerenUE. AmerenUE has indicated, although due to some confusion perhaps only recently, that it will meet those current demands in the manner desired by Cardwell. During the evidentiary hearing Mark Cardwell ("Mr. Cardwell"), Vice-President of Cardwell Lumber Inc., indicated that Cardwell currently requires single-phase electric service delivered to its office building and does not require three-phase service electric service in any other building. Tr. 2, p. 128. AmerenUE previously provided Cardwell with a price quotation for these specific services,

although the facility arrangement discussed at that time was later described by Mr. Cardwell as inconsistent with his desires. Tr. 2, p. 129. AmerenUE witness Dave Hagan (“Mr. Hagan”) disputed the characterization of Mr. Cardwell’s previous dissatisfaction, claiming that Mr. Cardwell initially told him that “poles in the yard were no problem”. Tr. 2, p. 171. In any event, it is now clear that AmerenUE has provided Cardwell with a quote for service delivered in the manner now clearly requested by the Applicant, indicating at least implicitly, the Company’s willingness to provide this service. Tr. 2, pp. 130-131. AmerenUE can provide Cardwell with any service currently desired.

Staff recognizes that this factor may also be read to address AmerenUE’s ability to meet Cardwell’s needs in the future; however, for the reasons expressed in the discussion of factor (I) below, Staff has some concerns about the speculative nature of any future needs at this location.

**(B) WHETHER THERE ARE HEALTH OR SAFETY ISSUES INVOLVING THE AMOUNT OR QUALITY OF POWER**

Cardwell has not demonstrated that its current electrical facilities pose a serious safety concern, although the Parties appear to be in agreement that the present facilities are in desperate need of repair or replacement. At one point during the evidentiary hearing Mr. Cardwell described a situation in which an electrical contractor, Meyer Electric, had to “wire in” certain electrical connection while the lines were “hot.” Tr. 2, p. 75. AmerenUE claims that this practice is not necessarily unsafe for trained linemen, claiming that “[i]t happens all the time”. Tr. 2, p. 163. Although Mr. Cardwell described certain safety concerns he believes were present immediately following the 2007 ice storm (Tr. 2, p. 87), Mr. Hagan claims that Cardwell’s system presents no safety concerns for Cardwell’s employees or to the general public. Tr. 2, p. 178.

**(C) WHAT ALTERNATIVES A CUSTOMER HAS CONSIDERED, INCLUDING ALTERNATIVES  
WITH THE PRESENT SUPPLIER**

It appears that the Applicant has explored a number of alternatives, both with Three Rivers and AmerenUE. Cardwell has contacted both Three Rivers and AmerenUE about the possibility of taking over the existing system, and both entities have refused to do so, citing the system's poor condition. Tr. 2, p. 107. Cardwell has also approached Three Rivers about the possibility of providing service under an alternative arrangement, but according to Mr. Cardwell, Three Rivers will not serve him absent an order from the Commission. Tr. 2, p. 109-110. Mr. Cardwell has also explored options such as inverters (Tr. 2, p. 169) and generators (Tr. 2, p. 179-180), but those alternatives are not Mr. Cardwell's preferred method of service.

In Staff's opinion, this factor is essentially moot, as no further options need be explored. AmerenUE has now agreed to provide Cardwell with the service it desires, in the manner that it prefers. Should Cardwell receive single phase service from AmerenUE, yet desire to receive three phase electricity at some point in the future, Mr. Cardwell has indicated that he use can use a generator as readily with AmerenUE's single phase service as he could with Three Rivers'. Tr. 2, p. 180. Staff would note additionally that AmerenUE would presumably provide single or three phase service to any of Cardwell's structures provided that the Applicant is willing to pay the costs associated with those extensions or modifications, as outlined in the applicable tariffs.

**(D) WHETHER THE CUSTOMER'S EQUIPMENT HAS BEEN DAMAGED OR DESTROYED AS  
A RESULT OF A PROBLEM WITH THE ELECTRIC SUPPLY**

Cardwell cannot establish that its equipment has been damaged or destroyed as a result of any problem with AmerenUE's supply of electricity. Although during the evidentiary hearing there was much discussion involving "trips" to Cardwell's boiler (Tr. 2, p. 88-94; *see also*

Exhibit 14), on cross-examination Mr. Cardwell admitted that his boiler control system did not know whether any failure originated from his equipment or AmerenUE's. Tr. 2, p. 139. In addition, a power quality monitoring device installed by AmerenUE at Mr. Cardwell's request reflected delivery of adequate service. Tr. 2, p. 165.

**(E) THE EFFECT THE LOSS OF THE CUSTOMER WOULD HAVE ON THE PRESENT SUPPLIER**

Losing Cardwell would have little effect on AmerenUE. During the evidentiary hearing AmerenUE witness Dave Hagan confirmed that revenue from one customer within AmerenUE's system would typically not be a large percentage of UE's revenue. Tr. 2, p. 198. In this case, loss of Cardwell would result in little stranded investment. Tr. 2, p. 196.

**(F) WHETHER A CHANGE IN SUPPLIER WOULD RESULT IN A DUPLICATION OF FACILITIES, ESPECIALLY IN COMPARISON WITH ALTERNATIVES AVAILABLE FROM THE PRESENT SUPPLIER, A COMPARISON OF WHICH COULD INCLUDE:**

- 1. THE DISTANCE INVOLVED AND COST OF ANY NEW EXTENSION, INCLUDING THE BURDEN ON OTHERS -- FOR EXAMPLE, THE NEED TO PROCURE PRIVATE PROPERTY EASEMENTS, AND**
- 2. THE BURDEN ON THE CUSTOMER RELATING TO THE COST OR TIME INVOLVED, NOT INCLUDING THE COST OF THE ELECTRICITY ITSELF**

A thoughtful analysis of these factors requires an examination of Cardwell's future expansion plans as well as its current demands. Given Cardwell's current situation, Staff represents that a change in electrical suppliers will not result in any significant duplication of facilities, but that such change will not likely to result in any conservation of facilities either. Given the present state of Cardwell's facilities, the current system will have to be repaired or

replaced if either provider is going to serve the existing structures. Both providers will presumably bring service from essentially the same starting point, as Cardwell's current primary metering point is within feet of Three Rivers' pole. Tr. 2, p. 57.

The only drastic conflict for potential duplicative facilities is presented if the Commission denies Cardwell's request (thus leaving AmerenUE to serve Cardwell's current facilities) and Cardwell either expands its operations to new structures on the tract or sells a portion of the tract to another entity for their future development. Cardwell has made it clear that AmerenUE will not be serving any new structures on the tract. Assuming that such is the case, and assuming future development by Cardwell or another entity, duplicative facilities could result. However, as contained in the discussion provided in response to factor (I) below, Staff believes that any future economic expansion is rather speculative in nature, despite Mr. Cardwell's assurance that such is solely dependent on the outcome of this case.

**(G) THE OVERALL BURDEN ON THE CUSTOMER CAUSED BY THE INADEQUATE SERVICE INCLUDING ANY ECONOMIC BURDEN NOT RELATED TO THE COST OF THE ELECTRICITY ITSELF, AND ANY BURDEN NOT CONSIDERED WITH RESPECT TO FACTOR (F)[2] ABOVE**

To begin, AmerenUE has not provided inadequate service. To the contrary, Cardwell's outage history demonstrates delivery of dependable and reliable service, as indicated by the fact that the Applicant has been subject to no outages for nearly three years. Tr. 2, p. 160. In reference to the 2007 ice storm, AmerenUE admits that they did not assist Cardwell in Cardwell's recovery efforts. Tr. 2, p. 158. According to the Company, AmerenUE was focused on restoring the portion of the system owned by AmerenUE and servicing the lines down in areas that could affect the general public. Tr. 2, p. 158. In other instances in which Cardwell claims to



have received inadequate service, Cardwell cannot demonstrate causation between the allegedly-inadequate service and AmerenUE. In other words, Cardwell cannot demonstrate that any alleged service issues originated on AmerenUE's portion of the system, as opposed to the facilities owned by Cardwell.

In addition, consistent with this factor Staff has reviewed a number of cases in which the Commission has examined the "miscellaneous burdens" to be borne by both consumers and utilities. Upon review of these cases Staff does not believe that a change of supplier can be justified in Cardwell's situation on any of these traditional "miscellaneous burden" grounds. In Case No. EO-2007-0199, the Commission found a change of supplier to be in the public interest where the change would eliminate a situation in which one residential customer was the only customer located on a mile-long feeder and had experienced numerous outages. In Case No. EO-2008-0319, the Commission granted a change of supplier in an effort to remove an unconnected "island," where the electric utility had no local workforce to address outages. In Case No. EO-2002-1105, the Commission's decision was meant to remedy a situation in which an electric company's equipment was extremely far away and would result in a cost of approximately \$20,000 to serve the applicant's new home, some of which would have to be paid by the consumer. Finally, in Case No. EO-2003-0564, the Commission's decision was based firmly upon cost efficiency in a situation in which electric company's facilities were located approximately 800 feet from a point requiring service and the cooperative's facilities were located within 50 feet of the same.

The facts forming the basis for the Commission's public interest determinations in these cases are absent under Cardwell's circumstances. Cardwell has received reliable service, has been able to secure maintenance on the portions of the systems owned by the respective parties,

has received discretionary assistance from AmerenUE in restoring customer-owned fuses, and is subject to extension costs corresponding to his various requests that are estimated as prescribed in AmerenUE's Commission-approved tariffs.

**(H) WHAT EFFORTS HAVE BEEN MADE BY THE PRESENT SUPPLIER TO SOLVE OR MITIGATE THE PROBLEMS**

AmerenUE has taken a number of steps to address Cardwell's dissatisfaction and should not be held further responsible to mitigate problems that are not their own. AmerenUE has installed testing devices to monitor the quality of the power supplier to Cardwell (Tr. 2, p. 90) and has participated in several consultations with Cardwell designed to help migrate Cardwell to a rate classification that would more appropriately, and economically, meet Cardwell's present demand characteristics. In Staff's opinion, much of Cardwell's dissatisfaction is related not to the extent, but rather to the timeliness of AmerenUE's customer relations efforts. According to Mr. Cardwell, had AmerenUE provided an estimate to deliver service in the manner desired by Cardwell (i.e. "bring the power across the road") prior the commencement of legal action, Cardwell would have opted to take service from AmerenUE in that manner. Tr. 2, p. 106-107. To be fair to AmerenUE, it appears that there was some confusion and/or a misunderstanding about Mr. Cardwell's preferred arrangement. Tr. 2, p. 171.

**(I) THE IMPACT THE COMMISSION'S DECISION MAY HAVE ON ECONOMIC DEVELOPMENT, ON AN INDIVIDUAL OR CUMULATIVE BASIS**

The Commission's decision may have an impact on economic development, although in Staff's opinion the extent of that impact is also tied to external economic factors and is likely to be minimal from a net perspective. As a bit of background, Cardwell has ceased production of its manufacturing facilities in St. Martins, although it does presently operate a retail facility at

that location. Cardwell has already downsized to three employees at that location. Tr. 2, p. 134. The “demise” of economic feasibility of the manufacturing operations resulted from the failure of Cardwell’s boiler (Tr. 2, p. 43) and the downturn in the economy. Tr. 2, p. 135. Tr. 2, p. 135. In the words of Mr. Cardwell, “[t]he main thing that happened is the economy. And that’s not Dave [Hagan’s] fault. That’s not my fault.” Tr. 2, p. 101. Cardwell does not allege that the quality of service received from AmerenUE had any impact on Cardwell’s decision to terminate those operations.

As far as future economic development is concerned, Cardwell maintains that it would like to increase revenues generated from retail sales (Tr. 2, p. 36), but that expansion into sanding and millwork (and thus development of the tract to help facilitate that expansion) is “100 percent dependent” on the outcome of this case. Tr. 2, p. 121. Mr. Cardwell claims that if he does not receive authority to change electrical suppliers he “will lock the doors.” Tr. 2, p. 121. Despite these statements, Staff remains skeptical that this case will result in an all-or-nothing outcome.

Furthermore, Staff would note that Cardwell has two additional business and manufacturing sites, located in Novelty and Frankford. Tr. 2, p. 33. Should Cardwell elect to cease operations in St. Martins, Staff believes that this decision would simply result in a reallocation of Cardwell’s business resources from St. Martin’ to these other locations. In this respect, Staff believes that there would not be a significant net loss from an economic development perspective. In fact, it appears that Cardwell’s past business decisions may have contributed to this very reallocation. Mr. Cardwell stated during the evidentiary that Cardwell had already elected to put in manufacturing equipment in Novelty, as opposed to bringing the St. Martins “equipment up to standards”. Tr. 2, p. 45. In Staff’s opinion, economic loss in St.

Martins may be at least partially classified as the opportunity cost of this deliberate investment in the company's Novelty operations.

Staff would point out that many change of supplier authorizations have been predicated upon a much broader view of economic development. For example, a number of recent cases were approved in an effort to facilitate construction of proposed highway extensions. *See* Case Nos. EO-2005-0076, EO-2007-0114, EO-2006-0553, EO-2006-0554, and EO-2006-0555. Staff urges the Commission to focus upon the broader economic implications presented by Cardwell's application, as Staff believes these broader implications to be more indicative of the public interest.

**(J) THE EFFECT THE GRANTING OF AUTHORITY FOR A CHANGE OF SUPPLIERS MIGHT HAVE ON ANY TERRITORIAL AGREEMENTS BETWEEN THE TWO SUPPLIERS IN QUESTION, OR ON THE NEGOTIATION OF TERRITORIAL AGREEMENTS BETWEEN THE SUPPLIERS**

As stated in the *JSFL*, filed by the Parties on November 5, there is no existing territorial agreement applicable to the Cardwell property. *JSFL*, p. 2. Staff has expressed no opinion on how granting Cardwell's request may affect future negotiations.

**4. STAFF POSITION REGARDING RATE DIFFERENTIAL LANGUAGE**

As contained in the *Joint List of Issues, Statements of Position, List of Witnesses, Order of Opening Statements, and Order of Examinations* filed on November 9, Staff approached the evidentiary hearing with the belief that Cardwell's change of supplier request was largely motivated by Cardwell having received a lower estimate for facility modification from Three Rivers than from AmerenUE. Staff found Mr. Cardwell's testimony convincing that such is not the case. According to Mr. Cardwell, had Cardwell "...received [a] quote to bring power from

across the road before started down the legal path, that's what they would have done. Would have been expensive, but this hearing is expensive. This is not about rates." Tr. 2, p. 106-107.

Staff continues to believe that construing estimated system extension costs as "rates," thus prohibiting consideration of any differences in those estimated costs in a public interest analysis, is consistent with intent of Missouri's "anti-flip-flop laws." Staff believes that the intent of the law is to prevent consumers from switching back and forth from electric utility providers based purely upon economic considerations. Staff would concede that the costs of a system modification is not a traditional "rate" as used in the sense of a kilowatt hour, but nonetheless maintains that a more expansive interpretation of this provision is consistent with the intent of the governing statutes.

## **5. CONCLUSION**

Cardwell's request to change electrical suppliers from AmerenUE to Three Rivers should be denied. Although Cardwell has expressed a strong preference for this change, customer preference in and of itself is not sufficient justification for a change of supplier.

Cardwell bears the burden of proving that its request is in the public interest and Cardwell has failed to meet this burden. Although AmerenUE would suffer little detriment upon loss of this one customer, it is the other ratepayers that will be forced to bear the burden of systemwide costs in Cardwell's absence. Although economic development at Cardwell's St. Martins location may be affected by the Commission's denial of Cardwell's request, Staff urges the Commission to consider economic development from a perspective that is much larger than that which focuses upon one location of one business entity.

In conclusion, Cardwell was aware of the responsibility to maintain its electrical equipment at time the equipment was purchased. Tr. 2, p. 121. Cardwell understands and

acknowledges that it receives a lower electric bill because of the upkeep and maintenance expense associated with this arrangement. Tr. 2, p. 121. All Parties agree that Cardwell's system is in drastic need of an upgrade, but electrical facilities simply do not last forever. The cost associated with the replacement of these facilities was and is contemplated in the benefit conferred by virtue of Cardwell's SPS rate classification. For these reasons and those stated above, the Commission should deny Cardwell's request in this matter.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 24th day of November, 2010.

**/s/ Eric Dearmont**