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February 8, 2005

**FILED**

**FEB 8 2005**

EUGENE E. ANDERECK (1923-2004)

GREGORY C. STOCKARD (1904-1993)

PHIL HAUCK (1924-1991)

Secretary  
Public Service Commission  
P.O. Box 360  
Jefferson City, Missouri 65102

**Missouri Public  
Service Commission**

Re: In the Matter of the Application of Gascosage Electric Cooperative and Three Rivers Electric cooperative for Approval of a Written Territorial Agreement Designating the Boundaries of Each Electric Service Supplier within Camden, Cole, Franklin, Gasconade, Maries, Miller, Moniteau, Osage, Phelps, and Pulaski Counties, Missouri

Dear Secretary:

Enclosed for filing please find an original and eight copies of the Applicants' Joint Brief in the above referenced case.

If you have any questions, please contact me at the number listed above.

Sincerely,

*Lisa Chase*  
Lisa Cole Chase

LCC:lw

Encl.

CC: Office of Public Counsel  
General Counsel, PSC  
Jon Greenlee  
Walt Ryan

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

**FILED**

**FEB 8 2005**

In the Matter of the Application )  
of Gascosage Electric Cooperative )  
and Three Rivers Electric Cooperative )  
for Approval of a Written )  
Territorial Agreement Designating )  
the Boundaries of Each Electric )  
Service Supplier within Camden, Cole, )  
Franklin, Gasconade, Maries, Miller, Moniteau, )  
Osage, Phelps, and Pulaski Counties, Missouri. )

**Missouri Public  
Service Commission**

Case No. EO-2005-0122

**APPLICANTS' JOINT BRIEF**

Gascosage Electric Cooperative and Three Rivers Electric Cooperative (hereinafter the "Joint Applicants") submitted their Territorial Agreement for Commission approval in their Joint Application which was filed with the Commission on November 2, 2004. The Joint Applicants filed their Direct Testimony on December 13, 2004. Staff and Intervener Union Electric Company, d/b/a AmerenUE filed their Rebuttal testimony on December 20, 2004. With the Joint Applicants and Staff filing Surrebuttal testimony on December 27, 2004. An evidentiary hearing was held by the Commission on January 7, 2005. During the Hearing Commissioner Murray requested that the Joint Applicants and Staff address specific issues discussed below, including the legal implications of the last sentence of Article 4 of the Territorial Agreement. In addition to responding to the Commissioner's request, this Brief will address the evidence presented at the Hearing that substantiates the Joint Applicants' request for Commission approval of their Territorial Agreement.

Pursuant to § 394.312.4 RSMo. the standard for Commission approval of Territorial Agreements is whether, after hearing, the Commission determines the Territorial Agreement in total is not detrimental to the public interest.

Mr. Ryan of Three Rivers Electric Cooperative and Mr. Greenlee of Gascosage Electric Cooperative both testified about how the Territorial Agreement is in the public interest. Each manager testified in his Direct Testimony that the Territorial Agreement “will promote the orderly growth for each Applicant within Camden, Cole, Franklin, Gasconade, Maries, Miller, Moniteau, Osage, Phelps, and Pulaski Counties, provide a greater reliability of service for the customers of both Applicants, and help eliminate costly duplication of facilities. ... If the Territorial Agreement is approved we believe that, because of better planning and more reliability of service, the agreement will ultimately lead to lower costs for both suppliers, and in turn lower rates for their customers.” Mr. Greenlee and Mr. Ryan testified in their Surrebuttal Testimonies that “this Territorial Agreement establishes parameters for each cooperative, and ensures both that the other will not serve new loads in the territory of the other. Such assurances enable our planning, engineering, and operational decisions to be simplified and our investments to not be driven by competition for new loads.” This is a cost benefit to each cooperative and their respective members.

Although AmerenUE, initially filed to intervene in this proceeding, AmerenUE announced at the hearing that it withdrew its opposition to the Territorial Agreement and further stated that it believed the Commission should find the Territorial Agreement not detrimental to the public interest. (T. 6) Furthermore, Staff's witness, Alan Bax, testified that "the Territorial Agreement in whole should be determined not detrimental to the

public interest," that nothing in his five years of experience indicates that the Commission shouldn't approve this Territorial Agreement, and that he recommends approval of the Territorial Agreement. (T.91 and 92). In fact, Mr. Bax indicated that there is no opposition to approval of the Joint Applicants' Territorial Agreement. (p. 92).

Mr. Bax raised Staff's concerns over the legal interpretation of § 394.312.2 RSMo. Mr. Bax also indicated that the concerns raised by Staff with respect to Articles 3 and 4 comes down to legal interpretation. (p. 90) Staff's counsel also indicated that it believed there were legal issues best addressed through briefing. (p. 103).

The Joint Applicants respectfully assert that determinations of law and legal issues are outside of the scope of the Commission's jurisdiction in determining whether this Territorial Agreement in total is not detrimental to the public interest. As the Missouri Supreme Court stated in *Lightfoot et al. v. City of Springfield et al.*, "[t]he Public Service Commission has no power to declare or enforce any principle of law or equity." 236 S.W.2d 348, 352 (Mo 1951). Declaration and enforcement of the legal principles of the statutes is within the jurisdiction of the courts. If Staff is suggesting that section 394.312.2 may be read to provide a rural electric cooperative the ability to serve in a municipality over 1500 inhabitants, then that is a legal interpretation of a statute for the Courts to determine. The Joint Applicants believe there may be several different legal interpretations of Section 394.312.2 RSMo., and currently there is no case law interpreting section 394.312.2 as no controversy has arisen between an electric cooperative and public or municipal utility. Under Section 394.312.2, notwithstanding the provisions of section 394.020 or 394.080 to the contrary, an electric cooperative can not operate within the boundaries of a municipality pursuant to the territorial agreement

without a grant of municipal authority to serve inside its municipal city limits. No municipality, with a population in excess of 1,500 inhabitants, has granted either Applicant authority to serve inside its city limits pursuant to the proposed Territorial Agreement between Gascosage and Three Rivers. Nor has either Applicant suggested in its testimony that without such authority that the Cooperatives have the ability to serve inside a city with a population in excess of 1,500 inhabitants, where they are not the predominant supplier.

### **Commissioner Questions**

At hearing, the Commission raised certain questions and requested the parties to file briefs addressing (1) the Commission's authority regarding whether a cooperative can serve within a municipality's boundaries (T 31), (2) the purpose for the last sentence in Articles 3 and 4 (T 53), and (3) termination of this Territorial Agreement upon notice by the Joint Applicants (T 32).

### **The Commission's authority regarding whether a cooperative can serve within a municipality's boundaries**

Electric Cooperatives have authority to serve in any rural area, which includes municipalities with less than 1,500 inhabitants pursuant to 394.020, and to serve municipalities over 1,500 pursuant to 394.080.2. Municipalities may either erect and maintain power plants and supply their inhabitants with electric power or grant franchises to cooperatives or investor-owned utilities to provide electric service within the municipal's corporate boundaries. See Section 71.530 RSMo. 2000. The Commission does not regulate the provisioning and selling of electric power by municipalities. The Commission has three limited instances where they are specifically provided statutory authority to regulate the provision of electricity by municipalities: i) Section 386.310 -

authority to regulate the safety and health of public and employees of every person, corporation, municipal gas and public utility ...; ii) Section 386.800 - service of municipally owned electric suppliers outside municipal boundaries; and iii) 394.312 - displacement of competition to provide retail electric service as between rural electric cooperatives, electric corporations and municipally owned utilities by territorial agreements.

Similarly, the Commission has limited jurisdiction over rural electric cooperatives. The Commission does not regulate the rates, financing, accounting or management of electric cooperatives. Like Municipalities, the Commission does regulate electric cooperatives as to safety and health as well as approval of Territorial Agreements. The statutory authority of the Commission with respect to service by electric cooperatives in municipalities appears to be limited to issues of safety and health as well as approval of Territorial Agreements that may be entered into between a municipally owned utility and an electric cooperative. With regards to the Territorial Agreement between the Joint Applicants, neither Cooperative has asked a municipality to allow it to serve inside its city limits pursuant to the pending Territorial Agreement.

#### **The purpose for the last sentence in Articles 3 and 4**

The last sentence in Articles 3 and 4 simply states that each rural electric cooperative may serve within municipalities that are located in each cooperative's exclusive service area pursuant to the Territorial Agreement. The language is consistent with and is directly from Territorial Agreements entered into between electric cooperatives and AmerenUE, where Counsel for the Joint Applicants have represented other electric cooperatives in their Territorial Agreements with AmerenUE. In the

interest of uniformity and ease of application, the pending Territorial Agreement contains similar language as the territorial agreement between Applicant Gascosage Electric Cooperative and AmerenUE. As Mr. Greenlee testified, the cooperatives agreed to adopt as much of the Territorial Agreement language Gascosage Electric Cooperative had with AmerenUE when negotiating their own Territorial Agreement. (T. 69). The Territorial Agreement language does not grant either cooperative rights that are either greater or lesser than the authority that either already has under the existing statutes. Both Mr. Greenlee and Mr. Ryan stated at the hearing that this sentence is basically a restatement of what the current law is with regard to a cooperative's ability to serve in certain municipalities. (T. 62, 70) Mr. Ryan further testified that if Section 394.312.2 required some additional grant of authority from a municipality to serve in a municipality over 1,500, that he would file that and follow the proper statutory procedures to obtain that authority. (T. 63). However, as stated above, the cooperatives have not sought to provide electric service to municipalities over 1,500 pursuant to the legal interpretation of 394.312.2 set forth by Staff. Simply put, the language in Article 3 and Article 4, which is in question, is a statement of where the Cooperative can serve pursuant to the Territorial Agreement, but does not grant either Applicant greater authority than they currently have. Removal of the language would have no effect on the Joint Applicants implementation or adherence to the terms of the Territorial Agreement.

#### **Termination of this Territorial Agreement upon notice by the Joint Applicants**

Section 394.312 contemplates Commission approval of Territorial Agreements. Section 394.312.6 does provide the Commission with authority, after a hearing, to terminate a Territorial Agreement when it determines to do so would be in the public

interest. The statute does not require Commission approval for when the parties decide to terminate a Territorial Agreement. The effect of entering into a Territorial Agreement is to displace competition, and thus requires Commission approval (i.e. government action) to overcome anti-trust issues. However, the same anti-trust concerns are not present when two parties agree to terminate a Territorial Agreement and return to operating on a competitive basis.

It is not clear what Staff's issue is with respect to the termination provision of the Territorial Agreement. If Staff is taking a new position, it is not clear what the basis is for Staff's change of direction on the termination provision contained in Territorial Agreements. It has been common for Territorial Agreements to contain provisions for termination by the parties. For instance, the same termination language contained in Article 11 of the Territorial Agreement between Gascosage and Three Rivers Electric Cooperatives is also contained in the following approved Territorial Agreements, which is not an exclusive list:


- First Amendment to Territorial Agreement between Union Electric Company d/b/a AmerenUE and Gascosage Electric Cooperative, paragraph 9, approved by Report and Order on January 24, 2002 in Case No. EO-2002-178;
- Territorial Agreement between Union Electric Company d/b/a AmerenUE and Callaway Electric Cooperative, Article 12, approved by Order Approving Application and Approving Stipulation and Agreement on July 18, 2002 in Case No. EO-2002-458;
- Second Territorial Agreement between Union Electric Company d/b/a AmerenUE and Cuivre River Electric Cooperative, Article 12, approved by Report and Order on September 17, 2002 in Case No. EO-2002-1091;
- Territorial Agreement between Union Electric Cooperative and Lewis County Rural Electric Cooperative, Article 10, approved by Report and Order on July 21, 2000 in Case No. EO-2000-630;

- Territorial Agreement between Aquila and Osage Valley Electric Cooperative, Article 9, approved by Report and Order on September 30, 2004 in Case No. EO-2004-0603.

Approval of the Territorial Agreement is approval of the terms and conditions of the contract between the parties, and such terms include how the parties will agree to terminate the agreement. The termination provision of Article 11 is just a function of the agreement. It provides for notice to the Commission of the termination, and such notice further provides notice to the public, so that the two parties can go back to operating on a competitive basis. An additional layer of Commission involvement in the termination of a Territorial Agreement, as suggested by the Staff, is not an efficient use of the time and resources of the parties or the Commission, nor is such action contemplated or required by Section 394.312 RSMo.

Respectfully Submitted,

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By 

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**ATTORNEYS FOR GASCOSAGE AND  
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COOPERATIVES**